Concise Explanatory Statement
(RCW 34.05.325.6a)

Of

WAC 463, Energy Facility Site Evaluation Council Operational Rules

And

Energy Facility Construction and Operation Standards

Washington State
Energy Facility
Site Evaluation Council

October 11, 2004

This document was prepared under Contract No. S04-55100-010.

Executive Summary

The Energy Facility Site Evaluation Council, EFSEC or the council, began the process of revising the state's energy facility siting rules in 2000. What started as an attempt to clean up existing language in the rules and to clarify the energy facility siting process resulted in legislative committee study, changes to legislation, reports to and directives from the governor and the establishment of a stakeholder group to assist the council in identifying and crafting energy facility siting standards. What resulted was an exhaustive review of all of the EFSEC operating rules, hundreds of edits and revisions, the establishment of energy facility siting and operating standards and complete reorganization of all the rules.

The Washington State Energy Facility Site Evaluation Council is authorized in 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 legislation preempts the authorities of both state and local entities when it comes to siting energy facilities under its jurisdiction. The council is granted authority to address environmental and ecological impacts resulting from siting energy facilities.

The start of the council's rule revision process began with several council discussions several years ago. The real work started when the council organized the stakeholder group to help craft standards for siting combustion turbine generating facilities. This stakeholder group met eleven times over a nine month period and provided the council with options for 12 different energy facility siting standards. These standards ranged from air and water quality to noise and wetland mitigation requirements.

After the stakeholder group provided its recommendations to the council, two things became apparent. First, the council came to realize that a standard for only one segment of the energy facilities that it is responsible for (combustion turbines) was not what it wanted. As a result the council worked with the stakeholder recommendations to establish standards that apply to all energy facilities under its jurisdiction. In doing so, the council was mindful of the need to ensure that its energy facility siting standards were consistent with those of other state and federal agencies. The second thing the council realized was that in order to adopt siting standards for energy facilities, other sections of the council's operating rules would also need to be updated.

The council decided to propose new siting standards for energy facilities and at the same time to review all of its operating rules for consistency with state law and rules of other agencies that the council must be compatible with, and to thoroughly edit all of its rules. The result was hundreds of editorial and organizational changes to the rules of the council, Chapter 463-68 WAC.

All of the editing, redrafting of existing rules and proposed siting and operating standards were done by council members, staff of the council and the assistant attorney general assigned to the council.

The goal of the council was to put in place mechanisms that add certainty to the siting process while balancing increasing demands for energy facilities with impacts on the environment and the broad interests of the public. It was the intent of the council to provide clear, definitive and understandable processes for siting new, or expanding existing, energy facilities.

The first draft of proposed rule revisions and siting standards included a new standard for limiting CO_2 emissions and for mitigating those emissions. During public meetings in October of 2003, the council received comments from 230 groups or individuals. Two hundred and twenty six of these comments addressed only the proposed CO_2 rule. Following legislative action in May 2004 creating a state CO_2 mitigation requirement, the council withdrew its proposed CO_2 standard. The four sets of comments addressing non-CO_2 related portions of the rules covered a variety of issues including need for energy issues, various proposed standards and many of the administrative sections of the council operating rules.

Following the October, 2003 public meetings, the council and staff continued to make revisions to the rules and to reorganize the rules into four parts. These are:

Part I - Administrative Procedures
Part 2 - Application and Standards
Part 3 - Site Certification Agreement
Part 4 – Permits

The council held a public comment meeting during its May 3, 2004 meeting and a public hearing on August 10, 2004. The August public hearing resulted in 144 comments for the council to consider. The changes that were made following the August 2004 public hearing were editorial in nature or changes that did not cause the intent of the rule as proposed by the council to change. The changes that were made were those that the council considered necessary to make the rules clear, concise and to clearly state its intent for how a particular rule is interpreted.

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A list of reference documents is attached at the end of this document. All reference documents are available from:

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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 RCW.[1] 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 considering these rule revisions significant.

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.

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[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."

[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."

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"

- balance the increasing demands for energy facility location and operation in conjunction with the broad interests of the public[6];
- 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[7];
- 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 fourth 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…";

[6] RCW 80.50.010.
[7] RCW 80.50.040(1).
[8] RCW 80.50.040(2).

(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) Process and procedures for conducting adjudicative hearings on proposed energy facilities per 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 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 Rule-making

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 or expanding existing energy facilities. The rules in place today were crafted in an era when nuclear energy development was emerging and although they are adequate, they are not completely appropriate for today's energy environment. It is the intent of the council to update its operational and energy-facility siting rules to provide clear and understandable energy-facility siting requirements while providing applicants 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. The goal of EFSEC 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 and proposed new additions 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 and policies and the addition of specific siting standards 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 siting standards for the construction and operation of energy facilities, incorporating legislative changes into the rules in a timely manner, having conducted a thorough review of the standards and made necessary housekeeping revisions to the rules and re-organized the existing rules into a more logical order.

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 and its mandate are much the same today as they were in 1970.

The EFSEC rules received an extensive overhaul and revisions were adopted on November 4, 1977. Since that time there have been numerous revisions as a result of new or revised legislation, changes resulting from revisions to federally-delegated programs and changing policies and procedures. Although the rules have changed over the past 28 years, there has not been a single focused review of the entire package of EFSEC rules (Chapter 463 WAC).

The current council rules address the requirements for energy facility siting, including the application process, application review, level of detail and topics to be addressed, the adjudication process, hearings and operational compliance. What these existing standards do not contain are the actual air, water quality, fish and wildlife, wetland or noise or other standards that energy facilities must satisfy. For these standards, EFSEC relies on the already promulgated rules, standards or other guidance or policies of agencies such as the Departments of Ecology, Fish and Wildlife and local governments. While other agencies have enacted standards such as water quality standards or noise standards, some of these requirements are in the form of guidance or agency policy. For example, the requirements for wetland protection and mitigation developed by the Department of Ecology and the fish and wildlife protection and mitigation requirements of the Department of Fish and Wildlife are agency guidance, not standards. As such both of these areas are subject to interpretation in their implementation.

Since 1971, EFSEC has dealt with more than 20 applications or amendments to applications for site certification. During this time, there have been changes to EFSEC

including adding or removing council members, changing jurisdictional thresholds and providing for a paid council chair position. However, the requirements for siting energy facilities have remained essentially the same. Although the requirements remained much the same, some feel that the manner in which the council approached the "balancing" required in RCW 80.50 was inconsistent.

The existing rules have worked well and while the existing rules provide the guidance necessary to complete facility siting, it was never clear if the rules were the minimum requirements or the maximum requirements. This lack of clarity in the requirements, especially given modern energy markets and new technologies for producing energy, point to the need to change the process. The nature of the EFSEC process that is as a single-stop permitting entity requires complex rules that encompass every aspect of preparing applications for energy facilities. This includes filing fees, application content and mitigation options, how applications are reviewed, how approval is granted, how facilities operate, compliance and enforcement and what happens if an energy facility is abandoned or the project is terminated.

In 1997, in an effort to improve processing applications for site certification, the council began to examine how it conducts business, through the formation of a work group to look at EFSEC operations. This resulted in changes as to when environmental reports were due, the sequence of adjudicative hearings and a recommendation that the council chair work with the office of the Governor and the legislature to promote a more comprehensive review of EFSEC. Also, after the formation of the Governor's Fuel Accident Prevention & Response Team in June, 1999, it was recommended that energy facility siting issues be studied.

When the council began discussing ways to improve the manner in which applications were processed they started with a council work session looking at the existing processes and opportunities for improvement. This was followed by a legislative study effort in 1998, an EFSEC sponsored public discussion of its operations also in 1998, and the Charlie Earl report to the governor on EFSEC issues in 2001.

From the start, EFSEC recognized that consideration of rule revisions would require more than just casual effort. The amount of attention that EFSEC received in the past five years speaks to both the degree of concern associated with EFSEC processes and the extent of the changes that were needed in the EFSEC rules.

The extent of the rules revisions that the council considered were the result of; 1) direction from Governor Locke to EFSEC, 2) the recommendations from a stakeholder group looking at combustion-turbine siting standards and 3) the administrative changes, both large and small, that would benefit the overall rules package.

Governor's Direction To EFSEC To Establish Clear Standards For Siting Energy Facilities

In 2001, Governor Gary Locke asked Charlie Earl to undertake a review of EFSEC operations and recommend how to improve the efficiency of energy-facility siting activities. The Earl Report is discussed later in the section on chronology of EFSEC actions to update rules. In all, the Earl Report contained 13 recommendations for change including:

- initiate rule-making for siting energy facilities;
- explore setting out enhanced environmental criteria that will enable "fast track" processing of siting applications;
- create certainty for applicants and intervenors;
- improve the timeline of the decision process and to; and to
- provide better quality input from participating agencies.

Following receipt of the Earl Report, Governor Locke directed EFSEC and other state agency directors to: "Work with key stakeholders in crafting quantifiable siting standards for power plant construction to help applicants and intervenors better understand our expectations and attain full compliance with environmental laws and rules."

Legislative changes to EFSEC law
During recent legislative sessions, a number of amendments to the EFSEC enabling legislation have been enacted. These include creation of a full time EFSEC Chair appointed by the Governor, a greater role for EFSEC staff in assisting applicants identify issues contained in an application for site certification and the opportunity for alternative energy facilities of any size or capacity to opt-in to the EFSEC process. The alternative energy opt-in provision is of particular interest at this time, as EFSEC is currently considering applications for two wind-to-energy projects.

All of these added up to the need to thoroughly review EFSEC operating rules and to consider adding siting standards to provide the higher degree of certainty that everyone would like to see.

Chronology Of EFSEC Actions To Update Rules

Initial Council Actions

In 1997 Governor Gary Locke asked all state agencies to review their existing and pending rules and look for opportunities to update or otherwise make them more efficient and responsive to the needs of the agencies' customers and stakeholders. Although EFSEC started this process and actually made a number of technical or administrative changes to the rules, this effort was suspended in 1999 because of an increasing workload and ongoing discussions in the state legislature about possible changes to the EFSEC

operating statute, Chapter 80.50 RCW. Previous EFSEC Chair Debora Ross,[9] in a paper[10] dated January 17, 2000, identified several issues and offered pro-con observations on a number of those issues. In her paper, Chair Ross identified five circumstances that may warrant updating the EFSEC operating rules, Chapter 463 WAC. These are:

- Rulemaking issues that arise as a result of ***statutory changes*** made since rules were last changed;
- Rule changes that may lead to ***improved fairness and efficiency***;
- Rule changes to reflect ***current practices*** that are not now explicitly reflected in rules;
- Potential improvements to rules to make them ***clearer and easier to understand***; and
- ***Technical changes*** that may be needed such as spelling or terminology.

It soon became apparent that any efforts to revise EFSEC rules would be a complex and tedious process that could take several years to accomplish. Both EFSEC Chair Deb Ross and, as outlined below, Charlie Earl recognized the difficulty and amount of time needed to make rule changes.

Legislative Task Force On Energy Facility Siting

In 2000, a legislative task force took on the issue of state energy facility siting issues. The Task Force started by holding three facilitated meetings giving all interested parties an opportunity to express their views on energy-facility siting and to voice specific concerns. Three smaller work groups were set up to provide materials for the Task Force to consider. These work groups focused on:

WHAT -

- Should the state have an energy-siting authority?
- Should the EFSEC have preemptive authority over all state and local laws and regulations?
- Should there be a "needs criterion" that must be satisfied before new energy facilities are approved?

WHO -

- Who should have membership on EFSEC?
- What is the role of the governor?
- What state and local agencies should participate on EFSEC?
- When and how is public participation provided for?

HOW -

- How are other laws such as SEPA and GMA integrated into the EFSEC process?
- How is EFSEC funded and how are costs allocated to various projects?
- How are EFSEC policies and procedures reflective of smooth energy facility siting?

[9] EFSEC Chair from February 23, 1998 to June 30, 2001.

[10] White Paper on State Roles in Energy Facility Siting, dated January 17, 2000. This is number 3 in the list of reference documents.

The task force recommended a number of changes, both to EFSEC's statutes and procedures. The following year the legislature passed HB 2247 that implemented several of the changes that were recommended by the legislative task force.

Charlie Earl Report To Governor On EFSEC

In January 2001, in response to the regional energy situation, Governor Locke asked Charles Earl to undertake a review of EFSEC operations and to make additional recommendations on how to improve the efficiency of energy-facility siting activities. Of his assignment, Mr. Earl writes:

> "On February 21, 2001, you asked me to undertake a fact finding assessment of the Energy Facility Site Evaluation Council (EFSEC) siting process. You stated 'effective siting of energy facilities should help ensure long term affordability and abundance of the [energy] resource, while maintaining environmental protection.' Your assignment was to 'suggest steps that should be taken to improve EFSEC process without impairing environmental protection. Recommendations should concentrate on potential executive action, although legislative solutions may be proposed.'"

The Earl Report[11] focuses on improving the siting process by;
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- Creating certainty for applicants and intervenors,
- Improving the timeline of the decision-making process, and
- Providing better input from participating agencies.

The Earl Report went to Governor Locke on October 25, 2001 and contained a total of twelve recommendations including a suggestion that EFSEC initiate rule-making, the focus of which should be on streamlining and rationalizing the adjudicatory process.

Stakeholder Group - The Stakeholder Process

Governor Locke appointed Jim Luce to Chair EFSEC in September 2001. Chair Luce was directed by the Governor to develop clear and understandable standards for the siting of energy facilities in Washington State. In a memorandum to state agencies, the Governor directs state agencies to work with stakeholders and assist EFSEC to create siting standards that ensured greater certainty in the siting process and make the application process easier to understand by both applicants and interested parties. In a presentation to the Washington Public Utility District Association Governor Locke said "I have asked Jim Luce, our new EFSEC Chair, to develop clear and objective criteria for new energy facilities to avoid the uncertainty that has sometimes complicated the permitting process in the past."

In late 2001, EFSEC contracted with the firm of Krogh & Leonard to facilitate a stakeholder process that would recommend new siting standards for energy facilities.

[11] The Earl Report was submitted to Governor Locke on April 20, 2001. A copy is included as Number 4, in the list of reference documents.

The stakeholder process began in December, 2001. First, key stakeholders were identified and asked to participate. These stakeholders were in turn asked to identify others who should be involved in this process. In all, over 70 people participated in the stakeholder group meetings. Ninety four people or groups were on the mailing list and received all of the meeting materials, minutes and proposed standards. During the stakeholder process, the group heard lengthy descriptions of how the Oregon Energy Facility Siting Council was created and functioned, and from representatives of the Oregon Department of Fish and Wildlife on the Habitat Rules used in Oregon.

The first meeting, on December 13, 2001, was focused on 1) getting the stakeholder group organized; 2) describing the council's expectations for accomplishment and 3) identifying the energy-facility siting issues that needed to have clear and concise standards. From the start of the discussions held by the EFSEC Standards Development Stakeholder Group, there was little or no thought that standards were not needed. The group easily accepted the idea that EFSEC should have clear and concise siting standards.

The stakeholder process consisted of eleven meetings during the period from December 13, 2001 to August 2002 and resulted in recommendations that EFSEC adopt twelve specific standards for power plant siting. The full Krogh & Leonard Report[12] documents the formation of the stakeholder group, contains minutes from the meetings, lists meeting attendees and includes various proposals for the twelve issues identified for developing siting standards. What the Report does not include are the numerous areas of Chapter 463 WAC that were in need of revision or update and the additional areas that would need to be revised as a result of addressing stakeholder suggestions for standards.

During subsequent meetings of the stakeholder group each of the twelve issues identified were discussed. Generally, someone, the EFSEC Chair or another party, would introduce the subject, the issues associated with it and possibly an option or idea that would address concerns related to that issue. Following this initial discussion, one or more people from the stakeholder group were assigned the task of researching the issue and coming back to a subsequent meeting with more information for the group or with a proposed standard for the group to consider

The Topics For Which Siting Standards Were Proposed:

- Air Quality,
- Fish and Wildlife,
- Greenhouse Gas Mitigation,
- Noise,
- Seismicity,
- Socioeconomics,
- Water Quality,
- Water Quantity,

[12] Krogh & Leonard Report to Jim Luce, Chair, Washington Energy Facility Site Evaluation Council Regarding EFSEC Standards Development – September 19,2002. This report is number 8 in the list of reference documents.

- Wetlands,
- Certificate Expiration,
- Need for Projects, and
- Mediation, Stipulations and settlement.

One of the issues the stakeholder group had to come to grips with is that most, if not all, of the areas it was dealing with were already regulated by other agencies of state or local government. This created the challenge of crafting quantifiable standards for energy-facility siting that were consistent with the requirements of other state and local agencies. Throughout this process members were mindful of the need to craft quantifiable, clear and concise standards while maintaining environmental protection and the health and welfare of the people of Washington State. The dilemma about whether EFSEC should adopt its own specific standards or adopt the existing standards of other agencies was resolved by using both approaches as appropriate to a specific circumstance.

Some of the proposed standards were discussed only once or twice, but most were included on several meeting agendas. This process continued until all issues were examined. The stakeholder meetings were designed to allow everyone an opportunity to participate in free-flowing discussion, debate and brainstorming of issues and ideas. When there appeared to be an impasse on a particular issue, small groups were encouraged to get together outside of the stakeholder meeting to reach a consensus that could be brought back to the group as a whole.

As is to be expected, there was not 100 percent consensus on every issue. To address this, the stakeholders' group agreed that where there was not full consensus, individuals or groups could offer alternative standards, and those alternatives would be included in the final recommendation to EFSEC. At the conclusion of the stakeholder meetings, full consensus was reached on only one of the twelve issues, a proposed mediation standard. Another, the seismicity standard was not objected to but received only limited discussion. Additionally, several members did not support the recommended noise standard. In total for the twelve issues identified by this group, three issues had only one alternative proposed, six issues had two alternatives, two issues had three alternatives and one issue had 4 alternatives. A total of twelve issues were proposed and resulted in the recommendation of 25 proposed standards for EFSEC to consider.

The September 19, 2002 "Krogh Leonard Report to Jim Luce, Chair, Washington Energy Facility Site Evaluation Council Regarding EFSEC Standards Development" describes some of the background related to the need for quantifiable standards for energy facilities, one of Governor Locke's objectives for Chair Luce and EFSEC.

The council began the formal rule-making process when it issued a Pre-proposal Statement of Inquiry (CR-101) on November 14, 2002, initiating the process for the proposal of new rules and the revision of the existing rules.

Council Action To Create A Strawdog Rule Revision Package

The council hoped that the establishment of siting standards would end the debate that ensued following the Sumas 2 adjudication[13] about whether the EFSEC requirements are the "floor" (minimum) or the "ceiling" (maximum) with respect to energy facility siting requirements. By establishing specific siting standards the council hoped to provide a much larger degree of certainty about energy facility siting requirements. In part, this is one of the issues that led the Governor to ask that standards be established and subsequently led to the creation of the EFSEC Standards Development Stakeholders' Group. When Governor Locke appointed Jim Luce to be the EFSEC Chair, he did so asking that EFSEC "develop clear and objective criteria for facilities to avoid the uncertainty that has sometimes complicated permitting proceedings in the past." It is this uncertainty that the siting standards for energy facilities are intended to address.

The premise behind establishing siting standards is that when adopted, they become a threshold that when met, removes that issue from debate during the siting process. Only in cases where the "environmental impact statement" documents an area that needs additional protection would EFSEC consider requiring greater protection or mitigation.

However, as mentioned before, when it came time to establish a "standard", the stakeholder group, while supportive of standards, was not of one mind on what the standard should contain. The stakeholder group identifying twelve issues could only reach consensus on one issue. For the other eleven there were at least two suggested standards proposed and in the case of greenhouse gas discussions, the group proposed four different options.[14]

Although the stakeholder group urged the development of standards, some of the topics for which standards were recommended are not areas that truly fit the mold for becoming a standard; that is they did not have a metric that could be measured to determine compliance. Thus EFSEC has taken recommendations from the stakeholder group and used those recommendations to strengthen requirements that an applicant needs to provide in its application for site certification, thereby clarifying the requirements for applications and subsequent Site Certification Agreements. While many of the stakeholder recommendations are presented in the form of a specific "standard" and included in the proposed council rules, an equal number of the stakeholder recommendations have become policy or guidance that must be included in an application, in a Site Certification Agreement or otherwise addressed during the life of an approved energy facility.

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[13] The National Energy Systems Application for Site Certification of a 660 MW gas fired Combustion Turbine in Sumas WA.

[14] The proposed standard for greenhouse gas is not included in the proposed EFSEC rules. In 2004, the Washington Legislature passed SSH bill 3141 requiring all new power plants to offset 20 percent of their green house gas emissions. EFSEC, the Department of Ecology and local clean air agencies are required to adopt rules to implement the new state legislation. That rule-making process is outside of the current EFSEC rule-making proposal.

The need for greater certainty in siting energy facilities is the driver behind the EFSEC rule revisions. Certainty for applicants wanting to build energy facilities, certainty for parties who either support or oppose proposed facilities, and certainty for protecting the public health and environment will simplify the siting process and save everyone involved both time and money. Proponents and opponents alike will know what must be done if a facility is to be approved. The revised council rules are intended to ease the burden of developing new energy facilities while assuring that new facilities will not cause adverse impacts on communities and the environment.

Throughout the stakeholder meetings, the discussion focused on establishing standards and requirements for the siting of combustion turbines. In a like manner, the Krogh & Leonard Report to EFSEC contained recommendations and alternatives for environmental protection when siting combustion-turbine electrical generators in Washington State. This same focus was maintained even as EFSEC began the process of discussing the various alternatives and establishing recommendations for each of the various standards. The council soon came to realize that to continue on this path would result in confusion about what siting standards, other than those for combustion turbines, would apply to other energy facilities under its jurisdiction. The EFSEC Council decided to broaden the focus of the standards being considered to include all facilities under EFSEC jurisdiction, not just the combustion turbines. To limit the applicability of the siting standards to only combustion turbines could cause serious delays in processing applications for facilities other than gas turbines. Such failure could also force EFSEC to have to adopt separate siting standards for the other facilities under its jurisdiction. Regardless of the type of energy facility requesting approval, the intent is to have siting requirements applicable to all types of facilities and to create a level playing field for parties interested in siting energy facilities.

Since most of the proposed standards such as water quality, air quality or noise would apply equally to a combustion turbine, a wind-power facility or a pipeline it made sense to have only one set of standards. The standards that are proposed will work in such a way that if a combustion turbine needs to address wastewater from the turbine the standards are there for that purpose. However a wind-power facility will probably not have any process wastewater discharges. In that case, the standard would not apply. At the same time, both a combustion turbine and a wind power facility would need to address stormwater runoff in the same manner and the proposed standards provide adequate direction for doing so.

Need For Housekeeping Updates Of EFSEC Rules

The council started the rule revision process because it wanted to develop energy-facility siting standards and to simplify the energy facility siting process. It soon became apparent that merely adopting some siting standards would not necessarily improve the siting process or the amount of time that it would take to go through the siting and approval process. Many areas of the existing rules needed to be changed or updated as well. It was also apparent that it would not be possible to only add new standards because doing so would require numerous changes to other areas of Chapter 463 WAC.

The operating rules for an agency such as EFSEC that has the total responsibility for siting major energy facilities need to be complete, concise and understandable. These rules are also required to be compatible with programs of other agencies that would otherwise regulate an energy facility in the absence of EFSEC, or a facility that falls below the jurisdiction of the council. Likewise, the process of developing standards for siting energy facilities demands that these rules be the same as standards for siting other types of facilities. Also, both the operating rules and the siting standards need to be compatible. One example is ensuring that the application content requirements contain sufficient information to allow an applicant to address necessary water and wastewater treatment so as to be able to describe how the water quality standards will be met; it must identify the requirements that need to be satisfied in order to receive timely approvals.

The EFSEC package of rules has not had a thorough review since it was adopted in 1972. During this 30-plus year period, there have been small revisions of the rule to stay current with changes to EFSEC legislation or to the Administrative Procedure Act. While these required revisions are always completed in a manner so as to not conflict with another section, they are written differently in terms of style and vocabulary. The nature of a rule package that covers everything from basic agency operation to application requirements and how adjudicative hearings are conducted to comply with the Administrative Procedure Act is very complicated. When combined with new siting standards, the need for clearly written rules is doubly important.

The council and its staff opted to revise the entire rule package, making the entire set of rules more easily understood. In doing so, they decided to review all of the administrative requirements and to make revisions as necessary. Where new language is added the intent is to make the rules easier to understand or to ensure consistency with other laws such as the Clean Water Act, Clean Air Act or the Administrative Procedure Act[15]. All of the changes made to the EFSEC rules, including an explanation about why each change or addition is being proposed, are included within this Concise Explanatory Statement.

After receipt of the Krogh & Leonard Report, the council formed a work group for the purpose of drafting a rule-development plan. The rule-development plan had to serve two purposes. First, it had to set forth the steps necessary to complete a systematic review of the very complex set of energy-facility siting standards. Second, it had to provide a base upon which to establish a time line for completion of the standards' review and set a target for filing the proposed standards with the State Code Reviser, marking the beginning the formal rule-making process.

The rule adoption plan was based on discussions that took place on October 24, 2002 at an EFSEC rule-adoption work group meeting and during the November 4, 2002 EFSEC Executive Committee meeting[16]. The Rule Adoption Plan was modified as a result of

[15] The Washington Administrative Procedure Act, RCW 34.05, guides the processes of state government operations.

[16] Prior to January 2004, the council met in the first and third Monday of each month in as an Executive Committee. The council met on the second Monday of each as a full council meeting where formal council

council member discussions and presented to the council and adopted at its November 12, 2002 meeting.[17]

The Rule Adoption Plan provided for the council to deal with each of the stakeholder recommendations in turn. Individual councilmember's or small groups of councilmember's[18] were assigned stakeholder recommendations to review and directed to return to the EFSEC Executive Committee with a recommended rule for council consideration. Over a period of several months, all the stakeholder recommendations were reviewed by councilmember's, discussed at council Executive Committee Meetings, and accepted by the council as a draft rule. Draft rules were placed on the EFSEC web site where public comment was encouraged. In a like manner, councilmember's and staff were also responsible for reviewing other portions of the council rules, proposing changes and recommending council approval.

Each of the Stakeholder Group recommendations was accepted as a draft rule and placed on the EFSEC web site. This was followed by extensive staff and councilmember review and discussion. Following these discussions, energy facility siting standards were proposed for the following topics.

a) Seismicity
b) Noise Limits
c) Fish and Wildlife
d) Wetlands
e) Water Quality
f) Air Quality

After council review the other six stakeholder standard recommendations were determined to be guidelines or policies and procedures pertaining to aspects of energy facility siting, compliance and enforcement rather than actual standards. These areas were added to various sections of the revised rules. Additions to the EFSEC rules that were recommendations resulting from stakeholder group recommendations are identified in a later section which describes all the changes that were made to the EFSEC rule package.

The plan adopted by EFSEC was an iterative process wherein a single councilmember or a small group would review one of the proposed standards and present it to the Executive Committee or the council. If there was not acceptance at either of these levels, the proposal went back to the small group for further review. EFSEC members encountered problems as they thought about how to incorporate the proposed siting

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business could be conducted. In an attempt to reduce costs, the council voted to discontinue the practice of holding Executive Committee meetings in favor of holding business meetings on the first and third Monday of each month.

[17] Taken from the EFSEC website at - www.efsec.wa.gov/rulerev

[18] The small groups of Council members were kept to only two or three members. The EFSEC Council is governed by the Open Public Meetings Act. Under the Open Public Meetings Act any time more than half of the members are present, that constitutes a meeting which must be both publicized and open to the public.

standards into existing rules. Principal among these problems was how to address the many sections of the existing rule that needed minor updates or revisions. Over time these small changes seemed to take on a "life-of-their-own." It was through this iterative process that the first few suggested revisions eventually led to the recommendation that the entire EFSEC rule be updated and re-organized. In this manner EFSEC considered the recommendations of the Krogh & Leonard Report as well as the original suggestions contained in the Charlie Earl report to Governor Locke and those suggested by former EFSEC Chair Deb Ross.

Under the Rule Development Plan adopted by EFSEC, Executive Committee meetings provided the setting for councilmember's, EFSEC staff and the EFSEC legal counsel to discuss each proposed standard as well as the needed administrative revisions to the basic EFSEC rules in turn, based on a schedule established by EFSEC. Only after review and discussion by the executive committee would a recommendation be made to the council that a particular draft proposed standard was ready for public review and comment. Following council acceptance of the proposed rule, the draft standard was posted on the EFSEC web site where it was available for public review and comment.

One of the challenges of which councilmember's and staff were mindful was the possibility of developing a standard that would conflict with a similar standard from another agency or a requirement of the federal government. Thus some existing standards are proposed to be adopted by reference, and in some instances EFSEC chose to write its own standards. In all cases where EFSEC chose to write a stand-alone standard, care was taken to ensure the EFSEC standard was consistent with other requirements that might be in existence at the state or federal level.

After EFSEC completed its review and accepted the proposed revisions for posting on its web site, the EFSEC manager (EFSEC's SEPA Responsible Official) issued a required State Environmental Policy Act (SEPA) determination on the environmental significance of the proposed rule revisions. The determination was that adoption of the proposed siting standards and amendments to current procedural rules would not have a probable significant adverse impact on the environment. Based on this determination, an environmental impact statement (EIS) was not required under RCW 43.21C.030 (2)(c). This decision was made after the environmental checklist was completed. The Environmental Checklist and the Determination of Nonsignificance are numbers 12 and 13 in the list of reference documents and are available from the council upon request.

The Rule Development Plan called for EFSEC to hold public comment and informational meetings after the proposed standards and revised rules were initially accepted by the council. These meetings were intended to hear public questions, comments and criticism on the proposed rules and standards. The council scheduled and held two meetings on October 29, 2003 in Spokane and October 30, 2003 in Burien, Washington[19]. The council accepted comments through December 1, 2003. The council provided for a court reporter at both of these meetings[20].

[19] The notice of the public meetings is included in Number 14 in the list of reference documents.
[20] The transcript of these meetings is included as Numbers 15 and 16 in the list of reference documents.

During these meetings, EFSEC received oral comments from 32 persons and written comments from 198 persons or groups. The vast majority of the oral and written comments resulting from these informational meetings focused on the proposed greenhouse gas mitigation standard that EFSEC was proposing. As has been discussed previously, the 2004 session of the Washington State legislature enacted SHB 3141, which put in statute a requirement that all new energy facilities mitigate twenty percent of their greenhouse gas emissions. The legislation set an initial fee for mitigation at $1.60 per ton of greenhouse gasses emitted. Because the legislature enacted specific legislation requiring greenhouse gas mitigation, EFSEC is not proceeding with establishing greenhouse gas mitigation criteria at this time. EFSEC along with the Department of Ecology and local clean air agencies will develop implementing rules in the future as funding becomes available.

The majority of persons and organizations offering comments in response to the two informational meetings focused their comments on the proposed greenhouse gas rule. In fact only four written comments addressed other sections of the proposed rules. These non-greenhouse gas comments addressed a number of specific areas pertaining to the proposed rules including:

- Clean air issues related to public health.
- Fish and Wildlife.
- Need for Power.
- Socioeconomic issues.
- Energy Consumption.
- Seismicity.
- Site Certification Agreement expiration.
- Noise.
- Water Resources.
- Environmental, Esthetic and other Benefits.
- Land-Use Consistency.

In addition, there were a number of more general comments regarding how EFSEC would develop the final standards, including:

- How the standards are organized.
- The need for consistency in the use of terms.
- The need to coordinate with other agencies and avoid duplicate rules.
- EFSEC overhead costs and how costs were allocated between applicants and certificate holders.
- What type of facilities the proposed standards apply to.

The council and staff reviewed these comments and made numerous changes in the proposed rules as a result. The proposed rules, including revisions, were published on the EFSEC web site in March, 2004. Table 1 lists the comments and the council response to that comment.[21]

[21] The comment letters are listed as numbers 17 through 20 in the list of reference documents.

Table 1 - Informational Meeting Comments and Responses

	Comment	Response
A.1	It is not clear if any of the proposed standards would apply to new renewable energy projects	Midway through its review of the Stakeholder Group recommendations, the council decided that it made sense to develop siting standards for all energy facilities, not just for combustion turbines. Having one set of siting standards is a step in the direction of easing the siting application process. The standards will apply as appropriate to renewable energy facilities as well as other energy facilities.
A.2	It does not appear that the EFSEC Standards Development Group considered any of the unique attributes of renewable energy projects during the formulation of these rules.	The Standards Stakeholder Group did not specifically consider renewable energy facilities when preparing its siting standards. Actually the discussion was focused on Combustion Turbine energy facilities. See Response to A.1 above.
A.3	If these rules apply uniformly to all energy projects we would like to provide additional comments at a later date.	The rules that were discussed at the informational meetings were draft standards and amendments to general EFSEC rules. Following further EFSEC review, the entire rule package was presented for formal public review and comment. Parties wishing to discuss any of the proposed standards or modifications to the rule package may do so by calling EFSEC to schedule an appointment for that purpose.
A.4	We strongly recommend that for wind projects sited by EFSEC the WDFW wind power guidelines be applied.	Chapter 463-42-332(4) requires applications "…give due consideration to any project-type specific guidelines established by state and federal agencies for assessment of existing habitat, assessment of impacts and development of mitigation plans." An example is the reference to WDFW Wind-Power Siting Guidelines in Chapter 463-42-332(4). Also, Chapter 463-42-010 "…encourages applicants to consult with appropriate agencies for guidance in gathering sufficient detailed information,

	Comment	Response
		and development of comprehensive mitigation plans for inclusion in their application."
A.5	A letter from the WDFW Regional Office should be used to indicate satisfaction of the fish and wildlife standard.	RCW 80.50.110 gives EFSEC preemption over any other law of the state to regulate energy facilities under its jurisdiction. As such, EFSEC is the agency responsible to determine compliance with its rules. EFSEC does consult with other agencies including the department of fish and wildlife concerning potential impacts which may occur as a result of siting energy facilities under its jurisdiction.
A.6	Proposed CO2 Standard	This standard has been withdrawn from consideration by EFSEC.
A.7	Consider revising the process for determining land use consistency WAC 43.28.	The EFSEC council discussed this issue and decided to not take it on at this time. Also, this was not a topic discussed during the stakeholder meetings.
A.8	EFSEC should create a timeline that requires local government to coordinate with EFSEC and act on a timeline consistent with EFSEC.	See the response to number A.7 above. In addition, EFSEC does not have jurisdiction to dictate the process or schedule that local governments follow when deciding land use issues.
A.9	Develop an option that would allow EFSEC to make land use consistency determinations when an application is submitted.	Legislation enacted in 2001 provides for EFSEC to conduct land use consistency hearings, RCW 80.50.090. EFSEC holds the land use hearing early in its application review process. However, EFSEC rulings may be delayed pending activities by local governments.
B.1	The draft proposals do not comprise a cohesive package.	The standards and rule revision package reviewed at the time of the initial public informational meetings were drafted by a number of individuals and committees. These proposed rules have been revised to reflect a more cohesive set of standards and operating rules.
B.2	New standards are not consistent with respect to applicability, terminology and format.	EFSEC and staff have reviewed the rules and addressed the use of common terms and references.
B.3	The proposals have been assembled from different sources without editing and organization.	See response to B.1 above.

	Comment	Response
B.4	Place the Purpose and Intent section of the standards at the beginning of that section.	This has been done.
B.5	Standards for environmental protection should be promulgated by the agencies with expertise.	See response to A.5 above. EFSEC has decided that in the interest of easing the application process, adopting clear, concise, standards and operating rules will benefit applicants and the state as a whole. The adoption of siting standards and revising existing operating rules consistent with the requirements of other agencies will accomplish that.
B.6	EFSEC rules should provide the "roadmap" for the SCA application process by linking and referencing rules that reside with other agencies.	The existing EFSEC rules are being reorganized to more logically follow the steps involved in developing an energy facility. The EFSEC standards for construction and operation and other requirements in this chapter closely follow the requirements of other agencies.
B.7	EFSEC should identify and address the issues that are unique to siting energy facilities such as need for power and site certification expiration dates.	RCW 80.50 gives EFSEC full jurisdiction to regulate all aspects of the construction and operation of an energy facility. As such, it is required to have programs and processes in place comparable to other agencies such as the Department of Ecology or the department of fish and wildlife. Through the use of the Potential Site Study, an applicant is able to identify its project and to tailor its application to those issues pertinent to its individual project. If, for example, a wind energy project is proposed, there are certain application steps that would not be applicable.
B.8	These rules should not be limited to just combustion-turbine energy facilities.	See Comment A.1
B.9	Seismicity – This draft section and several others sections are more wordy than necessary	EFSEC and staff provided a reference to the Uniform Building Code, thereby making the standard much shorter. Some of the information that was previously in the standard is now included in the application guidelines.

	Comment	Response
B.10	Seismicity – Providing evidence to the council does not pertain to an objective standard.	See response to B.9 above.
B.11	The following wording would be more appropriate for Seismicity and other standards: "The seismicity standard for construction of a combustion turbine under council jurisdiction is the applicable building code for seismic hazards."	See response to B.9 above.
B.12	It should be sufficient for the noise standard to point to the Department of Ecology's noise regulation.	Much like the seismicity standard, the noise standard has been shortened and EFSEC has proposed adoption by reference, the state noise standards. Several of the monitoring requirements were added to the application guidelines.
B.13	The specific attributes of proposed monitoring programs for the preconstruction, construction and operational phases should be in the application requirements.	See response to B.12 above. Because EFSEC must deal with a variety of energy facilities, the council decided to not specify specific monitoring requirements for various phases of project development. Instead, noise monitoring is recommended commensurate with the sensitivity of noise receptors near the facility.
B.14	Standards for wildlife mitigation belong in Title 220, Fish and Wildlife - Fisheries and Title 232, Fish and Wildlife - Wildlife.	The development of the wildlife mitigation standard was a recommendation of the stakeholder group. Also see response to B.7 above.
B.15	A fish and wildlife rule that is thirteen pages long is something other than "clear, objective and quantifiable."	The fish and wildlife standard has been shortened. Much of the original content has been moved to the application content section.
B.16	The "no net loss" standard may be inconsistent with the intent of SEPA.	The concept of no net loss is an intent statement and may or may not be practical in every situation. SEPA may also play a role in the determination of appropriate mitigations.
B.17	Since EFSEC no longer issues water right withdrawal authorization in the SCA...	While EFSEC encourages applicants to include valid water rights with their applications, in what EFSEC would view as a worst case scenario, EFSEC can issue water rights.
B.18	The applicant with a valid water right should not have to obtain EFSEC's	EFSEC is advocating a proposal where all applicants come to EFSEC with

	Comment	Response
	authorization as well (as in proposed subsection [2]).	adequate water to operate the proposed facility. This is not to say that EFSEC will or could not take steps to approve water consumption and usage if necessary.
B.19	Site Restoration – It is not clear if this is a CT standard or a stand-alone chapter.	See Response to Comment A.1 above.
B.20	There is no apparent link to the initial site-restoration plan required in the application guidelines (WAC 463-42-655).	All EFSEC rules related to site restoration have been placed in one separate Chapter of these rules. The basis of a final site restoration plan will be established at the time an energy facility ceases operation. Potential for future use of the site will be considered when determining the degree of site restoration that is required.
B.21	Site Restoration - the purpose and intent section of the site restoration chapter expresses a pre-disposition toward "Greenfield" restoration.	This is not the position of the council. While in many instances, this may be a desirable conclusion, the development of a final restoration plan which takes into account possible future uses of the site will determine restoration options.
B.22	Restoration should be determined through the planning process that may include an end-of-life use for the facility.	See response to B.21 above.
B.23	Pollution liability insurance is inappropriate.	The council feels pollution liability insurance is very appropriate to protect the public from the necessity of cleaning up contamination caused by the construction and operation of an energy facility. It provides protection in the event of bankruptcy.
B.24	A site-closure bond is inappropriate because it requires that coverage for the future site restoration be demonstrated before site preparation is commenced.	The council feels that a site closure bond is very appropriate to protect the public from the costs and necessity of conducting site restoration in the event a developer refused to do so. It provides protection in the event of bankruptcy.
B.25	EFSEC should provide more flexibility in the timing and selection of financial	The council provides a great deal of flexibility in allowing developers to

	Comment	Response
	instruments for the satisfaction of site-restoration requirements.	determine the nature of the financial instrument that they propose to use to provide necessary site restoration bonding.
B.26	Environmental, esthetic and other benefits – This section is included in the CT standards but is numbered as a general application requirement.	See Comment A.1 Above.
B.27	Environmental, esthetic and other benefits – It is not clear what would satisfy these requirements.	This proposed section was deleted from the proposed standards for construction and operation of energy facilities. This concept has been included in the application guidelines section.
B.28	Water Quality – The CT siting standard should be the applicable rules of the Department of Ecology.	The water-quality standard is essentially that of the Department of Ecology. While there are a few differences, those differences are due to some of the unique circumstances that EFSEC has encountered in recent application reviews.
B.29	Water Quality – The proposal that allows EFSEC to impose more stringent requirements is not needed.	Requirements more stringent than existing standards are only applicable when, through the SEPA process, outstanding issues are identified or an issue is identified in the course of an adjudication that was overlooked in the application and SEPA review.
B.30	The ability of EFSEC to allow re-evaluation of prior decisions regarding the adequacy of an NPDES permit provides an open- ended process for selectively changing permit conditions.	NPDES permits are reviewed every five years. At that time, revisions can be made for cause or because of a revision in the state or federal clean water acts or their attendant regulations.
B.31	The update process for NPDES permits should be the same as provided for in the air-quality standards.	The process for updating NPDES permits is spelled out in Federal rules and is somewhat different from the provisions governing update of the air quality standards.
B.32	Air Quality – The second condition says that the first condition does not apply to carbon dioxide emissions. Because there are no state or federal carbon dioxide standards this second condition should be dropped.	This was originally included because EFSEC intended to adopt a greenhouse gas mitigation rule under its existing authorities. Now that the state has enacted a greenhouse gas standard, this section is still pertinent.
B.33	Need for power – This should be relevant to any application for site	The need-for-power standard has been deleted. The legislature has stated that

	Comment	Response
	certification. It is not a standard so much as an application requirement.	there is a pressing need for energy facilities. As such applicants need not address this issue in the application for site-certification.
B.34	Greenhouse Gas Mitigation	See response to A.6 above
B.35	Council overhead costs – The draft language is deficient in that it provides no explanation of how overhead costs are to be equitably allocated between certificate holders and applicants.	This section has been deleted and is currently being addressed by the council and a legislative committee.
B.36	In the absence of a statutory basis, this rule would not contribute to EFSEC's authority to assess costs.	See response B.35 above.
B.37	EFSEC should redirect its efforts related to cost reimbursement toward securing general funds for its operating functions and activities.	The Washington state legislature determines funding levels and sources for funding for EFSEC. There is currently a legislative committee discussing issues associated with EFSEC funding.
C.1	Carbon dioxide emissions mitigation standard.	See response to A.6 above
C.2	Need for Power – This rule is inappropriate because it unnecessarily forfeits EFSEC authority in looking at legitimate issues of serious public concern in the certification process.	See response to B.33 above
C.3	Need for Power – The second half of the proposed rule, beginning "…and the council shall not consider the question…"should be removed.	See response to B.33 above
C.4	The economics of efficiency [efficient use of] resources establishes the need for power as an ongoing issue of legitimate public concern.	See response to B.33 above
C.5	Socioeconomic Impact – We approve of the proposed rule.	Comment accepted
C.6	Environmental, esthetic and other benefits – The applicant should describe how the proposed facility is consistent with the policies articulated in RCW 43.21F, where development of efficiency and renewable resources is encouraged as state policy.	This proposed standard has been deleted. The intent of this section has been added to the application guideline Chapter as questions the applicant should address in its application for site certification. EFSEC authorities are tied to approval of energy facility sites and do not include authorities to dictate the type of energy facility that is proposed.

