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BEFORE THE STATE OF WASHINGTON  
ENERGY FACILITY SITE EVALUATION COUNCIL

In re Application No. 96-1  
of  
OLYMPIC PIPE LINE COMPANY  
For Site Certification

PREHEARING ORDER NO. 15  
COUNCIL ORDER NO. 716  
  
ORDER RESPONDING TO  
THURSTON COUNTY  
SUPERIOR COURT RULING  
ON INTERVENTION  
(July 10, 1998)

**Nature of the Proceeding:** This matter involves an application to the Washington State Energy Facility Site Evaluation Council (the Council) for certification of a proposed site in six Washington counties for construction and operation of a pipeline for the transportation of refined petroleum products between Woodinville and Pasco.

**Procedural Setting:** The application was filed February 5, 1996. Notice of the opportunity to present petitions for intervention in the adjudicative proceeding regarding this matter was published April 22, 1996. On July 11, 1996, the Council entered Prehearing Order No. 1, granting intervention to seven state agencies. On August 15, 1996, the Council entered Prehearing Order No. 3, granting conditioned intervention to twenty parties, and denying intervention to one. On October 15, 1996, the Council entered its final order on intervention, Prehearing Order No. 5, responding to objections raised by six of the parties.

On November 14, 1996, Cascade Columbia Alliance (Cascade) filed a petition for judicial review of the Council’s decision regarding its intervention status. Judge Richard Hicks, Thurston County Superior Court, heard the case and entered an Oral Opinion on May 7, 1998. On July 10, 1998, the judge signed an Order and Judgment, incorporating the Oral Opinion.<sup>1</sup>

<sup>1</sup> Order and Judgment, Cascade Columbia Alliance v. Energy Facility Site Evaluation Council, et al., No. 96-2-04073-5, July 10, 1998. In the Order and Judgment, Judge Hicks ruled on EFSEC’s Prehearing Order Nos. 3 and 5. Prehearing Order No. 3, dated August 15, 1996, is captioned “Prehearing Order Granting in Part, on Condition, and Denying Petitions for Intervention.” Prehearing Order No. 5, dated October 15, 1996, is captioned “Order on Objections to Prehearing Order No. 3.”

1 On July 22, 1998, prior to addressing the Court's order, the Council sent a letter to Cascade and  
2 the Olympic Pipe Line Company (Olympic), providing an opportunity to comment on the  
3 Court's ruling. A copy of this letter was sent to all intervening parties in the Council's  
4 adjudication. Both Cascade and Olympic filed written comments on August 7, 1998. Cascade  
5 recommended a broad reexamination of intervention, including reopening of the Council's  
6 proceeding to receive further interventions. Olympic suggested that the Council (i) reaffirm its  
7 decision regarding property owners, and (ii) modify its decision regarding fishing, to allow  
8 Cascade to represent the interest of Trout Unlimited (Trout) in the recreational fishing of its  
9 members.

## 6 **Discussion:**

### 7 **A. Introduction**

8 Judge Hicks, Thurston County Superior Court, recently ruled on the Council's orders  
9 regarding intervention. His ruling sustained the intervention standards applied by the  
10 Council. Intervention in Council proceedings is governed by the state Administrative  
11 Procedure Act (APA) and the Council's rules.<sup>2</sup> It is not governed by the standards for  
12 intervention in state and federal civil litigation.<sup>3</sup>

13 Judge Hicks remanded the matter to the Council on two issues. The judge's order  
14 provided that the Council must allow the same degree of participation to property owners  
15 represented by Cascade that it allowed to Weyerhaeuser. The order also provided that the  
16 Council must clearly apply the same standard to the intervention of Trout that it did to the  
17 Yakama Nation.

18 This discussion will address (i) the Council's standards for intervention, (ii) the history of  
19 the Council's original intervention decision, and (iii) the Council's present decision on  
20 intervention, consistent with Judge Hicks's ruling.

### 21 **B. Standards for Intervention**

22 In deciding whether to grant intervention, the Council is guided by RCW 34.05.443 and  
23 WAC 463-30-400 and 410. The Council explained its application of these standards at  
24 length in Prehearing Order No. 3:

25 To qualify, a petitioner must establish, with particularity, a legal interest in  
26 the subject matter, which could be adversely affected by the project in a  
27 direct and substantial way, and show that a failure to allow intervention  
28 could impair this interest. Even if the Council determines that a petitioner

29 <sup>2</sup> WAC 463-30-400, WAC 463-30-410.

