

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of
Application No. 2006-01

ENERGY NORTHWEST

PACIFIC MOUNTAIN ENERGY CENTER
POWER PROJECT

**ADJUDICATIVE ORDER NO. 2
COUNCIL ORDER NO. 833**

**ORDER: STAYING ADJUDICATIVE
PROCEEDING**

Nature of the Proceeding

This matter involves Application No. 2006-1 submitted by Energy Northwest (“ENW”) for certification of a site at Kalama, Washington in Cowlitz County under RCW 80.50. ENW proposes to construct the Pacific Mountain Energy Center (“PMEC”) a combined cycle gasification facility for the production of electrical energy. Chapter 80.50 RCW gives the Energy Facility Site Evaluation Council (“EFSEC” or “the Council”) the authority to make a recommendation to the governor as to whether the State, by action of the Governor, should enter into a site certification agreement with the applicant that would authorize the construction and operation of PMEC subject to the terms of the agreement.

At this moment,¹ ENW proposes to construct PMEC as a 793 megawatt electrical generating facility. PMEC is proposed to operate on synthetic gas produced from petroleum coke, a byproduct of refining, or coal. ENW filed this application initially on September 12, 2006, before the enactment of Engrossed Substitute Senate Bill 6001 (ESSB 6001), codified as RCW 80.80. ENW was the first in Washington State to propose an Integrated Gasification Combined Cycle (IGCC) project with carbon sequestration. The project involves environmental technology that seeks to minimize carbon emissions, to recapture byproducts such as sulfur, and to utilize as its fuel, products such as petroleum coke, a refinery waste product that might otherwise not be recycled, and coal.

ESSB 6001, RCW 80.80

Approximately seven months after ENW filed its application, the legislature enacted and the Governor signed ESSB 6001 of the 2007 legislative session. The bill is codified as chapter 80.80 of the Revised Code of Washington.

¹ Its present proposal differs somewhat from the proposal in its original filing; the applicant intends to file an update soon that will set out in accurate detail its current proposal. An application may evolve during review (*see*, WAC 463-60-116).

The new law imposes conditions on pending applications. RCW 80.80.040(11) requires new facilities generating more than 1100 pounds of greenhouse gases per megawatt hour of electricity to sequester greenhouse gases to this level or below. The project must satisfy the criteria of RCW 80.80(11)(a)-(f) although it is not required to comply with rules being separately promulgated by the Department of Ecology and the Council.²

The statute, RCW 80.80.040(13), requires that an application pending on the date the law became effective³ must include a carbon sequestration plan, referred to herein as a greenhouse gas reduction plan (GGRP), that demonstrates how the project will meet all of the requirements of RCW 80.80(11). RCW 80.80(13) also requires the applicant to make a good faith effort to implement the plan. Only after preparing a detailed sequestration plan, receiving a site certification agreement, and making a good faith effort to implement the plan, may an applicant who finds implementation “not feasible” be excused from its terms and allowed to purchase greenhouse gas offsets.⁴

Energy Northwest’s Greenhouse Gas Reduction Plan

ENW filed the GGRP on July 30, 2007. The GGRP explained ENW’s view that a plan such as contemplated by the statute is impossible to prepare at present based on the technological and economical infeasibility of geological sequestration. Instead, ENW presented a proposal to

² (11) In adopting the rules for implementing this section, the energy facility site evaluation council and the department shall include criteria to be applied in evaluating the carbon sequestration plan, for base load electric generation that will rely on subsection (7) of this section to demonstrate compliance, but that will commence sequestration after the date that electricity is first produced. The rules shall include but not be limited to:

- (a) Provisions for financial assurances, as a condition of plant operation, sufficient to ensure successful implementation of the carbon sequestration plan, including construction and operation of necessary equipment, and any other significant costs;
- (b) Provisions for geological or other approved sequestration commencing within five years of plant operation, including full and sufficient technical documentation to support the planned sequestration;
- (c) Provisions for monitoring the effectiveness of the implementation of the sequestration plan;
- (d) Penalties for failure to achieve implementation of the plan on schedule;
- (e) Provisions for an owner to purchase emissions reductions in the event of the failure of a sequestration plan under subsection (13) of this section; and
- (f) Provisions for public notice and comment on the carbon sequestration plan.

