

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

In re Application No. 96-1

COUNCIL ORDER NO. 699

Olympic Pipe Line Company
Cross Cascade Pipeline Project

PREHEARING CONFERENCE ORDER No. 1

Nature of the Proceeding: This matter involves an application to the Washington State Energy Facility Site Evaluation Council for certification of a proposed site in six Washington State counties for construction and operation of a pipeline for the transportation of refined petroleum products between Woodinville, King County, and Pasco, Franklin County. The Applicant, Olympic Pipe Line Company (Applicant) has requested the Energy Facility Site Evaluation Council (EFSEC or the Council) to recommend to the Governor that a Site Certification Agreement for the Cross Cascade Pipeline Project be issued to permit the construction and operation of the pipeline.

Procedural Setting: The Washington State Energy Facility Site Evaluation Council, (Council or EFSEC), convened a prehearing conference in the adjudication regarding this matter on Monday, June 24, 1996, pursuant to due and proper notice to all interested persons. The Conference was held before Chairman Fred Adair and Council members C. Robert Wallis (Utilities and Transportation Commission), Ronald Skinnerland (Dept. Of Ecology), Jo Roller (Dept. Of Fish & Wildlife), Stephanie Warden (King County) and Mack Funk (Port of Pasco).

Participants: Representatives of the statutory parties, the Applicant, and Counsel for the Environment appeared. Also in attendance were representatives of seven state agencies having membership on the Council;¹ four counties; four cities; three water districts; one Tribe; one federal agency; and seven businesses or other organizations asking the Council's permission to intervene and become parties.

Appearances were entered as follows:

Applicant	Olympic Pipe Line Company , by Joshua J. Preece and Charles R. Blumenfeld, attorneys, Seattle
Counsel for the Environment	Thomas C. Morrill and Mary E. McCrea, Asst. Attys. General, Olympia

¹ The Parks and Recreation Commission was a Council member at the time it filed its notice of participation and at the time of the prehearing conference.

State Agencies	<p>Dept. Of Community, Trade & Economic Development, by Richard McCartan, Asst. Atty. Gen., Olympia</p> <p>Dept. Of Ecology, by Rebecca Todd and Jerri L. Thomas, Asst. Attys. Gen., Olympia</p> <p>Dept. Of Fish & Wildlife, by William C. Frymire and Marilyn Mockensturm, Asst. Attys. Gen., Olympia</p> <p>Dept. Of Natural Resources, by James R. Schwartz, Asst. Atty. Gen., Olympia</p> <p>Parks & Recreation Commission, by Joseph E. Shorin, Asst. Atty. Gen., Olympia</p> <p>Dept. Of Transportation, by Theodore O. Torve, Asst. Atty. Gen., Olympia</p> <p>Utilities & Transportation Commission, by Ann E. Rendahl, Asst. Atty. Gen., Olympia</p>
Counties ²	<p>King County, by Michael J. Sinsky, Senior Deputy Prosecuting Attorney, Seattle</p> <p>Kittitas County and Grant County, by Dennis D. Reynolds and Brian J. Deagle, attys., Seattle</p> <p>Snohomish County, by Marya J. Silvernale, Deputy Prosecuting Atty., Everett</p>
Cities	<p>City of Ellensburg, by Jeffrey A. Watson, City Council Member, Ellensburg</p> <p>City of Kittitas, by Messrs. Reynolds and Deagle</p> <p>City of North Bend, by Michael B. McCarty, atty., North Bend</p> <p>City of Snoqualmie, by Pat Anderson, atty., Snoqualmie</p>
Water Districts	<p>Cross Valley Water District, by Patricia A. Murray, atty., Seattle</p> <p>Woodinville Water District and Northshore Utility District, by Rosemary A. Larson, atty., Bellevue</p>
Tribe	<p>Tulalip Tribes, by Jeffrey C. Wishko and James Jones, attys., Everett</p>
Federal Agency	<p>Dept. Of the Army, by David A. McCormick atty., Arlington, Virginia, and Stephen Hart, atty., Ft. Lewis, Washington</p>

² In addition, Mr. Reynolds advised the Council that Adams and Franklin Counties might submit late petitions for intervention.

