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BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In re Application No. 98-1
of
WASHINGTON PUBLIC POWER
SUPPLY SYSTEM¹
For Amendment of Site Certification
Agreement for Satsop Power Plant Site

COUNCIL ORDER NO. 735
ORDER ON RECONSIDERATION
REAFFIRMING ORDER 731 AND
DENYING STAY

Nature of the Action. This matter involves a request to the Washington State Energy Facility Site Evaluation Council (EFSEC or the Council) to amend the existing Site Certification Agreement (SCA) for the Satsop Power Plant Site. The existing SCA authorizes construction and operation of two nuclear power plants (WNP-3 and WNP-5) and a combustion turbine (Satsop Combustion Turbine Project). The purpose of the requested amendment is to remove the authorization for the two nuclear power plants from the agreement. The remaining agreement would continue to authorize the operation and construction of the combustion turbine project with an associated natural gas pipeline.

Procedural Setting. On April 20, 1999, the Council entered Order No. 731, recommending gubernatorial approval of the proposed amendment of Site Certification Agreement for the Satsop Power Plant Site. By letter dated April 30, 1999, Wildlife Forever of Grays Harbor (Wildlife Forever) requested reconsideration of the Council’s order and a stay of the order until its lawsuit, Wildlife Forever v. Washington Public Power Supply System (Thurston County Superior Court No. 99-2-00620-5), is decided. On May 5, the Council sent notice to interested persons, providing an opportunity to comment on Wildlife Forever’s motions. Comments were received from the Wise Use Movement (Wise Use), Grays Harbor Audubon Society (Audubon), Columbia-Pacific Resource Conservation and Development (Columbia-Pacific), Washington Wetlands Network (Wetnet), Friends of Grays Harbor (FOGH), the Chehalis River Council, the Satsop Redevelopment Project (SRP), and the Washington Public Power Supply System (Supply System).

¹ Effective June 2, 1999, the Executive Board of the Washington Public Power Supply System voted to change its name to Energy Northwest.

1 The Council has reconsidered Order 731 in light of these comments and reaffirms its earlier
2 order.

3 **Discussion:**

4 In 1996, the Washington Legislature amended EFSEC's statute, chapter 80.50 RCW, to reflect
5 the State's encouragement of economic development at certain unfinished nuclear sites. As a
6 matter of policy, the Legislature stated that it intended to seek the broad interest of the public by
7 avoiding the costs of complete demolition and restoration of unfinished nuclear facilities and
8 using such facilities for public uses, including economic development.

9 The Legislature allowed EFSEC latitude to work within this policy, pursuant to its full statutory
10 authority, in dealing with the Satsop site. Within its statutory authority, EFSEC had the authority
11 to recommend amendment of the Satsop SCA at any time, consistent with applicable regulations.
12 The one requirement set by the Legislature was that if title to some portion of the Satsop site
13 were transferred to a political subdivision, EFSEC would be required to "release the transferred
14 portion" from the SCA at that time (if it had not done so already).²

15 The Council believes that in recommending amendment of the Satsop SCA, it has supported the
16 policy of the State and comported with all relevant statutes and rules. The Council's action in
17 Order No. 731 is narrowly focused. Through the order, the Council recommends the termination
18 of the Supply System's license to construct and operate two nuclear plants at the Satsop site.
19 Concomitantly, EFSEC properly withdraws its authority as the regulator of an energy facility.
20 Responsibility for planning and regulation of the site passes to the entities that are properly
21 involved with its subsequent use.

22 The Council understands that subsequent actions at the site are anticipated. However, the
23 Council's order itself does not authorize any future action. Contrary to the suggestions in some
24 of the comments, the Order does not authorize a new use at the Satsop site; it does not transfer
25 title to the site;³ and it does not mandate how local entities will discharge their responsibilities
26 for public health, safety, and welfare at the site when EFSEC's responsibility terminates. These
actions are beyond the scope of the Council's jurisdiction. Any subsequent action must occur in
accordance with applicable laws and regulations.

Although the Council has reviewed certain agreements between third parties regarding the future
use of the site, the Council has no statutory authority to dictate or influence the terms of these
agreements. They are executed by independent third parties. The Council's sole purpose in
reviewing such documents has been to satisfy itself that termination of the SCA would be
consistent with public health, safety and welfare.

