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BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In re Application No. 93-2 of CSW ENERGY, INC., AND. KVA RESOURCES, INC.	)	PREHEARING CONFERENCE ORDER No. 11 691
Certification of the NORTHWEST REGIONAL POWER FACILITY	)	COUNCIL ORDER DENYING RECONSIDERATION; REJECTING OBJECTIONS TO PREHEARING ORDER NO. 10

The Council entered its tenth prehearing order in this matter on September 25, 1995. Counsel for the Environment (CFE hereinafter) moved for reconsideration of the order on October 5, 1995.[1] The Colville Tribes submitted a statement outlining its interpretation of the SEPA and EIS process on October 4, 1995.

The Council rejects the objections. Because the "motion" consists largely of the repetition of arguments the Council has already rejected and of stated conclusions that do not flow from the order, the Council will be brief in its observations.

1. Reason for denying continuance. CFE misstates the Council's reasoning in denying her earlier motion for a continuance. The reason for denial was not, as she contends, because the SEPA[2] and APA[3] processes are separate. The denial was made because CFE has demonstrated no right to receive the draft environmental impact statement (DEIS) at any particular stage -- or to receive it at all for purposes of the parties' presentations in the adjudication -- and has demonstrated no harm to her in failure to have it available to her in final form at an earlier time.

2. Confining the decision to the record. CFE contends that there is an issue in "whether the APA requires EFSEC to confine its decision to the record . . . ." She points out that the Council has previously acknowledged that the Administrative Procedure Act applies to this proceeding and that it will comply with the APA. There is no issue.

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[1]The motion is not properly for reconsideration, which is limited to the review of final orders under RCW 34.05.476. "Objections" to a prehearing conference orders are permitted under WAC 463-30-330. The Washington State Department of Ecology filed a notice concurrence with CFE's arguments on October 10, 1995.

[2]State Environmental Policy Act, Chapter 43.21C RCW.

[3]Washington State Administrative Procedure Act, Chapter 34.05 RCW.

A. Evidence outside the adjudicative record. Under the APA the Council is confined to the evidence of record to decide contested issues of fact and resolve issues in the adjudication. CFE acknowledges that the Council has so ruled. CFE need not continue to argue for propositions that have been accepted from the beginning of the adjudication.

B. Timing of the environmental review. CFE repeats an argument that she acknowledges the Council has already rejected: that it should complete its own environmental review before beginning the adjudication. She offers no new perspective or argument and the time for reconsideration of the prior order is past.

CFE's citation to Loveless v. Yantis, 82 Wn.2d 754, 513 P.2d 36 (1973) is not on point. That case deals with an agency's failure to conduct any environmental review before granting a preliminary approval to a plat, an action that grants certain rights to the applicant. The issue in that case was "whether an environmental impact statement pursuant to RCW 43.21 is a necessary prerequisite for preliminary approval of [a] plat." Id. at 756.

The Council acknowledges that an FEIS is necessary and will be issued before the Council takes any action to recommend a decision to the Governor. In this proceeding there is only one stage of decision making, a recommendation to the governor that includes all aspects of the project. The Council's focus is on mitigating environmental degradation by dovetailing the SEPA and APA environmental review processes.

WAC 197-11-448 states in part:

> [A]n environmental impact statement analyzes environmental impacts and must be used by the agency decision makers, along with other relevant considerations or documents, in making final decisions on a project.

(emphasis added). The Council's process complies with this rule.

WAC 197-11-406 requires an agency to begin the SEPA process as soon as possible after it receives an application; the Council did so. The rule also requires the FEIS to be completed in time to be an important contribution to decision making rather than used to rationalize a decision already reached; the Council process facilitates doing so.

CFE argues that the issuance of the draft PSD permit was an action taken by the Council without the FEIS being available and thus a violation of SEPA. The notice of the draft permit states that the Council has made a "preliminary determination" that the PSD permit will satisfy the permit requirements. That step is specifically allowed prior to an FEIS under the SEPA rules.[4]

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[4] "Preliminary steps or decisions are sometimes needed before an action is sufficiently definite to allow meaningful environmental analysis." WAC 197-11-055(a)(ii).

