

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In re Application No. 94-2)	PREHEARING ORDER NO. 1	<u>678</u>
)		
of)		
)		
CHEHALIS POWER, INC.)	PREHEARING CONFERENCE	
)	ORDER; DENYING PETITION	
For Site Certification,)	FOR INTERVENTION	
Chehalis Generation)		
Facility)		
.....))		

This is an application for certification of a proposed site at Chehalis, Lewis County, Washington for construction and operation of a natural gas-fueled combustion turbine facility to generate electrical energy.

The Council held a prehearing conference on April 25, 1995, before Council Chair Frederick S. Adair and members C. Robert Wallis, Ron Skinnarland, Doug Kilpatrick, and John Nacht.

APPEARANCES. The following persons participated in the prehearing conference.

Applicant	Chehalis Power, Inc., by Elizabeth Thomas, Attorney, Preston, Gates & Ellis, Seattle, Washington
Counsel for the Environment	Thomas J. Young, Asst. Attorney General Olympia
Council Member Agencies	Dept. of Ecology, by Mary Sue Wilson and Ronald L. Lavigne, Asst. Attorneys General, Olympia
	Dept. of Fish and Wildlife, by William C. Frymire, Asst. Attorney General, Olympia
	Washington State Energy Office, by Thomas Prud'Homme, Asst. Attorney General, Olympia

**Petitioners for
Intervention:**

Northwest Environmental Advocates
and **Greenpeace**, by **Nancy Holbrook**, NWEA
Director, Clinton, Washington, and **Nina**
Bell, NWEA Executive Director, Portland,
Oregon

Critical Issues Council, by **Allen T.**
Miller, attorney, Connolly, Holm, Tacon &
Meserve, Olympia

Bonneville Power Administration, by **Nancy**
Baker, Counsel, Portland

In this order, the Council rules on petitions for intervention.

I. Petitions for Intervention.

In this proceeding, the Council has received seven petitions for intervention, including those filed by member agencies that are granted intervenor status upon request. They are the Energy Office, the Department of Ecology, and the Department of Fish and Wildlife.

In addition, the Council has received petitions from the Critical Issues Council, a group of persons who reside near the proposed facility, Northwest Environmental Advocates, a public interest organization, and the Bonneville Power Administration.

The Applicant has voiced no objection to the interventions of the Critical Issues Council and the Bonneville Power Administration. Those entities having demonstrated an interest in the proceeding that could be substantially adversely affected, the petitions should be granted.

Northwest Environmental Advocates (NWEA) also petitions for intervention. In support of its petition, it states concerns about specific environmental issues. It notes that the Nuclear Regulatory Commission granted it intervenor status in the federal licensing proceeding involving nuclear plants at the Satsop site. Neither the petition nor any other information states that it or its members have any property or other legal or substantial interest that would be adversely affected by a grant of the application. The applicant opposes this petition. Responses to the objection were filed by Counsel for the Environment, Department

The joint petitioners will be referred to collectively for convenience under the name of NWEA, who provided the written documentation in support of the petition and whose representatives appeared at the prehearing conference.

of Ecology, and NWEA, who supported the petition for intervention, and by the Energy Office.

NWEA contends that it has an interest in the proceeding because it wishes to protect the environment of the state of Washington.² In that sense, it seeks to perform the same functions that the law assigns to Counsel for the Environment. It contends that because it has filed suit against the State of Washington to compel compliance with environmental requirements, its interests cannot be represented by Counsel for the Environment.

Counsel for the Environment contends that he is obligated under the statute to balance the interests of the environment with those low cost power, and that consequently he does not represent the same public interest that NWEA would represent. The Department of Ecology states that it supports NWEA's petition because the applicant's objections would impose on Ecology the burden to represent NWEA's interests if the petition were denied. The Energy Office neither supported nor opposed the petition but asked the Council to consider in ruling on the petition the possibility that the agency might withdraw from the proceeding entirely or stipulate with the applicant to a settlement.

NWEA does not contend that it wishes to represent the interests of persons living near the facility. It did not name any individual members affected, nor did it contend that its purpose in intervening was to represent the unique interests of those persons.

