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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. 17
COUNCIL ORDER NO. 718

ORDER ON
INTERVENTION ISSUES

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 mailed to an extensive list of potential intervenors on 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. On May 7, 1998, Judge

1 Richard Hicks, Thurston County Superior Court, heard the case and subsequently entered an
2 Order and Judgment.¹ The ruling sustained the intervention standards applied by the Council.
3 Judge Hicks remanded the matter to the Council on two issues. The judge's order provided that
4 the Council must allow the same degree of participation to property owners represented by
5 Cascade that it allowed to Weyerhaeuser. The order also provided that the Council must clearly
6 apply the same standard to the intervention of Trout Unlimited that it did to the Yakama Nation.

7 On September 25, 1998, the Council entered Prehearing Order No. 15, responding to the
8 Superior Court ruling on intervention. The Council "affirm[ed] that the scope of intervention for
9 all identified property owners in this proceeding [was] consistent vis-à-vis their property and the
10 pipeline."² The Council modified the scope of Cascade's intervention to include the fishing
11 interests of members of Trout Unlimited, consistent with the right of the Yakama Nation to
12 represent its treaty fishing interests.

13 On October 5, 1998, Cascade filed an objection to Prehearing Order No. 15 and a motion to
14 intervene for good cause. Olympic responded on October 30, and Cascade replied on November
15 23. The Council has considered these pleadings, and its decision is expressed herein.

16 **Discussion:**

17 **A. Introduction**

18 The Council will consider Cascade's Objection as a motion for reconsideration. Under
19 the Administrative Procedure Act, reconsideration is based solely on facts and arguments
20 pleaded prior to the initial action; a party may not raise issues and facts on
21 reconsideration that could have been raised earlier. The Council will deal with Cascade's
22 Motion for Late Intervention by determining (i) whether the standards of intervention are
23 met and (ii) whether, in its discretion, the Council finds good cause that the interests in
24 question were not pleaded earlier. Cascade has asked the Council to consider some
25 intervention interests in the alternative under both motions.

26 The Council has subdivided the identified Cascade members into six groups, based on
factual and logical similarities within each group.³ The members of each group are listed
by name and address in the appendix to this order. The second portion of this order will
address the unique circumstances of each group and reach an intervention decision for
each.

¹ 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."

² Prehearing Order No. 15, "Order Responding to Thurston County Superior Court Ruling on Intervention," September 25, 1998, p. 9.

³ These groupings are made on the basis of information provided by Cascade and Olympic. Information provided by Olympic is available in Appendix A of the revised application. Some submissions contained information inconsistent or not included in this appendix, which was not explained.

1 Initially, however, the Council will address the common issues.

2 **B. Preliminary Issues**

3 1. Intervention Standards

4 In its objection, Cascade asked the Council to reconsider whether the level of
5 specificity the Council has required of Cascade to demonstrate “direct effect” on
6 property outside the study area⁴ is consistent with the level of specificity required
of Weyerhaeuser.

7 The Council has concluded that its intervention standards have been applied
8 consistently throughout this proceeding. The Council applies its standards to the
9 unique facts of each petition. The property for which Weyerhaeuser was granted
intervention is not similarly situated to the property outside the study area for
which Cascade seeks intervention.

10 The property for which Weyerhaeuser sought intervention is within the study area
11 and listed in the appendix to the application. For the purposes of petitions for
12 intervention, the Council accepts that all property within the study area is subject
13 to direct effect from the pipeline.⁵

14 Property which is outside the study area (and not listed in the appendix to the
15 application) must be clearly identified; the showing of direct effect must be
16 specific to each unique property and sufficiently detailed to demonstrate that the
17 alleged effects are not speculative.

18 This standard has been settled; it is the law of the case.⁶ Parties must be able to
19 rely on the fact that the law of the case will remain constant.

20 2. Notice

21 In its Motion for Late Intervention, Cascade argues that some of its members had
22 insufficient notice of the right to intervene in the adjudication, and as a result, did
23 not petition for intervention prior to the June 1996 deadline. Cascade argues that
24 this constitutes good cause for late intervention.

25 ⁴ The Council has used the term “study area” to mean a one-half mile corridor centered on the proposed pipeline
26 route.

⁵ Prehearing Order No. 15, p. 3, footnote 6.

