BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In re Matter of **Application No. 99-1**	**PREHEARING ORDER No. 1** **In consideration of Second Revised Application**
Second Revised Application **of**	**COUNCIL ORDER NO. 759**
SUMAS ENERGY 2, INC.	
SUMAS ENERGY 2 GENERATION FACILITY	

Nature of the Proceeding: This matter involves an application by Sumas Energy 2, Inc. (SE2 or Applicant) to the Washington State Energy Facility Site Evaluation Council (EFSEC or Council) for certification to construct and operate the Sumas Energy 2 Generation Facility (SE2GF), a 660-megawatt combustion turbine natural gas-fired electrical generation facility in Sumas, Washington.

Procedural Setting: SE2 submitted an application to EFSEC in January 1999 for the SE2GF project, which the Applicant subsequently withdrew. The Applicant submitted a revised application in January of 2000. After review of that first revised application, EFSEC decided in February of 2001 to recommend denial of the project. SE2 asked EFSEC to reconsider its decision and offered numerous and significant changes to the proposed project. The Council denied the motion for reconsideration, but allowed the Applicant to submit a Second Revised Application with its proposed changes for EFSEC's consideration.

The Council explained in its Order on Applicant's Motion for Reconsideration, Council Order No. 757, that if the Applicant voluntarily withdrew its current application and re-filed an application with the modifications proposed in its motion for reconsideration, the Council would immediately schedule a prehearing conference to establish an abridged process to consider the revised proposal. The Council explained that the process would necessarily include some additional opportunity for evidentiary hearings and for public comment. The Council noted that the record on the existing application included much of what the Council would consider in evaluating the revised project. The Council explained that the record could be adopted for purposes of a new proceeding and would need to be supplemented so that the implications of the new proposed facility configuration could be fully understood. The Council also recognized that the Applicant sought to present to the Council what it perceives to be changed circumstances in the

power market since the time that the record in the case closed. In Order 757, the Council announced that it was open to considering the Applicant's revised position on need and consistency in the context of further proceedings that will give all parties an opportunity to address such new circumstances as might cause the Council to weigh differently the energy benefits promised by SE2 in its new proposal.

In accord with the provisions of Order No. 757, and after receipt of the Applicant's Second Revised Application, the Council, pursuant to due and proper notice, conducted a prehearing conference on July 16, 2001. The hearing was held before, Acting Council Chair Charles Carelli, (Department of Ecology), Ellen Haars (Department of Health), Gary Ray (Department of Transportation), Tony Ifie (Department of Natural Resources), Gerald Richmond (City of Sumas), Jenene Fenton (Department of Fish and Wildlife), Dennis J. Moss (Washington Utilities and Transportation Commission) and Dan McShane (Whatcom County). Also present were Robert Fallis who serves as the Assistant Attorney General for the Council and Nan Thomas, Administrative Law Judge with the Office of Administrative Hearings, who has been retained by the Council to facilitate and conduct hearings. Appearances of the parties were taken and made part of the record.

The Council announced that the Department of Natural Resources (DNR) has elected to substitute Tony Ifie as its Council member in the place of Gayle Rothrock, who is no longer employed by that agency. No parties offered any objection to Mr. Ifie's participation. Constance Hoag suggested that the Council request that DNR reappoint Ms. Rothrock to remain as the agency's Council member even though she is no longer employed with the DNR. DNR has made their selection of Council member and the Council finds that such substitution is contemplated by WAC 34.05.461(6). The Council declines to dictate to the agency its choice of representative. The Council also announced that Linda Crerar will act as the Council member for the Department of Agriculture in place of Daniel Jemelka. No objection was raised regarding Ms. Crerar's participation.

Hearing Schedule and Process: All parties were provided with a copy of the "Sumas Energy 2, Inc. - 2nd Revised Application Tentative Review Schedule" that outlined the Council staff's suggested schedule for the forthcoming proceedings. After considering the schedules of parties and Council members and argument on proposed changes in schedule or process, the Council has made a number of revisions to that schedule. A copy of the revised schedule for hearings is attached to this order as Appendix A.

