

**Cami Petersen - Taylor Resources Substantial Development Application - Prehearing Conference
(No. 961372 SSDP)**

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Date: 01/30/2012 5:16 PM
Subject: Taylor Resources Substantial Development Application - Prehearing Conference (No. 961372 SSDP)
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Dear Counsel and Staff:

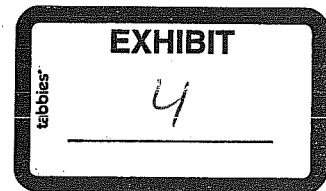
Ms. Kisielius, on behalf of the Applicant, has requested a prehearing conference in this matter to discuss the structuring of and potential limitations on testimony at the hearing set to begin on February 13, 2012.

The Thurston County Hearing Examiner Rules authorize prehearing conferences in matters involving permit applications and in appeals. See Chapter I, Section 7.2 and Chapter II, Section 4. However, conferences are held infrequently in permit cases, because typically not all the parties are identified until the hearing.

Although I have only begun to review the EIS and its associated studies, it's clear that this matter likely involves disputed scientific and technical issues and that public participation could be significant. I do not know to what extent expert testimony will be offered. For these reasons, a prehearing conference which at least allows identified parties to raise procedural issues or concerns could make the process more efficient. The Association for the Protection of Hammersley, Eld and Totten Inlets (APHETI) has been actively involved in this matter, as reflected by the EIS. David Mann of Gendler & Mann has stated that he is representing APHETI and that the organization will take part in this hearing. Because this is a principal group that has participated in this matter and has indicated it will take part in the hearing, its participation in the prehearing conference would provide balance and would give a voice at the conference to the side questioning or opposing the request. Thus, APHETI should be present at any prehearing conference.

Chapter I, Section 1 of the Hearing Examiner Rules defines "party of record" as either:

- "a. a person who testifies at a hearing;
- b. the applicant;
- c. persons submitting written testimony about a matter pending before the Examiner.
- d. Persons who have signed a sign-up sheet at the hearing."



Of these categories, (a) and (d) will only be known at the hearing. Category (c) is restricted to those submitting "testimony", which is defined by Black's Law Dictionary (5th Ed.) as "evidence given by a competent witness under oath or affirmation", including evidence delivered under oath at trial or by affidavit or deposition. A large number of comments have been submitted through the EIS process. These, however, are typically not submitted under oath. Mr. Smith advised me that the Staff has not received any comments on this substantial development permit proposal since the close of the EIS process. Thus, no parties are yet identified under Category (c).

The U.S. Supreme Court has held that

"[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

Mullane v. Central Hanover Bank and Trust, 339 U.S. 306, 314 (1950).

A prehearing conference is not the hearing on the merits, but can determine procedural rights at that hearing. To

ensure compliance with the Due Process Clause, I believe that no order restricting the procedural opportunities (such as time of testimony and number of witnesses) of persons not present at the prehearing conference should be issued on the basis of that conference. Any such restrictions would be imposed at the start of the hearing, consistent with customary procedure.

For these reasons and with these restrictions, a telephonic prehearing conference would likely promote the efficiency of the hearing and would not offend due process. As Ms. Petersen, the Hearing Examiner Clerk, has advised you, it will be held at noon on February 1, 2012, with attorneys for the Applicant, the County and APHETI, as well as a representative of the Department participating.

In considering the Applicant's request for this conference, I have had telephone conversations with Laura Kisielius, attorney for the Applicant, Jeff Fancher, attorney for the County Resource Stewardship Department, David Mann, attorney for APHETI, and Robert Smith of the Resource Stewardship Department. These conversations did not involve any advocacy for any issue, whether substantive or procedural.

Tom Bjorgen
Thurston County Hearing Examiner

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