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7 **BEFORE THE STATE OF WASHINGTON**  
8 **ENERGY FACILITY SITE EVALUATION COUNCIL**

9 In the Matter of  
10 Application No. 2003-01

11 SAGEBRUSH POWER PARTNERS,  
12 LLC,

13  
14 KITTITAS VALLEY WIND POWER  
15 PROJECT  
16

PREHEARING ORDER NO. 5  
COUNCIL ORDER NO. 783

DECISION OF THE ENERGY  
FACILITY SITE EVALUATION  
COUNCIL IN RESPONSE TO  
INTERVENOR F. STEVEN  
LATHROP'S MOTION TO  
DISQUALIFY THE DEPARTMENT  
OF NATURAL RESOURCES AND  
THE DEPARTMENT OF  
COMMUNITY, TRADE AND  
ECONOMIC DEVELOPMENT

17  
18 **I. INTRODUCTION**

19 Intervenor F. Steven Lathrop (the moving party) seeks to disqualify Energy Facility  
20 Site Evaluation Council members Richard Fryhling and Tony Ifie and the Departments of  
21 Community, Trade and Economic Development (CTED) and Natural Resources (DNR) from  
22 participation in this matter.<sup>1</sup> The Energy Facility Site Evaluation Council issues this decision  
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24 <sup>1</sup> This matter is a proceeding to consider Sagebrush Power Partners' application No. 2003-01 to construct  
25 and operate the Kittitas Valley Wind Power Project, an approximately 182-megawatt wind turbine electrical  
26 generation facility. Parties to this proceeding are: Sagebrush Power Partners, L.L.C. (represented by Darrel  
Peeples); Counsel for the Environment Michael Lufkin; the Department of Community, Trade and Economic  
Development; Kittitas County (represented by James L. Hurson); Renewable Northwest Project (represented by  
Susan Elizabeth Drummond); Phoenix Economic Development Group; Sierra Club Cascade Chapter; Residents

1 in response to the portion of the motion seeking to disqualify CTED and DNR. The portions of  
2 the motion seeking to disqualify Councilmembers Tony Ifie and Richard Fryhling are  
3 addressed in separate decisions.

## 4 II. FINDINGS OF FACT

### 5 A. The Energy Facility Site Evaluation Council

#### 6 1. Creation and Purpose

7 The Energy Facility Site Evaluation Council (the Council) was created in 1970 to  
8 provide “one stop” service in the siting of power plants, rather than having the various pieces  
9 of a siting decision spread among a multiplicity of state agencies and local governments. 1970  
10 Wash. Laws 1<sup>st</sup> ex. sess. §45. The legislature intended to integrate the administrative and  
11 technical resources of state government for the review, certification, and monitoring of the  
12 siting, construction, and operation of power plants. John A. Granger and Kenneth R. Wise, A  
13 Critique of One-Stop Siting in Washington: Streamlining Review Without Compromising  
14 Effectiveness, 10 Environmental Law 457 (1980).

#### 15 2. Membership

16 The Council consists of representatives from a variety of state agencies and local  
17 governments. There are six fixed members and a varying number of additional members  
18 appointed when their appointing entities’ interests are affected by a proposed project.

19 The six fixed members are a chair appointed by the Governor and representatives of the  
20 Departments of Community, Trade and Economic Development; Ecology; Fish and Wildlife;  
21 and Natural Resources; and the Utilities and Transportation Commission. RCW  
22 80.50.030(2)(b) and (3)(a).

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24 Opposed to Kittitas Turbines (ROKT) (represented by James C. Carmody); F. Steven Lathrop (represented by Jeff  
Slothower); and Chris Hall.

25 Responses to F. Steven Lathrop’s motion were timely filed with the Council by Sagebrush Power  
26 Partners L.L.C. (the applicant) and intervenor Renewable Northwest Project and untimely filed by Kittitas  
County. A reply to the responses of Sagebrush Power Partners L.L.C. and Renewable Northwest Project was  
timely filed by F. Steven Lathrop.

1 Additional members appointed on a case-by-case basis include representatives of local  
2 governments and, possibly, four state agencies. The four state agencies that may, at their  
3 discretion, appoint members to consider project applications are the Departments of  
4 Agriculture; Health; Transportation; and the Military Department. RCW 80.50.030(3)(b).  
5 Counties, cities, and port districts appoint Council members when a project is proposed within  
6 their boundaries. RCW 80.50.030(4) – (6).