Businesses or other organizations **Cascade Columbia Alliance**, by David A. Bricklin, atty., Seattle
Chevron Products Company, by William H. Grady, atty., Seattle
Maritime Environmental Coalition, by Jerry McMahan, President, Seattle
Tidewater Barge Lines, Inc. and Tidewater Terminal Company³, by Guy C. Stephenson, atty., Portland, Oregon
Washington Environmental Council and People for Puget Sound, by Toby Thaler, Seattle
Weyerhaeuser Company, by Helmut Wallenfels, Senior Legal Counsel, Tacoma

Procedural issues and uncontested agency intervention: This order will address procedural matters that were raised at the prehearing conference and state agency requests for intervention but will reserve ruling on other requests.

Petitions for intervention:

The Council received petitions for intervention from 29 entities, including seven EFSEC member state agencies. Twenty seven petitioners appeared at the prehearing conference. Pacific Gas Transmission filed, then withdrew, a petition.

EFSEC member agency participation: EFSEC member agencies are permitted to participate upon request, pursuant to WAC 463-30-050. The seven agencies that have asked to participate are granted intervenor status. Those agencies are the Dept. Of Community, Trade & Economic Development, Dept. Of Ecology, Dept. Of Fish & Wildlife, Dept. Of Natural Resources, Parks & Recreation Commission, Dept. Of Transportation, and the Utilities & Transportation Commission.

Imperfect petition for intervention: One Tribe, the Yakama, filed a late petition for intervention and did not appear at the prehearing conference. If the Tribe wishes to pursue its petition, it may state the reason for its failure to meet the deadline or to appear and state why late intervention should be granted, on the schedule set out below.

Expected future petitions for intervention: Two counties that did not submit timely petitions, Adams and Franklin, indicated an interest in pursuing intervention. These requests may be received and commented upon on the schedule set out below.

Contested petitions for intervention: The Applicant has opposed the intervention of six entities. They are Cascade Columbia Alliance, Chevron Products Company, Maritime Environmental Coalition, Tidewater Barge, Washington Environmental Council and People for Puget Sound. The applicant filed its objection to their participation on June 21. At the prehearing conference, the schedule set out below, was adopted for comments.

³ These petitioners will be referred to collectively as “Tidewater” or “Tidewater Barge” in this Order.

The Council will rule upon the contested petitions and upon the other remaining petitions in a subsequent order.

Hearing guidelines:

The Council distributed proposed guidelines for the conduct of complex hearings, indicating that those guidelines set out the Council's expectations for behavior and that the Council intends to reference them as guidelines for the conduct of the proceeding. Parties may comment in writing on the proposed guidelines on the schedule set out below. The guidelines will be a topic for discussion at the next prehearing conference.

Schedule for written submissions:

<u>Date</u>	<u>Pleading deadline</u>
July 22	Responses to objections to intervention Late-filed interventions Statement from Yakama Comments on hearing guidelines
July 30	Replies to responses to objections to intervention Objections to late-filed interventions Responses to statement of Yakama Responses to comments on guidelines
August 5	Responses to objections to late interventions Response to any new material in replies ⁴

The Council will rule upon these matters after considering the parties' presentations.

Various procedural matters raised at the prehearing conference:

A review of the transcript of the prehearing conference indicates that some participants appear to be alleging that an adjudicative proceeding began with the filing of the application; that the Council is required to certify that an application is absolutely complete and final before beginning any processing of the application; that every document relating to the application is evidence in the adjudication; that every communication between anyone and Council members or staff mentioning the

⁴ Due in the Council's offices no later than noon. This document may be filed by telefacsimile if (a) it consists of five or fewer pages and (b) the original and requisite number of hard copies are filed with the Council the following day.

application is subject to “ex parte” provisions of law; and that every discussion of the application at a Council or Executive Committee meeting is a public hearing of which all persons interested in the application must be given notice. The Council -- rather strenuously -- rejects each of these allegations.

