

BEFORE THE STATE OF WASHINGTON  
ENERGY FACILITY SITE EVALUATION COUNCIL

In re Application No. 96-1

of

OLYMPIC PIPELINE COMPANY

For Site Certification

PREHEARING ORDER NO. 5  
COUNCIL ORDER NO. 703

ORDER ON OBJECTIONS TO PREHEARING  
ORDER NO. 3

**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:**<sup>1</sup> In its third prehearing order, the Council decided the petitions for intervention from the local jurisdictions, water districts, tribes, and other third parties. It granted conditioned intervention to twenty parties and denied intervention to one.

Six parties filed timely objections to the order, protesting either the limitations and conditions placed upon their participation or the denial of intervention status.<sup>2</sup> The Applicant filed a

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<sup>1</sup> Significant dates in Cross Cascade Pipeline Application No. 96-1 adjudication:

02/05/95	Application filed.
04/22/96	Notice of opportunity to intervene. Notice of initial prehearing conference.
06/24/96	First prehearing conference.
07/11/96	Prehearing Order No. 1 entered. (Addresses procedural issues. Seven state agencies granted intervention.)
08/15/96	Prehearing Order Nos. 2 and 3 entered. (No. 2 responds to objections to No. 1. No. 3 grants, conditions, or denies intervention.)
08/22/96	Second prehearing conference.
08/26/96	Objections to Prehearing Order No. 3 due.
09/12/96	Applicant's Response to Objections due.
09/13/96	Prehearing Order No. 4 entered. (Addresses procedural issues.)
10/17/96	Third prehearing conference.

<sup>2</sup> The following parties filed objections: Chevron Products Company, Cascade Columbia Alliance, King County, Cross Valley Water District, Northshore Utility District, and the Yakama Nation.

response to these objections. The Council has considered all relevant pleadings by the participants, and herein makes its final decision in response to the filed objections. This order incorporates Prehearing Order No. 3 by reference, except as herein modified.

**A. The Water and Utility Districts (Cross Valley Water District and Northshore Utility District)**

Three water districts, Cross Valley Water District (Cross Valley), Woodinville Water District (Woodinville), and Northshore Utility District (Northshore), all share rights in an aquifer that could be affected by the project.<sup>3</sup> Two of the three filed objections, addressing the following matters:

1. Protection of mains and facilities.

Cross Valley requests that, in addition to the integrity of the Cross Valley Aquifer itself, it be allowed to address possible effects of pipeline construction on Cross Valley's infrastructure - water mains and facilities. It argues that this interest was raised at the June 24 prehearing conference and should be included among the issues Cross Valley is allowed to address in the adjudication. The Applicant does not oppose Cross Valley's request.

The Council finds that the protection of the beneficial use of property (Cross Valley's mains and other facilities) from direct and substantial adverse impact is a type of interest that is properly raised and considered in the adjudication. Cross Valley was granted intervention in Prehearing Order No. 3, and extending the scope of intervention to include this additional interest is proper as part of the prehearing process of issue identification and clarification.

2. Separate representation.

Prehearing Order No. 3 required the three districts to coordinate their participation through one lead counsel. Cross Valley argues that its interests are sufficiently distinct from those of Northshore and Woodinville to require separate representation. Northshore also argues that conditioning its intervention on its participation through one lead counsel is a violation of its constitutional rights to "due process."

The Council finds that its original decision to condition intervention on the water and utility districts' coordination of their participation through one lead counsel was reasonable and within its authority under WAC 463-30-410 and RCW 34.05.443(2).<sup>4</sup> The Council believes

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<sup>3</sup> The three water districts are members of the Snohomish River Regional Water Authority, a consortium of five water service providers. All have an interest in the Cross Valley Aquifer. See Cross Valley Water District's Petition to Intervene at 1-2.

<sup>4</sup> WAC 463-30-410 states, "...Intervenor status may also be conditioned upon allowance of other parties to act as lead parties, where appropriate." RCW 34.05.443 states, "...the presiding officer may impose conditions upon the intervenor's participation in the proceedings... Conditions may include ... (b) [l]imiting 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) [r]equiring two or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceedings."

that this condition will enhance the adjudication by eliminating unnecessary duplication, as contemplated by the Administrative Procedure Act (APA) and EFSEC rules. Coordination of participation does not foreclose any party's right to retain counsel and participate in discovery, presentation of evidence, argument, or cross-examination. Affected counsel may agree to alternate as lead. What counsel may not do is present duplicating evidence, ask duplicating questions, or make duplicating motions or responses.