7 By statute, the Council consists of agency representatives and not of the agencies  
8 themselves. RCW 80.50.030(3). The Council’s WAC 463-30-050 underscores this principle:

9 All state agencies having members on the council are deemed to be parties to  
10 any adjudicative proceedings before the council. For purposes of any  
11 adjudicative proceeding, however, the agency representative on the council  
12 shall be deemed to be a member of the council and not a member of the agency.  
13 It shall be proper for the agency representative on the council to communicate  
14 with employees of the represented agency, excepting those agency employees  
15 who have participated in the proceeding in any manner or who are otherwise  
16 disqualified by RCW 34.05.455.<sup>2</sup>

17 The Council is not a consortium of state agencies. It is a stand-alone entity comprised  
18 of the appointees of the governor, state agencies and local governments.

### 19 **3. Funding**

20 The Council is totally fee funded. Applicants and permits holders are required  
21 to pay the Council’s reasonable and necessary costs, including councilmembers’  
22 salaries and expenses, staff salaries, and overhead. RCW 80.50.071 and RCW  
23 80.50.175. Actual expenditures are dependent on the number of applications and  
24 operating sites.

## 25 **B. The Department of Community, Trade, and Economic Development**

### 26 **1. Mission**

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<sup>2</sup> Emphasis added to the original.

1 The Department of Community, Trade, and Economic Development (CTED)  
2 implements a wide variety of programs in three major subject areas:

- 3 • Trade – CTED represents the state in trade activities with other states and nations.
- 4 • Community Development – CTED provides guidance, technical assistance, and  
5 financial assistance to Washington’s cities and counties in the areas of housing,  
6 public works, growth management, and social programs.
- 7 • Economic Development – CTED provides guidance, and technical and financial  
8 assistance to economic development agencies, as well as approved individual  
9 developments.

## 10 **2. CTED’s Energy Division Has Appeared in Support of the Proposed Project**

11 One of CTED’s many programs is its Energy Division. In accordance with its statutory  
12 mandate, the Energy Division advises the governor and legislature on energy related matters  
13 and performs other energy-related functions such as coordination of the state energy strategy.  
14 RCW 43.21F.045; RCW 43.330.904.

15 The legislature has provided statutory direction to the Energy Division through  
16 Washington’s energy policy, which states in pertinent part that “[t]he development and use of a  
17 diverse array of energy resources with emphasis on renewable energy resources shall be  
18 encouraged....” RCW 43.21F.015(1).

19 CTED’s Energy Division has appeared in this proceeding in support of the proposed  
20 project:

21 CTED Energy Division supports the Sagebrush Power Partners, LLC’s  
22 [a]pplication ... as consistent with state energy policy that is to encourage  
23 renewable energy resources according to the state energy strategy and RCW  
43.21F.015(1).<sup>3</sup>

## 24 **C. The Department of Natural Resources**

### 25 **1. Mission**

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26 <sup>3</sup> Notice of Appearance; Notice of Intention to Participate as Intervenor and Preliminary Statement of  
Issues by Washington State Department of Community, Trade & Economic Development.

1 The Department of Natural Resources (DNR) has a variety of functions. In addition to  
2 regulating forest practices and performing wild land fire suppression statewide, DNR manages  
3 3 million acres of uplands and 2.6 million acres of aquatic lands on behalf of the citizens of the  
4 state. The 3 million acres of uplands were granted to the state in Washington’s Enabling Act,  
5 and are held in trust pursuant to federal law and the Washington Constitution. 25 Stat. 676  
6 (1889); Wash. Const. art. 16. The legislature has authorized DNR to lease trust land for a  
7 variety of purposes. RCW 79.01.242. As a matter of federal and state law, income from trust  
8 land leases benefits trust beneficiaries such as the K-12 school system.

9 **2. The Common School Trust, DNR’s Budget, and the Sagebrush Power**  
10 **Partners Lease.**

11 DNR’s current biennial state funded operating budget is \$223 million. 2003 Wash.  
12 Laws, 1<sup>st</sup> Sp. Sess., ch. 25, Sec. 308. In fiscal year 2002, DNR received lease revenues of  
13 \$37.2 million.