Commencing an adjudication. The Council’s statute, RCW 80.50.090(3), states, “[p]rior to the issuance of a council recommendation to the governor under RCW 80.50.100 a public hearing, conducted as an adjudicative proceeding under chapter 34.05 RCW, the Administrative Procedure Act, shall be held. (emphasis added).

Under the APA, an adjudication is commenced with the service of a notice of hearing or of prehearing conference.⁵ Notice of the prehearing conference of June 24, issued on April 22, marked the commencement of the adjudicative proceeding.

Certification of completeness. It has been asserted that the Council is required to certify an application as complete and that the adjudication may not be completed unless and until that certification is made.

The Council finds no such requirement in the law or in its rules; nor has it required that step in processing prior applications. Some participants appear to contend that Council rules create a full disclosure and absolute compliance standard for acceptance of an application.

When the EFSEC statute and rules are considered together rather than piecemeal, it is apparent that any decision as to “completeness” is committed to the discretion of the Council and need not be formalized in a Council “finding.” The EFSEC statute states, “[a]pplications for certification shall be upon forms prescribed by the council and shall be supported by such information and technical studies as the council may require.” RCW 80.50.060(4). The EFSEC rules on applications for site certification state, “[t]he application shall provide the council with information regarding the applicant, the proposed project design and features, the natural environment . . . This information shall be in such detail as determined by the council to enable the council to go forward with its application review.” WAC 463-42-010 (emphasis added). The Applicant has certified that the application is professionally prepared and substantially complete, as required by WAC 463-42-115.

A project under the EFSEC statute is by statutory threshold requirements a major, complex, environmentally sensitive matter. It is simply not appropriate to impose the requirement that an application for a project of this size and scope be absolutely complete and absolutely correct, on pain of rejection, before processing begins. The land use hearing, the application review, the SEPA process, and the adjudicative proceeding

⁵ RCW 34.05.413 reads in part as follows:

(5) An adjudicative proceeding commences when the agency or a presiding officer notifies a party that a prehearing conference, hearing, or other stage of an adjudicative proceeding will be conducted.

are all designed to test and to supplement the information in the application before the Council makes a decision.

The appropriate standard for completeness is the reasonable standard set out in the rules: the information in the application must be certified “substantially complete” and must be in such detail as the Council determines will enable it to go forward with application review. The Council has not had reason to determine that the present application is substantially incomplete or that it is insufficient to go forward with review.

Adjudicative record; log of documents. Adjudicative record. The Cascade Columbia Alliance questioned at the conference whether the Council is keeping separate adjudicative or hearing records. The Council is complying with requirements of law.

RCW 34.05.461(4) provides that “[f]indings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding.”

RCW 34.05.476 provides in part, that for an adjudication,

(2) The agency record shall include:

* * *

(d) Evidence received or considered; * * *

It is clear from the statutes as well as the Council’s rules of procedure that not all documents filed or logged with the Council can or will be considered as evidence in the adjudication. The presiding officer will determine the admissibility of evidence. Admitted evidence becomes part of the record, whereupon the Council may use it in making its decision in the adjudication. In making its decision, the Council will consider only a proper record. Because the Council has received a document or logged it as part of the application file does not mean that the document is evidence, that it will be considered in making the adjudicative decision, or that Council members will even see it.

Index or log of application-related documents. The Council may maintain a log of documents relating to the application. Council Staff is responding to participants, consistent with the commitment at the prehearing conference, describing the Council’s present log. It should also be noted that the Council Staff may not maintain the log on an hour-by-hour basis but that it will make a reasonable effort to keep any log reasonably current and accurate. The Cascade Columbia Alliance contended at the conference that the Council is required to index all documents. The law cited by Mr. Bricklin does not require the indexing of all documents.