30 <sup>3</sup> "Both State and Federal court rules on intervention, such as CR 24 and FR 24, do not govern intervention in this  
31 state agency proceeding..." Cascade Columbia Alliance v. Energy Facility Site Evaluation Council, Oral Opinion,  
32 May 7, 1998, p. 3.

has otherwise qualified, it may, in its discretion, limit or deny the petitioner's request for intervention to ensure an orderly and efficient hearing. In the exercise of its discretion, the Council must consider whether intervention would cause an undue burden on the proceeding or otherwise prejudice the rights of existing parties. WAC 463-30-400.

1. Legal interest in the subject matter. The Council's recent decisions on intervention refer to the petitioner's establishing a legal, as opposed to a philosophical, interest.
2. Specific interest could be adversely affected by the project in a direct and substantial way. A petitioner has the burden to "establish its interest with particularity, clearly and specifically," and to show that this interest could be "adversely affect[ed]...in a direct and substantial way." Intervention should be denied to parties whose asserted interests are indirect or remote, or whose potential damage is speculative.
3. Failure to allow intervention could impair this interest. If the interests of a petitioner are represented by another party in the proceeding, failure to allow intervention would likely not impair the protection of the interest.<sup>4</sup>

In addition to making clear its rules and approach to intervention, the Council specifically invited Cascade to provide additional information, identifying information that would be useful for the Council in reaching a proper decision.

### **C. Intervention of Property Owners**

#### **1. Council's Original Decision**

Weyerhaeuser provided information that its property would be traversed by the pipeline. In granting Weyerhaeuser's intervention, the Council stated, Weyerhaeuser should be allowed to intervene, limited to protection of the beneficial use of its real property traversed or subject to direct effect from the construction or operation of the pipeline.<sup>5</sup>

Cascade provided information regarding property owned by several of its members. Some of this property would be traversed by the pipeline or would lie within the study area.<sup>6</sup> Other property was at some distance from the study area.

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<sup>4</sup> Prehearing Order No. 3, p. 3.

<sup>5</sup> Id., p. 5.

<sup>6</sup> The Council will use the definitions in the Revised Application, p. 3.4-1. Specifically, the Council will use the term "study area" to mean a one-half mile corridor centered on the proposed pipeline route.

In granting Cascade’s intervention to represent certain of its property owners, the Council stated,

Cascade claims the membership of five private property owners within the pipeline corridor and an additional owner whose property is downstream of certain river crossings. These individuals have demonstrated a legal interest in the possession, beneficial use, and quiet enjoyment of their real property, including the ability to use and enjoy the waterways within the boundaries of their respective properties for avocation and recreation. However, because the risk of adverse effect to the downstream properties of Jim Watts and Robert Smith is indirect and speculative, the Council does not find that these downstream owners have a sufficient interest to support intervention. The named property owners within the pipeline corridor are granted intervention, and may be represented by Cascade, limited to the impact of the pipeline on the identified real property interests of the five named corridor owners, David and Sharon Damkaer, William Brown, Warren Bunger, Douglas Gibb, and Robert Smith (parcel on corridor only). The unnamed property owners have not pleaded their interests with specificity and their petitions are denied.<sup>7</sup>

On Cascade’s Motion for Reconsideration of this decision, the Council stated, The Council’s treatment of Cascade corridor owners is entirely consistent with its treatment of Weyerhaeuser as a corridor owner. Like Weyerhaeuser, Cascade-member, named corridor owners achieved intervention to protect their interests in the beneficial use and quiet enjoyment of their real property. Neither Cascade nor Weyerhaeuser was granted intervention to protect undisclosed property or property on which the pipeline’s impact was indirect or speculative.<sup>8</sup>

2. Council’s Decision on Remand

In reviewing the Council’s decision, Judge Hicks stated, ...[I] find the Agency’s action [is] arbitrary if it is in any way construed to limit Cascade’s scope of participation on behalf of the property owners it identified as owning property over which the pipeline is proposed to traverse to something less than that which the Agency allowed for the Weyerhaeuser Company.