	Comment	Response
C.7	Environmental, esthetic and other benefits – How will an applicant describe that a proposed facility is consistent with the EFSEC premise of providing abundant power at reasonable cost?	This standard has been deleted.
C.8	Will a proliferation of natural-gas combustion turbines hurt other businesses and citizens who use natural gas for other purposes? This information should be used by EFSEC to weigh recommendations for or against a project.	EFSEC is charged with siting power facilities and does not have authority to determine if one entity or another should use a particular fuel. The SEPA process will necessarily examine the issue of proliferation of natural gas combustion turbines. If this is an issue in SEPA, the applicant will need to address this issue.
D.1	Fish and Wildlife – The measure fails to meet its stated objective in that it creates new standards that apply only to facilities under EFSEC jurisdiction and dramatically increases uncertainty, delay and burden in power-plant development.	The contents of the Fish and Wildlife Standard are taken from existing policies and guidelines of the Department of Fish and Wildlife. EFSEC has chosen to not put these conditions into a standard, but rather to incorporate the intent in the site certification application content guidelines. EFSEC has also used its existing guidelines for potential site studies to describe the application content criteria. Most of the guidelines of the Department of Fish and Wildlife are applicable to all types of development.
D.2	Fish and Wildlife – Power projects are located in industrial sites or sites already developed, there is no demonstrated need to add new regulations.	While many sites are developed in existing or previously disturbed areas, these areas may still have value for fish and wildlife habitat. Recent applications for site certification have been in areas with significant fish and wildlife benefit.
D.3	Fish and Wildlife – Project sites average 50 acres. Existing state and federal regulations already provide protections and or require mitigation of impacts. The proposed rule imposes a needless additional layer of regulation to protect resources that are already protected.	See response to D.1 above
D.4	Fish and Wildlife – The rule seeks to establish a no-net-loss policy for all types of fish and wildlife whenever	Yes. This is done consistent with existing WDFW guidance for all projects, be they energy facilities or non-

	Comment	Response
	facilities under EFSEC jurisdiction are developed.	energy projects. Also, see response to D.1 above.
D.5	Fish and Wildlife – These new requirements will increase the costs for development in Washington state, making it more difficult to finance projects in the state.	Creating a standard for fish and wildlife will establish certainty in the siting process. These requirements are existing policies and guidelines of the Department of Fish and Wildlife.
D.6	Fish and Wildlife – These requirements go beyond what is required for projects below EFSEC jurisdiction or what EFSEC has required in the past.	See response to D.1 above. Also, these requirements are existing policies and guidelines of the Department of Fish and Wildlife. As such they would be applicable to all developments.
D.7	Fish and Wildlife – This standard is very broad and could lead to extensive and costly fish and wildlife surveys that may not be needed. It would be more appropriate to have a standard that identifies species of concern and then design a survey to fit that specific need.	See response to D.1 above
D.8	Fish and Wildlife – The emphasis placed on HEP will cause delays.	The requirement to use HEP has been removed from the fish and wildlife standard.
D.9	The Instream Flow Incremental Methodology is also singled out and will become the default protocol regardless of its efficacy.	See response to D.1 above. The reference to Instream Flow Incremental Methodology was removed.
D.10	Fish and Wildlife – HEP – For a project to be formulated without early agency concurrence on methods invites delays later when agencies do become involved.	See response to D.8 above
D.11	Fish and Wildlife – The study process as contemplated by the proposed regulation could take two years to complete.	See response to D.1 above
D.12	Fish and Wildlife – How will EFSEC fit into the process when disagreement arises about the criteria?	Should guidance related to programs of another agency become an issue, EFSEC is prepared to work with parties to assist in resolution of issues. If resolution cannot be reached, that issue can become an issue in the adjudication on the proposed energy facility.

	Comment	Response
D.13	Fish and Wildlife – On-site in-kind mitigation may not be the best option for providing mitigation.	On-site, in-kind mitigation is currently the policy of the Department of Fish and Wildlife. EFSEC can not change that policy.
D.14	Fish and Wildlife – The following principles are recommended for evaluating mitigation plans. (See letter from NIPPC dated December 1, 2003.)	EFSEC recommends that applicants work with agencies requiring mitigation to determine appropriate guidelines for evaluating mitigation plans.
D.15	Fish and Wildlife – The costs of providing mitigation property and the ongoing cost to maintain that property are an important element to the overall cost of a project.	See response to D.1 above.
D.16	Fish and Wildlife – Mitigation is required to be identified as part of the application. Developers are in the unacceptable position of having to obtain rights to offset sites without knowing whether they will be adequate.	Impacts to fish and wildlife resources must be identified in the application. Actual offsets are not required until the application is approved by the governor
D.17	Fish and Wildlife – Delay adoption of the proposed rule pending a thorough assessment of alternative approaches consistent with objectives to better manage facility siting.	See response to D.1 above.

Council Discussions

Following the October public meetings, the council continued to review and make revisions to the proposed rules and standards for siting energy facilities. This was done based on the Krogh & Leonard Report, council review of its existing rules, discussions during council meetings and other comments provided after the October public meetings.

The extent and nature of the changes that are proposed by this revision of Title 463 WAC range from very minor editorial and grammatical changes, to a complete reorganization of the order in which the rules are presented, to significantly rewritten sections, to completely new and definitive requirements (standards) for siting energy facilities. For this reason, EFSEC has chosen to consider these rules as "significant legislative rules" as defined in RCW 34.05.328(5) and to prepare a Small Business Economic Impact Statement and a Concise Explanatory Statement, both of which describe the anticipated impacts to the rule revisions.

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 stakeholder group meetings and worked in small groups, individually and with staff, to prepare the proposed rules revisions and additions. Discussions during executive committee meetings shaped the content of the proposed siting standards and identified areas within the existing set of EFSEC rules that needed revision. During the period from September 2002 to October 2003, the rules were discussed at most executive committee meetings.

March 15 Council Work Session To Review Proposed Rules Package

In an effort to move the rulemaking process ahead, the council held a Special meeting on March 15, 2004 to review the proposed siting standards and revisions to its operating rules. This meeting resulted in a recommendation that a revised set of proposed rules be placed on the EFSEC web site for public review and comment. The discussions resulted in several revisions which responded to comments from the public and various interest groups, changes recommended by EFSEC staff. Most of the staff recommendations had to do with putting more information in the application section, but there were also recommendations to consolidate information pertaining to Site Certification Agreements and site restoration.

Reorganize Existing Rules

In an effort to improve the usability of the EFSEC rule package, it has been reorganized into a more logical order. When the rules were originally written, there was certain logic as to the location of various chapters. Over time and with new rules being added this logic became somewhat haphazard. The proposed rule package has been divided into four parts.

These are:

Part I.	Agency Procedures
Part II	Application and Standards
Part III	Site Certification Agreement
Part IV	Permits

Separating the rules into logical groupings will improve the usability of the rules, particularly when it comes to locating a provision. Also as new rules are adopted they can easily be added to the appropriate part, thereby keeping like rules together. Table 3 below shows how the rules were separated into four parts.

These recommendations served to improve the language of the proposed additions and revisions, reorganize all the standards into logical parts and to ensure that various rule components were in the correct sections.[22]

Council Action To Prepare Final Draft Of Proposed Rules

During the period prior to March 15, 2004, the council continued to discuss possible revisions to various aspects of its proposed rule package. Specifically, up until the time that the council completed its drafting of siting standards and modifying most sections of its administrative rules, individual comments were considered as the council or staff were drafting that particular section. In the period after March 15, 2004, the council received various oral and written comments and held an informational hearing on the proposed rule revisions right up until the time that a CR102 notice was filed.

On March 15, 2004, the council held a special meeting to discuss revisions to the proposed energy facility construction and operation standards and the administrative rules. At this meeting, councilmember's and staff reviewed all of the proposed rule revisions and new siting standards. The revisions that were accepted by the council are reflected in the rules proposed for adoption. While the entire rule package was discussed by the council at that time, some topics needed additional discussion before the council could recommend adoption. Council member's and staff continued to discuss various issues up until the time the council authorized issuance of the CR 102[23], the formal rule-making proposal. The CR 102 signaling the council's intention to adopt the draft standards and other revised rules was published in the state register on July 21, 2004. These discussions are described below.

After the March 15, 2004 special council meeting, they continued to receive oral and written comments on a limited number of the rules. During this same time, the council set a schedule that would lead to final adoption of the proposed rule revisions. On April 5, 2004 the council discussed the remaining key dates or actions necessary for completion

[22] A transcript of the March 15, 2004 meeting is included as number 23 in the list of reference documents.
[23] The CR 102 containing the proposed energy facility siting standards and other administrative changes was filed with the Code Reviser's office on June 23, 2004.

of the rule update and adoption. This included recommending that an informational hearing be held on May 3, 2004, filing the CR 102 in June, 2004, holding a formal public hearing on the entire rule and standards package on August 10, 2004 and filing final adoption papers with the Code Reviser in October 2004. If this schedule were adhered to, the new council rules would go into effect sometime during November 2004.[24] A summary of the issues and council discussions, during the period from March 15, 2004 up to the time the CR 102 was authorized, including issues raised during the May 3, public information hearing, is included below[25].

The following is a summary of council discussions and actions taken following the March 15, 2004 council meeting until the CR 1021 was filed on June 15, 2004.

April 5, 2004 Council Meeting

- The council decided to withdraw the CO_2 rule from consideration at this time. Since the 2004 Washington legislature enacted SHB 3141 and Governor Locke signed the new legislation into law, EFSEC no longer needed to adopt the CO_2 mitigation rule as previously proposed. EFSEC will work with the Department of Ecology and local clean air authorities to develop and adopt rules that implement the provisions of SHB 3141.
- The council and staff discussed the process and steps necessary to get the proposed rule revisions and standards in the necessary format for printing in the state register. This includes using the Order Typing Service (OTS) to ensure that the proposed rules and standards are in the correct format and are numbered properly.
- Once the OTS provides its draft of the rules, staff and councilmember's will review the entire package to ensure that everything is correct. Any changes or corrections will be marked and sent back to OTS for another draft.
- Any changes made to the rules as a result of public comment or editing, result in those edits going back to OTS.
- When the council is satisfied the rules are complete, the council files a form CR 102 notice with the Code Reviser's Office stating its intent to adopt rules.
- Once the CR 102 is filed, the council has 180 days during which it must hold a public hearing, respond to comments and adopt the new rules.
- It was noted that the Federal Agency National Marine Fisheries Service had changed its name to NOAA Fisheries.

[24] Rule development steps must follow a very prescriptive schedule. A form CR 101 is required to be filed providing notice of intent to begin the rulemaking process. Form CR 102 may be filed once new rules or rule revisions are prepared and are in "final draft". Once the CR 102 is filed Agencies have a maximum of 180 days in which to adopt rules. If rules are not adopted within those 180 days, the agency must re-issue a new form CR 102. Rules in the CR 102 stage are considered the final draft that the agency intends to adopt. After the CR 102 is published the agency may hold the necessary public hearing as soon as 20 days after that publication and must allow at least 30 days for public comment. Following the public hearing, the agency must address any public comments and can then finalize the rules for adoption. When the rules are finalized and the agency has adopted them, the agency files form CR 103 notice of adoption. The rules go into effect 31 days after the notice of adoption is filed.

[25] Copies of the minutes of the Special March 15, 2004 EFSEC council meeting and the May 3, 2004 Informational Hearing are listed as numbers 22 and 24 in the list of reference documents.

- A public meeting to receive comments on the proposed rules was discussed and scheduled for May 3, 2004.

April 19, 2004 Council Meeting

- It was reported that the draft rules were sent to the Order Typing Service and that a public meeting on the entire rule package was to be held on May 3, 2004.
- It was determined that while the council had addressed the comments from the October 29 and 30 hearings not all the responses to those comments had been documented. The council was to receive a listing of all those comments and was asked to provide its comments on how those issues were responded to.[26]

May 3, 2004 Council Meeting

During the May 3, 2004 council Meeting and Public Hearing on the council rules and Standards the council received comments on three issues. These were the proposed standard for Need for Power, the Ten-Year Build Window and council Overhead and Administrative Costs.

Need for Power

The proposed standards deal with this topic in two areas. The first, Chapter 463-14-020 referencing RCW 80.50.010, requires the council "to recognize the pressing need for increased energy facilities." The second area is a new construction standards chapter (463-62 WAC) in which it states that "Applications for site certification for energy facilities complying with the standards set forth in this chapter are not required to demonstrate a need for power, and the council shall not consider the question of need for power in site certification proceedings."

Northwest Energy Coalition objected to the new section in chapter 463-62 in which the council would not require an applicant to demonstrate the need for power and would not consider the question of need in site certification proceedings. The objection was that there was not a balance between need versus other concerns including public health and the environment. It was suggested that the council could best balance the interest of providing abundant power with minimal impact on the environment and surrounding communities and public health by requiring the applicant to demonstrate the need for new facilities, especially those that may have a detrimental impact on the environment. The council also heard the views that:

- there was a conflict between Chapter 463-14-020 requiring the council to recognize the pressing need for new energy facilities and the new section WAC 463-62 stating that applicants not be required to address need for power and that the council would not consider the question of need of power in site certification proceedings; and
- the council should balance traditional energy production facilities with renewable energy facilities, in effect becoming a gatekeeper and deciding which applications

[26] Due to the lengthy discussion on the rules that took place on May 3, 2004, the council decided to provide their individual comments to EFSEC staff. Table 1 above documents council responses to these issues.

were appropriate given the level of environmental impact from any given proposal.

Ten-Year Build Window

The Northwest Energy Coalition expressed concern that a ten year build window[27] was too long and that a five-year build window would be more appropriate. The key concern had to do with changing environmental conditions and mitigation requirements. For example, if a new energy facility is approved in 2005 and construction does not start until 2014 will it be required to meet 2013 environmental and mitigation requirements or will it only need to meet the standards that were in effect in 2005? If the build window [or term of the Site Certification Agreement] were limited to five years, the energy facility would be required to meet standards that were not more than five years old.

The Northwest Energy Coalition felt that there was uncertainty about how a ten-year build window might be used when SHB 3141, the CO2 mitigation legislation, is implemented. Will mitigation payments be calculated based on the mitigation rates at the time the Site Certification Agreement is approved or will rates at the time construction is commenced apply?

One individual suggested that there were at least two options for interim environmental review during the ten-year term of a Site Certification Agreement. The first is the review of environmental conditions at the end of the first five years of the SCA. The second is that the air quality permit or Prevention of Significant Deterioration Permit (PSD) was only issued for 18 months and could be extended for another 18 months before a new PSD application is required.

Council Overhead Costs

The council heard concerns about the use of the term "equitably allocated" to describe how council overhead and administrative costs would be charged to holders of Site Certification Agreements or to applicants. It was suggested that the council not adopt a rule on this issue in light of the ongoing discussions about how the council allocates charges to certificate holders and applicants for the day-to-day expenses involved in running the agency. It was opined that some certificate holders and applicants did not believe that the council should be charging them for expenses that were not directly related to its facility or its application. This included the council overhead charges and as a specific example, any charges related to developing operating standards or rule revisions.

[27] The build window or length of time that the Site Certification Agreement between the applicant and the state is in effect.

Council Discussion of Comments Received During The May 3, 2004 Public Hearing

Following public testimony and council interaction with persons offering testimony, the council discussed the three issues identified in the public testimony session. The discussion and the consensus reached on each issue are described below.

Council Overhead Costs

The council discussed how to best address concerns about how administrative and overhead costs are allocated to applicants and certificate holders. Options included discussing the issue with the industry group, going to the legislature, going ahead with the proposed rule or removing this section from the rules and undertaking a separate process to establish a cost allocation plan. If this proposed rule section were removed now it could be added later through a separate rulemaking process or addressed through adoption of a council policy on cost allocation. The council identified three separate issues with this proposed rule. These are the use of the Office of Community, Trade and Economic Development (CTED) overhead or indirect rate, the allocation of costs that may not be directly attributable to a specific project and how overhead or indirect costs and non-attributable costs are allocated to individual applicants and certificate holders.

The council and staff have been in discussion with applicants and certificate holders on the subject of costs for several months. The council has also met with and discussed this issue with legislative committees. These discussions are ongoing and will likely continue through the 2005 legislative session. In general, the council felt that:

- the use of indirect rates or overhead rates is appropriate,
- there may be an issue of how these costs are allocated among applicants and certificate holders, and
- there may be legal issues about charging applicants and certificate holders for expenses that do not appear to be directly attributable to a specific project.

In the end, it was the consensus of the council that the section on council overhead costs should be removed from the rules package and addressed through a separate process to be defined at a later time.

Ten-Year Build Window

Council discussion focused on how the ten-year build window would work with SHB 3141, the CO_2 mitigation legislation passed in 2004, and when an applicant would be expected to make its CO_2 mitigation payment. Was the payment due when the site certificate was approved, when construction commenced or when operation commenced?

The ten-year build window is a precedent established by the council over the past several Site Certification Agreements. The council has taken that precedent and incorporated the ten-year build window in one of the new council rules (Chapter 463-68 WAC). Earlier,

the council heard that a ten-year build window was too long and that a five-year term would be beneficial because it would avoid site certificate banking and would assure the council that projects being built used the most current technology and met the most current standards.

The council decided to not make any changes to the ten-year build window provision. The position of the council is further discussed in the description of the changes made to this New Chapter 463-68.

Need for Power

The questions before the council on the subject of need for power are:

- does the council want to hear arguments for or against the need for power in adjudicative hearings?
- should the council prohibit applicants and intervenors from entering information on need for power?
- should the council accept or reject applications based on the need for a particular type of energy facility? and
- should the council establish a requirement that says the council will not consider the need for power when RCW 80.50.010 says there is a pressing need for energy

In the course of discussion on this issue, the council considered a CTED Energy Policy Office memorandum suggesting the council make decisions based on the need for a particular type of energy facility and that applications should be judged based on satisfying that need as opposed to being judged on its merit. The council felt that doing so would cause it to become a gatekeeper limiting the type of energy facilities that would consider it. This is not the role of the siting council. The council evaluates each application on its merit and its environmental impacts.

The original need for power standard was a negative standard as compared to the other standards which say that you must take an action. It presented a conflict with RCW 80.50.010 (pressing need for energy). The inconsistency between a standard saying that you need to demonstrate the need for power and RCW 80.50.010 which says that the state recognizes a pressing need for new energy facilities caused the council to propose that this standard be deleted. In its place, the council proposed that Chapter 463-14-020 WAC, the Need for energy facilities – Legislative intent binding be revised to recognize that there is an existing need for power and to evaluate applications based upon the provisions of RCW 80.50.010. In reaching this conclusion the council recognized that the need for power question was most often initially raised by an applicant in support of its project. The council also discussed how to address the issue if "need" is not included in an application. Should the council hear arguments on an issue that is not brought up by the applicant? Likewise, the question was raised about what the council should do if other parties wanted to discuss need. Could they bring it up as an issue and would the council allow discussion on that topic?

The council tentatively agreed that if need were raised by the applicant, other parties could present testimony on that point. Also, if an application did not raise the question of

need, and another party wanted to make it an issue, the council should consider its applicability based on weight if testimony were presented. Although a general consensus was reached as to how to resolve the question about need for power, the council opted to consider alternative language at its next meeting.

May 17, 2004 Council Meeting

The council discussed three rule topics during this meeting. These were need for power, term of the Site Certification Agreement, and Department of Fish and Wildlife comments on the proposed fish and wildlife standard.

The changes suggested at the May 3, 2004 council meeting regarding the need-for-power were discussed. In reviewing possible solutions to the need-for-power standard, it was determined that the environmental, esthetic and other benefits standard should also be a policy statement rather than a standard. The council and staff recommendations were to combine need-for-power and the environmental, esthetic and other benefits standards in the Policy section (WAC 463-14-020) of the rule package. In addition the council agreed to add a new section to 463-42 WAC, Application, that recognizes the need for energy and the fact that an applicant need not address that topic in its application.

During review of text received from the OTS, staff found that the NEW 463-68 WAC addressing the term of the Site Certification Agreement had been overlooked and was not sent to OTS. Following review of this omitted section the EFSEC legal counsel proposed several revisions for the council to consider. These revisions were intended to make the rule consistent with other sections of the council rules and to better clarify the intent of the rules. The changes that were incorporated in the rule are described fully in the Rules Changes and Explanation section of this Concise Explanatory Statement.

The council also discussed two other issues. These are the extent of review necessary if construction does not commence within five years after approval of the Site Certification and the Comments by the Department of Fish and Wildlife on the fish and wildlife standard.

Concerning the term of the Site Certification Agreement, the council debated the extent of reporting by a Certificate Holder if construction does not commence within five years after approval of the Site Certification Agreement. The council wanted to be precise about the amount of reporting a certificate holder would have to do at that time. A second question ensued about whether a certificate holder would need to report only changes on the site or whether the council would want to know about changes to relevant offsite environmental conditions.

After discussing this, the council agreed that they wanted a rule that reflected what has been the current practice of the council. To accomplish this, a small sub-committee was created to make the necessary revisions. In general, it was the position of the council that reporting at the end of the first five years would be less rigorous than reporting required for any period after the first five years of the term of the Site Certification Agreement had passed.

Comments made by the Department of Fish and Wildlife concerning the Fish and Wildlife Standard were discussed by the council.

Comment 1
Changes in proposed language may not allow a councilmember's to communicate with the staff of its agency during an adjudication. Council member's may not communicate with a member of their respective agencies if that staff person is involved as an intervenor in a case before the council. If the agency is not an intervenor or if staff is not involved as an intervenor, councilmember's may communicate with that person or persons. After reviewing of WAC 463-30-050, council staff felt that the rule was clear enough. No change was recommended.

Comment 2
In WAC 463-42, there are references to the applicant being responsible for various fees; however, nothing in the rule states that the applicant is responsible for mitigation costs, contingencies or bonding. The council found that an applicant may not be responsible for all fees and or mitigation costs. Some may come from other parties. In any case, the Site Certification Agreement will spell out what the certificate holder is responsible for. No change is recommended.

Comment 3
WAC 463-42-332 Natural Environment, the first sentence includes the phrase "construction, operation, and decommissioning." In previous drafts the term "abandonment" was also included. Council member's and staff reviewed this section and added "abandonment" to this section.

Comment 4
WAC 463-42-332 Natural Environment, WDFW suggested that because the Fish and Wildlife Standard had been edited and some parts moved to the application section, the council should add a sentence stating that, "The determination of fish and wildlife impacts and appropriate mitigation measures shall follow WDFW current mitigation policy (WDFW Policy M-5002, dated January 18, 1999), and as hereafter amended." Following council discussion it was decided to add this reference.

Comment 5
Section "j" of a prior draft contained a requirement that started, "if the site is not proposed to be restored, including provisions for retaining and protecting mitigation sites which were required mitigation for on-site impacts." Following council discussion, it was recommended that this issue be dealt with at the time that the council prepares the Site Certification Agreement for any project.

Final Council Rule Adoption Process

The council approved issuance of a Proposed Rule-making notice, Form CR 102, on June 23, 2004. That notice established an August 10, 2004 public hearing date and an October 10, 2004 intended rule adoption date.

The council scheduled and held a formal public hearing on the draft rules on August 10, 2004 beginning at 2:00 PM. The council did not receive any public comment during the formal public hearing. They did receive two letters commenting on the proposed rule revisions and construction and operation standards prior to the hearing and an additional seven (total of 9) prior the public comment deadline of August 13, 2004 at 5:00 PM.

One of these comment letters, from Renewable Northwest Project (comment letter no. 1 below) offered comments on an April 7, 2004 draft of the proposed rule revisions and construction and operating standards being proposed by the council. This comment letter was dated June 16, 2004 and received by the council just after the council authorized the issuance of the proposed rule-making notice (form CR 102). In light of the timing of the receipt of these comments and the action of the council to schedule the public hearing and publish the latest draft of its proposed rule revisions, the council opted to include this letter with other comments received as part of the formal public hearing comment period. The Renewable Northwest Project also provided written comments prior to August 15, 2004.

All nine comment letters that were received were discussed by the council and resulted in recommendations as to how that comment should be disposed of. Many of these comments related to issues that the council had discussed previously and several were new issues not previously considered by the council. 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. The council did not make any changes that would alter the substance of the proposed rules or that may have expanded the intent of the rules. Clearly there were some suggestions for clarification 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.

Those persons submitting written comments are listed below. Copies of their written comments are included as numbers 35 through 43 in the list of reference documents. .

1. Renewable Northwest Project
Comments on April 7, 2004 proposed rules
Comment Letter Dated June 16, 2004

2. National Energy Systems Company
Comments on June 23 proposed rules
Comment Letter Dated August 5, 2004

3. Northwest Energy Coalition
Comments on June 23 proposed rules
Comment letter dated August 12, 2004

4. Chehalis Power
Comments on June 23 proposed rules
Comment letter dated August 12, 2004

5. Washington Department of Fish and Wildlife
Comments on June 23 proposed rules
Comment Letter Dated August 12, 2004

6. British Petroleum
Comments on June 23 proposed rules
Comment letter dated August 13, 2004

7. Renewable Northwest Project
Comments on June 23 proposed rules
Comment Letter Dated August 13, 2004

8. Energy Northwest
Comments on June 23 proposed rules
Comment Letter Dated August 12, 2004

9. Karen McGaffey, Perkins Coie
Comments on June 23 proposed rules
Comment Letter Dated August 10, 2004

Table 2 - August 10, 2004 Public Hearing Responsiveness Summary

Comment No.	WAC Reference	Comment	Response
1.01	463-28	Strongly recommend EFSEC create a timeline that requires local government to coordinate with EFSEC and act on a timeline consistent with EFSEC.	The council discussed this issue and decided to not address it at this time. The council was also involved in an adjudicative proceeding that involved this matter and did not want to discuss this issue during that proceeding. This was not a topic discussed during the stakeholder meetings and the council would like to have additional discussions on this issue before attempting to propose a revision to this existing rule.
1.02	463-28	Develop an option that would allow EFSEC to make land use-consistency determinations when an application is submitted.	See response to 1.01 above.
1.03	463-28	Develop standard similar to Oregon where the Applicant may choose to have EFSEC make the land use determination when the application is submitted.	See response to 1.01 above.
1.04	463-26-(025) (2)	RNP believes that general public comments are not part of the adjudicative record because the council can not cross-examine.	As common practice, the council includes all oral and written comments received during public comment sessions in the record of an adjudication hearing. The council considers all public comments based on the weight of the testimony.

Comment No.	WAC Reference	Comment	Response
1.05	463-26-100	EFSEC should set a time frame in which local governments must act on land use issues.	See response to 1.01 above. Legislation enacted in 2001 provides for EFSEC to conduct land use consistency hearings, RCW 80.50.090. EFSEC holds the land use consistency hearing early in its application review process. However, EFSEC rulings may be delayed pending activities by local governments.
1.06	463-42-332	Recommend that the WDFW regional office issue an approval for wind power projects.	RCW 80.50.110 gives EFSEC authority over energy facilities under its jurisdiction. As such, EFSEC is the agency responsible to determine compliance with its rules. EFSEC consults with other agencies including the department of Fish and Wildlife concerning potential impacts which may occur as a result of siting energy facilities under its jurisdiction.
1.07	463-42-332	Recommend the WDFW WP guidelines be applied to applications for wind power	Chapter 463-42-332(4) requires applications "…give due consideration to any project-type specific guidelines established by state and federal agencies for assessment of existing habitat, assessment of impacts and development of mitigation plans." An example is the reference to WDFW Wind-Power

Comment No.	WAC Reference	Comment	Response
			Siting Guidelines in Chapter 463-42-332(4). Also, Chapter 463-42-010 "…encourages applicants to consult with appropriate agencies for guidance in gathering sufficient detailed information, and development of comprehensive mitigation plans for inclusion in their applications."
1.08	463-42-332	Believe that the WDFW WP guidelines are adequate and that no additional conditions should apply.	See response 1.07 above. The recommendation that applicants give due consideration to WDFW Wind Power guidelines was added to 463-42-332 (4) as a recommendation.
1.09	463-42	It was suggested that the council use the WDFW Wind Power guidelines.	See response to 1.07 and 1.08 above.
1.10	463-42-332 (2) (e)	Quantify impacts to any species of importance -- Believe it would be difficult, impossible and irrelevant to quantify individuals.	The intent of this section is to identify the impact on species, not individual animals.
1.11	463-42-332 (2) (g)	It is not appropriate to require applicants to assess risk of collision of avian species with a project during both day and night. It has been shown that nighttime studies do not always reveal any new information, thus they should not be required. Recommend the WDFW WP Guidelines	The applicant should state any assumptions in its application. The council will consider the recommendations of the Fish and Wildlife Wind Power Guidelines.
1.12	463-42-332 (4)	Will using WDFW WP Guidelines supersede WAC 463-42-332 requirements?	No. The Wind Power Guidelines have not been adopted as a standard by the Department of Fish and Wildlife. If an applicant feels that a requirement of the

Comment No.	WAC Reference	Comment	Response
			council does not apply to its circumstance, it may request that the council waive that requirement.
1.13	463-42-332 (4)	WDFW WP Guidelines should be sufficient for meeting standards for siting wind power turbines.	The wind power guidelines are not standards. They do provide a format and means for providing information that is necessary for the council to evaluate an application.
1.14	463-42-352 (1)	Why measure background noise levels.	The council asks applicants to measure background noise to establish pre-construction and operational noise levels.
1.15		WAC 173-60 does not require existing noise levels to be determined.	Correct, Chapter 173.60 WAC does not require that existing noise levels be determined. This requirement is found in Chapter 463-42-352 WAC and is used to describe and quantify the background noise environment that would be affected by the energy facility.
1.16		Will meeting 50 dBA at residential receptors meet the EFSEC standard?	The standard that must be met is that contained in Chapter 173.60 WAC.
1.17		The requirement to quantify background noise environment could present unique challenges for wind power facilities. The source of the energy, wind, carries with it a certain amount of existing noise.	The council acknowledges this comment.
1.18	463-42-352 (b)	Rather than specify state-of-the-art modeling the requirement should be to have a qualified acoustical consultant do the analysis	The council assumes that applicants requesting site certification will always use the most qualified

Comment No.	WAC Reference	Comment	Response
			individuals possible when preparing their application. To not do so could put a request for certification in jeopardy during any adjudicative proceeding.
1.19		If low frequency limits are going to be addressed in the rule, quantitative limits should be established.	This comment was based on a prior draft of the standards that were finally proposed. The council deleted references to low frequency noise when they adopted WAC 173-60 by reference.
1.20		Use noise limits used in other EFSEC proceedings, namely those used in Oregon.	This comment was based on a prior draft of the standards that were finally proposed. Chapter 173.60 WAC is the adopted state noise regulations. While the council feels this comment may have merit, it did not want to adopt a noise regulation that was different than WAC 173.60, and create ambiguity about the state noise standard.
1.21		If tonal noise limits are to be addressed by EFSEC, quantitative limits such as those used in Oregon should be used.	This comment was based on a prior draft of the standards that were finally proposed. The council deleted the tonal limit conditions when they adopted by reference WAC 173-60.
1.22	463-42-352 (c)	What purpose does 463-42-352 (c) serve? – local state federal noise guidelines -	In the event another organization has adopted a noise regulation that is more stringent than

Comment No.	WAC Reference	Comment	Response
			Chapter 173.60 WAC[28], it is the practice of the council to require an applicant to meet or exceed that other noise control regulation.
1.23		If there are other noise guidelines that applicants need to address they should be specifically identified.	See response to1.22 above.
1.24	463-42-352 (d)	Applicants are required to describe noise mitigation measures to be implemented. There are few practical ways to mitigate noise from a wind turbine.	This Title 463 WAC is applicable to all energy facilities that fall under the jurisdiction of the council. In the case of wind turbines, while it may be difficult to construct or enact measures to mitigate noise, it is possible to locate the wind turbine at a site where noises from the wind turbine would not have an adverse impact.
1.25	463-62-040 (d)	This requirement - 1ac for 1ac replacement does not specify the habitat type or quality of the habitat.	It is the position of the council that, as an example, one acre of shrub steppe habitat would be replaced by one acre of shrub steppe habitat of equal or greater value.
1.26		Using the WDFW WP Guidelines, projects sited on cropland are not required to mitigate for habitat impacts – crop land has no habitat value.	See response to 1.26 above. If as suggested by this comment, cropland has no habitat value, mitigation may not be required. In such a situation the council may consult with WDFW to determine appropriate mitigation, if any.

[28] Several local units of government (example – King County, Lewis County) have adopted noise control requirements that may differ from Chapter 173.60 WAC.

Comment No.	WAC Reference	Comment	Response
1.27		This section conflicts with the WDFW WP Guidelines in that development on crop land would have to mitigate for habitat impacts.	See response to 1.25 above.
1.28		Recommend EFSEC use the WDFW WP Guidelines for wind projects sited by EFSEC.	The council suggests that applicants consider WDFW WP guidelines referenced in Chapter 463-42-332 (4).
1.29	463-62-040 (f)	This section requires a minimum of 1 year of fish and wildlife surveys to determine breeding and habitat condition. WDFW WP Guidelines require a 1 year operational monitoring program for wind projects.	If a study is being done, it must encompass all seasons. It is up to the applicant to propose such a study to support its application. It is important to note that the rules of the council are applicable to all projects that come under council jurisdiction. If a particular rule is not applicable, an applicant may ask the council to waive that requirement. The preparation of a potential site study will also identify issues that may not be applicable for a particular energy facility.
1.30		Once a wind project is operational requiring comprehensive wildlife survey would be unnecessary. - Use the WDFW WP Guidelines	See response to 1.29 above.
1.31	463-62-030	WAC 173-60 is incorporated by reference. There are 2 ambiguities in 173-60 that need to be resolved	See response to 1.32 and 1.33 below.
1.32	463-62-030	Numeric limits of WAC 173-60 should be identified as L_{eq} and should be clarified if they only pertain to noise from the project, not cumulative limits.	Chapter 173.60 WAC is the adopted state noise regulations. While the council feels this comment may have

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			merit, it did not want to adopt a noise regulation that was different than WAC 173.60 and create ambiguity about the state noise standard.
1.33	463-62-030	The EDNA for residences on large parcels of land should be clarified as follows: the area within 50 feet of a residential dwelling shall be evaluated as EDNA Class A, while the remainder of the parcel shall be evaluated consistent with its use.	See response to1.32 above.
2.01	463-68-010	Read literally, Chapter 463-68-010 would appear to apply to projects that have already been certified as well as to future applications.	As a matter of practice and by contract law, it is the position of the council that these proposed or newly adopted rules do not apply to existing certificate holders or to applicants that have applied for site certification and the council has determined their application to be complete. An existing certificate holder has a binding agreement with the state for the construction and operation if its energy facility. Likewise, an application for site certification that is accepted prior to the date these rule revisions are in effect is governed by the rules in effect at the time its application was accepted by the council. It is possible that if an existing certificate holder

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			proposes to significantly change its approved project, the revisions may then be subject to the rules in effect at that time. The same is true if an applicant decides to revise its application before it is approved; that project may then be subject to the rules in effect at that time. Additional text was added to Chapters 463-62 WAC, 463-68 WAC, and 463-72 WAC to clarify the applicability of these rules. The added text states "The council shall apply these rules to Site Certification Agreements issued in connection with applications filed after the effective date of this chapter. Except for the provisions in chapter 463-36 WAC, these regulations shall not apply to energy facilities for which Site Certification Agreements have been issued before the effective date of this chapter."
2.02	463-72-010	Read literally, Chapter 463-72-010 would appear to apply to site restoration at projects that have already been certified as well as to future applications.	See response 2.01 above.
2.03	463-72-070	This Chapter 463-72-070 WAC seems to require that site restoration be to the level of the original condition of the site.	It is not the position of the council that all sites be restored to their original condition. The council recognizes the

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			value of maintaining existing infrastructure and that many sites will continue to have beneficial future uses.
3.01	463-42-021	Requiring an applicant to meet a need standard is consistent with the council's mission to balance demand for energy with public interest.	Comment noted. This is not the view of the council. The role of the council is to site energy facilities and to do so in a manner that protects public health and the environment. The council's role is not to determine the need for a specific facility or to determine appropriate types of energy facilities.
3.02	463-42-021	463-72-021 only addresses the demand side of providing a balance of need with protecting public interest.	See response to 3.01 above.
3.03	463-14-020	Applicants should have the burden of demonstrating that new power resources will not have an adverse impact on the environment or public interests.	The council believes the application of its rules will protect the public and environment from adverse impacts.
3.04	463-14-020	A reasonable test of need for power would require applicants to demonstrate existing, permitted and demand side resources are insufficient to meet 115% of projected demand in critical water years for ten years following the date of application.	See response to 3.01 above.
3.05	463-68-080	Allowing a ten year build window provides a loophole allowing developers to evade responsibility by mitigating CO2 emissions at outdated mitigation rates.	The council believes that the provisions of RCW 80.70, Carbon Dioxide Mitigation address this issue. The council will also consider this comment when they draft rules implementing the

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			provisions of RCW 80.70.
3.06	463-68-080	A ten-year build window allows developers to bank permits in a way that makes it difficult to predict the number of new facilities constructed as a consequence of "short term perceived energy crisis."	The jurisdiction of the council does not include resource management issues. The council did consider this issue but decided to keep to a ten-year build window with significant review if construction does not commence within the first five years following approval of the Site Certification Agreement.
3.07	463-68-080	A 5-year build window is recommended.	The council has discussed this issue on several occasions and reached the conclusion that a ten-year build window with an appropriate review after the first five years is appropriate.
3.08	463-42-535	There is no projection of the number of jobs that could be filled by organized labor. Such information could increase the likelihood of creating prevailing wage jobs with adequate health care.	The concern of the council and the analysis required in the application for site certification is on the total labor force and impacts to the communities where energy facilities are proposed to be constructed.
3.09	463-42-535	Developers should be required to disclose whether they plan to offer state approved apprenticeship programs	See response to 3.08 above.
3.10	463-42-535 (6)	Saying "the applicant is encouraged to work with local government…" is a noble goal but provides no accountability. Requiring the applicant to report its progress	The council listens carefully to all parties about issues impacting local communities. These requirements are

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		working with local communities could better ensure that community impacts are offset.	intended to provide applicants with content minimums for an application for site certification. All parties are strongly encouraged to work together to identify impacts and to establish appropriate mitigation. Clearly un-mitigated impacts will be addressed during adjudication of the application or site certification.
3.11	463-28	The rules fail to require local governments to coordinate with the council on a clear timeline for determining land use consistency.	EFSEC cannot require local governments to take a particular action or to determine their schedule for action.
3.12	463-42-332	A letter from WDFW attesting to a developer's compliance with WDFW wind power guidelines should suffice to meet mitigation plan requirements proposed under 463-42-332 (1-5).	The council will not delegate its jurisdiction to another agency. All information, including letters indicating approval of various aspects of a project, is considered by the council.
3.13	463-62-040	463-62-040(d) fails to make a distinction between undisturbed or intact habitat.	The intent of this section is to require replacement habitat of an equal quality, type, and size.
3.14	463-62-040	The 1 acre for 1 acre replacement requirement for impacted habitat should not be applied as a universal standard.	These are the current guidelines of the Department of Fish and Wildlife. The council has determined that a minimum of a 1:1 ratio is appropriate to prevent loss of habitat.
3.15	463-62-040	The council should use the WDFW habitat mitigation guidelines for wind projects.	The council has opted to strongly encourage applicants to consider the

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			WDFW Wind Power guidelines as they prepare their applications for site certification.
3.16	463-62-040	Instead of requiring a minimum of a one-year fish and wildlife survey to determine impacts to a site, the council should require a one-year operational monitoring program with the option of a technical advisory committee to recommend additional monitoring and studies if the first year monitoring results indicate unanticipated impacts.	The council deals with many different types of energy facilities. See response to 1.28 above.
4.01	463-30-335	In this subsection, the phrase "petition for reconsideration" should be substituted for "petition for review."	Valid comment. The council revised this section to more clearly establish its intent.
4.02	463-54-070 (5) and (6)	It is recommended that the word "council" be inserted before the words "enforcement actions" in both subsections.	Valid comment. The council revised this section to more clearly establish its intent.
4.03	463-58-070	It is recommended that the council revise this rule as follows: "…or, in the case of a certificate holder, in the council's initiation of enforcement action pursuant to WAC 463-54-070. The council will require any delinquent applicant or certificate holder to show cause why the council should not suspend application processing..."	Valid comment. It is not the intent of the council to terminate a Site Certification Agreement in the event of a certificate holder being delinquent in payment of necessary fees. This section has been revised to indicate that the council would initiate enforcement action consistent with Chapter 463-54-070 WAC. The section was also revised to indicate that the council shall consider reinstatement of application processing and shall reconsider its decision to take

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			enforcement action against a certificate holder.
4.04	463-62	An executed Site Certification Agreement ("SCA") is a contract between the state and the certificate holder. Any attempt to have the new rules regarding project construction and operation supersede the terms and conditions of the SCA would constitute an impairment of contract under the Washington and United States Constitutions.	Valid comment. See response to 2.01 above.
4.05	463-72	Add the following sentence to the end of 463-72-010: "These rules apply to projects for which no site restoration plan has been approved by the council prior to _____ [the effective date of the rules]."	Valid comment. See response to 2.01 above.
5.01	463-30-050	In the interest of clarification and to preclude potential ex-parte issues from being raised in the future, it is suggested that the council clarify what it means to participate in an EFSEC proceeding, or to include a sentence which clarifies that any staff that are under contract to the council shall be deemed to be a member of the council for the purposes of 463-30-050.	The council reviewed this section and found the text appropriate, allowing councilmember's to discuss energy siting issues with other members of their agency; provided that those members are not involved with that agency's participation as an intervenor in that case.
6.01	463-14-020	The reasons for changing the existing rules are not understood.	The rules were revised in substantial part because of the need for certainty in siting projects. Project developers and the public will know in advance with a high degree of specificity what is required. This is particularly important because of the capital-intensive need in

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			building these facilities and their impact on the environment. Many of the council rules date from 1972. While this is not a reason to change the rules, the council feels the proposed revisions and re-organizing the rules, putting them in a more logical order, makes them easier to follow. The revisions are intended to make the intent of the rules and the EFSEC process more understandable.
6.02	463-14-020	The proposed changes to the rules are problematic because they do not track statutory language. The council has not presented any rationale for the changes proposed.	Comment noted. It is not the intent of the council nor does this rule change the intent of RCW 80.50.010. This section has been revised to correctly reflect the content of 80.50 RCW.
6.03	463-14-020	It is suggested that the council abandon the changes to this rule.	Comment noted. This is not the position of the council.
6.04	463-14-020	If the changes to this section are not abandoned, change the numbered list to a bulleted list so that no one criterion would have more value than another.	The numbering in this rule is not intended to connote value; rather it is only a system of identification unless otherwise noted.
6.05	463-14-020	The list should be expanded to include the policy found in RCW 80.50.010 and to recognize the importance of maintaining a mix of generating resources and to encourage high efficient thermal resources.	RCW 80.50.010 does not include a requirement that the council maintain a balance of different types of energy facilities. The council is not a planning body.

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6.06	463-14-020	It is important that the council take into account the broader view of regional/national resources and the environmental benefits of high efficiency thermal resources.	It is the responsibility of the council to make recommendations to approve or reject applications for site certification. The council does not determine which type of energy application comes before it. The council evaluates each application on its own merits. The council is not a planning body.
6.07	463-14-020	EFSEC should give energy efficiency including co-generation a high level of importance in this section.	See response to 6.06 above.
6.08	463-36-030	The last sentence of this section makes a public hearing mandatory for all proposed SCA amendments regardless of the significance of that amendment. Change the last sentence of this section to indicate that the council shall provide public notice of all amendment requests, and that the council "may" conduct a public hearing regarding such requests.	The council did not make any changes to this section.
6.09	463-36-070	The regulation would be clearer and easier for everyone to understand if it simply read: "An amendment request which is determined not to have a significant detrimental effect upon the environment shall be effective upon approval by the council. Such approval may be in the form of a council resolution."	The council discussed this comment, but opted to not make any changes.
6.10	463-36-080	Considering whether the requested amendment "substantially alters the substance" of the SCA does not add anything to the inquiry and makes the regulation difficult to understand. If the council chooses to keep the language about	Chapter 463-36-070 WAC, does not use “and”, it uses “or.” The only change to this section was to eliminate three redundant words at the end of the section,

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		substantially altering the substance of the SCA, then the word "or" in this regulation should be changed to "and" to be consistent with the wording of WAC 463-36-070. As indicated in -070, governor approval should not be required unless there is both a substantial alteration in the substance of the provisions of the SCA and a significant detrimental effect on the environment.	other wise the section remains the same.
6.11	463-36-100	The council has not proposed any substantive changes to this regulation, but it is suggested that the council take this opportunity to revise it to reflect the reality of power project development and financing in the current market. As written, the regulation appears to require EFSEC approval before a certificate holder could transfer any legal or equitable interest in the SCA. It is suggested that the Certificate Holder only be required to notify EFSEC if there is a change in the majority ownership of the project.	Comment noted. The council chose not to change this section but only to re-number this section and to correct references to other sections of council rules.
6.12	463-36-100	EFSEC approval should only be required if the certificate holder requests to change the Certificate Holder or add another party as a certificate holder.	Comment noted. See response to 6.11 above.
6.13	463-36-100	The council should also consider deleting the portions of this regulation that address mergers or "other change[s] in corporate or partnership ownership." The purpose of this requirement is difficult to understand, and its implications in practice seem problematic.	Comment noted. See response to 6.11 above.
6.14	463-36-100	Please consider modifying this regulation as follows: "No Site Certification Agreement, ~~or any~~	Comment noted. See response to 6.11 above.

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		~~portion of a site certification agreement~~, nor ~~any~~ controlling legal or equitable interest in such an agreement issued under this chapter shall be transferred, assigned, or in any manner disposed of (including abandonment), either voluntarily or involuntarily, directly or indirectly, through transfer of control of the certification agreement or the site certification agreement owner or project sponsor without notice to the ~~express~~ council ~~approval~~ of such action. ~~In the event a site certification agreement is to be acquired via a merger, leveraged buy-out, or other change in corporate or partnership ownership, the successor in interest must file a formal petition under the terms of this section to continue operation or other activities at the certificated site.~~"	
6.15	463-68-030	A ten-year term of the SCA is appropriate.	The council agrees.
6.16	463-68-060	This regulation should clearly state that it does not apply to projects for which applications have already been filed or SCAs issued.	See response to 2.01 above.
6.17	463-68-060	This proposed regulation is unnecessary and inappropriate as a more general policy matter. Subsection (1)(a) and (1)(b) requires a certificate holder to inform the council after 5 years whether there have been any changes to the project design or statements and information in the application. These provisions are unnecessary. No new regulation is required to address that issue. Given other existing regulatory requirements, this new regulation is not needed to inform the council about changes to the project.	The council has heard many comments about the term of site certificates it has issued and about possible changes to these rules to limit the so- called build window to 5 years. The council will continue to allow a ten-year term for Site Certification Agreements. However, the council will require certificate holders that have not commenced

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			construction within 5 years to report on possible changes to the project, changes to environmental regulations and the impact the project will have on the environment. The extent of review necessary will be based on the nature of the changed conditions or rules. The council felt that this was a reasonable balance given that many parties requested a shorter term for a Site Certification Agreement.
6.18	463-68-060	Subsection (c) requires the Certificate Holder to report any changes to "statements and information" in project-related environmental documents. This requirement is inappropriate. The primary environmental document is the FEIS, which is the council's document not the Certificate Holder's document. In a document that contains literally thousands of "statements," it is unduly burdensome to require a Certificate Holder to review and evaluate each statement to determine whether any change is appropriate. The requirement is tantamount to requiring preparation of a new EIS.	See response to 6.17 above.
6.19	463-68-060	Subsection (d) requires the Certificate Holder to report any changes in "project-related environmental conditions," and subsection(2) requires the Certificate Holder to submit a report indicating	See response to 6.17 above.