14 In 2003, DNR leased trust land to Sagebrush Power Partners for the Kittitas Valley  
15 Wind Power Project. Since its inception, this lease has generated approximately \$28,000 in  
16 income for the common school (K-12) trust managed by DNR. According to DNR’s 2002  
17 Annual Report, the total revenue generated by DNR and directed into the common school trust  
18 account was \$67.6 million. Seventy-five percent of this money goes directly into the Common  
19 School Construction Fund, which in accordance with the state constitution, is to be used  
20 “exclusively for the purpose of financing the construction of facilities for the common  
21 schools.” Wash. Const. art. 9, sec. 3; RCW 28A.515.320. School construction is not the  
22 mission of DNR – that mission falls upon the state board of education. RCW 28.525.190. The  
23 other twenty-five percent earned from the leasing money goes into a Resource Management  
24 Cost Account (RMCA), which is a trust asset dedicated to the management of the trust. RCW  
25 79.64.020, -.030, -.040; AGO 1989, No. 14. DNR does not have any direct appropriation  
26

1 authority with respect to the RMCA; therefore the legislature must first appropriate such funds  
2 before the DNR is authorized to spend them for the purposes of managing the trust.

3 DNR has not appeared in this proceeding in support of the proposed project.

4 **D. The Disqualification Motion**

5 The moving party seeks to disqualify CTED on the grounds that intervention of  
6 CTED's Energy Division creates a conflict of interest and demonstrates prejudice in  
7 violation of the appearance of fairness doctrine:

8 With CTED as an intervenor as well as a decision maker, there is a conflict of  
9 interest. One of the decision makers is a representative of CTED. CTED is  
10 publicly advocating the approval of this application prior to the public hearing.  
11 CTED, as an agency, has prejudged this application before the matter has come  
12 before an appropriate body for public hearing. This violates the Appearance of  
13 Fairness Doctrine and should serve as a basis for the disqualification of CTED  
14 and its designated representative from the Energy Facility Site Evaluation  
15 Council in this matter.<sup>4</sup>

16 The moving party seeks to disqualify DNR based on an alleged conflict of interest and  
17 an alleged violation of the appearance of fairness doctrine:

18 [The lease payment to DNR] not only is an actual conflict of interest in that the  
19 Department of Natural Resources has a pecuniary interest in the out come of the  
20 determination the Energy Site Evaluation Council [sic] will make but it also  
21 violated the Appearance of Fairness Doctrine.

22 The Department of Natural Resources' participation violates the second prong  
23 of the Appearance of Fairness Doctrine. The Department of Natural Resources  
24 will benefit financially if the application is approved. The Department of  
25 Natural Resources' participation as a decision maker on this application is a  
26 clear violation of the Appearance of Fairness Doctrine.<sup>5</sup>

27 **III. CONCLUSIONS OF LAW**

28 **A. The Council's Authority to Decide the Motion.**

29 The Council has the power to address motions concerning the Council's composition.  
30 RCW 80.50.030.

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31 <sup>4</sup> Declaration of Counsel for Intervenor F. Steven Lathrop, B(9).

32 <sup>5</sup> Id. at A(4) and (7).

1 **B. The Motion to Disqualify CTED and DNR is Fundamentally Flawed Because**  
2 **CTED and DNR are not Members of the Council.**

3 The motion to disqualify CTED and DNR from participation as members of the  
4 Council reflects a fundamental misunderstanding of the composition of the Council. The  
5 Council cannot disqualify CTED and DNR from a council upon which they do not, as a matter  
6 of fact and law, sit.

7 As described in Section II(A)(2) above, by statute the Council is composed of the  
8 representatives of a variety of state agencies and local governments. The Council is not  
9 composed of the agencies or local governments themselves. RCW 80.50.030(3) and (4) (“The  
10 council shall consist of the directors, administrators, or their designees, of the following ...  
11 agencies ... .”; “The ... county legislative authority ... shall appoint a member or designee as a  
12 voting member of the council.”). Moreover, the Council’s WAC 463-30-050 emphasizes that  
13 not only are the agencies and local governments themselves not members of the Council but  
14 that council members appointed by the listed agencies and local governments do not serve as  
15 representatives of their agencies. Rather, councilmembers serve as members of the Council  
16 itself as a stand-alone entity: “For purposes of any adjudicative proceeding, however, the  
17 agency representative on the council shall be deemed to be a member of the council and not a  
18 member of the agency.” WAC 463-30-050. There has been no legal challenge to this rule by  
19 the moving party.

20 Consequently, the Council cannot disqualify from participation in this matter agencies  
21 that are not council members and the moving party’s motion must be denied.