### 3. Conclusion.

The Council reaffirms its decision to condition the intervention of the three water and utility districts, as it relates to the protection of the aquifer, on the coordination of their participation through one lead counsel. Cross Valley may address issues relating exclusively to the protection of its infrastructure independently.

## **B. The Yakama Nation**

The Yakama Nation has been granted intervention to protect its treaty rights to hunt, fish, and gather traditional foods and medicines and its statutory right to protect its cultural and archeological resources. In Prehearing Order No. 3, the Council required the Yakama Nation to identify of its interests with greater specificity. The Nation opposes the requirement.

The Nation argues that the requirement is inappropriate because (1) the Tulalip Tribes were not required to identify their interests with specificity, (2) the requirement would impose a significant burden on the Yakama Nation and would likely impact its federal treaty rights, and (3) the requirement is beyond EFSEC's authority.

The Council finds, first, that the Tulalip Tribes *have* made considerable effort to identify their usual and accustomed treaty fishing areas, both in their scoping comments and in a pleading captioned "Identification of Tulalip Tribes Possessive Treaty Fishing Areas."<sup>5</sup>

Second, in order to set effective and appropriate protections, the Council must know what hunting, fishing, gathering, and cultural resource areas require protection. The Council is not persuaded that an identification sufficient to meet those needs would cause an unreasonable burden or violate the Nation's treaty rights.

Third, the Council finds that it does have the authority to require voluntary participants in its proceedings to explain what they want to protect in sufficient detail to allow the Council to

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<sup>5</sup> The pleading captioned "Identification of Tulalip Tribes Possessive Treaty Fishing Areas" was submitted by the Tulalip Tribe in direct response to the Council's request during the first prehearing conference. The Council had been prepared to make the same request of the Yakama Nation at the prehearing conference; however, the Yakama Nation did not appear at the conference.

formulate and require suitable protections.<sup>6</sup> Without clear and sufficiently specific identification, the Council has no basis on which to require clear and specific protection.

The Council is sensitive, however, to the fact that the Nation may not want the location of certain cultural or archeological sites to be disclosed on a public record. For such matters, confidentiality is a legitimate concern. The Council invites the Yakama Nation to explore alternatives, with the Applicant and with Council staff, to avoid unwanted exposure of sensitive information, including the use of a motion for a protective order to provide for confidentiality of certain information.

In summary, the Council requires the Yakama Nation to identify its interests with sufficient specificity to allow for meaningful consideration, but notes that alternatives are available to enable the Yakama Nation to avoid public disclosure of confidential information.

### **C. King County**

King County requested clarification that Prehearing Order No. 3 allows the county to protect all lands and resources within its jurisdiction, not only those under its ownership or control. The Applicant did not oppose the County's request.

The Council did not intend to limit King County's participation to the lands and resources it owns when it accepted the county's statement of its interests. King County may intervene to exercise its duty under the police power to protect the public interest lands, water, and environment within its jurisdiction.<sup>7</sup>

### **D. Chevron Products Company**

Chevron originally petitioned for intervention, arguing that it had economic interests in the oil marketing and transportation industry and therefore had a right to intervene. Pre-hearing Order No. 3 denied the petition, stating that Chevron had failed to specify how the construction or operation of the pipeline could adversely affect its economic interests.<sup>8</sup> The order did observe that Chevron could communicate with parties with a view to providing them with information. Insofar as this information was useful and relevant, these parties could present it on the record. The order also encouraged Chevron to participate in the

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<sup>6</sup> The Council has no authority to require the tribe to do something irrelevant to the proceeding; it is not empowered by state or federal law to regulate the tribe.

<sup>7</sup> This is the same intervention status that has been afforded to the other counties in this proceeding.

<sup>8</sup> There was no indication in Chevron's petition that Chevron would not continue to supply the eastern Washington market through its own existing pipeline from Salt Lake City, nor any indication that it would not continue to ship petroleum from the Puget Sound region, either on the proposed pipeline or via barge on the Columbia River. There was no indication of how construction of the pipeline might directly or indirectly affects its interests.

SEPA process and to provide evidence at sessions set to receive testimony from members of the public.

In response, Chevron argues that the Council misconstrued the applicable legal rules, applying impermissibly narrow standards in denying its petition for intervention. Chevron argues that, under a proper construction of the rules, it does qualify for intervention. It requests oral argument on the issue of intervention.

