



## PETITION FOR ADOPTION, AMENDMENT, OR REPEAL OF A STATE ADMINISTRATIVE RULE (RCW 34.05.330)

The Office of Financial Management (OFM) has adopted this form for members of the public who wish to petition a state agency to adopt, amend, or repeal an administrative rule (regulation). Full consideration will be given to a petitioner's request.

Please complete the following:				
PETITIONER'S NAME (PLEASE PRINT)			TELEPHONE NUMBER (INCLUDE AREA CODE)	
John P. Neff, CBO			360-339-2621	
STREET ADDRESS	PO BOX NUMBER	CITY	STATE	ZIP CODE
2315 Buckingham DR SE		Olympia	WA	98501-7016
AGENCY RESPONSIBLE FOR ADMINISTERING THE RULE				
WA State Building Code Council, as authorized by RCW 19.27 and RCW 19.27A				
Please submit completed and signed form to the "Rules Coordinator" at the appropriate state agency. The agency will contact you within 60 days.				
<i>Submitted to Tim Nogler, Rules Coordinator, SBCC.</i>				
Check all that apply below and explain on the back of this form with examples. Whenever possible, attach suggested language. You may attach other pages if needed.				
<input type="checkbox"/> 1. NEW: I am requesting that a new WAC be developed.				
<input type="checkbox"/> 2. AMEND: I am requesting a change to existing WAC				
<input checked="" type="checkbox"/> 3. REPEAL: I am requesting existing WAC 51-11, WA State Energy Code 2009 Edition, be removed/repealed. (Note, this would revert the rules to the 2006 WSEC.)				
I believe this rule should be <del>changed or</del> repealed because (check one or more):				
<b>[Author's Note: this form has been modified slightly to strictly conform with the items noted in RCW 34.05.330 for specific items to be "addressed, among other concerns [RCW 34.05.330.(4)]"</b>				
<input checked="" type="checkbox"/> RCW 34.05.330 (4) (a) Is the rule authorized?				
<p>In the adoption of 19.27.160, "The state building code council shall evaluate and consider adoption of the international energy conservation code [IECC (added by author for clarity)] in Washington state in place of the existing state energy code." Further, in Section 5, Subsection (2), the Legislature explicitly stated, "The council shall adopt state energy codes from 2013 through 2031 that incrementally move towards achieving the seventy percent reduction in annual net energy consumption as specified in subsection (1) of this section. The council shall report its progress by December 31, 2012, and every three years thereafter." It is very clear from the wording of the legislation that the Legislature's action intended first that the SBCC would consider the IECC for adoption, and that the adoption of the new codes would occur starting in the year <u>2013</u>. From this legislation, which replaces the equivalent sections of the previous RCW 19.27A, there was no statutory authority to consider any new code prior to 2013, and in that consideration, the IECC needed to be considered to be adopted. The adoption of</p>				

the current WSEC by the SBCC is in violation of the legislation addressing this energy code issue in two ways:

1. The SBCC lacked the authority to consider new codes under the newly-revised legislative authority until 2013; and
2. The SBCC was directed by the legislature to use the time from the passage of the legislation to 2013 to review and consider adoption of the IECC.

*RCW 34.05.330 (4) (b) Is the rule needed?*

The rule is not needed, as it is not authorized by statute, and since the Legislature clearly directed the SBCC to consider the IECC, which is the energy code endorsed and promoted by the U.S. Department of Energy, for compliance with American Recovery and Reinvestment Act of 2009 (Enrolled Bill [Final as Passed Both House and Senate] - ENR)

*RCW 34.05.330 (4) (c) Does the rule conflict with or duplicate other federal, state or local laws?*

The adoption of the current WAC rule adopting the WSEC clearly conflicts with 42 USC 6297 (f) (3) (a through g). This will be addressed further, in detail, in Item (i), below.

*RCW 34.05.330 (4) (d) Do alternatives to the rule exist that will serve the same purpose at less cost?*

The adoption of the IECC will produce the same energy efficiencies at less cost. The adoption of the IECC is endorsed by the U.S. Dept. of Energy. Equal to the efficiencies gained in the actual construction of structures; the answer to this question has to address the costs to local governments to train to the new code; to purchase the new codes; to gain proficiency in plan review of new plans submitted for permits; for inspection of the construction in the field; for training of the registered design professionals (home designers, architects, etc.); and training of the contractors who will have to comply with this new rule for construction.

In the adoption of this rule, there is no written evidence that the SBCC ever considered any of those training or implementation costs; let alone the costs of the comparison of the implementation of the IECC as currently written by ICC compared to the adoption of the WSEC as they proposed it for adoption.

*RCW 34.05.330 (4) (e) Does the rule apply differently to public and private entities?*

(Not applicable to this submittal.)

