

**BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL**

SERVICE DATE

DEC 20 1996

In re Application No. 94-2

Chehalis Power Generating,
Limited Partnership

Chehalis Generation Facility

COUNCIL ORDER NO. 705

COUNCIL ORDER ON REMAND,
AMENDING ORDER NO. 698

Procedural Setting: In September 1994, Chehalis Power Generating, L.P. submitted an application to the Energy Facility Site Evaluation Council (Council) to site a 458 megawatt combined-cycle combustion turbine plant near Chehalis, Washington. The Council reviewed the application and held adjudicative hearings on the proposal in the fall of 1995. On June 10, 1996, the Council voted to approve the proposal, on condition, in Council Order No. 698 and an accompanying draft Site Certification Agreement. Order No. 698 recommended that the Governor approve the project and sign the proposed Site Certification Agreement (SCA). A minority opinion was filed as part of Order No. 698; it recommended that the Applicant be required either to rely exclusively on reclaimed water for the project's water needs or to reconfigure the plant to use air cooling.

The Council received Petitions for Reconsideration from Counsel for the Environment (CFE) and intervenor Critical Issues Council (CIC) and a letter from the Applicant requesting certain "technical amendments" to the SCA. On August 19, 1996, the Council entered Order No. 702, denying the Petitions for Reconsideration and the Applicant's requested technical amendments.

The Council's Orders and the SCA were forwarded to Governor Mike Lowry on August 20, 1996. On November 6, 1996, Governor Lowry remanded the Order and SCA to the Council for additional deliberations on the issues of the potential effects of the project on water quality and quantity, including additional consideration of the approaches favored in the minority report.

On November 13, 1996, the Applicant filed a motion to modify both Council Order No. 698 and the SCA to address the concerns expressed in Governor Lowry's remand letter. On November 15, CFE filed a motion and supporting affidavit requesting an extension of time to respond to Chehalis Power's motion, and on November 19, the Department of Ecology filed a letter supporting CFE's request. The Council granted all parties a two day extension until November 27, 1996, to file response briefs and notified the parties of the extension.

On November 20, Council staff issued a notice to interested persons, advising them of the substance of the proposed changes. The notice invited public comment through December 3, 1996. Ten members of the public provided comment.

The CIC filed a document entitled "Notice of Procedural Error" on November 25, 1996. This Notice asserted that the Council had failed to give parties an adequate opportunity to respond to the Applicant's motion and that additional time to file response briefs should be granted.

Three parties filed response briefs with the Council on November 27, 1996: CFE, the Department of Ecology, and the CIC. All three requested that additional hearings be held. The Department of Ecology also requested an opportunity to present oral argument and to submit a surrebuttal brief. The Council, by letter of the Council Manager, denied the requests but granted leave to petition the Council further in the event that the Applicant's reply brief raised new issues.

The Applicant filed its reply brief on December 3, together with a modified proposal. On December 6, 1996, the Council received a stipulation between the Applicant and the Department of Ecology. The stipulation contained minor revisions to the Applicant's December 3 proposal. In the stipulation, the Department of Ecology withdrew its opposition to the Applicant's proposed modification of the SCA and Order No. 698.

On December 9, 1996, the Council¹ deliberated and, at its regularly scheduled Council meeting, voted to approve the modified proposal and recommend it to the Governor under RCW 80.50.100.

DISCUSSION

A. Nature of Governor's Concerns

In his remand letter, Governor Lowry expressed his belief that the Centralia Reach of the Chehalis River suffers from "acute problems of water quality and inadequate water supply." In light of these problems, the Governor concluded that the Council had not fulfilled its statutory mandate to balance the need for new energy facilities against the adverse environmental impacts of the facility. Specifically, he decided that the SCA's provision allowing the potential use of a limited quantity of raw water and its provision allowing the potential discharge of biological oxygen demanding material (BOD) and ammonia between May and October ran counter to the Council's charge to pursue "beneficial changes to the environment."

Governor Lowry remanded Order No. 698 and the SCA to the Council to reconsider the project's effect on water quality and water quantity, with instructions to give "adequate reconsideration" to alternatives suggested in the minority opinion or to other approaches that would benefit the river. The Council was charged to produce an amended Order and SCA that would meet the needs of the Applicant and of the environment.