⁶ Judge Hicks sustained the Council’s standards for intervention: “The Court ... finds that the Agency. ... correctly
based their rulings on intervention on RCW 34.05.443 and WAC 453-30-400, and that they were not bound to
follow CR 24, nor base their discretionary rulings on allowing intervention to an identical standard to that which
might be found under that court rule.” Order and Judgment, Cascade Columbia Alliance v. Energy Facility Site
Evaluation Council, et al., No. 96-2-04073-5, July 10, 1998, p. 11.

1 The Council rejects this argument. The Council has made and will continue to
2 make a concerted effort, consistent with relevant law, to notify and involve the
3 public in the application review process.

- 4 • In February 1996, the Council issued a press release describing the project and
5 the opportunities for public involvement.⁷
- 6 • In March 1996, the Council placed legal notices and display ads in over
7 twenty-five newspapers along the route, to notify the public of land use
8 consistency hearings and public meetings (including SEPA scoping meetings)
9 later in the month.
- 10 • In March 1996, the Council mailed scoping notices to agencies, local
11 governments, and tribes.
- 12 • In March 1996, at the six public meetings in the counties traversed by the
13 proposal, the Council explained in depth the EFSEC process and the
14 opportunities for public involvement.
- 15 • On April 22, 1996, the Council mailed notice of the opportunity and deadline
16 for intervention to individual property owners in the study area, attendees at
17 the six public hearings, and a broad list of local government units, tribes, and
18 other interested persons.⁸ Cascade’s legal representative received a copy of
19 this notice.
- 20 • On October 7, 1998, the Council mailed individual notice of the opportunity
21 to intervene to individual property owners in the study area for any new
22 (alternate) alignments⁹ proposed by Olympic.

23 Despite the sufficiency of its prior actions, the Council is prepared to take
24 additional actions to assure full public involvement.

25 **C. Intervention on behalf of Particular Categories of Cascade Members¹⁰**

26 1. Category A: Study Area for Alternate Route

Category A consists of sixteen (16) parcels that lie within the study area for the
alternate route. Cascade argues that these landowner-members have good cause
for late intervention: they were not potential intervenors at the time of the

27 ⁷ The press release states, “...Once an application is received, EFSEC undertakes a comprehensive and thorough
28 review of the project including a review by an impartial independent consultant. EFSEC also holds public and
29 adjudicative hearings (quasi-judicial proceedings) to hear testimony regarding the project from the applicant,
30 concerned parties, state agencies, the public, and a “Counsel for the Environment”...”

31 ⁸ The Council deemed this an adequate means to inform potential intervenors of the deadline, as required by WAC
32 463-30-400.

33 ⁹ Hereafter, the proposed changes in alignment for certain sections of the original route will be denoted “the
34 alternate route.”

35 ¹⁰ As noted in the Conclusion below and elsewhere in this order, Cascade as an intervenor, may present evidence on
36 issues common to all parties in this proceeding. Our reference (and presumably Cascade’s) to “intervention” on
37 behalf of specific property interests refers only to Cascade’s ability to present evidence specifically on behalf of and
38 in relation to the interests of individual property owners, as distinguished from the public interest generally.

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original deadline but have become potential intervenors as a result of changes in the proposed route.

The Council finds that these landowners have good cause for late intervention. They have an interest subject to direct effect and good cause arising from the changes in route.¹¹ Consistent with the scope of intervention granted to all other property owners within the study area, Cascade may represent their property interests.¹²

2. Category B: Study Area for Original Route, Denied Intervention in PHO No. 5

Category B consists of twenty-seven parcels that lie within the study area for the original route.¹³ Although these landowners were members of Cascade before the June 1996 deadline, they were first identified to the Council on August 26, 1996, in Cascade’s objections to the Council’s intervention order. The Council denied them intervention in Prehearing Order No. 5, October 15, 1996, finding no good cause for late intervention.

In its current objection, Cascade asks the Council to reconsider whether these landowners have been treated consistently with Weyerhaeuser. The Council concludes that they have been treated consistently. The Council did not make distinctions between the pipeline’s effect on Weyerhaeuser’s property and the property in this category.¹⁴ The Council did make distinctions between the timeliness of the two petitions.¹⁵ Weyerhaeuser was granted intervention based on a timely petition; Cascade’s members were denied intervention based on the untimeliness of their petition.