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For any property within or traversed by the study area, the Council accepted the possibility of a direct effect. For property completely outside the study area, the Council requires a clear statement about how the property will be directly affected. A statement that property is downstream from a stream crossing is not by itself a sufficient explanation of “direct effect.” To some extent, a large percentage of properties within the state would be downstream from one crossing or another. The intervening state agencies and Council for the Environment are charged to protect such properties.

<sup>7</sup> Prehearing Order No. 3, p. 8.

<sup>8</sup> Prehearing Order No. 5, p. 13.

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The Agency must allow Weyerhaeuser and other property owners a similar scope of participation either by limiting Weyerhaeuser's participation to that identical with the five property owners identified within the diversity of Cascade or by allowing Cascade an expanded scope of participation equal to that held out to Weyerhaeuser for consideration of issues that may affect an entity's property, even if the pipeline does not directly traverse over it, under the realization that it might be affected by the pipeline and its attendant risks.<sup>9</sup>

The Council intended to grant identical rights to all property owners to protect their property interests. The Council's Prehearing Order No. 5, cited above, should leave no doubt about this issue. In this decision on remand, the Council makes this intent absolutely clear as follows. As to all property owners granted intervention, this intervention is limited to protection of the beneficial use of their real property traversed or subject to direct effect from the construction or operation of the pipeline.

On remand, the Council reiterates that, from the information Cascade has provided, the Council has not been able to discern how the pipeline would have a direct effect on the property of Mr. James Watt near the confluence of the Yakima and Columbia Rivers or on the 80-acre parcel of Mr. Robert Smith in the vicinity of the Crab Creek wildlife refuges. If Cascade believes that it can clearly establish a direct effect on either of these properties, it may do so and the Council will consider the information provided. However, if the properties are similarly situated with properties throughout the state that share a smaller degree of potential effect, the Council will continue to deny intervention. This showing must be filed on or before October 23, 1998.

The Council further affirms that intervention was properly denied to Cascade members who were not identified.

**D. Intervention for Fishing Interests**

1. Council's Original Decision

In granting the Yakama Nation's intervention, the Council stated, The Yakama Nation should be allowed to intervene, limited to protection of its treaty rights to hunt, fish, and gather traditional foods and medicines... The traditional use areas ... must be named with specificity as the hearing proceeds.<sup>10</sup>

<sup>9</sup> Cascade Columbia Alliance v. Energy Facility Site Evaluation Council, Oral Opinion, May 7, 1998, p. 12.

<sup>10</sup> Prehearing Order No. 3, p. 5.

1 In denying participation by Cascade on behalf of Trout Unlimited, the Council  
2 stated,

3 Although [Cascade] has pleaded the interests of three environmental  
4 organizations, only the recreational fishing interests of the members of  
5 Trout Unlimited have been defined to any degree. Even there, no specific  
6 fishing areas have been identified. Based on the supporting affidavit, it is  
7 uncertain whether one member's personal fishing recreation, undertaken  
8 as a member of the public, would be impacted at all by the proposed  
9 project. The Washington Department of Fish and Wildlife has been  
10 granted intervention in this case to advocate the interests of fish and  
11 wildlife. Counsel for the Environment is charged with protecting the  
12 interests of members of the public in the environment. Cascade's  
13 participation would be duplicative, detracting from the efficient and  
14 orderly flow of the proceeding. Thus, the Council denies Cascade's  
15 request for intervenor status to represent (1) the recreational fishing  
16 interests of Trout Unlimited, (2) the fishing, hunting, and other  
17 recreational interests of individual members, or (3) the unnamed interests  
18 of 1000 Friends of Snohomish County or People for the Preservation of  
19 Tualco Valley.<sup>11</sup>

20 In its Motion for Reconsideration, Cascade did not argue that the decision to  
21 reject participation by Trout Unlimited was inconsistent with the decision to allow  
22 participation of the Yakama Nation. Because the issue was not raised, the  
23 Council had no opportunity to address the issue in its Prehearing Order No. 5.  
24 Rather, the Council stated,