¹ Mr. Ron Skinnarland represented the Department of Ecology on the Council during the period the Chehalis Generation Facility was under review and was reappointed for the remand deliberations.

B. Council's Reconsideration

On remand, the Council has carefully reconsidered the proposed project. In the course of its reconsideration, the Council reviewed the relevant portions of the record, Order No. 698, and the draft SCA transmitted to the Governor on August 20, 1996. The Council examined the Applicant's proposed approach², engaged in thorough discussion regarding the minority opinion and suggested alternatives, and examined the arguments advanced by the parties and the public against acceptance of the Applicant's proposal.

1. Council's reconsideration of its earlier work.

The Council regards its statutory charge³ very seriously. During its twenty months of considered work on this application, the Council was continually aware of its duty to balance the need for new energy facilities and the need to protect the state's environment, particularly the sensitive Centralia Reach of the Chehalis River.

Water Quality. Consistent with the intent of the TMDL to allow *no new BOD/ammonia load* in the Chehalis River (while ultimately working to achieve reductions in that load), Order No. 698 not only allowed *no new load*, but provided for *reductions* in the levels of BOD and ammonia otherwise dischargeable by the Waste Water Treatment Plant (WWTP) under the City's NPDES Permit. Indeed, the Order set interim benchmarks with a final requirement that by July 1, 2003, CGF would treat all City effluent it used for cooling to achieve a "zero discharge" level for BOD and ammonia.⁴ As further mitigation for any possible effects of the project on water quality, the Order required the Applicant to commit \$170,000 (1995 dollars) for the support of local fish and wildlife habitat restoration, local water resources improvement, and other local environmental projects.

² On November 13, 1996, the Applicant filed Applicant's Motion to Modify Portions of Council Order No. 698 and Draft Site Certification Agreement. On December 3, 1996, the Applicant's reply amended its November 13 motion. See Applicant's Reply to Responses on Motion to Modify Portions of Order No. 698 and Draft Site Certification Agreement, including Appendix A: Chehalis Power's Proposed Modifications of Order and SCA.

³ RCW 80.50.010. "It is the policy of the state of Washington to recognize the pressing need for increased energy facilities, and to ensure through available and reasonable methods, that the location and operation of such facilities will produce minimal adverse effects on the environment... It is the intent to seek courses of action that will balance the increasing demands for energy facility location and operation in conjunction with the broad [environmental] interests of the public."

⁴ The Draft SCA (Attachment 9) allows an Interim Limitation for BOD and ammonia to be 10% by weight, of the permitted allowance specified in the City's NPDES Permit, with a requirement to reduce BOD and ammonia received from the city by 95% by January 1, 1998, and to achieve "0" discharge by July 1, 2003.

These provisions *benefit* the Chehalis River. Indeed, Chehalis Power's treatment of the reclaimed water would reduce the City's discharge of BOD and ammonia by 75%, in addition to providing an infrastructure for other local water users to utilize reclaimed water. Further, the benchmarks in the City's NPDES permit for reductions in the discharge of BOD and ammonia will be met at an *earlier* date with the CGF in operation, providing supplemental treatment of the City's effluent.

Water Quantity. Protection of critical water levels in the Chehalis River was also important in the Council's evaluation of the project. Order No. 698 required the Applicant to use reclaimed water for cooling purposes. Only under exceptional circumstances, when reclaimed water was not available,⁵ would the Applicant be allowed to request to use raw municipal water.⁶ Even under such circumstances, the Applicant's request would be limited by the availability of raw water under the City's existing water permit, which contains minimum instream flow requirements for the Centralia Reach set by the Department of Ecology.

As mitigation for any effects on water quantity, the Order required the Applicant to acquire and dedicate a minimum of fifty (50) acre feet of surface water rights regardless of whether any raw water was ever used, and to acquire and dedicate additional water rights before the CGF could use raw water during any low flow period.