*RCW 34.05.330 (4) (f) Does the rule serve the purpose for which it was adopted?*

In a very narrow application of these words, the adopted rule may barely serve the “purpose for which it was adopted.” However, in review of the rule and the legislation which authorized such rule adoption, it clearly does not serve that purpose. The rule, as adopted, does not “review and consider” adoption of the IECC, and does not consider the vast amount of work needed to review to codes to get to the Legislative goal of adoption of a new code by 2013. Further, there is no defined support system in place for the adoption of the code, such as exists for the IECC, through the U.S. DOE, *Building Energy Code* Program, for support of the IECC. For the IECC, the U.S DOE provides a vast support system for plan review, inspection, and code interpretations. In the State of WA, there is the out-dated W.S.U. Energy Extension office supported by vested interests for keeping the current code in place; and the Northwest

Energy Efficiency Alliance—again supported by those with the vested interest of keeping the current code in place.

*RCW 34.05.330 (4) (g) Are the costs imposed by the rule unreasonable?*

The costs imposed by the adopted rule are clearly unreasonable, for local government who will be tasked for implementation; and for contractors who will be required to implement. The WA Administrative Procedures Act, RCW 34.05, requires that the adoption agency, in Section .320 (j), to prepare and file a small business economic impact statement prepared under chapter [19.85](#) RCW, or an explanation for why the agency did not prepare the statement. The SBCC received a letter from the Joint Administrative Rules Review Committee stating clearly that the SBCC did not comply with that requirement and did not provide the required economic impact statement. RCW 19.85 defines a small business as “any business entity, including a sole proprietorship, corporation, partnership, or other legal entity, that is owned and operated independently from all other businesses, and that has fifty or fewer employees.” This definition applies to the majority of all construction contractors within the State of WA.

Further, the implementation of the adopted rule falls squarely on the shoulders of local government building safety departments (divisions). There has been no thought given in the adoption of the rule or the adoption of the effective date, of the impact on local government. Local building departments have been decimated by the current economy and the current downturn of building permits. The training budgets and total staff have been reduced to the lowest levels in years. Yet, the adoption of this new rule falls on those departments to enforce. There has been no system developed by the SBCC for training, funding, staffing, or other appropriate means to assure the enforcement and implementation of the rule.

Even further, the Governor’s Council of Economic Advisors stated clearly that the “economy needed to rebound,” prior to implementation of the new code. The action taken by the SBCC was contrary to the Governor’s own request.

*RCW 34.05.330 (4) (h) Is the rule clearly and simply stated?*

No. The adopted rules are not clear as they do not correlate with the legislatively-mandated building codes specified in RCW 19.27.031. To provide a rule that has been developed in the same manner as the other mandated codes, and is coordinated and correlated with them—to provide that clarity—would require the SBCC to review and adopt the IECC as noted in ESSSB 5854.

*RCW 34.05.330 (4) (i) Is the rule different than a federal law applicable to the same activity or subject matter without adequate justification?*

This adoption of the rule is in direct conflict with 42 USC 6297(f)(3)(A-G). This issue was raised to the SBCC numerous times during the development of the rule, and was ignored. As this code was adopted in violation of this federal law, the entire adoption is in question.

*RCW 34.05.330 (4) (j) Was the rule adopted according to all applicable provisions of law?*

No. The adopted rule was not adopted in accordance with RCW 34.05.320, for development and adoption of a small business economic impact statement, even though the SBCC is clearly required to do so by RCW 34.05 and RCW 19.85; and because of the direct request from the Joint Administrative Rules Review Committee to do so [RCW 19.85.030(1)(b)].

The adopted rule was not adopted in accordance with the SBCC’s own Bylaws, requiring that only

designated TAG Committee members vote on code proposals. The code proposals were routinely adopted by a voice vote of all the people in the room, whether TAG members or not, as the TAG Chair insisted on that procedure, even though in violation of the SBCC's own rules.

*Other (1) Was a needs assessment of training of local inspectors, plan reviewers, registered design professionals and contractors completed prior to implementation?*

As noted above, the SBCC did not develop any needs assessment of the training requirements of all of the affected parties. As such, there has been very little training of those persons. What has occurred was through WSU Energy Extension Service for residential applications, such as blower-door testing, duct testing, etc.

*Other (2) Did the agency develop a well thought out implementation plan prior to adopting and later setting an effective date?*

No. The SBCC has not shown any development of how this adopted rule is to be implemented by local governments, registered design professionals, contractors, manufacturers, suppliers, homeowners, or any other party affected by its adoption. The current action of putting the code into effect on January 1, 2011, shows a complete disregard for those considerations.

*Other (3) Did the agency reply to the Joint Administrative Rules Review Committee as requested? If not, what implications have arisen from the agencies adoptive action?*

No. RCW 19.85.030, Agency rules — Small business economic impact statement — Reduction of costs imposed by rule.

- (1) In the adoption of a rule under chapter [34.05](#) RCW, an agency shall prepare a small business economic impact statement: (a) If the proposed rule will impose more than minor costs on businesses in an industry; or *(b) if requested to do so by a majority vote of the joint administrative rules review committee within forty-five days of receiving the notice of proposed rule making under RCW [34.05.320](#).*

The answer given in public by the SBCC for not doing so was that the SBCC is "Executive Branch," and the JARRC is "Legislative Branch," so they were not bound to do so. That action is in clear violation of the requirements of law. The answer provided did not comply with the requirements of RCW 19.85, or the JAARC's request.