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		whether any new information or changed conditions indicates the existence of probable significant adverse impacts not previously considered. Like subsection (c), these subsections appear tantamount to requiring the Certificate Holder to initiate another comprehensive environmental investigation and to prepare a new EIS.	
6.20	463-68-060	Subsection (3) requires the Certificate Holder to report any suggested changes, modifications or amendments to the SCA. This subsection is unnecessary. If the Certificate Holder wants to amend the SCA, it would be required by other regulations to file an application for an amendment.	See response to 6.17 above.
6.21	463-68-060	The proposed regulation read together with WAC 463-68-070 would create tremendous uncertainty. These regulations appear to require the Certificate Holder to conduct a new comprehensive environmental evaluation after 5 years, and appear to give EFSEC unlimited discretion to modify the SCA after 5 years. In effect, this would turn a 10-year SCA into a 5-year SCA. An unrestricted 10-year term is more appropriate.	See response to 6.17 above.
6.22	463-68-060	Even if the report mentioned in this regulation were necessary and appropriate, it should not be required to be submitted until the Certificate Holder decides to initiate or resume construction.	See response to 6.17 above.
6.23	463-68-070	As explained in connection with proposed regulation 463-68-060, if adopted, this regulation should clearly state that it would not apply to projects for which applications	Valid comment. See response to 2.01 above. The council revised this section to more clearly establish its intent.

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		have already been filed or SCAs issued.	
6.24	463-68-070	It is inappropriately one-sided. The SCA is a contractual agreement between the State of Washington and the Certificate Holder. By this regulation, the council proposes it be allowed to amend the agreement unilaterally after 5 years. This is contrary to the statutory idea of an "agreement."	See response to 6.17 above. The term of Site Certification Agreements is for a period of ten years with a review conducted if construction has not commenced and proceeded, reasonably un-interrupted, within five years.
6.25	463-68-070	The regulation is too vague. It does not identify what criteria the council would use to determine whether changes to the Site Certification are necessary. Nor does it explain the process the council would use to make that decision. Interested parties might seek to intervene in the process and request an adjudicatory hearing.	Comment noted. The council will assess all changes to a project and determine if changes to a Site Certification Agreement are necessary and if other parties should be heard on a particular change.
6.26	463-68-070	The regulation as written is too broad and effectively limits the SCA term to five years. It appears to grant the council unlimited discretion to modify the SCA if construction has not begun after five years, and it may require a time-consuming and expensive process to determine whether to modify the SCA.	See responses to 6.17, 6.24 and 6.25 above.
6.27	463-68-070	The 5-year review is not necessary given the review requirements of major permits. The council conducts a comprehensive evaluation of land use and environmental impacts at the time a project is certified. The two areas where the permitting requirements are often based on the available control technology – air and water permitting - which already must be reviewed after 18 months	Comment noted. See responses to 6.17, 6.24 and 6.25 above.

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		and 5 years respectively.	
6.28	463-68-080	Subsection (1) requires that EFSEC cancel an SCA after ten years. It is recommended including language in this provision that would allow the Certificate Holder to request an extension of the SCA. Consider rephrasing the end of this subsection to read, "the site certification shall expire unless the applicant requests an extension."	Comment noted. This section provides for the cancellation of a Site Certification Agreement if construction has not commenced or re-commenced within ten years. The council believes that where construction has not commenced within 10 years of SCA approval, a new application approval process must be undertaken. As per Chapter 463-68-080 subsection (2), if construction has commenced and been suspended, and/or commercial operation has not commenced, the certificate holder may request an extension to the term of its Site Certification Agreement.
6.29	463-68-080	Subsection (2) is inconsistent with proposed WAC 463-68-030. WAC 463-68-030 states that construction may start any time within 10 years, but this subsection says that construction has to be completed and commercial operation commenced within 10 years. This subsection would, in effect, make the SCA good for only 7 ½ years, assuming a 2 ½ year construction period. Consider rewording this section to state "If construction has not been commenced within 10 years…."	Comment noted. See response to 6.28 above.

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6.30	463-72	This chapter should make clear that it does not apply to projects for which applications have already been filed or SCAs issued.	See comment to 2.01 above.
6.31	463-72-040	Removing the requirement that the Initial Site Restoration Plan "include a discussion of economic factors regarding costs and benefits of various restoration options…" The initial site restoration plan is prepared before construction even begins. At that stage, it should address major environmental and public health and safety issues, and likely restoration plans in broad strokes.	The application requirements for the initial site restoration plan are to provide the council and others a complete broad initial view of possible site restoration (and re-use) options, their costs and possible impacts.
6.32	463-72-040	Subsection (3) of the regulation would require a site closure bond, "sinking fund" or other financial instrument as security. The council should add to the last sentence of section 040 (3) the option of providing a corporate guarantee as an appropriate funding mechanism.	Comment noted. A corporate guarantee may fall under the "other financial instrument as security" portion of this rule. If a corporate guarantee is proposed it will be evaluated in conjunction with the economic and financial strength or viability of the corporation.
6.33	463-72-050	It is not reasonable to require a detailed restoration plan within 30 days of project termination. Consider modifying this regulation as follows: "When a project is terminated, a detailed site restoration plan shall be submitted within ~~30 days~~ 12 months from the time the council is notified of the termination."	Comment noted. The council noted this error and agrees that 30 days is not an adequate period of time in which to prepare a detailed site restoration plan. Although the council cannot accept a 12 month time period, the council has corrected this time period to 90 days.
6.34	463-72-070	The council should not adopt this regulation, which would establish a presumption in favor of requiring a	Comment noted. It is not the position of the council that every site be

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		Certificate Holder to return a site to its original condition at the end of the project's life. Rather than establishing a presumption in favor of returning a site to its original condition, the final condition of the site should be addressed in the site restoration plan and considered on a site-specific basis.	returned to original condition.
6.35	463-72-080	The second sentence requires that the initial site restoration plan be reviewed and updated at least every 5 years. The initial site restoration plan is addressed in WAC 463-72-040, so if the council were going to require updates every 5 years, the requirement should be included in -040 not here.	These rules are in sequence. Section 040 addresses the initial site restoration plan and this section addresses a site preservation plan or restoration plan.
6.36	463-72-080	The requirement of updating the initial plan every 5 years seems completely unnecessary. It is hard to imagine having any reasonable basis for "updating" the site restoration plan every 5 years. It is pointless to request revisions until the Certificate Holder actually reaches a point in time when it decides to suspend or terminate operations.	Comment noted. If there have been no changes to the project or other conditions, an update could simply reflect that there have been no changes.
6.37	463-72-080	The third sentence provides that the council may direct the submission of site preservation, restoration plans at any time during the development, construction or operating life of the project. This provision makes no sense in light of the council's goal to provide certainty through regulations.	This requirement allows the council to direct the submission of site preservation, restoration plans at any time during the development, construction or operating life of the project “based upon (only after) the council’s review of the project status.” At such time the council may require action as is appropriate to protect the environment and all

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			segments of the public.
6.38	463-72-080	The final sentences says that "the council may require such information and take or require such action as is appropriate to protect the environment and all segments of the public against risks or dangers resulting from conditions or activities on the site." The meaning of this sentence is unclear and seems designed to give the council unlimited discretion to require a Certificate Holder to implement environmental improvement projects at any time. The council should not be free to impose whatever additional requirements it might deem appropriate at any particular time.	See response to 6.37 above. In addition, the council is limited by rule in what it can and cannot require of a certificate holder. The council has discretion to take action deemed necessary to protect the environment and public health and safety.
7.01	463-42-332	Have the Washington Department of Fish and Wildlife (WDFW) Wind Power (WP) Guidelines be applied for wind projects sited by EFSEC and that a letter of approval for a proposed project from the regional office be used to meet this standard.	Comment noted. See response to 1.06 through 1.12 and 1.25 through 1.30 above.
7.02	463-42-332	If EFSEC only wants to give due consideration to the WP Guidelines, we hope that EFSEC will reconsider and discuss our June 16th comments on WAC 463-42-332 (2) (e), (g), and 4.	Comment noted. See Response to 7.01 above.
7.03	463-42-332	It is unnecessary to impose additional standards that go beyond the WP Guidelines.	Comment noted. See Response to 7.01 and7.02 above.
7.04	463-42-332	The additional requirements do not consider site specific conditions. For example, EFSEC would impose the same amount of studies and mitigation for a high quality habitat site and a low quality habitat site.	Comment noted. See Response to 7.01 and7.02 above.
7.05	463-62-040	Further clarification on WAC 463-62-040 (d) and (f) Fish and Wildlife. Proposed WAC 463-62-040 (d)	This will be evaluated by the council which may, on a case by case basis,

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		would require an applicant to replace one acre of impacted habitat with at least one acre. It is unclear whether this requirement would apply to both temporary and permanent habitat impacts.	consult with the department of Fish and Wildlife on this issue.
7.06	463-62-040 (d)	One of the problems with this requirement is that it does not distinguish habitat type and quality.	See response to 1.25 above.
7.07	463-62-040 (f)	Proposed WAC 463-62-040 (f) would require an applicant to conduct a minimum of one year of fish and wildlife surveys once an energy facility is operational. We would be extremely concerned if this standard would require comprehensive wildlife surveys once a project is operating. If the intent is to conduct at least a year of operational monitoring, then EFSEC should revise the language to reflect this.	See response to 1.29 and above.
7.08	463-42-352 (1)	RNP did not notice any changes to the standard based on our June 16th, 2004 comments and we would recommend that EFSEC reconsider our recommendations.	Comment noted - no changes were made.
7.09	463-62-030	RNP did not notice any changes to the standard based on our June 16th, 2004 comments and we would recommend that EFSEC reconsider our recommendations.	Comment noted. See response to 1.32 and 1.33 above.
8.01	463-06-050 (5)	This provides a general description of the council and its operations. It seems inappropriate to use the auxiliary verb "shall" when listing the duties of the staff.	Comment noted. This is consistent with RCW 80.50.085 (1).
8.02	463-06-050 (5)	The wording of this section seems awkward.	Comment noted. See response to 8.01 above.
8.03	463-06-150	This section will be clearer if the word "inspection" is replaced with "a records request."	Comment noted. The council opted to not make this change.
8.04	463-14-	The additions to this section are not	Comment noted – See

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	020	necessary. Place a period after RCW 80.50.010.	response to 3.01 above.
8.05	463-14-020	The cited section of law states "preserve and protect the quality of the environment." The proposed rule makes the subtle and incorrect change to "enhancing the environment."	Comment noted – The council has revised this section to more closely reflect the intent of 80.50.010 RCW.
8.06	463-14-030 (2)	The proposal extends the scope of land use consistency to include city ordinances. Note that RCW 80.50.090 (2), does not mention cities. Confirm that this change is consistent with the scope of land use review intended by the legislature.	For any energy facility that is located within the boundaries of a city, the council will address land use and zoning ordinances the same as they would for a county.
8.07	463-30-020	The proposed change designated the council as the presiding officer at adjudicative hearings. Is it more appropriate to designate the council chair? WAC 463-30-080 (3) implies that the presiding officer is a person rather than a group.	The council is the presiding officer. Please see 34.05 RCW the Administrative Procedure Act.
8.08	463-30-091	The proposed language makes it optional that the council set a drop-dead-date for petitions to intervene. It is suggested that wording be changed to "[t]he council shall establish a date…."	The council is using language from RCW 34.05.443(3) that allows granting intervention at any time if it is deemed appropriate.
8.09	463-42-010	The sentence proposed for addition to the first paragraph does not belong in this statement of purpose. It is more appropriate to address expectations in other sections of Chapter 463-42.	The council believes that this is the correct placement of this item.
8.10	463-42-012	This section acknowledges that an applicant's environmental report prepared under NEPA can be substituted for appropriate portions of the application for site certification. This should be expanded to include other environmental documents prepared	The council always encourages applicants to use existing information if it is current and pertinent to the application being considered by the council. The language in

Comment No.	WAC Reference	Comment	Response
		for federal agencies with jurisdiction over energy facilities.	this section does not exclude or limit types of environmental reports used to support an application for site certification.
8.11	463-42-205	The proposed addition is unnecessary because the existing language is complete in specifying that applicants must describe measures for preventing and controlling spills.	This sentence is added to more clearly explain what is required in this section and the citation is appropriate.
8.12	463-42-205	A hazardous waste management plan is prepared by the state or local government – See RCW 70.105.200 and is not relevant to the application.	Comment noted. This is intended to direct an applicant to have information in the application that will allow the council to evaluate if the application is consistent with the requirements of 40 CFR 112.
8.13	463-42-205	There should be no presumption that 40CFR Part 112 applies.	40 CFR Part 112 may or may not apply.
8.14	463-42-205	This entire section should be deleted and incorporated in WAC 463-42-535.	This chapter contains the content requirements for applications for site certification. In the interest of having complete applications, all requirements are identified.
8.15	463-42-235, -245, & 255	These sections could be combined under the heading of construction management.	Comment noted. The council believes that this is the correct placement of this item.
8.16	463-42-235, -245, & 255-	Information on employment for construction and operation could be included in Chapter 463-42-535 WAC.	Comment noted. See response to 8.15 above.
8.17	463-42-275	The addition of terrorism seems unnecessary since this section already includes “sabotage” and	Comment noted.

Comment No.	WAC Reference	Comment	Response
		other "security threats."	
8.18	463-42-332 & -333	Both of these sections require that information be prepared by a qualified professional. This seems gratuitous and unnecessary. Unless the council is prepared to state what constitutes qualifications the phrases should be deleted	Comment noted.
8.19	463-42-332 & -333	Section 333 should be incorporated into section 332.	The council views these two sections as separate application requirements.
8.20	463-62-040 (2) (e)	Referring to the wetland standard established in Chapter 463-62-050 WAC for a replacement ratio, it is not clear that the referenced section establishes a standard other than no net loss. Does this suggest that the standard (ratio) is 1: 1?	Please see Chapter 463-42-333. This section contains reference to the Department of Ecology guidelines for developing freshwater wetland mitigation plans and proposals.
8.21	463-62-050	As in chapter 463-42, the wetlands requirements should be combined with the other fish and wildlife habitat standards.	See response to 8.19 above.
9.01	463-06-110(2) (a)	The proposed revision to this regulation states that the council "shall not impose a fee" for locating and making documents available to requesting parties under the Public Disclosure Act. Consider modifying this regulation to state that the council "shall generally not impose a fee" or something along those lines.	The council is following the guidelines of RCW 42.17.300. At this time the council has not determined the actual per page cost for photocopies of public records; therefore it is not authorized to charge in excess of fifteen cents per page.
9.02	463-14-020	It is not clear why subsections (1)-(3) depart from the language of RCW 80.50.010. Consider simply referencing the statutory provision and deleting subsections (1)-(3).	Valid comment. The council revised this section to more clearly establish its intent.
9.03	463-28-030	The process set forth in this proposed rule for addressing an inconsistency with local land use requirements is unnecessarily cumbersome and not required by	See response to 1.01 above.

Comment No.	WAC Reference	Comment	Response
		EFSEC's statute. After an initial finding of inconsistency, the proposed regulation requires an applicant to "make all reasonable efforts to resolve the noncompliance" before requesting preemption. The statute does not require an applicant to try to cure an inconsistency with local land use requirements.	
9.04	463-28-030	The regulation does not provide any criteria for determining whether an applicant has made "all reasonable efforts." The council should not get involved in assessing the reasonableness of this strategic business decision, but should instead focus on whether or not to preempt a local land use requirement when asked to do so.	See response to 1.01 above.
9.05	463-28-040	This section should be modified to remove the requirement that an applicant seeking preemption demonstrate a good faith effort to resolve an inconsistency. It is not clear what criteria would be used to determine whether an effort was "in good faith."	The council chose not to modify this section at this time. The comment will be noted if the council chooses to modify this section in the future.
9.06	463-30-120	Consider revising subsection (3)(b)(I)(D) to eliminate the requirement that the council manager authorize service by fax. It is understandable that the council manager would want to authorize the filing of a pleading by fax, but serving other parties by fax should be permitted as a matter of course.	Comment noted. The council will normally work with parties to establish hearing guidelines early in the adjudicative process. This can include establishing acceptable methods of service.
9.07	463-30-335	The section heading and subsection (1) refer to a "petition for reconsideration," but subsections (2) and (3) refer to a "petition for review." To be clear, the phrase "petition for reconsideration" should	Valid comment. The council revised this section by changing “petition for review” to read “petition for reconsideration.”.

Comment No.	WAC Reference	Comment	Response
		be used throughout this section.	
9.08	463-42-085	Subsection (2) entitled "Fair Treatment" is not clear. Most energy facilities (indeed most industrial facilities of any type) are likely to have more impact (both positive and negative) in the immediate area in which they are located. This regulation needs to be more carefully crafted to capture what appears to be the council's intent regarding "environmental justice."	The intent of this section is to demonstrate to the council that any impacts resulting from the construction of an energy facility do not disproportionately impact any one segment of the population or group of people.
9.09	463-42-116	The requirement in subsection (3) is not necessary and departs from the council's historic practice. An applicant would typically include commitments made during the hearing in its proposed Site Certification Agreement. There is no need to file a separate list with the council at the conclusion of the hearing.	This requirement has not changed. It is the practice of the council to have certificate holders prepare a list of changes to its application and to identify commitments made following the adjudicative hearing. This information is beneficial to the council when preparing a Site Certification Agreement.
9.10	463-42-332	Read literally, this section appears to impose an unreasonable requirement to provide compensatory mitigation for every impact to any habitat, no matter how insignificant the impact or how unimportant the habitat. Consider modifying this section to require compensatory mitigation only when there will be a "significant," "substantial," or "material" impact to habitat or wildlife.	See response to 1.25 above.
9.11	463-42-535	This proposed section would require an application to contain far more information and detail about current socioeconomic conditions than the council is ever likely to need in	Comment noted.

Comment No.	WAC Reference	Comment	Response
		making a siting decision. The council should consider what portion of this information it is likely to need, keeping in mind that more information could be provided during the adjudicatory process if a genuine issue were raised by an intervenor.	
9.12	463-58-070	The council should provide a mechanism for dispute resolution regarding fees. If a certificate holder has a good faith basis for believing that the amount of fees that has been charged is incorrect, there should be a mechanism for resolving the dispute without the certification agreement being suspended.	Certificate holders are always welcome to come to the council and discuss fees or other issues that may arise.
9.13	463-62-040	The proposed "no net loss of habitat functions and values" standard is unreasonable and is not consistent with the statutory requirement that "reasonable methods" be used to ensure that an energy facility result in "minimal adverse effects."	See responses to 1.25.
9.14	463-64-030	This regulation purports to regulate the Governor. It seems odd for EFSEC to adopt a regulation concerning the Governor's actions.	Valid comment. This section is included in the council rules for the sake of clearly describing the intent of RCW 80.50.100. This section will be revised to read "Pursuant to RCW 80.50.100, the governor will take one of the following actions:"
9.15	463-64-040 (3)	Subsection (3) purports to regulate the Governor's actions.	Valid comment. This section is included in the council rules for the sake of clearly describing the intent of RCW 80.50.100. This section will be revised to read "Within sixty days of

Comment No.	WAC Reference	Comment	Response
			receipt of such draft certification agreement, the governor will either approve the application…"
9.16	463-64-020	The last part of this section states that EFSEC will include in the Site Certification Agreement "conditions designed to recognize the purpose of the laws or ordinances, or rules or regulations promulgated there-under, that are preempted or superseded." If EFSEC decided to preempt the local ordinance, it would not make sense to include the conditions in the SCA that recognize the purpose of the preempted ordinance because the purpose of the ordinance was to prohibit the project now being certified.	Comment noted. This section is a reiteration of RCW 80.50.100.
9.17	463-68	This chapter should clearly state that it only applies to applications filed after the effective date of these regulations. Existing SCAs already address these issues.	See response to 2.01 above.
9.18	463-72	This chapter should clearly state that it only applies to applications filed after the effective date of these regulations. Existing SCAs already address these issues.	See response to 2.01 above.

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 and construction and operation standards. Throughout the almost three-year rule revision and standard 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 and the new standards.

As described previously, most councilmember's participated in the eleven Stakeholder meetings. These meetings, over a nine month period were the basis for the construction and operation standards that are being adopted. After the stakeholder process was concluded and the Krogh & Leonard report was submitted to Chair Luce, the councilmember's continued the work of refining the 12 recommended standards (a total of 25 separate alternative recommendations for standards). The end results are the recommendations for six new energy facility construction and operation standards. The other six stakeholder group recommendations that were not added to the construction and operation standards chapter (Chapter 463-72 WAC) were incorporated into various sections of the EFSEC operating rules, most of them being added to the application content section.

It was the opinion of the council that this second group of six proposed standards did not provide a metric against which an application for site certification could be measured. But, at the same time the council realized that with the exception of the proposal for a "need" standard, these were important topics and would add significant value to the council rules and the site certification process. With regard to the proposed need standard, the council took its direction from Chapter 80.50 RCW, the EFSEC enabling legislation. The RCW establishes that there is a pressing need. It is not appropriate for the council to add rules which would require a demonstration of need given the legislative finding that there is a pressing need for increased energy facilities. RCW 80.50.010 states:

> "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 effects on the environment, ecology of the land and its wildlife, and the ecology of state waters and their aquatic life."

From the time the council received the Stakeholder report in September, 2002, councilmember's actively took part in the process of editing and refining its recommendations. They also reviewed and drafted revisions to all of the existing council rules. The rule review process was underway concurrently with work on the construction and operation standards. The result was that every Chapter in 463 WAC was reviewed and revised. In all, about 90 percent of the sections on Chapter 463 WAC received changes. Many of these changes were small or editorial in nature and of little or no

consequence, while other sections had to be almost entirely rewritten in order to achieve the conciseness and clarity wanted by the council.

In making rule revisions, the council was guided in large part by its past practices, and is mindful of how these new rules will relate to the manner in which they have conducted business in the past. The council is also aware that existing site certificate holders and applicants that have received or are currently applying for site certification have a standing that is different from the new application that is received after these rules become effective.

Each existing certificate holder has a written agreement (Site Certification Agreement [SCA]) with the state allowing it to operate an energy facility within the limits established in its SCA. That existing SCA is valid until the project is terminated or such time as the SCA holder desires to make a change to the project which may cause these revised rules to be imposed. Likewise, applications currently before the council for consideration are measured against the rules that were in effect at the time that application was deemed complete by the council. In almost all instances, if the council determines that a pending application should be approved, its Site Certification Agreement will be written based on the findings of its adjudicative hearing and council rules in effect at the time that application was deemed complete.

Generally, the circumstance that would warrant imposing these new standards is a decision made by the council on a case-by-case basis. It is not something that can be prescribed in rule. It is possible that one change to an SCA may prompt the council to invoke the new rules in one circumstance, while in another it may be the result of several lesser revisions that would prompt such action. This decision is made by the council on a case-by-case basis and would be intended 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 timely and without unnecessary delay."[29]

[29] RCW 80.50.010 Legislative finding – Policy – Intent.

For an explanation of the rule revisions see the detailed explanation and summary section below.

Rule-making 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 growth[30]. 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 adopt siting standards for energy facilities. In addition, the council is taking this opportunity to update its operating rules. The rulemaking process is established to provide agencies

[30] Findings and intent of 34.05.328 RCW.

with open and meaningful discussion and review of proposed rules. Given that the current council rules need to be updated, combining these revisions with the process of adopting construction and operating standards for energy facilities is a logical process. This also provides an opportunity to provide some much needed reorganization of the council rules.

The council has opted to prepare a Small Business Economic Statement and this explanatory statement describing the rule revisions made by the council and what those rule revisions and operation construction standards will mean once they are adopted. While the majority of the revisions that are being proposed are administrative in nature and not of substance, all revisions, the administrative changes as well as the new energy facility construction and operation standards, will be described using the same detailed process. The process and steps that the council has followed in this rulemaking effort are described in this document.

Summary Of Small Business Economic Impact Statement (SBEIS)

The Small Business Economic Impact Statement[31] notes that "…it is unlikely the impacts will be disproportionate and so no specific actions were taken by EFSEC to reduce the impacts of the rule on small businesses. However, it is hoped the review process will be improved with these rule revisions in such a way that uncertainty and process application time are reduced. This should be a benefit to both small and large businesses." Throughout the council rulemaking process, businesses in one form or another were involved in the stakeholder rule development process during public meetings and the public comment period.

The SBEIS evaluated both changes to the existing rules of the council as well as the costs associated with implementing the existing policies of the council that are now being added to the energy facility siting rules. Briefly, the results of this examination anticipate that only a few of the many proposed changes to the council rules will result in increased costs and then the increases will be nearly inconsequential. A summary of the SBEIS is included as number 51 in the list of reference documents. The entire report is available from the council.

The council identified the following changes that may impose additional requirements on new applicants.

1. A new requirement to conduct a public meeting during potential site studies.
2. Increased application requirements associated with noise and socioeconomic analyses, and review by EFSEC's independent consultant.
3. Term limits and conditional updates on Site Certification Agreements (SCA).
4. New pollution insurance requirements.
5. Elimination of the requirement to show a "Need for Power."
6. Changes in requirements associated with expanded socioeconomic analysis.

[31] Small Business Economic Impact Statement For Proposed Energy Facility Site Evaluation Council Rule Revisions, May 2004. This is included as number 52 in the list of reference documents.

Alternative Rule-making Considerations

The council chose to follow traditional rule-making procedures in the revisions of its operating rules and the adoption of construction and operating standards for energy-facilities. Many of the standards being adopted are the current practice of either the council or another state agency and do not constitute a change in methods of approving energy facilities. Likewise, the administrative changes which make the rules easier to understand will not change the manner in which the council makes recommendations for site approval or denial. Many of these revisions could be adopted using expedited rulemaking, or at least the normal process without going through the significant rule adoption process.

The council did not consider alternative rule-making processes. Expedited rulemaking processing was a brief consideration but, given the large number of technical and editorial changes, this idea was discarded. This, along with the fact that new construction and operating standards were being added that would otherwise require formal rulemaking, was enough to rule out any thought of using the expedited process. Likewise, no thought was given to any sort of negotiated rulemaking. The nature of the rules, the administrative changes and adoption of rules, the guidelines of other agencies and the number of parties that could have an interest in the process would have made the negotiated rule process more complex and more costly than the standard formal rulemaking.

Given the extent of revisions and the addition of siting standards to the rules, the council is adopting these revisions following a traditional rule-making process and voluntarily complying with many of the requirements of 34.05 RCW for Significant Legislative Rule-making.

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 lead to inconsistent application of siting criteria and the need to provide burdensome data or testimony on issues that are not pertinent to their projects. As a single example, the current application content rule WAC 463-42 - Procedure—Guidelines—Applications For Site Certification will require a discussion of air-quality issues and emissions from an energy facility. While this is an appropriate topic for an application for a combustion turbine, it is not necessarily appropriate for a wind farm proposal. In current practice, applicants must address this issue. Under the revised rules, applicants may simply request that this requirement be waived.

The council rules have, for the most part, been in existence for thirty years. Over time, there have been a number of amendments to the EFSEC legislation that prompted individual rule revisions. While these and any other revisions made to the rules are carefully reviewed to ensure consistency with other rules, over time the package of EFSEC rules has taken on a bit of a patchwork appearance. Under the proposed changes, the rules have been revised and reorganized to make a complete and cohesive rule package.

Examples of the need to update the rules can be demonstrated by the recent need to adopt revisions to the general and operating permit regulations for air pollution sources, Chapter 463-39 WAC. The issuance of air-operating permits is jointly delegated to EFSEC and the Department of Ecology by the federal Environmental Protection Agency. Because the Department of Ecology was proposing new air-operating permit rules, it was incumbent upon the council to do so at the same time. This is necessary so that facilities under council jurisdiction and those under the jurisdiction of the Department of Ecology are treated equally. The same can be said for the federally delegated National Pollution Discharge Elimination System (NPDES) permit program. This program is delegated to the council for energy facilities under its jurisdiction and is delegated to the Department of Ecology for all other wastewater facilities in the state. The council has not had reason to update its NPDES rules at the same rate as the Department of Ecology. A requirement of the federal delegation of this and other programs is that the delegated agencies stay current with the federal program requirements. Failure to update the NPDES rule (Chapter 463-38 WAC) could result in having that delegation being rescinded by the Environmental Protection Agency.

If it is determined that rules of an agency including NPDES, Air Operating Permits, Application Guidelines and even meeting notices are not adequate, the actions of the agency can be appealed. This could bring into question past actions of the agency and would put parties at serious risk of having siting approvals overturned. This would result in substantial losses to those parties.

Consistency With State And Federal Law

The consequences of the council rules being inconsistent with other laws or rules is demonstrated in the preceding discussion about the clean air rules and the NPDES permit program. Equal and consistent application of the laws of the state is one of the findings and intents for the enactment of RCW 34.05.328 – "Significant legislative rules, other selected rules," which states that "Governments at all levels better coordinate their regulatory efforts to avoid confusing and frustrating the public with overlapping or contradictory requirements."[32] It is essential that agencies implement the policies established by the legislature in a manner that helps assure these policies are clearly understood, fairly applied, and uniformly enforced.

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 siting standards and proposed changes to other rules is to

[32] Significant legislative rules, other selected rules - Reviser's note: Findings - Short title - Intent - 1995 c 403: (2) (c).

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 and concise energy facility siting requirements and construction and operating standards.

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 RCW 80.50, 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. While a list of these changes would be extensive, a few such changes are listed here.

- Amendments to the Federal Clean Water Act
- Amendments to the Federal Clean Air Act – the subject of a separate EFSEC rulemaking
- Amendments to the Washington State Administrative Procedure Act
- Wetland mitigation guidance from the Department of Ecology
- Fish and Wildlife requirements and guidance of the Department of Fish and Wildlife
- Amendments to EFSEC legislation, Chapter 80.50 RCW

The council is the one-stop permitting entity for siting, constructing and operating energy facilities. As such, close coordination is required with both state and federal agencies. When changes occur to the operating laws or rules of other agencies this dictates that the council incorporate those changes into its rules and procedures. The council has made a number of these incremental changes to its rules as they were required. When the many small rule changes are combined with changes to other agency programmatic guidance or policy the situation only becomes more complicated and difficult to understand. The council has heard from various sides that the complicated and overlapping rules and guidance were making the energy facility siting process more difficult. It was also confusing and in some cases inconsistent with requirements of other agencies. Simple things, such as how terms are used and applied, were causing applicants and others to misunderstand siting requirements.

Over time these incremental changes caused the overall tone of the rules to change. What started as logical siting guidance for siting energy facilities became over time less clear and in some cases overly complicated. That is where the council finds itself now. The principles behind the siting requirements are sound and are intended to achieve the

necessary balance between development and protection of public health and the environment, but these requirements also needed to be reviewed, edited and updated and reorganized.

The rulemaking proposed by the council creates greater understanding of the energy facility siting process. This is true for both applicants and other parties that must become involved with the council. The proposed rule revisions first reorganize the entire rule package into logical and related processes. Second, the entire set of rules has been reviewed for clarity and consistency. Third, numerous redundancies in application requirements have been removed and finally, construction and operation standards were developed for energy facilities.

The re-organized rules now consist of four parts containing:

Part I. Agency Procedures – How the council operates under the administrative procedure act and how siting adjudications are conducted.

Part II Application and Standards – This Part contains the requirements for Potential Site Studies, everything that an applicant needs to have in an application for an energy facility and the standards and extent of mitigation that must be satisfied before the council recommends a Site Certification Agreement for approval by the Governor.

Part III Site Certification Agreement – This part contains the approvals for siting an energy facility, the length of the approval, compliance and monitoring and termination requirements.

Part IV Permits – Those separate permits that the council is obligated to issue and the procedures for doing so. In particular, this Part contains the NPDES and Clean Air Act permitting requirements.

The adoption of the proposed rule package will ease the process of applying for and receiving a favorable recommendation for siting a new or expanding an existing energy facility.

Effect Of Adopting Siting Standards – Greater Certainty

At the direction of Governor Locke, the council and other state agencies have worked with stakeholders to propose a set of construction and operation standards for energy facilities. The adoption of these standards as a part of the council rule package will put an end the debate about what standards apply to the siting of energy facilities. There will no longer be a question about the standards being the floor or the ceiling with respect to siting requirements. When satisfied, the new standards are the standard. Meet the standard and unless an impact identified in the Environmental Impact Statement, is not fully mitigated that is all that is required. Only if there are issues in the EIS that are not mitigated would a requirement or level of mitigation greater than the standard be imposed.

The amount of mitigation required for greenhouse gas emissions is one example of how different mitigation requirements found their way into Site Certification Agreements. Greenhouse gas mitigation is not a part of this package of proposed rules but it does demonstrate how applicants interpret the policies of the council. In the Chehalis Power case, the permittee is offsetting the increment of expansion resulting from an amended Site Certification Agreement. Sumas Energy 2 proposed mitigation based on the Oregon greenhouse gas standard. Wallula Power took still another approach and created a package of several different venues to provide some degree of greenhouse gas mitigation.

The establishment of clear and concise standards will eliminate the guesswork about what must be done to mitigate impacts, be they impacts from greenhouse gas[33], noise or impacts to wetlands or fish and wildlife.

The standards that are being proposed are not new. The same requirements that must be met if someone is proposing a shopping center, a warehouse or a new power plant. By formally adopting as rule these already existing requirements, the council is making it clear that there is one set of environmental rules for development in Washington and they apply equally to all facilities. This is intended to simplify the siting process and provide a much higher degree of certainty for persons or groups proposing to construct energy facilities that fall under council jurisdiction. Clear standards and understandable rules will speed up the process for siting energy facilities and reduce the cost for both the developers and other parties involved in the process.

Change In The Manner In Which The Council Operates

The significant changes in the council rules, reorganization, editing and clarification and the establishing of clear and concise standards for siting energy facilities, will simplify the process for siting energy facilities in Washington. Editing, adding clarification and reorganization of the rules as described above will make the rules easier to understand and the overall siting process easier to understand. Having done so applicants will know what is expected of them when submitting an application for site certification. The adoption of construction and operation standards for new proposed energy facilities creates the visible threshold that must be met in order to achieve a favorable recommendation to the Governor and an approved Site Certification Agreement.

This may result in a significant change in how the council processes applications for site certification. In the past the concept of expedited processing[34] for an application was the exception. Only one project in the council's history has received approval via expedited processing. While there are no guarantees about what the future will bring, applications for site certification that meet the standards, and have no findings of unmitigated impacts

[33] EFSEC, the Department of Ecology and local air agencies will begin work on preparing rules to implement greenhouse gas standards recently enacted by the Washington Legislature.

[34] Expedited processing (RCW 80.50.075). The council may grant expedited processing when it finds that the environmental impact, the area potentially affected, the cost and magnitude of the proposed energy facility; and the degree to which the proposed energy facility represents a change in use of the proposed site are not significant enough to warrant a full review of the application under the provisions of 80.50 RCW.

in its environmental impact statement, will find an easier path to follow in order to gain approval. It must be kept in mind that there is no guarantee that a project will be approved. While most projects will have impacts that would disqualify them from being considered for expedited processing, the revisions resulting from this rulemaking process may create a larger window of opportunity for some projects to be considered.

Clearly a benefit of firm standards will be fewer issues that must be addressed in an adjudicative proceeding including the necessity to produce expert witnesses and to go through an extensive trial-like proceeding. This opportunity should be more than enough incentive to promote applications that fully meet the intent of the new construction and operating standards. The time saved and financial savings will far offset any costs associated with meeting these standards. There will be fewer numbers of issues in an adjudication, and the amount of testimony will likely be far less that has been experienced in the past. It will at least open the door for more cases like the 2001 Wallula Power case where all issues raised either in the environmental impact statement, by agencies or by intervening parties were settled before the adjudication hearings commenced.

Explanation And Summary Of The Rules

Comparison Of Existing Rules And Proposed Final Rules

Table 3 below lists the major WAC Chapters of the council rules as they exist currently and shows how they are proposed to be reorganized and incorporated into the revised rule format. A detailed listing of the rules including all the proposed changes will be described in this Concise Explanatory Statement.

Table 3 - Comparison Of Existing And Proposed Final Rules

Old WAC Number and Title		New WAC Number and Title	
463-06	Agency Operations and Public Records	Part I. Agency Procedures	
463-10	Definitions used in this title	463-06	Agency Operations and Public Records
463-14	Policy and Interpretation	463-10	Definitions used in this Title
		463-14	Policy and Interpretation
463-18	Council Meetings and Proceedings	463-18	Council Meetings and Proceedings
463-22	Potential Site Study	463-22	Potential Site Studies
463-26	Public Informational Meetings and Land Use Hearings	463-26	Public Informational Meeting and Land Use Hearing
463-28	State Preemption	463-28	State Preemption
463-30	Adjudicative Proceedings	463-30	Adjudicative Proceedings

Old WAC Number and Title		New WAC Number and Title	
463-34	Petitions for Rulemaking and Declaratory Orders	463-34	Petitions for Rulemaking and Declaratory Orders
463-36	Amending or Terminating a Site Certification Agreement – Procedure	463-43	Expedited Processing
463-38	NPDES Permits	463-47	SEPA Rules
463-39	General and Operating Permit Regulations for Air Pollution Sources	463-50	Independent Consultants – Guidelines
463-40	Dangerous Wastes	463-58	Fees and Charges for Independent Consultant Study
463-42	Applications for Site Certification	Part II. Applications and Standards	
463-43	Applications for Expedited Processing	463-60	Applications for Site Certification
463-47	SEPA Rules	463-62	Construction and Operation Standards for Energy Facilities
463-50	Independent Consultants – Guidelines	Part III. Site Certification Agreement	
463-54	Certification Compliance Determination and Enforcement	463-64	Issuance of Site Certification Agreement
463-58	Fees and Charges for Independent Consultant Study	463-66	Amending or Terminating a Site Certification Agreement – Procedure
463-54	Certification Compliance Determination and Enforcement	463-68	Site Certification Agreement – Start of Construction, Expiration and Reporting
		463-70	Certification Compliance Monitoring and Enforcement
463-58	Fees and Charges for Independent Consultant Study	463-72	Site Restoration and Preservation
		463-74	Dangerous Wastes
		Part IV. Permits	
		463-76	NPDES Permits
		463-78	General and Operating Permit Regulations for Air Pollution Sources

Description of Changes made to Chapter 463 WAC.

The following is a detailed section-by-section description of the changes made to council rules. Each area of the rules contains several parts. This includes:

Old Chapter and section number
New Chapter and section number (if a change was made)
Because the rules were reorganized, many chapters and sections were moved to new locations.

Changes to the rule:
This includes a description of changes and why the change was made. If no changes were made, the comment area shows "No changes."

Comment(s) received related to this Section:
A summary of comments to the section is included. If no comments were made, the comment area shows "NONE."

Council Response to Comment(s):
If there were comments, the response of the council to those comments is included.

Changes to the Rule Following Public Comment: (proposed rule versus rule actually adopted)
If any changes were made in response to comments received during the public hearing comment period, those changes are described.

PART I -- Agency Procedures

Old -- Chapter 463-06 WAC, General Organization – Public Records

New -- Chapter 463-06, Agency Operations and Public Records.

Old -- Chapter 463-06-010 WAC, Organization of this title.

New -- Chapter 463-06-010 WAC, Purpose.

Changes to the Rule:
The content of this section was deleted in its entirety and replaced with "Purpose." The new content identifies the purpose of this Chapter.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-06-020 WAC, Description of organization.

New -- Chapter 463-06-020 WAC, Description of the organization.

Changes to the Rule:
Content was added to clearly state that EFSEC is an agency of state government authorized by legislation, and that the voting membership, in the case of state agencies, is the director or administrator or designee of member agencies listed in 80.50.030 RCW. It also places the office of the Chair in the EFSEC Office rather than in the office of the Department of Community, Trade and Economic Development.

New text is added clarifying the ability of the Chair to designate a member of the council to serve as acting Chair, and that the acting Chair is entitled to vote on any matters that come before the council and shall continue to fulfill his or her duties under 80.50.030(3) through (5).

New text is added clarifying that the Chair or a designee executes all official documents of EFSEC, and that the Chair or any member of EFSEC may perform duties as authorized by the council and consistent with 80.50.040 RCW.

These clarifying changes are prompted because of confusion by some parties about the role of an EFSEC member, the member's voting rights, when the member represents the parent agency and director and when the member is acting independently from the agency on behalf of EFSEC. The result of these changes is to more clearly describe the roles of an acting chair or other designee and that the chair or a designee, while acting at the direction of the council, must do so in a manner consistent with 80.50.040 RCW.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-06-030 WAC, Council office — business hours.

New -- Chapter 463-06-030 WAC, Council office — business hours.

Changes to the Rule:
This is a clarifying change indicating that the physical location of the EFSEC office is currently at 925 Plum Street and providing a P.O. Box mailing address which would not change in the event that the council office should move in the future.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-06-040 WAC, Monthly meetings.

New -- Chapter 463-06-040 WAC, Monthly meetings.

Changes to the Rule:
This section was deleted in its entirety. The council has stopped holding two executive committee meetings per month. The new meeting schedule will provide for two full council business meetings per month. This is done to both be more responsive to the needs of applicants, certificate holders and the public and to reduce expenses. Generally these meetings are held on the first and third Monday of each month and are announced in advance through the state register and notification to a council mailing list of interested parties. In the event that there are no pressing issues that must come before the council, a meeting may not be announced and, as such, not held. This change reduces meetings of the council from a total of three per month to two or fewer per month. Additional meetings may be scheduled by the council as necessary to conduct pressing business.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-06-050 WAC, General method by which operations are conducted.

New -- Chapter 463-06-050 WAC, General method by which operations are conducted.

Changes to the Rule:
Subsection (1) is revised to clarify that "all meetings" of the council are held "pursuant to the Open Public Meetings Act, the State Administrative Procedure Act, or other applicable laws."

A new subsection (5) is added to implement the provisions of the 2001 amendment to RCW 80.50.185 and to clarify the role of council staff where they;

- shall assist applicants in identifying issues presented by the application,
- shall review all information submitted and recommend resolutions to issues in dispute that would allow site approval, and
- may make recommendations to the council on conditions that would allow site approval.

A new subsection (6) is added because of the expanded role of council staff in assisting applicants to identify issues pertaining to their applications as provided for in RCW 80.50.085 and WAC 463-06-050(5). This new section states "The council staff is not party to adjudicative proceedings conducted under Chapter 34.05 RCW." This allows the staff the opportunity to work with applicants and the council without violating ex-parte rules contained in Chapter 34.05 RCW.

Comment(s) Received Relating to this Section:
One comment suggested that the wording of this section seemed awkward and was difficult to understand. Also, in subsection (5, which contains a general description of the council and its operations, it seems inappropriate to use the auxiliary verb "shall" when listing the duties of the staff.

Council Response to Comment(s):
The council noted this comment. This is consistent with RCW 80.50.085 (1).

Changes to the Rule Following Public Comment: (Proposed rule versus rule actually adopted):
NONE

Old -- Chapter 463-06-060 WAC, Public Records Available.

New – Chapter 463-06-060 WAC, How to obtain public records.

Changes to the Rule:
The title of this chapter was changed to "How to obtain public records." The changes include clarifying those public records that may be obtained during the normal business hours of the council and the different forms that will be accepted for requests for public records. These include mail, E-Mail, in person or by fax. The appropriate address or telephone number is also provided. All requests must conspicuously state "Public Records Request."

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-06-070 WAC, Public Records Officer.

New -- Chapter 463-06-070 WAC, Public Records Officer.

Changes to the Rule:
The changes to this section are intended to clarify that the Council Manager or his or her designee will be the council's public records officer and that correspondence need not be directed to the Public Records Officer.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-06-080 WAC, Contents of requests for public records.

New -- Chapter 463-06-080 WAC, Contents of requests for public records.

Changes to the Rule:
Changes made to this section are intended to make these rules consistent with Chapter 42.17 RCW – to prevent invasion of privacy and to protect public records. It also describes the form and specificity necessary for successfully making public records available by requiring sufficient particularity so that that the council can identify the record in question. This includes, where possible, a reference as described in the current public record index maintained by the council.

Material deleted from this section was made redundant by the new text describing the process of securing public records.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-06-090 WAC, Staff assistance.

New -- Chapter 463-06-090 WAC, Staff assistance.

Changes to the Rule:
The revisions to this section clarify that staff will provide assistance to persons seeking access to public records. In so doing, staff may ask that the requesting party clarify what records are being sought.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-06-100 WAC, Record for requests maintained.

