

January 18, 2024

Washington State Building Codes Council  
PO Box 41449, Olympia WA 98504-1449

Via email: sbcc@des.wa.gov

RE: Cascade Natural Gas Corporation  
Public Letter Addressing Repeal of  
WSR 23-21-105 and WSR 23-21-106  
Pursuant to the Regulatory Fairness Act

To the Honorable Members of the Washington State Building Code Council (SBCC),

Cascade Natural Gas Corporation (Cascade) appreciates the SBCC's efforts to undertake additional rulemaking intended to address the legal uncertainty stemming from the decision in *California Restaurant Association v. City of Berkeley* issued by the U.S. Court of Appeals for the Ninth Circuit. Washington is a leader in the development and adoption of energy codes across the United States, and it is therefore critical that our state energy codes be structured and adopted in conformance with both State and Federal law.

### **Summary**

Cascade is aware that this council, on January 19, 2024, will consider our submitted Petition for Reconsideration related to this council's filing of WSR 23-21-105 and WSR 23-21-106 – collectively, the CR-102 filings that seek to amend the WSEC to reduce the risk of EPCA preemption. As indicated by Cascade's written (see [CNGC Letter dated Nov. 20, 2023](#)) and verbal (see [Ty Jennings' testimony from November 21, 2024](#)) testimony, Cascade has remaining concerns regarding the CR-102 filings for the Washington State Residential and Commercial Energy Codes that relate to a non-compliant Small Business Economic Impact Statement (SBEIS), as required under the Regulatory Fairness Act (RFA; see [RCW 19.85](#)). Additionally, the issue was raised during the Council's special meeting on November 28, 2023, during which myself (Ty Jennings) and Mr. Patrick Hanks of the Washington Policy Center, were invited by members of this council to speak regarding the incomplete SBEIS.

CNGC has been an active member of the code development process, having submitted public testimony aimed at informing this council during the various stages of regulatory proceedings. Within the noted testimony, Cascade has sought to inform the SBCC and its associated Department of Enterprise Services Staff (DES Staff) of the incomplete and non-conforming SBEIS. Whereas the testimony provided by Cascade and others did not alter the course of the Council's process in the discussed rulemaking, Cascade filed a Petition for Repeal of a State Administrative Rule pursuant to RCW [34.05.330](#) on December 8, 2023.

### **At Issue**

As required under the APA (see RCW 34.05.320(1)(j)) and RFA (see RCW 19.85.030), a small business economic impact statement is required as part of a CR-102 filing. Within Section 3 of the CR-102 filings, a listing of industries required to comply with the energy code was provided, including a minor cost estimate comparative to the industries' 1% of average annual payroll and 0.3% of average annual gross business

income. Pursuant to RCW 19.85.040(3), “To obtain information for purposes of this section, an agency may survey a representative sample of affected businesses or trade associations and should, whenever possible, appoint a committee under RCW 34.05.310(2) to assist in the accurate assessment of the costs of a proposed rule, and the means to reduce the costs imposed on small business.”

As noted during our testimony, it appears that the values provided within the table may not have been prepared in conformance with the RFA. Through communication with DES Staff, it is understood that the values provided within the CR-102 are not in fact a representative sampling of business or trade associations, but are the threshold values produced by the [ORIA Minor Cost Threshold Calculator](#). Furthermore, the values provided are exactly the same as those provided in the August 2023 Residential and January 2022 Commercial CR-102 filings (WSR 22-17-149 and WSR 22-02-076) made prior to this effort to address EPCA preemption.

Although the filings only included the threshold values produced by the ORIA Minor Cost Threshold Calculator, the filings indicated that the threshold by which a mandatory SBEIS was required under the APA ([RCW 19.85.030 \(1\)\(a\)](#)) was met. While a partial exemption from completing an SBEIS was claimed for editorial changes under [RCW 34.05.310 \(4\)\(d\)](#), the Council did not claim an exemption from completing the SBEIS under [RCW 19.85.061](#). Therefore, by the Council’s determination and filing of WSR 23-21-105 and WSR 23-21-106, a SBEIS was required in order to comply with the APA and RFA.

As stated in our petition, components missing or not fully provided within the SBEIS include:

- i. 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).
- ii. Full analysis on whether compliance with the rule will cause businesses to lose sales or revenue – RCW 19.85.040 (1).
- iii. 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.
- iv. 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).
- v. A full estimate of the number of jobs that will be created or lost as the result of compliance – RCW 19.85.040 (d).

For the items noted above as (i), (ii), and (v), the CR-102 filings (WSR 23-21-105 and WSR 23-21-106) speculative claims are provided, but lack any supporting data, research, documentation, or analysis. Item (iii) is entirely omitted from the CR-102 filings; thus, without a comparison of compliance cost between small business and the 10% of business that are the largest and no technical data indicating the cost of compliance for businesses, it is practically infeasible to fulfil item (iv). This council simply lacked the required information, as stipulated in RCW 19.85.040, and had no available basis by which to assess the impact to small businesses.