CFE cites Juanita Bay Valley Community Ass'n v. Kirkland, 9 Wn.App. 59, 510 P.2d 1140 (1973) in support of her argument. The court there required the FEIS to be issued before the first governmental authorization of any part of a project.[5] Here, the first governmental decision regarding authorization is the Council's recommendation to the Governor. Federal law is in accord. See Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures (S.C.R.A.P.), 422 U.S. 289, 95 S.Ct. 2336, 45 L.Ed.2d 191 (1975).

A legal scholar has addressed the timing issue and the tradeoffs that the Council considered in establishing its rule:[6]

> Earlier environmental review facilitates efficient termination of environmentally unacceptable projects but tends to be less accurate and detailed. Late environmental review is more reliable but less likely to overcome project momentum.
>
> The Supreme Court has emphasized the "SEPA is designed to avoid crisis decision making by requiring meaningful early evaluation of environmental matters"[7] but also has ruled that it is "entirely consistent" for an agency to forego environmental review at an early regulatory stage and require an EIS later when "details of the specific structure and use of the property are more clearly defined."[8]

The Council's experience, acknowledged in its rules, is that details of a complex major project change until the completion of the hearing phase. Only by issuing the FEIS after the conclusion of the adjudicative hearing sessions can the Council be assured that the FEIS relates to the proposal that it will be considering.

Professor Settle also states, at page 193, that "for proposals involving private applications for quasi-judicial government action, the FEIS normally must precede or accompany the

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[5] "Appellant correctly suggests that the environmental impact of the total project, rather than that of the grading project alone, must be weighed in order to meet the requirements of SEPA. We therefore conclude SEPA requires that an Environmental Impact Statement be prepared prior to the first government authorization of any part of the project or series of projects which, when considered cumulatively, constitute a major action...." 9 Wn.App. at 72.

[6] Settle, Richard L., The Washington State Environmental Policy Act: A Legal and Policy Analysis (Butterworth Publishers ed., 1994) pp. 163-165.

[7] Citing Loveless v. Yantis.

[8] Citing Narrowsview Preservation Ass'n v. City of Tacoma, 84 Wn.2d 416, 526 P.2d 897 (1974) (emphasis added).

final staff recommendation, if any."[9] Here there is no Council Staff recommendation, but the Council's action itself is a recommendation to the Governor.

Finally, the applicant notes that CFE asks the Council to take an illegal action, i.e., ignore its own rule as to timing, WAC 463-47-060(3). Agencies' ability to disregard their own rules are limited. See Seattle v. Dept. of Ecology, 37 Wn.App. 819, 683 P.2d 244 (1984).

The Council's timing of its processes is necessary to meet its statutory responsibilities;[10] is necessary to allow a complete, coordinated and enlightened decision;[11] is entirely appropriate and lawful,[12] avoids unnecessary duplication and revision, and cannot "be used to rationalize or justify decisions already made".[13]

C. **Substantial change in process.** CFE contends that the Council's Order No. 10 and rulings at the hearing announce that the Council will change and violate rather than add context to its prior orders[14] and that the Council will violate the APA and in the adjudication consider

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[9] Citing WAC 197-11-055(3)(a).

[10] RCW 80.50.100 requires the Council to enter a final order within one year.

[11] Prehearing Order No. 8, page 2-4.

[12] CFE contends that the Council must complete the SEPA process before beginning its "review". The Council does not review the project until after the adjudicative hearings are concluded. CFE contends, citing Lean, C. & Roe, C., The State Environmental Policy Act of 1971 & Its 1973 Amendment, 49 Wash. L. Rev. 509 (1974), that even insignificant approvals must not be given until the SEPA process is completed; here, no approvals are given before completion. CFE contends that a preliminary draft permit, issued for comment as part of a federally-mandated process, constitutes such an approval; the PSD argument is incorrect, as the draft is merely a vehicle to develop comment and to focus later review and decision. The Council has no jurisdiction to make final approval of any aspect of construction or operation because it has no authority to make any final approval but only to make a recommendation to the Governor. Unlike the preliminary determination in Loveless, the preliminary PSD determination here is merely a vehicle for comment. It does not reflect the Council's affirmative decision to progress past any preliminary stage of the proceeding and does not grant any right to the applicant nor affect in any way the Council's ultimate decision.

