

BEFORE THE STATE OF WASHINGTON  
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of

Application No. 2002-01

BP WEST COAST PRODUCTS, LLC.

BP CHERRY POINT  
COGENERATION PROJECT

COUNCIL ORDER NO. 797

POSTHEARING ORDER NO. 2

ORDER ON AMENDED STIPULATION  
AND SETTLEMENT AGREEMENT  
BETWEEN APPLICANT  
AND WHATCOM COUNTY

**Nature of the Proceeding:** This matter involves an Application by BP West Coast Products, LLC, (“Applicant” or “BP” herein), for certification to construct and operate the BP Cherry Point Cogeneration Project (Project), a 720-megawatt (MW) combined cycle cogeneration natural gas-fired energy production facility, with an associated electric transmission line and a natural gas pipeline, on land adjacent to the BP Cherry Point Refinery, in Whatcom County, Washington.

**Procedural Setting and Participation:** On March 1, 2002, BP requested that EFSEC conduct a Potential Site Study. On June 10, 2002, BP submitted an Application to the Council for certification to construct and operate the BP Cherry Point Cogeneration Project in Whatcom County, Washington. On October 1, 2002, EFSEC issued its Potential Site Study report. On April 22, 2003, the Applicant submitted a revised Application that included, among other things, a change from air to water cooling, and a plan for using recycled industrial water from the Alcoa Intalco Works.

Pursuant to due and proper notice, an Adjudicative Proceeding was held on December 8 through 11, 2003, in Bellingham, Washington, before the Council Chair, Jim Luce, and Council members Richard Fryhling (Department of Community, Trade & Economic Development), Hedia Adelman (Department of Ecology), Tony Ifie (Department of Natural Resources), Tim Sweeney (Utilities and Transportation Commission), Chris Towne (Department of Fish and Wildlife), and Dan McShane (Whatcom County). Julian C. Dewell, Administrative Law Judge, acted as facilitator for the proceeding. On December 9 and 10, concurrent with the Adjudicative Proceeding, a land use hearing was held. Public testimony was taken on the evening of December 9, 2003, in Blaine, Washington.

Participants in the Adjudicative Proceeding were:

**BP West Coast Products, LLC**, by Karen M. McGaffey and Elizabeth McDougall, Attorneys at Law, Seattle.

**Council for the Environment**, by Mary Barrett, Assistant Attorney General, Olympia, Washington.

**Whatcom County**, by David M. Grant, Deputy Prosecuting Attorney, Bellingham, which was granted party status by EFSEC.

At the conclusion of the land use hearing on December 10, 2003, the Council determined that the parties should file briefs on the land use questions and the Adjudicative Proceeding. The briefs of the parties were duly filed by the parties on the land use matters, but prior to EFSEC entering an order on land use consistency and before briefs were due on the Adjudicative Proceeding, the Applicant, BP, and Whatcom County, on January 29, 2004, requested that the Council defer any ruling on the land use consistency question, and, at the Council's February 2, 2004, meeting, through legal counsel, reiterated the request that the Council defer its decision on all matters to allow BP and Whatcom County time to resolve all issues. The Council entered its Posthearing Order No. 1, Council Order No. 788, which granted a delay in the time for making its decision on the land use consistency matter and postponed the post hearing briefing schedule on the Adjudicative Proceedings. Subsequently, EFSEC granted further postponements to the Applicant and Whatcom County.

On June 30, 2004, BP West Coast Products, LLC, the Applicant, provided EFSEC with, and filed, the "BP - Whatcom County Stipulation and Settlement Agreement" (herein the "Stipulation"), which provided, in part, that the BP and Whatcom County had resolved all Whatcom County's concerns regard the issuance of an SCA and related permits for the Project. The County also withdrew portions of its testimony and evidence deemed to be inconsistent with the stipulation.

On July 26, 2004, after due and proper notice, the Adjudicative Proceeding was reconvened in Seattle, Washington, before Council members Richard Fryhling (Department of Community, Trade & Economic Development), Hedia Adelsman (Department of Ecology), Tony Ifie (Department of Natural Resources), Tim Sweeney (Utilities and Transportation Commission), and Chris Towne (Department of Fish and Wildlife). Julian C. Dewell, Administrative Law Judge, acted as facilitator for the proceeding.