Given that the implementation of state and federal regulation of various regional users of water from the Chehalis River is presently in flux (with new permit conditions to take effect in 2003), the Council believed it could *best* protect and enhance the river by reconsidering its provisions for the protection of water levels after further studies provided additional information. Accordingly, the Council incorporated a *key checkpoint* into Order No. 698 and the draft SCA: "[t]he Council will revisit the water supply situation three years from the date of approval of the Site Certification Agreement, or nine months prior to commencement of plant construction whichever comes first. ... Chehalis Power shall explore mitigation measures including the use of additional sources of reclaimed water and water use minimization technologies."⁷

⁵ "Chehalis Power may ... purchase untreated municipal water from the City of Chehalis to meet its needs for process and cooling water, but will do so only when reclaimed water from the City of Chehalis is insufficient to meet such needs or when operational conditions at the CGF temporarily preclude the use of reclaimed water." Draft Site Certification Agreement, Article VI, Section A.2., p. 12.

⁶ Such a "fall-back" provision would be necessary to allow CGF to meet its contractual commitments to provide power at times that the WWTP was off-line due to factors beyond the City's and Applicant's control (e.g. floods, emergency outages, mechanical failures, etc.)

⁷ Draft Site Certification Agreement Between the State of Washington and Chehalis Power Generating, L.P. for the Chehalis Generation Facility, Article VI, Section A.6., p. 13.

The Council believed and continues to believe that this checkpoint will allow it to benefit from future knowledge and set timely requirements for the CGF's use of water, in the context of regional developments and developing technology. The feasibility and environmental effect of using alternate sources of reclaimed water and the efficacy of various forms of mitigation will have been studied in considerably more depth by the time of the checkpoint, and these studies will inform the Council's decision at that time.⁸

Requirements for mitigation and the use of reclaimed water based on additional study will further minimize potential adverse effects and further benefit the Chehalis River.

2. Council's consideration of Applicant's proposal.⁹

On November 13, 1996, the Applicant requested that the Council modify Order No. 698 to provide even stronger environmental protection. Specifically, the Applicant proposed (1) that the CGF be required to treat *all* effluent it received from the City during the "summer months" (May through October), including any excess which the facility did not need or use for cooling purposes,¹⁰ and (2) that the CGF not be allowed to use raw municipal water during the summer months (when instream flow tends to be lower) even under exceptional circumstances.

The Council believes that the Applicant's proposal does strengthen the protection of the state's environment and resources.

Water Quality. The Applicant's proposal exceeds the requirements of Order No. 698 by requiring the CGF (during the summer months) to treat not only the effluent it uses, but the effluent also it does not use. By requiring the CGF to treat

⁸ The Council considers seriously its obligations under law. We presume that any future proposals involving modifications in plant design, source and use of resources, etc. will be dealt with properly and lawfully. The Council is required by law to determine whether a proposal involves a significant action affecting the environment and to conduct a full environmental review when the proposal is so defined under law. Further, the Council's procedure for amending an SCA (chapter 463-36 WAC) requires that any proposed amendment that substantially alters the substance of the SCA or that is determined to have a significant detrimental effect upon the environment is subject to gubernatorial approval.

Sensitive to the procedural history of this application, the Council anticipates that a future request to return to a proposal previously questioned by the Governor would be considered by the Council to be a "substantial alteration" of the SCA. As such, the Governor's approval would be required.

⁹ The Governor's letter reads, "I am returning this proposal so the Council can give adequate reconsideration to ... alternatives [suggested in the minority opinion] OR to other approaches that would benefit the ... Chehalis River." The Applicant's proposal falls into the latter category, and the Council has carefully considered both.

¹⁰ The plant is expected to operate at a lower output during the summer months than during the winter months. As a result, during the summer it may not need to use all the effluent it receives.

water that it was not required to treat in the original order, the proposed modification provides additional benefit to the Chehalis River.