25 Cascade ... pleaded the interests of three environmental organizations;  
26 however, only the recreational fishing interests of the members of Trout  
Unlimited were defined to any degree. One member of Trout Unlimited  
was named, but his specific fishing areas were not identified. The Council  
held that it was uncertain whether this member's personal fishing  
recreation would be affected at all. The Council further noted that the  
Department of Fish and Wildlife (WDFW) had been granted intervention  
in the case to advocate the interests of fish and wildlife, and that Counsel  
for the Environment (CFE) was charged with protecting the interests of  
members of the public. Cascade's participation would appear to duplicate  
the participation of WDFW and CFE. The Council denied Cascade's  
petition to represent the various environmental organizations among its  
membership.<sup>12</sup>

2. Council's Decision on Remand

On judicial review, the Court expressed concern that the Council appeared to treat

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<sup>11</sup> Id., pp. 7-8.

<sup>12</sup> Prehearing Order No. 5, p. 11.

Trout differently from the Yakama Nation. The Court stated,

1 ...the Court finds the Agency was arbitrary in not allowing Cascade to  
2 represent the recreational and sportsman interests as represented by Trout  
3 Unlimited without explaining how those interests might be identical to that  
4 of the Department of Fish and Wildlife, and Cascade should be given the  
5 same scope of inquiry or participation into streams, rivers, and reservoirs  
6 that the Yakama Tribe is given for streams, rivers, and reservoirs whose  
7 statement of particularity was even less particular than that of Cascade.

8 Under such circumstances, it is arbitrary to allow one intervenor in upon  
9 assumptions and speculation, such as the Tribe, while denying another  
10 who made a more concrete showing, such as Cascade.<sup>13</sup>

11 From the Court's ruling, the Council understands that it must allow Cascade to  
12 represent Trout's fishing interests to the same extent that it allowed the Yakama  
13 Nation to represent its treaty fishing interests. When the Council granted  
14 intervention to the Yakama Nation, it accepted the tribe's legal interests, based in  
15 treaty rights, and stated that the Yakama Nation would be required to name its  
16 traditional use areas with specificity as the hearing proceeded. Pursuant to the  
17 remand, the Council grants intervention to Cascade to represent the interests of  
18 members of Trout Unlimited in recreational fishing.

19 Consistent with Prehearing Order No. 3, the Council directs both the Yakama  
20 Nation (as to its fishing interests) and Cascade, on behalf of Trout, to identify  
21 particular locations where the pipeline would have a direct effect on their fishing  
22 interests. Such identification will likely include documentation of the presence of  
23 sport or harvestable fish in the immediate vicinity of particular stream crossings  
24 and a showing that construction and/or operation of the pipeline would have a  
25 direct and verifiable effect on fishing in these locations. In addition, the Council  
26 directs Cascade (for Trout), the Yakama Nation, the Department of Fish and  
Wildlife (WDFW), and Counsel for the Environment (CFE) to identify clearly  
and specifically the nature of the interests they seek to protect vis-à-vis fish and  
fish habitat. These showings must be filed on or before November 23, 1998.

The Yakama Nation has expressed a willingness to coordinate its presentation  
with other parties, including CFE, the Washington Department of Ecology  
(Ecology), and WDFW. Similarly, Cascade is encouraged to coordinate its  
presentation with these and other parties as appropriate.<sup>14</sup> As affirmed in Judge

<sup>13</sup> Cascade Columbia Alliance v. Energy Facility Site Evaluation Council, Oral Opinion, May 7, 1998, p. 12.

<sup>14</sup> For example, EFSEC understands that the Department of Fish and Wildlife maintains a database showing the presence of fish and wildlife in every state waterway. Cascade and WDFW are encouraged to coordinate in presenting this information.

1 Hicks's order,<sup>15</sup> the Council retains the right to require coordination or association  
2 among parties. On the basis of the information submitted, the Council may  
3 encourage or require further coordination to the extent identified fishing interests  
4 are coincident with the statutory mandates of CFE and WDFW.<sup>16</sup>

4 **E. Reopening of the Council's Intervention Decision**

5 Cascade argued that the Council should reopen the opportunity to intervene on a broad basis.  
6 The Council has considered Cascade's arguments in support and finds no reason to do so.

