

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. 3
COUNCIL ORDER NO. 701

PREHEARING ORDER GRANTING IN PART,
ON CONDITION, AND DENYING PETITIONS
FOR INTERVENTION

NOTICE OF CONTINUED PREHEARING
CONFERENCE (August 22, 1996, 9:00 A.M.)

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, King County, and Pasco, Franklin County.

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 and of the initial prehearing conference was published April 22, 1996. Twenty-nine petitions for intervention were filed.¹ The Applicant filed objections to some of these petitions on June 21, 1996, indicating that they should be conditioned or denied altogether.

The Council held the first prehearing conference in the adjudication on June 24, 1996. A prehearing conference order stated the results of the conference and procedural rulings; among other things, it granted intervention to the seven state agencies that had filed petitions or notices of appearance and established a schedule for additional comments and pleadings regarding intervention from the remaining petitioners.² The Council deferred ruling on the other requests for intervention until all participants could have the opportunity to comment and the Council could fully and carefully consider those comments.

The Council has considered the petitions, transcribed oral comments from the prehearing conference, and all relevant pleadings by the participants. In this order, the Council states its decision regarding intervention.

¹ Pacific Gas Transmission filed a petition but later formally withdrew, leaving twenty-eight petitioners.

² Prehearing Conference Order No. 1 identified the Yakama Nation's petition as imperfect and provided a schedule through which the Nation could pursue its petition. The Order further noted that Adams county had failed to file for intervention, but would be allowed to file a late petition on good cause shown. Adams county submitted a petition for intervention on July 12, 1996.

A. Standards for Granting, Conditioning, or Denying Intervention

The Council's statute and rules, in conjunction with the state Administrative Procedure Act (APA), provide the standard for the Council's decisions regarding intervention. At various stages of the proceedings, both parties and petitioners have argued that standards from other procedural settings should be applied in this setting. Some parties have argued that the standard to establish standing for judicial review should be used; others have argued that the standard for intervention into judicial proceedings under Washington Court Rule 24 is relevant. While either standard may be instructive in certain settings, the Council finds that neither is controlling of its decision regarding intervention into its own administrative proceeding.

Both the Council's rules and the APA require the Council (1) to determine whether the petitioner "qualifies" for intervention, and (2) to determine whether there are discretionary reasons to deny or condition intervention.³ To qualify, a petitioner must establish, with particularity, a legal interest in the subject matter, which could be adversely affected by the project in a direct and substantial way, and show that failure to allow intervention could impair this interest.⁴ Even if the Council determines that a

³ WAC 463-30-400. "On timely application in writing to the council, intervention shall be allowed to any person upon whom a statute confers a right to intervene and, in the discretion of the council, to any person having an interest in the subject matter and whose ability to protect such interest may be otherwise impaired or impeded. All petitions to intervene shall ... establish with particularity an interest in the subject matter and that the ability to protect such interest may be otherwise impaired or impeded. In exercising discretion..., the council shall consider whether intervention by the petitioner would unduly delay the proceeding or prejudice the rights of the existing parties..."

RCW 34.05.443 Intervention. (1) The presiding officer may grant a petition for intervention at any time, upon determining that the petitioner qualifies as an intervenor under any provision of law and that the intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings.

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

- (a) Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition; and
- (b) Limiting the intervenor's use of discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings; and
- (c) Requiring two or more intervenors to combine their presentations of evidence and argument, cross-examination discovery, and other participation in the proceedings.

(3) The presiding officer shall timely grant or deny each pending petition for intervention, specifying any conditions, and briefly stating the reasons for the order. The presiding officer may modify the order at any time, stating the reasons for the modification. The presiding officer may modify the order at any time, stating the reasons for the modification. The presiding officer shall promptly give notice of the decision granting, denying, or modifying intervention to the petitioner for intervention and to all parties.