The Council does not believe that the petitioner has stated a sufficient interest to qualify it for intervention. Neither it nor its members have legal or other substantial interests that it contends would be adversely affected, except those of all members of the public generally. Those interests are represented by Counsel for the Environment and the state agencies. The petition for intervention should be denied.

This is not a situation in which there is no protection for the public interest in this process -- in fact, the EFSEC process was designed from the ground up to assure that the public interest is protected. That is the charge to the Council; that is the reason for creating the office of Counsel for the Environment; and that is the reason for allowing intervention of right to Council member agencies. The Council is not using RCW 80.50.080 to deny the intervention of any entity that is otherwise entitled to intervenor status. It is granting intervention in this proceeding

²It also seeks to have the Council consider environmental effects outside the State of Washington, resulting from "upstream" activities such as the exploration for and extraction of natural gas.

to the Critical Issues Council, a citizen's group who have identified general environmental issues. It merely rules that NWEA has not stated a sufficient legal or other interest in the proceeding to support intervention.

If the Council accepts interventions in application proceedings from persons or entities who have no interests at stake -- except as members of the public -- then the Council could be put to an impossible task in each proceeding, bound to accept such interventions and still process the application within the statutory timeframe. Applicants could be bound to defend not only against the concerns of persons personally affected, the statutory Counsel for the Environment, and the state agencies, but also any other citizen who wished to participate as an intervenor. This is an application proceeding after all, in which an individual applicant's rights are determined and the Council must apply public policy, and not one in which a government branch or agency sets out to create or develop public policy.

Counsel for the Environment contends that he is unable to represent the public interest in the proceeding because he is obligated to balance the interests of the environment with the public's interests in low cost power. We disagree with his argument and his perspective. It is the Council, not Counsel for the Environment, who is obligated to perform the balancing he spoke of. We find no statutory duty for Counsel for the Environment to limit his participation in the hearing process. Moreover, we are concerned that granting the petition for intervention could be seen as a finding that Counsel for the Environment, either personally or institutionally, is inadequate to represent the public interest. We disagree with that perspective, and will not act to support it.

The Department of Ecology's argument, that if NWEA's intervention is denied the applicant would force the agency to represent NWEA, also must fall. The Department is charged with advocating the portion of the public interest that its statutes assign to it for protection. The applicant cannot change that, nor can the acceptance or rejection of a petition for intervention in any given proceeding.

WSEO observes that it may withdraw or settle its issues with the applicant. We presume that a settlement would come to the Council with the agency's representation that it satisfies the agency's concerns. We do not presume that any set of issues will be pursued through any particular agency's participation, and withdrawal of one agency or intervention of another merely indicate that the agency chooses to, or not to, pursue its interests in the given context.

The parties continue to mix the basis for grants of intervention -- a substantially affected interest -- with individual parties' or potential intervenors' views of the issues

that should be presented to the Council. The petitioner has not stated an interest that requires intervention for its protection. There is no test related to whether one issue or another is pursued. The Council appends its discussion from a prehearing order in Application No. 93-2, KVA's Northwest Regional Power Facility, regarding interventions.

The petitioner argues that we should disregard an element of our statute -- need for energy -- merely because petitioner disagrees with it. It cites the statutory provision that there is a pressing need for energy facilities. It urges that because that is not true, the Council should disregard the statute.

We disagree with petitioner's position. We cannot disregard an element of our statute merely because we disagree with it. The legislature has had ample opportunity to review the provision and, if it wishes the policy of the state to change, amend it. The legislature has not done so. We remain a creature of statute, and do not have the authority to amend it without legislative action.

Denial of the intervention does not impair petitioner's members' rights as citizens. They may attend and observe all hearing sessions to the same extent as any member of the public. They may appear and testify at the hearings designated to hear evidence from members of the public, subject to any reasonable limitations applicable to all such witnesses. NWEA and its members may also participate fully in the environmental impact process. Contrary to petitioner's contention, denying its petition for intervention does not foreclose it from participation and does not preclude the Council from considering the public interest.

The petitioner has not demonstrated any substantial interest in the outcome of the application that differs from any other group or member of the public. The fact that it disagrees with the Department of Ecology or Counsel for the Environment on a particular issue does not entitle it to party status. Using that standard could promote dissention and disagreement to gain party status and still does not identify an interest warranting participation in this process, and could force the Council to accept virtually every petition for intervention.