New -- Chapter 463-06-100 WAC, Record for requests maintained.

Changes to the Rule:
No changes.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-06-110 WAC, Fees for copying.

New -- Chapter 463-06-110 WAC, Copying and fees.

Changes to the Rule:
The title of this section was changed to "Copying and fees."

This section was rewritten to clarify the council's role in making copies of public documents and requires that such copying not unreasonably disrupt the council's operations or cause excessive interference with other essential functions. If it is

determined that making copies will disrupt the council's operations, an alternative schedule will be developed or other arrangements for copying will be made.

The council may charge a fee of up to 15 cents per page for copies of public records provided.

Comment(s) Received Relating to this Section:
The proposed revision to this regulation states that the council "shall not impose a fee" for locating and making documents available to requesting parties under the Public Disclosure Act. The council should consider modifying this regulation to state that the council "shall generally not impose a fee" or something along those lines.

Council Response to Comment(s):
The council is following the guidelines of RCW 42.17.300. At this time the council has not determined the actual per page cost for photocopies of public records; therefore it is not authorized to charge in excess of fifteen cents per page.

Changes to the Rule Following Public Comment: (Proposed rule versus rule actually adopted):
NONE

Old -- Chapter 463-06-120 WAC, Determination of exempt status.

New -- Chapter 463-06-120 WAC, Disclosure procedure.

Changes to the Rule:
The title of this section was changed to "Disclosure procedure."
This section was revised to achieve consistency with RCW 42.17.320 wherein, within 5 business days, the council shall provide the requested records, acknowledge that the council has received the request and provide a reasonable estimate of the amount of time the council will require to respond to or to deny the record request.

This section also requires that the council review the requested records for exempt material before disclosure. Exempt material shall not be disclosed. If a record contains exempt material, the council shall clearly specify in writing the reasons for denial, including a statement of the specific exemptions or reason for denial of disclosure.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-06-130 WAC, Deletion of identifying details.

New – Section deleted.

Changes to the Rule:
This section was incorporated in 463-120 above.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-06-140 WAC, Written denials.

New – Section deleted.

Changes to the Rule:
This section was incorporated in 463-120 above

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-06-150 WAC, Review of denials.

New -- Chapter 463-06-150 WAC, Review of denials.

Changes to the Rule:
The content of this section was deleted and new text was added to describe when, for the purpose of judicial review, final agency action is deemed to have occurred.

Comment(s) Received Relating to this Section:
This section will be clearer if the word "inspection" is replaced with "a records request."

Council Response to Comment(s):
The text of this section is consistent with the statute Chapter 46.05 RCW, the Administrative Procedure Act.

Old -- Chapter 463-06-160 WAC, Time for completion of review.

New – Section deleted.

Changes to the Rule:
This section was incorporated in 463-120 above.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-06-170 WAC, Records index.

New -- Chapter 463-06-170 WAC, Records index.

Changes to the Rule:
This section has been revised to include a description of how the records index will be maintained, its location and availability and the frequency and time period for revising the index.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-10 WAC, Definitions.

New -- Chapter 463-10, Definitions.

Old -- Chapter 463-10-010 WAC, Definitions.

New -- Chapter 463-10-010 WAC, Definitions.

Changes to the Rule:
This section has been changed to clarify that the council does not approve the Site Certification Agreement. The Site Certification Agreement becomes a binding document when it is signed by the governor. In addition, definitions of the chair, council manager, Site Certification Agreement and the term "rule, as used in this chapter" are added.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-14 WAC, Policy and Interpretation.

New -- Chapter 463-14 WAC, Policy and Interpretation.

Old -- Chapter 463-14-010 WAC, Purpose of this Chapter.

New – Purpose.

Changes to the Rule:
The heading for this section was changed to "Purpose."

Old -- Chapter 463-14-020 WAC, Need for energy – Legislative intent binding.

New -- Chapter 463-14-020 WAC, Need for energy facilities – Legislative intent binding.

Changes to the Rule:
The title of this section was revised to include the word "facilities" following "Need for energy." This change makes this section consistent with Chapter 80.50.010.

The council had extensive discussions on the topic of need for energy, need for power and need for energy facilities. In part, these discussions resulted from previous energy facility siting cases that the council has heard. In these prior cases, (Chehalis Power, Cross Cascade Pipeline, Sumas Energy 2 and Satsop Power) the issue of the "need for new energy facilities" was a contested issue in the adjudicative hearings for these projects.

The question of need for power was the subject of a possible standard discussed by the stakeholder group. These discussions resulted in three proposed standards for council consideration. Alternative A proposed there should be no need standard and cited RCW 80.50.010 which articulates that the council needs "to recognize the pressing need for new energy facilities."

Alternative B proposed the council should adopt a need standard and that such a standard be used to "balance demand for energy facilities with the broad interests of the public as expressed in RCW 80.50.010." This alternative also ties in the necessity of an application for site certification meeting the provisions of the state energy policy as outlined in RCW 43.21F.015. This included demonstrating the extent to which the proposed energy facility would benefit consumers, whether the application offered to increase the diversity of power resources and the extent to which a proposed energy facility would mitigate environmental impacts.

Alternative C proposed that the council had the opportunity to consider need through the adjudicative process and opted to leave things as they were but also proposed that if cost-effective efficiency measures were available, then it's possible that new generation facilities may not be necessary.

As part of stakeholder group discussions on the topic of need, the group also heard how the state of Oregon addressed the question of need in its energy facility siting standards. The Oregon Energy Facility Siting Council statute originally contained a requirement that applicants conduct a "detailed need analysis." In 1997, the Oregon legislature eliminated the necessity for any "need test." See 1997 Ore. Laws 428 (HB3283). The Oregon statute now provides that "…the need test for new generating facilities . . . is sufficiently addressed by reliance on competition in the market rather than by consideration of cost effectiveness and shall not be a matter requiring determination by the Energy Facility Siting Council . . .."[35]

The stakeholder discussions were largely focused on developing standards for gas-fired combustion turbine generating facilities. After the conclusion of the stakeholder group meetings, and following council discussions, the applicability of the standards was broadened to include all energy facilities under the jurisdiction of the council. That being the case, some of the arguments for including a need standard and offsetting a need requirement with alternative energy facilities were no longer appropriate.

During information meetings and hearings on proposed rule revisions, the council has heard and discussed much about the necessity for a need standard. Arguments in favor of the need standard included balancing need with public benefit, encouraging development of alternative energy sources, encouraging conservation, and avoiding the proliferation of energy facility sites across the state that may never be built. Arguments opposed to the need standard were that no applicant is going to build an energy facility if there is not an opportunity to sell the product(s) of an energy facility. Need will be demonstrated if the developer is able to secure funding, and the facility operates to produce or deliver energy. In other words, the competitive marketplace will determine need much as in the Oregon statute.

[35] Exhibit B(4) – Report to Jim Luce, Chair Washington Energy Facility Site Evaluation Council. February 28, 2002 EFSEC Standards Development Group Meeting Materials.

Another issue with having a need standard is that a council requirement to demonstrate need would be counter to established legislative policy stating that "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 effects on the environment, ecology of the land and its wildlife, and the ecology of state waters and their aquatic life." (RCW 80.50.010, Legislative finding -- Policy – Intent.)

The council also heard testimony and discussed a proposal that would forbid the council from hearing testimony on the issue of need for an energy facility.

In the end, the council opted not to propose a need standard and revised this section to clearly reference RCW 80.50.010. In doing so, the council recognized that an applicant may wish to discuss need in its application for an energy facility and that this may result in need becoming an issue during the adjudication portion of the siting process.

Comment(s) Received Relating to this Section:
The council received several oral and written comments concerning the issue of need for power and the need for energy facilities and why this section was changed. There were two opposing views; the council should establish a need for power standard and the council should not establish a need for power standard. Those commenting in favor of a need standard suggested that the balancing required in RCW 80.50.010 required the council to provide a balance of alternative energy sources along with traditional energy production facilities.

They also suggested that Washington could wind up with any number of gas-fired facilities that may never be built or, if they were not built for several years, they may not have the most current technologies and efficiencies. It was also suggested that the council provide for a mechanism that would create a balance amongst the types of energy resources that it recommended for approval. The varying types of energy resources included traditional hydropower,[36] combustion turbines with various energy sources, co-generation, wind power, solar energy, and conservation measures to reduce energy demand. It was suggested that since the state has several gas-fired combustion turbines already sited but not constructed, before additional gas-fired facilities were recommended for approval, the council should require some amount of alternative energy generation to be developed. Others commented or suggested that if the council had a need standard it might be possible to balance that need standard by requiring additional mitigation or other concessions from an applicant.

For the most part, arguments opposing a need standard suggested that new facilities, regardless of type would be built only if there was a market for the power. In large part, the cost of developing and delivering power would determine if new facilities were constructed. If there were no customers to purchase the output, the facility would not be constructed. Those opposing a need standard also believed that the intent of RCW 80.50.010 was not to require different types of energy facilities, but instead to require the

[36] The council does not regulate or recommend siting approval for hydroelectric power installations.

council to carefully balance the siting of energy facilities with impacts on the environment and the public.

A comment was received suggesting that the proposed text of this section did not fully track the statutory language. If the listing of points is kept in the rule, that list should be expanded to include the policy found in RCW 80.50.010 and to recognize the importance of maintaining a mix of generating resources and to encourage high efficiency thermal resources.

It is important that the council take into account the broader view of regional/national resources and the environmental benefits of high efficiency thermal resources.

The cited section of law states "preserve and protect the quality of the environment." The proposed rule makes the subtle and incorrect change to "enhancing the environment."

Applicants should have the burden of demonstrating that new power resources will not have an adverse impact on the environment or public interests.

A reasonable test of need for power would require applicants to demonstrate existing, permitted and demand-side resources are insufficient to meet 115% of projected demand in critical water years for ten years following the date of application.

Council Response to Comment(s):
In several past energy facility siting applications and subsequent adjudications, the council has heard pro and con arguments concerning the need for an energy facility. In some cases, (Satsop and Chehalis) need was an integral part of the application and the council did balance need by requiring additional mitigation. The council is required "…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."[37] RCW 80.50.010 provides a legislative definition of its view of the term "broad interests of the public."

The council originally proposed a need standard which said that it would not hear arguments for or against whether a particular facility was or was not needed, essentially a negative standard. Following council discussions which included review of RCW 80.50.010, the council determined its role was facility siting and it was not responsible for resource planning or allocation. Following those discussions the council did debate how to best convey its view while maintaining consistency with the legislation. The council considered including its view in the application requirements section and in this section. In the end, the council opted to add direct reference to RCW 80.50.010 to this section.

While one of the comments received offered a prototypical calculation to determine if new energy facilities are needed, the council did not feel this was warranted given the intent of RCW 80.50.010. The council is mindful of its responsibility to protect the

[37] RCW 80.50.010 Legislative finding – Policy – Intent.

environment and interests of the public. The content requirements for applications for site certification contained in new Chapter 463-60 WAC are intended to have the applicant provide sufficient information for the council to make a sound energy facility siting recommendation.

In response to comments, the council revised bullets 1. and 2. of this section to correctly reflect the intent of 80.50.010 RCW. It is also important to note that numbering of these bullets is done only for the purpose of identifying different points. Unless otherwise noted, the numbers used do not connote a preference or priority; they are only a system of identification.

Changes to the Rule: following Public Hearings: (Proposed rule versus rule actually adopted):
The proposed rule revision did not correctly track statutory language and was revised to correctly represent the content of RCW 80.50.010. Bullets 1, 2 and 3 of this section now read as follows:
"(1)Ensuring through available and reasonable methods, that the location and operation of such facilities will produce minimal adverse effects on the environment, ecology of the land and its wildlife, and the ecology of state waters and their aquatic life;
(2) Enhancing the public's opportunity to enjoy the esthetic and recreational benefits of the air, water and land resources; and
(3) Providing abundant power at reasonable cost."

Old -- Chapter 463-14-030 WAC, Public hearings policy.

New -- Chapter 463-14-030 WAC, Public meetings and hearings policy for application reviews.

Changes to the Rule:
The title of this section was changed to public meetings and hearings policy for application reviews.

Revisions to this section are made to ensure consistency with 80.50.090 RCW with respect to the number and timing of public hearings to be held during the consideration of an application for site certification. The revisions clearly state the policy of EFSEC to provide for public participation in its public meetings and public hearings.

Subsection 1 changes the first public hearing to a "public informational hearing" as intended in RCW 80.50.090 and states that this hearing shall be held in the county of the proposed site and that all persons shall be afforded an opportunity to address the council with comments about the site.

Subsection 2 is revised to clarify how, where, and when the land use consistency hearing is held by the council. In the interest of expediting the overall application review process, comments during the land use consistency hearing are limited to land use issues and are not intended to include pro or con statements about the proposed energy facility.

Subsection 3 is revised to clarify that a person need not be a "party" in the adjudicative hearing in order to provide testimony on the proposed site or the project in general. A public testimony period is provided in the adjudication proceeding for this purpose. Typically these public testimony periods are held in the evening to afford the maximum number of persons an opportunity to provide testimony to the council.

Subsection 4 is revised to clarify that additional public hearings may be scheduled by the council. These additional hearings may include land use issues, public information hearings, adjudicative hearings or other hearings on the application for site certification.

Comment(s) Received Relating to this Section:
The proposal extends the scope of land use consistency to include city ordinances. The council should note that RCW 80.50.090 (2), does not mention cities. Confirm that this change is consistent with the scope of land use review intended by the legislature.

Council Response to Comment(s):
The council believes that it must, for any energy facility that is located within the boundaries of a city, address land use and zoning ordinances the same as it would for a county.

Changes to the Rule Following Public Comment: (Proposed rule versus rule actually adopted):
NONE

Old -- Chapter 463-14-040 WAC, County, city and port district representatives--Segmentation of hearings and issues.

New -- Chapter 463-14-040 WAC, County, city and port district representatives--Segmentation of hearings and issues.

Changes to the Rule:
No Changes

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-14-050 WAC, Preemption.

New -- Chapter 463-14-050 WAC, Preemption.

Changes to the Rule:
No Changes.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-14-060 WAC, Open meetings with full discussion.

New – Section deleted.

Changes to the Rule:
This section was deleted. The intent of this section is now contained in Chapter 463-18 WAC– Procedure for Regular and Special Council Meetings. EFSEC complies with the Open Public Meeting Act, Chapter 42.30 RCW, and the Administrative Procedure Act, Chapter 34.05 RCW.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-14-070 WAC, Integration of council activities with federal agency activities.

New -- Chapter 463-14-070 WAC, Integration of council activities with federal agency activities.

Changes to the Rule:
No Changes.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-14-080 WAC, EFSEC deliberative process.

New -- Chapter 463-14-080 WAC, EFSEC deliberative process.

Changes to the Rule:
This section was revised substantially. The new language added to this section more fully describes the deliberative processes the council will use when considering an application for site certification. Only when the council is satisfied that it has all the information necessary to make a decision will the council make a recommendation to the Governor for approval of the site-certification agreement or denial of the application. The council normally conducts its deliberative discussions in private. That being the case, the last sentence was modified by deleting the phrase "in open session." The council will conduct any final debate, if any, and make its final decision in open session.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-14-100 WAC, Citations.

New -- Chapter 463-14-100 WAC, Citations.

Changes to the Rule:
This is a section added to clarify that citations to state statues and regulations should include such laws as they now exist or as they are hereafter amended.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-18 WAC, Procedure -- Regular and Special Council Meetings.

New -- Chapter 463-18 –Council Meetings and proceedings

Old -- Chapter 463-18-010 WAC, Purpose of this chapter.

New – Chapter 463-18-010 WAC, Purpose.

Changes to the Rule:
The title of this subsection was changed to "Purpose."

This subsection has been revised to remove any reference to regular or special council meetings. Beginning in January, 2004, the council began to hold two meetings per month. See Chapter 463-18-050 WAC for more information on council meetings.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-18-020 WAC, Governing Procedure.

New -- Chapter 463-18-020 WAC, Governing Procedure.

Changes to the Rule:
The content of this subsection was deleted and replaced with text that fully explains the manner in which the council operates. This subsection now describes how the council will conduct business, including what constitutes a quorum, that decisions shall be transacted by motion and second, that voice vote or division of the house may be used for voting, that the order of business shall be as described in the agenda, that the council manager in consultation with the chair shall prepare each meeting's agenda, and that the agenda may be modified by the council.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-18-030 WAC, Quorum.

New – Section moved.

Changes to the Rule:
This subsection was moved to and incorporated into revised Chapter 463-18-020 WAC, Governing Procedure.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-18-040 WAC, Delegation of Duties.

New – Section moved.

Changes to the Rule:
This subsection was moved to and incorporated into revised Chapter 463-06-020 WAC, Description of the Organization.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-18-050 WAC, Special meetings.

New -- Chapter 463-18-050 WAC, Open Public Meetings Act Proceedings.

Changes to the Rule:
The title of this subsection was changed to Open Public Meetings Act Proceedings.

Because the council does not hold meetings in accordance with a periodic schedule declared by statute or rule, the council's meetings are not "regular meetings" within the meaning of the Open Public Meetings Act. Therefore all council meetings are considered special meetings. The chair or a majority of the voting members may call a special meeting.

Regardless of the change to all special meetings, the council will still, on or before January of each year, fix the time and place of the special meetings it proposes to hold during the upcoming calendar year and publish a schedule of those meetings in the *Washington State Register*. The chair, or a majority of the voting members of the council, may call an executive session at any time in accordance with RCW 42.30.110.

The change to all special meetings was made to reduce the number of meetings, reduce costs associated therewith and to allow meetings to be more easily cancelled when there is not enough business to warrant a council meeting.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-18-060 WAC, Procedure in the absence of the chairman.

New – Section moved.

Changes to the Rule:
This section was moved and incorporated into Chapter 463-06-020 WAC, Description of the Organization.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-18-070 WAC, Council duties of acting chairman.

New – Section moved.

Changes to the Rule:
This section was moved and incorporated into Chapter 463-06-020 WAC, Description of the Organization.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-18-080 WAC, County city and port district representatives participation.

New – Section deleted.

Changes to the Rule:
This subsection was deleted. County, city and port representation is provided for in Chapter 463-06-020 WAC, Description of the Organization.

Comment(s) Received Relating to this Section:
NONE

New -- Chapter 463-18-090 WAC, Adjudicative Proceedings.

Changes to the Rule:
This new section states that adjudicative proceedings required by RCW 80.50.090(3) shall be governed by the Administrative Procedure Act, chapter 34.05 RCW, and chapter 463-30 WAC.

Comment(s) Received Relating to this Section:
NONE

New -- Chapter 463-18-100 WAC, Rule-making Proceedings.

Changes to the Rule:
This new section states that Rulemaking proceedings shall be governed by the Administrative Procedure Act, Chapter 34.05 RCW.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-22 WAC, Procedure and Guidelines – Potential Site Studies.

New -- Chapter 463-22 WAC, Potential Site Studies.

Old -- Chapter 463-22-010 WAC, Purpose of this Chapter.

New -- Chapter 463-22-010 WAC, Purpose.

Changes to the Rule:
The title of this subsection was changed to "Purpose."

Comment(s) Received Relating to this Section:
NONE

Old -- WAC 463-22-020, Potential site study--Where submitted.

New -- WAC 463-22-020, Potential site study request --Where submitted.

Changes to the Rule:
The word "request" was added to the title of this section. The title now reads "Potential site study request--Where submitted."

Comment(s) Received Relating to this Section:
NONE

Old -- WAC 463-22-030, Potential site study--Fee.

New -- WAC 463-22-030, Potential site study--Fee.

Changes to the Rule:
This section was changed to clarify that the $10,000 fee that accompanies the request for a potential site study is only the "initial" payment necessary to begin processing the request. Potential site studies as they are conducted today provide the basis, including the minimum content necessary, for completing an application for site certification. As such, this results in costs that exceed $10,000.

Old -- WAC 463-22-040, Potential site study--Contents.

New -- WAC 463-22-040, Potential site study--Contents.

Changes to the Rule:
No Change

Comment(s) Received Relating to this Section:
NONE

Old -- WAC 463-22-050, Retention of consultant.

New -- WAC 463-22-050, Retention of consultant.

Changes to the Rule:
This section is revised, recognizing that the purpose of retaining an independent consultant is in part for the purpose of advising the council on the completeness of the request. As such, the council deleted the phrase stating that it would retain a consultant after determining the request was complete.

The content of the potential site study has been refined to require that the independent consultant shall set forth a general analysis of the potential environmental impact of the proposed energy facility and impacted areas surrounding or adjacent to the site.

Comment(s) Received Relating to this Section:
NONE

Old -- WAC 463-22-060, Notification of local authorities.

New -- WAC 463-22-060, Notification of local authorities.

Changes to the Rule:
No Change

Comment(s) Received Relating to this Section:
NONE

Old -- WAC 463-22-070, Independent consultant study--No preliminary approval.

New -- WAC 463-22-070, Independent consultant study--No preliminary approval.

Changes to the Rule:
No Change

Comment(s) Received Relating to this Section:
NONE

Old -- WAC 463-22-080, Procedure where application precedes conclusion of study.

New -- WAC 463-22-080, Procedure where application precedes conclusion of study.

Changes to the Rule:
No Change

Comment(s) Received Relating to this Section:
NONE

Old -- WAC 463-22-090, Additional costs procedure.

New -- WAC 463-22-090, Additional costs procedure.

Changes to the Rule:
As outlined in WAC 463-22-030, the initial fee for a potential site study is $10,000. This section of WAC 463-22-090 is changed to require the council to identify the "full cost needed to complete the study including costs for consultants, council staff, councilmember's, and other such expenses that are deemed reasonable by the council." All council costs attributable to a potential site study, (as well as an application for site

certification and operation and compliance monitoring) must be borne by the applicant or certificate holder.

Comment(s) Received Relating to this Section:
NONE

New -- Chapter 463-22-100 WAC, Public information meeting.

Changes to the Rule:
This new section is added to indicate that the council "may" hold a public information meeting pertaining to the potential site study. When so doing, the council "shall" be required to publish notice of the meeting in local daily or weekly news publications. This public information meeting shall not be in lieu of the requirements of RCW 80.50.090.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-26, Procedure -- Initial public hearing and public information meetings.

New – Public informational meeting and land use hearing.

Changes to the Rule:
The Title of this Chapter 463-26, was changed to "Public Informational Meeting and Land Use Hearing."

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-26-010 WAC, Purpose of this chapter.

New -- Chapter 463-26-010 WAC, Purpose.

Changes to the Rule:
For consistency through these rules, Purpose and Scope has been changed to "Purpose."

The name of the hearing held upon submittal of an application for site certification is changed from Public Hearing to Public Informational Hearing pursuant to RCW 80.50.090(1) and as described in new WAC 463-26-130 and the public land use hearing held pursuant to RCW 80.50.090(2).

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-26-020 WAC, Notification of local authorities.

New -- Chapter 463-26-020 WAC, Notification of local authorities.

Changes to the Rule:
The changes made in this section are intended to clarify that local authorities will be notified about the project before public informational hearings are scheduled.

Comment(s) Received Relating to this Section:
NONE

New -- Chapter 463-26-025 WAC, Public informational meeting.

Changes to the Rule:
This section was previously numbered 463-26-130 WAC. The changes made to this section include moving it to near the beginning of the chapter and changing the format from paragraphs to numbered sections. Also, as used throughout these rules, the word "will" has been changed to "shall."

Subsection (2) clarifies that written or oral comments received at public informational meetings, relating to the proposed project, may become part of the adjudicative proceeding record.

Comment(s) Received Relating to this Section:
It was suggested that general public comments are not part of the adjudicative record because the council can not cross-examine the person offering comments.

Council Response to Comment(s):
As common practice the council includes all oral and written comments received during public comment sessions in the record for an adjudication. Although written testimony can not be cross-examined and the council does not generally cross-examine persons offering public comments, it does consider all oral and written public comments based on the weight of the testimony they provide.

Changes to the Rule Following Public Comment: (Proposed rule versus rule actually adopted):
NONE

New -- Chapter 463-26-035 WAC, Introduction of counsel for the environment.

Changes to the Rule:
This section was previously numbered 463-26-070 WAC. The change to this section is limited to moving it to near the beginning of the chapter.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-26-040, Adversary nature of hearings.
New -- Section deleted.

Changes to the Rule:
This section was deleted. Previously the initial public hearing was conducted as an adversarial hearing. The Washington legislature in 2001 amended Chapter 80.50 RCW making the initial public hearing an informational hearing. The intent was to make these meetings more open and to allow greater exchange of information without the adversarial setting.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-26-050 WAC, Purpose for hearing.

New -- Chapter 463-26-050 WAC, Purpose for land use hearing.

Changes to the Rule:
The title of this section was changed to "Purpose for Land Use Hearing."

This change is made to clearly differentiate this land use hearing from the earlier New Chapter 463-26-025 WAC Public Informational Hearing.

Changes made to this section include deleting the word initial when referring to the land-use hearing. A proposed project will have a land use hearing and while that hearing may be continued from time to time, it remains one land use hearing. The purpose of the hearing was also changed from determining land use consistency to determining land use consistency and compliance with applicable land use plans and zoning ordinances at the time the application was submitted to EFSEC. Definitions of the terms "land use plan" and "zoning ordinance" complete with the appropriate citations have been added to this section.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-26-060 WAC, Public Announcement -- Testimony.

New -- Chapter 463-26-060 WAC, Public Announcement -- Testimony.

Changes to the Rule:
The changes to this section were made to clarify that it is the obligation of the council to announce at the public land use hearing that anyone has the opportunity to offer testimony relative to consistency and compliance with land use and zoning ordinances.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-26-070 WAC, Introduction of counsel for the environment.

New – Section deleted

Changes to the Rule:
This section was deleted and moved to New Chapter 463-26-035, above.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-26-080 WAC, Explanation of entire certification process.

New --- Section deleted.

Changes to the Rule:
This section was deleted. EFSEC felt that this section was redundant in that under New Chapter 463-26-060, the council is obligated to present the general procedure to be followed in processing the application including a tentative sequence of council actions, the rights and methods of participation by local government in the process, and the means and opportunities for the general public to participate.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-26-090 WAC, Procedure where certificates affirming compliance with zoning ordinances or land use plans are presented.

New -- Chapter 463-26-090 WAC, Procedure where certificates affirming compliance with land use plans and zoning ordinances are presented.

Changes to the Rule:
The title of this chapter was changed to read "Procedure where certificates affirming compliance with land use plans and zoning ordinances are presented."

This section was clarified to direct applicants at the public land use hearing to enter as exhibits, certificates from local authorities attesting to the fact that the proposal is consistent and in compliance with land use plans and zoning ordinances.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-26-100 WAC, Procedure where no certificates relating to zoning ordinances or land use plans are presented.

New -- Chapter 463-26-100 WAC, Procedure where no certificates relating to land use plans and zoning ordinances are presented.

Changes to the Rule:
The title of this section was changed to read "Procedure where no certificates relating to land use plans and zoning ordinances are presented."

This section is revised to require the applicant and local authorities to address compliance or non compliance with land use plans and zoning ordinances. The requirement that the

applicant demonstrate compliance and that the local authorities then testify to the question of consistency has been deleted. It is the belief of the council that it is best to allow the applicant and local authorities to resolve the land use and zoning consistency issues without council interference.

In all cases, the applicant is obligated to demonstrate compliance and consistency with land use plans and zoning ordinances. Failing an agreement between the applicant and the local authorities, the applicant can petition the council under RCW 80 50.110 where the state preempts the regulation and certification of the location, construction, and operational conditions of certification of the energy facilities included under RCW 80.50.060.

Comment(s) Received Relating to this Section:
EFSEC should set a time frame in which local governments must act on land use issues.

Council Response to Comment(s):
Legislation enacted in 2001 provides for EFSEC to conduct land use consistency hearings, RCW 80.50.090. The council holds the land use consistency hearing early in its application review process. However, council rulings may be delayed pending activities by local governments.

Changes to the Rule Following Public Comment: (Proposed rule versus rule actually adopted):
NONE

Old -- Chapter 463-26-110 WAC, Determination regarding zoning or land use.

New -- Determination regarding land use plans and zoning ordinances.

Changes to the Rule:
The title of this section was changed to read "Determination regarding land use plans and zoning ordinances."

This section was revised to remove the requirement that the council make a land use consistency ruling prior to the conclusion of the land use hearings. In the event an applicant and local authorities can not reach agreement on land use and zoning, and the applicant opts to ask EFSEC to preempt under RCW 80.50.110, this matter would be dealt with during the adjudicative hearing.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-26-120 WAC, Initial determination subject to review.

New -- Section deleted.

Changes to the Rule:
This section was deleted.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-26-130 WAC, Public information meeting.

New – Section deleted

Changes to the Rule:
This section was deleted. The deleted material is included as New -- Chapter 463-26-025 Public Informational Meeting.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-28, Procedure – State Preemption.

Changes to the Rule:
NONE.

Comment(s) Received Relating to this Section:
Strongly recommend EFSEC create a timeline that requires local government to coordinate with EFSEC and act on a timeline consistent with EFSEC.

Develop an option that would allow EFSEC to make land use consistency determinations when an application is submitted.

Develop standard similar to Oregon where the Applicant may choose to have EFSEC make the land use determination when the application is submitted

The rules fail to require local governments to coordinate with the council on a clear timeline for determining land use consistency.

Council Response to Comment(s):
The council discussed this issue and decided to not address it at this time. The council was also involved in an adjudicative proceeding that involved this matter and did not want to discuss this issue during that proceeding. This was not a topic discussed during the stakeholder meetings and the council would like to have additional discussions on this issue before attempting to propose a revision to this existing rule.

Changes to the Rule Following Public Comment: (Proposed rule versus rule actually adopted):
NONE

Old -- Chapter 463-28-010 WAC, Purpose and Scope.

New -- Chapter 463-28-010 WAC, Purpose

Changes to the Rule:
The title of this section was changed to Purpose.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-28-020 WAC, Authority of council--Preemption by state.

New -- Chapter 463-28-020 WAC, Authority of council--Preemption by state.

Changes to the Rule:
No Change

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-28-030 WAC, Determination of noncompliance – Procedures.

New -- Chapter 463-28-030 WAC, Determination of noncompliance – Procedures.

Changes to the Rule:
The council deleted the word “existing” from the first sentence of this section to clarify that land use plans or zoning ordinances in effect at the time the application is submitted shall be observed.

Comment(s) Received Relating to this Section:
The process set forth in this proposed rule for addressing an inconsistency with local land use requirements is unnecessarily cumbersome and not required by EFSEC's statute. After an initial finding of inconsistency, the proposed regulation requires an applicant to "make all reasonable efforts to resolve the noncompliance" before requesting preemption. The statute does not require an applicant to try to cure an inconsistency with local land use requirements.

The regulation does not provide any criteria for determining whether an applicant has made "all reasonable efforts." The council should not get involved in assessing the reasonableness of this strategic business decision, but should instead focus on whether or not to preempt a local land use requirement when asked to do so.

Council Response to Comment(s):
The council discussed this issue and decided to not address it at this time. The council was also involved in an adjudicative proceeding that involved this matter and did not want to discuss this issue during that proceeding. This was not a topic discussed during the stakeholder meetings and the council would like to have additional discussions on this issue before attempting to propose a revision to this existing rule.

Changes to the Rule Following Public Comment: (Proposed rule versus rule actually adopted):
NONE

Old -- Chapter 463-28-040 WAC, Inability to resolve noncompliance.

New -- Chapter 463-28-040 WAC, Inability to resolve noncompliance.

Changes to the Rule:
No Change

Comment(s) Received Relating to this Section:
This section should be modified to remove the requirement that an applicant seeking preemption demonstrate a good faith effort to resolve an inconsistency. It is not clear what criteria would be used to determine whether an effort was "in good faith."

Council Response to Comment(s):
The intent of this section is that the council wants to see efforts by the applicant to resolve consistency issues before coming to the council asking for preemption.

The EFSEC council discussed this issue and decided to not modify this section at this time. The comment will be noted if the council chooses to modify this section in the future. The council was also involved in an adjudicative proceeding that involved this matter and did not want to discuss this issue during that proceeding. This was not a topic discussed during the stakeholder meetings and the council would like to have additional discussions on this issue before attempting to propose a revision to this existing rule.

Changes to the Rule Following Public Comment: (Proposed rule versus rule actually adopted):
NONE

Old -- Chapter 463-28-050 WAC, Failure to request preemption.

New -- Chapter 463-28-050 WAC, Failure to request preemption.

Changes to the Rule:
No Change

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-28-060 WAC, Request for preemption – Adjudicative proceeding.

New -- Chapter 463-28-060 WAC, Request for preemption – Adjudicative proceeding.

Changes to the Rule:
No Change

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-28-070 WAC, Certification -- conditions – State/local interests.

New -- Chapter 463-28-070 WAC, Certification conditions – State/local interests.

Changes to the Rule:
No Change

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-28-080, Preemption--Failure to justify.

New -- Chapter 463-28-080, Preemption--Failure to justify**.**

Changes to the Rule:
No Change

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-28-090 WAC, Governing Rules.

New -- Section deleted.

Changes to the Rule:
This Section was deleted. During the period since July 15, 1977, there have been numerous changes to state and federal laws and rules that business and industry are required to comply with. Many of these new laws and rules are mandatory requirements, consequently the reference in this section to July 15, 1977 is inappropriate.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-30 WAC, Procedure--adjudicative proceedings

New -- Chapter 463-30 WAC, Adjudicative proceedings

Old -- Chapter 463-30-010 WAC, Purpose and scope of this chapter.

New -- Chapter 463-30-010 WAC, Purpose and scope of this chapter.

Changes to the Rule:
The title of this section was changed to “Purpose.”

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-30-020 WAC, Council conducted hearings and administrative law judges.

New -- Chapter 463-30-020 WAC, Council conducted hearings and administrative law judges.

Changes to the Rule:
This section has been revised to clarify that while the council may choose to use an administrative law judge from the office of administrative hearings, the council is still the presiding officer pursuant to chapters 34.05 and 80.50 RCW. For purposes of this chapter, administrative hearings held by the council will be governed by chapter 34.05 RCW and this chapter.

Comment(s) Received Relating to this Section:
The proposed change designated the council as the presiding officer at adjudicative hearings. Is it more appropriate to designate the council chair? WAC 463-30-080 (3) implies that the presiding officer is a person rather than a group.

Council Response to Comment(s):
The council is the presiding officer. Please see RCW 34.05, the Administrative Procedure Act.

Changes to the Rule Following Public Comment: (Proposed rule versus rule actually adopted):
NONE

Old -- Chapter 463-30-030 WAC, Use of the term "council."

New – Section Deleted.

Changes to the Rule:
This section was deleted. "Council" is defined in 463-10 WAC.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-30-050 WAC, Status of agencies and agency members in adjudicative proceedings.

New -- Chapter 463-30-050 WAC, Status of members in adjudicative proceedings.

Changes to the Rule:
This section has been revised to include references to the local governmental representative(s) on the council. It is also revised to clarify that both the state agency and the local government councilmember's during any adjudicative hearing are members of the council and do not represent their parent organizations. This section was revised to clarify that members of the council shall not communicate with employees of any represented agency who have an involvement in the proceeding.

Comment(s) Received Relating to this Section:
In the interest of clarification and to preclude potential ex-parte issues from being raised in the future, it is suggested that the council clarify what it means to participate in an EFSEC proceeding, or to include a sentence which clarifies that any staff that are under contract to the council shall be deemed to be a member of the council for the purposes of 463-30-050.

Council Response to Comment(s):
The council reviewed this section and found the text appropriate, allowing councilmember's to discuss energy siting issues with other members of their agency; provided that those members are not involved with that agency's participation as an intervenor in that case.

Changes to the Rule Following Public Comment: (Proposed rule versus rule actually adopted):
NONE

Old -- Chapter 463-30-055 WAC, Applicant funding of councilmember's salaries and fringe benefits for extended adjudications.

New – Section Deleted.

Changes to the Rule:
This section was deleted. This section did not allow the council to charge the applicant for council-member time spent working on the various aspects of participating on the council. This included attending council meetings, travel on council business, and preparing for adjudicative hearings. Previously, it was only after the tenth day of hearings that an agency could be reimbursed for time spent by a member on the council.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-30-060 WAC, Definitions -- Persons and parties.

New -- Chapter 463-30-060 WAC, Definitions -- Persons and parties.

Changes to the Rule:
Section (2) has been edited to correct a reference to 80.50.030 RCW.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-30-080 WAC, Commencement of adjudicative proceedings.

New -- Chapter 463-30-080 WAC, Commencement of adjudicative proceedings.

Changes to the Rule:
The reference to "EFSEC" in this section has been changed to "council."

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-30-085 WAC, Provisions regarding limited English-speaking and hearing-impaired persons.

New -- Chapter 463-30-085 WAC, Provisions regarding limited English-speaking and hearing-impaired persons.

Changes to the Rule:

No Change

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-30-090 WAC, Publicity--Commencement of adjudicative proceedings.

New -- Chapter 463-30-090 WAC, Publicity--Commencement of adjudicative proceedings.

Changes to the Rule:
No Change

Comment(s) Received Relating to this Section:
NONE

New -- Chapter 463-30-091 WAC, Intervention.

New -- Chapter 463-30-091 WAC, Intervention.

Changes to the Rule:
This section was previously Chapter 463-30-400 WAC. It has been moved here in its entirety and has not been changed.

Comment(s) Received Relating to this Section:
The proposed language makes it optional that the council set a drop-dead-date for petitions to intervene. It is suggested that wording be changed to "[t]he council shall establish a date…."

Council Response to Comment(s):
The council is using language from RCW 34.05.443(3) that allows granting intervention at any time if it is deemed appropriate. Because the council may invite intervention before the draft environmental impact statement is released for public review, the council may set a second intervention date for new issues at a later date. A single drop-dead intervention date is not appropriate in that it may preclude persons with a valid reason for intervention from participating.

Changes to the Rule Following Public Comment: (Proposed rule versus rule actually adopted):
NONE

New -- Chapter 463-30-092 WAC, Participation by intervenor.

Changes to the Rule:
This section was previously Chapter 463-30-410 WAC. It has been moved here in its entirety and has not been changed.

Comment(s) Received Relating to this Section:
NONE

New -- Chapter 463-30-093 WAC, Participation by county, city and port district representatives.

Changes to the Rule:
This section was previously Chapter 463-30-420 WAC. It has been moved here in its entirety and has not been changed.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-30-100 WAC, Appearance and practice before the council.

New -- Chapter 463-30-100 WAC, Appearance and practice before the council.

Changes to the Rule:
No Change

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-30-120 WAC, Filing and service.

New -- Chapter 463-30-120 WAC, Format, Filing and Service of documents
.
Changes to the Rule:
The title of this section has been changed to read "Format, filing and service of documents."

A new section (1) Format, was added. This section requires that all documents, with the exception of exhibits filed with the council, be on 8 ½ X 11 inch paper and printed on two sides of the paper and that all documents be legibly written or printed.

Numbering in this section has been modified to accommodate the addition of new material.

Old subsection (1) Filing, has been edited for format and states that the council will specify the number of copies of documents that must be provided when they are filed with the council.

A definition of the term "fax" was added.

This section was revised to clarify that a "document" received in the council's fax machine does not constitute a "filing" unless the council manager has specifically authorized such filing. Additional information was added regarding specifically when a fax is deemed to have been received, the information that must be included in a fax cover sheet, and the fact that a party filing by fax bears the risk that a fax may not be received in a timely manner or that a received fax may not be legible when received. If a fax is not received in legible form, it will be considered as though it had never been sent.

A new subsection on e-mail filing was added. E-mail filing is allowed only upon the specific authorization by the council manager or his or her designee.

New information was added to this section to clarify that a filing with the council does not constitute service on the attorney general or any other party. Likewise, a filing with the attorney general does not constitute service on the council or any other party.

The service and pleadings section has been revised to clarify that service means delivering one copy of the pleading to each party and that in the case of the council, with prior council manager or designee approval and when the pleading is less than 25 pages in length, this may be by fax.

A new subsection for "courtesy copies" has been added wherein parties are encouraged to send courtesy copies of documents to the council by e-mail.

These changes reduce the risk of improper and untimely filings and help ensure that all parties are aware of the various filings that are taking place.

Comment(s) Received Relating to this Section:
Consider revising subsection (3)(b)(I)(D) to eliminate the requirement that the council manager authorize service by fax. It is understandable that the council manager would want to authorize the filing of a pleading by fax, but serving other parties by fax should be permitted as a matter of course.

Council Response to Comment(s):
Comment noted. The council will normally work with parties to establish hearing guidelines early in the adjudicative process. This can include establishing acceptable methods of service.

Changes to the Rule Following Public Comment: (Proposed rule versus rule actually adopted):
NONE

Old -- Chapter 463-30-190 WAC, Discovery – Practice.

New -- Chapter 463-30-0190 WAC, Discovery – Practice.

Changes to the Rule:
No Change

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-30-200 WAC, Subpoenas – Practice.

New -- Chapter 463-30-200 WAC, Subpoenas – Practice.

Changes to the Rule:
Subsection (4) (c) has been revised to clearly state that the council's independent consultant is deemed to be a member of the council staff. This also clarifies the special relationship between the special consultant and the council and preserves the ability of the special consultant to work with the council and staff without the risk of compromising confidentiality between the special consultant and the council and council staff.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-30-230 WAC, Official notice.

New -- Chapter 463-30-230 WAC, Official notice.

Changes to the Rule:
No Change

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-30-240 WAC, Official notice – Evaluation of evidence.

New -- Chapter 463-30-240 WAC, Official notice – Evaluation of evidence.

Changes to the Rule:
No Change

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-30-250 WAC, Stipulations and settlement.

New -- Chapter 463-30-250 WAC, Stipulations of fact

Changes to the Rule:
The title of this section was changed to "Stipulations of fact."

This section was deleted in its entirety and new information was added in its place. The changes provide a council definition of a stipulation and encourage parties to enter stipulations of fact. The part dealing with settlement has been moved to a new chapter 463-30-252 WAC, Settlement and is discussed below.

It is the policy of the council to encourage stipulations and agreements among the parties to all siting cases that come before it. Stipulations of fact that are entered and accepted are binding on the stipulating parties and may be entered into evidence at the hearing. The council may accept the stipulation or it may require additional information before it renders a decision.

Comment(s) Received Relating to this Section:
NONE

New -- Chapter 463-30-251 WAC, Alternative dispute resolution.

Changes to the Rule:
The council strongly supports any concept that will lead to resolution of potential issues that would otherwise become a part of an adjudicative hearing process. While a settlement process has been in existence in past council energy-facility siting cases, the council wanted to specifically address this concept in its rules. The stakeholder group, working from 2002 energy-facility siting standards, proposed a standard for stipulations, settlement and mediation. Included in that proposed standard was the concept of alternative dispute resolution (ADR). In its discussions, the council opted to separate them into individual sections, for the purposes of this rule.

In the interest of achieving the greatest number of settlements, the council, based on this rule, will be able to direct parties to enter in to an ADR process. Although parties may voluntarily enter into ADR, the process is entirely without prejudice to the rights of the parties.

Under the ADR concept, parties may negotiate issues at any time without council oversight. The council may direct parties to meet to discuss settlement, or the parties may be directed to undertake a collaborative process to attempt to achieve settlement of one or more issues. In such cases, any party with an interest in the issue is offered the opportunity to participate. Normally, council staff will participate in or facilitate the collaborative process.

Section (4) establishes four simple guidelines for these discussions. These are that the council will establish ground rules for the negotiations, no statements from the discussions will be admissible as evidence without all of the involved parties' consent to the extent applicable by law, negotiations will be considered confidential, and

participants in the process will periodically advise the council and non-participating parties of progress or lack thereof.

Comment(s) Received Relating to this Section:
NONE

New -- Chapter 463-30-252 WAC, Settlement.

Changes to the Rule:
The council strongly supports any concept that will lead to resolution of potential issues that would otherwise become a part of an adjudicative hearing process. Settlement was one of the topics the stakeholder group, working from 2002 energy-facility siting standards, proposed for consideration as a standard.

This section defines a settlement and encourages any and all parties to enter into a settlement of issues in an energy-facility siting case. Settlements may be proposed for one issue between two parties, a multiple-party settlement on one or more issues may be proposed, or a full settlement involving all parties may be proposed. In all cases, the council will review all proposed settlements and will determine the appropriate procedure in each proceeding consistent with the requirements of WAC 463-30-253 and 463-30-254.

Comment(s) Received Relating to this Section:
NONE

New -- Chapter 463-30-253 WAC, Settlement consideration procedure.

Changes to the Rule:
As described in the settlement section Chapter 463-30-252 WAC above, the council must be afforded the opportunity to review any settlements and have the opportunity to question parties about proposed settlements. This section delineates the necessary content of settlement agreements and the process the council will use to review and hear testimony in support of or against a settlement.

The process includes the following requirements: the council will be given sufficient time to review and approve the proposed settlement, settlements must have supporting documentation that allows the council to understand the extent of and the legal merit of the settlement, and the council will hold a hearing where parties to the settlement are required to present testimony in support of the settlement and any parties who may be opposed to the settlement have the opportunity to present their views of the settlement to the council.

Comment(s) Received Relating to this Section:
NONE

New -- Chapter 463-30-254 WAC, Council discretion to accept or reject a proposed settlement or other agreement.

