BEFORE THE STATE OF WASHINGTON

ENERGY FACILITY SITE EVALUATION COUNCIL In the Matter of Application No. 2009-01 of WHISTLING RIDGE ENERGY PROJECT LLC for WHISTLING RIDGE ENERGY PROJECT	COUNCIL ORDER NO. 850 PREHEARING ORDER NO. 6 ORDER CLARIFYING AND MODIFYING PREHEARING ORDER

The Administrative Law Judge entered Prehearing Order No. 4 in this matter on June 29, 2010, addressing matters presented at a prehearing conference of June 17, 2010. Thereafter,[1] the Council received objections to the order presented jointly by Save Our Scenic Area ("SOSA") and Friends of the Columbia Gorge ("Friends") and objections from the Cultural Resources Program (CRP) of the Cultural Committee of the Yakama Nation.

I. OBJECTIONS OF SOSA AND FRIENDS

A. General matters

The objections of SOSA[2] are addressed principally to statements in the Order relating to the process by which the Energy Facility Site Evaluation Council ("the Council" in this order) integrates compliance with the Washington State Environmental Policy Act ("SEPA") with its responsibility to conduct an adjudicative hearing in considering this application. The Cultural Resources Program makes similar objections and addresses the authority of the CRP to participate in the proceeding on behalf of the Yakama Nation.

[1] Two of the objections were procedurally flawed. Prehearing Order No. 4 provided that objections must be filed within ten days of entry of the order (i.e., on July 9, 2010). Filing by electronic mail is specifically prohibited by WAC 463-30-120(2) (d) unless authorized in advance by the Council Manager or designee (for adjudicative filings, including the administrative law judge). It is often critical for internal distribution that an original document and the required number of copies be received by the stated deadline. The Council timely received the initial filing from SOSA. On July 9 it also received by electronic mail the supplemental objections of SOSA and the objections of the Yakama Nation. Paper copies of those objections were not received until July 13. Despite the late filing, the Council believes it appropriate to address the objections on its own motion in this instance. Fairness to all parties and the tribunal, however, argue for the rejection of untimely future filings.

[2] We will refer to the joint objections by the name of the first-listed party for brevity and convenience.

At the outset, we observe that conciseness in the prehearing order appears to have contributed to concerns voiced by the parties that the Council fails to consider SEPA requirements adequately under the law.[3]

SOSA quotes extensively from the National Environmental Policy Act, from federal regulations promulgated thereunder, and from interpretations of NEPA in federal proceedings. We recognize the similarities between the two laws, and understand that SEPA is patterned closely after NEPA. The laws, however, are not identical. The federal statute, and the federal regulations and interpretations of the law, may be helpful in interpreting the Washington law. In this proceeding, the Council and the Bonneville Power Administration (BPA), a federal agency, have cooperated in issuing a single joint Draft Environmental Impact Statement (DEIS) to comply with both jurisdictions' individual laws and requirements. However, it is error to assume that the federal law and its interpretations apply literally and completely to the application of SEPA within the State of Washington. That the Environmental Impact Statement (EIS) in this proceeding is a joint document of the BPA and EFSEC to satisfy both laws does not alter the application of Washington law, and only Washington law, to judge the compliance of the document with Washington requirements. The joint nature of the document does not confer jurisdiction on Washington agencies or courts to substitute the federal law in judging compliance with Washington law.

B. Integration of SEPA and the Adjudicative Hearing.

SOSA confuses references to the development process of the EIS (independent of the adjudicative process) with use of the environmental information (appropriately integrated with the Council's adjudicative decision process) when it argues that the Council's process is erroneous.

SOSA properly cites WAC 197-11-655(2) as authority for the Council's obligations to consider such information under SEPA:

> (2) Relevant environmental documents, comments, and responses shall accompany proposals through existing agency review processes, as determined by agency practice and procedure, so that agency officials use them in making decisions.

The Council has adopted this provision by reference (WAC 463-47-020) and complies with this practice. In preparing an FEIS, the Council begins with scoping, based on unsworn

[3] As we note in the ensuing discussion, the Council properly implements SEPA. It is simply untrue that the Council "mocks" the State Environmental Policy Act, that it "turns SEPA on its head", that it commits "unheard of procedural misdirection," that it fails in any manner to effect the purposes of the Act, or that it fails to comply with the requirements of the Act or the Council's own rules.

comments, issues a DEIS that is released for comment, and receives unsworn oral and written comments on the draft (and in this proceeding, providing an extended period for such comments). The comments are reviewed, responses are prepared and then the general agency practice is that the responsible official issues a draft final EIS (DFEIS).