II. Other Matters.

Timing and Format of Hearing. The parties agree at this point that it appears feasible to begin the hearing in the time frame of late September or early October. Witness scheduling issues may require the latter date.

Hearing format. The Council prefers a format in which parties' direct and rebuttal evidence is prefiled, and then a single hearing is held.

Discovery: The parties agreed that they would begin the process by committing to provide information voluntarily whenever possible. The parties acknowledged, and the Council rules, that doing so does not prevent any party from seeking formal discovery rulings from the Council at a later time.

Hearing Guidelines: The Council distributed copies of hearing guidelines to the parties and invited comments about use of the guidelines in determining how the Council will exercise its statutory discretion under the Administrative Procedure Act to govern the course of the hearing. No participant filed comments. The Guidelines are adopted; they are attached to this Order as Appendix A. As provided in the Guidelines, they are subject to such exceptions as the Council believes to be just and fair in light of the circumstances before it.

Amended Service List. The Council will provide a copy of the amended service list as an Appendix to this Order. The parties should note that individual Council members are now on the service list and that they should receive any document that is filed with the Council for inclusion in the official file or the record, including pleadings and prefiled evidence.

DATED and effective at Olympia, Washington this 17th day of May, 1995.



FRED ADAIR, Chairman

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

Appendices

- A: Excerpt.
- B: Hearing guidelines.
- C: Service List.

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of
Application No. 94-2

CHEHALIS POWER, INC.

CHEHALIS GENERATION FACILITY

APPLICATION NO. 94-2

CERTIFICATE OF SERVICE

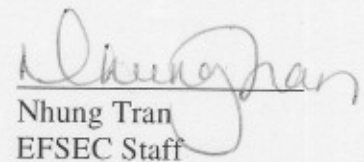
The undersigned certifies that on May 17, 1995, she served the enclosed:

PREHEARING ORDER NO. 1

PREHEARING CONFERENCE ORDER; DENYING PETITION FOR
INTERVENTION

by depositing copies thereof in the United States mail, properly stamped and addressed, as
indicated on the Chehalis Generation Facility Service List.

DATED: May 17, 1995


Nhung Tran
EFSEC Staff

APPENDIX A

EXCERPT, PREHEARING CONFERENCE ORDER NO. 3 IN RE KVA/CSW APPLICATION NO. 93-2

II. Petitions for Intervention.

A. Standards for granting or denying intervention.

1. **Parties of right.** When the Council enters into an adjudication upon an application for site certification, there are two statutory parties of right. These are the Applicant³ and Counsel for the Environment.⁴

2. **State agencies.** Another class of entities has a right to participate under Council rules: any Council member state agency is entitled to party status by operation of WAC 463-30-050 and -060. Three state agencies have indicated their intention to participate in this adjudication: the Departments of Ecology and Fish & Wildlife, and the Washington State Energy Office. It is immaterial for our purposes whether or not we call them intervenors, although technically that is what they appear to be -- their participation as full parties is provided for by the rule, each has statutory responsibilities to pursue, and each has filed a document identifying itself and its interests in the proceeding.

3. **Petitions for intervention; standards for granting intervention.** Twenty-three petitions for intervention were filed by parties who have no "absolute" right to participate under statute or rule. In reviewing these petitions, the Council considered the petitions, oral comments made at the prehearing conferences, and any supplementary filings made by the petitioner.

In addition, it considered pertinent provisions of the statute and of the Council's rules and it considered pertinent decided judicial appellate cases and other recognized legal research materials as identified in this order.

a. **Adjudicative Proceeding.** The Council must hear applications for site certification as adjudications, with minor exception.⁵ This proceeding is an adjudication established by statute to determine the applicant's right to complete a single, specific, proposed project in light of existing state and federal environmental requirements. It is not a rulemaking, in which the broadest possible public participation is encouraged at every stage

³RCW 80.50.090.

⁴RCW 80.50.080.

