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ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of
Application No. 96-1,

OLYMPIC PIPE LINE COMPANY
CROSS CASCADE PIPELINE
PROJECT.

NO.
**COUNSEL FOR THE
ENVIRONMENT’S OPENING
STATEMENT IN THE MATTER
OF APPLICATION NO. 96-1,
OLYMPIC PIPELINE COMPANY
CROSS CASCADE PIPELINE
PROJECT**

INTRODUCTION

The Olympic Pipeline Company (Olympic) has requested that the Energy Facility Site Evaluation Council (the Council) recommend the siting of a 231-mile long pipeline which would be constructed across the Cascade Mountains from Woodinville to Pasco. As the legislature has acknowledged, the Council’s decision “will have a significant impact on the welfare of the population, the location and growth of industry and the use of the natural resources of the state.” RCW 80.50.010. In making its decision, the Council must determine whether the demand or need for this project outweighs any harm to the environment that will result from the proposed project. *Id.* The balancing test that must be performed by the Council is based on three premises set forth by the legislature:

- 1) To assure Washington citizens that, where applicable, operational safeguards are at least as stringent as the criteria established by the federal government and are technically sufficient for their welfare and protection;
- 2) To preserve and protect the quality of the environment; to enhance the public’s opportunity to enjoy the esthetic and recreational benefits of the air, water and land resources; to promote air cleanliness; and to pursue beneficial changes in the environment;
- 3) To provide abundant energy at reasonable cost.

RCW 80.50.010.

1 In each proceeding before the Council, the attorney general appoints an assistant attorney
2 general as Counsel for the Environment (“CFE”)¹. The charge of CFE is “to represent the public
3 and its interest in protecting the quality of the environment.” RCW 80.50.080. It has been our
4 position throughout this case that the primary responsibilities of CFE are (1) to ensure, to the
5 extent possible, that the Council has the information it needs to make an informed decision, and
6 (2) to ensure that the Council’s siting analysis adequately balances the need for this project
7 against the project’s potential impacts to the environment. It has also been CFE’s position that
8 Olympic has the burden of proving that it has complied with EFSEC’s statutes and regulations
9 and of demonstrating that its proposed pipeline should be sited.

10 Although EFSEC’s governing statute, Ch. 80.50 RCW which was passed in 1975,
11 recognizes a pressing need for new energy facilities, the Council must go beyond that statement
12 to determine whether there is a need for the proposed pipeline. The premises set forth by the
13 legislature in RCW 80.50.010 indicate that the “need” identified by the legislature concerning
14 new energy facilities was a need for “abundant energy at reasonable cost.”

15 The proposed pipeline is not a facility that will create new petroleum products, rather it is
16 a facility that creates an alternative mode of transporting petroleum products to central and
17 eastern Washington. Accordingly, the Council must first determine whether there is a need in
18 central and eastern Washington for additional petroleum products and whether the proposed
19 project is necessary to meet that need. If central and eastern Washington already have abundant
20 supplies of petroleum products at a reasonable cost, then there is no need for the project even if it
21 will reduce transportation costs of petroleum products to central and eastern Washington. The
22 desires of individual shippers to save transportation costs does not, in and of itself, create a need
23 for the project under RCW 80.50.010.

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25 _____
26 ¹ Because of the size and complexity of Olympic Pipeline Company’ proposed project, Attorney General
Gregoire appointed two assistant attorneys general to act as Counsel for the Environment.

1 The three separate premises set forth in RCW 80.50.010 indicate that the legislature did
2 not find that *any* additional increase in the state's ability to create or transport energy was
3 necessarily a public benefit or that *any* decrease in energy costs was necessarily a public benefit.
4 The legislature was looking to ensure an abundant supply of energy at a reasonable cost while at
5 the same time ensuring the protection and enhancement of our environment and the protection of
6 public welfare.