Water Quantity. The Applicant's proposal again goes an additional step by removing the option to request the use of raw municipal water from May through October. Under the proposal, the Applicant may not use raw municipal water during this period, even temporarily. Nonetheless, the Applicant has voluntarily accepted this risk in order to strengthen environmental protection.¹¹

The Council believes that the proposed modification will produce a minimal adverse effect on the environment and that it will produce beneficial changes in the river. Under no circumstances may raw municipal be withdrawn during the summer months when instream flows are lowest, and the river is amply protected during the winter months (when instream flows are higher) by the minimum instream flows established in the City's NPDES permit.¹²

3. Council's consideration of the Minority Opinion.

Reopening the adjudicative hearing to consider alternate sources of reclaimed water. The Minority Opinion advocates the purchase of reclaimed water from additional sources. Counsel for the Environment argues that, consonant with the governor's directive to the Council,¹³ "EFSEC should reopen the adjudicative

¹¹ "...the risk of occasional curtailment [of operations] is a business risk that Chehalis Power is willing to bear until it has an opportunity to explore the availability and environmental effects of additional sources of reclaimed water, and to seek permission from EFSEC to incorporate the specifics of use of any such sources into the SCA: Applicant's Reply to Responses on Motion to Modify, p. 6..

¹² One Council member remains concerned that, although the river is high during the "winter months," there may be occasions during the winter when the river is at a critical level, such that the withdrawal of raw municipal may be detrimental. This member would prefer that the withdrawal be conditioned on instream flow, rather than on season variations.

The Council has acknowledged that there may be advantages in conditioning the withdrawal of raw municipal water on instream flows at the point of withdrawal. The draft SCA, Article VI, Section A.5. sets the groundwork for the possibility of a flow gauge at the point of withdrawal. It states, "Chehalis Power shall consult with the City of Chehalis, Ecology, U.S. Geological Survey, and Council staff in order to determine the means by which the portion of the Chehalis River known as the Chehalis Reach can best be gauged to measure and record flow rates. The Applicant shall report to the Council the result of the consultation within six months after the execution of the Site Certification Agreement. The Council may then take whatever action it deems appropriate to require Chehalis Power to provide funds for the construction and operation of a flow gauge." Draft SCA, p. 13.

If a flow gauge were ultimately installed, baseline data would be required before the Council could set appropriate standards for withdrawal. Until such time, the Council is comfortable in basing its requirements on the provisions of the Department of Ecology's TMDL, which differentiates based on the seasons.

¹³ The Governor's letter directed the Council to consider alternatives in the minority's opinion.

hearing in order to explore the minority's preferred alternative."¹⁴ The Application does state that Darigold, National Frozen Foods, and the City of Centralia "currently generate sufficient wastewater to meet the needs of the CGF when added to the City of Chehalis reclaimed water."¹⁵ However, the use of this water was never formally proposed by the Applicant, and the environmental effects of delivering and using these additional sources of effluent were not explored in the adjudication. Additional hearings would be necessary to address these issues.¹⁶

The Council finds that reconsideration of the use of reclaimed water from additional sources has already been directed in Order No. 698.¹⁷ "[t]he Council will revisit the water situation ... [Before this reconsideration occurs] the Applicant *shall* explore mitigation measures including possible additional sources of reclaimed water..."¹⁸ Indeed, the Council's evaluation of the use of additional sources of reclaimed water for cooling will be more constructive three years from now. Presently, local dischargers are negotiating how to implement their own NPDES requirements, effective in 2003. Certainly the Applicant has significant economic incentive to be closely involved in this process, as local dischargers search for regional solutions to the problems of the Chehalis River.¹⁹ It is premature to reopen the hearings before those involved have had the opportunity to explore alternatives and conduct needed environmental reviews.

The fact that some additional benefit to the Chehalis River may be possible through the use of reclaimed water from other sources should not delay the Council's approval of the project until that time. Certification now will allow Chehalis Power to make plans to meet the region's future needs for power. Before EFSEC grants final approval for construction and operation, the Applicant must satisfy the Council that it has fully explored the use of reclaimed water and that its chosen cooling technique will promote beneficial changes in the environment.

¹⁴ Counsel for the Environment's Response to Chehalis Power's Motion, p. 2.

¹⁵ Application No. 94-2, pp. 3.3-22.

¹⁶ Counsel for the Environment's Response to Chehalis Power's Motion, p. 5.