In this order, the Council addresses the arguments advanced by Wildlife Forever in support of its
motion.

² RCW 80.50.300(2) states in relevant part, "[i]f a certificate holder transfers all of a portion of the site..., the council shall amend the site certification agreement to release those portions of the site that are transferred..."

³ On page two of its Motion for Reconsideration, Wildlife Forever states, "...the Order attempts to transfer the site..." This statement appears to misapprehend the Council's role in this action.

1 **A. The Council’s authority to amend the SCA**

2 Arguments. Wildlife Forever argues that the Council lacks authority to amend the SCA as it has
3 done in Order No. 731. Wildlife Forever argues that under RCW 80.30.300(2), the Council’s
4 authority to release the site *is conditioned* upon the transfer of title. Because title has not
transferred, it argues, the Council has no authority to amend the SCA to release the site.⁴

5 Response. The SRP and Supply System respond that the Council has the authority to amend the
6 SCA without invoking the provisions of RCW 80.50.300. The Council amended the SCA under
the general authority provided by its laws and rules to amend any Site Certification Agreement.
The general authority is not in conflict with the provisions of RCW 80.50.300(2).

7 Discussion. The Council has full authority under chapter 80.50 RCW and chapter 463-36 WAC
8 to amend the SCA as it has done in Order No. 731. RCW 80.50.300(2) does not restrict the
Council’s ability to exercise its general authority to amend a Site Certification Agreement. RCW
9 80.50.300(2) is applicable *only after* the transfer of title. The Council’s action, *taken before the*
transfer of title, was not constrained by RCW 80.50.300(2).⁵

10 **B. Compliance with RCW 80.50.300**

11 Arguments. Wildlife Forever argues that the Council did not comply with RCW 80.50.300.
12 Under RCW 80.50.300, the Council may not release the mitigation lands from the SCA until
13 they are “validly transferred” to a political subdivision. Because no “valid transfer” has
occurred, the Council may not release the mitigation lands.

14 Response. The SRP and Supply System respond that the Council was not required to comply
15 with RCW 80.50.300. Nonetheless, Order No. 731 “fundamentally comported” with this section
of the statute.

16 Discussion. The Council does not believe that RCW 80.50.300 constrained its actions in the
present situation as Wildlife Forever suggests.

17 The Council can find no language in RCW 80.50.300 to support Wildlife Forever’s argument.
18 RCW 80.50.300 does not purport to define a “valid transfer;” nor does it purport to limit the
Council’s actions prior to such transfer or to condition the Council’s actions upon such a
19 transfer.⁶

20 Whether or not RCW 80.50.300 specifically constrains its actions here, the Council notes that
insofar as RCW 80.50.300 is intended to further the Legislature’s policy favoring economic
21

22 ⁴ Friends of Grays Harbor support this argument in their comments.

23 ⁵ If events had occurred differently, such that the Council had not “released the site” prior to the transfer of title,
24 RCW 80.50.300(2) would have required the Council to release the site after such transfer.

25 ⁶ Specifically, RCW 80.50.300(1) is permissive in nature; a certificate holder *may* transfer its responsibilities for site
26 restoration to a political subdivision, pursuant to the conditions of that subsection. In skeletal form, RCW
80.50.300(2) states “if title transfers, then EFSEC must release.” In skeletal form, Wildlife Forever argues “if no
transfer, then EFSEC must not release.” Wildlife Forever’s position does not follow logically from the statute.

1 redevelopment, EFSEC’s action comports fully, and in that sense, EFSEC has complied with
2 RCW 80.50.300.

3 **C. Compliance with SEPA**

4 Arguments. Wildlife Forever argues that amendment of the SCA is a “new action” under SEPA
5 and requires a “new” SEPA process, beginning with a threshold determination. It contends that
6 the Council may not rely on past SEPA studies as the basis for a new action.⁷

7 Response. The SRP and Supply System respond that an Environmental Impact Statement (EIS)
8 was prepared at the time the Council approved the project. Thus, the relevant question is
9 whether termination of the project requires a supplemental EIS (SEIS). Because termination
10 (withdrawal of the right to complete construction and operation) is not a “substantial change” in
11 the original proposal and because the Council had no “significant new information” indicating
12 probable significant adverse environmental impacts, no SEIS was required. See WAC 197-11-
13 405(4).

