

**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON**

**DIVISION II**

COLUMBIA RIVERKEEPER, a  
Washington nonprofit corporation,  
And PETER HUHTALA, an  
Oregon resident,

Petitioners/Appellants,

v.

COWLITZ COUNTY, a political  
Subdivision of the State of  
Washington, ENERGY NORTH-  
WEST, a Joint Operation Agency  
In the State of Washington, and  
PORT OF KALAMA, a  
Washington municipal corporation,

Respondents.

Superior Court Case No.:  
07-2-00400-0

Court of Appeals Case No.:  
36393-3-II

**APPELLANTS' OPENING  
BRIEF**

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## **A. Assignment of Error**

### **Assignment of Error**

The trial court erred in entering the order of May 2, 2007, granting Respondents' motion to dismiss.

### **Issues Pertaining to Assignment of Error**

Cowlitz County made a final land use decision which stated that a proposed power plant, the Pacific Mountain Energy Center, is consistent with County regulations. The County submitted this decision to the Washington Energy Facility Site Evaluation Council, which relied on the County's decision as *prima facie* proof of consistency and compliance with County land use regulations. Does RCW 80.50.110 preempt judicial review of a County's land use decision under the Land Use Petition Act, RCW 36.70C.030?

## **B. Statement of the Case**

The Land Use Petition Act ("LUPA") provides the "exclusive means of judicial review of land use decisions." RCW 36.70C.030.<sup>1</sup> On February 13, 2007, Cowlitz County ("County") Planning Director Mike Wojtowicz submitted a letter to the Washington Energy Facility Site Evaluation Council ("EFSEC"), stating that the proposed Pacific

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<sup>1</sup> Pursuant to RAP 10.4(c), the full text of RCW 36.70C is included in Appendix B.

Mountain Energy Center (“power plant”) in Kalama, Washington complies with all County land use regulations. CP 37-38. The letter stated that the proposed power plant was consistent with County zoning, shoreline regulations, floodplain regulations, and critical areas ordinances for wetlands and aquifer recharge. *Id.* The County did not produce any record to support its decision. CP 22 (“As the County neither received nor processed any application for any permit or approval with respect to the subject property, there is simply no administrative record.”) Petitioners appealed the County’s decision under the LUPA as inconsistent with the substantive and procedural requirements of County law. CP 1-16.

The County submitted the letter to EFSEC pursuant to EFSEC’s regulations. CP 37-38. EFSEC regulations contemplate that the local government will issue “certificates . . . attesting to the fact that the proposal is consistent and in compliance with land use plans and zoning.” WAC 463-26-090.<sup>2</sup> The local government certificate of land use consistency “will be regarded as *prima facie* proof of consistency and compliance with such land use plans and zoning ordinances . . . .” *Id.* Relying on the County’s letter as *prima facie* proof of consistency, EFSEC produced an Order that stated that the proposed power plant “is consistent

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<sup>2</sup> Pursuant to RAP 10.4(c), the full text of WAC 463-26 is included in Appendix C.

and in compliance with local land use plans and zoning ordinances.”<sup>3</sup> As such, EFSEC does not need to utilize its authority to preempt the County’s enforcement of County regulations. WAC 463-28-030.<sup>4</sup>

In order to challenge the County’s decision under LUPA, Petitioners filed a land use petition for review in Cowlitz County Superior Court on March 6, 2007. CP 1-16. Respondents Cowlitz County, Energy Northwest, and Port of Kalama filed a motion to dismiss on April 5, 2007. CP 17-23, 24-33. Respondents argued that the Cowlitz County letter was not a “land use decision,” as defined by LUPA. *Id.* Cowlitz County Superior Court (“Superior Court”) granted the motion to dismiss on May 2, 2007 with the following Order:

The opinion letter of Mike Wojtowicz dated February 13, 2007 is an interpretive decision which is a final decision under RCW 36.70C.020. However, RCW 36.70C.040 is superceded and pre-empted by RCW 80.50.110. Therefore, the defendants’ motions to dismiss are granted.

CP 22.

The Superior Court agreed with Petitioners that the Wojtowicz letter was a “land use decision,” as defined by LUPA. *Id.* However, the

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<sup>3</sup> Council Order No. 828, Order on Consistency with Local and Regional Land Use Plans or Zoning Ordinances, April 26, 2007. This EFSEC order was not part of the record below because EFSEC issued the order after the parties completed briefing. Council Order No. 828 contains findings of facts and conclusions of law.

<sup>4</sup> Pursuant to RAP 10.4(c), the full text of WAC 463-28 is included in Appendix D.

Superior Court ruled that EFSEC's preemption authority under RCW 80.50.110 preempts judicial review. *Id.*

On May 31st, 2007, Petitioners timely filed a Notice of Appeal seeking review of the portion of the Superior Court's Order which held that LUPA review is preempted by RCW 80.50.110. CP 105-108.

### **C. Argument**

The Superior Court erred by failing to review a final land use decision under LUPA. This brief will demonstrate the following: 1) the Cowlitz County decision is arbitrary and has a major impact on protected resources; 2) the Cowlitz County decision is an appealable land use decision under LUPA; 3) the Superior Court erred by ruling that RCW 80.50.110 preempts the Court's jurisdiction under LUPA; and 4) even if preemption is appropriate, there is no conflict here because EFSEC did not review the County's critical areas ordinances.

#### **1. The Cowlitz County Decision is Arbitrary and Has a Major Impact on Protected Resources**

Cowlitz County made an interpretive decision, stating that the proposed power plant is consistent with County land use regulations, including County zoning, critical areas ordinances, and floodplain regulations. CP 37-38. The County's one and one-half page decision-

letter failed to make even rudimentary findings to demonstrate compliance with these County laws. *Id.*

The proposed power plant would be located on the banks of the Columbia River at a location that the Cowlitz County Code has designated as “critical” for wetlands, fish and wildlife habitat, and aquifer recharge.<sup>5</sup> Cowlitz County Code (“CCC”), Title 19, Chapter 15.<sup>6</sup> The proposal calls for filling several acres of wetlands, including a 2.1-acre backchannel of the Columbia River that is designated critical habitat for threatened and endangered salmonids under the federal Endangered Species Act, 16 U.S.C. 1531 *et. seq.*

The power plant would import 2.5 million tons of coal each year by train from Montana and Wyoming as a fuel source, or import petroleum coke on barges from oil refineries. It would also withdraw 8.4 million gallons of water from the Columbia River per day and discharge millions of gallons of heated wastewater containing toxic pollutants directly to the Columbia River.

Despite these potentially severe impacts and despite Cowlitz County’s strong environmental protection of the designated “critical

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<sup>5</sup> The physical description of the proposed power plant, the pollution discharges, and the location of the County’s “critical areas” are taken from the power plant’s application.

<sup>6</sup> Pursuant to RAP 10.4(c), the full text of Cowlitz County Code Title 19, Chapter 15 is included in Appendix E.

areas,” Cowlitz County determined that the proposal is consistent with all local regulations. CP 37-38. For example, Cowlitz County declared the project consistent with its critical areas ordinance for wetlands and aquifer recharge without complying with the basic procedural and substantive criteria in the County Code. *Id.* The critical areas ordinance for wetlands prohibits alteration of wetlands that include documented habitat for state-listed endangered, threatened, or sensitive species. Cowlitz County Code 19.15.120(C)(1). Despite the likely presence of endangered, threatened, or sensitive species, Cowlitz County deemed the project consistent with this ordinance. CP 37-38.

In addition, the County failed to mention that the proposed location is also protected under the critical areas ordinance for fish and wildlife habitat. *Id.*; See Cowlitz County Code 19.15.130. For these, and multiple other problems, Petitioners challenged the County’s determination that the project is consistent with County land use regulations.

The County’s review of critical areas ordinances and floodplain regulations is vital to the protection of these resources. Instead of complying with its land use code, Cowlitz County rubber-stamped this project as “consistent.” In fact, County counsel stated that the County made the decision without producing any kind of justification in a record.

CP 22. (“as the County neither received nor processed any application for any permit or approval with respect to the subject property, there simply is no administrative record”). Making a decision without any justification is, by definition, arbitrary.

The County submitted its arbitrary decision to EFSEC as part of EFSEC’s administrative process. CP 37-38. EFSEC’s regulations state that the County’s decision “will be regarded as *prima facie* proof of consistency and compliance with such land use plans and zoning ordinances . . . .” WAC 463-26-090. Based on the County’s arbitrary decision, EFSEC produced an order that declared the project consistent with local land use regulations.

The statutory framework of RCW 80.50 gives the County’s decision paramount importance. EFSEC’s preemption process in RCW 80.50 is only triggered if the project is inconsistent with County regulations. WAC 463-28-030. During the preemption process, EFSEC does not simply disregard local laws, but instead must condition the project certification to minimize impacts. For example, in order to preempt a local land use ordinance, EFSEC must include “*conditions designed to recognize the purpose of the laws or ordinances . . . that are preempted . . . .*” Id. at 463-28-070 (emphasis added). Therefore, even if

local laws are preempted, local resources must be protected by the conditions imposed by EFSEC. If EFSEC certifies a project without engaging in the preemption process, the certification is not conditioned upon protecting local resources.

In this case, the County has deemed the project consistent with local law, despite zero analysis of critical local laws that protect the environment. As such, all of the safeguards built into the preemption process, such as conditions designed to recognize the purpose of preempted laws, are lost because EFSEC will not engage in the preemption process. A valid decision by the County, therefore, is critical to protect local resources.

## **2. The Cowlitz County Decision is an Appealable Land Use Decision**

Cowlitz County's decision that deems the proposed power plant consistent with County land use regulations is an appealable land use decision under LUPA. RCW 36.70C.030. LUPA defines "land use decision" in pertinent part as:

a final determination by a local jurisdiction's body or officer with the highest level of authority . . . on:

...

(b) *An interpretive or declaratory decision* regarding the application to a specific property or zoning or other ordinances or rules regulating the improvement,

development, modification, maintenance, or use of real property.

*Id.* at 36.70C.020(1)(b) (emphasis added).

The Cowlitz County decision is clearly a land use decision because the County reviewed the power plant proposal and made a determination that the power plant complies with local regulations. LUPA provides the “exclusive means of judicial review of land use decisions.” *Id.* at 36.70C.030.

**a. The Superior Court ruled that the Cowlitz County decision was a “land use decision,” as defined by LUPA**

The primary issue before the Superior Court was whether the Cowlitz County letter to EFSEC was a “land use decision,” as defined by LUPA. Report of Proceedings; CP 17-23, 66-92, 98-101. Respondents argued that the County letter was not a land use decision, claiming that the letter was not a final decision and that the letter did not affect Petitioners’ rights. CP 17-23.

The Superior Court rejected Respondents’ arguments and agreed with Petitioners that Cowlitz County made a final land use decision. CP 104. As such, the Superior Court expressly held that the Cowlitz County decision was a “land use decision,” subject to review under LUPA. *Id.* (“the opinion letter of Mike Wojtowicz dated February 13, 2007 is an

interpretive decision which is a final decision under RCW 36.70C.020.”). Respondents did not challenge this ruling.

Despite the finding that LUPA jurisdiction attached, the Court dismissed the case by ruling that judicial review under LUPA is preempted by RCW 80.50.110. *Id.* The Court’s preemption analysis is misplaced because there is nothing in LUPA that allows the Superior Court to relieve itself of review of this land use decision. Based on the plain language of LUPA, the Court erred by dismissing a final land use decision without an adequate basis. The Court’s erroneous finding of preemption is discussed in detail in Section 3.

**b. Petitioners must challenge the Cowlitz County decision in Cowlitz County Superior Court**

Cowlitz County Superior Court is the only jurisdiction in which to challenge the County’s decision. RCW 36.70C.040. Petitioners emphasize that they are challenging the Cowlitz County decision, not an EFSEC decision. Simply because EFSEC has a separate administrative process does not mean that the County’s decision is not reviewable under LUPA. See *Samuel’s Furniture, Inc. v. Department of Ecology*, 147 Wn.2d 440, 455, 54 P.3d 1194, 1201 (2003) (rejecting argument that additional review by another agency affects finality under LUPA). Land use decisions commonly involve multiple agencies making concurrent

decisions. Each final decision from a distinct governmental body is subject to judicial review. The fact that the County's decision was made in the context of the EFSEC process does not render the County's decision any less final or less reviewable under LUPA.

In addition, Petitioners cannot wait until after the EFSEC process is completed to appeal the County's arbitrary decision because LUPA does not permit Petitioners to challenge the County's decision after the 21-day deadline passes. RCW 36.70C.040. The Supreme Court has repeatedly held that Petitioners cannot wait until the termination of another agency's administrative process, and then make a collateral attack on the County's decision. See *Ashce v. Bloomquist*, 132 Wn.App. 784, 796, 133 P.3d 475, 476 (2006) ("failure to file a land use petition within 21 days of the issuance of the building permit as required by RCW 36.70C.040 is determinative"). The Supreme Court has expressly rejected the idea of a continuing land use process that results in an evasion of judicial review. The Supreme Court held that "defects in land use determinations that could have resulted in decisions that were void *ab initio* under pre-LUPA cases fall within LUPA, with its express 21-day limitation period." *Habitat Watch v. Skagit County*, 155 Wash 2d 397, 120 P.3d 56, 61 (2005); See also *Chelan County v. Nykriem*, 146 Wn.2d 904, 931-932, 52

P.3d 1, 14 (2002). Therefore, Petitioners lose all opportunity to challenge the County's consistency determination after the 21-day statutory deadline.

In sum, Petitioners have a statutory right to appeal Cowlitz County's final land use decision under LUPA. There is nothing in LUPA that allows the Superior Court to relieve itself of review of a land use decision.

### **3. The Superior Court Erred by Ruling that RCW 80.50.110 Preempts the Court's Jurisdiction Under LUPA**

Despite ruling that the County made a land use decision that is subject to review under LUPA, the Court dismissed Petitioners' lawsuit. The Court's reason for the dismissal, reproduced in its entirety, is: "RCW 36.70C.040 is superseded and pre-empted by RCW 80.50.110." CP 104.

RCW 36.70C.040 is the "Commencement of Review" section of LUPA, which describes how to challenge a land use decision. RCW 80.50.110 contains EFSEC's authority to preempt local land use regulations. It provides:

(1) If any provision of this chapter is in conflict with any other provision, limitation, or restriction which is not in effect under any other law of this state, or any rule or regulation promulgated thereunder, this chapter shall govern and control and such other law or rule or regulation

promulgated thereunder shall be deemed superceded for the purpose of this chapter.

(2) The state hereby preempts the regulation and certification of the location, construction, and operational conditions of certification of the energy facilities . . . .

RCW 80.50.110.<sup>7</sup>

Due to the Court's brevity, the reasoning behind the Court's ruling is not clear. A plain reading of the two statutes cited by the Court – LUPA and RCW 80.50.110 – demonstrates that RCW 80.50.110 does not preempt jurisdiction under LUPA.

First, RCW 80.50.110(1) only supercedes laws that conflict with EFSEC's certification authority. LUPA, which provides for judicial review of land use decisions, does not conflict with EFSEC's authority. Second, RCW 80.50.110(2) only preempts the regulation and certification of energy facilities. LUPA does not regulate or certify energy facilities, so it is not preempted.

In the alternative, the Court's Order may have meant that judicial review is unnecessary because the County's land use regulations are preempted under RCW 80.50.110. This reasoning is equally incorrect, as shown below.

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<sup>7</sup> Pursuant to RAP 10.4(c), the full text of RCW 80.50 is included in Appendix E.

**a. The Court erred by usurping EFSEC's statutory authority to determine the appropriateness of preemption**

The Court erred by preempting the County's ordinances, thereby circumventing EFSEC's statutory obligation to assess whether preemption is appropriate. The legislature granted EFSEC the authority to certify energy facilities and preempt any law that is in conflict with this certification. RCW 80.50.110. Petitioners do not dispute EFSEC's clear authority to preempt Cowlitz County's land use regulations if the applicant and EFSEC follow the proper procedural and substantive steps laid out in WAC 463-28-010 *et seq.* In this case, EFSEC did not preempt the County's regulations, the Court did. Here, the Court stepped into EFSEC's shoes and preempted the County's regulations prior to any action by EFSEC. The Court erred by usurping a decision vested in an administrative agency.

The intent of RCW 80.50 is to grant EFSEC authority to preempt local regulations, but only after EFSEC ensures considerable procedural and substantive protections to safeguard the resources of the preempted municipality. EFSEC's administrative rules require EFSEC to engage in an adjudication to decide whether preemption is appropriate. WAC 463-28-060.

By ruling that RCW 80.50.110 preempts the Cowlitz County land use regulation, the Court ignored the implementing regulations which demonstrate that only EFSEC has the authority to recommend preemption. The regulations provide, “this chapter sets forth procedures to be followed *by the council* in determining whether to recommend to the governor that the state preempt local land use plans.” WAC 463-28-010 (emphasis added); WAC 463-28-020 (*the authority of the council is contained in . . . 80.50.110(2)*) which provides that the state preempts the regulation and certification of . . . energy facilities”) (emphasis added); WAC § 463-28-060 (“*the Council shall determine during an adjudicative process* whether to recommend to the governor that the state should preempt the local land use plans”) (emphasis added).

The implementing regulations also require that the applicant file a written request to begin the preemption process. WAC 463-28-040. In this case, the applicant did not apply for preemption, but the Court preempted the County’s regulations anyway. The Court’s action encroaches on EFSEC’s statutory authority and its expertise as the agency charged with making the preemption decisions. The Supreme Court stated, “we have held that courts cannot control the action of an executive or administrative body in the exercise of their discretionary powers.”

*State v. International Typographical Union*, 57 Wn.2d 151, 159, 356 P.2d 6, 11 (1960). Here, the Superior Court has improperly usurped the discretionary power of EFSEC by declaring that the County’s decision is preempted.

