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7 BEFORE THE STATE OF WASHINGTON
8 ENERGY FACILITY SITE EVALUATION COUNCIL

9 In the matter of:

NO. 99-01

10 APPLICATION NO. 99-1

MEMORANDUM IN OPPOSITION
TO MOTION FOR STAY

11 SUMAS ENERGY 2 GENERATION
FACILITY

12 **INTRODUCTION**

13 SE2 is correct in its assertion that a stay is an available option. However, a stay is not
14 required. Granting a stay is entirely discretionary. Denying a stay in this instance would not
15 affect any protected property interest and due process would not be violated if a stay were
16 denied. A denial is not subject to immediate judicial review. The statutory scheme of Chapter
17 80.50 RCW suggests a stay of under the present circumstances is unwarranted. Granting a stay
in order to modify the application without reopening the adjudicative hearing would prejudice
those parties who asked the Council to consider newly discovered, but currently moot,
evidence regarding the geographic faults underlying the site. SE2's motion should be denied.

18 **ARGUMENT**

19 **I. Neither the law nor the underlying facts of this case support SE2's motion for a
stay, it should be denied.**

20 SE2 argues that their perception of the Council's past practices should control what the
21 Council must do in this case. Granted, under applicable controlling law and procedures the
22 Council does have the prerogative to issue an initial order or a final order. *See*, WAC 463-30-
23 320; RCW 34.05.461. However, no where in the Council's adopted procedures or in the
24 Administrative Procedure Act, Chapter 34.05 RCW, is the issuance of an initial order a
requirement in the context of these proceedings. The Council has the discretion to issue an
initial order or final order as it determines the circumstances of each case merit. As to required
orders, the law only requires the issuance of the Final Order, as was done in this case. RCW
80.50.100 and 80.50.040(8).

1 Rejected their request for a stay would not violate due process. Based on their
2 perception of the Council's past practices, SE2 seems to imply that without an opportunity to
3 respond to and debate the merits of an initial order, the issuance of a final order would
4 necessarily usurp some unidentified right of the parties. Since the Council has decided to
5 recommend denial of the permit application, there will be no impact on any Constitutionally
6 protected property interest for the purposes of substantive due process. SE2 has no right to
7 receive their sought after permit, and they have no substantive due process claim to assert here,
8 *See e.g., Silver Firs Town Homes, Inc. v. Silver Lake Water Dist.*, 103 Wn.App. 411, 426; 12
9 P.3d 1022 (Div. 1, 2000). Implying that due process requires a stay in this case is simply
10 injecting a red herring into these proceedings in order to distract the Council from the real issues
11 before it.¹

12 SE2 argues that past practice should control the Council's current action. However,
13 SE2's perception of the Council's past practices appears to be somewhat skewed. A review of
14 the Council's past actions, of which the Council may take Official Notice, will evidence that
15 fact that while over the years it has issued a number of recommendations favoring acceptance
16 of the application, those final orders have certainly not uniformly been preceded by an initial
17 order. There is no pattern from which SE2 should draw such a conclusion or expectation.
18 Initial orders are simply not done in every case.

19 In regard to prior denials, SE2's typical procedure claim is baseless. Looking at the
20 Council's most recent denial, being the "Northern Tier" project, there is no record of the
21 Council having issued an initial order. Instead, as in the present case, the Council simply
22 issued a final order of denial. Since neither history nor procedural requirements would indicate
23 that SE2 should have anticipated anything other than a final order, their surprise alone should
24 certainly not weigh in favor of granting them a stay.

25 In those instances in which an initial order was entered, there were likely very fact
specific reasons for doing so. Those cases likely involved different circumstances in which the
Council believed that modifications within the scope of the then existing application were
appropriate. They were most likely undertaken to assist the Council in refining the draft
certificate for a project where the Council had already determined the site was an appropriate
location for that type of generation facility. Here, the Council has obviously determined, as a
matter of fact, that the site is simply not suitable for the project, even if further changes could
be implemented within the scope of the permit application. We are dealing with an interrelated
but two tiered decision-making process. If the relevant features of the site simply make it
unsuitable for a generation facility, further debate beyond that threshold issue would be
unreasonable and superfluous.