7 By requiring operational safeguards that are sufficient to assure the welfare and protection
8 of Washington citizens, the legislature is clearly stating that Washington will not allow project
9 proponents to build inadequate facilities as a means of providing more and cheaper energy. By
10 requiring that the need for abundant and reasonably priced energy be balanced against the need to
11 protect and enhance the environment and the public's use of the environment, the legislature is
12 clearly saying that simply providing more and/or cheaper energy is not enough to demonstrate a
13 public need for a project.

14 CFE and the Council are both charged with preserving and protecting the quality of the
15 environment. With this goal in mind, we identified what we believe are the major issues that the
16 Council needs to address in reaching a decision whether or not to recommend to the governor
17 that the pipeline be approved: (1) need for the project; (2) comparative risk to the environment
18 from operation of the existing transport system versus operation of the proposed pipeline; and (3)
19 construction impacts from the proposed pipeline.

20 We believe that the Council should make a decision on each of these major issues in
21 order. First, the Council must decide whether there is a public need for the project, i.e., whether
22 the project is necessary to ensure an abundant supply of petroleum products to central and eastern
23 Washington at a reasonable cost to the ultimate consumer. If the Council finds there is no public
24 need, the Council can deny Olympic's request for a favorable siting recommendation on that
25 basis alone, or the Council can rule that Olympic's siting request will be denied unless Olympic
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1 demonstrates that construction and operation of the proposed pipeline will actually benefit the
2 environment. RCW 80.50.010.

3 If, on the other hand, the Council finds that there is a public need for the project, the
4 impacts of constructing and operating the proposed pipeline must be weighed against the need
5 for the project.

6 The analysis for determining the potential impacts of operating and constructing the
7 proposed pipeline begins with comparing the relative risk to the environment posed by operation
8 of the existing system for transporting refined petroleum products to central and eastern
9 Washington with those posed by operation of the proposed Cross Cascade Pipeline. Only if the
10 project is needed and/or it presents less risk to the environment than the existing transport system
11 should the Council consider construction impacts of the project. The Council should consider
12 the combined impacts from construction and operation to create a total potential risk created by
13 the project which can then be balanced against the public's need for the project.

14 **DISCUSSION OF ISSUES**

15 1. Public Need for the Project

16 As discussed above, the Council must balance the demand or need for this project with
17 any harm to the environment that will result from the proposed project. The balancing test seeks
18 to ensure sufficient operational safeguards, the preservation and protection of the quality of the
19 environment, and the enhancement of the public's opportunity to enjoy the esthetic and
20 recreational benefits of the environment while at the same time provide for abundant energy at
21 reasonable cost. RCW 80.50.010.

22 To perform the balancing test the Council must first determine whether there is a public
23 need for the proposed pipeline, i.e., whether an abundant supply of petroleum products is
24 available at a reasonable cost to the consumers in central and eastern Washington and whether
25 such a supply is likely to continue to be available. RCW 80.50.010. The testimony that has been
26 and will be submitted to the Council will demonstrate that central and eastern Washington

1 already have abundant supplies of petroleum products available at reasonable costs and will
2 continue to have abundant supplies available at reasonable costs without the proposed pipeline.

3 The testimony will also demonstrate that the project will not create new or additional
4 supplies of petroleum product or ensure any decreases in the retail price of petroleum products in
5 central and eastern Washington. Moreover, even if Olympic could demonstrate that petroleum
6 prices for the ultimate consumers in central and eastern Washington may fall as a result of the
7 proposed pipeline, any decrease in prices that would be attributable to the proposed project
8 would be miniscule in relation to the total retail price.

9 A decrease in the retail price of petroleum products is not necessarily a public benefit,
10 especially if the retail price is already reasonable and the decrease is minimal. For example, the
11 testimony will show that the consumers in central and eastern Washington already have access to
12 reasonably priced energy products. The cost of gasoline in central and eastern Washington is less
13 than the cost of gasoline in western Washington. There is no public need to create even lower
14 priced energy products in central and eastern Washington.

15 Moreover, the testimony will show that Olympic cannot guarantee that the proposed
16 pipeline will lead to any decrease in the costs ultimate consumers will pay for petroleum products
17 in central and eastern Washington. There is even a reasonable chance that the proposed pipeline
18 will lead to an increase in costs to the ultimate consumers of petroleum products in central and
19 eastern Washington.

