

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. 798  
POST-HEARING ORDER NO. 3  
  
ORDER ON DETERMINATION MADE IN  
CONNECTION WITH THE LAND USE  
HEARING UNDER RCW 80.50.090 (2),  
WAC 463-14-030, AND WAC 463-26-110

**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, and an associated electric transmission line and natural gas pipeline, on land adjacent to the BP Cherry Point Refinery.

**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 (Project) in Whatcom County, Washington. On October 1, 2002, EFSEC issued its Potential Site Study report. On June 10, 2002, the Applicant submitted an Application for Site Certification to EFSEC. On April 22, 2003, 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 proper notice, an Adjudicative Proceeding was commenced, in Bellingham, Washington, on the Project on December 8, 2003, during which, on December 9 and 10, 2003, a land-use hearing was held in accordance with RCW 80.50.090 (2) and WAC 463-14-030, to “determine whether or not the proposed use of the site is consistent and in compliance with county or regional land use plans or zoning ordinances at the time of application.” The land-use hearing was held before the Council Chair, Jim Luce, and 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), Chris Towne (Department of Fish and Wildlife), and Dan McShane (Whatcom County). Julian C. Dewell, Administrative Law Judge, acted as facilitator for the proceeding.

Participants in the land use hearing were:

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

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

Council for the Environment, Mary Barrett, Assistant Attorney General, did not participate in the December 9, 10 and 11, 2003, land use proceedings.

At the land-use hearing on December 9, 10 and 11, 2003, Michael D. Torpey, Ann Eissinger, and Paul Wierzba testified on behalf of the Applicant. On December 9 and 10, 2003, Hal Hart, Dr. Kate Stenberg and Roland Middleton testified on behalf of Whatcom County. The following Exhibits were admitted in conjunction with the witnesses' testimony: 42.2; 45.0 through 45.5, 60.1 through 60.4, and 60.6 through 60.11; and 61.1 through 61.7. It was further ordered that any testimony and exhibits admitted during the Adjudicative Proceeding, which were material and relevant to the land use hearing, would be considered in the land use matter. Upon the request of the council, the Whatcom County Comprehensive Plan and the adoption procedures for the Comprehensive Plan were admitted as exhibits 60.10 and 61.6, respectively. No members of the Public testified at the land-use hearings on December 9, 10 or 11, 2003.

At the conclusion of the land use hearing, the Council determined that the parties should file briefs on the issue of the Project's consistency with local land-use plans and zoning ordinances. The parties' briefs were duly filed on the land-use matters: BP's Opening Brief on Land Use Consistency received on January 16, 2004, Whatcom County's Closing Argument Regarding Land Use Consistency received on January 20, 2004 and BP West Coast Products, LLC Land Use Consistency Reply Brief received on January 23, 2004.

Prior to EFSEC entering an order on land use consistency, the Applicant, 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 land use consistency. The Council then entered 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, the Applicant, provided EFSEC with and filed the "BP - Whatcom County Stipulation and Settlement Agreement" (herein the "Stipulation"), which provided, in part, that the County concluded that the Project was consistent with all applicable local land use requirements and that the Stipulation was a certificate from Whatcom County within the meaning of WAC 463-26-090. The County also withdrew testimony, evidence and argument previously submitted to the contrary.

On July 26, 2004, after proper notice, the land use consistency matter was heard in Seattle, Washington, before Councilmembers 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.

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

**Counsel for the Environment**, Mary Barrett, Assistant Attorney General, participated in the land use proceedings telephonically.

At the land-use hearing on July 26, 2004, Michael D. Torpey testified on behalf of the Applicant, and Hal Hart, Petur Sim and David Grant testified on behalf of Whatcom County. Exhibits 11.0, 11.1 and 11.2 were admitted in conjunction with the witnesses' testimony. One member of the public, Mr. Bob Wiesen, of Ferndale, Washington, also testified essentially in favor of the application and expressed his concern with delay in approving the BP Application for site certification.

#### **Review of Applicable Statutes and Rules:**

RCW 80.50.090 provides that the Council shall conduct a public hearing to determine whether or not the proposed site is consistent and in compliance with county or regional land use plans or zoning ordinances.

WAC 463-26-040 and -050 provide, generally, that the land use hearing shall be adversarial in nature and shall be held to determine whether the proposed facility is consistent and in compliance with county or regional land use plans or zoning ordinances.

WAC 463-26-090 provides the procedure where certificates affirming compliance with zoning ordinances or land use plans are presented, and further provides that such certificates are regarded as *prima facie* proof of consistency and compliance with zoning ordinances or land use plans, absent contrary demonstration by anyone present at the hearing.

WAC 463-26-110 requires the Council to determine whether the proposed site is consistent and in compliance with land use plans or zoning ordinances.