⁴ "Interest is not used in the sense of "being interested," but in the sense of having a legal as opposed to philosophical interest that the intervention will afford an opportunity to protect. Intervention may be allowed to protect such an interest when failure to participate could adversely affect the interest in a direct and substantial way. The rule places the burden on the petitioner to establish its interest 'with particularity,' that is, clearly and specifically, and to establish that the failure to allow intervention could impair that interest." KVA Resources, Prehearing Order No. 3 at 8.

petitioner 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 philosophical, interest.⁵
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."⁶ 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.⁷
4. Burden on the proceeding. If the Council finds that a petitioner has fully qualified, it may nonetheless exercise its discretion to limit intervention or deny it altogether. It is well accepted that an agency has wide discretion to ensure the type of fair and orderly proceeding which will allow performance of its statutory duty.⁸

If the Council finds a potential for burden on the proceeding, it may deny intervention or streamline the proceeding at any time (1) by limiting the issues an intervenor may address, and (2) by requiring the intervenors to work together

⁵ KVA Resources, Inc., Prehearing Order No. 3 at 8. Chehalis Power, Inc., Prehearing Order No. 1, Appendix A at 5, Washington Public Power Supply System, Prehearing Order No. 1, Appendix A at 5..

⁶ KVA Resources, Inc., Prehearing Order No. 3 at 8.

⁷ RCW 80.50.080 states that appointment of Counsel for the Environment "shall not be construed to prevent any person from being heard or represented by counsel in accordance with the other provisions of this chapter." CFE's presence does not prevent others from participating, and the Council does not view CFE's participation as a bar to others. Conversely, this section does not require that others be admitted as intervenors. The decision as to participation is made through consideration of the pertinent standards on a participant-by-participant basis in light of the circumstances in the pertinent proceeding.

⁸ Administrative Conference of the United States, "Public Participation in Administrative Hearings, Recommendation No. 71-6" 1 CFR 305.71-6.

through a lead counsel.⁹ The Council may also limit the participation of intervenors in discovery, cross-examination, or other procedures at any time.¹⁰

B. Rulings on Specific Petitions for Intervention

1. Local Jurisdictions (traversed by pipeline):¹¹ Three cities and five counties traversed by the pipeline have demonstrated a legal interest in the proceeding. All should be allowed to intervene, limited to the interests stated in their petitions as follows:

City of Kittitas: Limited to protection of the “public interest in the city’s lands, water, and environment.”

City of North Bend: Limited to the protection of the “public health and welfare (particularly water supply) within its boundaries.”¹²

City of Snoqualmie: Limited to protection of the public health and welfare (particularly water supply) of its citizens.

Adams County: Limited to protection of the “public interest in lands, water, and environment within its jurisdiction.”

Grant County: Limited to protection of the “public interest in lands, water, and environment within its jurisdiction.”

King County: Limited to fulfilling its statutory duty to protect “the general public health and welfare, [particularly as it relates to] the county’s lands and resources.”

Kittitas County: Limited to protection of the “public interest in lands, water, and environment within its jurisdiction.”

Snohomish County: Limited to protection of its “public interest,” including but not limited to, county land use, county comprehensive plan, Growth Management issues, and water supply.¹³

2. City of Ellensburg (not traversed by pipeline). The city of Ellensburg should be allowed to intervene, limited to protection of its municipal water supply.

⁹ WAC 463-30-410.

¹⁰ RCW 34.05.443(2).

¹¹ The local jurisdictions traversed by the pipeline are separated here because of their distinct status under RCW 80.50.

¹² In its petition North Bend expressed an interest in joint representation. The Council encourages North Bend to pursue the suggestion with others of similar interest.

¹³ The land use and related issues appear to arise principally in the context of the land use hearings, but may arise in the adjudicative proceeding as well.

