

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of
Application No. 2009-01

of

WHISTLING RIDGE ENERGY PROJECT LLC
for

WHISTLING RIDGE ENERGY PROJECT

PREHEARING ORDER NO. 9
COUNCIL ORDER NO. 853

Prehearing Order on APA-SEPA process
interface and Timing of the Adjudicative
Hearing

Procedural Setting:

Intervenors Save Our Scenic Area (SOSA) and Friends of the Columbia Gorge (“Friends” in this order) argued two matters during a prehearing conference in this matter on September 22, 2010. Administrative Law Judge C. Robert Wallis has referred the issues to the Council for decision.¹

Issues Presented:

The issues, and the answers we reach, are as follows:

- Are the SEPA process and the Council’s adjudicative process inextricably linked so as to preclude one from going forward without the other being completed? **No.**
- Must the Council, in its adjudicative hearing, receive evidence about the merits of the parallel SEPA process and its conclusions? **No.**
- Is Applicant involvement in preparation of a draft EIS inherently suspect? **No.**
- Must a draft final EIS be made available prior to issuance of the final EIS? **No.**
- Must the Council consider the final EIS in reaching a decision on the merits of the application? **Yes.** The Council may not decide the application until at least five days after it receives the final EIS, as required by SEPA rules.
- Must the Council delay the adjudication until issuance of a final EIS by the Responsible Official? **No.**

¹ Participants in the conference are as noted in Order No. 852, served October 1, 2010. The Council considers the transcript of the conference, the Intervenors’ memorandum of authorities and objection to Order 851, the prior prehearing orders, and the sources cited in this order.

SEPA – APA Process Interface.

Two legally separate processes are involved in reaching a Council recommendation to the Governor. The first is the process of our adjudicative hearing, required by RCW 80.50.090 and governed by the Administrative Procedure Act, Chapter 34.05 RCW. The second is our review of environmental factors, required under and governed by the Washington State Environmental Policy Act (SEPA), Chapter 43.21C RCW.

SOSA and Friends (“Intervenors” in this order) continue to raise matters resolved in prior prehearing decisions. This order appears necessary to finally determine the issues.

Intervenors’ arguments pose the question: Must the Council *in its Adjudicative process*, consider evidence or argument aiming to discredit, negate, challenge, examine, support, enhance or inquire into the SEPA process, or the information and comments that inform the SEPA process, or supplement the SEPA record through which the Council reaches and considers the Final Environmental Impact Statement (FEIS)? The answer, expressed in prehearing orders number 6 and 7², is “No.”

Separate statutory bases for separate processes. SEPA itself defines the process for conducting a SEPA review. Chapter 43.21C RCW; Chapter 197-11 WAC. The process involves: 1) scoping of the issues; 2) preparing and issuing a draft EIS; 3) receiving oral and written comment during a defined comment period; 4) responding to the comments; and 5) preparing and issuing a final EIS.

Agencies must follow this procedure. A supplemental draft EIS may be required if comments disclose that new or increased significant environmental impacts are likely, or significant issues/impacts were missed in the draft EIS, or that additional alternatives or mitigation should be evaluated. *See*, WAC 197-11-600(4) (d). The Council’s responsible SEPA official is Mr. Al Wright, the Council’s Managing Director, and he alone will make this decision after considering this information and whether SEPA goals would be better served with an additional draft EIS and comment period.

The Council is familiar with, and is following, the required processes in this matter. The Washington State Supreme Court recently sustained unanimously certain of the Council’s processes against challenges alleging improprieties.³

² The early prehearing orders apparently assumed erroneously that parties shared the Council’s awareness of SEPA and its requirements as a context for the orders’ descriptions of Council actions.

³ *See, Residents Opposed to Kittitas Turbines, et al v. EFSEC*, 165 Wn.2d 275, 197 P.3d 1153 (2008).

May the Council allow examination of SEPA Preparers and the SEPA process? No.

WAC 197-11-680(3) (a) (i) precludes an agency from administrative review of its own SEPA process unless it has promulgated a rule specifying the process for review. The Council's SEPA process does not provide for administrative review of its SEPA process or products. Therefore, such inquiry will not be allowed.

Is Applicant involvement in drafting the DEIS improper? No. Intervenors argue that because the DEIS was prepared by the Applicant or a consultant in the Applicant's employ, the DEIS is suspect and the Council must allow administrative review to test the validity of the EIS. Applicant involvement in drafting the EIS, a process explicitly allowed by law,⁴ is not inherently suspect. Intervenors' argument is not well founded and is denied.

May the Council allow access to EIS documents concurrently with the adjudication? Yes.

Prior prehearing orders have indicated correctly that the EFSEC responsible official has in one or more earlier proceedings allowed access to an internal draft of the final EIS at the time of the adjudicative hearing. The Council has referred to this document informally as a "draft final EIS." This document is not officially a part of the SEPA process but is merely a decision to allow the public to view certain work completed on the EIS at the time of the adjudication. EFSEC's responsible official will determine whether to make available a draft of the final EIS if it is available at an appropriate time.

Does the Council's process comply with law? Yes. We agree with the conclusions of the Administrative Law Judge in Prehearing Order No. 6, in clarifying Order No. 4, and denying Intervenors' suggestion to combine the SEPA and APA process,

[S]ome parties appear to assume that the EIS, its development, and its conclusions are subject to discovery and litigation in the adjudication Because the EIS is prepared for and by the agency making the decision, exhaustive review of the document . . . appears, facially at least, to be inconsistent with the adjudicative concept that the applicant has the burden of supporting its proposal. . . . [I]nclusion in the record has been without objection and without examination, as the result of the SEPA process. . . . there is no apparent statutory or decisional bridge that would countenance the process that SOSA suggests. The purpose of the environmental impact statement process is to inform the agency. Parties to the adjudication have the opportunity to inform the agency through their own presentations. The law requires only that the agency's responsible official issue a final EIS before the agency makes a final decision . . .