The County’s decision plays a critical role in the EFSEC administrative process. The County’s interpretive decision acts as the trigger to determine whether preemption is necessary. If the County’s review determines that the project is consistent with County regulations, then EFSEC treats the County decision as “*prima facie* proof of consistency” and issues an Order declaring that the project is consistent with land use regulations. See WAC 463-26-090, 110. The applicant would not need to engage in the preemption process described in WAC 463-28-010 *et seq.* Therefore, the Court’s decision to preempt the County’s ordinances circumvents the regulatory safeguards in EFSEC’s preemption analysis.

**b. EFSEC’s implementing regulations contain safeguards to protect local resources**

The EFSEC preemption process contains safeguards to protect local resources in the event that preemption is necessary. Because the Court declared that the Cowlitz County regulations are preempted, EFSEC cannot engage in its preemption process. By usurping EFSEC’s

preemption authority, the Court forecloses the implementation of the safeguards mandated by the statute and regulations. Simply put, the Court's preemption subverts the regulatory safeguards designed to protect County resources. These safeguards are described below.

**i. The applicant must work with County to resolve noncompliance**

If EFSEC decides, based on a letter from a county, that the project is inconsistent with land use regulations, the applicant must try to resolve the inconsistency with the county. WAC 463-28-030. EFSEC's regulations state:

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

*Id.*

Pursuant to the regulations, the applicant must attempt to resolve the noncompliance *prior* to EFSEC's exercise of its preemption authority.

*Id.* A determination of noncompliance by the County sets in motion a requirement for the applicant to work with the County to "make all reasonable efforts to resolve the noncompliance." *Id.* In this case, "all reasonable efforts" may include modification of the project design to

avoid sensitive wetlands or reduce the amount of salmon habitat destroyed. It is critical to the regulatory process, therefore, that the County make a valid and legally justifiable determination of land use compliance.

By declaring that the County's regulations are preempted, the Superior Court foreclosed EFSEC's administrative process. Thus, the applicant did not need to resolve the noncompliance.

**ii. To preempt local laws, EFSEC must ensure that local resources are protected**

If the applicant is unable to resolve the noncompliance with the local land use regulations, then:

the applicant shall file a written request for state preemption as authorized in WAC 463-28-020 within ninety days after completion of the public hearing . . . . The request shall address the following: (1) That the applicant has demonstrated a good faith effort to resolve the noncompliance issues. (2) That the applicant and the local authorities are unable to reach an agreement which will resolve the issues. (3) That alternate locations which are within the same county and city have been reviewed and have been found unacceptable. (4) Interests of the state as delineated in RCW 80.50.010.

WAC 463-28-040.

This regulation makes clear that the applicant and EFSEC must comply with procedural and substantive requirements before preemption can occur. *Id.* These requirements protect the local government by

ensuring that preemption is a last resort. *Id.* The applicant must apply for preemption on time, must demonstrate it could not resolve the local conflict, and must demonstrate no alternative locations exist. *Id.*

Further, the rules require the applicant to address the state policies delineated in RCW 80.50.010, which state that the location of energy 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” *Id.*; RCW 80.50.010. Additionally, EFSEC’s siting decisions must “preserve and protect the quality of the environment [and] enhance the public’s opportunity to enjoy the esthetic and recreational benefits of air, water and land resources.” RCW 80.50.010(2).

The preemption process, therefore, is not simply a formality; it requires an assessment of whether the energy facility’s location harms the environment. Here, the power plant would destroy lands deemed “critical” by Cowlitz County for wetlands, fish and wildlife habitat, and aquifer recharge. The mandatory assessment required by WAC 463-28-040 may demonstrate to EFSEC that preemption is not appropriate at this location.

However, under the Superior Court’s erroneous preemption ruling, EFSEC will not undertake the preemption analysis, even though the

project is clearly inconsistent with County regulations. EFSEC can instead rely on a wholly arbitrary and unreviewable County consistency determination as “*prima facie* proof of consistency.” WAC 463-26-090. The Superior Court erred by preempting the County ordinances without allowing EFSEC to undertake the preemption analysis that protects local resources.

**iii. EFSEC must condition the preemption to protect the County’s interests**

The most important protection that RCW 80.50 offers is that EFSEC has a statutory duty to design conditions that recognize the purposes of laws that are preempted. RCW 80.50.100(1). If EFSEC utilizes preemption, EFSEC

shall include conditions in the draft certification agreement to . . . protect state and local governmental interests affected by the construction or operation of the energy facility, and *conditions designed to recognize the purpose of the laws or ordinances . . . that are preempted . . . .*

*Id.* (emphasis added).

If EFSEC preempted the Cowlitz County critical areas ordinances for aquifer recharge, for example, the statute requires EFSEC to include conditions in the power plant’s certification that would protect the aquifer recharge area. These conditions could include limiting the amount of

paved surfaces on the aquifer recharge area, or ensuring the safe storage of toxic waste above the aquifer recharge area.

The Superior Court erred by deciding that RCW 80.50.110 automatically preempts the County decision without allowing EFSEC to undertake the preemption process.

**c. The Court's decision thwarts legislative intent**

The Court's ruling that RCW 80.50.110 preempts the County's ordinances thwarts the delicate balance achieved by the EFSEC statute and implementing regulations.

RCW 80.50 and the implementation regulations strike a fine balance to address the contentious problem of siting energy facilities. Due to the obvious need for energy facilities, the Legislature recognized the necessity of state control over the siting of energy facilities. RCW 80.50.010. The Legislature granted the state authority to preempt local regulations that conflict with the regulation and certification of energy facilities. That way, local municipalities could not deny or place burdensome regulations on an energy facility that EFSEC considered appropriate.

The Legislature did not, however, attempt to deem all local land use regulations and local concerns meaningless. The implementing rules,

described above, craft a careful balance that gives EFSEC the ultimate siting authority, but provides significant safeguards to protect County resources. The Court's decision that the Cowlitz County land use ordinances are automatically preempted disrupts the balance crafted in the regulations. This judicial encroachment into EFSEC's administrative functions violates the separation of powers doctrine by "inwad[ing] the prerogatives of the executive branch." *City of Bellevue v. Hellenthal*, 144 Wn.2d 425, 436, 28 P.3d 744, 750 (2001).

**4. There is No Conflict Because EFSEC Did Not Review Cowlitz County's Critical Areas Ordinances**

Even if the Court could somehow preempt the Cowlitz County ordinances, preemption is not appropriate here because there is no conflict. RCW 80.50.110(1) preempts all regulations that conflict with RCW 80.50. Judicial review of the Cowlitz County land use ordinances under LUPA does not conflict with RCW 80.50 because EFSEC did not review the Cowlitz County critical areas ordinances. CP 102-103. Preemption requires a conflict. *Parkland Light & Water Co. v. Tacoma-Pierce County Bd. of Health*, 151 Wn.2d 428, 433, 90 P.3d 37, 39 (2004) ("a local regulation conflicts with a statute when it permits what is forbidden by state law or prohibits what state law permits").

Here, EFSEC has interpreted the statute in a manner that resolves the question of preemption. EFSEC ruled that its consistency determination does not include review or authority over the critical areas ordinances, which are central to this appeal. CP 102-103. EFSEC's April 26, 2007 Council Order No. 828 on Consistency with Local and Regional Land Use Plans or Zoning Ordinances (Order) states:

the council approved a motion that specifically finds the project site to be '...consistent and in compliance with...' existing land use plans and zoning ordinances. The Council's determination of consistency *does not include a review or determination of whether the project is in compliance with the Cowlitz County's critical areas ordinance.*<sup>8</sup>

Based on its regulations, EFSEC determined that its scope of review does not contemplate review of the critical areas ordinances. CP 102-103. As such, there is no conflict with the Superior Court reviewing the County's interpretation of its critical areas ordinances because EFSEC declared it did not have the authority to do so.

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<sup>8</sup> Council Order No. 828, Order on Consistency with Local and Regional Land Use Plans or Zoning Ordinances, April 26, 2007 (emphasis added). As described in footnote 1, this EFSEC order was not part of the record below because EFSEC issued the order after the parties completed briefing. The record contains the Declaration of Darrel K. Whipple, CP 102-103, which described EFSEC's vote to approve land use compliance. The EFSEC vote preceded the order. Mr. Whipple's declaration states, "In the discussion of its vote, EFSEC specifically stated that it did not review the project to determine compliance or consistency with the County's Critical Areas Ordinances." CP 102-103.

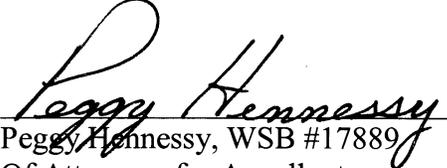
The EFSEC regulations are presumed to be consistent with the statute. *Baker v. Snohomish County Dept. of Planning and Community Development*, 68 Wn.App. 581, 589, 841 P.2d 1321, 1325 (1992). Because EFSEC declared that its regulations do not authorize review of the critical areas ordinances, review of the critical areas ordinances under LUPA does not conflict with RCW 80.50.

**D. Conclusion**

Pursuant to the foregoing, Petitioners request that this Court reverse the Superior Court's Order that granted Respondents' motions to dismiss.

DATED this 13<sup>th</sup> day of August, 2007.

Respectfully submitted,  
REEVES, KAHN & HENNESSY

  
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SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

COLUMBIA RIVERKEEPER, a )  
Washington nonprofit corporation, )  
And PETER HUHTALA, an )  
Oregon resident, )  
 )  
Petitioners/Appellants, )  
 )  
v. )  
 )  
COWLITZ COUNTY, a political )  
Subdivision of the State of )  
Washington, ENERGY NORTH- )  
WEST, a Joint Operating Agency )  
In the State of Washington, and )  
PORT OF KALAMA, a )  
Washington municipal corporation, )  
 )  
Respondents. )  
\_\_\_\_\_ )

Superior Court Case No.:  
07-2-00400-0

Court of Appeals Case No.:  
36393-3-II

REPORT OF PROCEEDINGS

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

COLUMBIA RIVERKEEPER, a )	
Washington nonprofit corporation, )	
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)	Superior Court Case No.:
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)	36393-3-II
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)	REPORT OF PROCEEDINGS
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_____ )	

CD PROCEEDINGS

**Dates** and **times** requested for transcription:

April 30, 2007

HEARD BEFORE THE HONORABLE:

James Warne

**COUNSEL FOR THE PLAINTIFF:**

Keith Hisaq Hirokawa & Brett VandenHeuvel

**COUNSEL FOR THE DEFENDANT:**

Ronald S. Marshall, Steve Cameron Morasch & Elizabeth Thomas

Also needed for transcription is a copy of the clerk's minutes, mainly for spellings of witness' names, etc, if not on CD

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1 April 30, 2007:

2 Judge: Columbia River Gate Keepers?

3 Male: Yes, Your Honor. Your Honor, I assume the  
4 court will be taking up the Motions to Dismiss but I know Mr.  
5 Hirokawa had filed a Motion for Leave for the Defendant who  
6 will appear pro hoc vice (ph) ...

7 Male: That's correct, if I might. Your Honor may  
8 I present Mr. Brett VandenHeuvel, a member in good standing of  
9 the Oregon bar and staff attorney for the Plaintiffs in this  
10 matter who'd like to appear under my provisions to represent  
11 the client's case.

12 Judge: And a proposed [inaudible].

13 Male: Yes.

14 Judge: I see no objection.

15 Male: No objection.

16 Male: I haven't heard any after consider that ...  
17 the second issue is that the initial Motion on the docket  
18 today was the procedural order and I had received a note which  
19 ... from one of counsel's associate's attorneys that all the  
20 attorneys have stipulated on their proposed Order which I had  
21 prepared in our heading and ... and I think everybody's had the  
22 opportunity to review that now, is that right? And so if it's  
23 all right with the procedural order, I'll circulate the  
24 signing of the stipulation for presentation if that's right.

25 Male: I didn't look at it. I'll let the parties

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...  
Judge: [Inaudible ... both talking] ... make a Motion to Dismiss?

Male: I'm sorry?

Male: Well ...

Male: I've got the Motion to Dismiss. We'll go first, Your Honor.

Judge: If I grant the Motion to Dismiss, there's no sense having the procedural Order.

Male: Well, of course, our position is, Your Honor, we're ...

Judge: All right. I think ... if you have a proposed Order and everybody's signed off on it, I'll take it up at the end of the Motion to Dismiss.

Male: Okay. Thank you.

Male: Your Honor, since it's proverbially my own field, I ... I beat the other counsel into submission and they allowed me to get up here first. I would like to introduce to the court Steve Morasch represents the Port of Kalama, Elizabeth Thomas represents Northwest Energy. Also present is Kyle Kooz (ph), Assistant Attorney General who represents EFSEC (ph) the energy facility site evaluation counsel who are not a party to this proceeding.

Your Honor, if I may, and the court can do with it as it sees fit, when the county received the Petition

1 in this matter, I had to look at RCW Chapter 80.50 for the  
2 first time and ... and my guess is that the court also ...

3 Male: For the first time?

4 Male: ... had the first opportunity to look at that  
5 chapter. And ... and so I've handed forward ... and I took the  
6 liberty of highlighting the sections that I think are ... are  
7 germane. And I also handed the court a copy of Chapter 463.26  
8 of the Washington Administrative Code. That is the chapter  
9 that deals with this stage of the certification proceeding  
10 that is pending before EFSEC.

11 I just have a couple of comments to make  
12 and then I'll sit down. I would suggest that there is a  
13 reason why I have no ... not previously looked at RCW Chapter  
14 80.50 and apparently the court has not as well, and that is  
15 the real reason we're here. That is because that statute  
16 creates exclusive jurisdiction in another court and provides  
17 for state preemption for a focused, single proceedings for  
18 decisions made relating to the siting, the construction and  
19 the operation of energy facilities that fall within it's  
20 purview and those include the Pacific Mountain Energy Center  
21 that is proposed for the Port of Kalama.

22 I know the court's aware of it but in case  
23 anybody else is listening, what we are here for today has  
24 nothing to do with whether the Pacific Mounnty ... Pacific  
25 Mountain Energy Set ... Center should or should not be

1 constructed in Cowlitz County. That's simply not an issue  
2 before the court.

3                   The County was drawn into this loop of  
4 proceeding in a somewhat unusual situation ... loop of the Land  
5 Use Petition Act, RCW Chapter 36.70(c) is something that I am  
6 familiar with. I don't know whether the court has had much  
7 occasion to deal with that statute. The County typically  
8 finds itself in court in a position somewhere in between  
9 project proponents and project opponents and one or the other,  
10 or both, most typically don't like what the county has either  
11 allowed or denied in terms of the development of a piece of  
12 property.

13                   Here we haven't even had a chance to do  
14 anything about the development of a piece of property. We  
15 haven't even determined or decided whether or pursuant to what  
16 conditions this project can proceed. And yet here we are  
17 again drawn into this petition under the Land Use Petition  
18 Act.

19                   If you look at the statute itself, RCW  
20 36.70(c).020(1) when it defines a land use decision ... and this  
21 is addressed in both the Motion and ... and the response of the  
22 opposition filed by the Petitioners ... the definition starts  
23 with *a final determination by a ... a ... a local agency or*  
24 *someone with jurisdiction.*

25                   I would suggest that the determination is a

1 word that means something. It means that there is a  
2 determination of whether or not some land use can, in fact,  
3 take place. And the purpose of the statute is to provide  
4 judicial review from determination. Cowlitz County has made  
5 and will make no determination as to whether or not the  
6 Pacific Mountain Energy Center will be constructed.

7 That determination under sub-section (1)(b)  
8 is with ... is with respect to the application of ordinances or  
9 rules regulating the development or use of real property. And  
10 we simply are not regulating the development or use of the  
11 Port of Kalama's property.

12 The petitioners, in their opposition, have  
13 a rather eloquent, interesting argument about LUPA (ph) and  
14 about a local jurisdictions, but one thing that they do not  
15 offer for the court anywhere in their briefing is any piece of  
16 authority indicating that LUPA jurisdiction can be asserted in  
17 the absence of a party with authority to regulate the land use  
18 development. There is ... that absence exists here. There is  
19 no party before the court that can determine whether or not  
20 Pacific Mountain Energy Center gets a certification from the  
21 inner ... Energy Facility Site Evaluation Counsel to construct  
22 and operate it's proposed facility.

23 Judge: Okay. Let me stop you. It's a  
24 certification ... you mean gets a permit?

25 Male: That ... the language of the statute is

1 certification. But it is a permit. It is a ...

2 Judge: That is what we're talking about here is  
3 certification of consistency so that when you say  
4 certification, I don't want to be confusing ...

5 Male: All right.

6 Judge: ... in the two processes.

7 Male: It ... it ... it is ... the actual permission  
8 hammered out typically in a ... in a document that sets forth a  
9 multitude of conditions, all of which Ms. Thomas could educate  
10 the court on ...

11 Judge: [Inaudible ... both speaking].

12 Male: ... I cannot. So in essence, Your Honor, as  
13 we suggested in our Motion and I suggest on behalf of ...  
14 behalf of the County, if you actually look at the LUPA  
15 Petition and ... and ... and the matter that the petitioners want  
16 to bring before this court, I still am unable to ... to fathom  
17 what type of Order ... what type of result if we assume for the  
18 moment that they met that burden of proof in RCW 36.70(c).130,  
19 the standards for relief in a LUPA proceeding, what would that  
20 ever mean? All we have is the director of the County  
21 Department of Building and Planning indicating and response to  
22 a request that ... that he believes that this project would be  
23 consistent with County Land Use Ordinances.

24 And then a regulation adopted pursuant to  
25 power conferred on the Energy Facility Site Evaluation Counsel

1 under statute that says that certification is accepted as  
2 prima facie proof when the counsel makes a determination as to  
3 whether or not there is consistency as to whether or not they  
4 go into other steps that involve the preemptive authority  
5 that's granted by the statute. That's all I have.

6 Judge: Let me ask you a question. What is the  
7 effect ... the determination we make here that account?

8 Male: It ... the affect was that it has been  
9 considered by the Energy Facility Site Evaluation Counsel  
10 exactly as the regulations provide.