3. Weyerhaeuser Company and Weyerhaeuser Real Estate Company. 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.
4. Department of the Army. The Department of the Army 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.
5. Water and Utility Districts. Cross Valley Water District, Woodinville Water District, and Northshore Utility District should be allowed to intervene, limited to protection of the integrity of the Cross Valley Aquifer for the supply of municipal drinking water. The three districts will be required to coordinate each aspect of their participation through one lead counsel.¹⁴ If the water districts subsequently show good cause that one or all should have independent representation, the council will consider the request.
6. Tulalip Tribes. The Tulalip Tribes should be allowed to intervene, limited to protection of fish habitat in the fishing areas protected by treaty. The Tulalips have expressed a willingness to coordinate their presentation with other parties, including Counsel for the Environment, the Washington Department of Ecology, and the Washington Department of Fish and Wildlife; but may participate through separate counsel.
7. Yakama Nation. The Yakama Nation should be allowed to intervene, limited to protection of its treaty rights to hunt, fish, and gather traditional foods and medicines and its statutory right to protect its cultural and archeological resources. The traditional use areas and archeological/cultural resources must be named with specificity as the hearing proceeds. The Yakama Nation has expressed a willingness to coordinate its presentation with other parties, including Counsel for the Environment, the Washington Department of Ecology, and the Washington Department of Fish and Wildlife; but may participate through separate counsel.
8. Tidewater Barge Lines and Tidewater Terminal Company (Tidewater). Construction of the pipeline could have a substantial effect not only on Tidewater, but on the entire Columbia-Snake River barge system, with a potential effect on the regional economy in general. Tidewater has specialized knowledge which may contribute to the Council's decision making process. Neither Franklin County nor any other county closely associated with the coastwise water transportation industry or the Columbia-Snake River barge system has moved to

¹⁴ Coordination in this context includes joint discovery and joint presentation of evidence/cross-examination through one lead counsel.

intervene. The Council grants Tidewater's petition for intervention, conditioned as follows:

Tidewater and Maritime Environmental Council (number 9 below) will be required to coordinate all aspects of their participation through one lead counsel.¹⁵ Their participation will be limited to issues related to (1) barge transport of petroleum products on the Columbia River, Puget Sound, the Strait of Juan de Fuca, and the waters between Anacortes/Ferndale and the Strait and near the Washington coast; (2) the safety of barge and pipeline transport of petroleum products; and (3) the effect of the pipeline on waterborne commerce on the Columbia River.

9. Maritime Environmental Council (Maritime). Maritime has demonstrated similar economic interests. The Council grants intervention, subject to the conditions stated above regarding Tidewater.
10. Chevron Products Company. Chevron has not demonstrated any potential substantial adverse effect on its interests as a supplier of petroleum products to the eastern Washington market. There is no indication that Chevron will not continue to supply the eastern Washington market through its own existing pipeline, nor any indication that it will not continue to ship petroleum from the west side either on the proposed pipeline¹⁶ or on the Columbia River. Thus, the Council denies Chevron's petition. Chevron may communicate with parties about the possibility of providing useful and relevant information and is encouraged to participate in the SEPA process and to provide testimony at sessions set to receive testimony from members of the public.
11. Washington Environmental Council/People for Puget Sound (WEC/PPS). WEC/PPS have demonstrated interests of identified members that could be affected by a significant increase in tanker traffic on the Sound. WEC/PPS may intervene, limited to the following issues: (1) whether tanker traffic on Puget Sound and the Strait of Juan de Fuca¹⁷ would be affected by certification of the proposed site, and if so, (2) the environmental impacts of changes in tanker traffic resulting from the pipeline.
12. Cascade Columbia Alliance (Cascade). Cascade Columbia Alliance has petitioned to intervene, alleging an adverse effect on (1) the economic interests of its business constituents (Tidewater and other businesses and labor union

¹⁵ Coordination in this context includes joint discovery and joint presentation of evidence/cross-examination through one lead counsel.

¹⁶ The Council finds no relevance in Chevron's stated concern about common carrier rates. These rates would be set by the Utilities and Transportation Commission pursuant to legal requirements.