20 The legislature did not find in RCW 80.50.010 that *any* additional increase in the state's
21 ability to create or transport energy was necessarily a public benefit or that *any* decrease in
22 energy costs was necessarily a public benefit. The legislature was looking to ensure an abundant
23 supply of energy at a reasonable cost while at the same time ensuring the protection and
24 enhancement of our environment and the protection of public welfare. By requiring that the need
25 for abundant and reasonably priced energy be balanced against the need to protect and enhance
26 the environment and the public's use of the environment, the legislature is clearly saying that

1 simply providing more and/or cheaper energy is not enough to demonstrate a public need for a
2 project.

3 The testimony will show that the prime beneficiaries of the proposed pipeline are the four
4 northwest refineries. They will be able to expand the delivery of their product into central and
5 eastern Washington and into northern Idaho and eastern Oregon. The proposed pipeline will
6 allow the northwest refineries to supply twenty thousand barrels of product a day to Boise, Idaho
7 while continuing to expand their market share in central and eastern Washington and continuing
8 to expand their market share in western Oregon.

9 The proposed pipeline creates a private financial benefit for the northwest refineries and
10 Olympic, but it does not create a public benefit in terms of greater supplies of petroleum product
11 at lower costs to the ultimate consumer. Moreover, the proposed pipeline may be at odds with
12 the public interest as it will likely lead to an expansion of northwest refineries and an increase in
13 crude exports into Puget Sound. This would violate the spirit of the Magnuson Amendments to
14 the Marine Mammal Protection Act, 33 U.S.C.A. § 476 (1998), which are intended to ensure that
15 tanker traffic does not increase in Puget Sound because of crude imports to meet the needs of
16 petroleum consumers outside the State of Washington.

17 If the proposed pipeline is not built, central and eastern Washington will continue to
18 receive adequate supplies of petroleum product. Central and eastern Washington already have
19 lower costs for petroleum products than western Washington. If there was an inadequate supply
20 costs would be higher in central and eastern Washington. Olympic's testimony demonstrates that
21 there will continue to be an adequate supply in central and eastern Washington without the
22 proposed pipeline.

23 Because the proposed pipeline is not based on a public need in terms of supply and costs
24 to the ultimate consumer in central and eastern Washington, Olympic will have to show that the
25 proposed pipeline will actually benefit the environment and that the existing system creates an
26 unacceptable risk to the environment. The testimony will show that Olympic is unable to

1 demonstrate that the existing system creates an unacceptable risk to the environment. Further,
2 the testimony will show that Olympic cannot demonstrate that the combined environmental
3 impacts of constructing and operating the proposed pipeline will likely be less than the
4 environmental impacts associated with continuing to rely on the existing petroleum products
5 transportation system.

6 2. Comparative Risk to the Environment

7 CFE believes the Council can best determine whether the proposed pipeline would
8 contribute to the preservation and protection of the quality of the environment by comparing the
9 operational risks of the pipeline with those of the existing transport system. CFE considers spills
10 to be the most significant operational risk to the environment from the proposed pipeline or the
11 existing system. Testimony will show that a proper spill risk analysis must include the frequency
12 and volume of potential spills, and the resulting impact on the environment.

14 To compare the operational risks of the proposed pipeline with the existing system, we
15 considered the following two scenarios. **Scenario A:** Olympic proposes to carry project oil by
16 pipeline from Woodinville to Pasco. Tanker trucks would deliver product throughout central and
17 eastern Washington from a new terminal in Kittitas and existing terminals in Pasco. **Scenario B:**
18 The existing system would transport project oil by ocean barge from the refineries to
19 Vancouver/Portland; by barges upriver to Pasco; by tanker trucks from Harbor Island to central
20 Washington; and by tanker trucks from Pasco to eastern Washington². The testimony will show
21 that based upon the amount of product the pipeline is projected to carry over the next 50 years,
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25 ² Because the existing north-south Olympic pipeline presents a static risk to the environment we did not
26 include the risks associated with the existing pipeline in the analysis. We recognize the existing pipeline does pose
risks to the state's environment, but those risks are a constant for purposes of the Council's decision in this case.