1. Standards for intervention.

Chevron argues that the Council impermissibly narrowed its standards for intervention in its order. Chevron contends that the Council's rules allow broader participation than the Council allowed in its order, requiring merely an "interest in the subject matter of the proceeding."

The Council believes that its interpretation of its own rules is appropriate. The Council follows its statute and rules and the Washington APA.<sup>9</sup> The Council has consistently applied the language in its rule ("interest in the subject matter") to require more than a mere philosophical or academic interest. Instead, the Council has ruled that some not-insignificant, legally protectable interest must be at stake in order to justify the additional time and cost of the intervenor's participation.<sup>10</sup>

2. Substantial adverse effect.

Chevron argues that it has an "interest" in the subject matter of the proceeding, that it has pleaded its interest "with particularity," and beyond this, no showing of direct, adverse, nontrivial effect is required to establish the requisite interest.

*Interest in the subject matter, pleaded with particularity.* Chevron argues that the subject matter of the proceeding is the pipeline transportation of petroleum products from western Washington to eastern Washington. Specifically, among other things, the purpose and need for the pipeline is subject matter to be addressed as the Council decides the application.

Because it is involved in the transportation and marketing of petroleum products in eastern Washington, Chevron argues, it has an "interest in the subject matter of the proceeding," particularly the purpose and need for the pipeline. This interest has been pleaded with particularity.

Consistent with its approach in its past three decisions, the Council requires more than a "philosophical or academic interest in the subject matter." Unquestionably, Chevron is *concerned* about the activities of its business competitors. However, unless it can show a

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<sup>9</sup> Chapter 80.50 RCW; WAC 463-30-400; RCW 34.05.443.

<sup>10</sup> This interpretation was clearly expressed in KVA Resources, Inc. and has been cited and used in subsequent EFSEC intervention decisions. See, KVA Resources, Inc., Prehearing Order No. 1, p. 8.

potentially direct and substantial adverse effect on a legal interest of its own, Chevron has demonstrated no more than a philosophical interest in the subject matter. The fact that Chevron desires to address a particular *issue*, specifically the “purpose and need” of the pipeline, does not establish the requisite legal interest.<sup>11</sup>

*Direct, adverse, substantial effect.* In its Supplemental Memorandum, filed October 1, 1996, Chevron introduces a new argument. Acknowledging what it had previously denied, the need to demonstrate potential “injury-in-fact” to establish standing, Chevron analogizes its position to that of the Seattle Trades Council in Seattle Building and Construction Trades Council v. Washington State Apprenticeship and Training Council, 129 Wn.2d 787 (1996). Chevron claims that it will suffer a procedural injury if intervention is denied.

The Council is not convinced that Chevron will suffer procedural injury if intervention is denied. In Seattle Trades Council, the permitting agency certified an apprenticeship program after discussion in an agency meeting. The Court held that, under the APA, the permitting agency could not make its certification decision on the basis of discussion in an agency meeting. Rather, a full adjudication was required to determine the rights of the interested parties. Because the Seattle Trades Council would have qualified to intervene in a full adjudication, without the adjudication, it was deprived of an opportunity to present its case, engage in discovery, and cross examine witnesses. This was procedural injury.

Chevron’s situation can be distinguished. Here, EFSEC *is* holding an adjudication to determine the rights of the parties. However, parties have no due process right to participate in an administrative adjudication without first qualifying for intervention. Chevron has failed to qualify. Refusal of intervention status to an unqualified party does not constitute procedural injury in the sense established in Seattle Trades Council.<sup>12</sup>

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<sup>11</sup> In Chevron’s Reply to Olympic’s Response, p. 5, Chevron argues that the Council denied its intervention before it had received sufficient information about the “purpose and need” for the pipeline. Chevron should be allowed to intervene *in the adjudication* to address the issue of purpose and need.

The Council notes that Chevron has taken the issue of purpose and need out of context. In the Council Minutes referenced by Chevron, the Council indicated that it needed a more specific “purpose and need statement” from the Applicant in order to proceed with the EIS. *The development of a purpose and need statement for an EIS is entirely distinct from the adjudication in an EFSEC process.* The Council has welcomed and will continue to welcome public comment about the EIS process. Indeed, Prehearing Order No. 3 encouraged Chevron to participate in the EIS-SEPA process.