Changes to the Rule:
The council views settlement as a positive step in resolving issues associated with siting energy facilities. However, all settlements may not necessarily benefit the public, the environment, or other parties to the process. The council retains full and undivided authority to take action on any proposed settlement agreement. The council may accept settlement as resolving certain issues in a siting case, the council may reject a settlement, or the council may take any other action deemed appropriate. Settlements may be accepted at the time they are proposed or they may be held until a later date, after the council has heard other testimony that may have bearing on the issue, before it makes a determination to accept or reject the settlement.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-30-270 WAC, Prehearing conference.

New -- Chapter 463-30-270 WAC, Prehearing conference.

Changes to the Rule:
The reference in subsection (3) to "such notice" meaning the documentation of action taken at a pre-hearing conference was changed to "the order." The council does not issue notices after pre-hearing conferences; it issues orders.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-30-280 WAC, Attendance by council members at prehearing conferences.

New – Section Deleted.

Changes to the Rule:
This section was deleted. Although council members may attend prehearing conferences and are encouraged to do so, their attendance is not required. However, council members are required to be fully familiar with all issues in an energy facility siting case and as such would have been expected to have read the transcript or heard the recording of the prehearing conference at which they were not in attendance.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-30-300 WAC, Hearing schedule guidelines.

New -- Chapter 463-30-300 WAC, Hearing schedule guidelines.

Changes to the Rule:
No Changes

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-30-310 WAC, Rules of evidence.

New -- Chapter 463-30-310 WAC, Rules of evidence.

Changes to the Rule:
No Change

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-30-320 WAC, Entry of initial and final orders.

New -- Chapter 463-30-320 WAC, Preparation of recommendation to the governor.

Changes to the Rule:
The title of this chapter has been changed to "Preparation of recommendation to the governor."

This section is revised to clarify that the council does not issue initial or final orders with respect to making energy facility siting decisions. Instead, the council makes a recommendation to the governor for his or her consideration. All references to the initial or final order of the original rule have been deleted and replaced with the statement that the council will forward a recommendation to the governor containing the requirements of this section.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-30-330 WAC, Petition for review and replies.

New – Section Deleted.

Changes to the Rule:
This section has been deleted. The focus of this section had to do with a party or parties filing a petition for review of an initial order. Because the council does not issue initial or final orders, this section is not appropriate. The subject of petitions for reconsideration is addressed in Chapter 463-30-335 WAC.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-30-335 WAC, Reconsideration.
New -- Chapter 463-30-335 WAC, Petition for reconsideration of recommendations to governor.

Changes to the Rule:
The title of this section was changed to read "Petition for reconsideration of recommendations to governor."

This section is changed to clarify that petitions for reconsideration or review of the recommendation to the governor may be made to the council manager. This revised section contains information about when a petition for reconsideration must be filed and the content of petitions for reconsideration, including the specific challenged portions of the recommendation to the governor, and shall refer to the evidence in the record that is relied upon to support the petition. Other parties to the case may file an answer to the petition for reconsideration and must do so within 14 days following service of the petition for reconsideration.

Comment(s) Received Relating to this Section:
The section heading and subsection (1) refer to a "petition for reconsideration," but subsections (2) and (3) refer to a "petition for review." To be clear, the phrase "petition for reconsideration" should be used throughout this section.

Council Response to Comment(s):
Valid comment. The council revised subsection 2 and 3 of this section by changing the word "review" to "reconsideration."

Changes to the Rule Following Public Comment: (Proposed rule versus rule actually adopted):
Subsection 2 and 3 of this section now read as follows:
"(2) The petition for reconsideration shall specify the challenged portions of the recommendation to the governor and shall refer to the evidence of record and legal authority which is relied upon to support the petition.
(3) Any party may file an answer to a petition for reconsideration. The answer shall be filed with the council manager within fourteen days after the date of service of the petition and copies of the answer shall be served upon all other parties or their representatives at the time the answer is filed."

New -- Chapter 463-30-345 WAC, Recommendations – Transmittal to governor.

Changes to the Rule:
This section, previously numbered Chapter 463-30-390, has been moved to this location to create a more logical order to this Chapter. No changes have been made.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-30-390 WAC, Recommendation – Transmittal to governor.

New – Section Moved

Changes to the Rule:
This section was moved to New Chapter 463-30-345 WAC.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-30-400 WAC, Intervention.

New – Section Moved.

Changes to the Rule:
This section has been moved to Chapter 463-30-091.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-30-410 WAC, Participation by intervenor.

New – Section Moved.

Changes to the Rule:
This section has been moved to Chapter 463-30-092.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-30-420 WAC, Participation by county, city and port district representatives.

New – Section Moved.

Changes to the Rule:
This section has been moved to Chapter 463-30-093 following Chapter 463-30-090 WAC, Publicity – Commencement of adjudication proceedings.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-34 WAC, Procedure--Petitions for Rule-making and Declaratory Orders

New -- Chapter 463-34 WAC, Procedure--Petitions for Rule-making and Declaratory Orders

Old -- Chapter 463-34-010 WAC, Purpose and scope of this chapter.

New -- Chapter 463-34-010 WAC, Purpose.

Changes to the Rule:
The title of this Chapter was changed to "Purpose."

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-34-030 WAC, Petitions for rule-making - Form, content, and filing.

New -- Chapter 463-34-030 WAC, Petitions for rule-making, content, and filing.

Changes to the Rule:
The title of this Chapter was changed to read "Petitions for rule-making, content, and filing."

By removing "Form" from the title, the content of subsections (1), (2) and (3) could also be deleted. Chapter 82-05 WAC provides detail necessary for submittal of petitions for rule adoption, amendment or appeal. Including the form for such petitions in Chapter 463-34 WAC could add confusion and represents duplication in the rule-making process. That duplication has been eliminated by this amendment.

A new subsection (2) has been added requiring that parties petitioning for rule-making submit their petition in accordance with WAC 82-05-030.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-34-050 WAC, Petitions for rulemaking--Consideration and disposition.

New -- Chapter 463-34-050 WAC, Petitions for rulemaking—Consideration.

Changes to the Rule:
The title of this Chapter was changed to read "Petitions for rulemaking—Consideration.

A new subsection (1) has been added referencing WAC 82-05-040 and informing petitioners that "within a reasonable time of receipt of a petition for rulemaking, the council will send the petitioner an acknowledgement of receipt of the petition and the name and telephone number of the council's contact person."

Old number (1) is renumbered to (2).

Old number (2) is deleted. The intent of this subsection dealing with denial of a petition is included in WAC 463-34-060, Petitions for rule-making -- Disposition.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-34-060 WAC, Disposition Time.

New -- Chapter 463-34-060 WAC, Petitions for rule-making—Disposition.

Changes to the Rule:
The title of this section has been renamed "Petitions for rule-making – Disposition." The revisions in this section are intended to make the rules of EFSEC consistent with those promulgated by the Office of Financial Management, specifically WAC 82-05-040 and RCW 34.05.330. The revised rule now clarifies that within 60 days of receipt of a petition, the council shall either deny the petition and serve the petitioner with a copy of said denial or commence rule-making.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-34-070 WAC, Declaratory orders--Form, content, and filing.

New -- Chapter 463-34-070 WAC, Declaratory orders--Form, content, and filing.

Changes to the Rule:
This section contains the content and form that petitions for declaratory orders must take. The introductory paragraph is revised to clarify that petitions for declaratory orders may be filed to determine the applicability to a specified circumstance of a statute, rule, or order enforceable by the council.

Subsection (1) is revised to require that the petition clearly state that it is a petition for declaratory order.

Subsection (2) (b) is also revised to require the identification of all statutes, rules, orders, or other legal requirements that are at issue in the petition.

Subsection (2) (c) is revised to clarify that petitioners need to adhere to RCW 34.05.240(1) and to provide sufficient information to support the petitioner's request and desired outcome.

Subsection (2) (d) is revised to specifically request that the last paragraph of the petition clearly state the petitioner's desired outcome.

While the requirements for this level of detail may seem burdensome, the need to adhere to standard legal practices as described in Chapter 34.05 RCW will, in the long run, provide timely results.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-34-080 WAC, Declaratory orders--Procedural rights of persons in relation to petition.

New -- Chapter 463-34-080 WAC, Declaratory orders--Procedural rights of persons in relation to petition.

Changes to the Rule:
Subsection (1) is revised by adding a clear reference to WAC 10-05-251 with respect to the time period for announcing proceedings specified under RCW 34.05.240.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-34-090 WAC, Declaratory orders—Disposition of petition.

New -- Chapter 463-34-090 WAC, Declaratory orders—Disposition.

Changes to the Rule:

The title of this section was changed to read "Declaratory orders—Disposition."
Subsection (1) is revised by adding a clear reference to WAC 10-05-252 with respect to the form that a petition for a declaratory order or a decision by the council must take and how it shall be served upon the petitioner and all other parties described in RCW 34.05.240(3).

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-43 WAC, Procedure – Applications for expedited processing.

New -- Chapter 463-43 WAC, Procedure – Applications for expedited processing.

Old -- Chapter 463-43-010 WAC, Purpose and scope.

New -- Chapter 463-43-010 WAC, Purpose.

Changes to the Rule:
The title of this section was changed to "Purpose."

The Purpose of this section was revised for clarity. The revisions set the tone for the remainder of the Chapter; that is to describe the eligibility and processing requirements for abbreviated procedures for applications as intended in RCW 80.50.075.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-43-020 WAC, Standard application required.

New -- Chapter 463-43-020 WAC, Standard application required

Changes to the Rule:
This section was shortened, making it clear that an applicant seeking expedited processing shall submit an application for site certification and pay the appropriate fees as described in RCW 80.50.075. These revisions increase the clarity of the section by removing language that is included in WAC 463-42 and WAC 463-58 and RCW 80.50.040.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-43-030 WAC, Eligible proposals.

New -- Chapter 463-43-030 WAC, Eligible proposals.

Changes to the Rule:
No Change

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-43-040 WAC, Prior to making a determination of eligibility for expedited processing.

New -- Chapter 463-43-040 WAC, Prior to making a determination of eligibility for expedited processing.

Changes to the Rule:
In subsections (1) and (2) the term "60 days" is changed to "sixty days."

In subsection (2), the reference to city, county or regional land use plans or zoning ordinances is changed to read "city, county or regional land use plans and zoning ordinances."

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-43-050 WAC, Expedited processing determination.

New -- Chapter 463-43-050 WAC, Expedited processing determination.

Changes to the Rule:
In subsection (1), the reference to city, county or regional land use plans or zoning ordinances is changed to read "city, county or regional land use plans and zoning ordinances."

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-43-060 WAC, Effect of expedited processing.

New -- Chapter 463-43-060 WAC, Effect of expedited processing.

Changes to the Rule:
Changes to this section include; subsection (1), the "and" at the end of this subsection is deleted, subsection (2), the word "hearing" is deleted and replaced with "proceeding," and the period at the end of this subsection is deleted and replaced with a "comma," and a new subsection (3) is added to read "Continue an adjudicative proceeding that has commenced."

By adding new subsection (3), it is clear that if an application qualifies for expedited processing, an adjudicative hearing will not be conducted nor continued if already underway.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-43-070 WAC, Expedited application processing.

New -- Chapter 463-43-070 WAC, Expedited application processing.

Changes to the Rule:
The reference to "regular or special" council meetings is deleted. This is consistent with WAC 463-18.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-43-080 WAC, Recommendation – Transmittal to the governor.

New -- Chapter 463-43-080 WAC, Recommendation – Transmittal to the governor.

Changes to the Rule:
The use of the number "60" is changed to "sixty."

This section also clarified that the council will only forward to the governor a copy of the draft site-certification agreement in cases where the council is recommending approval of the subject application. The process of preparing a site-certification agreement is very time-consuming and difficult. By not preparing a draft site-certification agreement in cases where denial is recommended, both the state and the applicant will save time and money.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-47 WAC, SEPA[38] rules.

New -- Chapter 463-47 WAC, SEPA rules.

Old -- Chapter 463-47-010 WAC, Authority.

New -- Chapter 463-47-010 WAC, Authority.

Changes to the Rule:
No Change.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-47-020 WAC, Adoption by reference.

New -- Chapter 463-47-020 WAC, Adoption by reference.

Changes to the Rule:
This section is revised to clearly state that any rules adopted by reference are adopted as of the effective date of these rule revisions. An agency of state government can not adopt by reference rules of another entity without specifying the effective date of the rules they are adopting.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-47-030 WAC, Purpose.

New -- Chapter 463-47-030 WAC, Purpose.

Changes to the Rule:
No change.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-47-040 WAC, Additional definitions.

New -- Chapter 463-47-040 WAC, Additional definitions.

Changes to the Rule:
Subsection (1) is deleted. See subsection (4) below.
Subsection (2) is renumbered (1).
Subsection (3) is renumbered (2).
Subsection (4) is renumbered (3).

A new subsection (4) is added, wherein "office" is defined to be the "offices of the council."

[38] SEPA, the "State Environmental Policy Act."

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-47-050 WAC, Designation of decisionmaker.

New -- Chapter 463-47-050 WAC, Designation of decision maker.

Changes to the Rule:
No Change

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-47-051 WAC, Designation of responsible official.

New -- Chapter 463-47-051 WAC, Designation of responsible official.

Changes to the Rule:
No Change.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-47-060 WAC, Additional timing considerations.

New -- Chapter 463-47-060 WAC, Additional timing considerations.

Changes to the Rule:
Subsection (2) is deleted. The council is the lead agency for purposes of SEPA.

Subsection "(3)" is renumbered, "(2)" and revised correcting the reference to RCW 80.50.100 to RCW 80.50.090. This subsection is also revised by deleting the phrase "hearing required by RCW 80.50.100," from the last sentence. The last sentence of this section now reads, "The council shall initiate and conclude an adjudicative proceeding prior to issuance of the final EIS."

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-47-070 WAC, Threshold determination process--Additional considerations.

New -- Chapter 463-47-070 WAC, Threshold determination process--Additional considerations.

Changes to the Rule:
No Change

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-47-080 WAC, Mitigated DNS[39].

New -- Chapter 463-47-080 WAC, Mitigated DNS.

Changes to the Rule:
No Change

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-47-090 WAC, EIS[40] Preparation.

New -- Chapter 463-47-090 WAC, EIS Preparation.

Changes to the Rule:
Subsection (3) of this section was revised by deleting the reference to local agencies transferring lead-agency status to the council under WAC 197-11-940. The council has lead-agency status for all projects under its jurisdiction.

Subsection (3) (a) was deleted. This section was redundant because the council retains an independent consultant for purposes of application review and environmental assessment under RCW 80.50.071(1) (a).

Subsequent subsections were renumbered (b) to (a), (c) to (b), and (d) to (c).

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-47-100 WAC, Public notice requirements.

New -- Chapter 463-47-100 WAC, Public notice requirements.

Changes to the Rule:

No Change

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-47-110 WAC, Policies and procedures for conditioning or denying permits or other approvals.

New -- Chapter 463-47-110 WAC, Policies and procedures for conditioning or denying permits or other approvals.

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[39] DNS, a common SEPA term referring to a "determination of non significance," or representing no environmental impact resulting from a proposed activity.
[40] EIS, the SEPA term referring to an "Environmental Impact Statement."

Changes to the Rule:
No Change

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-47-120 WAC, Critical areas.

New -- Chapter 463-47-120 WAC, Critical areas.

Changes to the Rule:
This section has been revised to allow the council not to be bound by local critical-area ordinances but to consider them in its deliberative process. By deleting the word "respect" and replacing it with "consider," the council has the ability to consider alternative mitigation measures which may accomplish the same desired end as the critical-area ordinance.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-47-130 WAC, Threshold levels adopted by cities/counties.

New -- Chapter 463-47-130 WAC, Threshold levels adopted by cities/counties.

Changes to the Rule:
This section was revised to require the council to "consider" rather than to only "inquire of" threshold levels adopted by cities and counties under WAC 197-11-800(1).

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-47-140 WAC, Responsibilities of the council.

New -- Chapter 463-47-140 WAC, Responsibilities of the council.

Changes to the Rule:
No Change

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-47-150 WAC, Coordination on combined council--Federal action.

New -- Chapter 463-47-150 WAC, Coordination on combined council--Federal action.

Changes to the Rule:
No Change

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-47-190 WAC, Severability.

New -- Chapter 463-47-190 WAC, Severability.

Changes to the Rule:
No Change

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-50 WAC, Independent consultants—guidelines.

New -- Chapter 463-50 WAC, Independent consultants—guidelines.

Old -- Chapter 463-50-010 WAC, Purpose and scope of this chapter.

New -- Chapter 463-50-010 WAC, Purpose and scope of this chapter.

Changes to the Rule:
The title of this section is changed to "Purpose."

This section is edited to reflect that its purpose is to, "establish" guidelines for independent consultants rather than to publish those guidelines.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-50-020 WAC, Solicitation of proposals to perform work.

New -- Section deleted.

Old -- Chapter 463-50-030 WAC, Principles governing selection of independent consultants.

New -- Chapter 463-50-030 WAC, Principles governing selection of independent consultants.

Changes to the Rule:
No Change

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-50-040 WAC, Duties to be performed.

New -- Chapter 463-50-040 WAC, Duties to be performed by consultant.

Changes to the Rule:
The title of this section has been changed to read "Duties to be performed by consultant."

The introductory paragraph to this section is revised to clarify that the independent consultant "may undertake" assignments for additional data collection or studies. In some cases the applicant may wish to collect additional data or conduct other needed studies.

Subsection (1) is revised to include the role of the independent consultant in preparing the potential site study and to prepare a criteria document that details the content of an application for site certification. The addition of a criteria document to the potential site study provides the applicant with the minimum content that must be included in the application for site certification. If the criteria document is correct and the applicant uses it to develop the application, most of the issues that may come up regarding the project will have been addressed.

A new subsection (2) is added requiring that the independent consultant's responsibilities include reviewing the application for compliance with the construction and operation standards for energy facilities (WAC 463-62). Existing subsections (2), (3), and (4) are accordingly renumbered to reflect the addition of new subsection (2).

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-50-050 WAC, Basis for compensation.

New -- Chapter 463-50-050 WAC, Basis for compensation.
Changes to the Rule:
No Change

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-58 WAC, Fees or charges for independent consultant study, regular and expedited application processing, determining compliance and potential site study.

New -- Chapter 463-58 WAC, Fees or charges for independent consultant study, regular and expedited application processing, determining compliance and potential site study.

Old -- Chapter 463-58-010 WAC, Intent and purpose of this chapter.

New – Chapter 463-58-010 WAC, Purpose

Changes to the Rule:
The title of this chapter was changed from "Intent and purpose of this chapter" to "Purpose."

This section was revised to clarify that there may be more than one independent-consultant study necessary for the council to complete its review of an application for site certification.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-58-020 WAC, Fees for the independent consultant study.

New -- Chapter 463-58-020 WAC, Fees for the independent consultant studies.

Changes to the Rule:
The title of this section was changed to "Fees for the independent consultant studies."

The introductory section was revised to clarify that the application fee for each proposed site is for an "application for site certification," and that the fee shall be applied to the "total" cost of the independent studies. The reference in the penultimate sentence of this section to "RCW 80.50.070" was corrected to "RCW 80.50.071." The last sentence of this section was revised to remove the term "independent consultant" and replace it with "study," because it is the study that caused the fee to be required, not the independent consultant.

The contents of subsection (1) have been deleted in its entirety and replaced with new text. The new text recognizes that the initial fee of $25,000 may not be adequate to fund the studies. It is the responsibility of the council to notify the applicant and provide the applicant with an estimate of the supplemental fees necessary to complete the studies. The applicant is obligated to deposit additional funds to cover anticipated costs. This section also requires that the applicant deposit the additional funds before the study can be continued.

Subsection (3) was considered redundant and was deleted.

Subsection (4) was renumbered (3). This section was revised to remove the requirement for an agreement between the council and the applicant concerning payment of fees. The council considers payment as acceptance of the estimated cost and agreement to proceed with the study. The requirement for the council to provide the applicant with a statement of the amount due was deleted from this subsection. That requirement is included in subsection (1) of this section.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-58-030 WAC, Fees for regular application processing.

New-- Chapter 463-58-030 WAC, Fees for regular application processing.

Changes to the Rule:
A new subsection (5) has been added consistent with WAC 463-58-020(1).

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-58-040 WAC, Fees for expedited application processing.

New -- Chapter 463-58-040 WAC, Fees for expedited application processing.

Changes to the Rule:
This section has been revised to provide a statutory citation for expedited application processing, RCW 80.50.075, and to remove redundant text.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-58-050 WAC, Fees for determining compliance.

New -- Chapter 463-58-050 WAC, Fees for determining compliance.

Changes to the Rule:
This section has been revised to include a more precise statutory citation (RCW 80.50.071(1)(c)), that describes that a certificate holder must pay all reasonable costs as are actually and necessarily incurred by the council for inspection and determination of compliance with the terms and conditions of the certificate. It is further revised to require that compliance fees must be deposited within 30 days of the date the governor signed the site-certificate agreement.

Subsections (1) and (2) of this section have been deleted. The dollar amounts discussed in these deleted subsections are now covered in the introductory paragraph to this section.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-58-060 WAC, Fees for potential site study.

New -- Chapter 463-58-060 WAC, Fees for potential site studies.

Changes to the Rule:
The title of this section has been changed to "Fees for potential site studies." The change recognizes that there may be a number of studies necessary before the council can act on an application for site certification.
Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-58-070 WAC, Failure to provide necessary fees.

New -- Chapter 463-58-070 WAC, Failure to provide necessary fees.

Changes to the Rule:
This section was edited to provide greater clarity, conciseness and some degree of flexibility regarding when the council deals with an applicant or certificate holder who is delinquent in payment of required fees. In the first sentence, the 30-day grace period for making required payments was deleted. Because all funds that the EFSEC receives come either from applicants or certificate holders, each applicant or certificate holder must pay for all activities by the council related to the application. It is not appropriate for an existing certificate holder or the state to advance funds to pay for processing the applications of another developer. The requirement that all applicants or certificate holders comply with 463-58-020 though 463-58-060, payment of fees, was added.

The section was also revised requiring the applicant or certificate holder to show cause why the council should not suspend its application or site certification and deleted the requirement that they must do so by attending a council meeting. The requirement that the council consider reinstatement at the next regular council meeting was deleted. This was done for several reasons. First the council, as described elsewhere in these rules, does not hold "regular meetings," Second, in the case of a suspension, the council will not act until all necessary fees are paid, and finally, for a variety of reasons, the council may not be able to address the issue at its "next" meeting.

Comment(s) Received Relating to this Section:

1. It is recommended that the council revised this rule as follows: "…or, in the case of a certificate holder, in the council's initiation of enforcement action pursuant to WAC 463-54-070. The council will require any delinquent applicant or certificate holder to show cause why the council should not suspend application processing..."
2. The council should provide a mechanism for dispute resolution regarding fees. If a certificate holder has a good faith basis for believing that the amount of fees that has been charged is incorrect, there should be a mechanism for resolving the dispute without the certification agreement being suspended.

Council Response to Comment(s):

1. Valid comment. The council revised this section. It is not the intent of the council to terminate a Site Certification Agreement in the event of a certificate holder being delinquent in payment of necessary fees. This section has been revised to indicate that the council would initiate enforcement action consistent with Chapter 463-54-070 WAC. The section was also revised to indicate that the council shall consider reinstatement of application processing and shall reconsider its decision to take enforcement action against a certificate holder.
2. Certificate holders are always welcome to come to the council and discuss fees or other issues that may arise.

Changes to the Rule Following Public Comment: (Proposed rule versus rule actually adopted):
This section was revised to read as follows:

"Failure to comply with WAC 463-58-020 through 463-58-060 shall result, in the case of an applicant, in suspension of all application processing activities or, in the case of a certificate holder, in the council's initiation of enforcement action pursuant to WAC 463-54-070. The council will require any delinquent applicant to show cause why the council should not suspend application processing. Following deposit of all required fees the council shall in the case of application processing, consider reinstatement of application processing, or in the case of a certificate holder, reconsider enforcement action."

Old -- Chapter 463-58-080 WAC, Payment, reporting and auditing procedures.

New -- Chapter 463-58-080 WAC, Payment, reporting and auditing procedures.

Changes to the Rule:
Subsection (1) of this section was revised to clarify that the council will provide a statement of actual expenditures made against deposited funds. The original text indicated that this would be done following the initial deposit. However, at that time, there would be nothing to report. The section was also clarified to require an accounting of all expenditures, not just those deemed "reasonable and necessary" by the council. This section is also revised to clarify that the applicant or certificate holder must restore the amount on deposit to levels established in WAC 463-58-020 through WAC 463-58-070.

The requirement in subsection (2) of this chapter was revised by deleting reference to increasing funds on deposit to cover increased costs for application processing and compliance monitoring. This subsection now says; "Any funds remaining unexpended shall be refunded to the certificate holder, or, in the case of an applicant, to the applicant or, at the applicant's option, credited against required deposits of a certificate holder."

Comment(s) Received Relating to this Section:
NONE

PART II -- Applications and Standards

Old -- Chapter 463-42 WAC, Procedure--guidelines-applications for site certification.

New -- Chapter 463-60 WAC, Applications for site certification.

Changes to the Rule:
This Chapter has been revised to provide more specificity with respect to the nature of and the quality of the content contained in applications for site certification. Throughout this Chapter, revisions have been made that provide better organization to the requirements for an application for site certification. Applicants are directed to the new Chapter 463-62 WAC, Construction and Operation Standards for Energy Facilities and reminded that all applications for site certification must demonstrate how their projects meet the siting standards. Although EFSEC is the one-stop permitting entity for major energy facilities, this does not imply that only EFSEC has an interest in mitigations proposed or necessary for developing the proposed project. Applicants are encouraged to work with other agencies to gather necessary information regarding mitigation and other requirements that need be met to develop energy facilities.

Old -- Chapter 463-42-010 WAC, Purpose and scope.

New -- Chapter 463-60-010 WAC, Purpose.

Changes to the Rule:
The title of this section was changed to "Purpose."

As mentioned above, this Chapter requires that applications for site certification contain information as to how the proposed energy facility will satisfy the construction and operation standards in Chapter 463-62 WAC. This section also encourages applicants to discuss their plans and proposed mitigation with other entities that may have expertise in any given area.

References to plans for project termination and site restoration have been deleted. A new section has been added to this rule that includes all applicable requirements for site restoration and preservation, Chapter 463-72 WAC.

Comment(s) Received Relating to this Section:
The sentence proposed for addition to the first paragraph does not belong in this statement of purpose. It is more appropriate to address expectations in other sections of Chapter 463-42.

Council Response to Comment(s):
Comment noted – The council believes that this is the correct placement of this item.

Changes to the Rule following Public Hearings: (Proposed rule versus rule actually adopted):
NONE

Old -- Chapter 463-42-012 WAC, General – Organization – Index.

New -- Chapter 463-60-012 WAC, General – Organization – Index.

Changes to the Rule:
References to new WAC chapters were corrected.

Comment(s) Received Relating to this Section:
This section acknowledges that an applicant's environmental report prepared under NEPA can be substituted for appropriate portions of the application for site certification. This should be expanded to include other environmental documents prepared for federal agencies with jurisdiction over energy facilities.

Council Response to Comment(s):
The council always encourages applicants to use existing information if it is current and pertinent to the application being considered by the council. The language in this section does not exclude or limit types of environmental reports used to support an application for site certification.

Changes to the Rule Following Public Comment: (Proposed rule versus rule actually adopted):
NONE

Old -- Chapter 463-42-015 WAC, General – Description of applicant.

New -- Chapter 463-60-015 WAC, General – Description of applicant.

Changes to the Rule:
No Changes

Comment(s) Received Relating to this Section:
NONE

New -- Chapter 463-42-021 WAC, Council recognizes pressing need for energy facilities.

New -- Chapter 463-60-021 WAC, Council recognizes pressing need for energy facilities.

Changes to the Rule:
This section was added to clarify consistent with RCW 80.50.010 the pressing need for energy facilities. This addition clarifies that applicants need not address the question of need for energy in its application. That is not to say that applicants can't address this issue, quite the contrary, if they see a need they may address this question.

Comment(s) Received Relating to this Section:
Requiring an applicant to meet a need standard is consistent with the council's mission to balance demand for energy with public interest.

463-72-021 only addresses the demand side of providing a balance of need with protecting public interest.

Council Response to Comment(s):
Comment noted. This is not the view of the council. The role of the council is to site energy facilities and to do so in a manner that protects public health and the environment. The council's role is not to determine the need for a specific facility or to determine appropriate types of energy facilities.

Changes to the Rule following Public Hearings: (Proposed rule versus rule actually adopted):
NONE

Old -- Chapter 463-42-025 WAC, General – Designation of agent.

New -- Chapter 463-60-025 WAC, General – Designation of agent.

Changes to the Rule:
No Changes

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-035 WAC, General – Fee.

New -- Chapter 463-60-035 WAC, General – Fee.

Changes to the Rule:
No Changes

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-045 WAC, General – Where filed.

New -- Chapter 463-60-045 WAC, General – Where filed.

Changes to the Rule:
No Changes

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-055 WAC, General – Form and number of copies.

New -- Chapter 463-60-055 WAC, General – Form and number of copies.

Changes to the Rule:
Subsection (1) of this section has been revised to remove the required number of copies that an applicant needs to submit to the council. This was previously set at thirty-five copies. This number of copies may or may not be sufficient for the council, local governments, interested parties and intervenors or other legal requirements of the council. The council will inform the applicant as to the number of application copies necessary to meet the needs of the council and other parties. This will be based on the number of state agencies opting to sit on the council for a particular hearing, the number of local entities or jurisdictions that the energy facility will affect and that have seats on the council, and the number of locations at which the council is required to place applications for public preview purposes. This will eliminate the need for applicants to print additional copies at a later date and a greater cost.

A new subsection (3) is added to require the applicant to identify applicable land use plans and zoning ordinances for the project site. This requirement was previously included in Chapter 463-42-362 WAC. The old requirement was for the applicant to submit "copies" of land use and zoning requirements for a specified area around the proposed energy facility. This has been revised to require the applicant to "identify" land use plans and zoning applicable to the proposed site.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-065 WAC, General – Full disclosure by applicants.

New -- Chapter 463-60-065 WAC, General – Full disclosure by applicants.

Changes to the Rule:
No Changes

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-075 WAC, General assurances.

New -- Chapter 463-60-075 WAC, General assurances.

Changes to the Rule:
This section was revised to include, as one of the required assurances, that the applicant describe its commitment to the requirements of chapter 463-55 WAC, Site Restoration and Preservation. Although site restoration planning has always been a part of an application for site certification (chapter 463-42-655, 665, 675 WAC), a requirement for the applicant to provide an assurance to its commitment to site restoration and preservation was omitted from earlier council rules.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-085 WAC, General – Mitigation measures.

New -- Chapter 463-60-085 WAC, General – Mitigation measures.

Changes to the Rule:
Subsection (1) of this section has been revised to require the applicant to "summarize" as opposed to the previous requirement that the section "describe" the means proposed to be used to mitigate impacts from the energy facility. This subsection is also revised to clarify that mitigation measures are required for impacts to the natural or built environment during the construction, operation and decommissioning periods of the proposed project, for other facilities associated with the proposed project and for any alternatives considered and being brought forward in the application for site certification.

A new subsection (2) addressing "fair treatment" has been added. The subject of socioeconomics or as referred to here, "fair treatment", was discussed by the EFSEC stakeholder group. As a result, the stakeholder-group report contained two separate options for the council to consider as potential standards for addressing the impacts on society, communities and community services as a result of developing an energy facility.

The council, in discussions during several executive committee meetings in 2003, could not find a way to create a definitive standard that would need to be satisfied before an energy facility could be recommended for approval to the governor. The decision of the council is to add this "fair treatment" section to the application guidelines. Under this rule revision, applicants will be required to describe how "the proposal's design and mitigation measures ensure that no group of people, including any racial, ethnic, or socioeconomic group, bear a disproportionate share of the environmental or socioeconomic impacts resulting from the construction and operation of the proposed facility."

Comment(s) Received Relating to this Section:
Subsection (2) entitled "Fair Treatment" is not clear. Most energy facilities (indeed most industrial facilities of any type) are likely to have more impact (both positive and negative) in the immediate area in which they are located. This regulation needs to be more carefully crafted to capture what appears to be the council's intent regarding "environmental justice."

Council Response to Comment(s):
The intent of this section is to demonstrate to the council that any impacts resulting from the construction of an energy facility do not disproportionably impact any one segment of the population or group of people. The council believes subsection (2) of this section clearly describes the intent of the council, especially when considered along with the requirements of New Chapter 463-60-101 WAC, General -- Consultation.

Changes to the Rule Following Public Comment: (Proposed rule versus rule actually adopted):
NONE

Old -- Chapter 463-42-095 WAC, General – Sources of Information.

New -- Chapter 463-60-095 WAC, General – Sources of Information.

Changes to the Rule:
NONE

New Chapter 463-42-101 WAC, General – Consultation.

New -- Chapter 463-60-101 WAC, General – Consultation.

Changes to the Rule:
This new section is added clarify for the council and others reading an application for site certification that the applicant has been in contact with local, state and federal agencies and governments, Indian Tribes, non-profit organizations and community-based citizen and interest groups prior to submission of the application to the council. While this is an additional requirement for applications, it removes doubt about the extent of contact and discussion an applicant has or has not had with interested parties. In fact, most applicants have extensive discussions with other parties before and during the preparation of their application. Simple documentation of these contacts will help speed deliberation on the application.

Subsection (2) is another offshoot of the council's discussions about the proposal to establish a "socioeconomics" standard for new energy facilities. While the council did not adopt a specific socioeconomics standard, the principles contained in the two standards proposed in the Krogh – Leonard report are used throughout these proposed rule revisions. The council takes seriously the need for meaningful involvement of all local and community groups, public and other organizations and the need to require applicants to document or otherwise describe their efforts to involve or to contact these groups.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-105 WAC, General – Graphic material.

New -- Chapter 463-60-105 WAC, General – Graphic material.

Changes to the Rule:
No Changes

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-115 WAC, General -- Specific contents and applicability.

New -- Chapter 463-60-115 WAC, General -- Specific contents and applicability.

Changes to the Rule:
No Changes

Comment(s) Received Relating to this Section:
NONE

New -- Chapter 463-42-116 WAC, General -- Amendments to applications, additional studies, procedure.

New -- Chapter 463-60-116 WAC, General -- Amendments to applications, additional studies, procedure.

Changes to the Rule:
This section was previously located at 463-42-690 WAC. It was moved to this location as a part of the general application requirements. No changes were made to this section.

Comment(s) Received Relating to this Section:
The requirement in subsection (3) is not necessary and departs from the council's historic practice. An applicant would typically include commitments made during the hearing in its proposed Site Certification Agreement. There is no need to file a separate list with the council at the conclusion of the hearing.

Council Response to Comment(s):
T his requirement has not changed. It is the practice of the council to have certificate holders prepare a list of changes to its application and to identify commitments made following the adjudicative hearing. This information is beneficial to the council when preparing a Site Certification Agreement.

Changes to the Rule following Public Hearings: (Proposed rule versus rule actually adopted):
NONE

New Chapter 463-42-117 WAC, General – Applications for expedited processing.

New -- Chapter 463-60-117 WAC, General – Applications for expedited processing.

Changes to the Rule:
This new section is taken in part from old Chapter 463-43-020 Standard application required and 030 WAC Eligible proposals. This new section describes the necessary content of applications for expedited processing, including prior completion of an environmental checklist delineated in WAC 197-11-960 and the reasons why the potential project impacts are not significant enough for the council to require a full review of the application for certification under the provisions of chapter 80.50 RCW.

Applications for expedited processing, Chapter 463-43 WAC, must address all sections of chapter 463-42 WAC, and chapter 463-62 WAC, Construction and operation standards for energy facilities. Applicants must also submit those fees and costs for independent

consultant review and application processing pursuant to RCW 80.50.071(1) (a) and (b) and chapter 463-58 WAC.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-125 WAC, Proposal – Site description.

New -- Chapter 463-60-125 WAC, Proposal – Site description.

Changes to the Rule:
No Changes

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-135 WAC, Proposal--Legal descriptions and ownership interests.

New -- Chapter 463-60-135 WAC, Proposal--Legal descriptions and ownership interests.

Changes to the Rule:
Subsection (2) was revised to delete the term "Ancillary" and replace it with the term "Associated and transmission" facilities.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-145 WAC, Construction on site.

New -- Chapter 463-60-145 WAC, Construction on site.

Changes to the Rule:
No Changes

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-155 WAC, Proposal – Energy transmission systems.

New -- Chapter 463-60-155 WAC, Proposal – Energy transmission systems

Changes to the Rule:
This section is revised to clearly require applicants for site certification to identify the federal, state, and industry criteria used in the conceptual design, route selection, and construction for all facilities identified in RCW 80.50.020(6)and (7), and to indicate how such criteria are met. Previously, applicants did not always identify the specific criteria that they were supposed to meet or the manner in which they intended to meet those criteria. This addition will save the council the time and effort of trying to determine

which criteria are proposed to be used and satisfied and will save the applicant time when asked to further explain its intentions.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-165 WAC, Proposal – Water supply system.

New -- Chapter 463-60-165 WAC, Proposal – Water supply.

Changes to the Rule:
The title of this section was changed to "Proposal – Water supply."

The EFSEC stakeholder group heard several presentations on the subject of water rights during its period of operation. This included a meeting on January 31, 2002, at which four questions were framed for future consideration.

1. How can EFSEC and Ecology's jurisdiction be clarified?
2. Should EFSEC adopt a rule on water-right transfers?
3. What should the process be by which water matters are worked into an EFSEC Application?
4. Should Ecology standards apply to the transfer of water rights?

During the period of January 31 to July 12, 2003, the stakeholder group formed a small work group that addressed these questions. During these discussions and consultation with the Department of Ecology, the council heard a total of six presentations on a proposed EFSEC rule for a "suggested standard for water rights" for EFSEC consideration. This started with a general discussion on "quantity issues" that resulted in the development of a "strawdog rule" for discussion purposes. In the end, this emerged as a proposed standard with near full consensus from the stakeholder group. Some members of the group did not feel that the policy section fit with the standard and questioned whether it should be removed. In the end, two drafts, one with and one without the policy statement were included in the stakeholder-group report.

The requirements of this section have been substantially revised to require greater detail of information in the application for site certification addressing water supplies. The council deliberated the merits of a standard and at one point reached a consensus on a standard for water quantity and agreed to place it on its web site for public review and discussion.

During discussions amongst members of the council and staff, the proposed standard placed on the web site was further refined to make it more concise and to place this requirement in the application requirements as opposed to a specific standard that would need to be met. The reason for moving these requirements to the application content section was that they were deemed to consist of processes rather than standards or numeric conditions that needed to be satisfied.

A new subsection (1) is added requiring the applicant to describe the location and type of water intakes, water lines, pipelines and water conveyance systems and other associated facilities required for providing water to the energy facility for which certification is being requested.

New subsection (2) requires the applicant to consider water-supply alternatives, including describing alternatives and associated costs of implementing such alternatives and the resulting benefits and penalties that would be incurred. The applicant must also include detailed information regarding using air cooling, including associated costs, as an alternative to consumptive water use,. A description of water-conservation methods that will be used during construction and operation of the facility also needs to be included. Previously, although not specifically asked for in the current EFSEC application guidelines, applicants routinely added this information to one extent or another.

New subsection (3) deals with application requirements pertaining to water rights and authorizations. Applicants proposing to use surface or ground water for a facility must describe the source and the amount of water required during construction and operation of the energy facility and:

1. Provide a water-use authorization or contract to use water;
2. Submit a water-right permit or water-right certificate in an amount sufficient to meet the need of the facility and evidence that the water-right permit is in good standing, or that the certificate has not been relinquished through non-use;
3. For new surface or ground water withdrawals, or applications for water right changes or transfers of existing rights or certificates for withdrawal, submit appropriate application(s) for such rights, certificates or changes in rights and certificates, to the Department of Ecology prior to submission of the application for site certification;
4. Include report(s) of examination identifying the water rights, or water-right changes, submitted to and under review by the Department of Ecology, the quantities of water (in gallons per minute and acre feet per year) that are eligible for change, together with any limitations on use, including time of year. The report(s) of examination shall also include comments by the Washington State Department of Fish and Wildlife with respect to the proposed water-right applications under review by the Department of Ecology;
5. Include a description of mitigation proposed for water supply and any and all mitigation required by the Department of Ecology pursuant to the review of water rights or certificates or changes to water rights or certificates;

The intent of these additions is to ensure that there is consistency in how the Department of Ecology and the council address the issue of new or existing water rights and their allowable uses. Also the applicant with a valid water right will experience fewer delays in its application process than those applicants without valid water-use rights or contracts.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-175 WAC, Proposal – System of heat dissipation.

New -- Chapter 463-60-175 WAC, Proposal – System of heat dissipation.

Changes to the Rule:
This section was revised to clarify that the application must include a description of proposed and alternative systems for heat dissipation.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-185 WAC, Proposal – Characteristics of aquatic discharge systems.

New – Chapter 463-60-185WAC, Proposal – Characteristics of aquatic discharge systems.

Changes to the Rule:
This section has been revised to provide clarity with regard to the level of detail that applications need to have when describing the characteristics of a proposed wastewater-discharge system. It is the experience of the council that applications, while they include discussions about proposed wastewater discharges, commonly do not include sufficient detail to satisfy the interests of the council or other parties. The additions to this section are intended to provide greater understanding for the council and greater certainty for applicants that their applications will not be found deficient due to a lack of necessary information.

Subsection (1) has been expanded to require applications to include information about locations of discharge systems, discharge rates and sizes of proposed discharge pipes. The characteristics of the receiving water also need to be described including flows, volumes, depth and width of receiving water at discharge point and whether a dilution zone is required due to the nature of the proposed outfall structure and dilution mechanism.

A new subsection (2) describes the necessary information when a change is proposed to an existing discharge system that the applicant does not own or otherwise control. Information is required about the ownership of the discharge system, terms of any use agreement, responsibility for operation and maintenance, existing state or NPDES permit numbers and capacities of the discharge line.

When a discharge is proposed to a publicly-owned treatment works, the application must also provide an engineering analysis showing that the proposed discharge will not cause the waste-treatment facility to violate its authorized discharge limits, including both the quality of the discharge and the volume of the discharge, or to violate the permits governing its operation.

This information is necessary in order for the council to understand the nature of proposed discharges, their relationship to other discharges and the possible impacts of the discharge on receiving waters.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-195 WAC, Proposal -- Wastewater treatment.

New – Chapter 463-60-195 WAC, Proposal -- Wastewater treatment.

Changes to the Rule:
This section has been revised to more clearly identify the information that the council needs in order to evaluate proposed wastewater-treatment systems. One additional clarification is added in the application to identify the type of storage vessel that may be used in the event of a facility intending to retain wastes for purposes of recycling or composting.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-205 WAC, Proposal – Spillage prevention and control.

New – Chapter 463-60-205 WAC, Proposal – Spillage prevention and control.

Changes to the Rule:
In past council proceedings, much has been said about the adequacy of plans or proposals for dealing with spills. This section has been modified to spell out council expectations about the level of detail necessary at the application stage of a proposed energy facility. This section is clarified to indicate that the application must include the "general content" necessary for a construction and operational phase for spill prevention and a counter-measure plan (Chapter 40 CRF Part 112 and Hazardous Waste Management Plan) and that a final plan will be required before commencement of construction.

Comment(s) Received Relating to this Section:

1. The proposed addition is unnecessary because the existing language is complete in specifying that applicants must describe measures for preventing and controlling spills.
2. A hazardous waste management plan is prepared by the state or local government – See RCW 70.105.200 and is not relevant to the application.
3. There should be no presumption that 40CFR Part 112 applies.
4. This entire section should be deleted and incorporated in WAC 463-42-535.

Council Response to Comment(s):

1. This sentence is added to more clearly explain what is required in this section and the citation is appropriate..

2. Comment noted. This is intended to direct an applicant to have information in the application that will allow the council to evaluate if the application is consistent with the requirements of 40 CFR 112.
3. 40CFR Part 112 may or may not apply depending on the circumstances of the application.
4. This chapter contains the content requirements for applications for site certification. In the interest of having complete applications, all requirements are identified.

Changes to the Rule following Public Hearings: (Proposed rule versus rule actually adopted):
NONE

Old -- Chapter 463-42-215 WAC, Proposal – Surface water runoff.

New -- Chapter 463-60-215 WAC, Proposal – Surface water runoff.

Changes to the Rule:
This section was revised to clarify that applications need to contain the general content of the more detailed surface runoff plans that are required prior to commencement of construction and/or operation of the facility.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-225 WAC, Proposal – Emission control.

New -- Chapter 463-60-225 WAC, Proposal – Emission control.

Changes to the Rule:
This section is revised to clarify that applications for site certification must include information describing and quantifying air emissions during the construction and operational phases of the energy facility that are both subject to and exempt from local, state and or federal regulations. In the case of an exemption from a regulation, the application must include the basis for that exemption.

A new subsection (4) is added wherein the application must identify all state and federal air emission permits that would be required after approval of the site certification agreement by the governor, and the timeline for submission of the appropriate applications for such permits. This helps the council to ensure that all permits are considered, and it assures applicants that they are not overlooking any necessary permits.

Subsection (5) has been revised by deleting a list of several compounds that the application "should deal with." This subsection is rewritten to require the application to describe and quantify all emissions of greenhouse gases.