¹⁷ See *supra* note 8.

¹⁸ Draft Site Certification Agreement Between the State of Washington and Chehalis Power Generating, L.P. for the Chehalis Generation Facility, Article VI, Section A.6, p. 13, (emphasis added).

¹⁹ "...the surface water rights acquisition and dedication requirements ... provide significant economic incentive for Chehalis Power to actively pursue other potential sources of reclaimed water." Applicant's Reply to Responses on Motion to Modify, p. 3.

Air cooling. Consistent with the Governor's directive to the Council to consider alternatives proposed in the minority's opinion, Counsel for the Environment asserts (in a footnote without further argument) that the Council should adopt an air cooled alternative. Having reconsidered its decision in Order No. 698, based on the considerable evidence in the record, the Council continues to believe that water cooling is preferable to air cooling. Air cooling will cause increased air emissions and visual/auditory impacts.²⁰ The proposed modifications to Order No. 698 reinforce the Council's decision that water-cooling is the preferred alternative.

4. Council's consideration of other arguments advanced by the parties.

CIC's Notice of Procedural Error. On November 21, 1996, the CIC filed a "Notice of Procedural Error" with the Council. The CIC asserts (1) that the Administrative Procedure Act requires the briefing schedule to be set by the full Council, rather than by the Vice Chairman of the Council, and (2) that the briefing schedule sent to parties on November 19, 1996, did not provide the parties with adequate time to respond. Although the CIC did not request relief from the alleged procedural error and a Council response is therefore not required, the Council herein formally rejects the assertion of procedural error.

Pursuant to WAC 463-30-020,²¹ the Council appointed its Vice Chairman to be the facilitator or presiding officer in the adjudicative proceeding. Under his authority to regulate the course of the proceeding,²² the presiding officer, in consultation with the Council's Executive Committee, set a schedule to allow the parties to respond fully to the Applicant's motion to modify Order No. 698. The schedule was set to allow ample time for direct and specific response to the Applicant's motion rather than time for parties to reopen and research issues previously decided in Order 698. The Council believes that the established schedule was fair and adequate.

Deferral of decision on CGF to allow time for regional study. Governor Lowry writes, "[o]n this record there may not be a present and immediate need for the power to be produced by the CGF." [Council Order No. 698, p. 21.] Thus, there is

²⁰ Council Order No. 698, p. 23.

²¹ WAC 463-30-020. "The council may conduct adjudicative proceedings pursuant to chapters 34.05 and 80.50 RCW or it may utilize an administrative law judge provided by the office of administrative hearings pursuant to chapter 34.12 RCW. In the event the council elects to conduct the hearing, a presiding officer shall be appointed and the hearing shall be governed by the regulations and procedures contained in this chapter and chapter 34.05 RCW, as applicable."

²² RCW 34.05.449 (1). "The presiding officer shall regulate the course of the proceedings, in conformity with applicable rules..." RCW 34.05.437. The presiding officer, at appropriate stages of the proceedings, shall give all parties full opportunity to submit and respond to ... motions ...

time available to carefully scrutinize various alternatives for reducing or avoiding impacts on our ... water resources.” In the same vein, CIC argues, “EFSEC should defer action on this project until DOE, in conjunction with local governments, has agreed upon a broad, area-wide solution.”²³

It is not appropriate to make siting of the CGF contingent on a regional solution to the water problems in the entire Centralia/Chehalis area. The Council has no jurisdiction to require such a solution. Regardless of whether consensus is ultimately achieved on a regional solution, the operation of the CGF will improve water quality in the Centralia Reach.

Even though the need is not “present and immediate,” the Council’s statute posits a “pressing need for energy.”²⁴ The Council continues to believe that it is advantageous to permit facilities in advance of “immediate need” for power in order to promote planning and negotiation about the state’s needs. In a market environment, facilities will not proceed to construction until there is a confirmed need for their power.²⁵

Thus, the Site Certification Agreement allows the Applicant to proceed with negotiations for the sale of power now, even while the final details of construction remain to be researched and negotiated. The basis for the Council’s decision is the specific environmental effects of the CGF.