⁵RCW 80.50.090(3).

in order to determine policies under the law.⁶ Instead, it is a limited proceeding, conducted under adjudicative rules and processes for the protection of parties' rights, to answer a single question. Unlike a rulemaking, "open entry" to an adjudication would be improper because it could adversely affect the rights of the parties whose narrow interests are being resolved, and it could adversely interfere with the Council's ability to conduct a fair and efficient hearing.

Also unlike a meeting or a rulemaking, persons who are granted intervenor status assume responsibilities that they must meet in order to protect their own interests and in order for the adjudicative process to be manageable for all participants. Intervenors must appear in the proceeding, either on their own behalf or by an attorney. Intervenors must study other parties' cases so they can participate knowledgeably. They must decide whether to question other parties' witnesses, and determine the questions to be asked. Intervenors have the responsibility either to attend the entire proceeding, including conferences, or to monitor it to learn when their interests will be at issue -- otherwise, they may be bound by matters that are resolved in their absence. They or their representatives have the responsibility to become familiar with the Council's procedural rules and guidelines, so they can participate knowledgeably and effectively to advance their interests, knowing what is expected and how to proceed. The Council is limited in its ability to instruct participants, because that would delay the proceeding and could interfere with their or other parties' rights. Intervention is not a step to be approached casually.

b. Administrative Procedure Act (APA). The basic document governing administrative adjudications is the state's Administrative Procedure Act, or APA, set out in Chapter 34.05 RCW. The APA contains provisions allowing, and setting parameters on agency treatment of, intervention. RCW 34.05.443.⁷

⁶Public participation in the adjudication is accommodated in two ways: by the creation and designation of Counsel for the Environment in RCW 80.50.080, to represent "the public and its interest in protecting the quality of the environment", and by the requirement that members of the public do have the opportunity to participate in the hearing by presenting testimony. RCW 80.50.090(3).

⁷The statute reads as follows:

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

Under the statute, an agency may grant intervention if it finds that the petitioner for intervention qualifies under a provision of law; that the intervention is in the interests of justice, and that it will not impair the orderly and prompt conduct of the hearing. The statute permits the imposition of conditions upon intervenors, and it permits the agency to impose those conditions at any time. The statute also allows the agency to impose limitations as to the issues an intervenor may address; limitations on the use of discovery, cross examination, and other procedures to promote the prompt and orderly conduct of the hearing, and may require two or more intervenors to combine their participation.

Intervention is an issue that shall be considered at a prehearing conference and decided by the presiding officer (here, the Council) in a prehearing conference order.⁸ The result of the order shall bind the course of the hearing unless objection is raised within 10 days after entry of the order.

c. Council regulations. The Council's regulations regarding intervention are set out at WAC 463-30-400 and -410.⁹ They parallel the statute.

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 at 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 shall promptly give notice of the decision granting, denying, or modifying intervention to the petitioner for intervention and to all parties.

⁸WAC 463-30-270.

⁹Those sections read as follows:

d. Analysis of requirements.

i. Qualification. A person "qualifies under any provision of law" for intervention by filing a timely petition, verified under oath,¹⁰ demonstrating an "interest in the subject matter of the proceeding" and impairment or impedance of its ability to protect that interest if it is not allowed to intervene.

The Council has the authority to condition and limit interventions, consistent with the statute.

WAC 463-30-400 Intervention. 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 be verified under oath by the petitioner, shall adequately identify the petitioner, and 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 with regard to intervention, the council shall consider whether intervention by the petitioner would unduly delay the proceeding or prejudice the rights of the existing parties. The council may establish a date after which petitions to intervene will not be considered except for good cause shown. When such a date has been established, the council will assure that adequate public notice is given.

WAC 463-30-410 Participation by intervenor. In general, it is the policy of the council to allow any intervenor broad procedural latitude. To the extent that the council determines that numerous intervenors might unduly delay the proceedings or prejudice the rights of existing parties, intervenor status may be conditioned upon assent by the prospective intervenor and counsel for the environment to allow the counsel for the environment to act as lead counsel for the balance of the hearing, where the intervenor's interests more closely align with those of the counsel for the environment. Intervenor status may also be conditioned upon allowance of other parties to act as lead parties, where appropriate. The council reserves the right to prescribe other limitations and conditions, where appropriate.