³ This is the only application subject to these terms of the law.

⁴ (13) A project under consideration by the energy facility site evaluation council by July 22, 2007, is required to include all of the requirements of subsection (11) of this section in its carbon sequestration plan submitted as part of the energy facility site evaluation council process. A project under consideration by the energy facility site evaluation council by July 22, 2007, that receives final site certification agreement approval under chapter 80.50 RCW shall make a good faith effort to implement the sequestration plan. If the project owner determines that implementation is not feasible, the project owner shall submit documentation of that determination to the energy facility site evaluation council. The documentation shall demonstrate the steps taken to implement the sequestration plan and evidence of the technological and economic barriers to successful implementation. The project owner shall then provide to the energy facility site evaluation council notification that they shall implement the plan that requires the project owner to meet the greenhouse gases emissions performance standard by purchasing verifiable greenhouse gases emissions reductions from an electric generating facility located within the western interconnection, where the reduction would not have occurred otherwise or absent this contractual agreement, such that the sum of the emissions reductions purchased and the facility's emissions meets the standard for the life of the facility.

prepare a specific plan at some future time, perhaps as late as 2020, when geological sequestration becomes a proven technology for use by power plants and a number of asserted technological, engineering, and legal questions have been answered. In the interim, ENW proposed to consider offsets based on assumptions that it enumerated in its GGRP.

The Council convened a prehearing conference on September 20, 2007 at Kalama, Washington to begin the adjudication and advised the parties that it had questions about the GGRP and its sufficiency. It informed the parties of its questions, set a briefing schedule, and a tentative schedule for oral argument. It provided the text of the questions to parties as an attachment to the prehearing conference order.⁵

The parties presented briefs on schedule, and the Council determined that the quality of the briefs was sufficiently high that it felt oral argument to be unnecessary.

The following persons provided opening and answering briefs to the Council.

Applicant:

ENERGY NORTHWEST

by Elizabeth Thomas, Attorney at Law, K&L Gates LLP, Seattle.

Counsel for the Environment:

Michael Tribble, Assistant Attorney General (AAG), Olympia.

Council Member Agencies:

Washington Department of Ecology by Laura Watson, Assistant Attorney General, Olympia.

Washington Department of Community Trade and Economic Development by Alice Blado, Assistant Attorney General.

Petitioners for Intervention:

Columbia Riverkeeper, Willapa Hills Audubon Society, Rosemere Neighborhood Association, by Scott Jerger, Attorney, Field Jerger, LLP, Portland, Oregon.

Northwest Energy Coalition, Washington Environmental Council, Sierra Club, by Stephen Mashuda, Attorney, Joshua Osborne-Klein, Attorney, Jan Hasselman, Attorney, Earthjustice, Seattle.

⁵ Appendix I.

Sufficiency of the GGRP

The most significant question – and the only question posed to the parties that the Council will address in this order⁶ – is whether the GGRP as proposed legally complies on its face with the requirements of the statute.

We determine as a Council, and without dissent, that the ENW GGRP fails to meet the minimum requirements of the law, that it is therefore insufficient as a matter of law, that its provisions cannot be supplemented to the level of minimal sufficiency by mere revisions, and that its flaws are pervasive and affect the processing of the entire application. Therefore, we stay the adjudicative process and direct the Council staff to suspend application processing pending action by the applicant to cure the present flaws.

1. The Basic Flaw.

The basic flaw in ENW's GGRP is that it is not a plan at all in terms of the statute – it does not identify specific steps it will take to implement sequestration. Instead, it is a plan to make a plan, and it vows to begin making specific steps toward implementing geological sequestration at some future time, after geological sequestration becomes commercially accepted for use in reducing emissions of fossil-fueled power plants. It proposes that eventually, at some indefinite future time, it will seek to develop a specific plan for accomplishing the purposes of the statute. In the meantime, it argues, after the fifth year of operation, it may purchase offsetting greenhouse gas emission rights from unspecified sources because a specific plan is futile and it need not make a good faith effort to comply with the letter of the statute.