*Other (4) Local Government's Implementation Dilemma:*

The adoption of this rule, in violation of several different sections of RCW statutes as noted above and the SBCC's own Bylaws and procedures puts local government in a very precarious situation. The administrators of the building departments, the Building Officials, are first and foremost bound to enforce and uphold law. The enforcement and implementation of a rule that was adopted in violation of statutory and rule requirement exposes local government to legal challenge. Local government cannot either legally, or ethically, enforce a rule that was adopted in violation of State and Federal laws and adopted rules. To do so would put those local governments at risk.

*Other (5) WAC 51-11-0701, Reference Standard 33, and all references to it contained within WAC 51-11, is not authorized by law.*

RCW 19.27.074 is the first statute containing the statutory Duties of the SBCC. In Subsection (1)(c), the

statute states that the Council, “As required by the legislature, [may] develop and adopt any codes relating to buildings.” Further, in RCW 19.27A, the SBCC is given the authority to, “(1) The state building code council shall adopt rules to be known as the Washington state energy code as part of the state building code.

(2) The council shall follow the legislature's standards set forth in this section to adopt rules to be known as the Washington state energy code. The Washington state energy code shall be designed to: [remainder omitted from this document]. . . .

There is no statutory authority for the Council to develop a “licensing,” “certification,” or special inspection testing program for the energy code, which RS 33 essentially creates. In fact, the beginning chapter of the energy code, WAC 51-11, clearly defers to the International Building Code (IBC) for requirements for inspections and states that the inspections be a part of the requirements of that code. Further, the IBC, as adopted by RCW 19.27.031, provides specifically for all special inspections within the scope of the IBC and leaves that responsibility and authority up to the local building official to determine the requirements and then administer.

The adoption of these rules is clearly intended to remove authority from the local governments, which under the WA Constitution, SECTION 11. POLICE AND SANITARY REGULATIONS, it states, “Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.” RCW 19.27.050. Enforcement, states, “The state building code required by this chapter shall be enforced by the counties and cities.” There is no statutory authority for the SBCC to adopt any rule removing any of the power of the local building official under the administrative portion of the code [WAC 51-04-030 (5), *Exception*].

Further, and perhaps more importantly, RS-33 is not a “standard,” because it was not developed under the procedures of a nationally recognized standards developing organization (SDO), and cannot be assumed to be a standard. Examples of two consensus processes by SDOs are ASTM and ANSI. Further, OMB 119, defining for the Federal use of Standards, defines a Standard as,

### **What Are Voluntary, Consensus Standards?**

For purposes of this policy, "voluntary consensus standards" are standards developed or adopted by voluntary consensus standards bodies, both domestic and international. These standards include provisions requiring that owners of relevant intellectual property have agreed to make that intellectual property available on a non-discriminatory, royalty-free or reasonable royalty basis to all interested parties. For purposes of this Circular, "technical standards that are developed or adopted by voluntary consensus standard bodies" is an equivalent term.

(1) "Voluntary consensus standards bodies" are domestic or international organizations which plan, develop, establish, or coordinate voluntary consensus standards using agreed-upon procedures. For purposes of this Circular, "voluntary, private sector, consensus standards bodies," as cited in Act, is an equivalent term. The Act and the Circular encourage the participation of federal representatives in these bodies to increase the likelihood that the standards they develop will meet both public and private sector needs. A voluntary consensus standards body is defined by the following attributes:

(i) Openness.

- (ii) Balance of interest.
- (iii) Due process.
- (vi) An appeals process.
- (v) Consensus, which is defined as general agreement, but not necessarily unanimity, and includes a process for attempting to resolve objections by interested parties, as long as all comments have been fairly considered, each objector is advised of the disposition of his or her objection(s) and the reasons why, and the consensus body members are given an opportunity to change their votes after reviewing the comments.

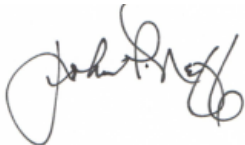
RCW 19.27.020 states, *“The purpose of this chapter is to promote the health, safety and welfare of the occupants or users of buildings and structures and the general public by the provision of building codes throughout the state. Accordingly, this chapter is designed to effectuate the following purposes, objectives, and standards:*

*(1) To require minimum performance standards and requirements for construction and construction materials, consistent with accepted standards of engineering, fire and life safety.*

*(2) To require standards and requirements in terms of performance and nationally accepted standards.*

RS-33 is merely a process developed by the WSU Energy Extension Office staff, identified as WSUEEP-09-008. While it may be a testing method that could be utilized by local government code officials for testing purposes, the requirement of these methods and requiring that all persons wishing to do the testing take this class and test to this document is improper and not authorized by law.

PETITIONER'S SIGNATURE



DATE

01-07-2011