1 the proposed pipeline system would be expected to spill almost twice as much project oil as the
2 existing transport system.

3 This conclusion is based upon the following assumptions presented by Olympic in its
4 direct testimony: (1) if the pipeline is approved it would replace ocean barges and Tidewater's
5 river barges that transport petroleum products from the northwest Washington refineries; and (2)
6 all future increases in supplies of petroleum products to central and eastern Washington will be
7 supplied by the northwest Washington refineries whether or not the pipeline is built. Both
8 assumptions now appear to be favorable to Olympic. Olympic has changed its position in its
9 rebuttal testimony and is no longer making assurances that ocean and river barges will be
10 completely replaced by the proposed pipeline. Olympic's new testimony indicates that Tidewater
11 may continue to barge petroleum up the Columbia River even with the proposed pipeline.
12 Moreover, certain petroleum products are barged in Puget Sound and on the ocean that are not
13 shipped by Olympic and will continue to be barged even if the proposed pipeline is built. If
14 Olympic's assumptions are incorrect, in whole or in part, the spill risk associated with the
15 proposed pipeline is even greater in relation to the existing transport system than is demonstrated
16 by the respondent parties' direct testimony.
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20 The fact that the proposed pipeline is projected to spill more oil than the existing system
21 is only part of the risk analysis. The Council must also consider the impact of the spills to the
22 environment. This portion of the analysis involves integration of the projected spill volumes and
23 the resources at risk from the spilled oil. The testimony will show that, given the relative
24 projected spill volume from the pipeline versus the existing transport system, the pipeline poses
25 well over twice the risk to the state's resources as the existing system. Further, testimony will
26

1 show that this analysis probably underestimates the relative risk posed by the pipeline because it
2 does not include several factors, that are difficult to quantify, that would increase the impact of
3 pipeline spills relative to barge and truck spills. Moreover, the analysis underestimates the
4 relative risk because it compares only the risk from spills; it does not include impacts from
5 pipeline construction.
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7 As indicated above, there is no public need for the project, and thus certification should
8 be denied unless the proposed pipeline would benefit the environment. The comparative risk
9 analysis demonstrates that the project will not benefit the environment but rather it will pose
10 greater risks than the existing system. Moreover, the testimony will show that Olympic provided
11 inadequate information to determine the entire impacts of the proposed project.
12

13 3. Project Specific Concerns

14 CFE coordinated with other parties in presenting evidence regarding project specific
15 concerns. Testimony presented by CFE will show that Olympic has provided inadequate
16 information regarding wetlands, aquatic toxicology and fisheries.

17 As to wetlands, the testimony will show that Olympic has failed to identify and delineate
18 the true extent of all the wetlands along the route; failed to identify the true extent of the impact
19 zone of pipeline construction; failed to adequately characterize the hydrology, soils, vegetation
20 and wildlife of each wetland; failed to describe individual wetland functions and performance to
21 allow design of compensatory mitigation; failed to describe detailed mitigation that would be
22 offered for each impact; and failed to consider the impacts of an oil spill from a pipeline leak or
23 rupture.³

24 Perhaps most telling with regards to Olympic's wetlands analysis is the fact that while

25 ³ Olympic filed with the rebuttal testimony of A. David Every a copy of the "Preliminary Wetland
26 Mitigation Plan" dated August 25, 1998. This is the first time the plan has been made available and CFE reserves
the right to offer surrebuttal testimony as to the plan.

1 Olympic admits to the fact that the project will indirectly impact 1,000 acres of wetlands, it
2 consistently characterizes the total impact as approximately 15 acres directly within the
3 construction corridor. The testimony will show Olympic has presented inadequate information to
4 assess the impacts to any single wetland, let alone the 78 wetlands it proposes to cross.