The reason this is a fundamental flaw is that it asks the Council to invalidate the statute – an action that is clearly beyond the power of an administrative agency.⁷ This is not an ambiguous statute, which might be cured by interpretation of its terms. Instead, the statute is detailed and specific in its requirements. The applicant must make specific plans for specific actions to accomplish a specific goal – geologic or other approved sequestration of greenhouse gases – and receive from the Governor a Site Certification Agreement, before it can ask for relief by the purchase of offsets. Then, only after ENW has made a good faith effort to implement the plan, and only after the Council has agreed that implementation is “not feasible,” may it be excused from compliance with plan implementation and allowed to purchase offsetting emission rights.

ENW argues that sufficiency of the GGRP is a factual issue that must be determined only after an evidentiary hearing. We strongly disagree. We need only look to the statute and the plan that ENW presented to determine whether the plan contains the elements that the statute requires.

⁶ In light of our decision on GGRP sufficiency, we find it unnecessary and inappropriate to address the remaining questions. The parties' briefs are available to us for consideration at a later time, and parties may address the remaining questions in their evidentiary presentations, as they choose and as may be appropriate.

⁷ An agency has some discretion to interpret an ambiguous statute which sets forth its authority; however, it may not alter or amend the provisions of such authorizing legislation and must interpret them within the statute's framework and policy. *Burlington Northern v. Johnston*, 89 Wn.2d 321, 572 P.2d 1085 (1977)

We determine that the GGRP simply does not contain the elements required by statute, not that a plan containing the required elements is inadequate in its measures.⁸

2. Futility or Impossibility of Compliance.

ENW argues that compliance with the statute is futile. While futility may be true from its perspective, which would require a fully developed carbon sequestration industry before literal compliance with the statute is mandated, it is not true from the standpoint of the other parties. They point out that some projects must be within the first wave of technological development – if all waited until a technology became mainstream, technology would never reach mainstream. They also note that sequestration technology is mature in other high-volume applications, such as extraction of oil from wells.

Futility is also not true from the plain language and the clear meaning of the statute. The other parties point out that the statute was enacted specifically to deal with applications in ENW's present situation and that the legislature is presumed to know the meaning and the application of its enactments. This is not an ambiguous statute, which might be susceptible of interpretation. The law is clear and specific in its application to this project. We will not interpret the statute to disregard the plain meaning of the legislature.

ENW argues that it made a good faith effort to comply with the statute. We do not impugn its motives. The test we must apply, however, is not whether it has made a good faith effort, but whether its GGRP complies with the clear terms of the law. We determine that it does not.

ENW proposes application of the “doctrine of impossibility,” citing a case in which physical incapacity excused a teacher from the duty to teach,⁹ and it argues that under terms of the “vested rights doctrine,” the law is invalid in application to PMEC because the application was filed before the law became effective and because of “constitutional principles of fairness and due process.”¹⁰ ENW does not contend that we have jurisdiction to invalidate the law on those bases and it does not address whether the vested rights principle also applies to matters such as this, which affect the public health, safety and welfare.

3. Specific Elements.

RCW 80.80.040(13) applies to ENW's application to require a GGRP with five specific elements identified in RCW 80.80.040(11): financial assurances, provision for geological or other approved sequestration, monitoring to ensure GGRP effectiveness, penalties for failure to achieve implementation, and provisions for public notice and comment. The parties all agree that adopting a GGRP through the EFSEC application process satisfies the requirement for public notice and comment. They disagree on whether the applicant has met the other requirements.

⁸ ENW's argument that it “addresses” the topics in RCW 80.80.040(11) begs the question – subsection 13 requires development of a plan, not a statement addressing issues and offering at some time later to develop a plan to resolve them.