Subsection (6) has been revised to clarify that nuclear-fueled power plants "shall address" optional plant designs instead of, as it previously read, "should deal with" optional plant designs as these may relate to gaseous emissions.

It should also be noted that EFSEC has adopted new air permitting rules effective September 2004.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-235 WAC, Proposal – Construction and operation activities.

New – Chapter 463-60-235 WAC, Proposal – Construction and operation activities.

Changes to the Rule:
This section was revised to clarify that the "application" as opposed to the "applicant" for site certification must include a proposed construction schedule, identify major milestones, describe activity levels versus time in terms of craft and non-craft employment and describe proposed operational employment levels.

Comment(s) Received Relating to this Section:
This section and sections 245 and 255 could be combined under the heading of construction management.

Information on employment for construction and operation could be included in Chapter 463-42-535 WAC.

Council Response to Comment(s):
Comment noted. The council believes that this is the correct placement of this item.

Changes to the Rule Following Public Comment: (Proposed rule versus rule actually adopted):
NONE

Old -- Chapter 463-42-245 WAC, Proposal – Construction management.

New -- Chapter 463-60-245 WAC, Proposal – Construction management.

Changes to the Rule::
This section was revised to clarify that the "application" as opposed to the "applicant" for site certification must describe the organizational structure including the management of project quality and environmental functions.

Comment(s) Received Relating to this Section:
This section and sections 235 and 255 could be combined under the heading of construction management.

Information on employment for construction and operation could be included in Chapter 463-42-535 WAC.

Council Response to Comment(s):
Comment noted. The council believes that this is the correct placement of this item.

Changes to the Rule following Public Hearings: (Proposed rule versus rule actually adopted):
NONE

Old -- Chapter 463-42-255 WAC, Proposal – Construction methodology.

New --Chapter 463-60-255 WAC, Proposal – Construction management.

Changes to the Rule:
This section was revised to clarify that the "application" as opposed to the "applicant" for site certification must detail the construction procedures, including use of major equipment, proposed for any construction activity within watercourses, wetlands and other sensitive areas.

Comment(s) Received Relating to this Section:
This section and sections 235 and 245 could be combined under the heading of construction management.

Information on employment for construction and operation could be included in Chapter 463-42-535 WAC.

Council Response to Comment(s):
Comment noted. The council believes that this is the correct placement of this item.

Changes to the Rule following Public Hearings: (Proposed rule versus rule actually adopted):
NONE

Old -- Chapter 463-42-265 WAC, Proposal – Protection from natural hazards.

New -- Chapter 463-60-265 WAC, Proposal – Protection from natural hazards.

Changes to the Rule:
This section was revised to clarify that the "application" as opposed to the "applicant" for site certification must describe the means to be employed for protection of the facility from earthquake, volcanic eruption, flood, tsunami, storm, avalanche or landslide and other major natural disruptive occurrences.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-275 WAC, Proposal – Security concerns.

New – Chapter 463-60-275 WAC, Proposal – Security concerns.

Changes to the Rule:
This section was revised to clarify that the "application" as opposed to the "applicant" for site certification must describe the means employed for protection of the facility from sabotage, terrorism, vandalism and other security threats. The threat of terrorism was added.

Comment(s) Received Relating to this Section:
The addition of terrorism seems unnecessary since this section already includes "sabotage" and other "security threats."

Council Response to Comment(s):
Comment noted.

Changes to the Rule following Public Hearings: (Proposed rule versus rule actually adopted):
NONE

Old -- Chapter 463-42-285 WAC, Proposal – Study schedules.

New – Chapter 463-60-285 WAC, Proposal – Study schedules.

Changes to the Rule:
This section was revised to clarify that the "application" as opposed to the "applicant" for site certification must furnish a brief description of all present or projected schedules for additional environmental studies. The studies' descriptions should outline their scope and indicate projected completion dates.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-295 WAC, Proposal--Potential for future activities at site.

New – Chapter 463-60-295 WAC, Proposal--Potential for future activities at site.

Changes to the Rule:
This section was revised to clarify that the "application" as opposed to the "applicant" for site certification must describe the potential for any future additions, expansions, or further activities that might be undertaken by the applicant on or contiguous to the proposed site.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-296 WAC, Proposal -- Analysis of alternatives.

New – Chapter 463-60-296 WAC, Proposal -- Analysis of alternatives**.**

Changes to the Rule:
This section was moved from Chapter 463-42-645 to this location and renumbered as Chapter 463-60 296 WAC.

This section was revised to clarify that the "application" as opposed to the "applicant" for site certification must include an analysis of alternatives for site, route, and other major elements of the proposal.

Comment(s) Received Relating to this Section:
NONE

New -- Chapter 463-42-297 WAC, Pertinent federal, state and local requirements.

New – Chapter 463-60-297 WAC, Pertinent federal, state and local requirements.

Changes to the Rule:
This section was moved from Chapter 463-42-685 to this location and renumbered Chapter 463-60-297 WAC.

Subsection (1) was edited to provide greater clarity about the various types of federal, state or local requirements, if the proposed energy project were not under the jurisdiction of the council, that the application must list. This is added to ensure all requirements applicable to the project are considered.

Subsection (2) is revised to clearly indicate that inadvertent omission of a pertinent requirement shall not invalidate the application. However, missing or omitted information may cause a delay in council review of the application.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-302 WAC, Natural environment – Earth.

New – Chapter 463-60-302 WAC, Natural environment – Earth.

Changes to the Rule:
The use of the term "applicant" is changed throughout this section to "application."

A new subsection (2) was added requiring the application to show that the proposed energy facility will comply with the state building code provisions for seismic hazards applicable at the proposed location. This new requirement is consistent with Chapter 463-62-020 WAC, Seismicity standard for construction and operation of energy facilities. The seismicity standard has been added to these rules based on a need for greater understanding of how the proposed facility will be designed and in an interest of limiting debate about such standards during adjudicative hearings. The seismicity standards associated with the universal building code are accepted as appropriate for most

construction practices. More discussion on this standard can be found in the new Chapter 463-62 WAC, Construction and operating standards for energy facilities.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-312 WAC, Natural environment – Air.

New -- Chapter 463-60-312 WAC, Natural environment – Air.

Changes to the Rule:
The use of the term "applicant" is changed throughout this section to "application." It should also be noted that EFSEC has adopted updated air permitting rules.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-322 WAC, Natural environment – Water.

New -- Chapter 463-60-322 WAC, Natural environment – Water.

Changes to the Rule:
The use of the term "applicant" is changed throughout this section to "application."

In subsection (1), the second sentence was deleted. This requirement is included in Chapter 463-42-165 WAC, Proposal – Water supply.

Subsection (4) Floods was revised by deleting the necessity of completing flood analysis for the 500-year-flood event and by adding the requirement that applications contain a description of possible flood impacts at the site, as well as possible flood-related impacts both upstream and downstream of the proposed facility as a result of construction and operation of the facility. While these requirements were generally assumed to be a part of the application process, adding the specific requirements eliminates confusion and creates more certainty for developers.

Subsection (5) Ground water movement/quantity/movement has been revised to clarify the information that is necessary for the council to assess impacts of a proposed energy facility. Because of limited water supplies in most areas of Washington State, more attention is being placed on the linkages and impacts of water withdrawals on surface and ground waters. These revisions require assessment of impacts on surface waters that result from ground water withdrawals and likewise for impacts on ground water from surface waters withdrawals. Because any impact on existing water users is not allowed, Chapter 90.54 RCW, the state water code, impacts must be mitigated.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-332 WAC, Natural environment – Plants and animals.
New – Chapter 463-60-332 WAC, Natural environment – Plants and animals.

Changes to the Rule:
The title of this section was changed to Natural environment – Habitat, vegetation, fish and wildlife.

The stakeholder group, held extensive discussions on a proposed fish and wildlife standard. It heard from representatives of the Departments of Fish and Wildlife in both Washington and Oregon. The Oregon Department made a presentation to the group describing its habitat mitigation policy, how it is intended to work to protect fish and wildlife habitat and how it was incorporated into the Oregon Energy Facility Siting Council (EFSC) rules.

It was reported to the stakeholder group that the Oregon EFSC adopted the fish and wildlife department's mitigation goals as one of its standards. The EFSC rules now contain a "Fish and Wildlife Habitat Standard" (OAR 635-415-0025). "This standard requires EFSC to make a finding that the design, construction, operation and retirement of the facility are consistent with the fish and wildlife mitigation goals of OAR 635-415-0025."

Oregon, like Washington, must provide a balance with respect to need for energy. In Oregon a facility may still be approved even if it does not fully meet a standard. The EFSC has a balancing test that weighs overall public benefits. If the overall public benefits outweigh the anticipated damage, the facility may be approved.

The stakeholder group asked the Washington Department of Fish and Wildlife (WDFW) to lead a small work group and propose a Fish and Wildlife standard for the stakeholder group to consider. In doing so, WDFW put into a proposed rule the current policy and guidance for determining mitigation necessary to offset impacts resulting from development. The initial review of this proposal did not provide a consensus on the merits of the proposal. Some stakeholders felt the rule lacked certainty, some felt it was too detailed and suggested some of the detail belonged in guidelines rather than in a rule, while others felt the level of detail was appropriate and necessary to provide assurances. Others questioned the proposed goal of no net loss and the possibility of aiming for a net gain in habitat. In the end, two proposed Fish and Wildlife rules were proposed for the council to consider, one with the detail as proposed by the Department of Fish and Wildlife and another with less detail that provided for the possibility of putting more information into guidelines.

The council placed the WDFW proposed standard on its website for public comment and discussion. Prior to the August 10, 2004 Public Hearing, the council received conflicting comments suggesting that fish and wildlife standards should be adopted by WDFW, that a proposed 13-page rule was anything but clear, objective and quantifiable, that the no-net-loss provision may be in conflict with the State Environmental Policy Act and that the

proposed requirements may not apply to energy facilities that are not under the jurisdiction of the council.

After review of the early comments received on this proposed standard and after discussions by the council and staff, the council opted to place the emphasis of the suggested fish and wildlife standards in newly numbered Chapter 463-60 WAC. The council also relied on a set of existing criteria for the content of potential site studies. The result is a much more concise standard, Chapter 463-62-040 WAC Fish and Wildlife, containing the detail of both the existing potential site study requirements and the proposed standard in the application content, Chapter 463-60 WAC.

The original content of Chapter 463-42-332 has been deleted and new text describing application content for fish and wildlife is provided. Old subsection (2) has been included in new subsection (2) (e), and old subsection (3) has been included in new subsection (2) (d). Also, the introduction includes similar principles as the old introduction to this section.

The introduction is taken in part from the rule proposed by WDFW, starts with the identification of all habitat types that may be directly or indirectly impacted by the proposed energy facility and includes a definition of the term "project site."

Subsection (1) describes the initial assessment of existing habitats and their uses. The habitat assessment must be prepared by a qualified professional and must contain a detailed description of the habitats; habitat health and species present; identification of important, threatened or endangered species or candidate species and a discussion of federal, state or local special management recommendations that have been developed for species on or adjacent to the proposed site.

Subsection (2) requires identification of impacts that may result from development of a proposed energy facility or its associated facilities. This will include estimating short and long term impacts to both habitat and species present. This will also include the acreage of habitat impacted and the number of individual species and individuals affected, threatened or removed. This needs to include a discussion of impacts to or resulting from:

- Water and water courses
- Noxious or non-native species
- Species adjacent to the site
- Migration routes
- Important or priority species
- Disruption of species
- Risk to avian species
- Spills

Subsection (3) describes the content of mitigation plans necessary when an impact to habitat of fish and wildlife species occurs. The mitigation plan provides a detailed

description of measures proposed to protect habitat and species through avoidance, minimization of impacts, mitigation through compensation or preservation and restoration of existing habitats and the species that may be proposed to be used to compensate for any impacts that have been identified. Included in the mitigation plan is a description of how mitigation will achieve the desired results and its probability of success, an implementation schedule and possible future of the mitigation features. The mitigation plan should provide for the use of proven mitigation methods. However, other or non-proven methods may be approved by the council on a case-by-case basis. Lastly, the mitigation plan needs to include a plan for management of the proposal to assure its successful performance.

Subsection (4) requires applicants to consider specific project-type guidelines of state or federal agencies when preparing their mitigation plans. Two examples of a project-type specific guideline are the fish and wildlife wind power guidelines that were developed in August 2003 and Policy M-5002 dated January 18, 1999.

Subsection (5) requires that applications include a listing and the status of any federal approvals necessary for habitat vegetation or fish and wildlife impacts.

The inclusion of these guidelines will provide applicants and other interested parties the assurance that consideration of fish and wildlife habitat and other impacts is important to the council. These guidelines are intended to provide applicants with clear understanding about the level of detail required in applications for energy facilities.

Comment(s) Received Relating to this Section:

1. Recommend the WDFW WP guidelines be applied to applications for wind power.
2. Recommend that the WDFW regional office issue an approval for wind power projects.
3. Believe that the WDFW WP guidelines are adequate and that no additional conditions should apply.
4. If EFSEC only wants to give due consideration to the WP Guidelines, we hope that EFSEC will reconsider and discuss our June 16th comments on WAC 463-42-332 (2) (e), (g), and 4.
5. It is unnecessary to impose additional standards that go beyond the WP Guidelines.
6. The additional requirements do not consider site specific conditions. For example, EFSEC would impose the same amount of studies and mitigation for a high quality habitat site and a low quality habitat site.
7. Read literally, this section appears to impose an unreasonable requirement to provide compensatory mitigation for every impact to any habitat, no matter how insignificant the impact or how unimportant the habitat. Consider modifying this section to require compensatory mitigation only when there will be a "significant," "substantial," or "material" impact to habitat or wildlife.
8. Both of these sections require that information be prepared by a qualified professional. This seems gratuitous and unnecessary. Unless the council is prepared to state what constitutes qualifications the phrases should be deleted.
9. Section 333 should be incorporated into section 332.

10. Quantify impacts to any species of importance -- Believe it would be difficult, impossible and irrelevant to quantify individuals.
11. Will using WDFW WP Guidelines supersede WAC 463-42-332 requirements?
12. WDFW WP Guidelines should be sufficient for meeting standard.
13. It is not appropriate to require applicants to assess risk of collision of avian species with a project during both day and night. It has been shown that nighttime studies do not always reveal any new information, thus they should not be required. Recommend the WDFW WP Guidelines

Council Response to Comment(s):

1. and 3. – The council does recognize the department of Fish and Wildlife Wind Power guidelines. The wind power guidelines are not standards. They do provide a format and means for providing information that is necessary for the council to evaluate an application. Chapter 463-42-332(4) requires applications to "…give due consideration to any project-type specific guidelines established by state and federal agencies for assessment of existing habitat, assessment of impacts and development of mitigation plans." An example is the reference to WDFW Wind Power Siting Guidelines in Chapter 463-60-332(4). Also, Chapter 463-42-010 "…encourages applicants to consult with appropriate agencies for guidance in gathering sufficient detailed information, and development of comprehensive mitigation plans for inclusion in its application." The Department of Fish and Wildlife "Fish and Wildlife Wind Power Guidelines" have not been adopted as rules by that agency. Therefore, the council can not adopt this guidance by reference and thereby make it a regulation without including the entire manual in these rules. The opinion of the council is that directing an applicant to consider the guidelines of other agencies and to consult with those agencies is sufficient.

2. - RCW 80.50.110 gives EFSEC preemption over any other law of the state to regulate energy facilities under its jurisdiction. As such, the council will not delegate its jurisdiction to another agency. All information, including letters indicating approval of various aspects of a project, is considered by the council. In addition, EFSEC may consult with other agencies including the department of Fish and Wildlife concerning potential impacts which may occur as a result of siting energy facilities under its jurisdiction.

4. and 8. - Comment noted.

5. and 10. - The council does not ask that the number of individuals be quantified, rather that the number of species be quantified.

6. and 7. If as suggested by this comment, cropland has no habitat value, mitigation may not be required. In such a situation the council may consult with WDFW to determine if mitigation is appropriate and the appropriate level of mitigation. It is the position of the council that, as an example, one acre of shrub steppe habitat would be replaced by one acre of shrub steppe habitat of equal or greater value.

9. - The council views these two sections, 332 Fish and Wildlife and 333 Wetlands, as separate application requirements, and as such it would be inappropriate to consider combining them.

11. and 12. The answer is no. The Wind Power Guidelines have not been adopted as a standard by the Department of Fish and Wildlife. If an applicant feels that a requirement of the council does not apply to its circumstance, it may request that the council waive that requirement.
13 - The applicant should state any assumptions in its application. The council will consider the recommendations of the Fish and Wildlife Wind Power Guidelines.

Changes to the Rule following Public Hearings: (Proposed rule versus rule actually adopted):
NONE

New -- Chapter 463-42-333 WAC, Natural environment – Wetlands.

New – Chapter 463-60-333 WAC, Natural environment – Wetlands.

Changes to the Rule:
This is a new section added to this Chapter.

The stakeholder group, included three wetland mitigation standards for the council to consider. The stakeholder group did not express a preference for any of the three proposed standards.

There was little difference between the first two proposals except in the amount of detail that is provided. The first version provides the details of a wetland mitigation rule while leaving out the exact detail of the mitigation ratios' buffer-zone widths and some administrative details for the user to find in referenced documents.

The second proposal contains all of the material contained in the first and includes additional detail found in some reference documents. It was also missing several sections originally intended to be included by the author. This longer version with the missing sections was originally included on the EFSEC web site as the proposed wetland standard. This proposal was based on the wetland and critical-area ordinance that is suggested for adoption by local governments and on recommendations from the Department of Ecology.

The third proposal required compliance with applicable city, county or state wetland-protection regulations as prima facie evidence of satisfying the no-net-loss condition. This allows the council discretion to determine if an applicant satisfies all applicable regulations.

The first two options did not differ significantly.. Both required mitigation in accordance with established wetland science. The difference was in the amount of detail that each proposal offered. In the interest of clarity for applicants, option two provided more

detail. However, it should be noted that wetland mitigation does not always lend itself to hard and fast criteria. Conversely, the argument can be made that flexibility lends itself to better balance.

Current practice has been to look at wetland mitigation on a case-by-case basis and to design a mitigation package for each individual case. To move away from this practice would put the council in a position that is different from the way that state and local entities approach wetland mitigation negotiations. Although creating that bright-line standard may provide greater certainty, it also reduces opportunities to mitigate for unique circumstances. Experience at the Department of Ecology shows that actual mitigation requirements are often reduced when each case is considered on a case-by-case basis as opposed to meeting a firm standard that may require a specific level of mitigation.

In much the same manner as it approached the proposed fish and wildlife standards, the council opted to draft a shorter version of a wetland standard in new Chapter 463-62 WAC, and to place much of the detail included in the various stakeholder group proposals in the application content sections. The intent of the council's wetland mitigation requirements is described in Chapter 463-62-050 WAC, Impact and mitigation standards for wetlands

This new section 463-42-333 WAC, includes five parts: an introduction, a wetland assessment, identification of any project impacts to wetlands, a wetland mitigation plan and a listing of necessary federal approvals.

The introduction requires that the application include a wetland report prepared by a qualified professional wetland scientist. This requirement removes some of the issues related to the creditability of the person or persons preparing the report. The introduction also defines the term "project site."

Subsection (1) describes the required content of a wetland assessment and includes requirements that:

- wetland delineation be done according to the Washington State Wetlands Delineation and Identification Manual, 1997,
- wetlands found on the site must be rated according to the Washington state wetland-rating system found in Western Washington, Ecology Publication #93-74 and Eastern Washington, Ecology Publication 391-58,
- include a discussion of water sources supplying wetlands and documentation of hydrologic regime encountered, and
- a functional-assessment report prepared according to the Washington State Wetland Functional Assessment Method to assess wetlands functions for those wetland types covered by the method, and including a description of type and degree of wetland functions that are provided.

Subsection (2) requires that all temporary and permanent impacts to wetlands, along with their functions and values caused by a proposed energy facility, be identified. Required

information shall include water quality and quantity of waters supplying the wetlands and the potential impacts resulting from possible mitigation measures.

Subsection (3) is the wetland mitigation plan. Here the application must include a detailed discussion of mitigation measures, including avoidance, minimization of impacts and mitigation through compensation or preservation and restoration of existing wetlands proposed for the direct and indirect impacts that have been identified. The mitigation plan shall be consistent with the Department of Ecology Guidelines for Developing Freshwater Wetlands Mitigation Plans and proposals, 1994, as revised.

The proposed wetland mitigation plan requirements are the same as those frequently adopted by local government to enact a local wetlands and critical area ordinance. These requirements are based on recommendations of the Department of Ecology and must demonstrate how;

- mitigation ratios have been incorporated into the mitigation proposal,
- variances from standard mitigation ratios must be supported,
- mitigation actions are appropriate and consideration was given in order of preference to opportunities that are on-site, within the same sub-basin or Watershed Assessment Unit, within the same Water Resources Inventory Area (WRIA) or in another WRIA,
- timing and schedule for implementation are included in the mitigation plan,
- management practices that will protect wetlands, including proposed monitoring and maintenance programs, will be implemented,
- proven mitigation methods are given priority, and
- proposals for experimental mitigation techniques and mitigation banking will be supported with analyses demonstrating that compensation will meet or exceed requirements.

Subsection (4) requires that applications include a listing and the status of any federal approvals necessary for wetland impacts and mitigation along with the federal agency responsible for that review.

The requirements that the council has chosen for wetlands and wetland mitigation are consistent with guidance provided by the Department of Ecology for wetland mitigation in Washington State, Department of Ecology publication number 04-06-013b.

These application guidelines do not provide new requirements for wetland mitigation but rather compile existing information, currently available science and current policies on mitigation and bring them together to streamline the permit process and provide more predictability through clear and useful guidance on state and federal requirements for wetlands and wetland mitigation.

Comment(s) Received Relating to this Section:
Section 333 should be incorporated into section 332.

Council Response to Comment(s):
The council views these two sections 332 fish and wildlife and 333 wetlands as separate application requirements. As such, the council believes that it would be inappropriate to combine them.

Changes to the Rule following Public Hearings: (Proposed rule versus rule actually adopted):
NONE

Old -- Chapter 463-42-342 WAC, Natural Environment – Energy and natural resources.

New – Chapter 463-62-342 WAC, Natural Environment – Energy and natural resources.

Changes to the Rule:
The use of the term "applicant" is changed throughout this section to "application."

Subsection (1) has been revised to clarify the requirement that the application include and describe the rate of use and efficiency of consumption of energy and natural resources during both construction and operation of the proposed facility.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-352 WAC, Built environment – Environmental health.

New -- Chapter 463-60-352 WAC, Built environment – Environmental health.

Changes to the Rule:
The use of the term "applicant" is changed throughout this section to "application."

Subsection (1) addressing "noise" has been revised to reflect discussions by the council and staff and take into consideration the stakeholder group recommendations as reported in the Krogh-Leonard Report. The application requirements take their foundation from existing state laws and rules adopted by the Department of Ecology. The council originally posted on its web site proposed noise rules that included specific requirements for pre- and post-project monitoring to ensure that compliance will be achieved and to provide developers of energy facilities certainty that its proposed development will not exceed standards.

In 1974, the Washington state legislature enacted a noise-control statute RCW 71.107, finding that noise adversely affects the health and welfare of people and the value of property. The Department of Ecology adopted noise regulations in 1976. The state noise control rules are contained in Chapter 173-60 WAC. While local governments may adopt their own noise standards by local code or ordinance, the legislature required that all local noise standards be filed with and approved by the Department of Ecology, therefore requiring a degree of consistency throughout the state.

The council, in recent application reviews, has heard a great deal about noise resulting from proposed construction of energy facilities including pipelines, pump stations, electrical switch and transformer yards or combustion turbine electrical-generating stations. The noise question has resulted in extensive testimony and argument. This has to do with both the level of noise proposed to be generated at a particular facility and the proximity of an energy facility to places of work, schools and residences. In one recent case, Sumas Energy 2, EFSEC Application 99-01, noise, noise sources, and noise monitoring were a large factor.

The existing Noise Standard Chapter 173-06 WAC is seemingly well accepted by local governments around Washington State. Several jurisdictions have not adopted noise rules. Rather, they rely upon the adopted state-noise standards while others have adopted their own specific noise controls or have only adopted "nuisance" ordinances. The existing council rules only require that an applicant "describe the impact of noise from construction and operation and shall describe measures to be taken in order to eliminate or lessen this impact", Chapter 463-60-352(1) WAC.

Following council and staff discussions of the proposals made by the stakeholder group and the initial council proposal, further revisions were made to both the proposed standard as well as the proposed application content. Applications must include the following:

- A description and quantification of the background noise.
- The presence of high density receptor locations.
- The number of locations used for assessment of the existing noise environment commensurate with the type of energy facility being proposed.
- A description and quantification of the impact of noise emissions using appropriate state-of-the-art modeling techniques
- A description of local, state, and federal environmental noise-impact requirements.
- A description of the mitigation measures to be implemented to satisfy new Chapter 463-62-030 WAC, Noise standards.

The noise rules for energy facilities are designed to take advantage of existing regulatory measures and are not an attempt to create new noise standards. The council also decided not to establish criteria for noise-monitoring frequency or locations. The council must consider many different types of energy facilities, and each facility will have different noise-emitting components. Instead, the applicant is required to select appropriate monitoring locations based on the nature of the impacts expected and the presence of high-density receptor locations in the vicinity of the proposed site.

A new subsection (4) addressing emergency planning has been added to this section. This subsection requires the application to describe emergency plans required to assure public safety and environmental protection on and off the site in the event of a natural disaster or other major incident relating to or affecting the project as well as identifying the specific responsibilities that will be assumed by the applicant.

Comment(s) Received Relating to this Section:

1. WAC 173-60 does not require existing noise levels to be determined
2. Will meeting 50 dBA at residential receptors meet the EFSEC standard?
3. The requirement to quantify background noise environment could present unique challenges for wind power facilities. The source of the energy, wind, carries with it a certain amount of existing noise.
4. Rather than specify state-of-the-art modeling the requirement should be to have a qualified acoustical consultant do the analysis
5. If low frequency limits are going to be addressed in the rule, quantitative limits should be established.
6. Use noise limits used in other EFSEC proceedings, namely those used in Oregon.
7. If tonal noise limits are to be addressed by EFSEC, quantitative limits such as those used in Oregon should be used.
8. What purpose does 463-42-352(1)(c) serve? – local state federal noise guidelines -
9. If there are other noise guidelines that applicants need to address they should be specifically identified.
10. Applicants are required to describe noise mitigation measures to be implemented. There are few practical ways to mitigate noise from a wind turbine.

Council Response to Comment(s):

1. This comment is correct, Chapter 173-60 WAC does not require that existing noise levels be determined. However, this requirement is found in Chapter 463-42-352 WAC and is used to describe and quantify the background noise environment that would be affected by the energy facility.
2. The standard that must be met is that contained in Chapter 173.60 WAC.
3. The council acknowledges this comment
4. The council assumes that an applicant requesting site certification will always use the most qualified individuals possible when preparing its application. To not do so could put its request for certification in jeopardy during any adjudicative proceeding.
5. This comment was based on a prior draft of the standards that were finally proposed. The council deleted references to low frequency noise when they adopted WAC 173-60 by reference.
6. This comment was based on a prior draft of the standards that were finally proposed. Chapter 173-60 WAC is the adopted state noise regulations. While the council feels this comment may have merit, it did not want to adopt a noise regulation that could conflict with WAC 173-60, and create ambiguity about the state noise standard.
7. This comment was based on a prior draft of the standards that were finally proposed. The council deleted the tonal limit conditions when they adopted by reference WAC 173-60.

8. and 9. In the event another organization has adopted a noise regulation that is more stringent than Chapter 173.60 WAC[41], it is the practice of the council to require an applicant to meet or exceed that other noise control regulation.
10. This Chapter 463 WAC has applicability to all energy facilities that fall under the jurisdiction of the council. In the case of wind turbines, while it may be difficult to construct or enact measures to mitigate noise, it is possible to locate the wind turbine at a site where noises from the wind turbine would not have an adverse impact.

Changes to the Rule following Public Hearings: (Proposed rule versus rule actually adopted):
NONE

Old -- Chapter 463-42-362 WAC, Built environment – Land and shoreline use.

New -- Chapter 463-60-362 WAC, Built environment – Land and shoreline use.

Changes to the Rule:
The use of the term "applicant" is changed throughout this section to "application."

Subsection (1), requiring applicants to furnish copies of adopted land use plans and zoning ordinances including a survey of existing land uses surrounding the proposed site for an energy facility, has been revised. The revisions now direct applicants to "identify" adopted land use plans and zoning ordinances applicable to the proposed site for an energy facility

Subsection (2) was deleted. The information previously required in this section is now included in Chapter 463-42-535 WAC, Socioeconomic impact. This change keeps socioeconomic information together in one section.

Old subsection (6), new (5) has been revised to clarify what an applicant is expected to do with cultural and or historical information or materials that it encounters on the proposed site for an energy facility. With these revisions, applicants are now required to coordinate with and provide a list of historical and archaeological sites within the area affected by construction and operation of the facility to the Washington State Office of Archaeology and Historic Preservation and interested tribe(s). The application will now be required to describe evidence of this coordination, describe how each site will be impacted by construction and operation and identify what mitigation will be required.

Comment(s) Received Relating to this Section:
NONE

[41] Several local units of government (example – King County, Lewis County) have adopted noise control requirements that may differ from Chapter 173.60 WAC.

Old -- Chapter 463-42-372 WAC, Built environment – Transportation.

New – Chapter 463-60-372 WAC, Built environment – Transportation.

Changes to the Rule:
The use of the term "applicant" is changed throughout this section to "application." Subsection (5) has been edited for grammar.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-382 WAC, Built environment – Public services and utilities.

New – Section Deleted.

Changes to the Rule:
This section has been deleted. The information previously required in this section is now included in Chapter 463-60-535 WAC, Socioeconomic impact. This change keeps socioeconomic information together in one section.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-385 WAC, PSD Application

New – Section Deleted.

Changes to the Rule:
This section has been deleted. The information previously required in this section is now included in New Chapter 463-60-537 WAC.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-435 WAC, NPDES Application

New – Section Deleted.

Changes to the Rule:
This section has been deleted. The information previously required in this section is now included in Chapter 463-60-537 WAC.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-525 WAC, Built environment – Emergency plans.

New – Section Deleted.

Changes to the Rule:
This section has been deleted. The information previously required in this section is now included in Chapter 463-60-535 WAC, Socioeconomic impact. This change keeps socioeconomic information together in one section.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-535 WAC, Built environment -- Socioeconomic impact.

New – Chapter 463-60-535 WAC, Built environment -- Socioeconomic impact.

Changes to the Rule:
The use of the term "applicant" is changed throughout this section to "application."

The stakeholder group, held extensive discussions on a proposed socioeconomic standard. During council executive committee meetings, the two socioeconomic standards proposed by the stakeholder group were thoroughly discussed. The council recommended placing a proposed socioeconomic standard on its website for public comment and discussion.

After discussion by the council and recommendations by council staff, the council opted to place the emphasis of the suggested socioeconomic standard in the application Chapter 463-42-535 WAC. In so doing, the council relied on existing criteria for the content of potential site studies necessary to include in applications for site certification. The result of these revisions, while appearing to be an increased number of requirements, actually uses information already collected, provided that an applicant has opted to prepare a potential site study. Also included here are other existing requirements moved from other sections of this chapter, WAC 463-42-382, Built environment--Public services and utilities and WAC 463-42-525, Emergency plans.

The introduction to this section has been edited for clarity and to delete elements related to traffic and safety that are addressed elsewhere in this chapter. The geographic extent (one-hour commute distance) of the area to be included in the socioeconomic impact analyses is also identified.

Subsections (1) through (6) are added and describe the content of the major sections of the required socioeconomic impact analysis. These additions require applicants to provide sufficient information so that the council can make informed recommendations when it comes to these issues. Because this requires applicant to coordinate and work closely with local jurisdictions, it ensures greater up-front discussion of possible impacts and fewer unanswered questions during council consideration of applications.

Subsection (1) includes requirements for information about:

- Population and growth rate and forecast population figures;
- Race/ethnic composition of the cities and counties;

- Per capita and household incomes, including the number and percentage of the population below the poverty level;
- Whether any minority or low-income populations would be displaced by this project or disproportionately impacted;
- Workforce size, total number of employed workers, and the number and percentage of unemployed workers;
- Monthly average size of the project-construction operational workforce by trade and workforce peak periods;
- Whether locally ..available workforce would be sufficient to meet the anticipated demand for direct workers and an estimate of the number of construction and operation workers that would be hired from outside the study area;
- A list of the required trades;
- How many direct or indirect operation and maintenance workers would temporarily relocate;
- How many workers would potentially commute on a daily basis.

Subsection (2) includes requirements for information about:

- Potential impact on housing availability;
- Housing data from the most recent ten-year period that data is available, including the total number of housing units in the study area, units occupied, and percentage of units vacant;
- How and where the direct construction and indirect workforce would likely be housed;
- Whether meeting the direct construction and indirect workforce's housing needs might constrain the housing market for existing residents;
- A description of mitigation plans, if needed, to meet shortfalls in housing needs.

Subsection (3) includes requirements for information about economic factors including:

- The approximate average hourly wage that would likely be paid to construction and operational workers and how these wage levels vary from existing wage levels in the study area;
- How much and what types of direct and indirect taxes would be paid during construction and operation of the project and which jurisdictions would receive those tax revenues;
- Economic benefits (including mitigation measures) and costs of the project on the economies of the county, the study area and the state.

Subsection (4) includes requirements for information about impacts on public facilities and services. This was moved from Chapter 463-60-382 WAC, Built environment--Public services and utilities.

Subsection (5) requires the application to contain pertinent information about revenues that may be generated by the proposed energy facility and to whom those revenues will accrue.

Subsection (6) requires the applicant to work with local jurisdictions to avoid, minimize or compensate for all primary and secondary impacts resulting from the proposed energy-facility project. This subsection also defines the term "local government."

Comment(s) Received Relating to this Section:

1. There is no projection of the number of jobs that could be filled by organized labor. Such information could increase the likelihood of creating prevailing wage jobs with adequate health care.
2. Developers should be required to disclose whether they plan to offer state approved apprenticeship programs
3. This proposed section would require an application to contain far more information and detail about current socioeconomic conditions than the council is ever likely to need in making a siting decision. The council should consider what portion of this information it is likely to need, keeping in mind that more information could be provided during the adjudicatory process if a genuine issue were raised by an intervenor.
4. Saying "the applicant is encouraged to work with local government…" is a noble goal but provides no accountability. Requiring the applicant to report it progress working with local communities could better ensure that community impacts are offset.

Council Response to Comment(s):
The concern of the council and the analysis required in the application for site certification is on the total labor force and impacts to the communities where energy facilities are proposed to be constructed.

1. See 1. above.
2. Comment noted.
3. The council listens carefully to all parties about issues impacting local communities. These requirements are intended to provide applicants with content minimums for an application for site certification. All parties are strongly encouraged to work together to identify impacts and to establish appropriate mitigation. Clearly un-mitigated impacts will be addressed during adjudication of the application or site certification.

Changes to the Rule following Public Hearings: (Proposed rule versus rule actually adopted):
NONE

Old -- Chapter 463-42-385 WAC, Air emissions and authorizations.

New – Chapter 463-60-536, Air emissions permits and authorizations.

Changes to the Rule:
This section was moved from Chapter 463-42-385 WAC and renumbered Chapter 463-60-536.

The title of this section was changed to Air emissions permits and authorizations.

The use of the term "applicant" is changed throughout this section to "application."

The term PSD was defined in subsection (1) and a notice of construction application pursuant to Chapter 463-39 WAC was added as a requirement in the application for site certification.

A new subsection (2) was added to require that the application include requests for authorization for any emissions otherwise regulated by local air agencies as identified in WAC 463-42-196 Proposal--Pertinent federal, state and local requirements.
Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-435 WAC, NPDES application.

New – Chapter 463-60-537 WAC, Wastewater/stormwater discharge permit applications.

Changes to the Rule:
This section was moved to Chapter 463-60-537 WAC.

The title of this section was changed to Wastewater/stormwater discharge permit applications.

The use of the term "applicant" is changed throughout this section to "application."

Subsection (1) of this section was revised to clarify that applications for site certification must include a completed National Pollutant Discharge Elimination System (NPDES) permit application, a state waste discharge application and a notice of intent to be covered under any applicable statewide general permit for storm water discharge.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-625 WAC, Criteria, standards, and factors utilized to develop transmission route.

New – Section Deleted.

Changes to the Rule:
This section was deleted. This requirement was added to Chapter 463-42-155 WAC.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-645 WAC, Proposal – Analysis of alternatives

New – Section Moved.

Changes to the Rule:
This section was moved to Chapter 463-42-296 WAC.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-655 WAC, Initial site restoration plan.

New – Section Moved.

Changes to the Rule:
This section was moved to New Chapter 463-72-040.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-665 WAC, Detailed site restoration plan – Terminated projects.

New – Section Moved.

Changes to the Rule:
This section was moved to New Chapter 463-72-050.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-675 WAC, Site preservation plan – Suspended projects.

New – Section Moved.

Changes to the Rule:
This section was moved to New Chapter 463-72-060**.**

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-680 WAC, Site restoration – Terminated projects.

New -- Chapter 463-42-680 WAC, Site restoration – Terminated projects.

Changes to the Rule:
This section was moved to New Chapter 463-72-070.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-685 WAC, Pertinent federal, state and local requirements.

New – Section Moved.

Changes to the Rule:
This section was moved to Chapter 463-60-297.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-42-690 WAC, Amendments to applications, additional studies, procedure.

New – Section Moved.

Changes to the Rule:
This section was moved to Chapter 463-60-116 WAC, General – Amendments to applications, additional studies, procedure.

Comment(s) Received Relating to this Section:
NONE

New -- Chapter 463-62 WAC, Construction and operation standards for energy facilities

New -- Chapter 463-62-010 WAC, Purpose.

Changes to the Rule:
This section Chapter 463-62-010 WAC, Purpose, introduces the intent of establishing siting standards for construction and operation of energy facilities under the jurisdiction of the council as provided for in Chapter 80.50 RCW.

Subsection (1) identifies the topical areas for which siting standards are proposed. Some areas for which standards were earlier proposed have been deleted from this standards chapter. These topics, namely need and esthetic and other benefits, were added to Chapters 463-14-020 and 463-60-355 WAC. Another proposed standard, council overhead costs, was deleted. The council is working on the overhead cost issue with several applicants, existing certificate holders and a state legislative committee. The topics for which standards are proposed include seismicity, noise limits, fish and wildlife, wetlands, water quality, and air quality associated with site certification for construction and operation of energy facilities under the jurisdiction of the council.

Subsection (2) states that these standards apply to energy facilities pursuant to Chapter 80.50 RCW.

Subsection (3) provides that compliance with the standards within this chapter shall satisfy, in their respective subject areas, the requirements for issuance of a site certificate for construction and operation of energy facilities. It also recognizes that meeting these proposed standards may not in all cases be sufficient to protect the environment and public health from the impacts of constructing and operating an energy facility. In some instances, simply meeting the standards may not be sufficient to eliminate impacts to the environment or to public health. If and when a SEPA document demonstrates that the project poses a probable significant adverse impact, the council may be obligated to require additional mitigation or, in extreme cases, find it necessary to recommend that the governor not approve a project.

The council had lengthy discussions on the question of providing the necessary balance between the pressing need for energy facilities and protection of the environment and public health. Discussion centered on whether an established standard should be considered the minimum that is required or the maximum that is required. The solution for the council was to rely on the process that applications for site certification must follow. Key to this is the development of an environmental impact statement as required by the state environmental policy act, Chapter 43.21C RCW.

The result provides certainty for applicants and the public that meeting these standards will protect the environment and public health. It also provides that in cases where the SEPA document finds impacts that will not be offset by simply meeting these standards, additional mitigation or other measures will be required.

The council held informational hearings during October of 2003. The majority of comments received during those informational hearings focused on the council's proposed greenhouse gas-mitigation standard. There was no public oral testimony addressing any proposed standard other than the standard proposed for greenhouse gas mitigation. While there were hundreds of written comments on the proposed standards originating from the October 29 and 30 2004 hearings, only five letters addressed issues other than greenhouse gas mitigation. When the 2004 legislature adopted standards for greenhouse gas mitigation, the council withdrew its proposed standard. As a result, only five letters contained comments on the other proposed energy-facility siting standards and other portions of the proposed rule revisions. Table 1 in discussion on the "Council Action To Create A Strawdog Rule Revision Package" identifies the issues that were raised and the council's responses to those issues. The council received three written comments as a result of a public hearing held on August 20, 2004. The comments contained in these three letters and the council responses are summarized in Table 3 above.

Comment(s) Received Relating to this Section:
An executed Site Certification Agreement ("SCA") is a contract between the state and the certificate holder. Any attempt to have the new rules regarding project construction and operation supersede the terms and conditions of the SCA would constitute an impairment of contract under the Washington and United States Constitutions.

Council Response to Comment(s):
As a matter of practice and by contract law, it is the position of the council that these proposed or newly adopted rules do not apply to existing certificate holders or to applicants that have applied for site certification and the council has determined its application to be complete. Existing certificate holders have a binding agreement with the state for the construction and operation its energy facility. Likewise, applications for site certification that are accepted prior to the date rule revisions are in effect are governed by the rules in effect at the time their application was accepted by the council. It is possible that, if an existing certificate holder proposes to significantly change its approved project, the revisions may then be subject to the rules in effect at that time. The same is true if an applicant decides to revise its application before it is approved; that project may then be subject to the rules in effect at that time. As a result, the council has clarified the applicability of these revised rules.

Changes to the Rule following Public Hearings: (Proposed rule versus rule actually adopted):
This section has been revised to read as follows:
"(1) The purpose of this chapter is to implement the policy and intent of RCW 80.50.010. This chapter sets forth performance standards and mitigation requirements specific to seismicity, noise limits, fish and wildlife, wetlands, water quality, and air quality, associated with site certification for construction and operation of energy facilities under the jurisdiction of the council. The council shall apply these rules to Site Certification Agreements issued in connection with applications filed after the effective date of this chapter. Except for the provisions in chapter 463-36 WAC, these regulations shall not apply to energy facilities for which Site Certification Agreements have been issued before the effective date of this chapter."

New -- Chapter 463-62-020 WAC, Seismicity.

Changes to the Rule:
The stakeholder group recommended that the council adopt a standard for seismicity. The stakeholder recommendation proposed a standard that consisted of the local building code unless the council found overwhelming evidence that the maximum probable and maximum credible seismic event is greater than that referenced in the local building code. In such an instance, the applicant would then be required to conduct a site-specific study to characterize possible seismic events and to design to withstand that event.

Council and staff discussions following the October, 2003 Informational Hearings resulted in changes to the original stakeholder proposal and the proposed standard that was originally published on the council web site. The council recommended adoption of a seismicity standard that requires compliance with the State Building Code.

The State Building Code (Chapter 51-40 WAC) includes the minimum construction requirements for the state of Washington:

- The Uniform Building Code with statewide amendments
- The Uniform Mechanical Code with statewide amendments

- The Uniform Fire Code with statewide amendments
- The Uniform Plumbing Code with statewide amendments
- The State Energy Code and
- The State Ventilation and Indoor Air Quality Code

The State Building Code has provisions whereby it is updated on a three-year cycle. The rule-making process also provides for amendments to maintain consistency with national, international and state codes.

The council's proposed standard for seismicity states: "The seismicity standard for construction of energy facilities shall be the standards contained in the state building code." This brief standard provides the consistency and certainty that energy-facility developers want and assures that energy facilities will meet appropriate seismic standards.

Comment(s) Received Relating to this Section:
NONE

New -- Chapter 463-62-030 WAC, Noise standards.

Changes to the Rule:
The stake holder group essentially proposed two noise standards for EFSEC to consider. First, was a proposed standard similar in content to Oregon regulations establishing noise standards. The second was a proposal to essentially adopt the Department of Ecology noise standards as they apply to siting energy facilities.[42]

These options provided the opportunity to:

1. Adopt either the Oregon standard or the Washington standards,
2. Adopt either Washington or Oregon standards with modifications appropriate to EFSEC needs, or
3. Adopt a rule requiring applicants and certificate holders to meet the Washington state noise rules and or any applicable local noise rules or ordinances; and to develop criteria to ensure that appropriate pre-application and operational monitoring occurs to ensure compliance with noise rules. In this latter regard, EFSEC could also require some monitoring or assessment to determine the existence or absence of low-frequency noise or tones.

The Oregon noise regulations appear more detailed that those of Washington, particularly with respect to consideration of noises other than those measured using something other than the traditional dBA scale. The Oregon Rules specify allowable octave-band sound

[42] The original idea was to have the council establish siting standards for combustion turbine electrical-generating facilities. After the conclusion of the stakeholder group meetings, the council opted to adopt siting standards for all energy facilities, avoiding the necessity of having separate siting standards for each type of energy facility that may come before the council.

pressure levels aimed at low-frequency noises and are also more specific about monitoring and locations where monitoring should be conducted.

Some members of the stakeholder group suggested that the Washington noise rules were out of date and might not be appropriate for today's circumstances. Nevertheless, they are the standard upon which most local governments base their local noise control ordinances or rules.

The third option would have had the council adopt the Washington noise rules as they currently exist in chapter 70.107 RCW and contained in Chapter 173-60 WAC Maximum Environmental Noise Levels, and to require specific noise source and receptor monitoring both prior to construction and during the operational life of the facility.