Participants’ responsibilities with regard to document tracking. Documents relating to this application that are being sent to or filed with the Council should be clearly directed to Mr. Zeller, Council Manager, and clearly marked with the name of the applicant and the application number, the nature of the document, and the name of the sender and the participant who is represented by the sender. Documents should also be

identified as to the matter addressed -- for example, the land use proceeding, the adjudication, the SEPA process, etc. Documents intended for distribution to Council members -- briefs, profiled evidence, pleadings, for example -- should be provided in the required number of copies -- an original plus 20 until further notice. Documents not intended for such distribution should be provided as an original plus one copy. If these precautions are not taken, it is possible that the document may not be properly logged, filed, or distributed.

Ex Parte Contact.

Section 34.05.455 of the Administrative Procedure Act provides,

(2) Unless required for the disposition of ex parte matters specifically authorized by statute or unless necessary to procedural aspects of maintaining an orderly process, a presiding officer may not communicate, directly or indirectly, regarding any issue in the proceeding, with any person not employed by the agency who has a direct or indirect interest in the outcome of the proceeding, without notice and opportunity for all parties to participate.

(3) Unless necessary to procedural aspects of maintaining an orderly process, persons to whom a presiding officer may not communicate under subsections (1) and (2) of this section may not communicate with presiding officers without notice and opportunity for all parties to participate.

Scheduling and procedural discussions. To maintain an orderly process there are times when scheduling and procedural matters are appropriately discussed with parties as those matters arise. Such matters are within the exception in the law. They include, but are not limited to, verification of hearing starting time, information that a party will have a matter to be argued in enough detail to permit scheduling, information that counsel or a witness will be delayed or absent, and information that may be necessary to participants to facilitate their scheduling. Participants having an objection to treating this sort of communication as within the exception in the law should state that objection by July 22; responses may be made by July 30, on the schedule for comments on the procedural guidelines.

Non-adjudicative matters. Not all matters relating to the application are related to the adjudication. For example, administrative matters such as the Council's accounting procedures would not ordinarily be considered relevant to an issue in the adjudication. Discussions regarding such matters would thus not be ex parte.

Communication between participants and Council staff. The Council staff does not vote on an application. It is not the presiding officer. Council staff will not take an advocacy role in the adjudication and staff members are not expected to appear as witnesses. Because Council Staff handles administrative matters and matters relating to non-adjudicative aspects of the application, it may be necessary, in order for them to perform their functions, for them to engage in discussions about issues in the proceeding. A problem arises only when the communication is intended to be an indirect

communication with the Council (i.e., lobbying or arguing the merits of a matter with the expectation that staff would use that information to influence the Council). So long as a communication is not an indirect communication with the Council about an issue in the adjudication, it would appear to be permissible.

The Council has designated Jason Zeller, Council Manager, as the staff person to receive inquiries. He may refer matters to other staff members. All contacts between staff and participants should be directed through Mr. Zeller or his designee in his absence.

Council meetings.

Improper notice of meetings as adjudicative hearings. The Cascade Columbia Alliance contended that the Council is holding adjudicative hearings without notifying all parties, citing both regular Council and Executive Committee open meetings.

The term “hearing” is not defined in Washington’s administrative procedure act. Common sense, based on the root term “hear,” would seem to indicate that a hearing is a session at which evidence of witnesses is “heard.” Black’s Law Dictionary supports that interpretation.⁶ So does Webster’s Dictionary.⁷

The Council does not receive evidence from witnesses or argument from participants on adjudicative matters at open public meetings. Matters relating to the application that the Council has considered at open meetings appear to have been either administrative in nature or have been related to non-adjudicative aspects of the application. In particular, the adjudication had not begun (by service of the notice of prehearing conference) until late in the spring.