14 Discussion. As explained in Order No. 731, the Council believes that it has fully complied with
15 SEPA. The original EIS for Satsop nuclear plants 3 and 5 studied the effects of the project
16 throughout its lifetime. Under SEPA, the termination of a project, taken alone, is not a separate
17 new action but the conclusion of a prior action.

18 The Council is fully aware that local Grays Harbor entities now intend to engage in agency
19 action that may have further environmental effects at the site; the Council firmly believes that a
20 SEPA determination will be necessary *at some appropriate time*. However, the SEPA rules and
21 case law demonstrate that during a transition in the use of property, SEPA action may not be ripe
22 until the subsequent project or use is sufficiently defined as to make SEPA action beneficial to
23 the decision maker.⁸

24 **D. Compliance with other applicable law**

25 Arguments. Wildlife Forever, joined by Audubon and Wetnet, argues that the Council did not
26 comply with WAC 463-36-050 or WAC 36-36-100.⁹

Discussion. In Order No. 731, the Council clearly recognized the requirements of WAC 463-36-
040 to review *all applicable laws and rules* in its amendment process. Order No. 731, p. 7. The
Council identified RCW 80.50.010, chapter 43.21C RCW (the State Environmental Policy Act or
SEPA), the Council’s rules for site restoration in WAC 463-54-080 and WAC 463-42-655
through 463-42-680, and RCW 80.50.300 as potentially applicable and discussed each in detail.

⁷ Audubon, Wetnet, FOGH, and the Chehalis River Council join in this argument.

⁸ See *Lassila v. City of Wenatchee*, 89 Wn.2d 804, 576 (1978) in which the court found that certain preliminary
decisions were not proposals for action for which environmental effects could be meaningfully evaluated. Audubon
and Wetnet have acknowledged that future industrial uses at the site are “yet undefined.”

⁹ The Council considered WAC 463-36-050 in its consideration of the public health safety and welfare. The
Council’s response is deferred to Section E of this order..

1 The Council did not identify and consider WAC 463-36-100 because this rule applies
2 specifically to the situation in which a certificate holder transfers *its certificate*, i.e. its right to
3 construct and operate an energy facility, to another entity. Because the Supply System did not
4 request to transfer its right to construct and operate to another entity, WAC 463-36-100 is not
5 applicable here.

4 **E. Compliance with WAC 463-36-040**

5 Arguments. Wildlife Forever argues that the Council’s amendment is not consistent with (i) the
6 intention of the original SCA, (ii) applicable laws and rules, or (iii) the public health, safety, and
7 welfare. First, it argues, the intent of the SCA was to protect the mitigation lands as old growth
8 forest habitat through state enforcement until full restoration of the site. By removing state
9 protection of the mitigation lands, the proposed amendment is inconsistent with this intent.

8 Second, it argues, the amendment is inconsistent with applicable laws and rules, including RCW
9 80.50.300. In addition to its earlier arguments regarding RCW 80.50.300, Wildlife Forever
10 argues that the Supply System has not transferred restoration responsibilities to the SRP, “as
11 required by” RCW 80.50.300.

11 Finally, Wildlife Forever argues, the amendment does not ensure the public health, safety, and
12 welfare, particularly the short and long-term environmental protection on the mitigation lands, as
13 required by WAC 463-36-050. Wildlife Forever argues that the new wildlife mitigation
14 agreement removes the state protection of these lands that was available through EFSEC.¹⁰

13 Response. The SRP and Supply System cite sections of Order No. 731 to demonstrate that the
14 proposed amendment is consistent with all aspects of WAC 463-36-040. In particular, the order
15 does consider the short and long-term environmental effects on the mitigation lands. Wildlife
16 Forever’s statement that the amendment removes all state protection of the mitigation lands is
17 “factually and legally baseless.” The wildlife mitigation agreement between WDFW and the
18 Supply System continues in effect until the new mitigation agreement between WDFW and the
19 SRP becomes effective.¹¹ Further, Columbia-Pacific in its comments has reiterated a
20 commitment to abide by the mitigation agreement *if* it becomes manager of the mitigation lands.