7 First, the Council's approach to interventions was thoughtful and consistent with applicable  
8 standards. The Court affirmed the standards and processes the Council used.<sup>17</sup> In particular, the  
9 Council used every reasonable means to assure that entities had proper notice, knew the  
10 standards for intervention, and had ample opportunity to present their cases to the Council. On  
11 occasion, the Council specifically requested parties, including Cascade, to provide the  
12 information that would assist the Council in its intervention decision.

13 Second, the Council notes that Cascade had ample opportunity to make its potential participation  
14 known to the public. The Council allowed it to present information to the public during the  
15 Council's land use hearings, both formally, through the appearances and testimony of its  
16 representatives, and informally.

17 In short, the Council believes that it provided ample notice to the public of the opportunity to  
18 intervene. The Council also believes that it used every reasonable means to assure that Cascade  
19 had ample opportunity to inform the public of its potential participation, to learn the standards  
20 for intervention, and to qualify for intervention. The Council finds no reason to reopen the  
21 opportunity to intervene on an unqualified basis.

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22 <sup>15</sup> "I also affirm the Council's right to limit Cascade's intervention, both as to restricting it to those interests which  
23 are not represented by others, such as the five property owners identified, and to choose not to allow them full  
24 participation in areas in which they might have been properly allowed to intervene, but in which their interests  
25 would be duplicative of another party or intervenor who is already participating." Cascade Columbia Alliance v.  
26 Energy Facility Site Evaluation Council, Oral Opinion, pp. 11-12.

RCW 34.05.443(2). "If a petitioner qualifies for intervention, the presiding officer may impose conditions upon the  
intervenor's participation in the proceeding, either at the time that intervention is granted or at any subsequent time."

WAC 463-30-410. "...The council reserves the right to prescribe other limitations and conditions, where  
appropriate."

<sup>16</sup> CFE is mandated to represent the public's interest in the quality of the environment. RCW 80.50.080. WDFW is  
mandated to preserve, protect, perpetuate, and manage the fish, shellfish, and wildlife resources and habitats of the  
state of Washington. RCW 75.08.012 and RCW 77.04.055. See also, letter dated April 15, 1996 from WDFW to  
Mr. Jason Zeller, EFSEC Manager.

<sup>17</sup> "The Court also finds that the Agency ... correctly based their rulings on intervention on RCW 34.05.443 and  
WAC 463-30-400." Cascade Columbia Alliance v. Energy Facility Site Evaluation Council, Oral Opinion, p. 11.



1 However, the Council has made clear that it will consider late-filed petitions for intervention and  
2 grant late intervention when good cause is shown. In Prehearing Order No. 5, the Council  
3 indicated that a change in the proposed route may give rise to good cause for late intervention.<sup>18</sup>  
4 The Council will ensure that the additional landowners, listed in Olympic's revised application,  
5 Appendix A, (and the landowners within the study area for any future route revisions) receive  
6 notice of their right to intervene, as did landowners who were notified pursuant to the original  
7 application.

8 Finally, the Council notes that individuals, including landowners, may testify regarding effects  
9 on their property during the public hearing sessions of the adjudication. Individuals may also  
10 participate in the SEPA process and offer comments in the land use phase of the Council's  
11 review.

#### 12 **F. Conclusion**

13 The Council affirms that the scope of intervention for all identified property owners in this  
14 proceeding is consistent vis-à-vis their property and the pipeline.

15 The Council modifies Cascade's intervention status as representative of Trout Unlimited as  
16 follows. Cascade may represent the fishing interests of members of Trout consistent with the  
17 right of the Yakama Nation to represent its treaty fishing interests. Cascade, the Yakama Nation,  
18 CFE, and WDFW are required to identify their interests with specificity, according to the terms  
19 of this order.

20 DATED and effective at Olympia, Washington, this \_\_\_ day of September 1998.

21 \_\_\_\_\_  
22 Deborah Ross, Chair

23 **Notice to Participants.** Unless modified, this prehearing order will control the course of the  
24 hearing. Objections to this order may be stated only by filing them in writing with the Council  
25 within ten days after the date of this order.

26 \_\_\_\_\_  
<sup>18</sup> Prehearing Order No. 5, p. 12. The Council stated, "[s]imilarly if the proposed route of the pipeline changes significantly to traverse and affect properties not affected to date, late intervention may also be appropriate."