¹⁰Most of the petitions were not verified. The applicant waived verification, and the Council will not reject the existing petitions for lack of verification. The Council must expect that all participants, however, be aware of and meet their basic obligations under pertinent law and rules.

ii. Interest in the subject matter. Petitioners must demonstrate an "interest in the subject matter" of the proceeding and that their ability to protect that interest may be impaired or impeded if they are not allowed to intervene.

"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.

iii. Representations considered. Petitioners had the opportunity to express their interest not only through the initial petition, but also through oral statements at the prehearing conferences and through supplemental presentations authorized by the Council. They also had the opportunity to answer any objections presented to the petition. The Council considers the petition, the oral comments, if any, and the supplemental comments and answers to objections, if any, in ruling on each petition to intervene.

iv. Burden on the proceeding. In determining whether to grant intervention, the Council may determine under the statute whether the intervention would impair the orderly and prompt conduct of the hearing and under the Council rule whether intervention would impair the rights of existing parties or unduly delay the proceeding.

¹¹A similar term in the Federal Rules of Civil Procedure, Rule 24(a)(2), has evoked varied application and considerable legal comment. See, for example, Tobias, "Standing to Intervene", 1991 Wisconsin L.Rev. 415; "Note: Acid Rain Falls on the Just and the Unjust: Why Standing's Criteria Should Not Be Incorporated into Intervention of Right", 1990 Univ. of Illinois L.Rev. 605; "Note: Intervention in the Public Interest under Rule 24(a)(2) of the Federal Rules of Civil Procedure", 45 Washington and Lee L.Rev. 1549 (1988). The United States Supreme Court seems to have resolved much of the uncertainty by defining interest in this context as a legally protected interest subject to an invasion in the litigation that is concrete and particularized, actual or imminent. Lujan v. Defenders of Wildlife, 112 S.Ct. 2130 (1992). Under the analogous provision of the Washington civil rules, the Washington State courts require an immediate, concrete and specific injury to an interest in which the petitioner has a right. See, Trepanier v. Everett, 64 Wn.App.380 (1992).

The Council has an obligation to its own administrative processes, to the applicant, to all participants, to the Council members, and to the public to maintain a process that not only fairly and legally allows it to reach a decision, but also does so effectively and efficiently. The statutory time limit on Council decisions imposes an obligation to conduct a timely proceeding and evidences the legislative intention that the Council conduct its process efficiently.

Unnecessary duplication of representation of the same interest, if the interest is otherwise adequately represented, imposes an unnecessary and undue burden of time and resources on the parties and will impair the orderly and prompt conduct of the hearing.

v. Cooperation and coordination. The Council is gratified at the evidence of cooperation and coordination that has been shown by the potential intervenors, including the state agencies. It especially appreciates the leadership shown in that regard by Counsel for the Environment. If the promise of coordination and cooperation that is expressed in the parties' actions to date is fulfilled, future limitations on the intervenors may well be unnecessary.

vi. Condition upon intervention. The Council may also consider potential delay and burden in deciding whether to condition intervention on the designation of lead party, or on the coordination or combination of presentations. The Council retains the authority to impose such conditions on interventions during the proceeding if doing so appears to be necessary.

vii. Limitations on intervention. Finally, the Council may limit the participation of intervenors in discovery, cross examination, or other procedures, and may limit the issues an intervenor may address, not only at the time it grants intervention but at any time. In general, when potential intervenors have defined their interest as relating to limited issues, the intervention will be limited to matters relating to those issues.

Appendix B

Hearing Guidelines

CHEHALIS GENERATION FACILITY Application No. 94-2

Washington State Energy Facility Site Evaluation Council

These guidelines are of a general nature and are provided to assist counsel in understanding the Council's expectations and how it will manage the adjudicative hearing. The Council may, when appropriate, vary from the guidelines or use measures not specified.

Administrative matters.

(1) **General; administrative matters.**

(a) **Case-related correspondence, pleadings, etc.,** should be addressed to the Council, not any Council member or staff member. Correspondence addressed directly to an individual may not be logged in, may not be inserted in the case file, and may not constitute a part of the official record for appeal or for other purposes. **Number of copies:** Unless other instructions are given or other arrangements are made with the Council Manager, parties shall file an original and 20 copies of pleadings and case-related correspondence.