22 **C. The Appearance of Fairness Doctrine is Inapplicable to this Matter**

23 Assuming for the sake of argument that DNR and CTED are members of the Council,<sup>6</sup>  
24 the moving party’s motion to disqualify them based on the appearance of fairness doctrine

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25 <sup>6</sup> In the balance of this decision, the Council accepts, only for the sake of argument, the moving party’s  
26 assertion that CTED and DNR are members of the Council. As discussed in section III(B), the Council most  
emphatically does not believe this to be this case. However, in order to demonstrate that the moving party’s

1 must be denied because the doctrine is inapplicable. The doctrine is inapplicable for three  
2 reasons. First, the Council is not a decisionmaker within the meaning of the doctrine. Second,  
3 the matter from which the moving party seeks CTED's and DNR's disqualification is not  
4 quasi-judicial. Third, the moving party has not met his threshold burden of providing evidence  
5 of actual or potential bias. Each reason is discussed below.

6 **1. The Council is Not a Decisionmaker.**

7 The appearance of fairness doctrine applies only to quasi-judicial decisionmakers. State  
8 v. Finch, 137 Wn.2d 792, 808, 975 P.2d 967 (1999); Carrick v. Locke, 125 Wn.2d 129, 143 n.  
9 8, 882 P.2d 173 (1994); State v. Post, 118 Wn.2d 596, 618, 826 P.2d 172 (1992). The Council  
10 is not a decisionmaker with respect to certification of the Kittitas Valley Wind Power Project.  
11 The Council's role is statutorily limited to preparing reports and recommendations to the  
12 Governor. The Governor alone decides whether to authorize the project. RCW 80.50.040(8)  
13 (“[The Council] shall ... prepare written reports to the governor”) and RCW 80.50.100 (“[The  
14 Council] shall report to the governor its recommendations as to the approval or rejection of an  
15 application for certification ....”). The existence and terms of site certification are solely  
16 within the Governor's discretion and are binding only upon execution of an agreement between  
17 the Governor and the applicant. RCW 80.50.100(2). Thus, the appearance of fairness doctrine  
18 does not apply to this matter because the Council is not a decisionmaker.

19 **2. The Matter Before the Council is not Quasi-Judicial**

20 The appearance of fairness doctrine applies to administrative decisionmakers acting in  
21 a quasi-judicial capacity. Organization to Preserve Agricultural Lands v. Adams County, 128  
22 Wn.2d 869, 889, 913 P.2d 793 (1996). The Council's consideration of Sagebrush Power  
23 Partners' application is not quasi-judicial.

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motion must be denied even if one were to conclude that CTED and DNR are members of the Council, the  
Council will proceed to discuss the moving party's assertion as if it were true.



1           Several factors are relevant in determining whether an administrative action is quasi-  
2 judicial: (1) whether a court has been charged with making the agency’s decision; (2) whether  
3 the action is a type which courts historically have performed; (3) whether the action involves  
4 the application of existing law to past or present facts for the purpose of declaring or enforcing  
5 liability; and (4) whether the action resembles the ordinary business of courts as opposed to  
6 that of legislators or administrators. WPEA v. PRB, 91 Wn.App. 640, 647, 959 P.2d 143  
7 (1998).

8           In determining whether a particular matter is quasi-judicial, the Supreme Court has  
9 directed that a flexible approach be taken, giving ample consideration to the functions being  
10 performed by the entity in question. Raynes v. City of Leavenworth, 118 Wn.2d 237, 243, 821  
11 P.2d 1204 (1992); Taggart v. State, 118 Wn.2d 195, 204, 822 P.2d 243 (1992).

12           The moving party has asked that CTED and DNR be disqualified from participation in  
13 “this matter” and “this application.” Declaration of Counsel for Intervenor F. Steven Lathrop,  
14 B(9) and A(7). The “matter” and the “application” before the Council are the application of  
15 Sagebrush Power Partners, L.L.C. to construct and operate the Kittitas Valley Wind Power  
16 Project. The legislature has established a multi-faceted process by which the Council develops  
17 a recommendation to the Governor regarding such “matters” and “applications.” The Council  
18 develops and applies environmental conditions regarding the type, design, location,  
19 construction, and operational conditions of projects. RCW 80.50.040(2). The Council obtains  
20 and evaluates independent scientific and technical studies of proposed projects. RCW  
21 80.50.040(6). The Council develops project-specific siting criteria and drafts certification  
22 agreements for proposal to the Governor. RCW 80.50.040(8). The Council administers air  
23 quality and water quality programs with respect to specific projects and issues air quality and  
24 water quality permits to project operators. RCW 70.94.422(2) and RCW 90.48.262(2);  
25 Chapter 463-38 WAC; Chapter 463-39 WAC. The Council provides for on-going monitoring  
26 of projects to ensure compliance with site certification agreements. RCW 80.50.040(9). The

1 Council holds public information and land use hearings, and such other hearings as it deems  
2 appropriate, along with various other public meetings as part of environmental permitting and  
3 in compliance with the State Environmental Policy Act and the Open Public Meetings Act.  
4 RCW 80.50.090.