[13] WAC 197-11-406. No decisions have been made or can be made that authorize the applicant to conduct operation, construction, or preconstruction activities.

[14] The Council has noted the first-impression nature of some of the issues it faces. CFE's analysis of pertinent issues has changed over time, according to a statement in her present submission. The Council has added context to its views as various unanticipated problems have arisen and the Council has sought to resolve those problems in ways that are consistent with the principles it accepts as true.

evidence outside the record. She contends that this ruling substantially prejudices the parties' ability to represent their interests.

CFE does not identify what change the Council made. The Council denied CFE's request for a continuance, and nothing more.[15] CFE's assumptions are unwarranted.

1. Assumption of availability. CFE asserts that parties have prepared their cases assuming that the DEIS would be available so parties could determine in a leisurely fashion whether to offer it or rebut it. She is correct in stating that the DEIS was expected at an earlier stage. She does not identify what right she has, however, as a litigant, to receive the Council's DEIS at an early stage for her own use in the litigation.

Neither does CFE describe the efforts that the Council has taken from the beginning of the adjudicative process to assist the parties and accommodate their desire for information about the SEPA process in advance of publication of any SEPA documents. The Council instructed its staff to assist the parties in finding and obtaining relevant documents in the Council's possession; it advised the parties and instructed its consultant that early drafts of the DEIS were to be released to the parties upon request; it assured itself that the latest delays would be as short as possible; and it is satisfied that changes resulting in the recent delay are limited to changes required by the applicant's decision to change from water to air cooling.

In terms of the internal SEPA process, the Council has also committed to offering an extended comment period with ample time for persons to study the DEIS and respond to it.

2. Burdens on parties. CFE contends that the Council order requires her to rework her case on short notice, respond to the DEIS as evidence on short notice, and provide technical comments on the DEIS outside of the adjudicative record while engaged in a two-week hearing.

CFE may be required to make changes in her approach to her case because of the timing of the DEIS, but she has not demonstrated that the information provided in the DEIS is so new and so substantial or that she has such right to it and to use it that it requires the changes in schedule that she contends. Most of the information in the DEIS has been available to her and her witnesses for months. The changes in cooling process and underlying information relating to the change have been available to her and her witnesses for weeks or months. The change is to accommodate environmental concerns and may reduce total project impact. By her own admission she has not examined the DEIS document that she has received.[16] We cannot accept her contention that she is prejudiced merely by timing. All parties have equal access to the DEIS.

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[15]The Council indicated a willingness to reconsider its decision expressed in the order to allow parties to offer the DEIS. No party suggested changing the ruling, and it will stand.

[16]At the prior prehearing conference, there was extensive discussion about timing of the DEIS. It was there determined that in order to maximize the time parties have the DEIS, the Council would make the camera-ready text available to the applicant, who agreed to make and distribute copies to

CFE contends that she is now "required to participate in three processes, all of which are occurring simultaneous [sic]" and that this requirement violates due process. We do not understand how the simultaneous processes, which are required by law and have been apparent from the filing of the application and have been discussed at conferences nearly from the beginning, surprise or prejudice her. At the prehearing conference the parties discussed but did not favor a plan to delay the issuance of the DEIS until the conclusion of the adjudication, a plan that would have reduced some of the timing concerns of which counsel now complains.

CFE contends that she is required to prepare separate comments for each of the processes. We do not understand how she reaches this conclusion. No Council order requires her to adopt this approach. The Council has indicated its intention to set aside segments of the adjudication in which it will hear evidence relating to the PSD application. The Council has committed to an extended period for receiving comments to the DEIS and to an additional opportunity in Creston for oral comments addressed specifically to the DEIS. All three processes relate to overlapping subjects. To avoid duplication, the Council expects parties to adopt submissions by reference or otherwise take reasonable steps to minimize unnecessary duplication. The Council is not imposing procedural impediments or substantive barriers to efficiency on any of the parties.