To the extent that any aspect of the application might be considered APA-adjudicative, the Council is entitled to engage in deliberative sessions in which it considers administrative, legal, and factual matters raised in the adjudication. Matters arising under the APA are specifically exempted from the state’s open meetings act. RCW 42.30.140. The Council may deliberate upon APA adjudicative matters in a private deliberative session or in an open public meeting, at its discretion. It is not required to provide “notice” to anyone that it will consider adjudicative matters at a regular open public meeting because doing so does not make the meeting a hearing.

Discussion and action at the June 10 meeting were addressed by prehearing conference participants. The application was noticed on the agenda as a topic for discussion. As the Applicant noted, the Council’s action did not involve the taking of evidence or legal argument. It involved the consideration of procedural requests. If it

⁶ “Proceeding of relative formality . . . in which witnesses are heard and parties proceeded against have right to be heard, and is much the same as a trial and may terminate in final order.” Black’s Law Dictionary, Fifth Ed., (1979, p. 649)

⁷ “[H]earing . . . (5) A session, as of an investigatory committee, at which witnesses submit testimony.” Webster’s II New Riverside University Dictionary, Boston (1984, p.570)

were the subject of an adjudication under the APA, the matter need not be undertaken in public at all. Under the Open Meetings Act the Council may discuss matters and take action without specific notice.

Meeting agenda requirements. At the prehearing conference, Counsel for the Environment asked that the Council clarify its agenda process; the Dept. Of Ecology referred to action at an open meeting of which it contended that it received no notice; and the Cascade Columbia Alliance demanded certainty that the Council would publish an agenda and limit its discussions strictly to matters that appear on the agenda.

Mandated requirements. None of the participants cited any authority for a requirement that the Council publish an agenda and limit discussions to matters listed. We have searched pertinent law and have found no such requirement.⁸

Council intention. The Council fully intends that its circulated draft agenda provide interested persons as well as Council members an indication of matters that it plans to consider during a regular open public meeting. The Council has adopted its agenda practices in an attempt to enhance the opportunity of persons interested in Council business to observe and participate. Council Staff makes a good faith attempt to include on the draft agenda every item of which it is aware.

Council and Executive Committee meetings. Having only one Council meeting per month for the conduct of agency business, and requiring the preparation of a draft agenda a week or more in advance to permit mailing, the Council is not able to guarantee that it can meet its operational obligations and effectively manage any pending application if it goes beyond the requirements of law and commits to limiting discussions to matters that have been anticipated a week or ten days in advance and put on the draft agenda. The Council and Executive Committee meetings have been published in the State Register as open meetings. All participants thus, and through this discussion, have notice that the application may be discussed at those meetings and that the Council will be conducting non-adjudicative business as it is required to do and may be discussing adjudicative matters that are exempt from open meeting act or adjudicative notice requirements as it is entitled to do, in the open meetings pursuant to the Open Meetings Act.

Land use hearing.

Several issues were raised at the prehearing conference regarding the integration into the adjudication of issues in the land use hearings. For clarity in defining the bounds of the adjudicative proceeding, they should be addressed in this Order.

Is the land use hearing a part of the adjudicative hearing? Clearly, the answer to that question is no. The statute requiring both hearings, RCW 80.50.090, requires an initial public hearing and an adjudicative hearing. These are separately identified,

⁸ The Open Public Meeting Act requires that special or continued meetings limit action to matters on the agenda, but contains no such requirement for regular scheduled meetings. RCW 42.30.080.

separately described, separately required, and accomplish separate functions.⁹ The land use hearing is held on an expedited statutory schedule, exclusively to identify consistency of a proposal with local land use requirements. The adjudicative hearing is held later, to evaluate relevant elements of the application. Participants in the land use hearing are not automatically Intervenor in the adjudication, and vice versa.

Is the land use hearing an APA adjudication? Here again, the answer appears clearly to be no.

Statutory interpretation. Beginning at the level of common sense, it is clear that the legislature knew how to designate hearings as APA hearings; it mentions two hearings in RCW 80.50.090 but directs that only one be held pursuant to APA adjudicative standards.