5 According to the WPEA v. PRB test, these activities are not quasi-judicial. 91 Wn.  
6 App. 640, 647, 959 P.2d 143 (1998). Courts have never been charged with performing any of  
7 the activities related to the Council's consideration of this matter, nor are these actions typical  
8 of those performed by the Courts. Courts do not prepare and implement environmental  
9 protection programs or issue air or water quality permits. They do not hold public hearings  
10 and take public testimony on land use and other issues. They do not develop on-going  
11 monitoring plans for energy plants to assure compliance with contracts between the Governor  
12 and a project operator. They do not marshal large amounts of technical information and make  
13 recommendations to the Governor concerning the environmental, operational and contractual  
14 conditions for construction and operation of large energy plants.

15 Similarly, this matter does not involve the application of existing laws to facts for the  
16 purpose of declaring or enforcing liability. This matter is in many ways analogous to the  
17 permitting activities performed by the Departments of Ecology and Fish and Wildlife. The  
18 Council's activities do not resemble the ordinary business of courts. They represent the  
19 ordinary business of the executive branch performing administrative functions. While as part  
20 of the lengthy process of considering a project application the Council is required to hold one  
21 adjudicative hearing, the fact that one adjudicative proceeding is held as part of the Council's  
22 larger process does not make the administrative matter quasi-judicial. Harris v. Hornbaker, 98  
23 Wn.2d 650, 660, 658 P.2d 1219 (1983).

24 Thus, again, the appearance of fairness doctrine does not apply to this matter because it  
25 is not quasi-judicial.

1           **3. The Moving Party Has Not Met His Threshold Burden of Providing**  
2           **Evidence of Actual or Potential Bias.**

3           Even if one were to conclude that the Council is a decisionmaker (section III(C)(1)  
4 above) and that the Council is acting in a quasi-judicial capacity (section III(C)(2) above), the  
5 appearance of fairness doctrine does not apply to the Council's recommendation to the  
6 Governor because the moving party has not met his threshold burden as articulated by the  
7 Supreme Court. Before the appearance of fairness doctrine will be applied, the moving party  
8 must provide evidence of the decisionmaker's actual or potential bias. Organization to  
9 Preserve Agricultural Lands v. Adams County, 128 Wn.2d 869, 890, 913 P.2d 793 (1996)  
10 (citing State v. Post, 118 Wn.2d 596, 618, 826 P.2d 172 (1992)). Mere speculation is not  
11 enough to meet this burden. In re Haynes, 100 Wn. App. 366, 377 n.23, 996 P.2d 637 (2000).

12           The moving party has made two allegations as the basis of his motion – first, that a  
13 conflict of interest has been created by the participation of the CTED Energy Division and  
14 DNR's receipt of lease payments, and second, that CTED has prejudged this matter. Neither  
15 allegation is sufficient to meet his burden.

16           The moving party's skeletal allegation that intervention of the CTED Energy Division  
17 creates a conflict of interest in violation of the doctrine cannot suffice to meet his threshold  
18 burden of providing evidence of actual or potential bias. The moving party has done nothing  
19 more than point out that the legislature has combined two functions within CTED: operation  
20 of the CTED Energy Division and membership on the Council. However, mere combination  
21 of functions within an agency does not violate the appearance of fairness doctrine.  
22 Washington State Medical Disciplinary Board v. Johnston, 99 Wn.2d 466, 479, 663 P.2d 457  
23 (1983); Smith v. Mount, 45 Wash. App. 623, 626 – 627, 726 P.2d 474 (1986); see also RCW  
24 34.05.458. Similarly, the moving party has noted that DNR is the legislatively established  
25 leasing agent for state-owned trust land and also a legislatively designated member of the  
26 Council. As discussed in section II(C)(2) above, disposition of the lease payments is not

1 under DNR’s control and DNR obtains no tangible benefit from them. Because the moving  
2 party has not provided evidence of actual or potential bias with respect to the combined  
3 functions within either CTED or DNR, he has not met his threshold burden.