The DFEIS precedes the beginning of the adjudicative hearing. Its information is public and available. The environmental record is received in evidence; its information is available to the parties and the public during the adjudicative hearing. The content of the DFEIS is the equivalent of a FEIS. At the conclusion of the hearing process, the responsible official issues a FEIS, which may incorporate additional environmental information received in the adjudicative hearing.[4] This process fully complies with the requirement of WAC 197-11-655(2) and WAC 463-47-020.

In an application for site certification, the Council does not make a final determination, but it instead makes a recommendation to the Governor.[5] The governor undertakes her or his own review of the record, including the environmental information and the draft, draft final (if any) and final environmental impact statements. The governor then makes her or his decision, subject to the limitations set out in RCW 80.50.

An illustrative opinion[6] of Division I, Court of Appeals, approved a less-complete process in *Kentview Properties, Inc v. City of Kent*, 59 Wn.App. 41, 795 P.2d 732 (1990) at 738-9. The city planning commission conducted an adjudication prior to completion of an FEIS, using the draft EIS and comments, then forwarded its recommended decision to the City Council with a final EIS. The Court said,

> The Planning Commission considered the draft EIS prior to making its recommendation to the city council and solicited comments on the draft EIS at a public hearing. The city council received the final EIS containing the Planning Department's response to comments approximately 2 months before making the decision to rezone. Under these circumstances, we find no violation of RCW

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[4] The prehearing order imprecisely lumped the specific responsibilities of the Council and its manager under the umbrella of the label "Council." WAC 463-47-090, however, provides that the Council has responsibility for preparation of the EIS documents.

[5] As a regulator, the Council may make decisions regarding the operation or modification of jurisdictional facilities that require an environmental review. Under RCW 80.50.040(8), however, the Council has no authority to make a final decision on jurisdictional siting applications. Instead, on such matters, it has authority only:

> To prepare written reports to the governor which shall include: (a) A statement indicating whether the application is in compliance with the council's guidelines, (b) criteria specific to the site and transmission line routing, (c) a council *recommendation* as to the disposition of the application, and (d) a draft certification agreement when the council *recommends* approval of the application. (Emphasis added.)

[6] The opinion was withdrawn from publication at the request of the City of Kent and the City of Seattle for unpublished reasons. 799 P.2d 1194. Accordingly, it is authority insofar as it represents judicial thought on an analogous matter.

43.21C.030 (2) (d) or WAC 197-11-406.

There, the adjudicative body used the DEIS. In contrast, the Council regularly uses a DFEIS, an equivalent in content to an FEIS at the same stage of issuance.

Use of the DFEIS is one mechanism by which the Council complies with environmental law requirements while pursuing compliance with the statutory one-year deadline for completing application reviews. RCW 80.50.100(1). SOSA summarily dismisses the Council's statutory obligation to complete a hearing in one year on the basis that the Applicant has waived that deadline, implying that time is now irrelevant and the statutory obligation is meaningless. The Council disagrees, believing that under the purpose of the statutory mandate it should make reasonable efforts to minimize the length of the proceeding, when doing so prejudices no party and complies with the letter and the spirit of applicable laws.

The SEPA review and the adjudication are governed by separate procedural laws and standards of review, a fact that the prehearing order identified. While the Council collects and uses the environmental impact *information* to inform it on matters within the adjudication, it would be improper (as the prehearing order noted) for the Council to confuse the two *processes*. The prehearing order neither ordered nor suggested use of the adjudication to implement the SEPA process, as SOSA claims. The order merely asked, in light of assertions of counsel,[7] that the Applicant present a complete case in its direct evidence to avoid need for original evidence on rebuttal. As Whistling Ridge points out in its response to objections, the Council will rely on the professional judgment of the parties to offer appropriate and adequate evidence.

C. Hearing length

In supplemental objections to the prehearing order, SOSA claimed error in the provision that the hearing consume a maximum of ten hearing days. It urges that no limitation should be imposed.