<sup>12</sup> In its Supplemental Memorandum, Chevron cites Kenneth Culp Davis and Richard Pierce, Administrative Law Treatise, to say that the U.S. Supreme Court “routinely recognizes probable economic injury resulting from agency actions that alter competitive conditions as sufficient to satisfy the injury-in-fact requirement.” Seattle Trades Council, No. 63074-7, slip op. at 7. Chevron has taken this citation out of context. The Washington Supreme Court explains in Seattle Trades Council that a party must have some “concrete interest” in order to assert a violation of its procedural rights. “Probable economic injury” is frequently recognized as sufficient to satisfy the “concrete interest” requirement. The cited language does not apply to Chevron, because Chevron has not first established “procedural injury.”

In summary, in Prehearing Order No. 3, the Council found Chevron's assertions to be insufficient to qualify it for intervention. In addition to the specific identification of an interest (particularity), the Council requires a showing that a proposed project could have a direct adverse effect on the asserted interest and that the effect is more than trivial or insubstantial. Chevron did not initially persuade the Council that the pipeline would cause any adverse effect to its financial or property interests and has provided no additional information to demonstrate any such effect. Nor has it established a procedural injury to meet the injury-in-fact requirement.

### 3. Legally protectable interest.

Chevron argues that its economic interests as a "petroleum shipper" and as an "industry participant" are legally protectable interests. It contends (1) that economic interests are generally protected under the law, (2) that chapters 81.28 and 80.50 RCW provide the necessary "provisions of law" required for intervention status by RCW 34.05.443,<sup>13</sup> and (3) that EFSEC acknowledged that strictly economic interests are legally protectable when it granted intervention to the Washington Water Power Company (WWP) in the KVA proceeding and to Tidewater in this docket.

Because Chevron did not show that its economic interests could be adversely affected in a direct and potentially substantial way, the Council denied intervention in Prehearing Order No. 3 without addressing the issue of legally protectable interests. The Council continues to believe that Chevron's failure to show direct and substantial adverse effect is a sufficient basis for its intervention decision.

Nonetheless, because Chevron continues to argue that its interest is legally protectable, the Council addresses Chevron's arguments here. The Council concludes that Chevron's arguments regarding its legal interest continue to be unpersuasive for the following reasons.

*Economic interest, generally.* Chevron appears to argue that any potential injury to a party's economic interest is ipso facto "legally protectable." Under certain circumstances, economic interests may be legally protectable. However, case law does not indicate that any conceivable injury to an economic interest automatically makes the interest legally protectable or that it automatically confers qualification for intervention. Even in the case cited by Chevron, there was no "automatic qualification" based on economic interest.<sup>14</sup> Rather, the court *analyzed* the economic interests in question

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<sup>13</sup> RCW 34.05.443 (1) states, "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..."

<sup>14</sup> Chevron cites Cascade Natural Gas Corp. v. El Paso Natural Gas Co. There, El Paso Natural Gas had acquired the Pacific NW Pipeline Company. The Supreme Court found a violation of the Clayton Act and remanded, with an instruction to the lower court to write an order for immediate divestiture. Two companies and the state of California moved to intervene in the divestiture proceedings to protect their economic interests. The Court held that each should be granted intervention because the primary purpose of the relevant statute (the Clayton Act) was to guarantee a system of healthy economic competition. *In sum, no automatic intervention was granted before careful*

carefully before deciding that they were sufficiently “related” to the statute and transaction in question to be considered “legally protectable.”

*Provisions of law.*<sup>15</sup> Chevron contends that chapters 81.28 and 80.50 RCW give it legally protectable interests. The Council does not find that either law creates a legally protectable interest for Chevron.

Chapter 81.28 RCW does prohibit a common carrier from giving unreasonable preferences and provides for the economic regulation of common carrier pipelines by the Washington Utilities and Transportation Commission (WUTC). That provision is not preempted by chapter 80.50 RCW. Chapter 80.50 RCW does not grant the Council jurisdiction over the economic regulation of common carriers. Whether Chevron has a legal interest under chapter 81.28 RCW (sufficient to qualify it for intervention in a WUTC proceeding) is irrelevant to this proceeding.

Chapter 80.50 RCW does refer to the growth of industry in the state.<sup>16</sup> However, a proper concern about statewide industry under the statute does not require the Council to protect existing market participants without some showing that the statute intended consideration of their interests or that the proposed project might have some effects on those interests.