⁴ WAC 197-11-420 (2) states that the lead agency may have an EIS prepared by agency staff, an applicant or its agent, or by an outside consultant retained by either an applicant or the lead agency. The Council parallels this rule in WAC 463-47-090(2), which states that the Council may require the applicant to prepare the environmental documents with agency supervision.

Decision on SEPA-APA Interface. We affirm the rulings of the Administrative Law Judge that the EFSEC adjudicative process is *not* a venue for reviewing or supplementing the SEPA process.⁵ The SEPA laws and regulations provide the remedy to address flaws in the SEPA process.⁶ Any language in prior prehearing orders that may be interpreted to a contrary effect is superseded.

Timing of the EIS and the Adjudication.

Must the final EIS be issued before the adjudicative hearing, or before Intervenors file testimony? No.⁷ Intervenors object to allowing the FEIS or a draft of the EIS to be filed after the date for pre-filing testimony, citing *West Main Associates v. Bellevue*, 49 Wn.App. 513, 517-18, 742 P.2d 1266 (1987). There, the issue was whether an opponent's failure to file a SEPA appeal within ten days under the code of the city of Bellevue barred the city council from further consideration of SEPA in reviewing the development issue before the city. The decision says, at p. 518:

A 'major purpose' of SEPA is to "combine environmental considerations with public decisions". RCW 43.21C.074 (1). Consistent with this purpose, "SEPA mandates governmental bodies to consider the total environmental and ecological factors to the fullest in deciding major matters."

We agree with the cited passage. However, it does not address the question before us. As we note below, the Council will fully consider the total environmental and ecological factors when it formulates any recommendation it may make to the Governor.

In our review of the applicable law,⁸ we find no requirement that adjudication wait until any particular point in the SEPA process is reached. There is no time limit⁹ for preparing the EIS.

⁵ A state adjudicative proceeding to satisfy a state requirement has no relationship with a requirement that the Bonneville Power Administration comply with the federal National Environmental Policy Act, or NEPA, and the Council does not envision any situation in which the NEPA process would be affected by or relevant to this adjudication.

⁶ As the administrative law judge indicated in earlier prehearing orders, the Council has included SEPA documents in the adjudicative record. SOSA notes in an unrelated October 8, filing in this matter that the Council so ruled in Orders 686 and 688 (both entered in 1995). Both of the cited Council orders rule that the SEPA and APA processes are separate and that SEPA review is excluded from the adjudicative hearing.

⁷ Intervenors have expressed agreement with the time sequence within the adjudication (the length of time between filing deadlines), acknowledging that it provides adequate time for preparation. However, in seeking to overturn the ruling of the Administrative Law Judge,⁷ they argue that it is error to proceed with the adjudication before issuance of the final EIS.

⁸ Mr. Kahn and Mr. Baker join Mr. Aramburu in urging a requirement that we issue a final EIS document before proceeding with the adjudication, citing WAC 463-47-110. That rule states a policy to avoid or mitigate adverse environmental impacts. We affirm the applicability of the rule to our processes, but nothing in the rule is inconsistent with our actions or requires the result urged.

⁹ WAC 197-11-460(6). Compare WAC 197-11-055(3) for adjudications in which agency staff takes a position.

WAC 197-11-055(2) (b) allows agencies to identify the times at which the environmental review shall be conducted on a case-by-case basis, which the Council is doing in this proceeding.

Are parties to the adjudication entitled to early issuance of a final EIS? No. The Council faces a one-year statutory time limit from receipt of an application until making a recommendation to the Governor. Although the Applicant has already waived a one-year deadline, RCW 80.50 100(1), the law is a direction to the Council to avoid *unnecessary* delay.

Intervenors urge delaying the hearing. They request that the final EIS be issued before they complete their testimony and exhibits so they will have the benefit of any information that the final EIS might contain. We find no statute, rule, or decision requiring issuance of a final EIS at any time other than within the limits specified in the SEPA rules. At the time of the hearing, the draft EIS and the comments will be available. The responsible official will determine, in his discretion, whether to make available any other document. EFSEC is adhering to the SEPA requirements in its processing of this application. The Council takes seriously its SEPA obligations and will fully consider the final EIS in its deliberations.

Decision on Adjudication Timing. We reaffirm the scheduling decision made in Prehearing Order 4, which was affirmed in Orders 6 and 7, that the Council is not required to delay the adjudicative hearing until after issuance of a final EIS. The hearing is presently scheduled to begin January 5, 2011, and is estimated to continue no longer than January 15. The Council will make every effort to complete as much work as possible on the EIS prior to the adjudicative hearing, but will not delay the adjudicative hearing until after the responsible official issues a final EIS. Any language in prior prehearing orders that may be interpreted to a contrary effect than specified in this order is specifically superseded.

Dated at Olympia, Washington, and effective this 8th day of October, 2010.

WASHINGTON STATE ENERGY FACILITY SITE EVALUATION COUNCIL

/s/

James O. Luce,
Council Chair

/s/

Richard Fryhling,
Department of Commerce

/s/

Hedia Adelsman,
Department of Ecology

/s/

Dennis Moss,
Utilities and Transportation Commission

/s/

Mary McDonald,
Department of Natural Resources

/s/

Jeff Tayer,
Department of Fish and Wildlife

/s/

Judy Wilson
Skamania County

Notice to Parties:

This order shall control further proceedings in this matter. No Council review is available from this order.