

NOTICE OF APPEAL

March 5, 2024

Via Certified Mail and Public Email Portal: <https://governor.wa.gov/contacting-governor/contacting-governors-office/send-gov-inslee-e-message>

The Honorable Jay Inslee
Governor of Washington
416 14th Avenue SW
Olympia, WA 98504

RE: Appeal of the State Building Code Council's denial of rulemaking petition to repeal WSR 23-21-105 and WSR 23-21-106 due noncompliance with the Regulatory Fairness Act

Dear Governor Inslee,

Pursuant to RCS 34.05.330 (3), we hereby appeal the State Building Code Council's February 6, 2024, denial of our December 8, 2023, petition, which asked the Council to repeal WSR 23-21-105 and WSR 23-21-106 due to the included Small Business Economic Impact Statements failing to properly comply with the Regulatory Fairness Act.

The Issue

WSR 23-21-105 and WSR 23-21-106 were proposed amendments to the 2021 Washington State Energy Code, Residential and Commercial provisions respectively. The Council determined that preliminary calculations showed that the proposed rules would likely impose more-than-minor costs to businesses and small business economic impact statements (SBEIS) were required per RCW 19.85.030. However, the included SBEIS failed to meet all the requirements of the Regulatory Fairness Act (RFA).

Components that are either missing from the SBEIS or do not meet the full requirements of the RFA are as follows:

- A. Full analysis of the costs of compliance for businesses. Including: costs of equipment, supplies, labor, professional services, and increased administrative costs ([RCW 19.85.040 \(1\)](#)).
- B. Full analysis on whether compliance with the rule will cause businesses to lose sales or revenue ([RCW 19.85.040 \(1\)](#)).
- C. Lack of a comparison of the cost of compliance for small businesses with the cost of compliance for the 10% of businesses that are the largest businesses required to comply with the proposed rules using at least one of the following for comparing costs ([RCW 19.85.040 \(1\)](#)): (a) cost per employee, (b) cost per hour of labor; or (c) cost per one hundred dollars per sales.

- D. Full analysis of the steps taken to reduce or mitigate costs for small businesses or an explanation why the agency can't reduce costs ([RCW 19.85.040 \(2\)\(a\)](#)).
- E. A full estimate of the number of jobs that will be created or lost as the result of compliance ([RCW 19.85.040 \(d\)](#)).

The Governor's Office for Regulatory Innovation & Assistance (ORIA) provides a website with tools and resources for agencies to help them meet the requirements of the RFA; including guidance documents: https://www.oria.wa.gov/site/alias_oria/3190/guidance-documents.aspx. One of those documents is a guidance document from the Attorney General's Office. Regarding what agencies should include in their rule making record, it states: "If the agency concludes the rule will not impact small businesses, it should consider documenting the research it conducted and the basis for its conclusion." The included SBEIS makes claims without providing the supporting research it conducted to arrive at these conclusions.

ORIA has also included in those guidance documents a Microsoft Word template that agencies may use for their SBEIS. If the Council had merely followed the template and filled it out with the appropriate information they would likely meet all the requirements of the RFA. However, the submitted SBEIS is missing required documentation and research and entirely missing the most important element which is component C: the cost of compliance shown as (a) cost per employee, (b) cost per hour of labor; or (c) cost per one hundred dollars per sales. Without this calculation it is impossible that Council accurately calculated the cost of compliance for small businesses. Without having that calculation, they cannot determine whether those costs are disproportionate and in need of mitigation. Therefore, by not following this crucial process, they have not met the requirements of the RFA.

History of our Appeal

The Washington Policy Center noticed potential issues with the SBEIS and the RFA in November 2023 and submitted testimony during the November 21-22, 2023, public comment period to notify the Council of these issues. Additionally, we emailed the ex officio legislative members of the Council to notify them and encourage them to address the matter. This was done separate from the Washington Policy Center's policy-based testimony to keep the issue with compliance separate from policy concerns.

The Council discussed the SBEIS at their November 28, 2023, meeting. However, the discussion failed to address the core issues of the noncompliance, including the missing components. We spoke with staff for the Joint Administrative Rules Review Committee (JARRC) of the legislature, via a phone conversation, to see if the matter could be brought before the committee and were informed that first we must petition the agency directly. In the interest of giving the Council the most possible time to address these concerns ahead of the March 15, 2024, implementation, we sent the Council a petition for repeal on December 8, 2023.

At the regular meeting on January 19, 2024, the Council discussed our petition. Included in the Council's deliberations were the following, with additional information provided by us in sub-bullet points:

- Whether they were able to respond to our petition because the CR-103 had not yet been filed.
 - They ultimately chose to respond anyways in the interest of time.
- Council members and staff cited “additional” cost-benefit analyses as helping them meet the requirements of the RFA.
 - The referenced cost-benefit analyses are required to comply with the Administrative Procedure Act (APA) RCW 34.05.328 and do not meet the requirements of the RFA.
- The Council discussed that during the entire 2021 Energy Code cycle they have submitted a total of four SBEIS with four different CR-102s and that they all had similar language. Multiple council members did not understand why each rule proposal should have a separate and unique SBEIS.
 - This demonstrates a clear misunderstanding by the Council of the requirements of the RFA and their duty to properly comply with the law and prepare unique and specific SBEIS for each proposed rule that requires a SBEIS.