Next Prehearing Conference

The next prehearing conference will be held on August 1, 2001 commencing at 9:00 a.m., in the Auditorium, at the Labor and Industries Headquarter Building, 7273

Linderson Way SW, Tumwater, Washington. Parties unable to attend in person may appear by telephone, as conference call capacity allows. If you plan to call in to the conference line, contact Mariah Laamb at 360/956-2121 for arrangements.

Prefiled Testimony

The Council has decided that prefiled written testimony best meets the needs for advance notice of witnesses' positions and will facilitate orderly presentation of evidence at the hearings to be conducted. As noted in the attached Appendix A, the Applicant's prefiled testimony will be due on September 4, 2001. The other parties' direct prefiled testimony will be due on October 1, 2001 and all prefiled rebuttal will be due on October 15, 2001.

Adjudicative Hearings and Public Testimony

Adjudicative hearings will commence on October 29, 2001 in Whatcom County and are tentatively scheduled for each day of that week as is necessary to receive relevant evidence. During the week of October 29, 2001, the Council also anticipates conducting two evening meetings to allow the public to present testimony to the Council on the project as reconfigured in the Applicant's Second Revised Application and to hear public comment on Prevention of Significant Deterioration and 401 Clean Water permits for the revised proposal. No hearings will be held during the week of November 5, 2001 due to parties' or Council members' previous conflicts. Adjudicative hearings will reconvene on November 13, 2001 in Olympia, Washington at a location to be announced later.

Post-hearing Briefs

The Council has decided that post-hearing briefing will be sequential, rather than simultaneous, and that the Applicant will be allowed to submit the final brief. Therefore, closing arguments will be submitted in writing in post-hearing briefs on the following schedule. The Applicant's Brief, which should include proposed findings of fact and conclusions of law and a proposed draft site certification agreement will be filed by November 26, 2001. Other parties' Response Briefs will be due by December 10, 2001 and any responses to the Applicant's proposed findings of fact and conclusions of law or proposed draft site certification agreement must be included in such briefing. The Applicant's reply brief will be due by December 24, 2001.

Permits and SEPA review

As noted in the schedule in Appendix A, the other aspects of the case, such as the Council's contractors' work on application completeness, SEPA analysis, PSD and 401

permits and any necessary public comment will occur concurrently with the above-described adjudicative schedule. Allen Fiksdal, as the SEPA responsible official, will make a SEPA determination regarding the revised application.

Council's Response to Requests to Delay or Expand the Schedule

The Council has considered the recommendation that nothing, including the public informational meeting, occur during the month of August due to previously scheduled personal matters, or to the public's potential vacation plans in late summer. The Council understands the requests and will, to the extent possible, accommodate parties' plans to be out of the area by allowing participation in the prehearing conference scheduled for August 1, 2001 by telephone, but declines to delay the proceedings for that period of time. The Council is attempting to conduct the proceedings in the most expeditious manner possible while affording fair process to the parties and the public. Taking a month out of that schedule would not help to accomplish this goal.

As discussed at the prehearing, and included in the schedule in Appendix A, time has been allowed in the schedule for any required supplementary environmental review and for both a public informational meeting, and for public comment and testimony on the proposed project. As noted above, two evenings of public testimony will be scheduled in Whatcom County during the week of October 29, 2001.

