



Confederated Tribes and Bands  
of the Yakama Nation

Established by the  
Treaty of June 9, 1855

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May 4, 2023

Sent via Electronic Mail

Adam Torem, Administrative Law Judge  
ENERGY FACILITY SITE EVALUATION COUNCIL  
adamtorem@writeme.com

Re: Topics of Discussion - Prehearing Conference #3 May 2, 2023

Dear Judge Torem,

This letter responds to your request for additional written feedback regarding topics that the parties and yourself discussed during the 3<sup>rd</sup> Prehearing Conference in EF-210022 on May 2, 2023. My understanding is that the purpose of this additional feedback is to assist you in finalizing a prehearing order regarding the adjudication schedule, issues list, and discovery provisions, and does not replace or negate Yakama Nation's ability to challenge any content of the prehearing order under WAC 463-30-270(3). This letter responds to each topic as they were listed in the agenda for the May 2<sup>nd</sup> Prehearing Conference. We will submit a second letter next week regarding the protective order.

I. Venue

Counsel for Yakama Nation maintains its objection to a virtual hearing for the reasons articulated in our March 23, 2023 letter on this topic. In response to Chair Drew's decision to maintain a fully remote hearing format, we would like to note that the justification for holding the hearing remotely by citing to EFSEC's monthly meetings ignores many of the practical reasons the parties articulated for having the hearing in-person given its nature as an adjudicative process rather than a routine check-in meeting for the agency. Yakama Nation is especially concerned about the limitations on witnesses to effectively use maps and to discuss sensitive cultural matters in an appropriate setting.

There was also no demonstration by any party that their witnesses would not be able to appear in person – which Chair Drew cites as the primary reason for holding the hearing virtually in the interest of fairness – only that it would inconvenience the applicant by increasing the cost of the adjudication and witness participation. Another concern with Chair Drew's decision is that it references the number of other pending adjudications, as well as EFSEC's limited staffing capabilities, and states that holding in person adjudications for all of them is 'impossible.' Whether or not doing so would in fact be impossible, Yakama Nation should not be prejudiced in its ability to fully participate as a party in this proceeding by the agency's administrative and staffing limitations. Lastly, it is unclear to Yakama Nation why the determination regarding hearing venue is being made by the EFSEC Chair instead of yourself or the full council pursuant to WAC 463-30-020. I urge you and/or the full council to reconsider the decision to hold the hearing virtually.

## II. Scheduling of the Adjudication

Scheduling the hearing in August does not allow sufficient time for discovery and witness testimony. Putting aside the procedural concerns raised by multiple parties about the timing/sequence requirements of SEPA, the applicant's extension request must allow sufficient time to complete the final environmental impact statement as well as an adjudication under a timeline that guarantees full due process. In order to avoid unnecessarily compressing the adjudication schedule, the adjudication should not be set until the extension date has been set.

## III. Filing Milestones

Reserving all possible objections to the compressed nature of the filing schedule, EFSEC's decision to move forward without issuance of the final environmental impact statement, and the detrimental impact of these filing milestones upon the parties' ability to fully conduct discovery, counsel for Yakama Nation believes that the filing milestones were sufficiently discussed during the prehearing conference. We appreciate your decision to push back the initial deadline for direct testimony to June 12, 2023.

In addition, counsel for Yakama Nation joins in Mr. Aramburu's request for a site visit involving EFSEC and counsel for all parties to the adjudication. We request additional discussion between the parties and yourself on whether the timing of such a site visit before or after the August hearing would better serve EFSEC's deliberations regarding the Project and its potential impacts.

## IV. Disputed Issues List

Counsel for Yakama Nation strongly objects to the disputed issues list as a whole because it omits, without explanation, the clear issue statements submitted by Yakama Nation that were submitted consistent with your previous verbal and written direction, and were not objected to by any other party. It also omits clear issue statements submitted by other parties that were not objected to by any party and that Yakama Nation was advised by yourself in the second prehearing conference that we would be able to join in addressing throughout the duration of the case. EFSEC is required to issue clear findings of fact and conclusions of law as a result of the adjudication. The vague issues list now presented weakens the parties' ability to advocate for clear findings and conclusions.

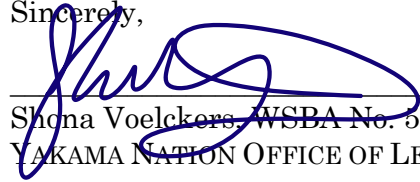
Specific to the new list of issues published in the 3<sup>rd</sup> prehearing conference agenda, we request the following changes: i) add a sub-bullet for "Impacts to legendary and monumental sites" under "Protection of Yakama Nation's Traditional Cultural Properties/Places"; ii) add a sub-bullet for "Impacts to burial sites on or adjacent to the Project" under "Protection of Yakama Nation's Traditional Cultural Properties/Places"; iii) add "Consistency with Benton County Comprehensive Plan" under the first section as its own bullet; and iv) move "Greenhouse Gas Reductions Analysis" back into the list of issues within the scope of EFSEC's review pursuant to RCW 80.50.010(2)'s requirement that EFSEC act "[t]o 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; to pursue beneficial changes in the environment; and to promote environmental justice for overburdened communities.”

V. Discovery

Counsel for Yakama Nation appreciates your verbal confirmation that discovery under RCW 35.05.446 is available to all parties in this proceeding, and requests that be made clear in the prehearing order as well. We join in statements by counsel for other parties during the prehearing conference that the current schedule does not allow sufficient time for the parties to conduct discovery. We respectfully request that your prehearing order maintain standard discovery deadlines contained in the superior court civil rules and consistent with RCW 35.05.446(3).

Sincerely,



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YAKAMA NATION OFFICE OF LEGAL COUNSEL