¹¹ Prehearing Order No. 15 states, “[f]or any property within or traversed by the study area, the Council accepted the possibility of a direct effect.” Prehearing Order No. 15, p. 3, footnote 6. The order continues, “[i]n Prehearing Order No. 5, the Council indicated that a change in the proposed route may give rise to good cause for late intervention.” *Id.*, p. 9.

¹² Prehearing Order No. 15 states, “[a]s 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.” *Id.*, p. 5.

¹³ Cascade lists seventeen parcels. One of these is listed as belonging to Patrick Donohoe at 15921 309th Ave. N.E., Duvall, Washington. Another is listed as belonging to Lauren Smith-Donohoe at the same address. Because it appears that this parcel has been double-counted, the Council has listed sixteen parcels in this category.

¹⁴ Both Weyerhaeuser’s property and the property in this category lie within the study area of the original route. The Council is willing to accept that any property within the study area is subject to direct effect.

¹⁵ WAC 463-30-300 allows the Council to establish deadlines for intervention. Judge Hicks affirmed Council’s procedures in deciding intervention. Among such procedures is the establishing of deadlines to ensure an orderly and timely process. At the time of its original intervention decision (prior to identification of the individuals in this category), the other relevant distinction is that Weyerhaeuser was granted intervention for property clearly located within the study area *as confirmed in the appendix to the application*. Until individuals were later identified, the Council could not confirm the location of Cascade property within the study area.

1 In the alternative, Cascade argues that these members have good cause for late
2 intervention based on the diligence of Cascade's attorneys in ascertaining the
3 Council's intervention standards. In light of the Council's request for the
4 identification of these members to assist it in its intervention decision,¹⁶ the
5 Council concludes that the enumerated efforts do not give rise to good cause.

6 The Council continues to deny intervention to this group.

7 3. Category C: Study Area for Original Route; Cascade Members after August 1996

8 Category C consists of six parcels¹⁷ that lie within the study area for the original
9 route. The owners of these parcels were sent notice of the right to intervene in
10 April 1996,¹⁸ but did not join Cascade until after August 15, 1996.¹⁹

11 Cascade claims that these individuals did not receive notice of the right to
12 intervene. Cascade argues that they have good cause for late intervention because
13 they had no notice of their right prior to the intervention deadline.

14 The Council declines to find good cause for late intervention. Based on its
15 records, these landowners had notice prior to the June 1996 deadline, and their
16 petition in October 1998 is untimely. Intervention is denied to this category.

17 4. Category D: Ambiguity in Location vis-a-vis Study Area of Original Route

18 Category D consists of eighteen (18) parcels of uncertain location with respect to
19 the study area. The owners of these parcels joined Cascade after August 15,
20 1996.

21 Cascade alleges that these parcels are in the study area for the original route.²⁰
22 Cascade argues that (i) these properties are subject to direct effect from the
23 pipeline, and (ii) good cause for late intervention exists because these members
24 had no notice of the right to intervene.

25 ¹⁶ On June 12, 1996, the Council mailed Cascade a specific written request to identify its landowner-members to
26 assist the Council's intervention decision. This request alerted Cascade to the Council's concerns. See Order and
Judgment, p. 6. Throughout the proceeding, the Council has required a level of specificity sufficient to demonstrate
direct effect.

¹⁷ Cascade lists seven parcels. One of these is listed as belong to Cristins, Matt, and Tamara Donohoe at 15921
309th Ave N.E., Duvall, Washington. This parcel appears to duplicate the parcel belonging to Patrick Donohoe
listed in category B, which has been consistently denied intervention. See footnote 12. Because it appears that this
parcel has been double-counted, the Council has listed six parcels in this category.

¹⁸ The Council has copies of the mailing labels and/or documentation in its database that individual notice was
mailed to each individual.

¹⁹ Declaration of Susan Harper, October 5, 1998, Exhibit 2. The interest of John and Pamela Mathwig appears to
fall into this category. Placement is difficult based on the information Cascade has provided.

²⁰ Declaration of Susan Harper, October 5, 1998, Exhibit 2.

1 These parcels are not listed in the Council's record of property within the original
2 study area. The Council can not verify their location within the study area from
3 the information Cascade has provided. Nor has Cascade established direct effect
4 through a clear pleading for each unique property.²¹ From the information before
5 it, the Council can not conclude that these members have an interest for which
6 intervention should be granted. Intervention is denied as to the interests of
7 members of this group at this time. However, if Cascade can provide evidence
8 that (i) the parcels are in fact within the study area and (ii) that the owners (or
9 their predecessors in interest) did not receive notice by the deadline described in
10 section D below, the Council will reconsider its decision at that time.