Chevron argues that the Washington Supreme Court’s analysis of the zone of interest test in both St. Joseph Hospital v. Department of Health, 125 Wn.2d 733 (1995), and Seattle Trades Council, 129 Wn.2d 787 (1966), is relevant to whether its interest is legally protectable under EFSEC’s statute, chapter 80.50 RCW. The Council believes that the facts and applicable laws in both cases are clearly distinguishable from Chevron’s position under chapter 80.50 RCW.

In St. Joseph Hospital, the Department of Health denied intervention status to St. Joseph Hospital in a proceeding to determine whether a competing health care provider would be granted a Certificate of Need to build a kidney dialysis center.

The Court held that the legislature’s intent chapter 70.38 RCW, establishing the “Certificate of Need” program, was to limit the negative effect of competition in the health care industry on consumer costs. Chapter 70.38 RCW seeks to protect the public interest by protecting competent existing health care providers from unnecessary competition. Consideration of the effect of competition on existing providers was a

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*consideration of the economic interests involved.* Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 1967.

<sup>15</sup> RCW 34.05.443 (1) states, “[t]he 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...”

<sup>16</sup> RCW 80.50.010 states, “...[t]he legislature recognizes that the selection of sites will have a significant impact upon the welfare of the population, the location and growth of industry, and the use of the natural resources of the state.”

necessary first step in protecting the ultimate consumers of health care. Thus, the economic interest of St. Joseph Hospital was legally protectable, and St. Joseph's Hospital was allowed to intervene to protect its interest.

In Seattle Trades Council, the State Apprenticeship Council (Council) approved and registered an apprenticeship program for non-union workers, submitted by the Construction Industry Training Council. Seattle Trades Council (Seattle Trade) sought judicial review of the Council's approval of the program, claiming that its own apprenticeship program for union workers would be harmed. The Council objected to judicial review, arguing that Seattle Trade did not have standing.

The Court held that Seattle Trade did have standing under RCW 34.05.530 because (1) Seattle Trade had suffered procedural injury when the agency refused to hold a required adjudication; (2) its procedural injury was supported by a "concrete interest," i.e., probable injury to its apprenticeship program (economic interest); and (3) the Council was required by statute and rule to protect Seattle Trade's interest in its apprenticeship program and its apprentices by ensuring uniform statewide standards in apprenticeship programs. See, RCW 34.05.530(2).

Chapter 49.04 RCW, the statute governing the certification of apprenticeship programs, contemplates that new apprenticeship programs must match the standards of existing programs, and that decisions regarding apprenticeship programs must be made in the best interests of the apprentices. Thus, the interests of the union apprentices represented by Seattle Trade are among the interests the statute required the Council to consider.

In both St. Joseph Hospital and Seattle Trades Council, the interest of the party seeking intervention fell within the statutory "zone of interests" which the decisionmaker was required to consider or protect. By contrast, despite the Legislature's concern about the location and growth of statewide industry and the broad public interest, chapter 80.50 RCW does not indicate that EFSEC is required to consider or protect the interests of individual economic competitors such as Chevron.

*Prior EFSEC decisions.* Chevron compares its economic interests with those of Washington Water Power Company (WWP) in the KVA case and Tidewater here, saying that the order discriminates against Chevron by not using the same standards. The Council disagrees. Chevron's interest appears to be the protection of its position as an economic competitor of potential pipeline customers (it is a petroleum shipper and industry participant). By contrast, in the KVA matter, WWP was granted intervention to protect a legally protectable water right and to protect against the anticipated effect on its electrical transmission system, not to protect its position as an economic competitor. Here, the Council has chosen to consider Tidewater's socioeconomic interest insofar as it is an integral part of a directly affected segment of the overall regional economy, not to protect Tidewater's interest as an economic competitor.

#### 4. Impairment of interests.

Chevron argues that failure to allow intervention would seriously impair its interest. First, Chevron contends, its economic interests will not be represented by Counsel for the Environment or any other existing party in the proceeding. Second, Chevron argues that if intervention is denied in this proceeding, it will be foreclosed from future rate proceedings before the WUTC and have no future forum through which to express its concerns about common carrier rates on the pipeline.