WAC 463-28-010, et seq., provides for determination by the council about whether the state should preempt local land use plans or zoning ordinances if the application is not consistent and in compliance with existing land use plans or zoning ordinances in effect at the date of the application, and for hearing procedures and other matters in connection with the land use proceedings.

WAC 463-30-250 provides for stipulations and settlements. Subsection (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, and subsection (2) provides that any settlement shall be stated on the record or submitted in writing and is subject to approval by the council.

## MEMORANDUM OF EVIDENCE

1. At the hearing on December 9 and 10, 2003, Whatcom County raised issues and presented testimony, exhibits and arguments in connection with the BP project's consistency with the county land use and zoning ordinances, including its Critical Areas Ordinance (CAO) including the effect of the project upon wildlife habitat (primarily the Great Blue Heron), noise (as to neighbors and the Great Blue Heron), wetlands, seismicity (including whether a "Probabilistic Seismic Hazard Assessment" was necessary) and site restoration. The county's testimony, exhibits and arguments were countered by the Applicant's testimony, exhibits and arguments.

2. Prior to EFSEC entering an order on land use consistency, 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 land use consistency; whereupon the Council, after due deliberation and in order to encourage settlement between the parties, entered its Posthearing Order No. 1, Council Order No. 788, granting a delay in the time for making its decision on the land use consistency matter and postponing the post hearing briefing schedule on the Adjudicative Proceedings. Thereafter, EFSEC granted further postponements to the Applicant and Whatcom County.

3. On June 30, 2004, the Applicant and Whatcom County entered into a settlement and stipulation entitled "BP - Whatcom County Stipulation and Settlement Agreement" (herein the "Stipulation", admitted as Exhibit 11.0), which provided, in part, that the "County has also concluded that the Project, as conditioned by this Stipulation, is consistent with all applicable local land use requirements" and that the "Stipulation constitutes a 'certificate[] from local authorities attesting to the fact that the proposal is consistent and in compliance with county or regional land use plans or zoning ordinances,' within the meaning of WAC 463-26-090" and under which the County withdrew "any testimony, evidence or argument previously submitted to the contrary." (Stipulation, paragraph I C 2). The County asserted certain conditions under the Stipulation in paragraph I C 3, but they do not relate to the land use questions.

4. On July 26, 2004, pursuant to proper notice, EFSEC reconvened the land use consistency hearing in Seattle, Washington, at which time legal counsel for BP and Whatcom County agreed to make changes in the Stipulation (Exhibit 11.0) answered questions from EFSEC members and agreed to furnish further information and clarify certain matters to the council. On August 2 and 13, 2004, these matters were furnished to EFSEC. The revised Stipulation is marked as Exhibit 11.0A and is admitted in this proceeding.

5. At the July 26, 2004 hearing Applicant and Whatcom County presented testimony and exhibits as follows:

- a. Exhibits 11.0 (BP - Whatcom County Stipulation and Settlement Agreement"),

11.1 (Figure 1 Aerial Photograph of Immediate Site Vicinity Showing Noise Measurement Locations), 11.2 (Figure 2 Wide View of Site Areas Showing Cottonwood Beach Noise Measurement Location) and 12.0 (Compensatory Mitigation Plan dated June 2, 2004).

b. The testimony of Mike Torpey (BP), who testified: (1) about changes made by BP in noise assessment and abatement and identified exhibits 11.0, 11.1 and 11.2 (which were admitted in evidence); (2) about heron habitat and wetlands assessment and changes made by BP with regard to impact and mitigation and identified exhibit 12.0 (which was admitted in evidence); (3) about project restoration and Exhibit 11.0's recitals on restoration; and (4) concluded that the BP changes set forth in Exhibit 11.0 cause the project to comply with Whatcom County's land use plans, zoning ordinances and its CAO.

c. Petur Sim (Whatcom County), who testified that the county and the county's prior witness, Dr. Kate Stenberg, were satisfied with the settlement (Exhibit 11.0) and Appendix F to Exhibit 11.0, stating that these changes satisfied county concerns over wetlands and the Great Blue Heron and satisfied the requirements of the CAO.

d. Hal Hart (Whatcom County), who testified the county is satisfied with the agreement on restoration set out in Exhibit 11.0.

e. David Grant (Whatcom County legal counsel), who testified that the settlement and stipulation (Exhibit 11.0) satisfied his and the county's concerns over noise, potential enforcement, wetlands, heron habitat and site restoration

6. At the July 26, 2004 hearing one member of the Public, Mr. Bob Wiesen of Ferndale Washington, testified essentially in favor of the application and expressed his concern with delay in approving the BP Application for site certification.

## **FINDINGS OF FACT**

1. No evidence of regional land use plans was presented and none are applicable, other than land use plans for Whatcom County.

2. EFSEC is required by RCW 80.50.090 (2), WAC 463-14-030, and WAC 463-26-110 to consider whether the project complies with local land use plans and zoning ordinances, but EFSEC has preemptive authority to determine those matters. See WAC 463-28-020.