4 Second, as a matter of law, the meaning of the term “prejudgment” in this context is  
5 the prejudgment of facts about parties, not prejudgment of laws such as the state energy  
6 policy. Organization to Preserve Agricultural Lands v. Adams County, 128 Wn.2d 869, 890,  
7 913 P.2d 793 (1996) (citing Buell v. City of Bremerton, 80 Wn.2d 518, 524, 495 P.2d 1358  
8 (1972)). Prejudgment is distinguishable from the policy leanings of a decisionmaker.  
9 Organization to Preserve Agricultural Lands v. Adams County, 128 Wn.2d 869, 890, 913 P.2d  
10 793 (1996). Prejudgment is also distinguishable from a decisionmaker’s considering and  
11 applying the pertinent laws in a particular case. Skold v. Johnson, 29 Wn. App. 541, 558, 630  
12 P.2d 456 (1981). The moving party has provided no evidence that CTED has actually or  
13 potentially prejudged any facts about the parties. Pointing to the Energy Division’s invocation  
14 of the statutory state energy policy does not meet the requisite test. Consequently, again, the  
15 moving party has not produced evidence of prejudgment that would suffice to invoke the  
16 appearance of fairness doctrine.

17 Accordingly, because the moving party has not met his threshold burden, the  
18 appearance of fairness doctrine does not apply to this matter.

19 **D. The Appearance of Fairness Doctrine has not been Violated.**

20 In preceding sections of this decision, the Council has demonstrated that DNR and  
21 CTED are not members of the Council (section III(B) above) and the appearance of fairness  
22 doctrine is inapplicable to this matter because the Council is not a decisionmaker within the  
23 meaning of the doctrine, the matter before the Council is not quasi-judicial, and the moving  
24 party has not met his threshold burden of providing evidence of bias (section III(C) above). In  
25 this section III(D) the Council explains that even if CTED and DNR are members of the  
26

1 Council and even if the appearance of fairness doctrine were applicable, it has not been  
2 violated.

3 **1. Overview of the Appearance of Fairness Doctrine.**

4 Quasi-judicial action will withstand an appearance of fairness challenge if a reasonably  
5 prudent and disinterested person would conclude that that all parties obtained a fair and neutral  
6 hearing. Id. (citing Washington Medical Disciplinary Board v. Johnston, 99 Wn.2d 466, 478,  
7 663 P.2d 457 (1983)). Application of this test requires that the reasonably prudent and  
8 disinterested person know and understand all of the relevant facts. Smith v. Behr Process  
9 Corporation, 113 Wn. App. 306, 340, 54 P.3d 665 (2002).

10 Despite the name of the doctrine, mere “appearance” of unfairness is insufficient to  
11 sustain an appearance of fairness challenge. State v. Carter, 77 Wn. App. 8, 11, 888 P.2d 1230  
12 (1995). The moving party must provide evidence of the decision maker’s actual or potential  
13 bias. Organization to Preserve Agricultural Lands v. Adams County, 128 Wn.2d 869, 890, 913  
14 P.2d 793 (1996) (citing State v. Post, 118 Wn.2d 596, 618, 826 P.2d 172 (1992)). Mere  
15 speculation is not enough to meet this burden. In re Haynes, 100 Wn. App. 366, 377 n.23, 996  
16 P.2d 637 (2000).

17 **2. Application of the Doctrine to CTED and DNR**

18 **a. Entire Agencies Cannot be Disqualified Under the Doctrine.**

19 The appearance of fairness doctrine does not allow the disqualification of an entire  
20 agency. See Grandmaster Sheng-Yen Lu v. King County, 110 Wn. App. 92, 111, 38 P.3d  
21 1040 (2002). See also RCW 34.05.425 (3) and (7) (APA authorizes disqualification of  
22 individual presiding officers, not entire agencies). On this basis alone, the moving party’s  
23 motion seeking the disqualification of CTED and DNR in their entirety must be denied.

24 **b. The Legislature Requires DNR’s and CTED’s Participation on the**  
25 **Council.**

1 Even if entire agencies could be disqualified under the appearance of fairness doctrine,  
2 the statutes authorizing the Council, DNR, and CTED demonstrate that the legislature does  
3 not intend the doctrine to require the disqualification of the agencies and local governments  
4 selected for membership by the legislature in RCW 80.50.030. Performing such a statutory  
5 analysis is essential because the appearance of fairness doctrine is a common law doctrine that  
6 is superseded by state statutes. Bellevue v. King County Boundary Review Board, 90 Wn.2d  
7 856, 863, 586 P.2d 470 (1978); Swoboda v. LaConner, 97 Wn. App. 613, 629, 987 P.2d 103  
8 (1999) (doctrine is a common law doctrine); RCW 4.04.010 (common law shall be the rule of  
9 decision unless incompatible with state law). In performing its statutory analysis, the Council  
10 is mindful that statutes must be construed as a whole, with all provisions being considered in  
11 relation to each other and, if possible, harmonized to give effect to the intent and purpose of  
12 the legislature. Tommy P. v. Board of County Commissioners of Spokane County, 97 Wn.2d  
13 385, 391 - 392, 645 P.2d 697 (1982).