Chevron appears to believe that the Council originally denied intervention in part because it believed that Chevron's interests *could* be adequately protected by other parties, including Counsel for the Environment. In Prehearing Order No. 3, however, the Council did not address the question of whether a denial of intervention would impair Chevron's ability to protect its interests because it decided against intervention on other grounds. The Council believes that Chevron's arguments about impairment of interest continue to be immaterial for the same reason.<sup>17</sup>

#### 5. Oral argument.

Chevron has requested oral argument to support its case for intervention. Chevron has not demonstrated that oral argument would assist the Council in making an appropriate decision. The Council has carefully reviewed five pleadings submitted by Chevron and the pleadings of the Applicant, understands Chevron's arguments, and is prepared to make a decision at this time. The additional time and expense of oral argument would create an unnecessary burden on the proceeding for both Council members and existing parties. Thus, the Council denies Chevron's request.

#### 6. Conclusion.

The Council denies Chevron's petition for intervention. Chevron has not explained how the Council's action on this application, pro or con, could affect its operations or its economic viability. Even if Chevron had passed this hurdle, the Council remains unpersuaded that Chevron's interest as an economic competitor is legally protectable under the EFSEC statute.

### **E. Cascade Columbia Alliance (Cascade)**

The Council's Prehearing Order No. 3 ruled that five Cascade members owning real property within the pipeline corridor had 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 property of identified downstream owners was indirect and speculative, the Council did not find that the named downstream owners had a sufficient interest to support intervention. The named property owners within the pipeline corridor were granted intervention, to be represented by Cascade, limited to the impact of the

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<sup>17</sup> Chevron has failed entirely to support its contention that the denial of intervention in this proceeding would preclude it from participating in future proceedings before the WUTC or that denial could adversely affect it in any other way.

pipeline on their identified real property interests. The downstream property owners were denied intervention.

Cascade also pleaded the interests of three environmental organizations; 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.

Cascade now objects to the order on intervention and repeats its request for intervention to represent property owners, fishers, and businesses whose interests it chose not to identify earlier.

1. Unknown effects.

Cascade argues that it is too early in the proceeding to identify members who may suffer direct effects. Although Olympic has proposed a corridor and identified property owners on that corridor, it has not completed the technical scientific fieldwork necessary to identify with specificity the pipeline's impact on a range of environmental resources from aquifers to streams. Cascade says that it is unreasonable to expect Cascade to have completed an independent technical analysis at this stage when neither the Applicant nor the Council's expert environmental consultant has completed such an in-depth analysis. As more detailed environmental information becomes available, Cascade claims that it will be able to identify member property owners and recreational fishers who may be directly affected.

The Council notes that under the APA, the presiding officer may modify an intervention order at any time, either to broaden or further limit participation.<sup>18</sup> The Council previously reserved the right to broaden participation at a later time when it established a deadline after which "petitions to intervene will not be considered *except for good cause shown*. (emphasis added)"<sup>19</sup>

The Council in no way bars Cascade from attempting to establish good cause to allow late intervention for a member whose interests were not pleaded before the June 7, 1996 deadline. However, the Council will look closely at any such request.

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<sup>18</sup> RCW 34.05.443(3).

<sup>19</sup> WAC 463-30-400.

The Council would not likely find good cause to allow late intervention to persons whose interests could easily and reasonably have been identified before the pleading deadlines. At present, no “good cause” is apparent to admit the nearly thirty right-of-way owners identified in Cascade’s objection.<sup>20</sup> Cascade had ample opportunity between April 22 and August 5 to make these identifications, but chose to avoid naming members.<sup>21</sup> While the Council finds it difficult to envision what “new” environmental information might support “good cause for late intervention,” Cascade is free to pursue the matter if it chooses to do so.

If the environmental studies reveal (1) an unexpected potential effect (not reasonably associated with pipeline construction or operation before the deadline for intervention), or (2) the existence of unexpected aquifers or natural scientific phenomena (indicating a possible effect on persons who previously had no reasonable awareness of that possibility), then late intervention may be appropriate. Similarly, if the proposed route of the pipeline changes significantly to traverse and affect properties not affected to date, late intervention may also be appropriate. As noted above, persons may assert good cause for late intervention. Cascade is free to propose other means to show good cause than those listed here. The Council will review any such properly filed requests.

## 2. Unfair application of rules.

Cascade argues that the intervention standards applied to Weyerhaeuser, Washington Environmental Council/People for Puget Sound (WEC/PPS), and Maritime Environmental Council were more liberal than those applied to Cascade.

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.