The council decided to accept the standard adopted by reference to the state noise control Act of 1974, Chapter 70.107 RCW and state rules adopted to implement those requirements in Chapter 173-60 WAC, Maximum Environmental Noise Levels. This provides consistency and uniformity whereby all energy- facility developers are held to the same standard.

Comment(s) Received Relating to this Section:

1. WAC 173-60 is incorporated by reference. There are 2 ambiguities in 173-60 that needs to be resolved.

   1. - Numeric limits of WAC 173-60 should be identified as L_{eq1} and should be clarified if they only pertain to noise from the project, not cumulative limits.
   2. - The EDNA for residences on large parcels of land should be clarified as follows: the area within 50 feet of a residential dwelling shall be evaluated as EDNA Class A, while the remainder of the parcel shall be evaluated consistent with its use.
2. WAC 173-60 does not require existing noise levels to be determined
3. Will meeting 50 dBA at residential receptors meet the EFSEC standard?
4. The requirement to quantify background noise environment could present unique challenges for wind power facilities. The source of the energy, wind, carries with it a certain amount of existing noise.
5. If low frequency limits are going to be addressed in the rule, quantitative limits should be established.
6. Use noise limits used in other EFSEC proceedings, namely those used in Oregon.
7. If tonal noise limits are to be addressed be EFSEC, quantitative limits such as those used in Oregon should be used.
8. If there are other noise guidelines that applicants need to address they should be specifically identified.
9. The council has not made changes to this section as a result of comments submitted on June 16, 2004.

Council Response to Comment(s):

1. Chapter 173.60 WAC is the adopted state noise regulations. While the council feels this comment may have merit, it did not want to adopt a noise regulation that was

different than WAC 173.60, and thereby create further ambiguity about the state noise standard.

2. Correct, Chapter 173-60 WAC does not require that existing noise levels be determined. This requirement is found in Chapter 463-42-352 WAC and is used to describe and quantify the background noise environment that would be affected by the energy facility.
3. The standard that must be met is that contained in Chapter 173-60 WAC.
4. While wind in and of itself can result in noise, the council is interested in the amount of additional noise that may result from construction of an energy facility.
5. This comment was based on a prior draft of the standards that were finally proposed. The council deleted references to low frequency noise when they adopted WAC 173-60 by reference.
6. This comment was based on a prior draft of the standards that were finally proposed. Chapter 173-60 WAC is the adopted state noise regulations. While the council feels this comment may have merit, it did not want to adopt a noise regulation that was different than WAC 173-60, and create ambiguity about the state noise standard.
7. This comment was based on a prior draft of the standards that were finally proposed. The council deleted the tonal limit conditions when it adopted by reference WAC 173-60.
8. In the event another organization has adopted a noise regulation that is more stringent than Chapter 173.60 WAC[43], it is the practice of the council to require an applicant to meet or exceed that other noise control regulation.
9. The council reviewed the comments submitted on June 16, 2004 but did not concur with those comments. As a result, no changes were made in response to those comments. See Council Response to Comment No.1 above.

Changes to the Rule following Public Hearings: (Proposed rule versus rule actually adopted):
NONE

New -- Chapter 463-62-040 WAC, Fish and wildlife.

Changes to the Rule:
This new standard that must be met for siting energy facilities under council jurisdiction is established to clarify council intent to achieve no net loss of habitat functions and values in areas impacted by energy-facility development. The basis for council development of this standard is described in the discussion of rule revisions to Chapter 463-42-332, WAC Natural environment – Plants and animals. The new title of this Chapter 463-42-332 is Natural environment – Habitat, vegetation, fish and wildlife. The discussion related to the addition of new application-content guidelines contains the rationale and decision-making process of the council for adopting a fish and wildlife standard as well as broadening the application guidelines for matters concerning fish and wildlife.

[43] Several local units of government (example – King County, Lewis County) have adopted noise control requirements that may differ from Chapter 173.60 WAC.

This section, in addition to stating the intent of the council to achieve no net loss of fish and wild life habitat, "…encourages applicants to select sites that avoid impacts to any species on federal or state lists of endangered or threatened species or to priority species and habitats."

The standards require applicants to demonstrate that:

- There will be no net loss of fish and wildlife habitat function and value.
- Restoration and enhancement are preferred over creation of habitats due to the difficulty of successfully creating habitat
- Mitigation credits and debits shall be based on a scientifically valid measure of habitat function, value and area.
- The ratios of replacement habitat to impacted habitat shall be greater than 1:1 to compensate for temporal losses, uncertainty of performance and differences in functions and values.
- Wetlands shall be replaced at ratios following the wetland standard established by the council in WAC 463-62-050.
- Fish and wildlife surveys shall be conducted during all seasons of the year to determine breeding, summer, winter, migratory usage and habitat condition of the site.

These standards, when taken with the requirements of Chapter 463-42-332 (4), require applicants to consider any specific guidelines of state or federal agencies[44] when preparing its mitigation plans provide the applicant clear and understandable requirements with regard to fish and wildlife impact mitigation.

Comment(s) Received Relating to this Section:

1. 463-62-040(d) fails to make a distinction between undisturbed or intact habitat.
2. The 1 acre for 1 acre replacement requirement for impacted habitat should not be applied as a universal standard.
3. The council should use the WDFW habitat mitigation guidelines for wind projects.
4. Further clarification on WAC 463-62-040 (d) and (f) Fish and Wildlife. Proposed WAC 463-62-040 (d) would require an applicant to replace one acre of impacted habitat with at least one acre. It is unclear whether this requirement would apply to both temporary and permanent habitat impacts.
5. The proposed "no net loss of habitat functions and values" standard is unreasonable and is not consistent with the statutory requirement that "reasonable methods" be used to ensure that an energy facility result in "minimal adverse effects."
6. Referring to the wetland standard established in Chapter 463-62-050 WAC for a replacement ratio, it is not clear that the referenced section establishes a standard other than no net loss. Does this suggest that the standard (ratio) is 1: 1?

[44] One such example of a project type-specific guideline is the fish and wildlife wind power guidelines that were developed in August 2003.

7. This requirement - 1ac for 1ac replacement does not specify the habitat type or quality of the habitat.
8. This requirement, as it is written, does not distinguish habitat type and quality.
9. This section requires a minimum of 1 year of fish and wildlife surveys to determine breeding and habitat condition. WDFW WP Guidelines require a 1 year operational monitoring program for wind projects.
10. Proposed WAC 463-62-040 (f) would require an applicant to conduct a minimum of one year of fish and wildlife surveys once an energy facility is operational. We would be extremely concerned if this standard would require comprehensive wildlife surveys once a project is operating. If the intent is to conduct at least a year of operational monitoring, then EFSEC should revise the language to reflect this.

Council Response to Comment(s):
It is important to note that the rules of the council are applicable to all projects that come under council jurisdiction. As such, if a particular rule is not applicable, an applicant may ask the council to waive that requirement. The preparation of a potential site study will also identify requirements that may not be applicable for a particular energy facility.

1. The intent of this section is to require replacement habitat of an equal quality, type, and size.
2. These are the current guidelines of the Department of Fish and Wildlife. The council has determined that a minimum of a 1:1 ratio is appropriate to prevent loss of habitat.
3. The council has opted to strongly encourage applicants to consider the WDFW Wind Power guidelines as they prepare its application for site certification.
4. This will be evaluated by the council with input from the department of Fish and Wildlife on a case-by-case basis.
5. and 7. and 8. It is the position of the council that, as an example, one acre of shrub steppe habitat would be replaced by one acre of shrub steppe habitat of equal or greater value.
6. Please see Chapter 463-43-333. This section contains reference to the Department of Ecology guidelines for developing freshwater wetland mitigation plans and proposals.
9. and 10. If a study is being done, it must encompass all seasons. It is up to the applicant to decide to do such a study to support its application. It is important to note that the rules of the council are applicable to all projects that come under council jurisdiction. As such, if a particular rule is not applicable, an applicant may ask the council to waive that requirement. The preparation of a potential site study will also identify issues that may not be applicable for a particular energy facility.

Changes to the Rule following Public Hearings: (Proposed rule versus rule actually adopted):
NONE

New -- Chapter 463-62-050 WAC, Impact and mitigation standards for wetlands.

Changes to the Rule:
This new standard is established to clarify council intent to achieve no net loss of wetlands in areas impacted by energy facilities under council jurisdiction. In much the same manner as the fish and wildlife standard discussed above, the majority of council discussions and rationale for establishing this standard are described in the discussion related to Chapter 463-60-333 WAC Wetlands.

Subsection (1) states the council's intent to achieve no net loss of wetland areas and that wetland impacts are to be avoided whenever possible. When it is not possible to avoid wetland impacts, applicants are required to (in the following order of preference) restore wetlands on upland sites, create wetlands on disturbed upland sites, enhance significantly degraded wetlands or preserve high-quality wetlands that are under imminent threat.

These standards, when taken with the application requirements of Chapter 463-60-333 (1) (a) and (b) and (3), require applicants to follow the established guidelines of the Department of Ecology when delineating and rating wetlands and when preparing mitigation plans intended to offset unavoidable wetland impacts related to the construction and operation of an energy facility under the jurisdiction of the council. The council considered adoption of the Department of Ecology guidelines as a standard that must be met before an energy facility site could be approved. However, because the Department of Ecology guidelines are not contained in rule and are subject to periodic change, the council opted to place the significant content of its earlier proposed rule in the application guideline section of these rules, Chapter 463-60-333.
The Department of Ecology is currently considering revisions to its guidelines. If the council were to adopt these guidelines as rule, and if the Department of Ecology goes ahead with revisions to the guidelines, there would essentially be two sets of wetland-impact mitigation requirements. By not adopting the Department of Ecology guidelines, the council hopes to achieve greater understanding of the requirements for siting energy facilities and greater coordination among agencies.

Comment(s) Received Relating to this Section:
As in chapter 463-42, the wetlands requirements should be combined with the other fish and wildlife habitat standards.

Council Response to Comment(s):
The council views these two sections 332 fish and wildlife and 333 wetlands as separate application requirements. As such, the council believes that it would be inappropriate to combine them.

Changes to the Rule following Public Hearings: (Proposed rule versus rule actually adopted):
NONE

Old -- Chapter 463-XX-XXX WAC, Environmental, esthetic and other benefits.

New – Proposed Section Deleted.

Changes to the Rule:
This proposed standard for siting energy facilities under the jurisdiction of the council was deleted in favor of adding its content to the application guidelines section Chapter 463-14-020 WAC, Need for energy – Legislative intent binding.

Comment(s) Received Relating to this Section:
NONE

New -- Chapter 463-62-60 WAC, Water quality.

Changes to the Rule:
This new standard is proposed to clarify that there is one set of water quality standards applicable to energy facilities as well as other developments in Washington State.

The stakeholder group proposed for council consideration two water quality standards. The two proposals, while similar, differ only in the presumption that compliance with existing state and federal regulations will satisfy the standard of the council. One of the proposed standards says:

> "For thermal power plants under the council's jurisdiction that discharge wastewater subject to the NPDES permitting program, compliance with existing state and federal regulations concerning the NPDES permitting program, as adopted by the council in Chapter 463-38 WAC, shall create a presumption that the council's standard has been satisfied."

The second stakeholder proposal says:

> "For thermal power plants under the council's jurisdiction that discharge wastewater subject to the NPDES permitting program, compliance with existing state and federal regulations concerning the NPDES permitting program, as adopted by the council in Chapter 463-38 WAC, shall satisfy the council's standard."

The first proposed standard created the presumption that the standard is met. This presumption could be overcome if the council determined that the proposed discharge would, despite compliance with existing standards, have a significant adverse impact on the environment or human health. In such a case, the council could then require additional levels of treatment or other mitigation to prevent adverse impacts. The second proposed standard does not contain the presumption concept. Both of the proposed

standards require satisfaction of surface and ground-water quality standards and both proposed standards deal with the presumption question in a similar manner.

There were few public comments concerning water quality during the October public comment period, and those few comments were addressed earlier. During March and April of 2004, the council and staff reviewed all the proposed standards and agreed to simplify the proposed standard for water quality.

The existing state surface and ground-water quality standards and the federal and state discharge permit programs require that discharges not have an adverse impact on existing water quality or its beneficial uses. As such, a discharge that will cause established state water criteria to be exceeded cannot be authorized.

Environmental documents prepared at the time of a proposed discharge will consider waste discharges and identify possible adverse impacts. These impacts must be addressed when treatment and discharge systems are being designed. Proposed treatment and discharge system designs can not be approved if they will cause an adverse impact on existing water quality or its beneficial uses.

The final water quality standard for energy facilities that the council proposed recognizes the intent of the state water quality standards, the safeguard provided through the SEPA process and the restrictions upon approval of design documents. This standard requires compliance with federal and state rules pertaining to wastewater treatment and discharge. The proposed standard does not create a separate set of standards that apply only to energy facilities. The proposed standard states:

> Waste water discharges from projects under the council's jurisdiction shall meet the requirements of applicable state water-quality standards, Chapter 173-201A WAC and groundwater-quality standards, Chapter 173-200 WAC, requirements of the Federal Water Pollution Control Act as amended (86 Stat 816,33 U.S.C. 1251, et seq.) and regulations promulgated thereunder.

Comment(s) Received Relating to this Section:
NONE

New -- Chapter 463-62-070 WAC, Air quality.

Changes to the Rule:
The stakeholder group provided the council with two proposed air quality standards for consideration. The first standard contained the presumption of compliance clause in much the same manner as was proposed in the water quality standard. The standard was presumed to have been satisfied if the state and federal regulations as adopted in Chapter 463-39 WAC were satisfied. However, the proposed standard enables the council to require additional treatment or mitigation in the event that evidence before the council suggests a probable significant adverse impact to the environment or public health. The second standard proposed would be met upon a determination by the council that the

project complies with existing state and federal air-quality regulations adopted by the council in Chapter 463-36 WAC.

For many of the same reasons that resulted in the council's decision to adopt a water quality standard in consistent with existing water quality regulations, the council proposed an air quality standard based on existing federal and state air quality regulations. The same SEPA requirements are applicable for air-quality issues as for other environmental concerns. The council has stated that if environmental documents demonstrate a significant environmental or public health impact, it will consider additional treatment or mitigation as provided for in this chapter (Chapter 463-62-010(3) WAC.

The air permitting requirements included in OLD Chapter 463-39 WAC, NEW 463-78 WAC, General and operating permit regulations for air pollution sources, define required air emission treatment requirements. The air permitting program is also different in that air permits issued by EFSEC are reviewed by the Regional Administrator of the Environmental Protection Agency (Chapter 173-401-810 WAC). For these reasons, the council determined that the best air quality standard to adopt is one that referenced existing rules and did not create any confusion about what the appropriate standards were or how those standards needed to be satisfied. The new standard says:

> Air emissions from energy facilities shall meet the requirements of applicable state air-quality laws and regulations promulgated pursuant to the Washington State Clean Air Act, chapter 70.94 RCW, and the federal Clean Air Act (42 U.S.C. 7401 et. Seq.), and Chapter 80.70 RCW.[45]

Comment(s) Received Relating to this Section:
NONE

PART III. Site Certification Agreement

New -- Chapter 463-64 WAC, Procedure – Issuance of a Site Certification Agreement

New -- Chapter 463-64-010 WAC, Purpose

Changes to the Rule:
This new chapter consolidates in one location and expands on the procedure for reporting recommendations for site certification approval or denial to the governor and his or her actions once a recommendation is received.

[45] An act relating to mitigating carbon dioxide emissions resulting from Fossil-fueled electrical generation; adding a new section to Chapter 70.94 RCW; and adding a new chapter to Title 80 RCW.

Comment(s) Received Relating to this Section:
NONE

New -- Chapter 463-64-020 WAC, Recommendation to governor – Approval or rejection of certification.

Changes to the Rule:
This section clarifies that the council makes a recommendation for approval or denial of an application for site certification and that it is the governor who makes the final determination of approval or rejection. If the council is recommending approval, it also sends to the governor a draft recommended Site Certification Agreement that details the conditions upon which its recommendation is based. This will include 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 the 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.

Comment(s) Received Relating to this Section:
The last part of this section states that EFSEC will include in the Site Certification Agreement "conditions designed to recognize the purpose of the laws or ordinances, or rules or regulations promulgated there under, that are preempted or superseded."
If EFSEC decided to preempt the local ordinance, it would not make sense to include the conditions in the SCA that recognize the purpose of the preempted ordinance because the purpose of the ordinance was to prohibit the project now being certified.

Council Response to Comment(s):
Comment noted. This section is a reiteration of RCW 80.50.100.

Changes to the Rule following Public Hearings: (Proposed rule versus rule actually adopted):
NONE

New -- Chapter 463-64-030 WAC, Governor's action – Approval or rejection of certification or reconsideration.

Changes to the Rule:
This section clarifies that, pursuant to RCW 80.50.100, the governor has 60 days after receipt of the council's recommendation to approve the Site Certification Agreement, reject the application or send the draft Site Certification Agreement back to the council for reconsideration of certain aspects of its content. The intent of the council is to provide applicants with a timeframe for final action.

Comment(s) Received Relating to this Section:
This regulation purports to regulate the Governor. It seems odd for EFSEC to adopt a regulation concerning the Governor's actions.

Council Response to Comment(s):
Valid comment. This section is included in the council rules for the sake of clearly describing the intent of RCW 80.50.100.

Changes to the Rule Following Public Comment: (Proposed rule versus rule actually adopted):
This section was revised to read as follows:
"Pursuant to RCW 80.50.100, within sixty days of receipt of the council's report, the governor will take one of the following actions:

(1) Approve the application and execute the draft certification agreement; the certification agreement shall be binding upon execution by the governor and the applicant;
(2) Reject the application; or
(3) Direct the council to reconsider certain aspects of the draft certification agreement."

New -- Chapter 463-64-040 WAC, Reconsideration of draft certification agreement.

Changes to the Rule:
This new section clarifies that under RCW 80.50.100(2) (c), when the governor returns a draft certification agreement to the council for reconsideration, the council shall reconsider such aspects of the draft and, as may be necessary, re-open the adjudicative proceeding to receive additional evidence on the issue(s) in question. The council shall resubmit to the governor its recommendations including any amendments it deems necessary upon reconsideration. The governor at this point has 60 days to approve or reject the revised certification agreement.

This new chapter does not change the manner in which the governor and council address the issuance of a certification agreement. This new section implements the intent of the legislature wherein the council is required to make a recommendation to the governor. It describes the options available to the governor upon receipt of a council recommendation and the limits of his or her options once a recommendation has been received. It also defines the responsibility of the council when a recommendation for reconsideration is received.

Upon receipt of a reconsidered recommendation from the council, the governor has two options: to execute the certification agreement or to reject it. Upon execution of the certification agreement, it becomes binding upon the governor and the applicant.

Comment(s) Received Relating to this Section:
Subsection (3) purports to regulate the Governor's actions.

Council Response to Comment(s):
Valid comment. This section is included in the council rules for the sake of clearly describing the intent of RCW 80.50.100. This section will be revised.

Changes to the Rule Following Public Comment: (Proposed rule versus rule actually adopted):
This section was revised to read as follows:

"This section will be revised to read "Within sixty days of receipt of such draft certification agreement, the governor [will] either approve the application…"
If directed by the governor under RCW 80.50.100 (2)(c) to reconsider certain aspects of the draft certification agreement, the council shall:
(1) Reconsider such aspects of the draft application or, as necessary, reopen the adjudicative proceeding to receive additional evidence. Such reconsideration shall be conducted expeditiously.
(2) Resubmit the draft certification to the governor incorporating any amendments deemed necessary upon reconsideration.
(3) Within sixty days of receipt of such draft certification agreement, the governor will either approve the application and execute the certification agreement or reject the application. The certification agreement shall be binding upon execution by the governor and the applicant."

New -- WAC Chapter 463-64-050 WAC, Rejection of an application for certification.

Changes to the Rule:
The rejection of an application for certification by the governor shall be final as to that application but shall not preclude submission of a subsequent application for the same site on the basis of changed conditions or new information. Because the council does not take the final action with respect to approving or denying site certification, parties can not appeal the council's recommendation to the governor. Only after the governor has acted to approve or deny a Site Certification Agreement, could the applicant, or any of the parties to the adjudication, appeal the decision of the governor.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-36 WAC, Procedure—amending or terminating a site certification agreement

New -- Chapter 463-66 WAC, Procedure—amending, transferring or terminating a site certification agreement

Changes to the Rule:
The title of this chapter and section was changed to include transferring a Site Certification Agreement and reads "Procedure—Amending, Transferring, or Terminating a Site Certification Agreement." In light of the nature of the energy market today and possibly into the future, there is a strong likelihood that approved site certificates may be sold or otherwise transferred to other parties. Doing so has implications for the new ownership and its willingness to live up to the terms and conditions of the previously approved site certification agreement for the site in question. This amendment provides

the council and the public with an opportunity to know and understand the intentions of the potential new owner before any transfer takes place. It also allows the council to exercise its responsibility to act as necessary to protect the public health, safety, and welfare.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-36-010, Council policy

New – Section Deleted.

Changes to the Rule:
This section was deleted. The intent stated in this section was that the council could take action as necessary to protect public health and the environment. This is the responsibility of the council as laid out in RCW 80.50.010 and restated in Chapter 463-14 WAC.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-36-020, Termination.

New -- Chapter 463-66-020, Termination.

Changes to the Rule:
No Change

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-36-030 WAC, Request for amendment.

New -- Chapter 463-66-030 WAC, Request for amendment.

Changes to the Rule:
Three revisions were incorporated into this section. The first was a revision to clearly indicate that it referred specifically to an amendment to a "Site Certification Agreement." The second was to change the second sentence to establish a schedule for considering a request instead of considering that request at the next feasible council meeting. This allows the council to discuss the request in open council session and to discuss with the requestor and any public present, options for scheduling necessary review and action on the request.

As a result of the change above, the third sentence that reads "The council will then refer the question to committee for recommendation, determine a schedule for action or take action upon the request," was deleted.

Comment(s) Received Relating to this Section:
The last sentence of this section makes a public hearing mandatory for all proposed SCA amendments regardless of the significance of that amendment. Change the last sentence of this section to indicate that the council shall provide public notice of all amendment requests, and that the council "may" conduct a public hearing regarding such requests.

Council Response to Comment(s):
The council did not make any changes to this section. However, if the council feels compelled to hold public hearing on a request to amend a Site Certification Agreement, it is many times conducted in conjunction with a scheduled council meeting.

Changes to the Rule Following Public Comment: (Proposed rule versus rule actually adopted):
NONE

Old -- Chapter 463-36-040 WAC, Amendment review.

New -- Chapter 463-66-040 WAC, Amendment review.

Changes to the Rule:
No Change

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-36-050 WAC, Environmental Impact – Alternatives.

New -- Chapter 463-66-050 WAC, Environmental Impact – Alternatives.

Changes to the Rule:
No Change

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-36-060 WAC, Council determinations.

New -- Chapter 463-66-060 WAC, Council determinations.

Changes to the Rule:
No Change

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-36-070 WAC, Approval by resolution.

New -- Chapter 463-36-070 WAC, Approval by council action.

Changes to the Rule:
The title of this section was changed to read "Approval by council action." The council deleted the word "resolution" from the title because all resolutions, amendments and other matters that come before the council are approved or denied by "council action." The council also removed the requirement that both a detrimental effect on the environment and a substantially altered Site Certification Agreement need be present before the council could authorize a change by council action in the form of a council resolution. By making this change, the council clarifies that requests for simple, and for the most part non-substantive, amendments that do not have a detrimental effect on the environment or which are determined not to substantially alter the terms and conditions of the Site Certification Agreement may qualify for approval by the council, rather than a formal Site Certification Agreement amendment signed by the Governor. In all cases, the council may choose to make such approvals in the form of a resolution.

Comment(s) Received Relating to this Section:
The regulation would be clearer and easier for everyone to understand if it simply read: "An amendment request which is determined not to have a significant detrimental effect upon the environment shall be effective upon approval by the council. Such approval may be in the form of a council resolution."

Council Response to Comment(s):
The council discussed this comment, but opted to not make any changes. The council will consider each application on its own merit. Each Site Certification Agreement represents the approvals necessary for the construction and operation of an energy facility. If, after considering the proposed change to a Site Certification Agreement and any testimony presented to the council pertaining to such a request and in the eyes of the council a proposal substantially alters a Site Certification Agreement, an amendment may be the appropriate course. The council needs the latitude to make that decision. The proposed alternative text does not allow that latitude.

Changes to the Rule following Public Hearings: (Proposed rule versus rule actually adopted):
NONE

Old -- Chapter 463-36-080 WAC, Approval by governor.

New -- Chapter 463-66-080 WAC, Approval by governor.

Changes to the Rule:
The phrase, "of Washington State" was deleted from this section.

Comment(s) Received Relating to this Section:
Considering whether the requested amendment "substantially alters the substance" of the SCA does not add anything to the inquiry and makes the regulation difficult to understand. If the council chooses to keep the language about substantially altering the substance of the SCA, then the word "or" in this regulation should be changed to "and" to be consistent with the wording of WAC 463-36-070. As indicated in 070, governor approval should not be required unless there is both a substantial alteration in the

substance of the provisions of the SCA and a significant detrimental effect on the environmental.

Council Response to Comment(s):
Subsection 070 was revised to remove the word "and" and to replace it with the word "or;" therefore this comment is not appropriate. The only change made to this section Chapter 463-36-080 WAC was to eliminate three redundant words ("of Washington State") at the end of the section.

Changes to the Rule following Public Hearings: (Proposed rule versus rule actually adopted):
NONE

Old -- Chapter 463-36-090 WAC, Council powers.

New -- Chapter 463-66-090 WAC, Council powers.

Changes to the Rule:
No Change

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-36-100 WAC, Transfer of a site certification agreement.

New -- Chapter 463-66-100 WAC, Transfer of a site certification agreement.

Changes to the Rule:
This section was renumbered and references to related sections were updated.

Comment(s) Received Relating to this Section:
The council has not proposed any substantive changes to this regulation, but it is suggested that the council take this opportunity to revise it to reflect the reality of power project development and financing in the current market. As written, the regulation appears to require EFSEC approval before a certificate holder could transfer any legal or equitable interest in the SCA. It is suggested that the Certificate Holder only be required to notify EFSEC if there is a change in the majority ownership of the project.

EFSEC approval should only be required if the certificate holder requests to change the Certificate Holder or add another party as a certificate holder.

The council should also consider deleting the portions of this regulation that address mergers or "other change[s] in corporate or partnership ownership." The purpose of this requirement is difficult to understand, and its implications in practice seem problematic. Please consider modifying this regulation as follows: "No Site Certification Agreement, ~~or any portion of a site certification agreement~~, nor ~~any~~ controlling legal or equitable interest in such an agreement issued under this chapter shall be transferred, assigned, or in any manner disposed of (including abandonment), either voluntarily or involuntarily, directly or indirectly, through transfer of control of the certification agreement or the site

certification agreement owner or project sponsor without notice to the ~~express~~ council ~~approval~~ of such action. ~~In the event a site certification agreement is to be acquired via a merger, leveraged buy-out, or other change in corporate or partnership ownership, the successor in interest must file a formal petition under the terms of this section to continue operation or other activities at the certificated site.~~"

Council Response to Comment(s):
Comments noted. The recommendation is not consistent with the views of the council. The only changes to this section were to re number this section and to correct references to other sections of council rules.

Changes to the Rule following Public Hearings: (Proposed rule versus rule actually adopted):
NONE

New -- Chapter 463-68 WAC, Site certification agreement – Start of construction, expiration and reporting

Through the adoption of this chapter, applicants for site certification will understand limits and implications if construction of an energy facility, granted approval by the state of Washington, does not commence within five years. It will also describe the additional conditions that apply if construction is commenced during the second five years after approval of the Site Certification Agreement. This rule is based on the provisions contained in RCW 80.50.010 – Energy facilities site locations, which in part states; "…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 effects on the environment, ecology of the land and its wildlife and the ecology of state waters and their aquatic life.

It is the council's 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…" The council proposed this rule to maintain a balance between developing energy facilities and changing economic, social and environmental conditions. Because of the many and substantial impacts that may result from the development of an energy facility, the conditions necessary for development will likely change over the lifespan of a Site Certification Agreement.

Comment(s) Received Relating to this Section:
This chapter should clearly state that it only applies to applications filed after the effective date of these regulations. Existing SCAs already address these issues.

Council Response to Comment(s):
The council has clarified the applicability of these revised rules.

Changes to the Rule following Public Hearings: (Proposed rule versus rule actually adopted):
The council made changes to Chapter 463-62 WAC, 463-68 WAC, and 463-72 WAC

New -- Chapter 463-68-010 WAC, Purpose.

Changes to the Rule:
This section specifies the purpose of the new chapter. The chapter will include the term on the Site Certification Agreement, what constitutes start of construction and commencement of commercial operation and specifies time frames during which the council must be notified in the event of changes to the project.

Comment(s) Received Relating to this Section:
Read literally, Chapter 463-68-010 would appear to apply to projects that have already been certified as well as to future applications.

Council Response to Comment(s):
As a matter of practice and by contract law, it is the position of the council that these proposed or newly adopted rules do not apply to existing certificate holders or to applicants that have applied for site certification and the council has determined its application to be complete. Existing certificate holders have a binding agreement with the state for the construction and operation of their energy facilities. Likewise, applications for site certification that are accepted prior to the date these rule revisions are in effect are governed by the rules in effect at the time its application was accepted by the council.

It is possible that if an existing certificate holder proposes to significantly change its approved project, the revisions they may then be subject to the rules in effect at that time. The same is true if an applicant decides to revise its application before it is approved, that project may then be subject the rules in effect at that time.

Changes to the Rule following Public Hearings: (Proposed rule versus rule actually adopted):
This section was revised to read as follows:

"This chapter sets forth the length of time before a Site Certification Agreement expires if construction is not started, or commercial operation has not commenced, defines what activities constitute start of construction, and specifies the time frame within which a certificateholder must notify the council of the certificateholder's intentions, any project design changes, and the status of the site. The council shall apply these rules to Site Certification Agreements issued in connection with applications filed after the effective date of this chapter. Except for the provisions in chapter 463-36 WAC, these regulations shall not apply to energy facilities for which Site Certification Agreements have been issued before the effective date of this chapter."

New -- Chapter 463-68-020 WAC, Construction and operation subject to certification conditions.

Changes to the Rule:
This section clearly establishes that all applicable laws and rules of the state must be adhered to and that the Site Certification Agreement, approved and signed by the governor and signed by the applicant, contains the terms and conditions under which an energy facility may be constructed and operated.

Comment(s) Received Relating to this Section:
NONE

New -- Chapter 463-68-030 WAC, Term for start of construction.

Changes to the Rule:
This section establishes that construction of an approved energy facility, subject to the terms of the Site Certification Agreement, may commence any time in the ten years following the effective date of the Site Certification Agreement approval. The term or length of time that a certificate holder has to commence construction once the site certificate is approved by the governor has always been an issue during adjudication hearings. During recent siting proceedings, applicants have wanted a long or unlimited period to commence construction while some parties have wanted short periods ranging from eighteen months to three or five years.

The council recognizes the need for an applicant to have some certainty about how long it will have before being required to commence construction. From the point of view of an applicant, there is greater value in a longer term. Likewise, from the standpoint of the cost of preparing the application and related documents as well as the need to secure necessary financing, a longer term benefits the applicant.

It has been argued that environmental and possibly social conditions may change during the period of time between when the Site Certification Agreement is approved and the commencement of construction. It is also argued that changing technology may provide better options. This could include development of different types of energy facilities, improved efficiencies or conservation measures that may cause the approved energy facility to be less than optimal.

The council has considered these factors and concluded that a ten-year term or "build window" is appropriate when combined with the reviews as required in Chapter 463-68-060 WAC. The ten-year term with applicable reviews creates the balance necessary to protect the environment and the public as well as to provide the certainty those applicants and certificate holders need.

Comment(s) Received Relating to this Section:
The council received oral and written comments about the length of time that a certificate holder had before starting construction and the length of time before a Site Certification Agreement expired.

Council Response to Comment(s):
This new section is added to the council rules to clarify existing council policy and practice aimed at limiting the term of a Site Certification Agreement to ten years. The council has heard testimony in several siting cases on the term of site certification agreements. The council has included a termination clause in all recent recommendations to the governor for approval of site certificate agreements. The council, based on information presented during the adjudicative process and through council discussions during deliberations, has conditioned site certification agreements by limiting them to a ten-year period. The term of the Site Certification Agreement is established at ten years because in the view of the council changes in energy facility development and technology, changing environmental conditions and changes in environmental regulations under which the approved energy facility was approved would almost certainly require significant amendments or a new application after ten years. It also recognizes the concerns of some that conditions may change and that a project approved today may not be appropriately sited or conditioned to be permitted five or ten years in the future.

This section establishes the term of Site Certification Agreements. Subsequent sections will describe what holders of site certificates must do in order to maintain their site certificates. Certificate holders are required to provide the council with necessary design plans and other documents before construction may commence, and the term of the site certificate is divided into two five-year periods with different reviews of environmental and other conditions taking place based on construction commencing in the first five-year period or in the second five-year period.

Changes to the Rule following Public Hearings: (Proposed rule versus rule actually adopted):
NONE

New -- Chapter 463-68-040 WAC, Start of construction.

Changes to the Rule:
In the past several years, the council has been attempting to establish a definition of commencement of construction. This new section clearly defines those activities that constitute the commencement of construction of an energy facility as defined in RCW 80.50.020 and as described in RCW 80.50.060, namely:

- Site preparation by grading of the site, foundation excavation, or other significant earthwork on the site;
- Construction of footings or foundations, form work, installation of rebar or pouring concrete for a project's major components or auxiliary structures;
- Excavation for natural gas supply, water supply, water or waste-water discharge pipelines or structures; and

- Earthwork or construction of access or service roads, electrical transmission lines, switchyard structures or laydown areas.

Commencement of any of the above activities constitutes commencement of construction and obligates certificate holders to have received approval of necessary plans and specifications or other documents. It is also the time when various mitigation or other Site Certification Agreement conditions become effective.

Comment(s) Received Relating to this Section:
NONE

New -- Chapter 463-68-050 WAC, Submittal of plans and specifications prior to start of construction.

Changes to the Rule:
The council must have appropriate advance notice of proposed commencement of construction in order to accomplish necessary reviews of various plans, permits and design documents. Section 040 above clearly defines those activities that constitute the commencement of construction of an energy facility. In the past several years, the council has been attempting to establish both a definition of commencement of construction and the time period prior to commencement of construction wherein plans and specifications must be submitted to the council for review. The ninety-day time period allows the council time to complete its required reviews prior to authorizing commencement of construction. The selection of ninety days is consistent with common practice of other agencies including the Department of Ecology. The ninety-day period requires that the council proceed expeditiously with necessary reviews, thereby allowing the certificate holder to commence construction.

Comment(s) Received Relating to this Section:
NONE

New -- Chapter 463-68-060 WAC, Review and reporting changes in the project status or site conditions.

Changes to the Rule:
This new section is added to establish the level and extent of review necessary if construction has not commenced or if construction has commenced but has not continued in a reasonably uninterrupted fashion toward project completion during the first five years of the term of the Site Certification Agreement. If construction has not commenced or reasonably continued in this five-year period, the certificate holder is required to report to the council its intention to proceed or not proceed with the project ninety days prior to the end of the five-year period.

When construction has not commenced or continued during the five-year period, the certificate holder shall report to the council and describe the nature and degree of any changes to the following since the effective date of the site-certification agreement:

- Project design
- Statements and information in the application
- Statements and information in project-related environmental documents
- Project-related environmental conditions
- Whether any new information or changed conditions indicate the existence of probable significant adverse environmental impacts that were not covered in any project-related environmental documents, including, but not limited to, those prepared under RCW 43.21C
- Suggested changes, modifications, or amendments to the site certification agreement and/or any regulatory permits

Comment(s) Received Relating to this Section:
Although not specifically regarding this section of Chapter 463-68, the council received several comments about the term of the Site Certification Agreement. Most comments pertained to having a shorter 5 year term instead of the proposed 10 year term.

1. This proposed regulation is unnecessary and inappropriate as a more general policy matter. Subsection (1)(a) and (1)(b) requires a certificate holder to inform the council after 5 years whether there have been any changes to the project design or statements and information in the application. These provisions are unnecessary. No new regulation is required to address that issue. Given other existing regulatory requirements, this new regulation is not needed to inform the council about changes to the project.
2. Subsection (c) requires the Certificate Holder to report any changes to "statements and information" in project-related environmental documents. This requirement is inappropriate. The primary environmental document is the FEIS, which is the council's document not the Certificate Holder's document. In a document that contains literally thousands of "statements," it is unduly burdensome to require a Certificate Holder to review and evaluate each statement to determine whether any change is appropriate. The requirement is tantamount to requiring preparation of a new EIS.
3. Subsection (d) requires the Certificate Holder to report any changes in "project-related environmental conditions," and subsection(2) requires the Certificate Holder to submit a report indicating whether any new information or changed conditions indicates the existence of probable significant adverse impacts not previously considered. Like subsection (c), these subsections appear tantamount to requiring the Certificate Holder to initiate another comprehensive environmental investigation and to prepare a new EIS.
4. Subsection (3) requires the Certificate Holder to report any suggested changes, modifications or amendments to the SCA. This subsection is unnecessary. If the Certificate Holder wants to amend the SCA, it would be required by other regulations to file an application for an amendment.
5. The proposed regulation read together with WAC 463-68-070 would create tremendous uncertainty. These regulations appear to require the Certificate Holder to conduct a new comprehensive environmental evaluation after 5 years, and appear to give EFSEC unlimited discretion to modify the SCA after 5 years. In effect, this

would turn a 10-year SCA into a 5-year SCA. An unrestricted 10-year term is more appropriate.

6. Even if the report mentioned in this regulation were necessary and appropriate, it should not be required to be submitted until the Certificate Holder decides to initiate or resume construction.

Council Response to Comment(s):
As described more fully above, the council proposed this rule to maintain a balance between the need to develop new energy facilities and the costs associated with doing so and the changing economic, social and environmental conditions. Because of the many and substantial impacts that may result from the development of an energy facility, the conditions necessary for development will likely change over the lifespan of a Site Certification Agreement.

The council has heard many comments about the term of site certificates it has issued and about possible changes to these rules to limit the so- called build window to 5 years. The council will continue to allow a ten-year term for Site Certification Agreements. However, the council will require certificate holders that have not commenced construction within 5 years to report on possible changes to the project, changes to environmental regulations and the impact the project will have on the environment. The extent of review necessary will be based on the nature of the changed conditions or rules. The council felt that this was a reasonable balance given that many parties requested a shorter term for a Site Certification Agreement.
Changes to the Rule following Public Hearings: (Proposed rule versus rule actually adopted):
NONE

New -- Chapter 463-68-070 WAC, Review of changes.

Changes to the Rule:
This section identifies for the holder of a Site Certification Agreement, and any other interested party, the nature of the review by the council if construction is not started or does not proceed in a reasonably uninterrupted fashion. Under section 060 above, if construction has not started or has stopped and been suspended during the first five years of the site-certificate agreement, the certificate holder shall identify suggested changes, modifications or amendments to the Site Certification Agreement and any regulatory permits.

The council must approve any commencement or re-commencement of construction. Any approval by the council may only be granted following review of the report required in section 060 above. This section clarifies that the council may retain an independent consultant to conduct or assist with this review and that the certificate holder is obligated to cover these expenses. The council added this section to ensure that projects that have delayed commencement of construction or possibly suspended construction continue to meet all appropriate and applicable environmental standards and that the site is still appropriate for construction of an energy facility. This provision also assures those

parties that requested a shorter site-certificate agreement term that projects will be held to the appropriate standards.

Comment(s) Received Relating to this Section:

1. As explained in connection with proposed regulation 463-68-060, if adopted, this regulation should clearly state that it would not apply to projects for which applications have already been filed or SCAs issued.
2. It is inappropriately one-sided. The SCA is an agreement between the State of Washington and the Certificate Holder. By this regulation, the council proposes it be allowed to amend the agreement unilaterally after 5 years. This is contrary to the statutory idea of an "agreement."
3. The regulation is too vague. It does not identify what criteria the council would use to determine whether changes to the Site Certification are necessary. Nor does it explain the process the council would use to make that decision. Interested parties might seek to intervene in the process and request an adjudicatory hearing.
4. The regulation as written is too broad and effectively limits the SCA term to five years. It appears to grant the council unlimited discretion to modify the SCA if construction has not begun after five years, and it may require a time-consuming and expensive process to determine whether to modify the SCA.
5. The 5-year review is not necessary given the review requirements of major permits. The council conducts a comprehensive evaluation of land use and environmental impacts at the time a project is certified. The two areas where the permitting requirements are often based on the available control technology – air and water permitting - which must already be reviewed after three and five years respectively.

Council Response to Comment(s):

1. Valid comment. The council revised this section to more clearly establish its intent.
2. The term of Site Certification Agreements is for a period of ten years with a review conducted if construction has not commenced and proceeded, reasonably un-interrupted, within five years.
3. The council will assess all changes to a project and determine if changes to a Site Certification Agreement are necessary and if other parties should be heard on a particular change.
4. The term of Site Certification Agreements is for a period of ten years with a review conducted if construction has not commenced and proceeded, reasonably un-interrupted within five years.
5. The term of Site Certification Agreements is for a period of ten years with a review conducted if construction has not commenced and proceeded, reasonably un-interrupted within five years.

Changes to the Rule following Public Hearings: (Proposed rule versus rule actually adopted):

The council revised Chapter 463-68-070 WAC, to read as follows:

"This chapter sets forth rules for the content and timing of preparing site restoration or preservation plans for implementation at the conclusion of a plant's operating life; if a project is terminated; or if construction is suspended. The council shall apply these rules

to Site Certification Agreements issued in connection with applications filed after the effective date of this chapter. Except for the provisions in chapter 463-36 WAC, these regulations shall not apply to energy facilities for which Site Certification Agreements have been issued before the effective date of this chapter."

New -- Chapter 463-68-080 WAC, Site Certification Agreement Expiration.

Changes to the Rule:
This new section clearly states that the Site Certification Agreement:

- expires if construction is not commenced or the project is canceled with in the ten years of the issuance of the Site Certification Agreement.
- expires if commercial operation has not commenced with in ten years of the issuance of the Site Certification Agreement. Subsection (2) is intended to put certificate holders on notice that if commercial operation has not commenced in ten years, the site certification may be cancelled unless the certificate holder has requested and received approval of an extension of the term of the site-certificate agreement by the council.

Subsection (3) establishes that in cases of a request for extension of the term of the site-certificate agreement, the council may conduct a review of the project consistent with the provisions of sections Chapter 463-68-060 and 463-68-070 WAC. The certificate holder may also need to satisfy other applicable laws and legal requirements before the council could consider an extension to extend the term of a site-certificate agreement.

Comment(s) Received Relating to this Section:
Comments were received concerning the applicability of these rules with regard to existing Site Certification Agreements and applications that have been filed prior the effective date of these rule amendments.

1. Allowing a ten year build window provides a loophole allowing developers to evade responsibility of mitigating CO_2 emissions at outdated mitigation rates.
2. A ten year build window allows developers to bank permits in a way that makes it difficult to predict the number of new facilities constructed as a consequence of "short term perceived energy crisis."
3. A 5 year build window is recommended.

Subsection (1) requires that EFSEC cancel an SCA after ten years.

4. It is recommended including language in this provision that would allow the Certificate Holder to request an extension of the SCA. Consider rephrasing the end of this subsection to read, "the site certification shall expire unless the applicant requests an extension."
5. Subsection (2) is inconsistent with proposed WAC 463-68-030. WAC 463-68-030 states that construction may start any time within 10 years, but this subsection says that construction has to be completed and commercial operation commenced within 10 years. This subsection would, in effect, make the SCA good for only 7 ½ years,

assuming a 2 ½ year construction period. Consider rewording this section to state "If construction has not been commenced within 10 years…."

Council Response to Comment(s):
The council is mindful of the status of existing Site Certification Agreements. If a Site Certification Agreement is approved by the governor and signed by the applicant, it is binding on the applicant and the state. It is important to note that approved Site Certification Agreements are binding upon both the state and the certificate holder. In the case of applications that are received prior to the effective date of these rules, the council will review the requirements with that applicant and reach agreement on the rules that would govern that application.

1. The council believes that the provisions of RCW 80.07 address this issue. The council will also consider this comment when it drafts rules implementing the provisions of RCW 80.07.
2. The jurisdiction of the council does not include resource management issues. The council did consider this issue but decided to keep to a ten-year build window with significant review if construction does not commence within the first five years after approval of the Site Certification Agreement.
3. The council has discussed this issue on several occasions and reached the conclusion that a ten-year build window with an appropriate review after the first five years is appropriate.
4. and 5. This section provides for the cancellation of a Site Certification Agreement if construction has not commenced or re-commenced within ten years. The council believes that any Site Certification Agreement that is ten years old and has not commenced construction must re-start the application approval process. As per Chapter 463-68-080subsection(2), if constriction has commenced and been suspended, and/or commercial operation has not commenced, the certificate holder may request an extension to the term of its Site Certification Agreement.

Changes to the Rule following Public Hearings: (Proposed rule versus rule actually adopted):
NONE

Old -- Chapter 463-54 WAC, Certification compliance determination and enforcement.