### **Resources Available**

For additional information, including educational content, the Governor’s Office for Regulatory Innovation and Assistance provides a website (<https://www.oria.wa.gov/>) dedicated to supporting agencies, such as

DES, in completing an SBEIS and compliance with the RFA. Included upon that website are the following Guidance Documents:

- [SBEIS Template](#) – A template DOH created for internal use that may help other agencies think through and document rationale on key RFA questions and requirements.
- Sample SBEIS analyses prepared by various agencies:
  - [Department of Ecology- Water Quality Permit Fees](#)
  - [Department of Fish and Wildlife- HPA Suction Dredge](#)
  - [Washington State Department of Agriculture-Quarantine, Agricultural Pests](#)
- [SBEIS and CBA Checklist](#) – A checklist of what to include in a SBEIS or CBA as an agency goes through rule development.
- [Cost-Benefit Analysis Decision Tree](#) – A decision tree to help determine when a Cost Benefit Analysis is required.
- [Attorney General's RFA Guidance](#) – Helpful information and FAQ's provided by the AGO for agencies to understand SBEIS process and requirements.

### **Council Action vs. Risk**

Cascade requests that this Council grant the Petition for Repeal of a State Administrative Rule on the grounds of the presented information. Should the council deny the petition(s), the Council should be aware that a legislative review is likely, whereas a denied petition may be elevated to the Joint Administrative Rules Review Committee (JARRC) as allowed under [RCW 19.85.030 \(6\)\(a\) and \(b\)](#). As noted in the [Attorney General's RFA Guidance](#): “... the failure to conduct a full and complete analysis leaves the rule open to potential challenge.”

Additionally, it is worth recognizing that there exists precedent from 2009 wherein JARRC issued findings indicating that the SBCC failed to comply with all requirements related the legislatively mandated SBEIS associated with the 2009 State Energy Code. JARRC, upon hearing the 2009 case, made findings that the SBCC failed to amend and provide the SBEIS prior to adoption of the rules pursuant to the requirements of the RFA (see [RCW 19.85.030](#)), and failed to include an estimate of the number of jobs created/lost with a detailed and rigorous cost analysis of the cumulative impact of the rules. Based upon these findings, and pursuant to [RCW 34.05.640](#), JARRC took the following action (see [WSR 10-02-085](#)):

- Recommend that the Governor suspend adoption and implementation of the changes to the State Energy Code that were adopted by the Council on November 20, 2009;
- Provide the Committee's objections to the Governor, the Office of the Code Reviser, the appropriate standing committees of the Legislature, and the Council;
- Direct the Code Reviser to publish the Committee's objections in the State Register and Washington Administrative Code; and
- Direct Committee staff to draft legislation that would suspend the implementation of the State Building Code Council's 2009 proposed changes and amendments to Chapter 51-11 of the Washington Administrative Code (the State Energy Code) until the Legislature has been provided with the additional economic impact and cost-benefit analysis information, as requested by the Committee in its October 14, 2009 letter to the Council, and has been given an opportunity to determine whether the additional information is sufficient to make an informed decision.

A Notice of Objection, filed Dec. 11, 2009 (see [WSR 10-01-065](#)), included the recommendation that the Governor suspend the adoption and implementation of the changes to the State Energy Code until such time as a more adequate analysis has been completed and considered by the appropriate bodies. Ultimately, the Governor requested the SBCC to delay the code to protect the associated industries from economic impact, with the SBCC delaying the implementation until January 1, 2011 (see [WSR 10-22-056](#)).

**Granting the Petition to Repeal**

As demonstrated by this letter, it is appropriate for this Council to grant the petition for repeal of WSR 23-21-105 and WSR 23-21-106. Given that the process, as established in statute, was not followed, stakeholders' and the public's ability to understand and respond to the cost of compliance for the proposed rules was stripped away. This Council, if it intends to proceed with these amendatory rules, must restart the process and include a complete SBEIS within new CR-102 filings.

Given that repeal of these rules would remove the amendments intended to address legal uncertainty stemming from the decision in California Restaurant Association v. City of Berkeley by the Ninth Circuit Court of Appeals, this council should also consider immediate extension of the adoption date for the 2021 codes or repeal of the EPCA preempted 2021 WSEC Residential and Commercial (see [WSR 23-02-060](#) and [WSR 22-14-091](#)).

Thank you for your consideration.

Sincerely,



Ty Jennings, Master Code Professional  
Building Codes Specialist  
Cascade Natural Gas Corporation