(b) **Starting times** will be strictly observed. The hearing may proceed without counsel who are late.

(c) All counsel are expected to address comments, objections, and statements to the Council rather than to other counsel. Questions will be addressed to the witnesses rather than to counsel.

(d) There will be no **off-the-record discussions** at the request of counsel unless counsel first asks leave to go off the record and states the purpose for the request. Extended **colloquies** regarding procedural issues should be conducted off the record. After such a colloquy, each attorney will be given the opportunity to state for the record a summary of his or her view on behalf of his or her client when the record resumes.

(e) **Predistributed evidence.** The Council may require that parties' evidence be distributed to the Council and other parties in advance of the hearing or hearing session. The schedule for predistribution will be determined after consultation with the parties.

(f) **Pleadings and Exhibits.** All pleadings and prepared exhibits shall be 8-1/2 by 11 inches in size or reduced to that size. They may be folded to that size if reduction would

render the document illegible. Every pleading and exhibit shall be punched for insertion into three-ring binders. Line numbers shall be set out on all prepared testimony to facilitate transcript or exhibit references. Large documents, charts, etc., may be used at the hearing for illustrative purposes so long as a legible reduction is provided for inclusion in the record.

(g) **Hearing format.** The Council will decide hearing format and schedule after hearing parties' comments. At least three format models are available: exchange of evidence, followed by a single hearing session; individual hearing sessions for cross examination of applicant's case, intervenors and Counsel for the Environment's case, and rebuttal cases; and individual hearing sessions for cross-examination of all evidence on a given topic. In addition, one or more hearing sessions will be held specifically for the purpose of receiving comment from members of the public.

(h) **Objections.** The Council need not specifically ask each representative whether that party objects to an offer of evidence or other motion or proposed action. Instead, the Council may ask generally whether there are objections, and persons having objections shall state them. Failure to respond or object means that the party does not object, and will constitute a waiver of the right to object.

(2) **Daily prehearing conferences** or administrative sessions. The Council will set a time prior to the start of the presentation of evidence for a prehearing conference for marking, distribution, and argument regarding objections to exhibits to be offered during the day and for arguing motions or other matters. Counsel who anticipate such matters should request that the time be set aside.

(3) **Petitions and motions.**

(a) **Time for Filing.** When a party asks the Council to take some **formal action prior to the next hearing session** or prehearing conference, the requester shall serve the request on all other parties, to be received no later than the day filed with the Council. Responses are due in the office of the Council no later than the fifth business day following service or one day prior to the hearing/prehearing session, whichever is earlier.

(b) **Motions to dismiss parties or issues.** Petitions or motions **seeking the dismissal of any party or any portion of a proceeding**, or that in the moving party's judgment require the submission of a written motion, petition, brief or statement of authorities, should be filed with the Council and served on other parties no later than one week prior to the first scheduled hearing session after grounds for the petition or motion become apparent, unless the Council finds that later filing is reasonable. Answers should be filed with the Council and served on other parties at least three days prior to the hearing session. Oral argument may be allowed on the record in the Council's discretion.

(c) **Motions related to evidence** or to the procedural course of the hearing, but not involving dismissal of a party or a part of the proceeding, should be stated and argued no later

Written and Oral Evidence.

(4) **Administration of evidence.**

(a) **Number of copies.** When predistribution of evidence is required, each party shall file 20 copies of its evidence with the Council no later than the established filing date unless different instructions are given.

(b) **Predistributed testimony** will be treated as an exhibit and may be accompanied by other exhibits. Parties should not preassign numbers to their own prefiled testimony and exhibits. Instead the following system should be used, including the witness's initials, and marked serially. For John Q. Witness's prefiled testimony and accompanying exhibits:

Ex (JQW-T)

Ex (JQW-1)

Ex (JQW-2)

Ex (JQW-3)

Parties not familiar with this method of identification may contact the Council for further guidance. The official numbers for the record will be assigned at the hearing session.

(c) **Summary.** Each witness should present a short summary of his or her remarks at the beginning of prepared testimony.

(5) **Revisions to predistributed evidence.**

(a) **Disclosure.** A party finding it necessary to make a revision to predistributed evidence having substantive effect shall disclose the revision to other parties as soon as need for the revision is discovered.