APA requirements. The Council is subject to the APA. It does not appear in the list of exclusions from the APA contained in RCW 34.05.030. In order to trigger the procedural requirements for adjudicative proceedings, however, the land use hearings must fall under the statutory definition for “adjudicative proceeding.” The definition states, “‘adjudicative proceeding’ means a proceeding before an agency in which an opportunity for hearing before that agency is required by statute or constitutional right before or after the entry of an order by the agency.” RCW 34.05.010(1). It is not in dispute that the land use hearings are before an agency and required by statute.

However, for the land use hearings to be an APA adjudication the land use consistency determination must also be an “order.” “Order” is defined under the APA as “a written statement of particular applicability that finally determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons.” RCW 34.05.010(10)(a) (emphasis added).

No legal rights are finally determined by the consistency determination. It is an initial determination which may be addressed during the adjudicative proceeding by a party to the proceeding. WAC 463-26-120. The decision on a recommendation to the Governor is not made until a much later stage. The opportunity for an APA hearing occurs in the adjudicative proceeding, before a Council final order is entered with its recommendation to the governor.

⁹ The statute reads in relevant part as follows:

RCW 80.50.090 Public hearings. (1) The council shall conduct a public hearing in the county of the proposed site within sixty days of receipt of an application for site certification: * * *

(2) The council must determine at the initial public hearing whether or not the proposed site is consistent and in compliance with county or regional land use plans or zoning ordinances. * * *

(3) Prior to the issuance of a council recommendation to the governor under RCW 80.50.100 a public hearing, conducted as an adjudicative proceeding under chapter 34.05 RCW, the Administrative Procedure Act, shall be held. * * *

(4) Additional public hearings shall be held as deemed appropriate by the council in the exercise of its functions under this chapter.

Actions of counsel. Counsel conducted themselves at the land use hearings in a manner that could be seen as inconsistent with an adjudication.¹⁰ Knowing that counsel value ethics and integrity, the Council finds it preferable to believe that counsel acted consistently with the assumption that the land use hearing is not an APA adjudication to avoid any possible question of ethical impropriety.

Constitutional requirements. Under constitutional standards, have any of the Council's land use hearing procedures denied any hearing participant's of due process rights? No. If there is a sufficient life, liberty, or property interest at stake during the land use consistency determination to require due process at all in this phase, as opposed to a later adjudicative phase, the Council's procedures afford ample protections.

Neither Cuddy v. Dep't of Public Assistance, 74 Wn.2d 17 (1968) nor Responsible Urban Growth v. Kent, 123 Wn.2d 376 (1994) is analogous to the procedural setting for the land use consistency determination. The land use consistency determination is a preliminary element in the energy facility siting process. It is not a land use permitting procedure by which a permit is issued, granting or vesting any rights, but it is a preliminary determination, in an inquiry scheduled upon an expedited time schedule, of whether a proposal is consistent with existing local requirements. The land use consistency determination is not a determination of entitlements involving the brutal need of a welfare recipient as in Cuddy. Nor is it a final determination like the passing of a rezoning ordinance in Responsible.

The Council's process provides ample protections, even if we accept for purposes of inquiry that constitutional rights are at issue at this juncture of the land use proceeding and must be protected. In this case, legal notice of the hearings was published in nineteen newspapers throughout the six counties in which the pipeline is proposed to be located. Notice was sent to the planning directors of all six potentially-affected counties and four cities. Notice was provided to Counsel for the Environment, the Applicant, and counsel for Cascade Columbia Alliance, who had indicated a desire to participate. Under the balancing test in Morris v. Blaker, 118 Wn.2d 133, 144-45 (1992) the degree of process afforded to the participants here appears to be amply sufficient.