The Council often deals with complex litigation. In its history it has conducted adjudications on the siting of nuclear-, coal- and natural gas-fueled generation facilities, a cross-state pipeline, and wind-powered generation facilities. Its estimate of maximum time was based on past experience in vigorously contested but well-prosecuted hearings. The Council feels at

[7] SOSA misstates the order when it contends that the order "acknowledge[s] that serious errors in the draft EIS have been identified." Instead, the order acknowledges only the statements of counsel at the prehearing conference (see, pages 11, l. 25 through p.12, l. 4 and p. 12, ll 14-17). Counsel described assertions made at an EIS comment session, and planned statements at a session following the prehearing conference, that *allege* potentially serious errors in, or omissions from, the draft EIS. Nowhere did the prehearing order conclude that such asserted errors exist.

this time that ten days is a reasonable "outside" estimate of the maximum time required for the hearing if reasonably prosecuted and thus a reasonable target.

The order, however, did not foreclose any party from identifying exceptional circumstances that might require a longer hearing. At this point, there is no witness list, no list of issues, no prefiled evidence to explore, and nothing specific offered to justify an unlimited time for hearing.[8] Counsel in status conferences will be asked to consider stipulations and other procedural means to preserve rights while limiting hearing time to necessary elements. The APA provides that

> To the extent necessary for full disclosure of all relevant facts and issues, the presiding officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence, except as restricted by a limited grant of intervention or by the prehearing order.[9]

The law does not require an agency to grant unlimited time or opportunity to any participant. Many factors provide valid reason to impose reasonable limits on time. The Council has the authority to impose reasonable restrictions on the hearing to avoid duplicative, cumulative, irrelevant, or immaterial evidence or examination.[10]

D. Rescheduling hearing dates

SOSA asks that the Council change the dates now scheduled for hearings. It says that counsel again have conflicts with proposed hearing dates, including one day of a scheduled trial and a vacation already scheduled. It urges that the hearing be rescheduled for early 2011 and that parties be consulted as to availability for hearings.

We trust that it is clear that the Council does not intentionally schedule matters to produce conflicts for parties or counsel. The December schedule was adopted in part because it was more than five months in the future, it is generally a light month for attorneys' trial obligations, and all Council members happen to be available. We are concerned that if we aim to limit the schedule to dates that are convenient to all parties, given the number of parties in this proceeding and apparently busy obligation schedules, it could lead to a long-

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[8] We note that counsel for SOSA and Friends have to date kept their commitment to coordinate their presentations to avoid duplication and unnecessary time. We are confident that this will continue and that all parties will support the Council's aim that the hearing provide every party a reasonable opportunity to present the evidence and argument reasonably necessary to support its position in a reasonable and timely manner.

[9] RCW 34.05.449(2)

[10] *See, Sherman v. State*, 128 Wn.2d 164, 184, 905 P.2d 355 (1995), "So long as [a] party is given adequate notice and an opportunity to be heard and any alleged procedural irregularities do not undermine the fundamental fairness of the proceedings, this court will not disturb the administrative decision." Accord, *Pacific Topsoils Inc. & Dave Foreman v. WA State Department of Ecology*, Thurston County Superior Court Cause #08-2-01638-0.

protracted start, a truncated hearing, or contentions of discrimination. The Council has an obligation to proceed fairly but speedily to conclusion of the proceeding.

If it proves necessary to adjust the schedule, we will strive to set a schedule as early as feasible and to consider parties' concerns. In the meantime, we adhere to our current schedule.

E. Waiver of Discovery

The prehearing order stated that in accepting informal discovery, as defined in the order and its attachment, the parties waived application of the Administrative Procedure Act provisions on discovery, RCW 34.05.446. That law provides that discovery under the Washington civil rules for Superior Court may be available in the discretion of the presiding officer, and this provision is recognized in WAC 463-30-190.

Counsel consented without reservation at the conference to the use of informal discovery procedures. In that respect, counsel did waive at least the initial application of the discovery process in RCW 34.05.446. The objection voiced no desire to reject the process for discovery proposed in the order, essentially telephonic inquiries, written requests where appropriate, and review of requests on application to the administrative law judge.

We take the acceptance of informal discovery to be a commitment that parties will use informal channels in good faith and will not use the discovery process to burden other parties unnecessarily or evade reasonable requests for information. Counsel are not foreclosed by the order from citing the discovery rules by analogy in seeking review, from seeking more formal treatment of discovery requests in the event of recalcitrance or noncompliance, or from otherwise seeking formal application of the civil rules to meet unexpected circumstances. In this manner, we believe counsel have adequate protections for their clients in both seeking and responding to discovery requests and that the statements in Prehearing Order No. 4 adequately express the circumstances.