5 As discussed above, CFE considers spills to the environment to be the most significant
6 operational impact of the pipeline. Yet testimony will show that Olympic has not provided
7 sufficient information on the potential impacts of spills to the environment, specifically the short
8 and long-term impacts of releases of refined oil products. Testimony will also show that
9 scientific information and methodology exist that can be used to estimate risks to resources based
10 on exposure modeling and the toxicology of petroleum products and constituent chemicals.

11 The testimony will document that petroleum products can cause injury to aquatic
12 resources, and will provide simple scenarios which show that spills into creeks with flow rates
13 similar to many creeks along the pipeline route would result in levels of petroleum product
14 known to cause impacts to aquatic resources. The testimony will also show a simple model to
15 determine the risks to groundwater from pipeline spills. The results show a significant potential
16 for groundwater contamination (concentrations in excess of health-based criteria) from a pipeline
17 leak. The lack of estimates of the aquatic ecological and health risks from exposure to petroleum
18 products that may leak or spill from the proposed pipeline is a serious deficiency in Olympic's
19 application.

20 The Council may take judicial notice of the fact that the people of the state of Washington
21 attach high importance to the salmon resources of the state. The importance of protecting salmon
22 and their habitat is underscored by the recent listing of the Puget Sound Chinook as threatened
23 under the Endangered Species Act (ESA), 16 U.S.C. 1531, et seq. The testimony will show,
24 however, that Olympic has provided insufficient information on the potential impacts of the
25 project on salmon. Olympic used agency documents to characterize fish and fish habitat which
26 are general in nature and do not provide the necessary level of detail. Testimony will show that

1 Olympic has provided no toxicological data, spill volume data or estimates of potential
2 hydrocarbon concentrations in streams following a spill. Despite failing to provide any of the
3 above information, Olympic describes the impacts of a spill on fish as small and limited in area.
4 Testimony will demonstrate that stream scour, lateral channel migration and mass wasting are
5 major factors leading to increased risk of pipeline failure. Olympic has failed to quantify stream
6 scouring depth and total meandering stream width at crossings or to identify mass wasting
7 potential. Testimony will show that the Application is particularly deficient in its analysis of fish
8 east of the Cascade mountains.

9 The deficiencies in the information provided by Olympic regarding the resources at risk
10 and the potential risks posed by the pipeline make it impossible for the Council to weigh the need
11 for the proposed pipeline against the potential impacts to the environment as is required by
12 statute. RCW 80.50.010.

13 4. Endangered Species Act

14 The fact that numerous stocks of Washington State salmon and steelhead have been listed
15 or proposed for listing as threatened or endangered species under the ESA requires the Council to
16 scrutinize more closely the potential impacts of the proposed project. Listed species occur along
17 both the route of the proposed pipeline and the route of the existing transport system. This
18 requires that the Council carefully examine the proposed pipeline's potential impacts on ESA
19 listed species and compare those potential impacts with the impacts associated with the existing
20 transport system. EFSEC has a responsibility not to issue any permits or licenses that result in
21 the taking of an endangered species. *Strahan v. Coxe*, 127 F.3d 155 (1st. Cir. 1997), *cert. denied*,
22 _____ S. Ct. ____ (1998) (A governmental third party that authorizes actions which result in the
23 taking of an endangered species may be found to have violated the ESA).⁴

24 Among the several stocks recently listed by the National Marine Fisheries Service

25 ⁴ The prohibition on the taking of an endangered species may be extended to a threatened species by rule.
26 *See infra*, p. 13.