Participants in the July 26, 2004, land use hearing were:

**BP West Coast Products, LLC**, by Karen M. McGaffey, Attorney at Law, Seattle.

**Council for the Environment**, by Mary Barrett, Assistant Attorney General, Olympia, participated in the proceedings telephonically.

**Whatcom County**, by David M. Grant, Deputy Prosecuting Attorney, Bellingham.

**Discussion:** In an EFSEC adjudicative proceeding, stipulations of facts and settlement agreement must be stated on the record or submitted in writing and are subject to approval by the Council. WAC 463-30-250. WAC 463-30-250(1) provides that the Council may require proof by evidence of the stipulated facts and that the stipulation, if accepted by the Council, shall be binding upon the parties thereto and may be used by the Council as evidence at the hearing.

The Council's approval of a stipulation of facts or settlement agreement means that the Council accepts the stipulation of facts or settlement agreement as binding between the settling parties. Stipulations and settlement agreements do not bind the Council or parties other than the stipulating or settling parties. Non-stipulating or non-settling parties may present relevant contrary evidence and arguments during the adjudicative proceeding.

To the extent that the Council approves a stipulation of facts or settlement agreement, approval does not cede the Council's jurisdiction and authority to the parties. The Council retains its jurisdiction and authority with respect to the proposed project, the Council's recommendation to the Governor, and the contents and enforcement of any site certification agreement. On July 26, 2004, having considered the proposed BP - Whatcom County Stipulation and Settlement Agreement (the Stipulation), which was admitted as Exhibit 11.0, together with Exhibits 11.2, 11.3 and 12.0 and having heard testimony of witnesses Mike Torpey (BP), Petur Sim (Whatcom County), Hal Hart (Whatcom County) and David Grant (Whatcom County legal counsel), the Council accepted the Stipulation contingent upon: 1) inclusion of changes to the Stipulation proposed by the Council on July 26, 2004, which were agreed to by legal counsel for BP and Whatcom County<sup>1</sup>, and 2) receipt of additional information from the Applicant clarifying questions from the Council. The Council's acceptance of the Stipulation is also made subject to the caveat that its acceptance does not constitute a decision on the terms of a site certification agreement, if one is issued, with respect to matters addressed in the Stipulation.

The Council heard testimony from a member of the public who was present at the hearing, Mr. Bob Wiesen, of Ferndale, Whatcom County, who testified essentially in favor of the application and expressed his concern with delay in approving the BP Application for site certification. The Council heard no testimony in opposition to the Stipulation at the hearing on the settlement agreement.

On July 29, 2004, Karen McGaffey, legal counsel for BP, sent a letter to EFSEC clarifying a question from the Council on Noise Definitions, which has been entered as Exhibit 11.3. On August 13, 2004, the Council received a modified Stipulation and the remainder of submittals requested by the Council, which has been entered as exhibit 11.0A.

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<sup>1</sup> The first sentence of paragraph I C 2 of the Stipulation was amended to read: The County has also concluded that if the Project complies with conditions at least as stringent as those contained in Section II (Resolution of Issues), as conditioned by this Stipulation, it is consistent with all applicable local land use and zoning requirements. [Changes are by strike-through and underline.]

**Decision:** The Council has considered Exhibits 11.0, 11.2, 11.3 and 11.0A, the testimony of witnesses Mike Torpey (BP), Petur Sim (Whatcom County), Hal Hart (Whatcom County) and David Grant (Whatcom County legal counsel) and hereby approves the Stipulation with the caveat that the Council's decision is not a decision on the terms of any site certification agreement, if one occurs, with regard to matters addressed in the Stipulation. Approval of the Stipulation does not bind the Council to incorporate the conditions outlined in the Stipulation as binding conditions of any site certification agreement issued by ESFEC. The Council retains its full jurisdiction and authority with respect to the proposed project, the Council's recommendation to the Governor, and the contents and enforcement of any site certification agreement.

DATED and effective at Olympia, Washington, this \_\_\_\_\_ day of August, 2004.

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Julian C. Dewell  
Administrative Law Judge