11 Judge: What if the decision had been ... it's not  
12 consistent with the county land use plan or comprehensive  
13 plan?

14 Male: Well, I ... I ... I can tell you what my  
15 understanding is. I think Ms. Thomas could respond to what  
16 Northwest Energy would do in ... in the face of a determination  
17 of inconsistency made by the Energy Facility Site Evaluation  
18 Counsel. The regulations that I handed forward give the  
19 counsel and anticipate that there may be opposing evidence  
20 presented when it makes it's determination and that's why the  
21 certificate is only prima facie proof that will suffice in the  
22 absence of any opposing information submitted to the counsel.

23 Judge: Weigh in.

24 Male: The Director ... the Planning Director said  
25 this is consistent with our county land use development

1 ordinance ... whatever it's called. And you met this decision  
2 and you were going through the petition and you were doing the  
3 determination in looking at our land use ordinance and he said  
4 it's the Prosecuting Attorney ...

5 Male: It's not consistent.

6 Male: ... Land Use Ordinance. This is consistent.

7 Is there any review by anyone that can tell by which standard  
8 the decision is stayed by the director?

9 Male: As it stands, there is no review because it  
10 ... it has no significance beyond the statement that it  
11 represents. If the County felt like it wanted to present a ...  
12 a countervailing position, then my office would have to  
13 determine whether we were involved in that or how we were  
14 involved in that. But that's ... that's not the issue in this  
15 proceeding.

16 Male: Does it strike you that every decision  
17 that's made by government generally is review able ...

18 Male: And ...

19 Male: ... by somebody else?

20 Male: ... and so is this. It ... it's review ... review  
21 able by EFSEC and ultimately by the Thurston County Superior  
22 Court if an interested party decides to seek that review.

23 Male: Your position is that the place for review  
24 is in the Energy Siting Committee ... the ... what's the name of  
25 the group?

1 Male: Energy Facility Site Evaluation Counsel.

2 Male: That's the place to review is there and not  
3 before?

4 Male: And ... and ... and it's not simply ...

5 Male: If the County ...

6 Male: ... my position. That is the statute and  
7 that the *Lathrop* decision out of Division III as well.

8 Judge: All right. Thank you.

9 ET: Good afternoon, Your Honor. Ms. Thomas of  
10 [inaudible] Gates. I guess I'd like to start by explaining a  
11 little bit about the background of the Pacific Mountain Energy  
12 Center and it ... and how it got to EFSEC. I'll try to pick up  
13 on a couple of the questions that you and Mr. Marshall  
14 discussed.

15 Energy Northwest is a Joint Operating  
16 Agency comprised of Public Utility District and  
17 municipalities. And it is looking to develop the Pacific  
18 Mountain Energy Center in order to meet it's members' needs  
19 for electricity. It's proposed development is six hundred  
20 megawatts that qualifies it as large for purposes of  
21 triggering the jurisdiction of the Energy Facility Site  
22 Evaluation Counsel.

23 The counsel, of course, is governed by  
24 Chapter 80.50, RCW and has a lengthy process with many  
25 opportunities for public input and also for governmental

1 input. It is designed as one-stop shopping with a single  
2 appeal pack after the governor's decision. It starts out with  
3 the filing of an application, then there is the preparation of  
4 the draft EIS. One of the other initial steps is kind of a  
5 checkpoint to see if the local government feels that, based on  
6 the information available at that point in the process, the  
7 project is consistent. And that was the source of the letter  
8 from the County Planning Director.

9           It's important to look through his letter  
10 because his letter makes clear that there are some things that  
11 are not yet known about the proposed development. Some of the  
12 important things that aren't known are what conditions EFSEC  
13 is going to attach in order to make sure that the development  
14 appropriately mitigates it's environmental impact.

15           The Land Use decision is made by EFSEC  
16 relatively early on and it's done as a checkpoint because if  
17 the County Planning Director came in and said no this is not  
18 consistent, as Mr. Marshall said, EFSEC would have two option:  
19 one would b to listen to the evidence and make it's own  
20 contrary decision. And in that sense the County Planning  
21 Direction is not binding. EFSEC can make a different  
22 decision. Or to say we agree, the project is not consistent  
23 and now we have to think about whether we're going to preempt  
24 the county's land use requirements ... because EFSEC has that  
25 power as well.

1 It's important therefore to get an early  
2 read on whether a proposed development is or is not consistent  
3 with the local land use requirements. But as the County  
4 Planning Director's letter reflects, much later in the  
5 proceeding is when the details of any proposed mitigation  
6 necessary to comply with flood plain requirements or ground  
7 water requirements or other ... you know ... detailed requirements  
8 relating to it ... to a particular site come up.

9 The EFSEC process does several things. It  
10 results in the issuance of what's called a Site Certification  
11 Agreement. At the end of the day, after EFSEC has had it's  
12 adjudicated proceeding with a review and pre-filed testimony  
13 and cross examination, EFSEC will issue an order and if it  
14 thinks that the development should go forward, to get a  
15 [inaudible] order will be a Site Certification Agreement that  
16 spells out all the terms and conditions on which site  
17 certification would be granted.

18 As well as seeking input from the County  
19 Planning Director, they'll seek input from the Department of  
20 Ecology and what the terms and conditions of what the waste  
21 water discharge permit should be, for storm water management,  
22 for air permit, and all that will get rolled into a proposed  
23 Site Certification Agreement. And then that goes to the  
24 governor's desk and the governor decides whether to accept it,  
25 reject it or remand it.

1                   After the governor has acted, there is an  
2 expedited appeal process where an appellant can initially file  
3 in Thurston County Superior Court and then obtain expedited  
4 review from the State Supreme Court. So it is a one-stop shop  
5 concept that's articulated in the ... in the preamble to the  
6 legislation.

7                   The order keeper has taken a creative tack  
8 here, attempting to use LUPA to kind of short circuit the  
9 EFSEC decision making process. But this court doesn't have  
10 subject matter jurisdiction over the question even of whether  
11 the County Planning Director made the correct or incorrect  
12 decision regarding land use consistency. That's because the  
13 County Planning Director is ... determination was purely  
14 advisory. He was telling EFSEC what he thought, but EFSEC  
15 makes up it's own mind first of all on whether consistency  
16 exists and it not, whether it should preempt local land use  
17 requirements. Thus the county's determination is just  
18 interlocutory and advisory. It's not binding. It doesn't fix  
19 any relationships in any way.

20                   The appeal is also premature. If it's ... I  
21 sense from the River Keeper's pleadings that they have  
22 concerns about flood plains and critical areas ... all of those  
23 concerns can be raised and addressed through the SEPA (ph)  
24 process that EFSEC will conduct, with a full-blown EIS and  
25 through the adjudicate of proceedings where they ... parties

1 such as Riverkeeperintervene, present witnesses, cross examine  
2 witnesses that are presented by Energy Northwest. So concerns  
3 about flood plains and critical areas aren't even right at  
4 this point.

5 Finally, Thurston County will be the  
6 Superior Court where ... where Riverkeeperneeds to go if, at the  
7 end of the day, it doesn't like the governor's decision. But  
8 until the governor decides, Energy Northwest can't build  
9 anything. That's ... at this point, there hasn't been any  
10 approval granted for Energy Northwest to do anything.

11 The case should also be dismissed on  
12 failure to join a necessary party. I think a cursory review  
13 of the pleadings demonstrates that this case is all about what  
14 EFSEC does and this was underscored by the late filed  
15 declaration that was submitted by Riverkeeperlast week, which  
16 we view was not only untimely, but also hearsay. But EFSEC is  
17 clearly the entity that's going to issue the Order determining  
18 consistency or non-consistency. EFSEC has an interest in the  
19 substance of this matter both for the Pacific Mountain Energy  
20 Center and institutionally.

21 If this court were to determine that the  
22 county's land use determination was incorrect or correct, that  
23 would probably be of interest to them. Certainly it's of  
24 interest to them to know whether the one-stop shopping that ...  
25 that the counsel feels it has ... that it's able to provide

1 under it's statute really exists or whether it's possible to  
2 bring collateral attacks on some of the inputs to the EFSEC  
3 process through proceedings in other Superior Courts. The  
4 fact that EFSEC is a necessary part of this ... the fact that we  
5 brought to River Keeper's attention on March 20<sup>th</sup> ...  
6 Riverkeeper has not attempted to join EFSEC since then.

7 We really feel strongly the court shouldn't  
8 issue a precedent setting decision on EFSEC's powers without  
9 at least giving EFSEC a chance to explain how it interprets  
10 it's own agency powers. This failure to join a necessary  
11 party provides independent grounds for dismissal of the  
12 action.

13 Finally, we feel our Motion to Dismiss was  
14 timely filed. We identified three grounds for dismissal.  
15 Lack of subject matter jurisdiction, failure to join and  
16 failure to state a claim upon which relief can be granted ...  
17 I'm sorry ... granted. Only the third of those, failure to  
18 state a claim, required conversion to a Motion for Summary  
19 Judgment if it depends on evidence. So we would feel, in any  
20 event, their Motion is based on lack of jurisdiction, failure  
21 to join ... stand regardless of whether the failure to state a  
22 claim motion would need to be converted into a Motion for  
23 Summary Judgment.

24 In any event, the factual material we  
25 presented is just for context. We don't feel it's necessary

1 to a decision on our Motion and invite the court to disregard  
2 it. I'd be happy to try to answer any questions now.

3 Judge: Anything [covered by a cough].

4 SM: Good afternoon, Your Honor. Steve Morasch,  
5 which probably you don't even see why I representing the Port  
6 of Kalama. I just have a few brief comments about the LUPA  
7 statute. And the first is that LUPA discourages piecemeal  
8 review. And that's been held time and time again. The cases  
9 are cited in our brief. The *King County* case is another so I  
10 think it's important to consider that kind of in the broad  
11 picture because in ... in essence what the petitioners are  
12 asking for here is a ... is a piecemeal review. They're asking  
13 to pull this letter out of the middle of the EFSEC process and  
14 take that on a separate review path and just as a general rule  
15 LUPA discourages that ... that type of an appeal.

16 The second point I would like to make is  
17 under RCW 36.70(c)(a)(2). Land use decisions ... now it's  
18 assuming it was a land use decision or ... for the sake of  
19 argument, but land use decisions that are subject to review by  
20 another quasi judicial body are not subject to LUPA. Now the  
21 petitioners have taken an overly narrow view of that statute  
22 in our opinion and it has asserted this word "appellate" into  
23 that statute where it doesn't exist. It just says review. It  
24 doesn't say appellate review. So I think that ... that's a  
25 narrowing of that statute that ... that is inconsistent with the

1 actual language of the statute.

2           And the third and probably the most  
3 important point I'd like to make is before you even get to the  
4 point of saying it's a land use decision ... so before you even  
5 look to see whether RCW 36.70(c).030(1)(a)(2) sends you  
6 elsewhere, you have to look under RCW 30.70(c).020(1) and that  
7 says ... the first part of the land use decision is it's got to  
8 be a final determination. And ... and here we have a case  
9 that's been briefed by ... by both sides ... that's right on point  
10 with that question. And that's the *Samuels Furniture* case.

11           And ... and the crux of what the petitioners  
12 are arguing is that ... that this makes a difference ... this  
13 letter of consistency makes a difference in the EFSEC process  
14 because when we get to EFSEC, there's gonna be a burden shift  
15 under the ... the Washington Administrative Code because that  
16 code says if the county's letter of consistency creates prima  
17 facie evidence and then we'll have to rebut that and that will  
18 somehow shift the burden away from us or to ... or away from the  
19 other side to us to show an inconsistency and so that's really  
20 why they're here arguing it.

21           And in the *Samuels Furniture* case, at page  
22 452, the court said that an interlocutory decision is one that  
23 intervenes between the commencement and the end of a suit  
24 which decides some point or matter, but is not a final  
25 decision of the whole controversy. And I think that's exactly

1 what we have here because this letter of consistency, at most,  
2 is ... is a point in this EFSEC process where the EFSEC counsel  
3 has to decide consistency and, depending on what the planning  
4 director says, that may create a prima facie case where the  
5 petitioners may have to rebut that and so it ... it may shift  
6 their burden. But that's just one point in the whole process.  
7 So I think clearly under the *Samuels Furniture* case we don't  
8 have a final determination, ergo, no land use decision and no  
9 jurisdiction under the law. Thank you.

10 Judge: Thank you.

11 Male: Your Honor, our pro hoc vice attorneys can  
12 make the final presentation but I would like to add comments.

13 Judge: Okay.

14 Male: Thank you.

15 BV: Thank you, Your Honor. Brett VandenHeuvel,  
16 attorney for Columbia Keeper.

17 The ... the first thing I want to do is just  
18 look at the statute ... look at LUPA. The Land Use Petition Act  
19 provides that ... provides the excusion ... exclusive means of  
20 jurisdiction for review of land use decisions. Exclusive  
21 means judicial review of land use decisions. So our central  
22 question in this case is, is this a land use decision?  
23 Because if it is, this court has the exclusive jurisdiction.  
24 A land use decision, luckily in this case, is defined in the  
25 statute. LUPA defines the land use decision as a *final*



1 determined as critical by the county for fish and wildlife,  
2 for wetlands and for aqua recharge. The county determined it  
3 was consistent with all of those things. If you look at the  
4 critical areas ordinance in Cowlitz County code, it describes  
5 very detailed procedural and substantive requirements that ...  
6 in order to determine something is consistent. The county did  
7 none of this. We're afraid that this project is gonna slide  
8 by without the county's review of these critical areas and  
9 other things.

10                   The ... the respondents are trying to frame  
11 this as simply the EFSEC process. I just want to make clear  
12 to the court, we're challenging the county's decision in this,  
13 not EFSEC's decision.

14                   Nowhere in the definition of land use  
15 determination or land use decision ... I'm sorry ... in LUPA does  
16 it require Cowlitz County to be the only agency involved. The  
17 court mentioned that earlier. Simply because there's  
18 additional review by other governmental agencies ... in this  
19 case the state ... doesn't mean the county didn't make a land  
20 use determination ... or land use decision. Of course there's  
21 going to be further steps. Any land use case has multiple  
22 steps. That does not somehow make this not a final decision.

23                   Counsel for the county also suggested  
24 because the county is not issuing a permit in this case, that  
25 it can't be a land use decision or can't be a final land use

1 decision. I would challenge counsel to point out anywhere in  
2 the LUPA statute where it requires the agency who's making the  
3 decision to be ... have a permit in front of them ... to actually  
4 be issuing a permit. All it says is that it is a declaratory  
5 or interpretive decision.

6 The court also mentioned earlier that ...

7 Judge: Let me ask you a question. I think this is  
8 pertinent. What is the difference between a decision which  
9 affects something and an advisory opinion that doesn't have  
10 any real affect on anybody?

11 BV: That there is some ... a decision that  
12 affects something, affects the legal relationship. It somehow  
13 shifts or fixes the legal relationship. In this case, EFSEC's  
14 rules require them to treat the county's land use decision as  
15 prima facie evidence of consistency. That, in effect, shifts  
16 the burden of proof. So no longer do respondents have to show  
17 that it is consistent. The county on ... or the county's letter  
18 on it's face is now a determination of consistency. In fact,  
19 EFSEC never did review any of these and EFSEC ...

20 Judge: I'd say it's a presumption of consistency.

21 BV: Correct. So in our case, petitioners have  
22 lost the ... the burden of proof has shifted upon us.

23 Judge: Okay.

24 BV: It would be similar to a jury instructions  
25 which shifts the burden of proof and says there's no

1 presumption of innocence.

2 Judge: Why is that a final decision?

3 BV: It's a final decision for two reasons: (1)  
4 is that ... or finality has been defined several ways. One is  
5 that it fixes a legal relationship as we just said ... this  
6 fixes a legal relationship by shifting the burden of proof.  
7 And two, in the *Samuels Furniture* case, it said a final  
8 decision is if there's nothing left to be done. In this case,  
9 the county's ... the county has nothing left to do. The county  
10 made it's decision. Simply because another government body is  
11 reviewing this doesn't mean the county's decision is not  
12 final. So for two reasons. One, it fixes the legal  
13 relationship, two, the county's job ... there is nothing more  
14 for the county to do. They've made their decision as  
15 consistent.

16 I'm happy to address ...

17 Judge: Isn't that sort of true in this sort of  
18 litigation any sort of pre-trial order ... any sort of per-trial  
19 order establishes some obligation? Any order that says  
20 plaintiff has the burden of proof. Isn't that a final order?  
21 I mean if it says ... plaintiff has the burden of proof. Here,  
22 as any person opposing this determination has the burden of  
23 proof. How does that become a final order?

24 BV: It's a ... the county's ... the county made a  
25 decision.

1           Judge:           I understand that.

2           BV:               And that's what their final decision on  
3 that point and that shifted the burden of proof on the EFSEC  
4 classes. What we're challenging is nothing ... we're involved  
5 in the EFSEC process. We've been going to the hearings and  
6 we're gonna engage in that process all along. Here, this is  
7 simply challenging the county's decision, which is final ...  
8 which is done and it has ... it has affected our legal  
9 relationship. And there's nothing more for the county to do.  
10 If we can't review it here, we lose all chance of review of  
11 the county's decision. The ... the ...

12           Judge:           They say that's true though. They say it's  
13 absolutely review able in essentially any permission that the  
14 presumption is in favor of the county. But that it is review  
15 able and that the safe netting (ph) is not bound by this  
16 determination. It's not bound by the county and it's not  
17 consistent. So how can you say this is final and anybody is  
18 bound by this decision?