5. Council’s consideration of other arguments.

Arguments advanced through public comment. The Council received ten public comments from organizations and individuals and a petition signed by 180 persons, regarding the Governor’s remand.²⁶ The comments ranged from being openly supportive of the Applicant’s proposed modifications and the project in general to strongly critical. In addition, several persons raised issues that were not germane to the subject of the Governor’s letter upon remand. Because most of the

²³ Critical Issues Council Reply to Applicant’s Motion to Modify, p. 3.

²⁴ RCW 80.50.010. See note 3.

²⁵ The Council has balanced the level of existing need with potential harm from operations in setting environmental criteria and it has required a review of the most sensitive areas prior to construction so that it may conclude the balancing in light of the latest available information about need, technology, and potential harm.

²⁶ In response to staff’s invitation for public comments, the Council received comments from the following individuals and organizations: State Representative Bill Brumsickle, Rose Spogen, Warren Smith, Steve Pedersen, Brady Engvall, Don Schluter (on behalf of Trout Unlimited), William and Barbara Bishop, Mack and Merrily Knutsen, Nina Bell (on behalf of Northwest Environmental Advocates), Dave Palmer (on behalf of the Chehalis River Council), and a petition signed by 180 citizens asking that the Council give additional consideration to the views expressed in the minority opinion.

issues raised by the public were also raised by one or more of the active parties, the Council believes these concerns have been adequately addressed in this order. The Council did not consider public comments that were not germane to the narrow issues raised in the Governor's remand letter.

FINDINGS AND CONCLUSIONS

A. Findings of Fact

Having heretofore stated its findings and conclusions, the Council enters the following ultimate findings of fact and conclusions of law. To the extent necessary and appropriate, the Council incorporates the foregoing findings, conclusions, and reasons in the following statement of findings and conclusions.

1. The Applicant's proposal to treat all effluent received from the City of Chehalis from May through October, whether used for cooling or not, will reduce the discharge of BOD and ammonia from the levels which would otherwise be discharged by the City or by the CGF under unamended Council Order 698.
2. The Applicant's proposal to eliminate the use of raw municipal water for cooling from May through October will contribute to the overall protection of minimum instream flows in the Chehalis River.
3. The Council will revisit the issue of water quality and water quantity three years from the date of approval of the Site Certification Agreement or nine months prior to the commencement of plant construction. If executed, the SCA requires Chehalis Power to explore mitigation measures and the use of additional sources of reclaimed water before the Council's checkpoint review.
4. The use of an air cooling system at this site would decrease the plant's efficiency, increase noise levels and visual impact, and create unnecessary adverse environmental effects, including the additional air emissions resulting from the decreased efficiency of the plant.

B. Conclusions of Law

1. Order No. 698, as here amended, and the revised SCA will serve the public interest, protect the environment, and promote the public interest in ensuring the availability of power at a reasonable cost.
2. The Council concludes that EFSEC should amend Council Order No. 698 and revise the draft SCA dated August 20, 1996, according to the modified text in Appendices A and B.

ORDER

Based on the foregoing findings of fact and conclusions of law, the parties' briefs, and the record in this matter, the Council enters the following Order:

1. With minor revisions, the Council adopts the Applicant's proposed modifications and hereby amends Order No. 698, as shown in Appendix A.
2. With minor revisions, the Council adopts the Applicant's proposed modifications and hereby revises the draft SCA, as shown in Appendix B.. The draft Site Certification Agreement shall be redated December 20, 1996.
3. The unmodified portions of Order No. 698 remain in full force and effect.
4. The Council directs that this Order, together with the Concurring and Dissenting Opinions, shall be attached to Council Order No. 698 and the revised Site Certification Agreement and shall be forwarded forthwith to the Governor of the State of Washington for his consideration and action.

DATED and effective at Olympia, Washington, this 20th day of December 1996.



Fred Adair, EFSEC Chair

NOTICE TO PARTIES: This is a final order of the Council. Administrative relief may be available through a petition for reconsideration, filed within ten days of the service of this order, pursuant to RCW 34.05.470 and filed with the Council Manager pursuant to WAC 463-30-335.