4. Violation of the APA. CFE contends that the present course requires violation of the APA; the Council disagrees and renews its commitment to comply with all pertinent requirements of law.

5. New information. CFE contends that she has only 10 days in which to evaluate approximately 800 pages of new information. As noted above, she has not demonstrated that the information is indeed new. She has been provided the opportunity to receive and examine early drafts of the DEIS and the same underlying information regarding the change to air cooling that the Council's consultant used to produce the DEIS. The applicant represented that most of the changes are ministerial in nature, to remove now-unneeded references to effects of water cooling. CFE has failed to demonstrate that the refiled material violates the agreement permitting the refiling.

CFE contends that she is prejudiced by having to formulate cross-examination and prepare a brief simultaneously. The applicant's prefiled direct evidence has been available since June 1, 1995; supplemental testimony regarding air cooling since August 11, 1995, and its rebuttal evidence since October 3, 1995. CFE does not show that she was required to wait until the last two weeks before the hearing to prepare cross examination.

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the parties before the Council ordered printing from the state printer. That agreed process has been followed. The document has not been formally released, but made available for parties' use in the adjudication. The date of release will govern the time for comments and other SEPA processes.

6. "Loss" of the DEIS. CFE contends that she is prejudiced by an asserted "loss" of the DEIS in the adjudicative hearing, contending that it "*presumably*" contains "a wealth of information regarding environmental impacts . . . ." As noted above, (a) CFE has not demonstrated that she has a right to the information at any particular stage of the adjudication; (b) CFE has had access to most of the preliminary draft of the DEIS for a considerable period; and (c) CFE has the same right as any other party and any other citizen to comment upon the DEIS in the SEPA process, and the Council is providing ample opportunities for that comment. CFE cites to no assertedly new information or citation supporting her argument.

7. Duplication. CFE states that she is required to make unneeded duplication of effort and that the duplication will impede the operation of government. As noted above, the Council is not requiring her to duplicate any effort and in fact discourages her from doing so.

D. Conclusion. CFE's motion repeats arguments that she has previously presented to the Council. The Council finds no reason to reverse its earlier ruling.

DATED and effective at Olympia, Washington this 13 day of October 1995.

Fred Adair

Fred Adair, Chair

NOTICE TO PARTICIPANTS: Unless modified, this prehearing order will control the course of the hearing. RCW 34.05.431; WAC 463-30-270(3). Objections to this order must be filed in writing with the Council within ten days after the date of this order. WAC 463-30-270(3).

STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL
PO Box 43172 • Olympia, Washington 98504-3172

September 21, 1995

Interested Parties

Subject: Northwest Regional Power Facility PSD Permit - Tentative Determination

The Energy Facility Site Evaluation Council (EFSEC) has issued for public comment the Prevention of Significant Deterioration (PSD) permit (also known as the Notice of Construction) for air emissions, for the Northwest Regional Power Facility (EFSEC Application No. 93-1). EFSEC made a tentative determination to issue the permit as required under law and rule. The permit is in draft form and will not be finalized until all comments are received.

Attached please find the notice of tentative determination, announcement of the public comment period, and a date for a public hearing regarding the PSD permit. EFSEC will conduct a public hearing to receive comments on the proposed permit beginning at 7:00 p.m., on October 24, 1995 in the gymnasium at the Creston School in Creston, Washington. This hearing will be part of the public portion of the adjudicative hearings regarding the project. Also enclosed for your information is a Fact Sheet for the permit which discusses the PSD process and the determination of permit standards.

If you would like a copy of the draft PSD permit or have any questions or comments please call me at (360) 956-2152.

Sincerely,

Allen J. Fiksdal
EFSEC Project Manager

Enclosures

(206) 956-2000 or SCAN 494-2000 Telefax (206) 956-2158 TDD (206) 956-2218