Finally, counsel are premature in alleging that rights have been irremediably violated. As noted below, the land use hearing has been continued, not concluded, and

¹⁰ Questions could be raised regarding the following. Counsel offered personal testimony on the merits of the case and indicated that the testimony had been prepared by them or under their control and direction. Doing so in an adjudication may be seen as inconsistent with RPC 3.7, which forbids an attorney from being an advocate in a matter in which the attorney would be a necessary witness. Counsel offered a personal opinion regarding the justness of a cause and the credibility of a witness, which in an adjudication could be a possible violation of RPC 3.4(f). Some testimony under oath contained apparent inaccuracies, which could conceivably raise questions of a possible violation of RPC 3.4(b). In addition, counsel disregarded the rulings of the chair, repeatedly offering comments that had been rejected as irrelevant to the proceeding. In an adjudicative hearing, such conduct could be found to violate RPC 3.4(c) or RPC 3.5(c).

participants will have every opportunity required by law to be involved in later phases of the proceeding.

Procedural steps. Participants' contentions of impropriety in the Council's receipt of objections to procedures and responses after the last initially-scheduled land use hearing fail totally to grasp the nature of the process in which the Council is engaged and the nature of the post-hearing submissions.

First, the Council has continued, and not concluded, the land use hearing. The statute requires that the Council make a determination at the land use hearing. It does not specifically require that the hearing be held in one session only. The Council has not yet addressed whether the jurisdictions have presented certificates of consistency. It has not concluded the hearing. It has not forbidden any party from making further presentations. Participants' allegations that the Council has done so are inconsistent with the Council's actions and are totally incorrect. When the land use hearing is to be resumed, further procedural discussions will be timely. They are not timely until that point.

Second, the requests for the opportunity to present additional information originated with the local jurisdictions, who indicated that the additional time would be sufficient for their purposes. The Council did not require the submission of additional information from the local jurisdictions, it allowed such submissions at the jurisdictions' request. The Council has not changed any burden of proof by allowing jurisdictions to offer material. The allegations misrepresent what the Council has done and misrepresent the consequences of its actions.

Third, the Council has not acted to indicate that it will consider any of the material that was submitted. The Council has continued the land use hearings indefinitely. It has considered procedural comments within the submissions but it has not reviewed the proposed evidence and has not closed any record. It is obvious from the status of the hearings that additional evidence will be presented, and the Council has never in any way indicated a denial of reasonable opportunity to participate.

Fourth, the Council denied all pending procedural requests relating to the land use hearing in light of its indefinite continuance of that hearing. Nothing is scheduled to happen regarding that hearing until the applicant's required report to the Council at an open public meeting late in the year. The Council has entertained issues raised at the prehearing conference to the extent that they bear upon the adjudication.

Application of the Growth Management Act (GMA).

Counsel for the Environment (CFE) at the prehearing conference repeated a concern raised during the land use hearing, asking that the Council determine whether the provisions of the GMA "apply." The Council has earlier indicated in rejecting motions relating to the land use hearing that the Council felt that it did not have sufficient information or argument to make a determination on that issue. The Council does not intend to enter an advisory opinion on insufficient information or argument.

At the prehearing conference, CFE argued that the GMA determination was not merely procedural, but was also substantive, and that it affected not only the land use consistency issues but also the issues in the adjudication. He did not explain how it is substantive and cited no examples regarding how it would have independent effect in the adjudicative phase of the application as opposed to the land use phase.

The Council believes that it should allow further participation on this question by all parties to the adjudication, when the parties have been determined, including the issue of whether an immediate determination is essential or whether counsel should be permitted to try the complete case and allow the Council to make its decision on a full record.

Notice to Parties:

Any objection to the provisions of this order must be filed within ten days after the date of service of this order, pursuant to WAC 463-30-270(3). Unless modified, this prehearing conference order shall control further proceedings in this Docket.

DATED at Olympia, Washington and effective this 11th day of July, 1996.

WASHINGTON STATE ENERGY FACILITY SITE EVALUATION COUNCIL

By

C. ROBERT WALLIS
Vice Chair