¹⁷ These waters will include the waters between Anacortes/Ferndale and the Strait of Juan de Fuca.

members); (2) the recreational interests of Trout Unlimited and two individuals¹⁸ (and unspecified interests of other environmental organizations); and (3) the beneficial use and enjoyment of the real property of six of its individual members.¹⁹

- a. *Economic Interests.* Tidewater is the only business which the Alliance has identified and whose interests have been pleaded with particularity. Tidewater has been granted intervenor status in its own right, and Cascade's representation of Tidewater would be duplicative.²⁰ Cascade will not be granted intervenor status to represent business and labor interests.
- b. *Environmental Interests.*²¹ Although the Alliance has pleaded the interests of three environmental organizations, only the recreational fishing interests of the members of Trout Unlimited have been defined to any degree. Even there, no specific fishing areas have been identified. Based on the supporting affidavit, it is uncertain whether one member's personal fishing recreation, undertaken as a member of the public, would be impacted at all by the proposed project. The Washington Department of Fish and Wildlife has been granted intervention in this case to advocate the interests of fish and wildlife. Counsel for the Environment is charged with protecting the interests of members of the public in the environment. Cascade's participation would be duplicative, detracting from the efficient and orderly flow of the proceeding. Thus, the Council denies Cascade's request for intervenor status to represent (1) the recreational fishing interests of Trout Unlimited, (2) the fishing, hunting, and other recreational interests of individual members,²² or (3) the unnamed interests of 1000 Friends of Snohomish County or People for the Preservation of Tualco Valley.

¹⁸ In his declaration, Jim Watts claims a recreational interest in fishing, swimming, and otherwise enjoying environmental resources of the Columbia River. In his declaration, Warren Bunger claims a recreational interest in "hunt[ing] elk in the area."

¹⁹ Five owners claim to own property on the pipeline corridor: David and Sharon Damkaer, Douglas Gibb, William Brown, Warren Bunger, and Robert Smith (in partnership). In addition, Robert Smith claims to own a second parcel downstream of certain river crossings. Jim Watts also claims to own "downstream property."

²⁰ Although Cascade has pleaded no other economic interests with particularity, the Council notes that many, if not all, of the businesses and labor interests Cascade seeks to represent will be represented by the joint representation of Tidewater and Maritime.

²¹ "Environmental interests" is used in the sense of economic, recreational, or aesthetic interests which may be damaged if the pipeline causes environmental damage.

²² The specific sites for Mr. Bunger's elk hunting and Mr. Watt's fishing and swimming are not identified.

- c. *Property Interests.* Cascade claims the membership of five private property owners within the pipeline corridor²³ 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.²⁴ 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).²⁵ The unnamed property owners have not pleaded their interests with specificity and their petitions are denied.

C. Order

Having considered the petitions for intervention, the Applicant's objections, the petitioner's responses, oral comment and argument from the prehearing conference, and all additional pleadings submitted pursuant to Prehearing Conference Order No.1,²⁶ the Council enters this Order.

The petitions for intervention are granted, granted upon condition, or denied, as stated in the body of this Order.

D. Notice of Second Prehearing Conference

ALL PARTIES PLEASE TAKE NOTICE: A continued prehearing conference in this matter will be held on August 22, 1996, beginning at 9:00 a.m., in the Auditorium of the Department of Labor and Industries, 7273 Linderson Way S.W., Tumwater, Washington. Parties will be able to participate by telephone: the bridge line number is (360) 664-3846.

²³ One of these five, Mr. Robert Smith, owns a second downstream parcel.

²⁴ Threatened damage to these properties is not "substantial and direct."

²⁵ If at later time, the pipeline corridor is realigned or otherwise found to by-pass these properties, intervenor status will be withdrawn from the respective individuals.

²⁶ Olympic Pipe Line Company, Prehearing Order No. 1 at 4.

The purpose of the conference will be to discuss hearing guidelines, hearing and prehearing schedules, and other procedural matters raised by the parties; to consider the narrowing of issues; and to consider or discuss matters related to the procedures involved in the adjudicative hearing.

DATED and effective at Olympia, Washington this 15th day of August 1996.

FREDERICK S. ADAIR, EFSEC Chair

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