14 First, the legislature has selected agencies and local governments for membership on  
15 the Council because they have expertise and a statutory stake in the outcome of the Council's  
16 process. RCW 80.50.030 and section II(A)(2) above.<sup>7</sup> The legislature did not select DSHS,  
17 the Department of Corrections, or the State Actuary for membership on the Council because  
18 those agencies have neither expertise nor a statutory stake in the outcome of the decision to  
19 site an energy facility. Rather, the legislature integrated the existing administrative and  
20 technical expertise of state and local governments for the siting of major power plants and  
21 selected the Council's members accordingly. Sections II(A)(1) and (2) above. The fixed

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23 <sup>7</sup> This is true whether one accepts the moving party's assertion that agencies such as CTED and DNR are  
24 members of the Council or whether one agrees with the Council that it is composed of agency appointees who  
25 serve as members of the Council and not as agency representatives. The overarching theme of the legislature's  
26 statutory directive is that agencies with expertise and a stake in the outcome either appoint representatives to the  
Council or serve on the Council themselves. If the former is the case, then additional safety is provided by the  
appointees' status as members of the Council and not as agency representatives. WAC 463-30-050. In either  
case, neither expertise nor a statutory stake in the outcome can provide a basis for disqualification under the  
appearance of fairness doctrine.

1 members of the Council have pre-existing statutory roles in environmental protection,  
2 community and economic development, energy, and state trust land management. RCW  
3 80.50.030(2)(b) and (3)(a). The Council’s discretionary member agencies join the Council  
4 only when their interests are affected and local governments join only when a project  
5 application is within their jurisdictional boundaries. RCW 80.50.030(3)(b); RCW  
6 80.50.030(4) – (6). The potential for CTED to intervene in support of the state energy policy  
7 or for DNR to lease land to a project developer is part and parcel of the overall statutory  
8 regime under which the legislature intends the Council to work.

9 This combination of functions within agencies is not uncommon. For example, DNR  
10 regulates forest practices on both private forest land and on DNR-managed forest land. RCW  
11 76.09.140, RCW 76.09.150. L & I protects worker safety not only in private businesses but  
12 also in L & I’s own offices. Chapter 49.17 RCW. The legislature is not required to divide the  
13 government’s tasks into a multiplicity of single-function entities. The legislature can, and  
14 does, group functions within agencies by subject matter for a variety of reasons, including  
15 efficiency and the need for coherent and uniform state policies. Doing so does not create an  
16 impermissible conflict of interest nor does it create a violation of the common law appearance  
17 of fairness doctrine. As stated above, combination of functions within an agency does not  
18 violate the appearance of fairness doctrine. Washington State Medical Disciplinary Board v.  
19 Johnston, 99 Wn.2d 466, 479, 663 P.2d 457 (1983); Smith v. Mount, 45 Wn. App. 623, 626 –  
20 627, 726 P.2d 474 (1986); see also RCW 34.05.458. The legislature is presumed to know the  
21 statutory duties of the entities it placed on the Council. Little v. Little, 96 Wn.2d 183, 634  
22 P.2d 498 (1981). The legislature’s decision that the public’s interest is best served by having  
23 agencies with expertise and a stake in the outcome serve on the Council must be respected as  
24 a matter of constitutional separation of powers. See Magula v. Department of Labor and  
25 Industries, 116 Wn.App. 966, 973, 69 P.3d 354 (2003); Hillis v. Department of Ecology, 131  
26 Wn.2d 373, 389, 932 P.2d 139 (1997).