19           BV:               LUPA requires an appeal to any decision  
20 within twenty-one (21) days. If we don't challenge the  
21 county's decision now, I think everyone will agree that we've  
22 waived that challenge under LUPA. There is an additional  
23 separate process under EFSEC and ... like I said, we intend to  
24 be involved in that process. But the county's decision is  
25 final and we're ... that affects our legal relationship in the

1 EFSEC process. For example ...

2 Judge: The land decision was made at the county  
3 level.

4 BV: Yes.

5 Judge: Okay. I understand that.

6 BV: Just briefly to address a couple arguments.  
7 Counsels for Energy Northwest the applicants said that this is  
8 just a checkpoint. It ... it's not a checkpoint in the county.  
9 It's the end of the road in the county. They said they're  
10 gonna review this later in the proceedings. But again, under  
11 LUPA this court has exclusive jurisdiction to hear ap ...  
12 appeals of land use decisions.

13 This clearly, by reading the definition of  
14 LUPA, is a land use decision. There's no other way to read  
15 that statute. If that is a land use decision, then this court  
16 has the exclusive means to review this.

17 Judge: Anything you want to say? Any other  
18 comments?

19 Male: Just briefly, Your Honor. Excuse me. Your  
20 Honor, just some companion issues so they don't become  
21 runaways. We disagree with counsel arguing that joinder can  
22 be a reason for dismissal. It's in the statute. It says very  
23 clearly that joinder can't be a reason for loss of  
24 jurisdiction by the Superior Court. And that's 36.70(c).050.  
25 And we'd ask the court to take notice of that.

1 Counsel for the Port of Kalama provided us  
2 with an analogy to piecemeal that I think is really important  
3 to grasp onto understanding and project on this entire case to  
4 make sure that we're not missing the point. If we were  
5 appealing a decision of EFSEC ... of a state agency as bound by  
6 particular state process ... then we would agree, which is why  
7 the reliance on the *Lathrop* decision would be on point if this  
8 had anything to do with that process.

9 We're in a separate process. It's not  
10 piecemeal because there's nothing else for the county to do  
11 while this appeal is pending. In other words, something along  
12 these lines. Are we worried about ... say ... well, let me go a  
13 different direction on that.

14 As counsel is saying, there's always some  
15 other aspect ... some other permit ... some other agency that can  
16 do something ... that has some level of review. You get a  
17 subdivision it still needs a building permit. You get a  
18 building permit you still need water quality certification.  
19 In and of itself, that doesn't make any of those decisions  
20 less final because it is that particular agency's final  
21 determination on the matter.

22 This is Cowlitz County's final  
23 determination. It clearly fixes a legal relationship of the  
24 parties to one another because no longer is the applicant  
25 really the applicant. In other words, you know, having to



1            Judge:            They're say ... no, but they're saying  
2 clearly now they're saying yeah. You're saying they can't.

3            Male:            Well, I ... I think that they're answering a  
4 question that wasn't this question. What they're asking and  
5 answering to you and not really addressing this issue is can  
6 the issue of consistency be addressed and will it be argued  
7 later? And the answer is yeah, EFSEC is gonna make some  
8 decision on it. So yeah, it's gonna be argued. But they  
9 haven't told you that Cowlitz County's decision will not be  
10 review able.

11                            In fact, they're gonna come back later and  
12 say it's a local decision. The Administrative Procedures Act  
13 doesn't allow you to appeal it. You had to appeal it under  
14 the Land Use Petitions Act ... the exclusive means of judicial  
15 review. This is the only opportunity. We have to take it.  
16 If we don't, that's it for us. We go into a process already  
17 the underdogs even though they're the applicants. So it fixes  
18 that legal relationship.

19                            And we think quite honestly, you know the  
20 one-stop shopping analogy we like, can you buy a permit there?  
21 You know? Can you buy your counsel there? Can you buy your  
22 experts there? We're joking a little bit obviously. But the  
23 issue is that one-stop shopping is it's own process. We want  
24 to look at the county's decision. And that's all I had to  
25 add. Thank you. Your Honor.

1 Judge: Very briefly. Mr. Marshall.

2 RM: Mr. Hirokawa may have said it facetiously  
3 but it leads right into the one comment I wanted to make. The  
4 county, as I think the court is probably aware, has a fee  
5 structure when it receives permit applications and I'm  
6 following up on a comment that Ms. Thomas made about ...

7 Judge: And it's fairly expensive.

8 RM: ... it's fairly expensive and ... and the  
9 review that would lead to an issuance of a permit regulated  
10 under the county's critical areas ordinance would involve  
11 paying those fees, probably saying bring your consultants to  
12 the county. We'll review your consultants for courts. We'll  
13 look at a lot of things that the county has not seen and will  
14 not see in this case.

15 And that's because if the court looks at  
16 RCW 80.50.110 and 120, those statutes say *any law or*  
17 *regulation in conflict with this chapter is superseded and the*  
18 *state preempts the field* in the citing of energy facilities  
19 and the affect of certification, *if it issues out of the*  
20 *governor's office is that certification shall bind the state*  
21 *and the political subdivisions as to the approval of the site*  
22 *and the construction and operation of the energy facility and*  
23 *it is ... it shall be in lieu of any permit, certificate or*  
24 *similar document required by any political subdivision,*  
25 *whether a member of the counsel or not.* We don't get to

1 decide and so there is no room for judicial review looked at.

2 Judge: Let me ask you this question and I thought  
3 it was the position ... a defendant's ... that the decision made  
4 by the director was review able.

5 RM: It's review able in the sense that ... the  
6 ultimately the decision as to whether this project forward is  
7 that decision that is ... is a recommendation from the counsel  
8 to the governor. And in that process, the submittal that the  
9 county made, which was the director's opinion of consistency,  
10 is simply part of that process. It's review able in the sense  
11 that if you meet the regulations, it can be challenged by  
12 anybody who disagrees before the Energy Facility Site  
13 Evaluation Counsel. That as ...

14 Judge: My determination can be challenged. It  
15 merely creates a presumption and is subject to review?

16 RM: And as I understand it, I'm not sure if a  
17 judiciary proceeding has actually been initiated ...

18 ET: It has not.

19 RM: ... yet. But that all takes place before the  
20 site evaluation counsel.

21 Judge: And I assume that Northwest Energy would  
22 also agree that that decision is review able?

23 ET: Yes, Your Honor. I guess I described it as  
24 a review de novo. The Energy Facility Site Evaluation Counsel  
25 takes the input from the county ...

1           Judge:           I understand. Let me ... let me just ask  
2 this. Even to the point where you would agree that to ... make  
3 the two would be estopped from taking any other position?

4           ET:               I'm sorry. That who would be estopped from  
5 taking a position different from whom?

6           Judge:           Northwest Energy would be estopped from  
7 taking the position that it's not review able.

8           ET:               Correct. And I ... I would say that ... and I  
9 think this may be reflected in the declaration that River Kee  
10 ... Keepers submitted recently ... the counsel, when it issues an  
11 order on land use consistency, which I anticipate may be  
12 happening today, will have completed it's review of the  
13 county's determination letter. And then that order ... that  
14 EFSEC will issue ... together with all the other orders that  
15 EFSEC's going to issue between now and the time the governor  
16 approves or disapproves anything will be subject to review  
17 first in Thurston County Superior Court and then in the State  
18 Supreme Court.

19           Judge:           Let me take it under advisement. Thank  
20 you. I appreciate the evidence from you all.

21           Male:             Thank you, Your Honor.

22           Hearing ends.

23           BV:               Your Honor, could I just reopen the record  
24 for one moment just to make sure ... what was attached to the  
25 declaration that we filed on Friday was a witness to a hearing

1 for the state agency who's already made this determination.  
2 And in that determination it determines that it didn't have  
3 authority in that determination to look at essentially the  
4 ordinances ... the decisions of the county ... that are important  
5 to the petitioners. And ... and so respecting you're taking it  
6 under advisement, I'd ask you to look at that, just to make  
7 sure that it melds with what we were talking about today.  
8 Thank you.

9 ET: Your Honor, we're ...

10 Judge: Does everybody have a copy of that?

11 Male: It's the declaration of Daryl K. Ripple  
12 which states, Your Honor, that ... that the counsel actually  
13 took a vote at the last commission meeting at ... at which  
14 present counsel was on the telephone and heard this and they  
15 actually voted and approved that ... that consistency with land  
16 use determination without ... and they clearly said that they  
17 didn't have the authority to look at the critical areas  
18 ordinance which we think is key to this case. And that wasn't  
19 objected to according to the declaration.

20 ET: Your Honor, we would submit that the  
21 declaration is hearsay. The commission is going to be issuing  
22 a ... I'm sorry ... counsel is going to be issuing an Order which  
23 will speak for itself.

24 Judge: Okay. I'll look at it. I assume that  
25 there is going to be some sort of an order. I'm not sure that

1 that's ... it probably doesn't make any difference what they've  
2 done. The issue is what authority do I have to do this. And  
3 that's what I'm going to look at.

4 Male: Thank you, Your Honor.

5 Judge: Okay.

6 Male: Thank you, Your Honor.

7 Judge: Thank you.

8 Hearing ends.

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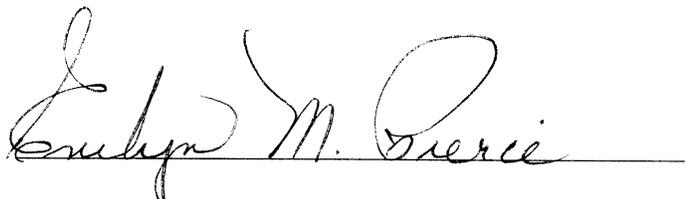
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C E R T I F I C A T E

I, Evelyn M. Pierce, certify that the hearing in the matter of *Columbia Riverkeeper, et al v. Cowlitz County, et al* occurred at the time and place set forth and that at said time and place the hearing was recorded on a CD. That I subsequently transcribed the entire recorded hearing to the best of my ability as accurately as possible.

July 24, 2007.



Evelyn M. Pierce

Certified transcriptionist

**Appendix A**

**RCW 80.50**

## Chapter 80.50 RCW

# Energy facilities — site locations

### Chapter Listing

### RCW Sections

- [80.50.010](#) Legislative finding -- Policy -- Intent.
- [80.50.020](#) Definitions.
- [80.50.030](#) Energy facility site evaluation council -- Created -- Membership -- Support.
- [80.50.040](#) Energy facility site evaluation council -- Powers enumerated.
- [80.50.045](#) Recommendations to secretary, federal energy regulatory commission -- Siting electrical transmission corridors -- Council designated as state authority for siting transmission facilities.
- [80.50.060](#) Energy facilities to which chapter applies -- Applications for certification -- Forms -- Information.
- [80.50.071](#) Council to receive applications -- Fees or charges for application processing or certification monitoring.
- [80.50.075](#) Expedited processing of applications.
- [80.50.080](#) Counsel for the environment.
- [80.50.085](#) Council staff to assist applicants, make recommendations.
- [80.50.090](#) Public hearings.
- [80.50.100](#) Recommendations to governor -- Approval or rejection of certification -- Reconsideration.
- [80.50.105](#) Transmission facilities for petroleum products -- Recommendations to governor.
- [80.50.110](#) Chapter governs and supersedes other law or regulations -- Preemption of regulation and certification by state.
- [80.50.120](#) Effect of certification.
- [80.50.130](#) Revocation or suspension of certification -- Grounds.
- [80.50.140](#) Review.
- [80.50.150](#) Enforcement of compliance -- Penalties.
- [80.50.160](#) Availability of information.
- [80.50.175](#) Study of potential sites -- Fee -- Disposition of payments.
- [80.50.180](#) Proposals and actions by other state agencies and local political subdivisions pertaining to energy facilities exempt from "detailed statement" required by RCW 43.21C.030.
- [80.50.190](#) Disposition of receipts from applicants.
- [80.50.300](#) Unfinished nuclear power projects -- Transfer of all or a portion of a site to a political subdivision or subdivisions of the state -- Water rights.
- [80.50.310](#) Council actions -- Exemption from chapter 43.21C RCW.
- [80.50.320](#) Governor to evaluate council efficiency, make recommendations.
- [80.50.900](#) Severability -- 1970 ex.s. c 45.
- [80.50.901](#) Severability -- 1974 ex.s. c 110.
- [80.50.902](#) Severability -- 1977 ex.s. c 371.
- [80.50.903](#) Severability -- 1996 c 4.
- [80.50.904](#) Effective date -- 1996 c 4.

### Notes:

**Reviser's note:** Powers and duties of the department of social and health services and the secretary of social and health services transferred to the department of health and the secretary of health. See RCW 43.70.060.

Energy supply emergencies: Chapter 43.21G RCW.

Regulation of dangerous wastes associated with energy facilities: RCW 70.105.110.

State energy office: Chapter 43.21F RCW.

Water pollution control, energy facilities, permits, etc., duties of energy facility site evaluation council: RCW 90.48.262.

(2) "Application" means any request for approval of a particular site or sites filed in accordance with the procedures established pursuant to this chapter, unless the context otherwise requires.

(3) "Person" means an individual, partnership, joint venture, private or public corporation, association, firm, public service company, political subdivision, municipal corporation, government agency, public utility district, or any other entity, public or private, however organized.

(4) "Site" means any proposed or approved location of an energy facility.

(5) "Certification" means a binding agreement between an applicant and the state which shall embody compliance to the siting guidelines, in effect as of the date of certification, which have been adopted pursuant to RCW 80.50.040 as now or hereafter amended as conditions to be met prior to or concurrent with the construction or operation of any energy facility.

(6) "Associated facilities" means storage, transmission, handling, or other related and supporting facilities connecting an energy plant with the existing energy supply, processing, or distribution system, including, but not limited to, communications, controls, mobilizing or maintenance equipment, instrumentation, and other types of ancillary transmission equipment, off-line storage or venting required for efficient operation or safety of the transmission system and overhead, and surface or subsurface lines of physical access for the inspection, maintenance, and safe operations of the transmission facility and new transmission lines constructed to operate at nominal voltages in excess of 115,000 volts to connect a thermal power plant or alternative energy facilities to the northwest power grid. However, common carrier railroads or motor vehicles shall not be included.

(7) "Transmission facility" means any of the following together with their associated facilities:

(a) Crude or refined petroleum or liquid petroleum product transmission pipeline of the following dimensions: A pipeline larger than six inches minimum inside diameter between valves for the transmission of these products with a total length of at least fifteen miles;

(b) Natural gas, synthetic fuel gas, or liquefied petroleum gas transmission pipeline of the following dimensions: A pipeline larger than fourteen inches minimum inside diameter between valves, for the transmission of these products, with a total length of at least fifteen miles for the purpose of delivering gas to a distribution facility, except an interstate natural gas pipeline regulated by the United States federal power commission;

(c) Electrical transmission facilities in excess of 115,000 volts in national interest electric transmission corridors as designated by the United States secretary of the department of energy or the federal energy regulatory commission pursuant to section 1221 of the national energy policy act, and such rules and regulations as the secretary or the federal energy regulatory commission adopts to implement the act.

(8) "Independent consultants" means those persons who have no financial interest in the applicant's proposals and who are retained by the council to evaluate the applicant's proposals, supporting studies, or to conduct additional studies.

(9) "Thermal power plant" means, for the purpose of certification, any electrical generating facility using any fuel, including nuclear materials, for distribution of electricity by electric utilities.

(10) "Energy facility" means an energy plant or transmission facilities: PROVIDED, That the following are excluded from the provisions of this chapter:

(a) Facilities for the extraction, conversion, transmission or storage of water, other than water specifically consumed or discharged by energy production or conversion for energy purposes; and

(b) Facilities operated by and for the armed services for military purposes or by other federal authority for the national defense.

(11) "Council" means the energy facility site evaluation council created by RCW 80.50.030.

(12) "Counsel for the environment" means an assistant attorney general or a special assistant attorney general who shall represent the public in accordance with RCW 80.50.080.

(13) "Construction" means on-site improvements, excluding exploratory work, which cost in excess of two hundred fifty thousand dollars.

(14) "Energy plant" means the following facilities together with their associated facilities:

(a) Any stationary thermal power plant with generating capacity of three hundred fifty thousand kilowatts or more, measured using maximum continuous electric generating capacity, less minimum auxiliary load, at average ambient

(2)(a) The chair of the council shall be appointed by the governor with the advice and consent of the senate, shall have a vote on matters before the council, shall serve for a term coextensive with the term of the governor, and is removable for cause. The chair may designate a member of the council to serve as acting chair in the event of the chair's absence. The salary of the chair shall be determined under RCW 43.03.040. The chair is a "state employee" for the purposes of chapter 42.52 RCW. As applicable, when attending meetings of the council, members may receive reimbursement for travel expenses in accordance with RCW 43.03.050 and 43.03.060, and are eligible for compensation under RCW 43.03.250.

(b) The chair or a designee shall execute all official documents, contracts, and other materials on behalf of the council. The Washington state department of community, trade, and economic development shall provide all administrative and staff support for the council. The director of the department of community, trade, and economic development has supervisory authority over the staff of the council and shall employ such personnel as are necessary to implement this chapter. Not more than three such employees may be exempt from chapter 41.06 RCW.

(3)(a) The council shall consist of the directors, administrators, or their designees, of the following departments, agencies, commissions, and committees or their statutory successors:

- (i) Department of ecology;
- (ii) Department of fish and wildlife;
- (iii) Department of community, trade, and economic development;
- (iv) Utilities and transportation commission; and
- (v) Department of natural resources.

(b) The directors, administrators, or their designees, of the following departments, agencies, and commissions, or their statutory successors, may participate as councilmembers at their own discretion provided they elect to participate no later than sixty days after an application is filed:

- (i) Department of agriculture;
- (ii) Department of health;
- (iii) Military department; and
- (iv) Department of transportation.

(c) Council membership is discretionary for agencies that choose to participate under (b) of this subsection only for applications that are filed with the council on or after May 8, 2001. For applications filed before May 8, 2001, council membership is mandatory for those agencies listed in (b) of this subsection.

(4) The appropriate county legislative authority of every county wherein an application for a proposed site is filed shall appoint a member or designee as a voting member to the council. The member or designee so appointed shall sit with the council only at such times as the council considers the proposed site for the county which he or she represents, and such member or designee shall serve until there has been a final acceptance or rejection of the proposed site.