¹ On a policy level, the best strategy the Council can take in cases of denial is to do exactly
what it did here, simply issue a final order of denial in the first instance. If for some odd reason the
Council were to issue an initial order, applicants might be lead to believe that a permit might be granted
under certain conditions. In such cases, if the application is ultimately denied, the aggrieved applicant
would likely attempt to use the expectation of a potential permit created by the initial order as a basis
upon which to assert a property interest for the purposes of due process where otherwise no such
interest would or should exist. It seems so illogical to issue an initial order in a denial case, that it is
equally illogical for an applicant to expect initial orders in all cases.

1 The statutory scheme devised for site certification militates against a stay. The
2 required timeline for action under Chapter 80.50 RCW, the Council's inability to modify the
3 application, and the remedies available to the applicant, all evidence that a stay is unwarranted
4 and undesirable in this case. Turning first to time limits, RCW 80.50.100(1) requires the
5 Council to transmit its decision to the Governor within 12 months of receiving the application.
6 In this case, that time period would run on or about February 26, 2001. SE2 filed its original
7 application in January of 1999. By agreement, it was allowed to file an amended application
8 on January 10, 2000. Adding 46 days for the granted continuance sought by Intervenor, the 12
9 months for the amended application should run on February 26th. If a stay were granted, the
10 statutory 12 month mandate, with its goal of expeditious handling of applications, a goal so
11 often previously touted by SE2, would be thwarted. Moreover, the Council's own rules direct
12 immediate forwarding to the Governor. WAC 463-30-390.

13 Since the application cannot be altered at this juncture, an initial order or a stay are
14 currently unwarranted. SE2's request for a stay implies that, if given an opportunity, perhaps
15 SE2 could convince the Council it should now modify the application in this case so as to gain
16 approval. Perhaps this notion is based on ideas expressed in concurring opinions to the final
17 order. Unfortunately for SE2, there can be no modifications to the permit at this time. The
18 ability to alter the application was lost to the Council and SE2 thirty days after the adjudicative
19 hearings were closed. WAC 463-42-690. It is too late to rearrange the pieces. The time for
20 flexibility has passed.

21 SE2's available remedies are quite limited and evidence very little chance that a
22 different result will be forthcoming. As discussed further below, since the Council has found,
23 as a factual matter, that the proposed site is simply not suitable for such a project, as a result
24 the Governor has no discretion to exercise and must also reject the application. A review of the
25 bases for judicial relief under WAC 34.05.570(3) shows that the courts will not be allowed to
substitute their judgment for that of the Council, so unless the Council has erroneously
interpreted the applicable law, a different outcome is unlikely. As a result, SE2's surest
remedy, if a modified approach is to be sought, is that which is provided by RCW
80.50.100(3): "rejection of the application...shall be final as to that application but shall not
preclude submission of a subsequent application for the same site on the basis of changed
conditions or new information." Given the structure of the permitting process under Chapter
80.50 RCW, the flexibility is not to be provided by the Council via initial orders; instead,
applicants are supposed to strive to meet new or changing concerns during the hearing process
or, as SE2 has done here, run the risk of failure with its concomitant new application option.
SE2 made its election, it should accept the results.

SE2 also requests a stay for the sake of procedural economy. SE2 argues that if the
Council's action is not stayed, the Governor may act on the recommendation, likewise by
saying no! Embedded in this argument is the fact that as of today, no action has been taken
from which a stay could be requested. Technically, the Council's Final Order is merely a final
recommendation asking the Governor to take action in accordance with RCW 80.50.100(2).
The Governor has not yet acted; thus, there is nothing to stay! Since it is the Governor's action
which represents the final formal action upon SE2's application, the one which actually
determines its outcome, SE2's request for a stay is premature. The request for a stay would
more properly come into play when and if SE2 files an appeal of the final administrative
determination of their application under RCW 34.05.566.

1 SE2 argues that a stay is necessary for a meaningful opportunity for reconsideration.
2 That is not true, the presence or absence of a stay will not have any impact on the merits of any
3 arguments underlying a motion for reconsideration. If the Governor chooses to act, so be it. If
4 after hearing the reconsideration motion, a fundamental change is made by the Council, the
5 Governor will have to redo his work (what little is required in response to a denial). If
6 Governor wishes to act while the reconsideration is under way, that is, as it should be, his
7 prerogative, but he need not do so.²

8 For purposes of general guidance, the Council may wish to consider what factors courts
9 apply when reviewing a stay request. Those considerations include the likelihood of a
10 different outcome on appeal (or reconsideration) and the risks of harm to the parties should a
11 stay not be granted. *See, e.g.*, WAC 34.05.550(3) (stays for public welfare grounds). In
12 relation to civil injunctions under Washington Court Rules, RAP 8.1(b)(3), the court in Boeing
13 Co. v. Sierracin Corp., 43 Wn.App. 288, 716 P.2d 956 (Div.I, 1986), stated:

14 RAP 8.3 allows us to stay an injunction if the movant can demonstrate that
15 debatable issues are presented on appeal and that the stay is necessary to preserve
16 the fruits of the appeal for the movant after considering the equities of the
17 situation....In actual application of this theory, courts apply a sliding scale such
18 that the greater the inequity, the less important the inquiry into the merits of the
19 appeal. Indeed if the harm is so great that the fruits of a successful appeal would
20 be totally destroyed pending its resolution, relief should be granted, unless the
21 appeal is totally devoid of merit.

22 Id. at 291(citations omitted).

23 Fortunately, in this case we are dealing with a denial of a permit, so the risk of harm
24 stemming from a denial of a stay to either side from the decision is non-existent. Since the
25 plant will not be built during the appeal process, the numerous environmental and societal
26 harms cited by the Council will be avoided, and SE2 will not be expending resources on an
27 endeavor which might ultimately be for naught. Additionally, denying the stay would not
28 impact SE2's ability to preserve its issues for reconsideration (although granting
29 reconsideration without reopening the hearing process may certainly prejudice the public, see
30 footnote 2).

31 Finally, SE2's argument in favor of a stay seems also to imply that the Governor has
32 the authority under RCW 80.50.100 to grant the permit they seek in spite of the Council's
33 decision to the contrary. This is not true, he cannot do so. In devising the structure of Chapter
34

35 ² On the other hand, the Council may wish to issue a stay if a hearing on SE2's motion for
reconsideration is ultimately granted. The Council decided not to reopen the adjudicative hearing in
this case based on the newly discovered earthquake/fault evidence because it had decided to issue a
denial; thus, mooted the point of that evidence. However, a reconsideration of the denial should also
carry with it an order to reopen the adjudicative hearing so that the Council would be able to consider
the earthquake/fault data so that it can formally address the overriding public safety and welfare issues
which inherent in that heretofore unaddressed site information.

1 80.50 RCW, the legislature obviously decided to give the Governor discretion in siting and
2 operational determinations only in those cases in which the Council, as a fact-finding body, has
3 already determined that the site is arguably suitable for the described project in the first place.
4 A review of the statutory process reveals this legislative intent.

5 Under RCW 80.50.040(8)(d) and 80.50.100(1) the Council shall issue a draft
6 certification only when an approval is recommended. There is no such certificate to be issued
7 when a denial is deemed appropriate. Under RCW 80.50.100(2) the Governor can only take
8 one of three actions. Of the three, two of those options are only open to the Governor when a
9 draft certification has been issued by the Council. RCW 80.50.100(2)(a) and (c). Such
10 certifications are only to be made if a approval has also been determined to be appropriate by
11 the Council. RCW 80.50.100(1). Without a draft certification, the Governor's only remaining
12 option is to reject the application. RCW 80.50.100(2)(b). Since rejection is the only action
13 which does not require a draft certification, and since there is no provision which would
14 empower the Governor to force the Council to issue a draft certification, this is the only course
15 of action available to the Governor in a case such as the present one. Clearly, the legislature
16 drafted Chapter 80.50 RCW so that a Council recommendation for approval is a condition
17 precedent for any discretionary action by the Governor. Since the Governor has no discretion
18 in the present case, neither SE2 nor the Council should worry about the Governor wasting his
19 time if a stay is not granted. He and his staff have nothing to which to devote their time in this
20 instance.

21 CONCLUSION

22 It is important for the Council remember that SE2 does not have a right to a stay. It is
23 not a necessary component for a reconsideration motion. WAC 34.05.470(2). It is not needed
24 for a meaningful reconsideration of the issues presented. To deny the stay request would not
25 afford the moving party the chance to forestall further agency action, as it is a decision which
is not subject judicial review. WAC 34.05.467. Since a recommendation for denial has been
issued, a stay would not be needed to preserve public health and safety, nor is one necessary to
preserve any of SE2's interests (i.e., their legal arguments will remain intact and they don't run
the risk of having to tear anything down). Given the required timeline for action under
Chapter 80.50 RCW, the Council's inability to modify the existing application, and the
remedies available to the applicant, a stay is not warranted or desirable at this time. The motion
for a stay should be denied.

Respectfully submitted this 26th day of February, 2001.

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