18 Discussion. In Order No. 731, the Council clearly recognized the requirements of WAC 463-36-
19 040 to review the intent of the original SCA, all applicable laws and rules, and the public health,
20 safety, and welfare (including short and long-term environmental effects) in its amendment
21 process. Order No. 731, p. 6. The Council found the amendment consistent with each.

20 With regard to the transfer of the responsibility for site restoration, Wildlife Forever’s
21 interpretation of RCW 80.50.300(1) does not comport with the Council’s understanding. RCW
22 80.50.300(1) is permissive only, and states that the certificate holder (the Supply System in this
23 case) *may* transfer its responsibilities for site restoration to a political subdivision. Nonetheless,

23 ¹⁰ Wildlife Forever cites four reasons that state protection of the mitigation lands will be reduced. First, the new
24 wildlife mitigation agreement has “dubious legal status.” Second, even if it is legally binding, the agreement is not
25 enforceable by state agencies (other than Washington Department of Fish and Wildlife or WDFW) or the public.
26 Third, it is not enforceable through specific performance or criminal penalties. Finally, the responsibility to protect
the mitigation lands is taken from the state and given to an unelected board of local officials.

¹¹ Satsop Power Plant Site Wildlife Mitigation Lands Management Agreement, November 1998.

1 in its consideration of the public health, safety, and welfare, the Council carefully reviewed the
2 transfer agreement between the Supply System and SRP in preparation for releasing its own
3 responsibilities on the site. As demonstrated in Findings of Fact 16 through 21, the Supply
4 System *has transferred* and the SRP has assumed responsibility for restoration work to protect
5 the public health and safety. See Order No. 731, p. 4.

6 In Order No. 731, the Council discussed its review of the short and long-term environmental
7 effects of the amendment, including its effect on the wildlife mitigation lands. See Order No.
8 731, pp. 9-10. The Council found that the continuity between the existing and the new wildlife
9 mitigation agreements ensured continued protection of the mitigation lands by competent state
10 and local entities, who have expressed their ability and willingness to enforce it. Enforcement by
11 WDFW is particularly apropos because the agreement is squarely within the expertise and
12 statutory mandate of the agency. The new agreement provides funding for WDFW to monitor
13 the SRP's management of the mitigation lands, attorneys' fees if enforcement actions are
14 necessary, personal liability for violations, and mutual consent before obligations under the
15 agreement can be assigned.

16 Because the amendment does not authorize continuing future use of the 3/5 site under the
17 Council's regulation and oversight, the Council did not engage in further analysis of the
18 availability of funding; to do so would have been beyond the scope of its jurisdiction.¹²

19 **F. Conclusion**

20 Although the Council addressed most if not all of the arguments in Wildlife Forever's motion
21 and other supporting comments in Order No. 731, the Council has carefully reconsidered the
22 arguments and reaffirms its decision. The Council declines to enter a stay of the effect of Order
23 No. 731 pending the outcome of Wildlife Forever v. WPPSS in Thurston County Superior Court.

24 Nonetheless, the Council notes that its decision in Order No. 731 was predicated on the transfer
25 of the site pursuant to the terms of February 1999 Transfer Agreement and on the effectiveness
26 of the new Mitigation Agreement upon transfer. If the site is not transferred to the proposed
transferee or to another entity that the Council deems sufficiently responsible to provide
adequate site restoration, the State of Washington retains the jurisdiction to consider and resolve
all issues related to site restoration.

In so far as this reservation may be inconsistent with the terms of Order No. 731, this order
supersedes the Council's earlier order.

DATED and effective at Olympia, Washington, this 11 day of June, 1999.

/s/ Deborah Ross
Deborah Ross, EFSEC Chair

¹² On page three of its motion, citing WAC 463-36-050, Wildlife Forever asserts, "no consideration was given to ... financial resources of the SCA [sic] to implement the proposal." Contrary to this assertion, the Council gave appropriate consideration to this issue.

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