(5) The city legislative authority of every city within whose corporate limits an energy plant is proposed to be located shall appoint a member or designee as a voting member to the council. The member or designee so appointed shall sit with the council only at such times as the council considers the proposed site for the city which he or she represents, and such member or designee shall serve until there has been a final acceptance or rejection of the proposed site.

(6) For any port district wherein an application for a proposed port facility is filed subject to this chapter, the port district shall appoint a member or designee as a nonvoting member to the council. The member or designee so appointed shall sit with the council only at such times as the council considers the proposed site for the port district which he or she represents, and such member or designee shall serve until there has been a final acceptance or rejection of the proposed site. The provisions of this subsection shall not apply if the port district is the applicant, either singly or in partnership or association with any other person.

[2001 c 214 § 4; 1996 c 186 § 108. Prior: 1994 c 264 § 75; 1994 c 154 § 315; 1990 c 12 § 3; 1988 c 36 § 60; 1986 c 266 § 51; prior: 1985 c 466 § 71; 1985 c 67 § 1; 1985 c 7 § 151; prior: 1984 c 125 § 18; 1984 c 7 § 372; 1977 ex.s. c 371 § 3; 1975-76 2nd ex.s. c 108 § 31; 1974 ex.s. c 171 § 46; 1970 ex.s. c 45 § 3.]

**Notes:**

**Severability -- Effective date -- 2001 c 214:** See notes following RCW [80.50.010](#).

**Findings -- 2001 c 214:** See note following RCW 39.35.010.

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.

[2001 c 214 § 6; 1990 c 12 § 4; 1985 c 67 § 2; 1979 ex.s. c 254 § 1; 1977 ex.s. c 371 § 4; 1975-'76 2nd ex.s. c 108 § 32; 1970 ex.s. c 45 § 4.]

**Notes:**

**Severability -- Effective date -- 2001 c 214:** See notes following RCW [80.50.010](#).

**Findings -- 2001 c 214:** See note following RCW 39.35.010.

**Effective date -- 1990 c 12:** See note following RCW [80.50.030](#).

**Severability -- Effective date -- 1975-'76 2nd ex.s. c 108:** See notes following RCW 43.21F.010.

**80.50.045**

**Recommendations to secretary, federal energy regulatory commission — Siting electrical transmission corridors — Council designated as state authority for siting transmission facilities.**

(1) The council shall consult with other state agencies, utilities, local municipal governments, public interest groups, tribes, and other interested persons to convey their views to the secretary and the federal energy regulatory commission regarding appropriate limits on federal regulatory authority in the siting of electrical transmission corridors in the state of Washington.

(2) The council is designated as the state authority for purposes of siting transmission facilities under the national energy policy act of 2005 and for purposes of other such rules or regulations adopted by the secretary. The council's authority regarding transmission facilities is limited to those transmission facilities that are the subject of section 1221 of the national energy policy act and this chapter.

(3) For the construction and modification of transmission facilities that are the subject of section 1221 of the national energy policy act, the council may: (a) Approve the siting of the facilities; and (b) consider the interstate benefits expected to be achieved by the proposed construction or modification of the facilities in the state.

(4) When developing recommendations as to the disposition of an application for the construction or modification of transmission facilities under this chapter, the fuel source of the electricity carried by the transmission facilities shall not be considered.

[2006 c 196 § 3.]

**Notes:**

**Findings -- 2006 c 196:** See note following RCW [80.50.020](#).

**80.50.060**

**Energy facilities to which chapter applies — Applications for certification — Forms — Information.**

**\*\*\* CHANGE IN 2007 \*\*\* (SEE 1037-S.SL) \*\*\***

(1) The provisions of this chapter shall apply to the construction of energy facilities which includes the new construction of energy facilities and the reconstruction or enlargement of existing energy facilities where the net increase in physical capacity or dimensions resulting from such reconstruction or enlargement meets or exceeds those capacities or dimensions set forth in RCW [80.50.020](#) (7) and (14). No construction of such energy facilities may be undertaken, except as otherwise provided in this chapter, after July 15, 1977, without first obtaining certification in the manner provided in this chapter.

(2) The provisions of this chapter apply to the construction, reconstruction, or enlargement of a new or existing energy facility that exclusively uses alternative energy resources and chooses to receive certification under this chapter, regardless of the generating capacity of the project.

(3) The provisions of this chapter apply to the construction of new electrical transmission facilities or the modification of

dollars, or such other amount as may be specified by council rule, to cover costs provided for by subsection (1)(c) of this section. Reasonable and necessary costs of the council directly attributable to inspection and determination of compliance by the certificate holder with the terms of the certification relative to monitoring the effects of construction and operation of the facility shall be charged against such deposit.

The council shall submit to each certificate holder a statement of such expenditures actually made during the preceding calendar quarter which shall be in sufficient detail to explain such expenditures. The certificate holder shall pay the state treasurer the amount of such statement to restore the total amount on deposit to the originally established level: PROVIDED, That if the actual, reasonable, and necessary expenditures for inspection and determination of compliance in the preceding calendar quarter have exceeded the amount of funds on deposit, such excess costs shall be paid by the certificate holder.

(2) If an applicant or certificate holder fails to provide the initial deposit, or if subsequently required payments are not received within thirty days following receipt of the statement from the council, the council may (a) in the case of the applicant, suspend processing of the application until payment is received; or (b) in the case of a certificate holder, suspend the certification.

(3) All payments required of the applicant or certificate holder under this section are to be made to the state treasurer who shall make payments as instructed by the council from the funds submitted. All such funds shall be subject to state auditing procedures. Any unexpended portions thereof shall be returned to the applicant or certificate holder.

[2006 c 196 § 5; 1977 ex.s. c 371 § 16.]

**Notes:**

**Findings -- 2006 c 196:** See note following RCW [80.50.020](#).

**80.50.075**

**Expedited processing of applications.**

(1) Any person filing an application for certification of an energy facility or an alternative energy resource facility pursuant to this chapter may apply to the council for an expedited processing of such an application. The application for expedited processing shall be submitted to the council in such form and manner and accompanied by such information as may be prescribed by council rule. The council may grant an applicant expedited processing of an application for certification upon finding that the environmental impact of the proposed energy facility is not significant or will be mitigated to a nonsignificant level under RCW 43.21C.031 and the project is found under RCW [80.50.090\(2\)](#) to be consistent and in compliance with city, county, or regional land use plans or zoning ordinances.

(2) Upon granting an applicant expedited processing of an application for certification, the council shall not be required to:

(a) Commission an independent study to further measure the consequences of the proposed energy facility or alternative energy resource facility on the environment, notwithstanding the other provisions of RCW [80.50.071](#); nor

(b) Hold an adjudicative proceeding under chapter 34.05 RCW, the administrative procedure act, on the application.

(3) The council shall adopt rules governing the expedited processing of an application for certification pursuant to this section.

[2006 c 205 § 2; 1989 c 175 § 172; 1977 ex.s. c 371 § 17.]

**Notes:**

**Effective date -- 1989 c 175:** See note following RCW 34.05.010.

**80.50.080**

**Counsel for the environment.**

After the council has received a site application, the attorney general shall appoint an assistant attorney general as a counsel for the environment. The counsel for the environment shall represent the public and its interest in protecting the quality of the environment. Costs incurred by the counsel for the environment in the performance of these duties shall be charged to the office of the attorney general, and shall not be a charge against the appropriation to the energy facility site

**80.50.100****Recommendations to governor — Approval or rejection of certification — Reconsideration.**

(1) The council shall report to the governor its recommendations as to the approval or rejection of an application for certification within twelve months of receipt by the council of such an application, or such later time as is mutually agreed by the council and the applicant. If the council recommends approval of an application for certification, it shall also submit a draft certification agreement with the report. The council shall include conditions in the draft certification agreement to implement the provisions of this chapter, including, but not limited to, conditions to protect state or local governmental or community interests affected by the construction or operation of the energy facility, and conditions designed to recognize the purpose of laws or ordinances, or rules or regulations promulgated thereunder, that are preempted or superseded pursuant to RCW 80.50.110 as now or hereafter amended.

(2) Within sixty days of receipt of the council's report the governor shall take one of the following actions:

- (a) Approve the application and execute the draft certification agreement; or
- (b) Reject the application; or
- (c) Direct the council to reconsider certain aspects of the draft certification agreement.

The council shall reconsider such aspects of the draft certification agreement by reviewing the existing record of the application or, as necessary, by reopening the adjudicative proceeding for the purposes of receiving additional evidence. Such reconsideration shall be conducted expeditiously. The council shall resubmit the draft certification to the governor incorporating any amendments deemed necessary upon reconsideration. Within sixty days of receipt of such draft certification agreement, the governor shall 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.

(3) 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.

[1989 c 175 § 174; 1977 ex.s. c 371 § 8; 1975-'76 2nd ex.s. c 108 § 36; 1970 ex.s. c 45 § 10.]

**Notes:**

**Effective date -- 1989 c 175:** See note following RCW 34.05.010.

**Severability -- Effective date -- 1975-'76 2nd ex.s. c 108:** See notes following RCW 43.21F.010.

**80.50.105****Transmission facilities for petroleum products — Recommendations to governor.**

In making its recommendations to the governor under this chapter regarding an application that includes transmission facilities for petroleum products, the council shall give appropriate weight to city or county facility siting standards adopted for the protection of sole source aquifers.

[1991 c 200 § 1112.]

**Notes:**

**Effective dates -- Severability -- 1991 c 200:** See RCW 90.56.901 and 90.56.904.

**80.50.110****Chapter governs and supersedes other law or regulations — Preemption of regulation and certification by state.**

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

(2) The state hereby preempts the regulation and certification of the location, construction, and operational conditions of

(d) The record is complete for review.

The Thurston county superior court shall assign a petition for review of a decision under RCW 80.50.100 for hearing at the earliest possible date and shall expedite such petition in every way possible. If the court finds that review cannot be limited to the administrative record as set forth in subparagraph (a) of this subsection because there are alleged irregularities in the procedure before the council not found in the record, but finds that the standards set forth in subparagraphs (b), (c), and (d) of this subsection are met, the court shall proceed to take testimony and determine such factual issues raised by the alleged irregularities and certify the petition and its determination of such factual issues to the supreme court. Upon certification, the supreme court shall assign the petition for hearing at the earliest possible date, and it shall expedite its review and decision in every way possible.

(2) Objections raised by any party in interest concerning procedural error by the council shall be filed with the council within sixty days of the commission of such error, or within thirty days of the first public hearing or meeting of the council at which the general subject matter to which the error is related is discussed, whichever comes later, or such objection shall be deemed waived for purposes of judicial review as provided in this section.

(3) The rules and regulations adopted by the council shall be subject to judicial review pursuant to the provisions of chapter 34.05 RCW.

[1988 c 202 § 62; 1981 c 64 § 3; 1977 ex.s. c 371 § 11; 1970 ex.s. c 45 § 14.]

**Notes:**

**Severability -- 1988 c 202:** See note following RCW 2.24.050.

**80.50.150**

**Enforcement of compliance — Penalties.**

(1) The courts are authorized to grant such restraining orders, and such temporary and permanent injunctive relief as is necessary to secure compliance with this chapter and/or with a site certification agreement issued pursuant to this chapter or a National Pollutant Discharge Elimination System (hereafter in this section, NPDES) permit issued by the council pursuant to chapter 90.48 RCW or any permit issued pursuant to RCW 80.50.040(14). The court may assess civil penalties in an amount not less than one thousand dollars per day nor more than twenty-five thousand dollars per day for each day of construction or operation in material violation of this chapter, or in material violation of any site certification agreement issued pursuant to this chapter, or in violation of any NPDES permit issued by the council pursuant to chapter 90.48 RCW, or in violation of any permit issued pursuant to RCW 80.50.040(14). The court may charge the expenses of an enforcement action relating to a site certification agreement under this section, including, but not limited to, expenses incurred for legal services and expert testimony, against any person found to be in material violation of the provisions of such certification: PROVIDED, That the expenses of a person found not to be in material violation of the provisions of such certification, including, but not limited to, expenses incurred for legal services and expert testimony, may be charged against the person or persons bringing an enforcement action or other action under this section.

(2) Wilful violation of any provision of this chapter shall be a gross misdemeanor.

(3) Wilful or criminally negligent, as defined in RCW 9A.08.010[(1)](d), violation of any provision of an NPDES permit issued by the council pursuant to chapter 90.48 RCW or any permit issued by the council pursuant to RCW 80.50.040(14) or any emission standards promulgated by the council in order to implement the Federal Clean Air Act and the state implementation plan with respect to energy facilities under the jurisdiction provisions of this chapter shall be deemed a crime, and upon conviction thereof shall be punished by a fine of up to twenty-five thousand dollars per day and costs of prosecution. Any violation of this subsection shall be a gross misdemeanor.

(4) Any person knowingly making any false statement, representation, or certification in any document in any NPDES form, notice, or report required by an NPDES permit or in any form, notice, or report required for or by any permit issued pursuant to \*RCW 80.50.090(14) shall be deemed guilty of a crime, and upon conviction thereof shall be punished by a fine of up to ten thousand dollars and costs of prosecution.

(5) Every person who violates the provisions of certificates and permits issued or administered by the council shall incur, in addition to any other penalty as provided by law, a penalty in an amount of up to five thousand dollars a day for every such violation. Each and every such violation shall be a separate and distinct offense, and in case of a continuing violation, every day's continuance shall be and be deemed to be a separate and distinct violation. Every act of commission or omission which procures, aids, or abets in the violation shall be considered a violation under the provisions of this section and subject to the penalty provided in this section. The penalty provided in this section shall be imposed by a notice in writing, either by certified mail with return receipt requested or by personal service, to the person incurring the same from the council describing such violation with reasonable particularity. The council may, upon written application therefor received within fifteen days after notice imposing any penalty is received by the person incurring the penalty, and when

governmental agency that might be requested to comment upon the potential site, and any municipal or public corporation having an interest in the matter. The full cost of the study shall be paid by the potential applicant: PROVIDED, That such costs exceeding a total of ten thousand dollars shall be payable subject to the potential applicant giving prior approval to such excess amount.

(4) Any study prepared by the council pursuant to subsection (3) of this section may be used in place of the "detailed statement" required by RCW 43.21C.030(2)(c) by any branch of government except the council created pursuant to chapter 80.50 RCW.

(5) All payments required of the potential applicant under this section are to be made to the state treasurer, who in turn shall pay the consultant as instructed by the council. All such funds shall be subject to state auditing procedures. Any unexpended portions thereof shall be returned to the potential applicant.

(6) Nothing in this section shall change the requirements for an application for site certification or the requirement of payment of a fee as provided in RCW 80.50.071, or change the time for disposition of an application for certification as provided in RCW 80.50.100.

(7) Nothing in this section shall be construed as preventing a city or county from requiring any information it deems appropriate to make a decision approving a particular location.

[1983 c 3 § 205; 1977 ex.s. c 371 § 13; 1975-'76 2nd ex.s. c 108 § 40; 1974 ex.s. c 110 § 2.]

**Notes:**

**Severability -- Effective date -- 1975-'76 2nd ex.s. c 108:** See notes following RCW 43.21F.010.

**80.50.180**

**Proposals and actions by other state agencies and local political subdivisions pertaining to energy facilities exempt from "detailed statement" required by RCW 43.21C.030.**

Except for actions of the council under chapter 80.50 RCW, all proposals for legislation and other actions of any branch of government of this state, including state agencies, municipal and public corporations, and counties, to the extent the legislation or other action involved approves, authorizes, permits, or establishes procedures solely for approving, authorizing or permitting, the location, financing or construction of any energy facility subject to certification under chapter 80.50 RCW, shall be exempt from the "detailed statement" required by RCW 43.21C.030. Nothing in this section shall be construed as exempting any action of the council from any provision of chapter 43.21C RCW.

[1977 ex.s. c 371 § 14.]

**80.50.190**

**Disposition of receipts from applicants.**

The state general fund shall be credited with all receipts from applicants paid to the state pursuant to chapter 80.50 RCW. Such funds shall be used only by the council for the purposes set forth in chapter 80.50 RCW. All expenditures shall be authorized by law.

[1977 ex.s. c 371 § 15.]

**80.50.300**

**Unfinished nuclear power projects — Transfer of all or a portion of a site to a political subdivision or subdivisions of the state — Water rights.**

(1) This section applies only to unfinished nuclear power projects. If a certificate holder stops construction of a nuclear energy facility before completion, terminates the project or otherwise resolves not to complete construction, never introduces or stores fuel for the energy facility on the site, and never operates the energy facility as designed to produce energy, the certificate holder may contract, establish interlocal agreements, or use other formal means to effect the transfer of site restoration responsibilities, which may include economic development activities, to any political subdivision or subdivisions of the state composed of elected officials. The contracts, interlocal agreements, or other formal means of cooperation may include, but are not limited to provisions effecting the transfer or conveyance of interests in the site and

[1970 ex.s. c 45 § 17.]

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**80.50.901**

**Severability — 1974 ex.s. c 110.**

If any provision of this 1974 act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances, is not affected.

[1974 ex.s. c 110 § 3.]

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**80.50.902**

**Severability — 1977 ex.s. c 371.**

If any provision of this 1977 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected.

[1977 ex.s. c 371 § 20.]

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**80.50.903**

**Severability — 1996 c 4.**

If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

[1996 c 4 § 5.]

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**80.50.904**

**Effective date — 1996 c 4.**

This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately [March 6, 1996].

[1996 c 4 § 6.]

**Appendix B**

**RCW 36.70C**

## Chapter 36.70C RCW Judicial review of land use decisions

### Chapter Listing

#### **RCW Sections**

36.70C.005 Short title.

36.70C.010 Purpose.

36.70C.020 Definitions.

36.70C.030 Chapter exclusive means of judicial review of land use decisions -- Exceptions.

36.70C.040 Commencement of review -- Land use petition -- Procedure.

36.70C.050 Joinder of parties.

36.70C.060 Standing.