⁹ *O'Neal v. Colton Consolidated Sch. Dist.*, 16 Wn.App. 488, 557 P.2d 11 (1976).

¹⁰ *Weyerhaeuser v. Pierce County*, 95 Wn.2d 883, 976 P.2d 1279 (1999).

a. Geological sequestration.

The principal flaw in the GGRP is its failure to present a plan to achieve geological sequestration. It does not detail specific actions ENW will take. Instead, the GGRP merely states that because geological sequestration of power plant emissions is not a conventional technology, and because uncertainties exist in technical and legal aspects of geological sequestration, it will not begin to prepare a specific plan until technical and legal questions are resolved. In this regard, ENW's GGRP fails to meet the plain language of the statute – it is a plan to prepare a plan at some indefinite later date.

b. Financial assurances.

The statute requires specific financial assurances in the GGRP.¹¹ ENW's financial assurance merely identifies the applicant's status as a public entity and proposes that its bonding power will enable it to meet costs of geological sequestration. It does not identify costs of construction and operation of necessary equipment, or any other specific significant costs. It does not demonstrate that its bonding power is unlimited or that it will in the future be capable of using its bonding power to meet any costs that may arise.

c. Monitoring.

The GGRP does not identify specific means of monitoring the effectiveness of a sequestration plan. Instead, it states that ENW will develop a monitoring plan at a later time, subject to EFSEC approval.

d. Penalties.

The GGRP does not identify penalties for failing to achieve implementation of the sequestration plan on schedule. Instead, it opines that costs the company would incur would constitute effective penalties. We disagree; had the legislature intended the result urged, no mention of penalties would have been needed in the law.

e. Offsets, in the event of sequestration failure.

The statute requires the GGRP to include provisions for the purchase of emissions reductions in the event of failure, in implementing the sequestration plan. The statute also requires documentation of that failure to be submitted to the Council, prior to purchasing verifiable greenhouse gases emissions reduction offsets. ENW identified the requirement, and stated that if necessary it would secure offsets. The statements do not rise to the level of a "plan" – they merely identify the requirement and postulate that ENW would be able to secure offsets.

¹¹ RCW 80.80.040(11)(a) requires “. . . financial assurances, as a condition of plant operation, *sufficient to ensure successful implementation of the carbon sequestration plan, including construction and operation of necessary equipment, and any other significant costs.*” (Emphasis added).

4. Conclusion.

In sum, the plain reading of the statute demands a carbon sequestration plan, with specifics, and ENW has provided only a general statement of intention that it will begin creating such a plan in the future at some indefinite time. In its brief, ENW calls this proposal “adaptive management,” under a practice that allows details of compliance to be developed through different measures, over time, allowing learning from and improving upon compliance measures. RCW 80.80 does not allow adaptive management in lieu of clear statutory requirements, and ENW’s proposal is a proposal to develop goals and measures later. It is not adaptive management, which pursues specific goals through clearly identified means.

We conclude that ENW’s proposed greenhouse gas reduction plan fails to meet the requirements of the statute, and must be rejected.

The GGRP is a statutory requirement that is essential to this application. It is irrevocably tied to the specific proposal in the application. And the proffered GGRP misses the mark by a wide margin – it is not susceptible of a few minor fixes to render it even minimally sufficient. For that reason, we stay the adjudicative proceeding and find it wisest to stop the application processing until ENW proposes a cure that addresses lack of an adequate GGRP.

We acknowledge ENW’s frustration.¹² The proposed project has been affected by the actions of the legislature. Relief however, is not available from EFSEC.

We acknowledge ENW’s pressing need to satisfy its members’ power requirements beginning in 2012, and trust that it will act promptly to address its situation in a way that allows it, and the Council, to resume application processing in a timely manner.

It is so ordered.

Dated at Olympia, Washington, and effective this 27th day of November, 2007.

WASHINGTON STATE ENERGY FACILITY
SITE EVALUATION COUNCIL


James O. Luce, Chair

¹² See ENW’s Reply Brief at p. 14 citing Federalist No. 44 at 301(J. Madison)(J. Cooke ed. 1961).