1 (NMFS) are four runs of chinook salmon, which occur along the route of the proposed pipeline
2 and the existing transport system. Puget Sound chinook salmon in Washington, Lower Columbia
3 River chinook salmon in Washington and Oregon, and the Upper Willamette River spring-run
4 chinook salmon were listed as threatened. 64 Fed. Reg. 14,308 (1999). A threatened species is
5 “likely to become an endangered species within the foreseeable future throughout all or a
6 significant portion of its range.” 16 U.S.C. §. 1532 (20). Upper Columbia River spring-run
7 chinook salmon was listed as endangered. *Id.* An endangered species is a species in danger of
8 extinction. 16 U.S.C. §. 1532(6). These runs are in addition to previously listed chinook salmon
9 and steelhead in the Columbia and Snake rivers.⁵

10 Section 9 of the ESA prohibits the taking of an endangered species. 16 U.S.C. §.
11 1568(a)(1). “Take” is defined to include harassing or harming an endangered species. 16 U.S.C.
12 § 1532(19). The U.S. Fish & Wildlife Service has defined harm to include harm to the critical
13 habitat of an endangered species. 50 CFR § 17.3. The U.S. Supreme Court upheld habitat
14 modification as a component of the definition of harm. *Sweet Home Chapter of Communities for*
15 *a Greater Oregon v. Babbitt*, 515 U.S. 687, 115 S.Ct. 2407 (1995).⁶ The prohibitions on take
16 apply automatically to a species such as the Upper Columbia River spring-run chinook which are
17 listed as endangered. These prohibitions may be extended to threatened species by regulation.
18 NMFS has announced that it “will soon pursue protective regulations pursuant to section 4(d)”
19 for the Puget Sound and Lower Columbia River chinook salmon. 64 Fed. Reg. at 14,325.

20 While it has not yet issued a section 4(d) regulation, NMFS has clearly indicated the types
21 of activities it “believes could potentially harm, injure or kill chinook salmon . . . and result in a

22 ⁵ NMFS also listed the following stocks as threatened: Columbia River chum salmon and Hood Canal
23 summer run chum salmon, 64 Fed. Reg. 14, 528 (1999); Ozette Lake sockeye salmon, 64 Fed. Reg. 14,528 (1999);
24 Middle Columbia River and Upper Willamette River steelhead, 64 Red. Reg. 14,517 (1999). The general principles
of the ESA also apply to these listed species.

25 ⁶ The ESA requires that, “to the extent prudent and determinable” NMFS designate critical habitat of listed
26 species concurrently with the listing. NMFS has extended the deadline for designating critical habitat for the
recently listed species for one year. 64 Fed. Reg. at 14,327.

1 [take in] violation of section 9.” Many of these activities are implicated in the construction and
2 operation of the proposed pipeline. The activities include, but are not limited to: (1) landuse
3 activities that adversely affect chinook salmon habitat (e.g. logging, road construction in riparian
4 areas and areas susceptible to mass wasting and surface erosion); (2) destruction or alteration of
5 chinook salmon habitat such as removal of large woody debris or riparian shade canopy,
6 dredging, discharge of fill material, diverting or altering stream channels or ground water flow;
7 and (3) discharges of toxic chemicals or other pollutants, including oil, into waters or riparian
8 areas supporting listed chinook salmon. 64 Fed. Reg. at 14,326.

9 The construction and operation of the proposed pipeline, as well as operation of the
10 existing system, pose potential risks to threatened and endangered salmon and steelhead. An
11 analysis of these potential impacts must be a central part of the Councils’ balancing of the need
12 for the project with the protection of the state’s environment. Olympic has failed to provide the
13 level of information needed to determine the proposed pipeline’s potential impact on threatened
14 and endangered species in Washington State.

15 CONCLUSION

16 Olympic has the burden of demonstrating a public need for the proposed pipeline and of
17 demonstrating that the proposed pipeline is better for the environment than the existing mode of
18 transporting petroleum product. The evidence will show that Olympic has not met either burden.
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There is no public need for the proposed pipeline, and the proposed pipeline presents greater risks to the environment in Washington State than does the existing transportation system.

DATED this _____ day of _____, 1999.

CHRISTINE O. GREGOIRE
Attorney General

MARY McCREA, WSBA #20160
AAG, Counsel for the Environment
(360) 459-6155

THOMAS C. MORRILL, WSBA #18388
AAG, Counsel for the Environment
(360) 459-6159 ____

OLYMPIC-T\PLEADINGS\FINAL OPENING STATEMENT