Public Informational Meeting

The public meeting to be held August 14, 2001 from 3:00 p.m. to 9:00 p.m., will be an informational Open House, with participation by the Applicant, Sumas Energy 2, Inc., the Counsel for the Environment, EFSEC staff, and staff from EFSEC's independent consultant, Jones and Strokes Associates. The Council denies the request to postpone this meeting because the Council wishes the public to have information about the revisions to the application and the Council's process for its review as soon as possible after giving adequate notice to the public. The purpose of the meeting is to allow the public to learn about revisions to the project as a result of the Second Revised Application, and Council's process for review of that application. This is an informational meeting intended to provide the public with pertinent information about the revisions proposed by Sumas Energy in their Second Revised Application for site certification. It is not intended that the Council receive public testimony at this informational meeting. Rather, the informational meeting is intended to inform the public and prepare them for participation in formal public hearings on this application to be held during the week of October 29, 2001. Therefore, public testimony will not be formally taken at that time. However, the public will have access to "public comment" sheets and may submit written comments either at the meeting or at a later date. This informational meeting will not replace any statutorily required public comment hearings

(on draft permits for example), nor public testimony to be received by the Council in association with additional adjudicative proceedings.

Discovery and Preliminary Motions

With regard to questions and concerns regarding discovery, the Council concurs with several parties' positions that prefiled testimony will be helpful to avoid surprise and allow parties to prepare their testimony. The Council declines to allow any additional time in the schedule than is already allowed and expects that discovery may commence immediately and that parties will be as responsive and prompt as possible in meeting discovery requests. Similarly, any potential preliminary motions may be made within the time already allowed for the process.

Scope of the Hearings

Seismic Issues

After the conclusion of hearings, but prior to the Council's Order recommending denial of site certification, the Counsel for the Environment and Whatcom County filed a motion to reopen the hearing record asking EFSEC members to hear recently discovered scientific evidence pertaining to the current seismic activity in Whatcom County and the Sumas Valley. An affidavit included with the motion described new evidence that was allegedly not available prior to November 28, 2000, regarding seismic activity and the extent of the Vedder Mountain fault across Whatcom County. The affidavit described the potential seismic hazards and alluded to the engineering needed for any identified threat. The Council denied the motion to reopen solely on the basis that it had decided to recommend that the application be denied on other grounds and that opening the record on the seismic issue was therefore unnecessary.

In light of the resumption of hearings on the revised application for this project, the Council agrees with the Counsel for the Environment and Whatcom County that evidence regarding changed seismic understanding should be heard by the Council. The Council recognizes that the Applicant has already supplied information in its Second Revised Application about recent concerns regarding earthquake risks at the site of the project. Council understands the Applicant's position that it commits to address seismic issues during the engineering design phase of the project. However, in order to prepare a complete recommendation to the Governor, the Council will allow the issue of seismic hazards, and proposed engineering to address such hazards, to be presented to the Council during the adjudicative proceedings.

Flood Hazard

One of the reasons that supported the Council's recommendation for denial of the project was that it had been presented with insufficient evidence to decide the effect of site filling on potential flooding events and consequent effects on other properties. The Council found that the studies conducted were inadequate to assess either the effect of the project on a flooding event or what mitigation might be effective and appropriate for impacts from the construction of the plant. The Council concluded that the Applicant had not met its burden to adequately describe the potential for flooding problems created by S2GF or the protective measures to prevent increased flood damage. The uncertainty surrounding the potential flooding impacts of the project contributed to the Council's decision not to recommend the siting of the plant in the proposed location. *See*, Council Order No. 754, at 35. In its Second Revised Application, the Applicant proposes to perform unsteady flood modeling of the site for 10, 25, 50 and 100-year flood events and evaluate potential adverse off-site impacts. Second Revised Application at 1.4-7.

However, the Applicant does not propose to conduct or submit a report of the unsteady modeling results and recommendations for mitigation of adverse impacts until six months prior to construction and after the Council has made a decision on what to recommend to the Governor. This proposal does not allow other parties, and particularly Whatcom County, to address the results of the new modeling or what mitigation would be reasonable. At the prehearing on July 16, 2001, the Council requested that the Applicant provide the results of the unsteady state modeling prior to going back into adjudicative hearings, but the Applicant declined to do so without giving any explanation why they were unable or unwilling to provide that data so it could be meaningfully addressed at hearings. Issues which significantly impact the Council's decision, whether or not to recommend approval of a site to the Governor, should be explored prior to the Council making its recommendation. The Council requests that the Applicant provide to the Council, on or before October 1, 2001, the results of unsteady-state modeling for the site for 10, 25, 50, and 100-year flood events, to evaluate potential impacts, and to describe mitigation options. This will give other parties an opportunity to decide if the flooding issue remains an issue and, if so, what mitigation may be appropriate. If the Applicant is unable or unwilling to provide such results in time for other parties to prepare for and address the issue at the adjudicative hearings, the Council will hear Applicant's explanation of why that is not feasible.