(b) **Labeling.** Any revisions to predistributed or previously admitted testimony or exhibits shall be prominently labeled "REVISED" and bear the date of the revision. The revised portions shall be highlighted, in legislative style or other manner clearly indicating the change for comparison with the original submissions. This practice should be followed even as to minor changes that involve only one page of an exhibit. Counsel should identify revisions by page and date at the time an exhibit is presented for identification, sponsored, or offered into evidence, as appropriate.

(6) **Evidence at the hearing.**

(a) **Copies.** Each party is responsible for having one revised, corrected copy of its exhibits ready for marking and inclusion in the official record at the hearing. A second revised, corrected set of exhibits will also be needed for the court reporter.

(b) **An errata sheet** may be used to indicate the corrections to predistributed evidence for a relatively small number of relatively minor revisions. A rule of reason will apply.

(c) **Corrections and revisions** should be made or attached to all documents distributed at the hearing before the copies are distributed.

(d) **Sufficient copies.** Parties must have sufficient copies at the hearing of each document that they distribute there other than prefiled evidence so that each party, each Council member, the Council Staff, and the Council consultant may each have a copy.

(7) **Direct examination.**

(a) **Typographical corrections.** Counsel should **not** ask the witness on the stand to correct obvious typographical errors in the prefiled testimony if more than three corrections are required, but should submit an errata sheet or revised documents.

(b) **Foundation questions.** Counsel will be expected to ask several foundation questions: the witness' name and business address, whether any predistributed testimony represents the answers the witness would give if asked those questions; whether any exhibits were prepared by the witness or under her or his control or direction; and what subjects the witness will cover. The latter foundation question should request only a statement of the subjects to be covered by the witness, e.g., aquatic biota, not a summary of the witness's positions on the subjects.

(9) **Cross-examination.**

(a) **Time estimates.** For planning purposes, counsel should be prepared to provide time estimates for cross-examination of witnesses.

(b) **Limitation.** Cross-examination will be limited to two rounds except upon a showing that good cause exists.

(c) **Subject to check.** Witnesses should not be asked to perform calculations or extract detailed data on the stand. Such questions should be provided to the witness in advance or should be asked "subject to check."

(d) **Performing a check.** When a witness answers "subject to check," the witness must perform the "check" as soon as possible. A response given "subject to check" will be deemed accurate unless disputed by the witness within ten days of distribution of the transcript or by the time the record is closed, whichever occurs first.

(9) **Public testimony.**

(a) **Public orientation.** At the beginning of a hearing session for the purpose of taking testimony from members of the public, counsel for the environment may inform the public of the major contested issues and the purpose of the hearing session.

(b) **Exhibits.** Documents provided by or on behalf of members of the public at a public hearing may be offered as illustrative exhibits.

(c) **Letters.** Letters received by the Council and counsel for the environment from members of the public may be offered into evidence as illustrative of the opinions of the correspondents.

(d) **Factually probative exhibits.** Documents from the public that Counsel for the Environment believes to contain factual information of a probative nature may be offered into evidence separately, provided that a sponsoring witness is available for cross-examination.

(e) **Expert witnesses.** If Counsel for the Environment knows that a witness intending to present evidence as a member of the public will be speaking with expertise in a technical or scientific area as opposed to expertise regarding the community, public sentiment or perception, or personal sentiment, Counsel should inform the Council in advance so that any questions of admissibility, scheduling, and rebuttal may be addressed.

(f) **Limitation to record.** Only exhibits and testimony offered and received are part of the record and subject to consideration by the Council in its decision.

Post-hearing process.

(10) The Council will confer with the parties at the conclusion of the hearing about post-hearing process.

(a) **Argument, briefs.** The Council will determine whether oral argument, briefs, or both will be required, taking into consideration the parties' preferences and its own needs.

(b) **Brief format, length.** If the Council requests briefs, it may determine a format to be used by all parties. The Council will establish a maximum length for briefs. Number and complexity of the issues will be considered in setting the allowed length of briefs. Limited-issue intervenors may be allowed fewer pages than parties addressing all issues.

- (11) **Transcripts.** Each party will bear its own costs for transcripts purchased from the court reporter, including charges for expedited service when the party requests it.

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