36.70C.070 Land use petition -- Required elements.

36.70C.080 Initial hearing.

36.70C.090 Expedited review.

36.70C.100 Stay of action pending review.

36.70C.110 Record for judicial review -- Costs.

36.70C.120 Scope of review -- Discovery.

36.70C.130 Standards for granting relief.

36.70C.140 Decision of the court.

36.70C.900 Finding -- Severability -- Part headings and table of contents not law -- 1995 c 347.

#### **36.70C.005**

##### **Short title.**

This chapter may be known and cited as the land use petition act.

[1995 c 347 § 701.]

#### **36.70C.010**

##### **Purpose.**

The purpose of this chapter is to reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review.

[1995 c 347 § 702.]

#### **36.70C.020**

##### **Definitions.**

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Land use decision" means a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on:

(a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property; excluding applications for legislative approvals such

(ii) Each person identified by name and address in the local jurisdiction's written decision as an owner of the property at issue;

(c) If no person is identified in a written decision as provided in (b) of this subsection, each person identified by name and address as a taxpayer for the property at issue in the records of the county assessor, based upon the description of the property in the application; and

(d) Each person named in the written decision who filed an appeal to a local jurisdiction quasi-judicial decision maker regarding the land use decision at issue, unless the person has abandoned the appeal or the person's claims were dismissed before the quasi-judicial decision was rendered. Persons who later intervened or joined in the appeal are not required to be made parties under this subsection.

(3) The petition is timely if it is filed and served on all parties listed in subsection (2) of this section within twenty-one days of the issuance of the land use decision.

(4) For the purposes of this section, the date on which a land use decision is issued is:

(a) Three days after a written decision is mailed by the local jurisdiction or, if not mailed, the date on which the local jurisdiction provides notice that a written decision is publicly available;

(b) If the land use decision is made by ordinance or resolution by a legislative body sitting in a quasi-judicial capacity, the date the body passes the ordinance or resolution; or

(c) If neither (a) nor (b) of this subsection applies, the date the decision is entered into the public record.

(5) Service on the local jurisdiction must be by delivery of a copy of the petition to the persons identified by or pursuant to RCW 4.28.080 to receive service of process. Service on other parties must be in accordance with the superior court civil rules or by first class mail to:

(a) The address stated in the written decision of the local jurisdiction for each person made a party under subsection (2)(b) of this section;

(b) The address stated in the records of the county assessor for each person made a party under subsection (2)(c) of this section; and

(c) The address stated in the appeal to the quasi-judicial decision maker for each person made a party under subsection (2)(d) of this section.

(6) Service by mail is effective on the date of mailing and proof of service shall be by affidavit or declaration under penalty of perjury.

[1995 c 347 § 705.]

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### 36.70C.050

#### Joinder of parties.

If the applicant for the land use approval is not the owner of the real property at issue, and if the owner is not accurately identified in the records referred to in RCW 36.70C.040(2) (b) and (c), the applicant shall be responsible for promptly securing the joinder of the owners. In addition, within fourteen days after service each party initially named by the petitioner shall disclose to the other parties the name and address of any person whom such party knows may be needed for just adjudication of the petition, and the petitioner shall promptly name and serve any such person whom the petitioner agrees may be needed for just adjudication. If such a person is named and served before the initial hearing, leave of court for the joinder is not required, and the petitioner shall provide the newly joined party with copies of the pleadings filed before the party's joinder. Failure by the petitioner to name or serve, within the time required by RCW 36.70C.040(3), persons who are needed for just adjudication but who are not identified in the records referred to in RCW 36.70C.040(2)(b), or in RCW 36.70C.040(2)(c) if applicable, shall not deprive the court of jurisdiction to hear the land use petition.

[1995 c 347 § 706.]

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### 36.70C.060

(3) The defenses of lack of standing, untimely filing or service of the petition, and failure to join persons needed for just adjudication are waived if not raised by timely motion noted to be heard at the initial hearing, unless the court allows discovery on such issues.

(4) The petitioner shall move the court for an order at the initial hearing that sets the date on which the record must be submitted, sets a briefing schedule, sets a discovery schedule if discovery is to be allowed, and sets a date for the hearing or trial on the merits.

(5) The parties may waive the initial hearing by scheduling with the court a date for the hearing or trial on the merits and filing a stipulated order that resolves the jurisdictional and procedural issues raised by the petition, including the issues identified in subsections (3) and (4) of this section.

(6) A party need not file an answer to the petition.

[1995 c 347 § 709.]

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### **36.70C.090**

#### **Expedited review.**

The court shall provide expedited review of petitions filed under this chapter. The matter must be set for hearing within sixty days of the date set for submitting the local jurisdiction's record, absent a showing of good cause for a different date or a stipulation of the parties.

[1995 c 347 § 710.]

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### **36.70C.100**

#### **Stay of action pending review.**

(1) A petitioner or other party may request the court to stay or suspend an action by the local jurisdiction or another party to implement the decision under review. The request must set forth a statement of grounds for the stay and the factual basis for the request.

(2) A court may grant a stay only if the court finds that:

(a) The party requesting the stay is likely to prevail on the merits;

(b) Without the stay the party requesting it will suffer irreparable harm;

(c) The grant of a stay will not substantially harm other parties to the proceedings; and

(d) The request for the stay is timely in light of the circumstances of the case.

(3) The court may grant the request for a stay upon such terms and conditions, including the filing of security, as are necessary to prevent harm to other parties by the stay.

[1995 c 347 § 711.]

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### **36.70C.110**

#### **Record for judicial review — Costs.**

(1) Within forty-five days after entry of an order to submit the record, or within such a further time as the court allows or as the parties agree, the local jurisdiction shall submit to the court a certified copy of the record for judicial review of the land use decision, except that the petitioner shall prepare at the petitioner's expense and submit a verbatim transcript of any hearings held on the matter.

(2) If the parties agree, or upon order of the court, the record shall be shortened or summarized to avoid reproduction and transcription of portions of the record that are duplicative or not relevant to the issues to be reviewed by the court.

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(d) The land use decision is a clearly erroneous application of the law to the facts;

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

(f) The land use decision violates the constitutional rights of the party seeking relief.

(2) In order to grant relief under this chapter, it is not necessary for the court to find that the local jurisdiction engaged in arbitrary and capricious conduct. A grant of relief by itself may not be deemed to establish liability for monetary damages or compensation.

[1995 c 347 § 714.]

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#### **36.70C.140**

##### **Decision of the court.**

The court may affirm or reverse the land use decision under review or remand it for modification or further proceedings. If the decision is remanded for modification or further proceedings, the court may make such an order as it finds necessary to preserve the interests of the parties and the public, pending further proceedings or action by the local jurisdiction.

[1995 c 347 § 715.]

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#### **36.70C.900**

##### **Finding — Severability — Part headings and table of contents not law — 1995 c 347.**

See notes following RCW 36.70A.470.

**Appendix C**

**WAC 463-26**

## Chapter 463-26 WAC Public informational meeting and land use hearing

Last Update: 10/11/04

### WAC Sections

- 463-26-010 Purpose.
- 463-26-020 Notification of local authorities.
- 463-26-025 Public informational meeting.
- 463-26-035 Introduction of counsel for the environment.
- 463-26-050 Purpose for land use hearing.
- 463-26-060 Public announcement -- Testimony.
- 463-26-090 Procedure where certificates affirming compliance with land use plans and zoning ordinances are presented.
- 463-26-100 Procedure where no certificates relating to land use plans and zoning ordinances are presented.
- 463-26-110 Determination regarding land use plans and zoning ordinances.

#### DISPOSITIONS OF SECTIONS FORMERLY CODIFIED IN THIS CHAPTER

- 463-26-030 News releases. [Order 109, § 463-26-030, filed 11/16/76.] Repealed by 92-09-013, filed 4/2/92, effective 5/3/92. Statutory Authority: RCW 80.50.040(1).
- 463-26-040 Adversary nature of hearings. [Order 109, § 463-26-040, filed 11/16/76.] Repealed by 04-21-013, filed 10/11/04, effective 11/11/04. Statutory Authority: RCW 80.50.040 (1) and (12).
- 463-26-070 Introduction of counsel for the environment. [Order 109, § 463-26-070, filed 11/16/76.] Repealed by 04-21-013, filed 10/11/04, effective 11/11/04. Statutory Authority: RCW 80.50.040 (1) and (12).
- 463-26-080 Explanation of entire certification process. [Statutory Authority: RCW 80.50.040(1). 87-01-065 (Order 86-1), § 463-26-080, filed 12/17/86; Order 109, § 463-26-080, filed 11/16/76.] Repealed by 04-21-013, filed 10/11/04, effective 11/11/04. Statutory Authority: RCW 80.50.040 (1) and (12).
- 463-26-120 Initial determination subject to review. [Statutory Authority: RCW 80.50.040. 91-03-090, § 463-26-120, filed 1/18/91, effective 2/18/91; Order 109, § 463-26-120, filed 11/16/76.] Repealed by 04-21-013, filed 10/11/04, effective 11/11/04. Statutory Authority: RCW 80.50.040 (1) and (12).
- 463-26-130 Public information meeting. [Statutory Authority: RCW 80.50.040. 91-03-090, § 463-26-130, filed 1/18/91, effective 2/18/91; Order 109, § 463-26-130, filed 11/16/76.] Repealed by 04-21-013, filed 10/11/04, effective 11/11/04. Statutory Authority: RCW 80.50.040 (1) and (12).

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### 463-26-010

#### Purpose.

This chapter sets forth the procedures to be followed in the conduct of the public informational meeting pursuant to RCW 80.50.090(1) and as described in WAC 463-26-025, and the public land use hearing held pursuant to RCW 80.50.090(2).

[Statutory Authority: RCW 80.50.040 (1) and (12). 04-21-013, § 463-26-010, filed 10/11/04, effective 11/11/04; Order 109, § 463-26-010, filed 11/16/76.]

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### 463-26-020

#### Notification of local authorities.

Before conducting either the public informational meeting under RCW 80.50.090(1) or the public land use hearing under RCW 80.50.090(2), the council will notify the legislative authority in each county, city and port district within whose boundaries the site of the proposed energy facility is located.

[Statutory Authority: RCW 80.50.040 (1) and (12). 04-21-013, § 463-26-020, filed 10/11/04, effective 11/11/04. Statutory Authority: RCW 80.50.040(1). 78-09-081 (Order 78-8), § 463-26-020, filed 8/28/78; Order 109, § 463-26-020, filed 11/16/76.]

11/16/76.]

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**463-26-090**

**Procedure where certificates affirming compliance with land use plans and zoning ordinances are presented.**

This rule contemplates that applicants will enter as exhibits, at the land use hearing, certificates from local authorities attesting to the fact that the proposal is consistent and in compliance with land use plans and zoning ordinances. In cases where this is done, such certificates will be regarded as *prima facie* proof of consistency and compliance with such land use plans and zoning ordinances absent contrary demonstration by anyone present at the hearing.

[Statutory Authority: RCW 80.50.040 (1) and (12). 04-21-013, § 463-26-090, filed 10/11/04, effective 11/11/04; Order 109, § 463-26-090, filed 11/16/76.]

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**463-26-100**

**Procedure where no certificates relating to land use plans and zoning ordinances are presented.**

In cases where no certificates relating to land use plans and zoning ordinances are presented to the council, then the applicant and local authorities shall address compliance or noncompliance with land use plans or zoning ordinances.

[Statutory Authority: RCW 80.50.040 (1) and (12). 04-21-013, § 463-26-100, filed 10/11/04, effective 11/11/04; Order 109, § 463-26-100, filed 11/16/76.]

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**463-26-110**

**Determination regarding land use plans and zoning ordinances.**

The council shall make a determination as to whether the proposed site is consistent and in compliance with land use plans and zoning ordinances pursuant to RCW 80.50.090(2).

[Statutory Authority: RCW 80.50.040 (1) and (12). 04-21-013, § 463-26-110, filed 10/11/04, effective 11/11/04; Order 109, § 463-26-110, filed 11/16/76.]

**Appendix D**

**WAC 463-28**

# Chapter 463-28 WAC State preemption

Last Update: 10/11/04

## WAC Sections

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

### DISPOSITIONS OF SECTIONS FORMERLY CODIFIED IN THIS CHAPTER

463-28-090 Governing rules. [Statutory Authority: RCW 80.50.040(1). 78-07-036 (Order 78-3), § 463-28-090, filed 6/23/78.] Repealed by 04-21-013, filed 10/11/04, effective 11/11/04. Statutory Authority: RCW 80.50.040 (1) and (12).

#### **463-28-010** **Purpose.**

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

[Statutory Authority: RCW 80.50.040 (1) and (12). 04-21-013, § 463-28-010, filed 10/11/04, effective 11/11/04. Statutory Authority: RCW 80.50.040(1). 78-07-036 (Order 78-3), § 463-28-010, filed 6/23/78.]

#### **463-28-020** **Authority of council — Preemption by state.**

The authority of the council is contained in RCW 80.50.040(1) and 80.50.110(2) which provides that the state preempts the regulation and certification of the location, construction, and operational conditions of certification of energy facilities.

[Statutory Authority: RCW 80.50.040(1). 78-07-036 (Order 78-3), § 463-28-020, filed 6/23/78.]

#### **463-28-030** **Determination of noncompliance — Procedures.**

If the council determines during the hearing required by RCW 80.50.090 that the site of a proposed energy facility or any portion of a site is not consistent and in compliance with land use plans or zoning ordinances in effect at the date of the application, the following procedures shall be observed:

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

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

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

**463-28-070**

**Certification — Conditions — State/local interests.**

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

[Statutory Authority: RCW 80.50.040(1), 78-07-036 (Order 78-3), § 463-28-070, filed 6/23/78.]

**463-28-080**

**Preemption — Failure to justify.**

During the adjudicative proceeding, if the council determines that the applicant has failed to justify the request for state preemption, the council shall do so by issuance of an order accompanied by findings of fact and conclusions of law. Concurrent with the issuance of its order, the council shall report to the governor its recommendation for rejection of certification of the energy facility proposed by the applicant.

[Statutory Authority: RCW 80.50.040, 91-03-090, § 463-28-080, filed 1/18/91, effective 2/18/91. Statutory Authority: RCW 80.50.040(1), 78-07-036 (Order 78-3), § 463-28-080, filed 6/23/78.]

**Appendix E**

**Cowlitz County Code, Chapter 19.15**

mittee by first class mail prior to the public hearing. Legal notice of the hearing shall be published in a newspaper of general circulation and the subject property shall be posted with said notice not less than 10 calendar days prior to the public notice.

3. Within 10 calendar days after the public hearing, the Board shall issue its written decision. Such written decision shall be available to the appellant and the public upon request. [Ord. 95-033, § 9, 3-13-95; Ord. 84-221, § 12, 10-1-84.]

#### **19.11.130 Fees.**

A. Fees for administrative actions, appeals authorized, and public notice required under this chapter shall be from time to time established by resolution by the Board of County Commissioners.

B. The responsible official may charge any person for copies of any document prepared under this chapter, and for mailing the document, in a manner provided by Chapter 42.17 RCW. [Ord. 95-033, § 8, 3-13-95; Ord. 84-221, § 13, 10-1-84.]

#### **19.11.140 Severability.**

If any provision of this chapter or its application to any person or circumstance is held invalid, the remainder of the chapter or the application of the provision to other persons or circumstances shall not be affected. [Ord. 84-221, § 14, 10-1-84.]

## **Chapter 19.15**

### **CRITICAL AREAS**

#### Sections:

- 19.15.010 Title.
- 19.15.020 Preamble.
- 19.15.030 Purpose and intent.
- 19.15.040 Authority and administration.
- 19.15.050 Definitions.
- 19.15.060 Applicability/regulated activities.
- 19.15.070 Exemptions.
- 19.15.080 Optional incentives for nondevelopment of critical areas.
- 19.15.090 Critical areas permits – Applications and approvals.
- 19.15.100 Relationship to other regulations.
- 19.15.110 Critical area inventory maps.
- 19.15.120 Critical area wetlands.
- 19.15.130 Fish and wildlife habitat conservation.
- 19.15.140 Frequently flooded critical areas.
- 19.15.150 Geologic hazard areas.
- 19.15.160 Critical aquifer recharge areas.
- 19.15.170 Mitigation plan performance standards – Mitigation planning requirements.
- 19.15.180 Variance/reasonable use allowance.
- 19.15.190 Appeals.
- 19.15.200 Penalties/violations.
- 19.15.210 Fees.
- 19.15.220 Liability for damages.
- 19.15.230 Severability.
- 19.15.240 Effective date.
- Appendix A Geotechnical Assessments.
- Appendix B Erosion Hazard Assessments.
- Appendix C Geotechnical Report.
- Appendix D Wetland Assessment.
- Appendix E Habitat Management Plan Requirements.
- Appendix F Hydrogeologic Testing and Site Evaluation.

#### **19.15.010 Title.**

This chapter shall be known and may be cited as the “Cowlitz County Critical Areas Protection Ordinance.” [Ord. 96-104, § 1, 6-24-96.]

#### **19.15.020 Preamble.**

Cowlitz County is responding to the state mandates contained in the Growth Management Act, RCW 36.70A.060, by developing and adopting the ordinance codified in this chapter which classifies, designates and protects critical areas. Cowlitz County believes it important to strike a balance

actions as appropriate. [Ord. 98-023, § 1, 2-9-98; Ord. 96-104, § 4, 6-24-96.]

### 19.15.050 Definitions.

For the purposes of this chapter, the following definitions shall apply unless the context clearly requires otherwise.

"Agricultural activities (existing and ongoing)" means those activities conducted on lands defined in RCW 84.34.020(2), Open Space, Agricultural, and Timber Lands – Current Use Assessment – Conservation Futures, and those activities involved in the production of crops and livestock, including but not limited to operation and maintenance of existing farm and stock ponds or drainage systems, irrigation systems, changes between agricultural activities, and maintenance or repair of existing serviceable structures and facilities. Activities which significantly impact a previously undisturbed critical area are not part of an ongoing activity. An activity ceases to be ongoing when the area on which it was conducted has been converted to a nonagricultural use, or has been unattended for five years. Forest practices are not included in this definition.