Transmission Lines

The Council will not expand the scope of the adjudication to include consideration of transmission lines that have not been applied for in the Applicant's First or Second Revised Applications. The Council reiterates its decision on the subject of "alternative transmission lines" announced in Council Order No. 743 at page 6.

Other Issues

In its letter of July 12, 2001, the Applicant explains that it intends to present testimony that will describe the modifications in the project contained in the Second Revised Application, and "*explain the implications of those modifications*." As explained in SE2's Motion for Reconsideration, and in its Second Revised Application, the Applicant has proposed numerous and very significant changes to the project in an attempt to satisfy Council members regarding the many reasons that supported the recommendation of denial of the project. The Council explained, in Order No. 757, that the prior record would be adopted for purposes of the new proceedings, but would need to be supplemented so that the implications of the new proposed facility configuration could be fully understood. In that Order, the Council also recognized that the Applicant seeks to present to the Council what it perceives to be changed circumstances in the power market since the time that the record in the case has closed. The Council announced in that Order that it was open to considering the Applicant's revised position on need and consistency in the context of further proceedings that will give all parties an opportunity to address such new circumstances as might cause the Council to weigh differently the energy benefits promised by SE2 in its new proposal. Therefore, the Council will hear both the proposed changes to the project and the implications of any of those changes from the Applicant and will also allow the other parties to submit factual information of what they consider to be the implications of any of the modifications to the project. All parties may address the changed circumstances in the power market since the Applicant has sought to, and will be allowed to, do so.

EFSEC's Contracts for Application Review and Draft Permit Preparation

On June 29, 2001, parties were informed that the EFSEC staff have directed EFSEC's independent contractor, Jones and Stokes Associates, to conduct their review of the SE2GF Second Revised Application, and to prepare a recommendation for additional SEPA analysis that would be required by the Council under the State Environmental Policy Act. EFSEC staff have also directed the Prevention of Significant Deterioration (PSD) permitting contractor (Air Quality Program, Ecology Headquarters) to conduct their review of the revised PSD permit application.

Intervention

All parties granted intervention to the original adjudicatory proceedings may remain parties to the continued proceedings.

The Province of British Columbia has informed the Council that it intends to petition for intervenor status and David Bricklin has informed the Council that he intends to represent the Province in their petition for intervention and act as their attorney if they

are granted intervenor status. The Province will submit its petition for intervention by July 20, 2001. The Applicant has indicated that it will oppose intervention by the Province and it will submit its response to the petition by July 27, 2001. The Province may submit a reply by August 1, 2001.

Constance Hoag has asked that the scope of her intervention be broadened. She may submit her petition on this matter by July 20, 2001. The Applicant opposes her motion and may respond by July 27, 2001. Ms. Hoag may reply by August 1, 2001.

Stipulations

The Second Revised Application includes a revised wetlands impact analysis and a revised mitigation proposal. The Council requests that the Department of Ecology and the Department of Fish & Wildlife and the Applicant meet and decide the current status, and any changes to the previous settlement agreements, on this issue. The Council plans to conduct a hearing on the status of settlement reached between the Applicant and the Department of Ecology and the Applicant and Department of Fish and Wildlife.