1 The moving party makes much of the fact that the project proponent has paid DNR  
2 \$28,000 in lease payments. However, this amount is de minimus in comparison with DNR's  
3 biennial budget (\$223 million), the revenue DNR generated for the common school trust  
4 account (\$67.5 million), and the lease revenues DNR received in fiscal year 2002 (\$37.2  
5 million). The Council simply does not agree with the moving party that receipt of \$28,000 in  
6 light of DNR's multimillion dollar budget, trust revenues, and lease revenues demonstrates  
7 actual or potential bias. Moreover, as a matter of federal and state law, the lease revenues  
8 received by DNR are trust funds that belong, not to DNR, but to the trust beneficiaries.  
9 Equally significant, disposition of the lease payments is not under DNR's control and  
10 provides no tangible benefit to either DNR or its appointee to the Council. See section  
11 II(C)(1) and (2) above. There is no evidence that the legislature intended the Council to be  
12 deprived of DNR membership when the trust beneficiaries' interests are most at stake, i.e.  
13 when trust land is being proposed for use as the site of a major energy facility. To the  
14 contrary, that is exactly the situation in which DNR representation on the Council is most  
15 crucial. Statutes must be construed to avoid unlikely, absurd or strained consequences and the  
16 Council does not conclude that the legislature intended DNR to disqualify itself when use of  
17 state trust land is proposed as the site of an energy facility. State v. Stannard, 109 Wn.2d 29,  
18 742 P.2d 1244 (1987).

19 Moreover, the legislature has made it clear that receipt of fees or other monies from  
20 project applicants is an appropriate part of the Council's work. The entire Council is a fee-  
21 funded entity. RCW 80.50.071, RCW 80.50.175, and section II(A)(3) above. Council  
22 members' salaries and agency expenditures are entirely dependent on fees paid by applicants  
23 and permit holders. Id. Similarly, the legislature has required that on-site inspections be  
24 performed by other state agencies. Because such inspections typically evaluate compliance  
25 with the environmental provisions of site certification agreements, it is the Departments of  
26 Ecology and Fish and Wildlife that frequently receive funds. RCW 80.50.040(9). Both



1 agencies are members of the Council. To adopt the moving party’s reasoning, the entire  
2 Council – with the exception of its Chair - would have to disqualify itself, something that the  
3 legislature did not intend to occur.

4 Finally, with respect to the allegation that CTED has prejudged this matter, as  
5 discussed above, the meaning of the term “prejudgment” in this context is the prejudgment of  
6 facts about parties, not prejudgment of laws such as the state energy policy. Organization to  
7 Preserve Agricultural Lands v. Adams County, 128 Wn.2d 869, 890, 913 P.2d 793 (1996)  
8 (citing Buell v. City of Bremerton, 80 Wn.2d 518, 524, 495 P.2d 1358 (1972)). The record is  
9 devoid of evidence that CTED has prejudged any facts about the parties.

10 Consequently, based on the relevant statutes and caselaw, the Council concludes that  
11 there is no evidence of actual or potential bias. A reasonably prudent and disinterested person  
12 who knows and understands the legislatively mandated duties of the Council, DNR, and  
13 CTED, and the facts concerning this matter, would conclude that participation of DNR and  
14 CTED does not violate the appearance of fairness doctrine.

15 **E. There is No Actual Conflict of Interest Separate from the Appearance of Fairness**  
16 **Doctrine.**

17 The moving party may also be alleging that DNR and CTED must be disqualified,  
18 separate from the appearance of fairness doctrine, for an alleged actual conflict of interest.  
19 Declaration of Counsel for Intervenor F. Steven Lathrop, A(4) and (7), B(9). There is  
20 ambiguity on this point because the moving party does not identify the legal basis for his  
21 allegation nor does he discuss it in either his motion or his reply. To the degree that such  
22 unsupported allegation has not been waived by the moving party, the Council concludes that  
23 its appearance of fairness doctrine analysis applies with equal validity to an actual conflict of  
24 interest challenge. The APA does not authorize the removal of entire agencies. RCW  
25 34.05.425. Moreover, the statutory authorization for the Council, DNR, and CTED, require  
26 DNR and CTED to participate in this matter.

1  
2 **IV. DECISION**

3 Based on the foregoing, and upon consideration of the memoranda of the parties to this  
4 proceeding, the Council denies the motion of Intervenor F. Steven Lathrop to disqualify  
5 CTED and DNR from membership on the Energy Facility Site Evaluation Council. This  
6 decision may be appealed to the Council manager within 10 calendar days of the date the  
7 decision is mailed.

8 DATED this \_\_\_\_\_ day of October, 2003.

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11 \_\_\_\_\_  
12 Jim Luce, Chair

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Charles Carelli

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14 \_\_\_\_\_  
15 Tony Ifie

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Richard Fryhling

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17 \_\_\_\_\_  
18 Tim Sweeney

\_\_\_\_\_

Chris Smith Towne

19 \_\_\_\_\_  
20 Patti Johnson  
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