"Alluvial fan" means a low, outspread, relatively flat to gently sloping mass of loose alluvium, shaped like an open fan, deposited by a stream where it issues from a narrow valley, or where a tributary stream issues into the main stream, or wherever a constriction in a valley abruptly ceases or the gradient of the stream suddenly decreases; it is steepest near the mouth of the valley where its apex points upstream, and it slopes gently and convexly outward with gradually decreasing gradient.

"Alteration" means a human-induced action which materially affects a regulated critical area or associated buffer, such as a physical change to the existing condition of land or improvements including but not limited to: construction, clearing, filling and grading.

"Applicant" means the person, party, firm, corporation, Indian tribe or federal, state or local government, or any other entity that proposes any activity that could affect a critical area.

"Aquifer recharge area" means areas where water infiltrates the soil, and percolates through it and surface rocks, to the groundwater.

"Best management practices" means systems of practices and management measures that: (1) control soil loss and reduce water quality degradation caused by nutrients, animal waste, and toxins; (2) control the movement of sediment and erosion caused by land alteration activities; (3) minimize adverse impacts to surface and ground water qual-

ity, flow and circulation patterns; and (4) minimize adverse impacts to the chemical, physical and biological characteristics of a critical area.

"Board" means the Cowlitz County Board of Commissioners.

"Buffer" or "buffer area" means an area established to protect the integrity or functions and values of a critical area from potential adverse impacts.

"Clearing" means the removal of trees, brush, grass, groundcover, or other vegetative matter from a site.

"Conservation easement" mean an interest or right of use over a property, less than fee simple, to protect, preserve, maintain, improve, restore, limit the future use of, or conserve for open space purposes, any land or improvement on the land.

"Critical area" includes the following areas and ecosystems: (a) wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas (RCW 36.70A.030).

"Critical areas permit" means a written authorization issued by the Department via letter or other instrument, including issuance of a building permit, declaring that identified development or regulated activity complies with the provisions of this chapter and/or specifying the conditions with which such development or regulated activity must comply.

"Department" means the Department of Building and Planning.

"Development" means a construction project involving property improvement or a change of physical character within the site; the act of using land for building or extractive purposes. "Development" shall include, but shall not be limited to, the activities identified in CCC 19.15.060.

"Director" means the Director of the Department of Building and Planning.

"Enhancement" means actions performed to improve the condition or functions and values of an existing viable wetland or buffer, or fish and wildlife habitat area or buffer. Enhancement actions include but are not limited to increasing plant diversity, increasing fish and wildlife habitat, installing environmentally compatible erosion controls, removing invasive plant species such as milfoil and loosestrife.

Erosion Hazard Area. See "geologic hazard areas."

"Excavation" means the mechanical removal of earth material.

“Noxious weeds” means any plant which, when established, is highly destructive, competitive or difficult to control. The county maintains a noxious weed list.

“Open space” means land satisfying the definition for “open space land” in Cowlitz County Ordinance No. 95-078, Section 3, and eligible for tax assessment at its current use value as authorized by Chapter 84.34 RCW.

“Pond” means a naturally existing or artificially created body of standing water under 20 acres, which exists on a year-round basis and occurs in a depression of land or expanded part of a stream.

“Priority species” means fish and wildlife species requiring protective measures and/or management guidelines to ensure their perpetuation, as determined by the Washington Department of Fish and Wildlife’s priority habitats and species list, as now exists or is hereafter amended.

“Qualified expert” for the purposes of these regulations, means a person who has received a degree from an accredited college or university in a field necessary to identify and evaluate a particular critical area, and/or a person who is professionally trained and/or certified in such field(s). Areas of technical expertise shall generally be as follows: wetlands biology or ecology (for wetlands); stream and/or fisheries biology or ecology (for streams); wildlife biology or ecology (for critical habitat); or a practicing geologist, hydrogeologist or engineering geologist (for geologic hazard areas). When a landscape or planting plan is required by these regulations, a qualified expert is one who has demonstrated expertise in the use of indigenous plant species, slope stabilization, and arboricultural practices.

“Regulated activity” means activities occurring in a critical area or associated buffer that are subject to the provisions of this chapter. Regulated activities generally include but are not limited to any filling, dredging, dumping or stockpiling, draining, excavation, flooding, construction or reconstruction, driving pilings, obstructing, shading, clearing or harvesting.

“Restoration” means efforts performed to re-establish functional values and characteristics of a critical area that have been destroyed or degraded by past alterations (e.g., filling or grading).

“Site” means any parcel or combination of contiguous parcels, or right-of-way, or combination of contiguous rights-of-way under the applicant’s ownership or control where the proposed project occurs.

“Slope” means an inclined earth surface, the inclination of which is expressed as the ratio of horizontal distance to vertical distance. In these regulations, slopes are generally expressed as a percentage; percentage of slope refers to a given rise in elevation over a given run in distance. A 40 percent slope, for example, refers to a 40-foot rise in elevation over a distance of 100 feet. A 100 percent slope equals a 45-degree angle.

“Snag” means any dead, partially dead, or defective (cull) tree at least 10 feet tall and 12 inches in diameter at breast height.

“Snag-rich areas” means areas with 10 or more snags per acre.

“Soil with severe erosion hazard” means any soil type indicated as having a degree of hazard or limitation of severe or very severe according to Table 3 of the Soil Survey of Cowlitz Area, Washington, issued February, 1974, by the U.S. Department of Agriculture, Soil Conservation Service.

“Talus slope” means a slope formed by the accumulation of rock debris at the bottom of steep slopes or cliffs.

“Undisturbed buffer” means a protective area left in its natural state, except for any access and/or utility crossings approved by the Director, between land development and a critical area.

“Utility line” means pipe, conduit, cable or other similar facility by which services are conveyed to the public or individual recipients. Such services shall include, but are not limited to water supply, electric power, natural gas, communications and sanitary sewer.

“Wetland” means areas that are inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas. Wetlands do not include those artificial wetlands intentionally created from nonwetland sites, including, but not limited to, irrigation and drainage ditches, grass-lined swales, canals, detention facilities, wastewater treatment facilities, farm ponds and landscape amenities, or those wetlands created after July 1, 1990, that were unintentionally created as a result of the construction of a road, street or highway. Wetlands include artificial wetlands intentionally created from nonwetland areas created to mitigate conversion of wetlands. The three general types of wetlands are emergent, forested and scrub-shrub. The Washington State Wetlands

and canals, detention facilities, farm ponds, and landscape or ornamental amenities. Wetlands, streams, lakes or ponds created as mitigation for approved land use activities or that provide critical habitat are not exempt and shall be regulated according to the mitigation plan;

M. Activities occurring in nonregulated wetlands. Shoreline, state, and federal regulations may apply to wetlands not regulated under this chapter;

N. Emergency actions which must be undertaken immediately or for which there is insufficient time for full compliance with this chapter when it is necessary to:

1. Prevent an imminent threat to public health or safety, or

2. Prevent imminent danger to public or private property, or

3. Prevent an imminent threat of serious environmental degradation,

4. In the event a person or emergency agency determines that the need to take emergency action is so urgent that there is insufficient time for review by the Department, such emergency action may be taken immediately,

5. The person or agency undertaking such action shall notify the Department within one working day following the commencement of the emergency activity. Following such notification the Department shall determine if the action taken was within the scope of the emergency actions allowed in this subsection. If the Department determines that the action taken or part of the action taken is beyond the scope of allowed emergency actions, enforcement action is authorized, as outlined in CCC 19.15.200. [Ord. 96-104, § 7, 6-24-96.]

**19.15.080 Optional incentives for nondevelopment of critical areas.**

A. Introduction. This section describes the alternatives available to property owners and incentives they may pursue in lieu of developing or altering their property under the terms and standards of this chapter. The incentives and options listed allow property owners to utilize the options that best suit their needs.

B. Open Space. Any person who owns an identified critical area as defined by this chapter may apply for current use assessment pursuant to Chapter 18.52 CCC, the Cowlitz County Open Space Ordinance, and Chapter 84.34 RCW, Open Space, Agriculture, and Timber Lands – Current Use Assessment – Conservation Futures. The Open Space Tax Act allows Cowlitz County to designate lands which should be taxed at their current use

value. The county has programs for agricultural lands, small forest lands less than 20 acres in size, and other open spaces. Cowlitz County has adopted a Public Benefit Rating System which classifies properties on the basis of their relative importance of natural and cultural resources, the availability of public access, and the presence of a conservation easement. These features are given a point value, and the total point value determines the property tax reduction. The open space program has property tax reductions of 50, 70 or 90 percent. Lands with wetlands, an important habitat or species would commonly qualify for this voluntary program. Applications are approved by the Board at a public meeting.

C. Conservation Easement. Any person who owns an identified critical area as defined by this chapter shall be entitled to place a conservation easement over that portion of the property designated a critical area by naming the county or its qualified designee under RCW 64.04.130, Interests in land for purposes of conservation, protection, preservation, etc. – Ownership by certain entities – Conveyances, as beneficiary of the conservation easement. The purpose of the conservation easement shall be to protect, preserve, maintain, restore, limit the future use of, or conserve for open space purposes the land designated as critical area(s), in accordance with RCW 64.04.130. Details governing easement restrictions shall be negotiated between the property owners and the county.

D. Bonus Density Points (Planned Unit Development – PUDs). The county shall allow transfer of density for residential uses from lands containing critical areas, as defined by this chapter, when developed pursuant to the County Planned Unit Development Ordinance (Chapter 18.30 CCC). Residential density may only be transferred from a critical area to an area on the same site which is not a critical area.

E. Density Credits. For development proposals (other than PUDs) on lands determined to contain critical areas as defined by this chapter, Cowlitz County shall determine allowable dwelling units for residential development proposals based on the formula below.

Percentage of site in critical area	Density credit
1 – 10%	100%
11 – 20%	90%
21 – 30%	80%
31 – 40%	70%
41 – 50%	60%

not subject to the critical area regulations in this chapter.

4. Board Action. The Board shall hold a public hearing to review all property owner requests, pursuant to this section. Notice of public hearing shall be made at least 30 days prior to the scheduled hearing date. Notice shall consist of the publication of a legal notice in the county's newspaper of record stating the description of the property, and the purpose, date, time and location of the hearing. Such notice shall also be mailed first class to the property owner and all persons owning property, as identified in the Auditor's records, within 300 feet of the subject property boundaries 30 days prior to the hearing. And, two or more notices shall be posted in the vicinity of the subject property 30 days prior to the hearing.

Following the public hearing, the Board shall issue its written decision, with findings, within 30 days.

H. Process for Conservation Easement or Density Incentives.

1. Time for Claim. Record owners of real property seeking relief under this section shall file with the Board a claim application for a conservation easement, density incentives, or density credits. The application may be filed at any time; provided, that all applications be filed in accordance with the requirements of this section.

2. Contents of Claim. The applicant is responsible for submitting a complete and accurate application. Such application shall include, at a minimum:

a. Completed master application and/or any required supplement sheets signed by the record owner of the property;

b. A map drawn to scale, showing the following information:

i. Name, address and telephone number of the property owner(s),

ii. Name, address and telephone number of the preparer of the application,

iii. Date of submittal,

iv. Property boundary lines,

v. A legal description of the property,

vi. A description of the nature, size and location of the critical area located on the property, as determined by a qualified specialist,

vii. All existing and/or public and private roads, sewer and water lines, wells, county utilities, easements, water courses, lakes, springs, drainage facilities, on-site sewage disposal drain-field areas, on and within 100 feet of the property boundaries,

viii. The boundaries of all lands reserved in the deeds for the common uses of the property owners,

ix. All other information identified by the Director during the pre-application conference.

3. Director's Action. When the application is complete, the Director shall determine whether all or part of the property is in fact subject to any critical area regulations in this chapter. The Director shall forward his/her findings to the Board.

4. Board Decision. Within 30 days of receipt of the Director's findings, the Board shall make the final determination on whether all or part of the property is subject to this chapter. For conservation easement applications, if the Board determines that all or part of the property is subject to this chapter, the Board shall accept, as beneficiary on behalf of the county or its qualified designee under RCW 64.04.130, a conservation easement over that portion of the property subject to this chapter to the extent requested by the record owner of the property. For density incentive applications, the Board shall approve requested density transfers subject to its final approval of a planned unit development. [Ord. 98-023, §§ 4, 5, 2-9-98; Ord. 96-104, § 8, 6-24-96.]

#### **19.15.090 Critical areas permits – Applications and approvals.**

All persons proposing to develop in critical areas or associated buffers shall first obtain a critical areas permit pursuant to this chapter, except as exempted in CCC 19.15.070. All critical areas permit applications shall proceed in conformance with this section.

A. Critical Areas Permit – Coordination with Other Permits. To avoid duplication, the information required by this section shall be coordinated by the county with the assessments and requirements for other associated permits.

B. Request for Determination of Critical Areas. Staff will conduct an environmental review, based on existing in-house data, to determine if critical areas exist on a parcel, provided that the applicant supplies the following:

1. A completed master application and vicinity map;

2. An assessor's map of the property;

3. A fee in the amount established, paid to the Department at the time an application for a critical area determination is submitted; and

4. Other information as needed. When the determination of critical areas has been completed, a letter will be issued to the applicant, placed in an

ized; field investigation and analysis by a qualified expert may be required to confirm the existence of a critical area. The county will update information and resource material as it becomes available and feasible. Digitized editions of any inventory map identified shall be used as each becomes available.

In the event of any conflict between the location, designation, or classification of a critical area shown on the county maps and the criteria or standards of this section, the criteria and standards and the determination of any field investigation shall prevail.

**Summary of Map Sources**

Topic	Map/Data Source(s)
Geologically Hazardous Areas	1. Digital Landslide Inventory, Cowlitz County, WA; DNR Landslide Study (Wegman, 2003), within the designated study boundary
	2. Geologic Hazard Map of Cowlitz County, Cowlitz-Wahkiakum Council of Governments, 1993, in those areas outside of the digital landslide study area
	3. USDA, Natural Resources Conservation Service, Cowlitz Area Soil Survey, 1974, or as amended, and as digitized, in those areas outside of the digital landslide study area
Frequently Flooded Areas	4. FEMA, National Flood Insurance Program, Flood Insurance Rate Maps, and as digitized, when available
Critical Aquifer Recharge Areas	5. Cowlitz County Aquifer Recharge Map, Cowlitz-Wahkiakum Council of Governments, 1993, and as digitized
Wetlands	6. Cowlitz County Wetlands Map, Cowlitz-Wahkiakum Council of Governments, 1993, source: Hydric Soils, USDA, Natural Resources Conservation Service; National Wetlands Inventory Maps, US Department of Interior, U.S. Fish and Wildlife Service, as amended and as digitized
Fish and Wildlife Habitat Conservation Areas	7. Priority Habitat and Species Maps, Washington Department of Fish and Wildlife, as amended and as digitized
	8. Forest Practices Act Stream Mapping, as amended and as digitized

[Ord. 04-219, § 1, 10-19-04; Ord. 96-104, § 11, 6-24-96.]

**19.15.120 Critical area wetlands.**

A. Wetland Classification. Wetlands are classified according to the following scheme, and regulated according to the threshold outlined in subsection B of this section.

1. Classification 1: Documented site-specific habitat or state-listed endangered, threatened, or sensitive animal species. (Chapter 232-12 WAC, Department of Wildlife, Permanent Regulations, as amended).

2. Classification 2:

a. High quality, regionally rare, wetland with irreplaceable ecological functions; or

b. Complex wetlands of three or more wetland types which cannot be replicated through newly created wetlands or restoration; or

c. Wetlands improved or enhanced by agency approved mitigation projects.

3. Classification 3:

a. Wetlands of sufficient characteristics to provide any of the following:

i. Significant flood control functions, or

ii. Ground and surface water aquifer recharge function, or

iii. Significant fish and wildlife habitat, or

iv. Significant water quality attributes for sediment retention and pollution control;

b. Wetlands of any size created as a result of agency approved/permitted mitigation projects.

4. Classification 4:

a. Wetlands dominated by non-native, invasive plant species.

b. Wetlands two acres or larger which are not Classification 1, 2, 3 or 4(a) wetlands.

B. Wetland Designation. For the purposes of this chapter “regulated wetlands” include:

Wetland Classification	Minimum Size
Classification 1	No minimum size
Classification 2	No minimum size
Classification 3	1 acre
Classification 4(a)	1 acre
Classification 4(b)	2 acres

C. Development Limitations – Alterations of Wetlands. Development or regulated activity shall conform with and be governed by the following:

1. Alteration of Classification 1 wetlands is prohibited unless the alteration would improve or maintain the existing wetland function and value, or the alteration would create a higher value or less common wetland type which would improve the

Soil Type	Buffer Width Range	
	Maximum	Minimum
Rose Valley Silt Loam 8-15% Slopes	160 ft.	120 ft.
Semiahmoo Muck 0-1% Slopes	200 ft.	150 ft.
Snohomish Silty Clay Loam 0-1% Slopes	120 ft.	80 ft.

**Table 2  
Buffer Widths for Regulated Wetlands Which  
Provide Functions and Values for Wildlife and  
Fisheries**

Description	Buffer Width	
	Maximum	Minimum
(A) Regulated wetlands with open water component (mapped open water or aquatic bed) at least 1/4 acre in size but less than 20 acres	200 ft.	100 ft.
(B) Vegetated regulated wetland associated with a riverine system or wetland on a lake 20 acres or greater in size	150 ft.	75 ft.
Wetlands with special sensitivities: heritage sites bogs and fens mature forested swamps (21 inch DBH) island systems lakes and shorelines of statewide significance priority species (as defined by ordinance)	As determined by a wetland assessment (see Appendix D)	

**E. Activities Allowed in a Wetland Buffer.**

1. Passive activities that do not have a significant adverse impact on the function of buffers shall be allowed. Examples include: educational or scientific projects, nonmotorized recreation, and utilities.