The Council also continues to believe that in admitting WEC/PPS, the Council exercised discretion within its authority. Finding that the interests of identified members of the organizations could be affected by an increase in tanker traffic on the Sound, the Council also recognized that the marine concerns of these organizations was not well represented by existing parties to the proceeding and that WEC/PPS’s participation would be valuable to the Council if limited to specific issues.<sup>22</sup> In contrast, the Council found not

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<sup>20</sup> Cascade’s list appears to include 51 right of way owners. However, Cascade’s list enumerates individual family members living on single parcels, so that up to six family names are mentioned in connection with one piece of property. In fact, only 30 parcels are identified.

<sup>21</sup> In fact, on June 12, 1996, the Council staff sent a letter to Cascade, specifically requesting more definite identification of the names and interests of its members.

<sup>22</sup> “WEC/PPS may intervene, limited to the following issues: (1) whether tanker traffic on Puget Sound and the Strait of Juan de Fuca would be affected by certification of the proposed site, and if so, (2) the environmental

only that an adverse effect on the interests of Cascade's non-corridor owners and recreational users was highly speculative, but that such interests were very well represented by other parties to the proceeding.

Similarly, the Council exercised discretion within its authority in admitting Maritime Environmental Coalition (Maritime). The Council's understanding of the economic interests of the maritime and coastwise industries represented by Maritime was sufficiently clear to allow the Council to find that those interests could be significantly affected by the pipeline and to grant joint intervention status to Maritime and Tidewater for a limited list of issues.<sup>23</sup> Cascade has been unable or unwilling to provide a similar level of understanding to the Council about the interests of the unidentified businesses and labor unions it represents.

### 3. Scope of participation.

Cascade argues that because it has identified five members who are right-of-way owners with legally protectable property interests, it must be allowed to represent all of its member right-of-way owners without further identification or qualification. It argues that the courts have granted standing to organizations which represent many individuals who have a common interest when the common interest is legally protectable. It contends that EFSEC's decision encourages future intervenor landowners to petition for intervention separately.

The Council is not persuaded by Cascade's interpretation of the "common interest" requirement. Cascade is correct in saying that courts have granted standing to organizations which represent many individuals who have a common interest. However, Cascade has not demonstrated that its individual property owners have a "common interest." Rather, each has an individual interest in the beneficial use and quiet enjoyment of his/her own individual parcel. Those interests may have common elements but are not common in the sense of the cases cited.

EFSEC strongly supports group participation by individual landowners. It conditioned landowner participation in the KVA proceeding on such a requirement. Nothing in the Council's treatment of Cascade's petition encourages individuals to petition separately rather than through a group. It merely requires the same identification and the same support for intervention, whether landowners are petitioning individually or as members of a group. This is entirely consistent with the Council's approach in recent prior cases.

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impacts of changes in tanker traffic resulting from the pipeline." In re Application No. 96-1, Prehearing Order No. 3, p. 6.

<sup>23</sup> Prehearing Order No. 3 states, "Tidewater and Maritime Environmental Council ... will be required to coordinate all aspects of their participation through one lead counsel. 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." p. 6

#### 4. Conclusion.

In summary, the Council reaffirms its decision on the scope and conditions of intervention for Cascade Columbia Alliance. If Cascade subsequently demonstrates good cause for late intervention on behalf of clearly identified individuals, the Council will address Cascade's request at that time in accordance with pertinent standards.

#### **F. Additional Avenues for Participation**

The Council's application review process for the Cross Cascade Pipeline will afford parties and non-parties several opportunities for input, above and beyond that allowed by intervention status in the adjudicative proceeding.

Any entity or individual may communicate with any party with a view to providing that party with information. Insofar as this information was useful and relevant, the "receiving party" could potentially present it on the record (within the constraints of its own intervention status).

Further, the Council will provide opportunities for public comment in a variety of forums: (1) the Council has recognized that additional public hearings may occur in the land use determination<sup>24</sup>; (2) the Council will set hearings for public comment on the DEIS and EIS in the course and context of the SEPA process; and (3) the Council will set at least one session for public comment as part of the adjudication.

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

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Fred Adair, EFSEC Chair

**Notice to Participants.** No further agency review of this Order is available. Judicial review may be available pursuant to the provisions of chapter 34.05 RCW.

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<sup>24</sup> Prehearing Order No. 3 states, "Within the applicable legal parameters, the Council intends to remain as flexible as possible and to allow additional participation by parties to the adjudication and the public. The Council, on its own motion, may set an additional hearing on land use issues; similarly, any party to the adjudication may make such a motion." p. 8.