New -- Chapter 463-70 WAC, Certification compliance monitoring and enforcement.

Changes to the Rule:
The title of this chapter was changed to Certification compliance monitoring and enforcement.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-54-010 WAC, Intent and purpose of this chapter.

New -- Chapter 463-70-010 WAC, Intent and purpose of this chapter.

Changes to the Rule:
The title of this section was changed to "Purpose."

This section was revised to more clearly describe the intent of the chapter to monitor the construction and operation of the energy facility and to assure compliance with the site-certificate agreement. The reference to RCW 80.50.040(11) was corrected to RCW 80.50.050(9).

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-54-020 WAC, Compliance to be determined.

New -- Chapter 463-70-020 WAC, Compliance to be determined.

Changes to the Rule:
This section was revised to more clearly state that the council would implement monitoring to ensure compliance with the site-certificate agreement and other requirements associated with the construction and operation of the energy facility.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-54-030 WAC, Compliance inspections and reports.

New -- Chapter 463-70-030 WAC, Compliance inspections and reports.

Changes to the Rule:
No Change

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-54-040 WAC, Compliance reports and determinations.

New -- Chapter 463-70-040 WAC, compliance reports and determinations.

Changes to the Rule:
This section received a grammatical correction.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-54-050 WAC, Noncompliance determinations and enforcement.

New -- Chapter 463-70-050 WAC, Noncompliance determinations and enforcement.

Changes to the Rule:
This section received a grammatical correction.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-54-060 WAC, Ecology monitoring and enforcement.

New -- Chapter 463-70-060 WAC, Monitoring and enforcement - - Departments of ecology and health.

Changes to the Rule:
The title of this section was changed to "Monitoring and enforcement - - Departments of ecology and health."

This section is changed to indicate that the council "may contract" with the Department of Ecology for monitoring activities pertaining to air and water discharges from energy facilities under the jurisdiction of the council. Previously this section delegated these activities to the Department of Ecology. In recent years, due to workload and the availability of staff, the Department of Ecology has been unable to perform all of the monitoring or inspections asked of them. The adoption of this change allows the council to pursue other means to achieve necessary inspections and compliance monitoring for energy facilities under its jurisdiction.
Subsection (2) is changed in much the same manner as subsection(1) above. The first sentence is changed to read "The council may contract with the Department of Health for monitoring activities related to radionuclide emissions to the air…"

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-54-070 WAC, Enforcement actions.

New -- Chapter 463-70-070 WAC, Enforcement actions.
Changes to the Rule:
The first sentence of this section citing several references to RCW 70.94 has been deleted. These RCW citations have been moved to subsection(5) below pertaining to air-emission violations.

The last sentence under subsection (1) General has been revised by deleting the word "apparent." Previously this sentence read in part that the council would use its discretion to choose the enforcement approach best suited "in light of the apparent seriousness of an apparent violation." This section now reads "…in light of the seriousness of an apparent violation…"

Subsection (5) Air emission violations, has been revised to include references to RCW 70.94 pertaining to air emissions. These references were previously included in the introduction to Chapter 463-54-070 WAC.

A new subsection (6), NPDES[46] permit violations, has been added consistent with subsection (5) of this section. This addition requires that noncompliance with NPDES permits administered by the council shall be consistent with RCW 80.50.150, chapter 90.48 RCW, and chapter 463-38 WAC.

Comment(s) Received Relating to this Section:
It was recommended that the word "council" be inserted before the words "enforcement actions" in both subsections.

Council Response to Comment(s):
Valid comment. The council added the word "council" to subsections 5 and 6 to clarify that enforcement actions referred to here are enforcement action of the council.

Changes to the Rule following Public Hearings: (Proposed rule versus rule actually adopted):
Subsections 5 and 6 were revised to read as follows:

(5) Air emission violations. Consistent with RCW 70.94.422, all council enforcement actions and penalties for all air emission violations shall be consistent with RCW 70.94.332, 70.94.430, 70.94.431 (1) through (7), and 70.94.435. The council may enter such orders as authorized by chapter 80.50 RCW regarding air pollution episodes or violations, as set forth in WAC 463-78-230.
(6) NPDES permit violations. In addition to the provisions of this chapter, council enforcement actions related to noncompliance with or violations of NPDES permits administered by the council shall be consistent with RCW 80.50.150, chapter 90.48 RCW, and chapter 463-76 WAC.

Old -- Chapter 463-54-080 WAC, Site preservation or restoration plan.

New -- Section moved

Changes to the Rule:
This section has been deleted and its contents moved to a new chapter 463-72 WAC, Site restoration and preservation.

Comment(s) Received Relating to this Section:
NONE

[46] NPDES, National Pollution Discharge Elimination System. These are wastewater-discharge permits mandated by the Federal Water Pollution Control Act.

New -- Chapter 463-72 WAC, Site restoration and preservation.

New -- Chapter 463-72-010 WAC, Purpose

Changes to the Rule:
This new section describes the purpose, timing and funding necessary for site restoration or preservation.

Comment(s) Received Relating to this Section:
1. The council received written comments on the intent of this Chapter. The concern is that "Read literally, they would appear to apply to all projects, whether or not a Site Certification Agreement has already been issued."
2. Add the following sentence to the end of 463-72-010: "These rules apply to projects for which no site restoration plan has been approved by the council prior to [the effective date of the rules]."
3. This chapter should make clear that it does not apply to projects for which applications have already been filed or SCAs issued.
4. This chapter should clearly state that it only applies to applications filed after the effective date of these regulations.
5. Existing SCAs already address these issues.

Council Response to Comment(s):
The council is mindful of the binding nature of a Site Certification Agreement and as such does not envision these new requirements would be applied to existing certificate holders. While there may be occasions due to a revised state or federal law that would require the council to amend a Site Certification Agreement, this would only happen with the full understanding of the certificate holder with respect to the binding nature of the necessary revisions.

Changes to the Rule following Public Hearings: (Proposed rule versus rule actually adopted):
This section was revised to read as follows:
"This chapter sets forth rules for the content and timing of preparing site restoration or preservation plans for implementation at the conclusion of a plant's operating life; if a project is terminated; or if construction is suspended. The council shall apply these rules to Site Certification Agreements issued in connection with applications filed after the effective date of this chapter. Except for the provisions in chapter 463-36 WAC, these regulations shall not apply to energy facilities for which Site Certification Agreements have been issued before the effective date of this chapter."

New -- Chapter 463-72-020 WAC, Plan elements.

Changes to the Rule:
This section describes the three principal processes that go into preparation of a site restoration or preservation plan: the basis for site restoration; how funding for restoration of the site will be provided and the extent of monitoring of the site after operation and

during site restoration activities; and how the site will be used following operation and the monitoring anticipated if a site is mothballed. Some parties may feel that having an energy facility in their community is a burden or that it is not the most beneficial use of a site. The site restoration or preservation plan is intended to ensure that, after its useful operational life, the energy facility will either be restored or developed for another beneficial use.

Subsection (1) requires detail about the assumptions a developer is using to estimate future uses for the site or whether the site will be demolished at the end of its operating life. This could include the assumption that a site would be returned to its original condition. Alternatively, the site-restoration plan would describe how the site would be "remodeled" to suit future uses. In all cases, the intent is to protect the environment and public health and other interests in the site.

Key to site restoration is the funding mechanisms proposed to guarantee that after the useful life of the energy facility, the site will be restored. These funding mechanisms, while key to site restoration, can take different forms depending on the needs of the certificate holder, the nature of the energy facility and the likelihood of future uses of the site.

Comment(s) Received Relating to this Section:
NONE

New -- Chapter 463-72-030 WAC, Council approval and schedules required.

Changes to the Rule:
This section confirms that council approval of site restoration or preservation plans, including restoration schedules and funding mechanisms, is required.

Comment(s) Received Relating to this Section:
NONE

New -- Chapter 463-72-040 WAC, Initial site restoration plan.

Changes to the Rule:
Parts of this section were taken from former chapter 463-42-665 WAC.

This is the first of several levels of site restoration or preservation plans that are required for an energy facility under the jurisdiction of the council. While this initial plan must be forward looking, it must also represent a good-faith estimate of potential futures for the site. This initial site restoration or preservation plan is intended to build on the site restoration information provided in the application for site certification. This level of site-restoration planning is only required after the governor has executed the site certification.

Subsection (1) requires that the initial site-restoration plan must be submitted 90 days prior to the commencement of site preparation. This allows the council time to review and approve the plan content and financial provisions before any site preparation work begins. This plan must also take into account what happens in the event the energy facility is suspended before construction is completed or if it is operational and shut down for any reason or any period of time, and site restoration at the end of the useful life of the energy facility.

Subsection (2) requires that the site-restoration plan parallel a decommissioning plan, if such a plan is prepared for the project. This ensures consistency among the various documents associated with the energy facility.

While it is likely that many circumstances will change during the operational life of an energy facility, the site-restoration plan is intended to predict future uses of the site, describe how these future uses will be accomplished and how the environment and interests of the public and public safety issues will be protected and addressed. This section requires that the processes used to evaluate future options for the site be described. Key to this discussion are the economic factors, including costs and benefits of the options versus the risk to the public and the environment.

This section also requires that the certificate holder provide evidence of pollution-liability insurance appropriate for the type of facility being constructed. The nature of the financial instrument that will be used to guarantee site restoration, monitoring and compliance is also described in the initial site-restoration plan. This financial instrument must be approved by the council.

Comment(s) Received Relating to this Section:
Remove the requirement that the Initial Site Restoration Plan "include a discussion of economic factors regarding costs and benefits of various restoration options…" The initial site restoration plan is prepared before construction even begins. At that stage, it should address major environmental and public health and safety issues, and likely restoration plans in broad strokes.

Subsection (3) of the regulation would require a site closure bond, "sinking fund" or other financial instrument as security. The council should add to the last sentence of section 040 (3) the option of providing a corporate guarantee as an appropriate funding mechanism.

Council Response to Comment(s):
The application requirements for the initial site restoration plan are to provide the council and others a complete broad initial view of possible site restoration (and re-use) options, their costs and possible impacts.

A corporate guarantee may fall under the "other financial instrument as security" portion of this rule. If a corporate guarantee is proposed it will be evaluated in conjunction with

the substance and/or economic and financial strength or viability of the corporation that it is tied to.

Changes to the Rule following Public Hearings: (Proposed rule versus rule actually adopted):
NONE

New -- Chapter 463-72-050 WAC, Detailed site restoration plan – terminated projects

Changes to the Rule:
This section was formerly Chapter 463-42-665 WAC. The only change to this section is a reference to the new WAC numbers.

Comment(s) Received Relating to this Section:
It is not reasonable to require a detailed restoration plan within 30 days of project termination. Consider modifying this regulation as follows: "When a project is terminated, a detailed site restoration plan shall be submitted within ~~30 days~~ 12 months from the time the council is notified of the termination."

Council Response to Comment(s):
Comment noted. The council noted this error and agrees that 30 days is not an adequate period of time in which to prepare a detailed site restoration plan. Although the council can not accept a 12 month time period, the council has corrected this time period to 90 days.

Changes to the Rule following Public Hearings: (Proposed rule versus rule actually adopted):
This section has been revised to read:
"When a project is terminated, a detailed site restoration plan shall be submitted within ninety days from the time the council is notified of the termination. An extension of time may be granted for good cause shown. The site restoration plan shall address the elements required to be addressed in WAC 463-72-040, in detail commensurate with the time until site restoration is to begin. The council will act on the plan at the earliest feasible time and may take or require action as necessary to deal with extraordinary circumstances."

New -- Chapter 463-72-060 WAC, Site preservation plan – Suspended projects.

Changes to the Rule:
This section was formerly Chapter 463-42-675 WAC. The only change to this section is a reference to the new WAC numbers.

Comment(s) Received Relating to this Section:
NONE

New -- Chapter 463-72-070 WAC, Site restoration – Terminated projects

Changes to the Rule:
This section was formerly Chapter 463-42-680 WAC.

Comment(s) Received Relating to this Section:
The council received written comments on the intent of this section. The concern is the underlying premise that the council will require an energy facility site to be restored to its "original condition" after conclusion the facility's useful life. This Chapter 463-72-070 WAC seems to require that site restoration be to the level of the original condition of the site. The council should not adopt this regulation, which would establish a presumption in favor of requiring a Certificate Holder to return a site to its original condition at the end of the project's life. Rather than establishing a presumption in favor of returning sites to its original condition, the final condition of the site should be addressed in the site restoration plan and considered on a site-specific basis.

Council Response to Comment(s):
The council recognizes that at the conclusion of the useful life of an energy facility valuable infrastructure may remain and may be in such condition as to be able to be used for other purposes. The purpose of this section is to indicate that in the absence of a council approved restoration plan, the site would need to be returned to original condition. Assuming that a reasonable restoration plan that provides for future use is approved that is the extent of site restoration that would be required.

It is not the position of the council that all sites be restored to their original condition. The council recognizes the value of maintaining existing infrastructure and the opportunity for using energy facility sites, after their useful life, for other purposes. The application requires that a site restoration plan be outlined. If the application is approved, an initial site restoration plan is required (Chapter 463-72-040 WAC) 90 days prior to commencement of construction. When a project is terminated, a detailed site restoration plan is required. Chapter 463-42-295 WAC requires applicants to examine possible future activities at the site after the end of the useful life of the project. The requirements for site restoration are contained in the Site Certification Agreement and are binding on the state and the certificate holder. In the event the council does not approve a site restoration plan or "in the absence of a council determination as to the level of site restoration, restoration of the site to a reasonable approximation of its original condition prior to construction shall be required." (Chapter 463-72-070)

Changes to the Rule following Public Hearings: (Proposed rule versus rule actually adopted):
NONE. The council discussed the possibility of revising this section but determined that its intent was clear and did not opt to make any changes.

New -- Chapter 463-72-080 WAC, Site preservation or restoration plan.

Changes to the Rule:
This section was formerly Chapter 463-54-080 WAC. The only change to this section is a reference to the new WAC numbers.

Comment(s) Received Relating to this Section:
1. Subsection (1) requires that EFSEC cancel an SCA after ten years.
2. It is recommended including language in this provision that would allow the Certificate Holder to request an extension of the SCA. Consider rephrasing the end of this subsection to read, "the site certification shall expire unless the applicant requests an extension."
3. Subsection (2) is inconsistent with proposed WAC 463-68-030. WAC 463-68-030 states that construction may start any time within 10 years, but this subsection says that construction has to be completed and commercial operation commenced within 10 years. This subsection would, in effect, make the SCA good for only 7 ½ years, assuming a 2 ½ year construction period. Consider rewording this section to state "If construction has not been commenced within 10 years…."
4. The second sentence requires that the initial site restoration plan be reviewed and updated at least every 5 years. The initial site restoration plan is addressed in WAC 463-72-040, so if the council were going to require updates every 5 years, the requirement should be included in 040 not here.
5. The requirement of updating the initial plan every 5 years seems completely unnecessary. It is hard to imagine having any reasonable basis for "updating" the site restoration plan every 5 years. It is pointless to request revisions until the Certificate Holder actually reaches a point in time when it decides to suspend or terminate operations.
6. The third sentence provides that the council may direct the submission of site preservation, restoration plans at any time during the development, construction or operating life of the project. This provision makes no sense in light of the council's goal to provide certainty through regulations.
7. The final sentences says that "the council may require such information and take or require such action as is appropriate to protect the environment and all segments of the public against risks or dangers resulting from conditions or activities on the site." The meaning of this sentence is unclear and seems designed to give the council unlimited discretion to require a Certificate Holder to implement environmental improvement projects at any time. The council should not be free to impose whatever additional requirements it might deem appropriate at any particular time.

Council Response to Comment(s):
With respect to comments 1-5 and 7, the council notes these comments but has opted to not make any changes.

Regarding comment 6, this requirement allows the council to direct the submission of site preservation, restoration plans at any time during the development, construction or operating life of the project "based upon (only after) the council's review of the project status." At such time the council may require action as is appropriate to protect the environment and all segments of the public.

Changes to the Rule following Public Hearings: (Proposed rule versus rule actually adopted):
NONE

Old -- Chapter 463-40 WAC, Dangerous wastes.

New -- Chapter 463-74 WAC, Dangerous wastes.

Old -- Chapter 463-40-010 WAC, Purpose.

New -- Chapter 463-74-10 WAC, Purpose.

Changes to the Rule:
Editorial changes were made to this section. The intent of the section remains the same; that is to describe the authority of the council to protect the public and environment from the effects of dangerous wastes generated at energy facilities.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-40-020 WAC, Coverage.

New -- Chapter 463-74-020 WAC, Coverage.

Changes to the Rule:
No Change
Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-40-030 WAC, Regulations.

New -- Chapter 463-74-030 WAC, Regulations.

Changes to the Rule:
No Changes

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-40-040 WAC, Monitoring and enforcement.

New -- Chapter 463-74-040 WAC, Monitoring and enforcement.

Changes to the Rule:
References to the Department of Ecology are changed from "DOE" to "Department of Ecology." In the penultimate sentence, the word "therefore" is changed to "therefrom."

Comment(s) Received Relating to this Section:
NONE

PART IV -- Permits

Old -- Chapter 463-38 WAC, Regulations for compliance with NPDES permit program.

New -- Chapter 463-76 WAC, Regulations for compliance with NPDES permit program

Changes to the Rule:
The content of this section was revised for consistency with Chapter 173-220 WAC, the National Pollution Discharge Elimination System (NPDES) permit program administered by the Department of Ecology. The NPDES permit program is a federal Environmental Protection Agency (EPA) requirement that regulates discharges into waters of the United States. This federal program is delegated to the states for administration, and in Washington State both the Department of Ecology and the council have received delegation from the EPA to administer the program. The council is responsible for all energy facilities under its jurisdiction and the Department of Ecology administers the program for other dischargers.

The council is authorized to administer the program through its NPDES delegation agreement with EPA and through state law, specifically RCW 80.50 and RCW 90.48. Changes made to this chapter represent revisions necessary for the council rules to stay consistent with the requirements of the federal program and EPA, and to ensure that the waste water discharge requirements of the Department of Ecology and of the council are consistent and do not represent different or conflicting regulatory requirements.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-38-010, Definitions.

New -- Chapter 463-76-010, Definitions.

Changes to the Rule:
The definitions have been reorganized alphabetically and where new definitions are added, these new definitions are commonly used definitions taken from existing federal or state NPDES permit program laws or rules. Also, the use of the words ”the term” to identify the subject of the definition has been deleted throughout this section. For the sake of consistency, the majority of definitions used here are the same as those of the Department of Ecology as contained in Chapter 173-220-030 WAC.

Subsection (3) of this section “applicable effluent standards and limitations” was deleted here and moved to Chapter 463-36-053. This has resulted in the necessity to renumber subsequent subsections accordingly.

Subsection (4) was revised to provide references to current Washington state and federal water quality standards.

Subsection (5) was revised to clarify that the terms "certification agreement" and "Site Certification Agreement" are the same and contain the requirements that must be met if an energy facility is to receive approval by the governor.

In subsection(6), the term "chairman" was changed to "chair."

A new subsection(7) defining "contiguous zone" was renumbered and was moved from 463-38-010(35) (h) to new 463-38-010(7).

Subsection (9) was moved from subsection(13) and revised to delete the term "executive secretary" and add the term "council manager."

Subsection (10) defining the term "discharge of pollutant" was revised to include "discharges of pollutants or any combination of pollutants to surface waters of the state." The term "navigable waters" was deleted in favor of the term "surface waters."

Subsection (11) defining the term "domestic wastewater" was imported from Chapter 173-220-030 WAC.

Subsection (12) defining the term "domestic wastewater facility" was imported from Chapter 173-220-030 WAC, the NPDES rules administered by the Department of Ecology.

Subsection (13) was revised to delete the term "DOE" and replace it with the term "Ecology." The term DOE is used to refer to the federal Department of Energy.

Subsection (14) was revised to delete the term "navigable waters" and replace with the term "surface waters of the state."

In subsection(15) the definition of "energy facility" was moved from 463-38-010(33).

Subsection (16) was moved to subsection(9).

In subsection(17) the definition of a general permit was imported from Chapter 173-220-030 WAC, the NPDES rules administered by the Department of Ecology.

In old subsection(15), the definition of "minor discharge" 463-38-010(15) is not consistent with federal language, and is not a necessary definition for energy facility discharges and was deleted.

In old subsection(16), the definition of "national data bank" 463-38-010(16) is not consistent with federal language, and is not a necessary definition for energy facility discharges and was deleted.

Subsection (19) defining "municipality" was moved from 463-38-010(35) (c) to new 463-38-020(19).

Subsection (21) was revised to be consistent with applicable language in current state and federal rules.

Subsection (23) defining "NPDES form" was revised to delete the reference to the "refuse action application." This term is no longer applicable for use in these NPDES rules.

Subsection (26) defining "NPDES reporting form" was revised to reflect that is the same as a "discharge monitoring report" for the purpose of reporting performance of facilities governed by NPDES permits.

Subsection (27) was revised to be consistent with applicable language in current state and federal rules. It now defines a permit authorizing discharge rather than defining a "permittee."

Subsection (28), defining the broad use of the term "person," was moved from 463-38-010 (35) (d) to new 463-38-020(28).

Subsection (29), defining the term "point source," was moved from 463-38-010 (35) (k) to new 463-38-020(29).

Subsection (30), defining the broad use of the term "pollution" was moved from 463-38-010 (35) (e) to new 463-38-020(30) and changed to "pollutant." This definition was expanded consistent with applicable language in current state and federal rules.

Old subsection(26), defining "refuse act" is an out-of-date term and was deleted.

Old subsection(27), defining "refuse act application" is an out-of-date term and was deleted.

Old subsection(28), defining "refuse act permit" is an out-of-date term and was deleted.

Old subsection(30), defining "schedule of compliance" was language inconsistent with state and federal requirements and was deleted.

Old subsection(31), defining t "sewage" is language that is not necessary for the implementation of these rules and was deleted.

Old subsection(32), defining "sewage sludge" is language that is not necessary for the implementation of these rules and was deleted.

Old subsection(34), defining "trade secrets," is language that is not necessary for the implementation of these rules and was deleted.

Old subsection(35) and (35) (a), defining t “interstate agency” is language that is not necessary for the implementation of these rules and was deleted.

Old subsection(35) (b), defining “state” was renumbered (32) and edited for clarity.

Old subsection(35) (c), defining “municipality” was moved and was renumbered (19).

Old subsection(35) (d), defining “person” was moved and renumbered (28).

Old subsection(35) (e), defining “pollutant” was renamed “pollutant” and moved and was renumbered (30).

Old subsection(35) (f), defining “navigable waters” is language that is not necessary for the implementation of these rules and was deleted.

Old subsection(35) (g) defining “territorial waters” is language that is not necessary for the implementation of these rules and was deleted.

Old subsection(35) (h), defining “contiguous zone” was moved and was renumbered (7).

Old subsection(35) (i) defining “ocean” is language that is not necessary for the implementation of these rules and was deleted.

Old subsection(35) (j), defining “toxic pollutant” is language that is not necessary for the implementation of these rules and was deleted.

Old subsection(35) (k), defining “point source” was moved and was renumbered (29).

Old subsection(35) (l), defining “interstate agency” is language that is not necessary for the implementation of these rules and was deleted.

Old subsection(35) (m), defining “discharge” was moved and was renumbered (28).

Subsection (33) is new, defining “stormwater discharge associated with industrial activity.” This definition is taken from federal rules 40 CFR 122.26(14) pertaining to stormwater discharges. In the period since the council rules for the NPDES permit program were initially added to this chapter, the EPA added new requirements for the control of stormwater discharges. This definition describes the sources and locations from which stormwater may originate and the types of activities that may contribute to stormwater discharges and thus be subject to these rules.

Subsection (34) is a new definition for “surface waters of the state” added for consistency with Chapter 173-220-030 WAC, the ecology NPDES rules.

A new subsection(35) is added to capture those definitions not specifically defined herein from federal rules and states that "In the absence of other definitions as set forth herein, the definitions as set forth in 40 CFR 122.2 and 122.26(b) shall be used."

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-38-020 WAC, Scope and purpose.
New-- Chapter 463-76-020 WAC, Purpose.

Changes to the Rule:
The title of this section has been changed to Purpose. This section has been moved to the beginning of this chapter.

Subsection (2) of this chapter has been revised to state that the purpose of the rules is "to establish a state individual permit program, applicable to the discharge of pollutants and other wastes and materials to the surface waters of the state, which complies with the requirements of chapter 80.50 RCW, chapter 90.48 RCW, EPA(40 CFR 122), and applicable state laws and regulations." Previously this subsection spoke of integrating the NPDES permit program into the procedures of the council.

Comment(s) Received Relating to this Section:
NONE

New -- Chapter 463-38-025 WAC, Authorization required.
New -- 463-76-025 WAC, Authorization required.

Changes to the Rule:
This new section was added to achieve consistency with the ecology NPDES rules, Chapter 173-220-030 WAC. This section requires that before any waste materials or pollutants may be discharged from any energy facility as defined in WAC 463-38-010 into surface waters of the state, except as authorized pursuant to this chapter or as authorized by the council pursuant to its authority under chapter 80.50 RCW for coverage under a general permit promulgated by ecology, an NPDES permit must be secured from the council.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-38-030 WAC, NPDES application and tentative determination.
New-- Section deleted

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-38-031 WAC, Application filing with the council.
New -- Chapter 463-76-031 WAC, Application filing with the council.

Changes to the Rule:
This section has been substantially revised to achieve consistency with 40 CFR 122.26(c)(1), the EPA NPDES rules and the Ecology NPDES rules, Chapter 173-220-020 WAC. The text of this section has also been edited to achieve greater clarity of the NPDES application requirements.

In subsection (1) and elsewhere in this chapter, references to the "refuse act" and the "Corps of Engineers" have been deleted and are replaced with a reference to NPDES. This subsection requires that a complete NPDES application for discharge of wastewater and or stormwater must be included in any application for site certification. It also clarifies that applicants may apply for or otherwise seek coverage for activities related to construction activities or for stormwater runoff from the industrial areas of the site, provided runoff from these two sites is not mixed with other stormwater.

Subsection (2) has been clarified to require that NPDES applications shall provide sufficient detail so as to satisfy the requirements of 40 CFR 122.26(c).

Subsections (3) and (4) of this section have been edited to provide greater clarity.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-38-032 WAC, Signature form.
New -- Chapter 463-76-032 WAC, Signature form.

Changes to the Rule:
The original content of this section has been deleted and replaced with the requirements taken from 40 CFR 122.22. The new section describes the various types of individuals who may be authorized to sign an application for an NPDES permit, including defining who may be considered a responsible officer for a corporation. In the case of a sole proprietorship or partnership, either the proprietor or a general partner may sign. The section also explains who may sign for municipalities. Only those persons may sign the application, or the various reporting documents required.

The signing officials are required to certify that they believe all statements made in the application and supporting reports are true accurate and complete.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-38-033 WAC, Tentative determination on NPDES permits.
New -- Chapter 463-76-033 WAC, Tentative determination on NPDES permits.

Changes to the Rule:
Subsection (1) (b) was edited for clarity. In addition, subsection (1) (b) (ii) dealing with schedules for compliance including interim dates for meeting effluent limitations was deleted. Compliance schedules must be met immediately.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-38-034 WAC, Fact sheets.

New -- Chapter 463-76-034 WAC, Fact sheets.

Changes to the Rule:
Subsection (1) has been revised to require the council to issue a fact sheet for every NPDES application that it receives.

In addition to the original requirements for fact sheets, this section adds the requirement that the council identify the type of facility or activity that is the subject of the application; the type of discharge described in the NPDES application, and whether the wastewater flow is continuous or intermittent. By including these additional requirements, the fact sheet issued by the council will be consistent with fact sheets issued by ecology and will comply with the EPA program requirements for fact sheets, namely sections 301, 302, 306 or 307 of the federal Clean Water Act and regulations published thereunder.

Subsection (1) (e) has been revised by restating the original intent and clarifying that the fact sheet content must identify the legal and technical grounds for the tentative determination, and include an explanation of how the conditions will meet water quality standards, effluent limitations and the uses of receiving waters and how the permit addresses the disposal of residual solids from the waste water treatment process. This revision includes a description of how the public may be involved in providing comments on this fact sheet.

Subsection (2) clarifies that a person or group, upon request for information about the application, will be placed on a mailing list and will receive subsequent revisions of the permit or fact sheet.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-38-040 WAC, Notice, hearings and information accessibility.

New -- Chapter 463-76-040 WAC, Notice of hearings and information accessibility.

Changes to the Rule:
This section was deleted.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-38-041 WAC, Notice, provisions.

New -- Chapter 463-76-041 WAC, Public notice.

Changes to the Rule:
This section was renamed Public notice and was edited to make it consistent with chapter 173-220 WAC. It was revised to clarify that the NPDES application and tentative determination would be circulated in the vicinity of the proposed energy facility and the proposed discharge. The notice of the NPDES application and the tentative determination will be posted for thirty days in the municipality in question, on the council's internet website and in a major newspaper of general circulation.

Subsection (3) clarifies that the name, address and telephone number of the council will be included on the posting required above.

A new subsection (4) has been added requiring the council to notify the applicant and persons who have submitted written comments or requested notice of the final permit decision. This notification shall include a response to comments received and reference to the procedures for contesting the decision.

Renumbered subsection (5) clarifies that the council is responsible for mailing notices to persons or groups on mailing lists. Upon written request, the name of any person or group shall be added to a mailing list for distributing copies of notices for all NPDES applications within the state or within a certain geographical area. This subsection also clarifies that, at a minimum, copies of the notice shall be sent to the district engineer of the Army Corps of Engineers, the United States Fish and Wildlife Service, the United States National Oceanic and Atmospheric Administration--Fisheries, the state departments of Ecology, Fish and Wildlife, Natural Resources, and Social and Health Services, the Office of Archaeology and Historic Preservation, applicable Indian tribes and any other applicable government agency. Upon request, copies shall also be provided to any other federal, state or local agency or Indian tribes. These organizations shall be provided an opportunity to respond, comment or request a public hearing pursuant to WAC 463-38-042.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-38-042 WAC, Public hearings.

New -- Chapter 463-76-042 WAC, Public hearings.

Changes to the Rule:
Subsection (1) was edited for clarity, to add Indian tribes and to emphasize that any petition for a public hearing is based on the council's tentative determination and not simply on an application for an NPDES permit.

The last sentence in subsection (2) was deleted. It is the responsibility of the council to make a deliberate decision about the need for a public hearing on its tentative determination. It is the process of the council to weigh the evidence or comments before it, and, based on that information, make a decision. This is true for siting decisions as well as the need to hold a hearing on the tentative determination.

Subsection 5 is clarified to indicate that the council will publish notices in a "major local newspaper of general circulation." While it is not the intent of the council to limit publication of hearing notices, it is not possible to publish notices in every conceivable venue. To do so would be time-consuming, cost-prohibitive and might lead to missing one or another possible venues. This subsection is also clarified to indicate that it is a notice of the fact sheet and not the NPDES application.

A new subsection (7) is added. This new section requires the council to provide a documented record of the hearing. The record may be stenographic, mechanical or electronic. Typically the council uses stenographic services to record hearings. The stenographic record is usually backed up with a recording of the proceeding.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-38-043 WAC, Public access to information.

New -- Chapter 463-76-043 WAC, Public access to information.

Changes to the Rule:
Subsection (1) has been revised to clarify that all "records" pertaining to a NPDES permit application, as opposed to all "NPDES forms," shall be available for public inspection and copying. The revised text also references Chapter 463-06-110 WAC Copying fees.

Subsection (2) has been revised by deleting what was an unnecessary procedure for confidentiality.

The council added a new subsection (3) that clarifies the confidentiality section and identifies areas for which confidentiality will not be granted.

In subsection (4), the council commits to providing facilities where "non-confidential" information related to NPDES forms may be inspected. Such inspections must take place in the offices of the council during the normal business hours.
Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-38-050 WAC, NPDES permit contents.

New -- Section deleted.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-38-051 WAC, General conditions.

New -- Chapter 463-76-051 WAC, General conditions.

Changes to the Rule:
Subsection (1) was revised to clarify that NPDES permits could not be issued for periods longer than five years. Additional text was added clarifying that the reissuance of an NPDES permit is the responsibility of the council and does not require the approval of the governor.

Subsection (2) corrects an earlier error in that the decision to issue or reissue an NPDES permit will be based on the contents of this "chapter," not just this "section." Also the reference to the "refuse act" is changed to "NPDES."

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-38-052 WAC, Prohibited discharges.

New -- Chapter 463-76-052 WAC, Prohibited discharges.

Changes to the Rule:
Subsection (1) is revised to clarify that this chapter regulates discharges under the federal Clean Water Act. There may be discharges that are not covered by NPDES permits such as discharges to groundwater.

Subsection (2) describes conditions under which the council may not issue an NPDES permit. Several additional conditions under which an NPDES permit may not be issued have been added. These conditions are the result of changes to the federal Clean Water Act and subsequent revisions of NPDES regulations by EPA. These new conditions consist of the following:

- When permit conditions do not satisfy the requirements of the federal clean water act
- When an applicant has not acquired a necessary 401 water quality certification
- When permit conditions can not ensure compliance with state water quality requirements
- Discharges of prohibited toxic pollutants
- Discharges of pollutants regulated under section 403(c) of the federal Clean Water Act
- Discharges not allowed if the discharge will lead directly or indirectly to a violation of water quality standards
- Discharges of dangerous waste into a subsurface disposal system such as a well or a drain field

These conditions are added to ensure consistency with the federal and state Clean Water Acts and associated rules and regulations.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-38-053 WAC, Effluent limitations, water quality standards and other requirements for NPDES permits.

New -- Chapter 463-76-053 WAC, Effluent limitations, water quality standards and other requirements for NPDES permits.

Changes to the Rule:
Subsection (1) was revised to reflect current waste discharge permit effluent standards including the addition of the requirement to provide "all known available and reasonable methods of treatment (AKART)." These rules are clarified to ensure that effluent limitations are not less stringent than those based upon the treatment facility design efficiency contained in approved engineering plans and reports. Requirements have also been added that are intended to prevent runoff, spillage or leaks, sludge or waste disposal, or materials handling or storage from entering surface or groundwaters without first receiving appropriate levels of treatment and that meet the permit by rule provisions of the state dangerous waste regulation, WAC 173-303-802 (4) or (5).

Subsection (2) is revised to indicate that issued NPDES permits are not intended to cause a violation of water quality standards and that sufficient study and review of proposed discharges would have been made so as to demonstrate that the standards would be met. The requirement that a waste load allocation be conducted has been deleted from this section. Also added to this section is the requirement that if a dilution zone is required for a discharge, the dimensions and limitations of that dilution zone will be included in the NPDES permit.

These requirements have been added consistent with section 402 of the federal Water Pollution Control Act, as amended, 33 U.S.C. 1251 et seq and the state Clean Water Act, Chapter 90.48 RCW and Chapter 173 WAC. The revisions made to this chapter are consistent with the requirements of the federal Water Pollution Control Act and those of the Department of Ecology as contained in Chapter 173-220-130 WAC.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-38-054 WAC, Schedules of compliance.

New -- Chapter 463-76-054 WAC, Schedules of compliance.

Changes to the Rule:
Subsection (1) was rewritten to achieve greater clarity as to its intent. In doing so, the first sentence of this subsection (1) was deleted as redundant. The resulting rule requires an NPDES permit holder to take steps to correct deficiencies and to otherwise become compliant with this chapter and the federal Water Pollution Control Act.

A new subsection (4) has been added providing that, in the case of noncompliance with an approved NPDES permit, the council may modify or revoke the permit or take direct enforcement action as provided for in this chapter.

The revisions made to this chapter are consistent with the requirements of the federal Water Pollution Control Act and those of the Department of Ecology as contained in Chapter 173-220-140 WAC.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-38-055 WAC, Other terms and conditions.

New -- Chapter 463-76-055 WAC, Other terms and conditions.

Changes to the Rule:
A new condition has been added to subsection (2) that clarifies that the NPDES permit will be modified, suspended or revoked when it is determination that the permitted activity endangers human health or the environment or contributes to water quality standards violations.

Subsection (5) has been modified to include the requirement that all dischargers meet the permit-by-rule provisions of the state dangerous waste regulation, WAC 173-303-802 (4) or (5). The toxic effluent standards become effective at the time they are enacted, and all dischargers shall comply with the standard even if their permit has not yet been modified to incorporate the requirement.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-38-060 WAC, NPDES permit review and appeal.

New -- Chapter 463-76-060 WAC, NPDES permits review and appeal.

Changes to the Rule:
This section was redundant and was therefore deleted. These issues are addressed in other sections of this chapter.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-38-061 WAC, Reissuance of NPDES permits.

New -- Chapter 463-76-061 WAC, Reissuance of NPDES permits.

Changes to the Rule:
Subsection 1 was edited for clarity and the last sentence was deleted. The deleted portions removed the discretion for the council to require that permit holders filing for re-issuance of the NPDES permit must also submit all applicable NPDES permit forms. As

a result, permit holders need only apply in writing, and it is then the obligation of the council to request additional information when the time is appropriate.

Sub section (4) was deleted. These provisions have expired and, as a result, no longer add value to these rules. In its place, the council has added a condition that when a permittee has made timely and sufficient application for the renewal of a permit, an expiring permit remains in effect and enforceable until the application has been denied or a replacement permit has been issued by the council pursuant to chapter 463-38-0625 WAC, Permit issuance. This is not a new provision. Although it is intended that NPDES permits be reissued every five years, this does not always happen. As such, under this provision, NPDES permits that may have expired are considered valid until such time as the permit is reissued, modified, or suspended.

The revisions made to this chapter are consistent with the requirements of the federal Water Pollution Control Act and those of the Department of Ecology as contained in Chapter 173-220-180 WAC.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-39-062 WAC, Modification of NPDES permit.

New -- Chapter 463-39-062 WAC, Modification of NPDES permit.

Changes to the Rule:
Subsection (1) has been revised to clarify the intent of the federal Water Pollution Control Act that NPDES permits may be modified, suspended or revoked for cause including but not limited to the causes listed in chapter 463-38-055(2) WAC.

Comment(s) Received Relating to this Section:
NONE

New -- Chapter 463-38-0625 WAC, Permit issuance.

New – Chapter 463-76-0625 WAC, Permit issuance.

Changes to the Rule:
This new section was added to clarify that all permits, including NPDES permits, necessary to construct and operate an energy facility become an attachment to a Site Certification Agreement and shall be effective only upon the governor's approval and execution of said SCA.

This new section also clarifies that for facilities under the jurisdiction of the council, revisions, modifications or re-issuance of NPDES permits shall be effective when approved by the council and signed by the chair.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-38-063 WAC, Appeal.
New -- Chapter 463-76-063 WAC, Appeal.

Changes to the Rule:
No Change

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-38-064 WAC, Transmission to regional administrator of proposed NPDES permit.
New -- Chapter 463-76-064 WAC, Transmission to regional administrator of proposed NPDES permit.

Changes to the Rule:
Subsection (1) was modified to clarify that the EPA Administrator has a ninety-day period to comment and or make recommendations on a proposed NPDES permit "unless (that ninety-day period) is waived in advance." This gives the EPA administrator the opportunity to decline to review a proposed NPDES permit and in so doing not unnecessarily delay its issuance.

Subsection (2) was edited to improve clarity,

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-38-065 WAC, Monitoring and enforcement.
New -- Chapter 463-76-065 WAC, Monitoring and enforcement.

Changes to the Rule:
The revisions that are proposed for this section are extensive when compared to the original content for this section. The original requirements of this section in large part left the amount of monitoring, compliance and enforcement to the Department of Ecology. The Department of Ecology was "delegated" the responsibility for conducting monitoring and enforcement for facilities under the jurisdiction of the council. In recent years, due to staff and budget constraints, the Department of Ecology has not been able to do all the work necessary to support necessary monitoring and enforcement for the council.

A principal change in this section is that the council will not automatically delegate to the Department of Ecology monitoring activities pertaining to air and water discharges. Clearly, the council will look to the Department of Ecology for this function, but in the event it is not able to accept such an assignment, the revisions allow the council to contract for these services from other governmental entities or from the private sector. The Department of Ecology and the council have entered into an agreement for providing

these services on a case-by-case basis. If the Department of Ecology is unable to accept a new task, these amendments provide a process for the council to seek outside assistance.

The change to the delegation to the Department of Ecology for monitoring and enforcement is relatively small compared to the other changes to this section. The changes are made to provide clear understanding of monitoring, compliance and enforcement associated with NPDES permits. The detailed description of monitoring requirements, record keeping and reporting and the consequences of any violation are requirements of the federal Clean Water Act and must be a part of the council's NPDES program. For the most part the content of this section has been modeled after the same requirements of the Department of Ecology as contained in chapter 173-220-210 and 220 WAC. Also, adding this level of detail provides an applicant or certificate holder with clear expectations about the amount and type of routine and compliance monitoring that will be required and the extent of enforcement if such is necessary. Although these requirements are contained in NPDES permits issued to any operating facility with a wastewater discharge, having them in the rules makes the requirement clear from the beginning of the application process. Having these requirements in rule also clarifies that the council may seek outside or private assistance to complete monitoring or enforcement activities for any facility under its jurisdiction.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-38-080 WAC, Transmittal of data to regional administrator.

New -- Chapter 463-76-080 WAC, Transmittal of data to regional administrator.

Changes to the Rule:
Subsections (1) and (2) have been revised or otherwise edited to improve clarity and understanding. No substantive changes are proposed in these two subsections.

A new subsection (4) has been added. This subsection is an NPDES reporting requirement wherein the council must report to EPA instances of failure or refusal of an NPDES permit holder to comply with permit conditions. This subsection describes the content for this required reporting to EPA. The provisions proposed here are consistent with chapter 173-220-140 WAC, administered by the Department of Ecology.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-38-090 WAC, Conflict of interest.

New -- Chapter 463-76-090 WAC, Conflict of interest.

Changes to the Rule:
This existing section received minor editing for clarity purposes.

Comment(s) Received Relating to this Section:
NONE

Old -- Chapter 463-39 WAC, General and operating permit regulations for air pollution sources.

New -- Chapter 463-39 WAC, General and operating permit regulations for air pollution sources.

Changes to the Rule:
This chapter has been revised by the council using a separate rulemaking process. The proposed changes include editorial revisions to the rules and the adoption of reference chapters of 173-400, 173-401, 173-406 and 173-460 WAC administered by the Department of Ecology.

Comment(s) Received Relating to this Section:
NONE

Attachments for Concise Explanatory Statement[48]

Number	Title
1	RCW 80.50
2	WAC 463 - OLD
3	White Paper on State Roles in Energy Facility Siting dated January 17, 200 - Deb Ross Paper
4	Charlie Earl Report requested by Governor Locke on EFSEC operations
5	HB 2247
6	Stakeholder Group Invitation
7	Setting the Standard: the legal case for CO2 regulation in Washington
8	Krogh & Leonard Report to Jim Luce, Chair, Washington Energy Facility Site Evaluation Council Regarding EFSEC Standards Development – September 19, 2002
9	EFSEC Rule Adoption Plan
10	Public Notice RE Form CR 101
11	Form CR 101
12	SEPA Environmental Check List
13	WAC 197-11-970 -- Determination of Non-significance
14	Public notice of October 29 and 30 public meetings
15	Transcript of October 29 public meeting
16	Transcript of October 30 public meeting
17	December 1, 03 Renewable NW Project letter
18	December 1, 2003 Energy Northwest letter
19	December 1, 2003 Comment Memo from Tony Usibelli - CTED
20	December 1, 2003 Comment letter from NIPPC
21	October 29/30 Public Hearing Responsiveness Summary Table
22	Public Notice RE March 15, 2004 Special Council Meeting
23	March 15, 2004 Council Meeting Transcript
24	Public Notice RE May 3 2004 Council Meeting and Hearing
25	May 3 2004 Meeting Minutes
26	May 17 2004 Meeting notice
27	May 17 2004 Meeting Minutes
28	RCW 80.70 -- SSH bill 3141
29	Proposed June DRAFT Chapter 463 WAC
30	Public Notice RE Form CR 102
31	Form CR 102
32	August 10, 2004 Special Council Meeting and Hearing Notice
33	August 10 Meeting Agenda

[48] Copies of all documents are available from the Energy Facility Site Evaluation Council. Many of the items listed herein are available on the EFSEC web site at www.efsec.wa.gov.

34	Transcript/Minutes of August 10, 2004 Special Council meeting and Hearing
35	June 16, 2004 Comment letter from Renewable NW Project
36	August 13, 2004 comment letter from NW Energy Coalition
37	August 13, 2004 comment letter from BP
38	August 13, 2004 comment letter from Preston, Gates and Ellis – Chehalis Power
39	August 13, 2004 comment letter from Renewable NW Project
40	August 5, 2004 comment letter from National Energy Systems Company
41	August 16, 2004 comment letter from Renewable NW Project
42	August 12 comment letter fro WDFW
43	August 10, 2004 comment letter from Karen McGaffey, Perkins-Coie
44	August 10, 2004 Hearing responsiveness Summary
45	Minutes fro September 20 meeting
46	Minutes from October 4, meeting
47	Public Notice RE Form CR 103
48	Form CR 103
49	Minutes from Adoption meeting
50	Final Council approved rules
51	Summary -- Small Business Economic Impact Statement - SBEIS
52	Small Business Economic Impact Statement - SBEIS
53	Concise Explanatory Statement