Such activities or projects shall be consistent with the wetland development limitations and mitigation standards set for the buffered wetland.

2. Prior to development or alteration within the buffer, the applicant shall demonstrate that no other feasible option exists.

**F. Mitigation Standards (refer to CCC 19.15.070, Mitigation Standards).**

1. All significant adverse impacts to Classifications 2 and 3 wetlands and buffers as identified in the wetlands assessment shall be specified in a mitigation plan consistent with CCC 19.15.170 and prepared by or on behalf of the applicant.

2. When an applicant proposes to alter or eliminate a regulated wetland, he/she shall be required to replace or enhance the function and value of the wetland based upon an approved evaluation procedure such as Wetland Evaluation Technique (WET). When replacement of a wetland

is proposed, the wetland and associated buffer shall be replaced at the following ratio:

Regulated Wetland Type	Minimum Ratio of Replaced Wetland to Lost Wetland
Classification 1 Wetland	Not applicable
Classification 2 Wetland and Classification 3 Wetland	At least 1 to 1, or as required, by the Department not to exceed 2 to 1
Classification 4(a) Wetland and Classification 4(b) Wetland	No replacement required

**G. Wetland Delineation.** For the purposes of this chapter, wetland delineations shall be performed in accordance with the procedures as specified in the Washington State Wetlands Identification and Delineation Manual. [Ord. 98-023, § 7, 2-9-98; Ord. 96-104, § 12, 6-24-96.]

**19.15.130 Fish and wildlife habitat conservation.**

**A. Designation of Critical Fish and Wildlife Habitat Conservation Areas.** Critical fish and wildlife habitat conservation areas are designated according to the classifications in the following table:

Classifications WAC 365-190-080(5)	Description
1. Areas with which state designated endangered, threatened or sensitive species have a primary association.	Areas which, if significantly altered, may reduce the likelihood that the species will reproduce over the long term. Habitats associated with these species are those identified by Washington Department of Fish and Wildlife's current system for mapping species of concern. These habitats are designated as critical areas, where endangered, threatened and sensitive species are verified to have a primary association.
2. Species and habitats of local importance.	Habitat: Unique or significant habitats which regionally rare wildlife species depend upon and that have high wildlife concentrations, including: 1. Caves, 2. Talus slopes, 3. Snag rich areas (outside forest practices), and

D. Habitat Management Plan – Classification 1 Only. A habitat management plan may be required (Appendix E) if the regulated activity is within 250 feet of a Classification 1 habitat area, or identified within 1,000 feet of a point location (nests, dens, etc.) for a Classification 1 habitat area.

E. Habitat Management Plan Requirements.

1. The habitat management plan will be prepared by a qualified expert (see Appendix E).

2. Habitat management plans will be sent to the Washington State Department of Fish and Wildlife and other state and federal agencies with jurisdiction for comment with the SEPA checklist.

F. Habitat Protection for Classification 2. Protection for these habitat areas shall be through the development performance standards listed in subsection B of this section.

G. Habitat Protection for Classification 3 and 4. If found to occur, protection of these areas shall be coordinated by the Department with the Washington State Department of Fish and Wildlife.

H. Habitat Protection for Classification 5, 6 and 7. Protection for these habitat areas shall be through the Shoreline Management Act, the Federal Clean Water Act, and the State Hydraulic Code and/or best management practices. Within Classification 6 – Type 1, 2 and 3 waters as defined in WAC 222-16-030, Forest Practices Board, Definitions, are regulated streams.

I. Habitat Protection for Classification 8. Protection for state natural area preserves and natural resource conservation area habitat is achieved by the Washington State Department of Natural Resources.

J. Habitat Protection for Classification 9. Protection for habitat provided by unintentionally created ponds shall be through the development performance standards in subsection B of this section. [Ord. 98-023, § 8, 2-9-98; Ord. 96-104, § 13, 6-24-96.]

#### **19.15.140 Frequently flooded critical areas.**

A. Frequently Flooded Area Classifications and Designation. All lands identified in the Federal Emergency Management Agency (FEMA) Flood Insurance Rate Maps, as amended, and approved by the county as within the 100-year floodplain are designated as frequently flooded areas. These maps are based on the following: Flood Insurance Study – Cowlitz County Unincorporated Areas.

B. Development Limitations. All development within designated frequently flooded areas shall comply with the Cowlitz County Floodplain Man-

agement Ordinance, Chapter 16.25 CCC, as now or hereafter amended. [Ord. 96-104, § 14, 6-24-96.]

#### **19.15.150 Geologic hazard areas.**

This section acknowledges the application of other relevant codes and regulations which may require mutual compliance.

A. Geotechnical Assessments and/or Reports. For all regulated activities proposed within designated landslide, erosion and mine hazard areas, a geotechnical assessment or an erosion hazard assessment prepared by a qualified expert shall be submitted and coordinated with the Uniform Building Code requirements (Appendix A and B).

If the geotechnical assessment indicates an inability of the site to accommodate the proposed activity without special measures or precautions as determined by a qualified expert, the Department may require a geotechnical report (see Appendix C).

B. Classification – Landslide Hazard Areas. Landslide hazard areas are those areas meeting any of the following criteria:

1. Areas of historic failure, such as areas designated as quaternary slumps, earthflows, mudflows or landslides;

2. Any area with all of the following:

a. Slope greater than 15 percent, and  
b. Steep hillsides intersecting geologic contacts with a relatively permeable sediment overlying a relatively impermeable sediment or bedrock, and

c. Springs or groundwater seepage;

3. Slopes that are parallel or subparallel to planes of weakness; such as bedding planes, joint systems, and fault planes;

4. Slopes having gradients greater than 80 percent and subject to rockfall during seismic shaking;

5. Areas potentially unstable as a result of rapid stream incision, stream bank erosion, and undercutting by wave action;

6. Areas located in a canyon, on an active alluvial fan, or that are presently subject to inundation by debris flows or catastrophic flooding;

7. Areas identified as being Class 4 or 5 on slope stability of the Longview-Kelso Urban Area Study. Division of Geology and Earth Resources, Department of Natural Resources, 1973;

8. Areas identified as being unstable or very unstable on Department of Natural Resources soils-based stability maps. Washington State Department of Natural Resources.

H. Development Standards – Mine Hazard Areas. Development adjacent to a mine hazard is prohibited unless the applicant can demonstrate the development will be safe. If a proposal is located adjacent to a mine hazard area, a geotechnical assessment may be required.

I. Classification – Volcanic Hazard Areas. For the purposes of this classification, all volcanic mudflow hazard areas shall be identified as the 500-year floodplain areas identified in FEMA maps.

J. Development Standards – Volcanic Hazard Areas. Development shall comply with existing Federal Emergency Management Agency regulations for floodplain management. A critical areas permit is not required by this chapter for development in a volcanic hazard area.

K. Designations. Lands of Cowlitz County meeting the classification criteria for geologic hazard areas are designated, under Chapter 36.70A RCW, as geologic hazard areas.

Maps that illustrate critical areas include, but are not limited to:

1. Alien J. Fiksdal, Slope Stability of The Longview-Kelso Urban Area, Cowlitz County, Department of Natural Resources, 1973.
2. Soil Conservation Service, Cowlitz Area Soil Survey, February, 1974.
3. Geologic Hazard Map developed by Cowlitz-Wahkiakum Council of Governments, 1993.
4. Federal insurance rate maps for Cowlitz County, FEMA 1993-1994.
5. Washington Department of Natural Resources, Soils-Based Slope Stability Map. [Ord. 98-023, § 9, 2-9-98; Ord. 96-104, § 15, 6-24-96.]

#### **19.15.160 Critical aquifer recharge areas.**

A. Classification – Critical Aquifer Recharge Areas. For the purposes of this classification the critical aquifer recharge areas are determined by the combined effects of soil types and hydrogeology. (Critical Aquifer Recharge Map, Cowlitz-Wahkiakum Council of Governments, 1993).

Classification 1: High susceptibility areas, identified on the aquifer recharge map, with a very high susceptibility to contamination of the underlying aquifer due to high soil permeability and high water table.

B. Regulated Activities – Classification 1. The following activities are regulated in Classification 1, critical aquifer recharge areas.

1. Solid waste disposal facilities, junk yards, etc.: landfills, junk yards, salvage yards, auto wrecking yards, and other solid waste disposal

facilities, except those for the disposal of brush and stumps, sawdust, and inert construction debris.

2. Aboveground and underground storage tanks and vaults: aboveground or underground storage tanks or vaults for the storage of hazardous substances or dangerous wastes as defined in Chapter 173-303 WAC, Dangerous Waste Regulations, or any other substances, solids or liquids in quantities identified by the County Health Department, consistent with Chapter 173-303 WAC, as a risk to groundwater quality, shall conform to CCC 16.05.060, the Uniform Fire Code, Chapter 173-360 WAC, Underground Storage Tank Regulations.

3. Utility transmission facilities: utility facilities which carry liquid petroleum products or any other hazardous substance as defined in Chapter 173-303 WAC.

4. Land divisions: subdivisions, short subdivisions and other divisions of land will be evaluated for their impact on groundwater quality within the Classification 1, aquifer recharge areas. The following measures may be required:

- a. An analysis of the potential contaminate loading;
- b. Alternative site designs, phased development and/or groundwater quality monitoring;
- c. Open spaces within development proposals;
- d. Community/public water systems and community drainfields.

C. Hydrogeologic Testing and Site Evaluation.

1. Hydrogeologic testing and site evaluation may be required for any regulated activity. If federal or state regulations require hydrogeologic testing, the Department may waive the requirement for additional testing provided the Director has adequate factual information to evaluate the proposal.

2. If hydrogeologic testing and site evaluation are required, they shall be conducted by a qualified expert and must include but not be limited to the requirements in Appendix F.

3. Development which negatively impacts the quality of Classification 1, critical aquifer recharge area, shall be prohibited unless the hydrogeologic testing and site evaluation satisfactorily demonstrate that significant adverse impacts will be mitigated. [Ord. 96-104, § 16, 6-24-96.]

#### **19.15.170 Mitigation plan performance standards – Mitigation planning requirements.**

All critical areas mitigation projects required pursuant to this chapter either as a permit condition

c. Natural constraints of the subject property that would otherwise preclude the proposed development activities; and

6. That as a result of the proposed development varying from the terms of this chapter there will be no threat to the public health, safety or welfare on or off the subject property; and

7. Any variance granted shall be for the least intrusion into the critical area or buffer necessary to allow an economically viable use of the subject property; and

8. That any authorized alteration of a critical area or buffer under this section shall be subject to conditions established by the Department in accordance with this chapter and may require mitigation under an approved mitigation plan. [Ord. 96-104, § 18, 6-24-96.]

#### **19.15.190 Appeals.**

Any interpretation or decision made by the Director in the administration of this chapter is final and conclusive unless appealed to the Cowlitz County Hearing Examiner as authorized by Cowlitz County Ordinance No. 95-193. Appeals of decisions made by other bodies shall be as directed by the appropriate county code governing the underlying action.

A. Any person aggrieved by a decision of the Director may, within 30 days following the date of the Department's written decision, submit an appeal of the Director's decision. The burden of proof in any appeal is the responsibility of the appellant. Any appeal shall be in written form and filed with the Department together with a fee as established by resolution by the Board. Any appeal shall as a minimum contain the following information:

1. An explanation and description of how the appellant is aggrieved;

2. A statement describing why the appellant believes the decision of the Director is in error and the specific relief sought;

3. A statement showing why upholding an appeal will not be detrimental to public health, safety or welfare, or significantly negate the functions of a critical area, the goals, objectives and policies of the Growth Management Act, and the purposes this chapter;

4. A statement describing any mitigating measures the appellant proposes to assure that the function of the critical area will not be irrevocably jeopardized in the event the appeal is successful.

B. Upon the filing of an appeal with appropriate fee, the Director shall set forth the time and place for a public hearing before the Hearing Examiner

on the matter. If the appeal is filed 20 days or more before the Hearing Examiner's regularly scheduled monthly meeting, he/she shall hear the appeal at that meeting. For appeals filed within 19 days of the regularly scheduled monthly meeting, the Hearing Examiner shall hear the appeal in the subsequent month.

C. Notice of the time, date and place of the hearing shall be sent to the appellant and the permittee by first class mail prior to the public hearing. Legal notice of the hearing shall be published in a newspaper of general circulation and the subject property shall be posted with the notice not less than 10 days prior to the public hearing.

D. Within 10 days after the public hearing, the Hearing Examiner shall issue a written decision, including findings of fact on which his/her decision is based. Such written decision shall be available to the appellant and the public upon request.

E. The Director shall transmit the application and appeal information to the Hearing Examiner at least five days prior to the public hearing. The Director may provide additional information if the appeal contains material or facts not available prior to the Director's decision.

F. The Hearing Examiner shall determine if the appeal should be upheld, upheld with conditions, or denied. Any person aggrieved by the decision of the Hearing Examiner regarding a permit pursuant to this ordinance may request relief from the Superior Court of Cowlitz County pursuant to state law. [Ord. 96-104, § 19, 6-24-96.]

#### **19.15.200 Penalties/violations.**

It is a civil infraction for any person to violate this chapter or assist in the violation of this chapter. Violations are subject to the provisions of Chapter 2.06 CCC. Any violation is a public nuisance. Each day a violation exists is a separate violation. Payment of any penalty imposed for a violation does not relieve a person from the duty to comply with this chapter. [Ord. 96-104, § 20, 6-24-96.]

#### **19.15.210 Fees.**

Fees for administering the provisions of this chapter shall be as set from time to time by the Board. [Ord. 96-104, § 21, 6-24-96.]

#### **19.15.220 Liability for damages.**

This chapter shall not be construed to hold the County of Cowlitz, or any officer or employee thereof, responsible for any damages to persons or property by reason of the certification, inspection or noninspection of any building, equipment or

colored flags than that used for the wetland delineation.

2) Vicinity Map drawn to scale and including a north arrow, public roads and other known landmarks in the vicinity.

3) National Wetlands Inventory Map (U.S. Fish and Wildlife Service) and/or a Cowlitz County Wetland Inventory Map identifying wetlands on or adjacent to the site.

4) Site Map. This map must be drawn to a usable scale, 1" = 100' or better, and must include a north arrow and all of the following requirements:

a) Site boundary/property lines and dimensions;

b) Wetland boundaries based upon a wetland specialist's delineation, and depicting sample points and differing wetland types if any;

c) Recommended wetland buffer boundary;

d) Internal property lines such as rights-of-way, easements, etc.;

e) Existing physical features of the site including buildings and other structures, fences, road utilities, parking lots, water bodies, etc.;

f) Topographical variations.

5) Report. This document must include each of the following:

a) Location information (legal description, parcel number and address);

b) Site characteristics including topography, total acreage, delineated wetland acreage, other water bodies, vegetation, soil types, etc., and distances to and sizes of other off-site wetlands and water bodies within one quarter mile of the subject wetland;

c) Identification of the wetland's classification as defined in the ordinance codified in this chapter, including the rationale for selecting the wetland category;

d) Analysis of functional values of existing wetlands, including flood control, water quality, aquifer recharge, fish and wildlife habitat, and hydrologic characteristics;

e) A complete description of the proposed project and its potential impacts to the wetland and, if applicable, adjacent off-site wetlands, including construction impacts;

f) Discussion of project alternatives including total avoidance of impacts to wetland areas;

g) If mitigation for wetland impacts is proposed, a description and analysis of that mitigation;

h) A wetland buffer recommendation and rationale for the buffer size determination.

6) Completed wetland data form provided by the county.

#### **Appendix E Habitat Management Plan Requirements.**

At a minimum, the habitat management plan shall typically contain the following information. Technical justification shall be provided where any information is not deemed applicable by the qualified expert.

1. A. A description of state or federally designated endangered, threatened or sensitive fish or wildlife species, or species of local importance, on-site or adjacent to the subject property within a distance typical of the normal range of the species.

B. A description of the critical wildlife habitat for the identified species known or expected to be located on-site or immediately adjacent to the subject property.

2. A site plan which clearly identifies and delineates critical fish and wildlife habitats found in subsection (1)(B) above.

3. An evaluation of the project's effects on critical fish and wildlife habitat both on and adjacent to the subject property.

4. A summary of any federal, state, or local management recommendations which have been developed for the critical fish or wildlife species or habitats located at the site.

5. A statement of measures proposed to preserve existing habitats and restore area degraded as a result of proposed activities.

6. A description of proposed measures which mitigate the impacts of the project.

7. An evaluation of on-going management practices which will protect critical fish and wildlife habitat after the project site has been fully developed, including proposed monitoring and maintenance programs of the subject property.

#### **Appendix F Hydrogeologic Testing and Site Evaluation.**

If hydrogeologic testing and site evaluation are required, they shall be conducted by a qualified expert and typically include at least the following. Technical justification shall be provided where any information is not deemed applicable by the qualified expert.

1. A characterization of the site and its relationship to the aquifer and evaluation of the ability of the site to accommodate the proposed activity;

2. A discussion of the effects of the proposed project on groundwater quality and quantity; and

**CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing APPELLANTS' OPENING BRIEF on:

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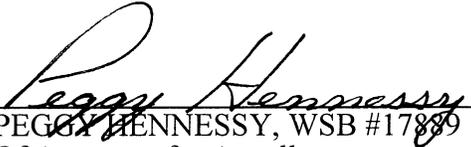
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STATE OF OREGON  
BY: [Signature]  
COURT REPORTER

by mailing full, true and correct copies thereof, contained in a sealed, first class postage prepaid envelope, addressed to said person(s) shown above at his/her last known address, and deposited in the post office at Portland, Oregon, on the date set forth below.

DATED this 13<sup>th</sup> day of August, 2007.

REEVES, KAHN & HENNESSY

  
PEGGY HENNESSY, WSB #17889  
Of Attorneys for Appellants