11 5. Category E: Outside Study Area for Original Route; Members prior to June 1996

12 Category E consists of ten (10) parcels outside the study area. The owners of
13 these parcels joined Cascade prior to June 1996.²² Cascade did not identify these
14 individuals by name or by interest prior to its October 1998 pleadings.

15 In its objection, Cascade asks the Council to reconsider whether these landowners
16 have been treated consistently with Weyerhaeuser. Cascade argues that the direct
17 effects to which these properties are subject are analogous to the direct effects to
18 which Weyerhaeuser's property is subject. Among these, Cascade alleges, are
19 effects on ground water (including aquifers), surface water, drinking water,
20 irrigation water and effects arising from proximity to the Kittitas terminal.
21 Further, Cascade argues that the direct effects on these properties were pleaded to
22 the same level of specificity that Weyerhaeuser pleaded the direct effects on its
23 property.

24 The Council concludes that these properties have been treated consistently with
25 Weyerhaeuser. The Council applies its standards to the unique facts of each
26 petition. The intervention status of this category differs from Weyerhaeuser in
two significant ways. First, Weyerhaeuser's petition was timely; Cascade's
October 1998 petition on behalf of these members was not. None were identified
in Cascade's June 1996 petition for intervention.

Second, because the properties are not similarly situated, different levels of
specificity are required to demonstrate direct effect. Weyerhaeuser demonstrated
direct effect on its property to the level of specificity required for property within
the study area and was granted intervention accordingly. The property in this
category is outside the study area. Although Cascade's October 1998 pleading
provides a general indication about which resource(s) might be affected for each
particular parcel, Cascade has not provided a detailed pleading, specific to unique
properties, explaining how the property could be affected. From the information
before it, the Council is unable to conclude that these members have an interest
for which intervention should be granted.

²¹ "For property completely outside the study area, the Council requires a clear statement about how the property will be directly affected." Prehearing Order No. 15, p. 4, footnote 6.

²² Declaration of Susan Harper, October 5, 1998, Exhibits 4 and 5.

1 The Council will require that all petitions for intervention meet all standards that have
2 been identified in this proceeding. Among these standards, the Council will require a
3 petitioner to identify specifically the property interest for which intervention is sought
4 and to demonstrate clearly how this interest is subject to direct effect from the project.²⁸
5 The Council will require a showing of good cause for which late intervention should be
6 granted.

7 The Council will process petitions that are received on or before December 30, 1998,
8 under the standards that are now the law of the case. New intervenors (or existing
9 intervenors with expanded interests), if any, will enter the case at the point it now stands;
10 the schedule will not be modified to repeat processes that have already occurred or to
11 extend timeframes that have been established.

12 Finally, the Council notes that individuals, including landowners, may submit written or
13 oral testimony regarding pipeline effects during the public hearing sessions of the
14 adjudication. Individuals may also participate in the SEPA process²⁹ and offer comments
15 regarding consistency with local ordinances in the land use phase of the Council's
16 review.

17 **E. Conclusion**

18 This decision has limited import to Cascade's participation in the proceeding. To some
19 degree, this order expands the scope of Cascade's intervention representing individual
20 property owners. Cascade's ability to elucidate the public interest through representation
21 of matters common to all members remains constant.

22 Under its statute, the Council is charged with protecting the public interest, and the nature
23 of this proceeding allows it to gain an understanding of that interest in various forums. In
24 the adjudicative proceeding, agencies, local government, organizations, and individuals
25 will provide testimony to clarify the public interest. In the public witness sessions, the
26 Council will receive further clarification of the public interest. This format allows the
Council to receive considerable information regarding the public interest, while
protecting the rights of the parties to the adjudication to an orderly process and timely
decision.

28 The location of property allegedly in the study area that does not appear in the appendix to the application should be identified as precisely as possible.

29 The ninety (90) day written comment period on the DEIS closes on December 17, 1998. During this time, EFSEC held four public meetings to gather oral comments on the DEIS.

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DATED and effective at Olympia, Washington, this ____ day of December 1998.

C. Robert Wallis, Presiding Officer

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.