Since discovering this issue, we have done everything in our power to address this issue in a good faith effort. At every juncture we attempted to quickly get these concerns to the Council so they could address them before implementing the codes. Had they taken this issue seriously in November and December of 2023 they could have prepared a new SBEIS to determine if there were disproportionate costs for small businesses and mitigate those costs before implementation. Instead, they have ignored the clear violations of the law which now threaten the implementation of the code.

After the Council denied our petition, we again contacted JARRC staff to inquire about their review process. We were informed that JARRC does not accept review requests during legislative session (or 30 days before and after the session). Instead, it was recommended that we contact our constituent legislators about addressing the matter through legislation. However, because of the timing of this process, the deadlines for new legislation to be submitted had come and gone. While it is still possible to request JARRC review this matter, 30 days after the 2024 legislation session, we believe the best way to quickly resolve this issue is for Governor Inslee to accept our appeal and formally request the Council address this matter.

The Case for Repeal

According to guidelines for petitioning agency described in RCW 34.05.3300 and WAC 82-05, petitioners are limited in requesting either the adoption, repeal, or amendment of rule. According to these restrictions we feel the most appropriate option was repeal. Considering neither adopting new rules or amending previous rules would not resolve the lack of proper SBEIS submitted with the proposed changes in WSR 23-21-105 and WSR 23-21-106.

The purpose of the RFA is for agencies to calculate the cost of compliance for small businesses compared to large businesses and if those costs are disproportionate, then to mitigate those costs. When one properly reviews the SBEIS in question along with the relevant statutes and guidance documents from ORIA, it is abundantly clear that the Council has failed to adequately follow the RFA. They have not properly calculated the cost of compliance for businesses. Then taken steps to mitigate those costs if they disproportionately fall on small businesses.

In their denial of our appeal the Council states that the SBEIS in the CR-102 filings state that there is “no economic impact on small businesses.” However, in those same CR-102 filings they check the box (on page 5 and 6 respectively) saying calculations show the rule proposal likely imposes more-than-minor cost to businesses. They go on to say, “There are costs imposed by the proposed rules, but the costs do not fall disproportionately on small businesses.” The Council simultaneously claims that there is no economic impact and that there are costs imposed by the rules. While the SBEIS does include a table showing how the rules will increase the cost of construction by single family building prototypes, this calculation has nothing to do with the RFA. The law requires them to calculate the cost of compliance with the rules, not the increased cost of home construction.

Because the Council has so egregiously failed to follow the RFA there is a strong argument for repealing the proposed changes and starting fresh to ensure full compliance with the law. This will give affected small businesses the chance to fully participate in and comment on a new proper SBEIS.

An Alternative Solution

We understand there is immense pressure to avoid any further delays in the implementation of the 2021 energy code. However, allowing the Council to get away with egregious noncompliance with the law would be a terrible mistake. It sets a horrible precedent that the legislature and Governor’s office will stand by while agencies fail to properly follow the law. However, there is a way that the codes can still go into effect and that the Governor can encourage them to follow the RFA and remedy this matter.

RCW 34.05.330 (3) (ii) states that in responding to our appeal, the Governor may state the “alternative means by which he or she will address the concerns raised by the petitioner”. Pursuant to this we recommend the following alternative solution. In response to our appeal, the Governor should formally request that the Council do the following:

1. Council members and staff receive training from ORIA staff on how to comply with RFA.
2. Survey affected businesses, trade associations, and other representative parties to calculate the cost of compliance for the entire 2021 energy code, meeting the criteria required in the RFA.
3. Complete a new SBEIS for the entire 2021 energy code using the data from the surveys. To do this they should follow the template provided by ORIA and ensure that all requirement elements are completed and filled out appropriately.
 - a. This process should include the Council taking steps to reduce or mitigate any disproportionate costs imposed by the rules for small businesses or explain why

they cannot. Starting new rulemaking may be necessary to reduce or mitigate costs. If the Council determines they cannot reduce or mitigate those costs then they should clearly document how that was determined and include their justification in the SBEIS.

4. Publish the new SBEIS on their website and in the Washington State Register. They should also send notice to affected businesses and trade associations.
5. Hold a public hearing on the new SBEIS so that affected businesses and the public can weigh in.

We suggest that the new SBEIS be completed not just for the proposed amendments, but the original 2021 energy code proposals as well because first the SBEIS are similar and contain many of the same provisions verbatim, thus they both contain similar compliance issues with the RFA, and the Council cited all four as a defense against our petition. As far as we are aware, there is no statute of limitations on when citizens can initiate a petition process. So, we could go back and start the appeals process for the older proposals. However, we believe this matter can be addressed without doing that.

This alternative is a reasonable way to uphold the law and demonstrate that agencies must follow all laws and requirements placed on them by the legislature. It would show how much Washington values small businesses and their importance to our economy, by protecting them from potentially negative consequences from regulation. Also, this approach respects the value of government transparency and accountability. Finally, it would help the Council receive training and support to fully follow the law in the process of doing their duty, while avoiding any further delays in the 2021 energy code.

If you have questions or would like to discuss this approach, please feel free to reach out to us.

Sincerely,



Todd Myers
Environmental Director
Washington Policy Center



Patrick Hanks
Project Coordinator
Washington Policy Center

Attached: State Building Code Council February 6, 2023, Denial