II. OBJECTIONS OF YAKAMA NATION CULTURAL RESOURCES PROGRAM

The Yakama Nation, on behalf of the Yakama Nation Cultural Resources Program (CRP)[11], filed objections to a portion of the order stating that the Cultural Program had not

[11] There has been some uncertainty regarding the name of the entity actually holding intervener status. Based on the initial filing and subsequent submissions, the intervenor is the Cultural Resources Program of the Cultural Committee of the Yakama Nation. Given the tribal structure and the circumstances, we find that it is not inappropriate for the Council to recognize all three entities, speaking through the Cultural Resources Program, as a participant in the proceeding. We ask that the intervener designate the person or persons authorized to sign

demonstrated a grant of authority by the Yakama Nation's governing body to appear in this matter.[12] It supplied a copy of the charter of the Cultural Committee charter from the Yakama Nation in conjunction with its objections. The Cultural Committee is the body within which the CRP operates.

Applicant responded to the objections, supporting the order, arguing that the chair of the Cultural Committee has asked the Council to return material supplied by the CRP representatives and has directed those representatives to suspend participation in the site certification proceeding until a review of the CRP participation is completed. It appears that the position to be taken in this proceeding has not yet been decided.

The Council regrets any appearance of disrespect in the observations of the prehearing order, and reiterates that it is very willing to work with the Yakama Nation, the Cultural Committee, the Cultural Resources Program and individual members of the Nation as permitted within the laws and rules that apply to the Council and the proceeding before it. It may be helpful to think of the Council in this adjudication as a court, in which it is improper to favor – or appear to favor – the interests of any of the participants.

The State and its agencies are not governed by requirements that federal government agencies engage in "consultation" with the Nation. However, "Government-to-government" in the context of a consultation means a relationship in which state government entities interact with Indian tribes as governments and not simply as individual Indian people. The concept was declared to be a formal policy of Washington's executive branch in the 1989 "Centennial Accord."

The Yakama Nation's objection to the prehearing order proposed that, to implement a government to government consultation, the Council staff work with the Washington Historic Preservation Office, authorized representatives of the Cultural Resources Program, and the Applicant as necessary, to explore cultural resources and requirements. This proposal appears to be a sound and appropriate way to implement a consultation under the Centennial Accord while respecting the "*ex parte*" limitations of adjudications and the Council supports it.

The objection's proposal that the Council familiarize itself with the Yakama Nation's structure and processes through direct staff contact with the Yakama Nation is also a helpful

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submissions and provide that information to the Council. We will assume that any filing has the full authority of the Nation, but ask for clarity that submissions be made only in the name of the CRP.

[12] The filing also objected to the proposed timing of the FEIS; that issue is addressed above.

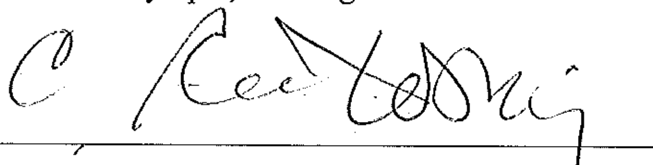
suggestion and the Council asks its EFSEC Manager to meet with representatives of the Nation for that purpose.

III. CONCLUSION

Prehearing Order No. 4 is modified as specified in this Order. The hearing schedule remains unchanged, although it may be modified by later notice to reflect good cause for doing so. In this light, counsel should notify the Council of any barrier to availability for hearing during the period of January through February, 2011.

WASHINGTON ENERGY FACILITY SITE EVALUATION COUNCIL

Dated at Olympia, Washington and effective this 11th day of August, 2010.



C. Robert Wallis, Administrative Law Judge

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of Application No. 2009-01 WHISTLING RIDGE ENERGY LLC WHISTLING RIDGE ENERGY PROJECT	CERTIFICATE OF SERVICE

I, Tammy Talburt, hereby certify that on Wednesday, August 11, 2010 I served, by Electronic mail and U.S. Mail or Campus Mail, the following document upon each person designated on the official service list in this proceeding.

1. Council Order No. 850, Prehearing Order No. 6, Prehearing Order clarifying and Modifying Prehearing Order,

Dated at Olympia this 11th day of August, 2010.

Tammy Talburt, Commerce Specialist 1
Energy Facility Site Evaluation Council

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