Appendix I

Council Questions About The Pacific Mountain Energy Center Greenhouse Gas Reduction Plan (GGRP)

When briefing these questions, please state reasons for your conclusions.

1. Rulemaking
 - a. Does ESSB 6001 require that the PMEC gasification plant proceedings be stayed until “...the energy siting council and the department....adopt rules...to implement and enforce the greenhouse gases emissions performance standard”?
 - b. If rulemaking need not be completed under Section 5(10) of ESSB 6001 prior to consideration of the PMEC project because the project was pending before EFSEC on the effective date of ESSB 6001, does the greenhouse gas plan “[include] all of the requirements of subsection 11 of [Section 5] ...”? If so, why; if not, why not, and, if not, what specific additional elements are needed.
2. Sufficiency of the PMEC greenhouse gas reduction plan (GGRP).
 - a. Is this applicant’s GGRP legally sufficient for the application to proceed?
 - b. Does the proposed PMEC greenhouse gas plan, on its face, “...work in unison with the state’s carbon dioxide mitigation policy, chapter 80.70 RCW and its related rules, for fossil fueled thermal electric generation facilities in the State”?¹³ Why or why not, and if not, what kind of modification of the plan would be needed for such “unison”?
 - c. Is the PMEC GGRP, as submitted, a sufficient “good faith” demonstration of compliance to warrant issuance of a conditional certificate allowing construction? If not, what elements are lacking?
 - d. If EFSEC were to issue a “final site certification agreement under authority of RCW 80.50,” would the submitted sequestration plan be capable of a demonstration of “good faith effort to implement [the law],” and why or why not, with respect to the following elements:
 - Financial assurances under Section 5(11)(a)
 - Geological or “other approved sequestration” commencing within 5 years of commercial operation under Section 5(11)(b) [Section V.A. of PMEC Plan]
 - Monitoring under Section 5(11)(c)
 - Penalties for failure to achieve implementation under Section 5(11) (d). If the project could not operate until EFSEC finds compliance, would that be a sufficient penalty?

¹³ ESB 6001, Section 1(e).

- Provisions for the purchase of offsets under Section 5(11)(e) [Section V.B. of PMEC Plan]
- e. How may an applicant meet the requirement that “full and sufficient documentation to support the planned sequestration” if technology to support plans for geological sequestration does not yet exist?
 - f. The applicant proposes to run the plant on natural gas for an initial period and, if gasification is not feasible, to continue firing it with natural gas indefinitely. Is this an adequate alternative, assuming that emissions under natural gas operations are anticipated to be lower than under gasification? If it operates as a natural gas-fired facility, will it comply with the requirements of ESSB 6001 and RCW 80.70?
3. Timing of GGRP support.
- a. Must the applicant submit a facially adequate GGRP before the adjudicative process may begin? May the Council delay the adjudicative review of an application until the applicant submits a legally sufficient GGRP?
 - b. If there is doubt under WAC 463-60-010 about the sufficiency of the GGRP as submitted, should further application processing be halted until the applicant submits a plan that is arguably adequate on its face, or may the applicant agree to modify its proposed GGRP during the hearing process under WAC 463-60-116? Why?
 - c. If the Council rules that a GGRP is deficient on its face and the applicant may not supplement it during the adjudication, may the applicant reapply or resubmit its application with a revised plan and still be vested under the exemption of subsection 5(13) of ESSB 6001?
4. Conditional permit possibility.
- a. Must an applicant submit a legally sufficient GGRP before the Council submits a draft site certification agreement to the Governor, or may the Council condition operating authority on later approval of such a plan, prior to operation?
 - b. Is the issue of final “gas reduction” compliance with ESSB 6001 premature to consider at this time, given EFSEC’s authority to issue a conditional certificate allowing construction, while reserving approval of commercial operation until construction is completed and all gas reduction goals established?

Pacific Mountain Energy Center Power Project Application No. 2006-01
Service List November 7, 2007

Unless otherwise indicated, copies must be served on all persons on this list.

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