On July 13, 2001, the Council received a letter from Sally G. Johnston, representing the Washington Utilities and Transportation Commission, confirming that all of the terms and conditions contained in the "Partial Settlement Agreement Between WUTC and SE2 concerning Natural Gas Pipeline Issues (Exhibit 1) and Stipulation and Settlement Agreement Between WUTC and SE2 (Exhibit 10) will retain their current status and be considered by the Council as it reviews SE2's Second Revised Application. The WUTC and SE2 agree the SE2's Second Revised Application does not affect the validity of those agreements. The Council confirms the WUTC's understanding that Exhibit 1 and Exhibit 10 will remain a part of the record in the pending proceeding.

All other parties who were signatories to a stipulation or settlement agreement should submit a written statement to the Council stating their position on whether they wish to continue to be bound to the agreements in light of the changes to the project as reflected in the Second Revised Application.

Parties are encouraged to continue addressing resolution of issues through stipulations and settlements with the Appellant as expressed in Council's Order No. 758 and in accord with WAC 463-30-250.

Notice to Participants: Unless modified, this prehearing order will control the course of the hearing. Any objection to the provisions of this order must be filed within ten days after the date of service of this order, pursuant to WAC 463-30-270(3). Unless modified, this prehearing conference order shall control further proceedings in this Docket.

DATED and effective at Olympia, Washington, the 26th day of July, 2001.

WASHINGTON STATE ENERGY FACILITY SITE EVALUATION COUNCIL

Nan Thomas
Senior Administrative Law Judge

Appendix A

Sumas Energy 2, Inc. - 2nd Revised Application
Tentative Review Schedule

WEEK OF	Adjudicative Process	Other Permits/Contracts (Tentative)
June 25	June 29, 2001: Submittal of 2nd revised application to EFSEC	EFSEC Staff formally instruct contractors to begin review work.
July 2		EFSEC Staff distributes application and issues appropriate notices.
July 9		
July 16	July 16, 2001: Prehearing Conference No. 1 in Olympia July 20, 2001 • British Columbia's Petition for Intervention • Hoag's Petition to Broaden Scope of Intervention	JSA provides recommendation for additional SEPA review.
July 23	July 27, 2001 • Parties response to B.C.'s intervention • Applicant's response to Hoag's intervention request	SEPA Determination
July 30	August 1, 2001 • Prehearing Conference No. 2 Tumwater, L & I Bldg., 9 a.m. • British Columbia's reply regarding intervention • Hoag's reply to Applicants response.	
August 6		
August 13	August 14, 2001 • Public Information Meeting expect to be conducted at Nooksack Valley H.S., Everson, WA, 3 – 9 p.m.	
August 20		
August 27		
Sept. 3	September 4, 2001 • Applicant Prefiled Testimony • Prehearing Conference No. 3, with hearing on stipulations as needed	
Sept. 10		
Sept. 17		
Sept. 24		

WEEK OF	Adjudicative Process	Other Permits/Contracts (Tentative)
Oct. 1	October 1, 2001 • Other Parties' Direct PFT • Applicant provides results of unsteady-state flood modeling.	
Oct. 8		• Possible Public comment hearing on additional SEPA documents (if necessary) • PSD and 401 permits are ready for public comment. EFSEC issues notices of availability and distributes. • Notice of Public Hearings on draft permits. • Notice of Adjudicative Hearings (actual dates)
Oct. 15	October 15, 2001 • Prefiled Rebuttals	As necessary, JSA begins response to supplemental SEPA document comments, and begins preparation of Preliminary Final EIS documents.
Oct. 22		
Oct. 29	October 29, 2001 • Prehearing Conference No. 4 (as necessary) • Adjudicative Hearings in Whatcom County • Public hearing, two evenings	
Nov. 5		
Nov. 12	November 13-16, 2001 • Adjudicative Hearings in Thurston County.	
Nov. 19		
Nov. 26	November 26, 2001 • Applicant's Brief	
Dec. 3		
Dec. 10	December 10, 2001 • Other Parties' Response Briefs	
Dec. 17		
Dec. 24	December 24, 2001 • Applicant's Reply Brief	