3. The Applicant and Whatcom County stipulated that the project was consistent with Whatcom County land use plans, zoning ordinances and the CAO. (Exhibit 11.0A). Based upon the Stipulation, the testimony and the exhibits at the July 26, 2004, hearing, Whatcom County concluded that the Project, as conditioned by the Stipulation, is consistent with all applicable local land use requirements and that the Stipulation constitutes a Certificate under WAC 463-26-090 that the project is consistent and in compliance with county land use plans or zoning ordinances.

4. Based on the Stipulation and the testimony and exhibits submitted on July 26, 2004, the BP Cherry Point cogeneration project complies with Whatcom County zoning ordinances. (Exhibits 21.3 and 61.1).

5. Based on the Stipulation and the testimony and exhibits submitted on July 26, 2004, the BP Cherry Point project complies with the Whatcom County Comprehensive Plan, which was the only land use plan submitted in evidence, as well as the CAO.

From the foregoing Findings of Fact, the Council makes the following:

### CONCLUSIONS OF LAW

1. WAC 463-14-030 and WAC 463-26-110 obligates EFSEC to “determine whether or not the proposed use of the site is consistent and in compliance with county or regional land use plans or zoning ordinances at the time of application.” This regulation refers to the enabling statute, RCW 80.50.090 (2), which requires EFSEC to conduct a public hearing “to determine whether or not the proposed site is consistent and in compliance with county or regional land use plans or zoning ordinances.” Both the statute (RCW 80.50.020 (15) and (16)) and the regulations (WAC 463-26-050) define the applicable terms as follows:

(15) “Land use plan” means a comprehensive plan or land use element thereof adopted by a unit of local government pursuant to Chapters 35.63, 35A.63, or 36.70 RCW.

(16) “Zoning ordinance” means an ordinance of a unit of local government regulating the use of land and adopted pursuant to chapters 35.63, 35A.63, or 36.70 RCW or Article XI of the state Constitution.

2. WAC 463-26-050 provides for a public adversary hearing to determine “whether the proposed facility is consistent and in compliance with county or regional land use plans or zoning ordinances”. The regulation defines the use of the words “land use plan” and “zoning ordinance” in accordance with RCW 80.50.020 (15) and (16), as recited in paragraph 1 above.

3. WAC 463-28-030, under preemption, deals with any inconsistency and noncompliance by the site with county or regional land use plans or zoning ordinances and states what the applicant must do under such circumstances. WAC 463-28-040, 060 and 070 provide for what action is to be taken upon the inability of the applicant to show consistency and compliance with county or regional land use plans or zoning ordinances.

4. WAC 463-42-362 requires the applicant to provide information on “county or regional land use plans and zoning ordinances”.

5. The Whatcom County Comprehensive Plan falls within the definition of “land use plans” under both WAC 463-26-050 and RCW 80.50.020 (15).

6. If the Critical Areas ordinance is applicable to the land use consistency questions, based on the Stipulation, the BP Cherry Point cogeneration project complies with such ordinance.

7. In light of the County’s approval of the Stipulation, under WAC 463-26-090, paragraph I C 2 of the Stipulation shall be regarded as *prima facie* proof of consistency and

compliance with Whatcom County zoning ordinances or land use plans. Any evidence contrary to this *prima facie* conclusion has been withdrawn by Whatcom County under the Stipulation.

8. In accordance with WAC 463-30-250 the Stipulation, if approved by EFSEC, is binding on BP and Whatcom County and may be used by EFSEC as evidence in this proceeding.

9. Despite the Stipulation, EFSEC has ultimate authority to determine questions as to noise, wetlands mitigation, wildlife, seismicity, and site restoration and to determine mitigation, as necessary, for any problems in connection with these matters.

From the foregoing MEMORANDUM OF EVIDENCE, FINDINGS OF FACT and CONCLUSIONS OF LAW, the Council renders the following Decision on the Land Use Hearing regarding whether or not the Applicant's proposed use of the site is consistent and in compliance with county land use plans or zoning ordinances in effect at the time the application was filed:

### DECISION

The statute, RCW 80.50.090 (2), requires EFSEC to hold a land use hearing and provides that the Council shall "determine whether or not the proposed use of the site is consistent and in compliance with county or regional land use plans or zoning ordinances at the time of application." In light of the Stipulation, the county's withdrawal of testimony, exhibits and argument, the testimony, exhibits and comments of legal counsel submitted on July 26, 2004, and under WAC 463-26-090 and WAC 463-26-110, the Council approves the Stipulation, as it relates to land use determination questions, and determines that the proposed use of the Project Site is consistent and in compliance with Whatcom County land use plans and zoning ordinances and the Whatcom County CAO.

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

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Julian C. Dewell  
Administrative Law Judge