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BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the matter of:

APPLICATION NO. 99-1

SUMAS ENERGY 2 GENERATION
FACILITY

NO. 99-01

JOINT MOTION TO REOPEN
RECORD FOR LIMITED PURPOSE

Comes now Council for the Environment, Mary C Barrett, Sr. AAG (hereafter CFE) and David Grant, DPA for Intervenor Whatcom County (hereafter County), and moves EFSEC to reopen the record for the limited purpose of determining whether the recently discovered scientific evidence pertaining to the current seismic activity in Whatcom County (see attached affidavit of Dr. Easterbrook) and the Sumas Valley impacts the deliberations by the EFSEC on the application 99-01.

PROCEDURAL BACKGROUND

The record was closed on October 5, 2000, following receipt of evidence from the reconvened public and adjudicative hearings held between September 27 and 29, 2000 in Whatcom County. Parties were advised of the schedule for supplemental documents and were informed that deliberations would commence shortly thereafter. The only outstanding issue at

1 that time was the status of the draft 401 permit.¹ The seismology in Whatcom County was not
2 one of the issues separately identified by CFE² or intervenors and was discussed in general
3 terms during the proceedings. (TR 451-454; 815-816; 937-938; 941-945; 1824; 1865-1866;
4 1886-1888; 1926-1927; 1934-1936).

5 **ARGUMENT**

6 EFSEC rules and statutes provide no process for reopening of the record. Motions are
7 generally addressed in the pre-hearing guidelines order # 743. However, these guidelines
8 provide no criteria on what the standards should be. EFSEC relies on the Administrative
9 Procedure Act for procedural guidance. RCW 80.50.090.

10 RCW 34.05.562(2)(b) provides:

11 (2) The court may remand a matter to the agency, before final disposition of a
12 petition for review, with directions that the agency conduct fact-finding and other
13 proceedings the court considers necessary and that the agency take such further
14 action on the basis thereof as the court directs, if:

15 ...

16 (b) The court finds that (i) new evidence has become available that relates to the
17 validity of the agency action at the time it was taken, that one or more of the
18 parties did not know and was under no duty to discover or could not have
19 reasonably been discovered until after the agency action, and (ii) the interests of
20 justice would be served by remand to the agency;.

21 This process contemplates supplementing the record once an action is taken. In this
22 instance, the EFSEC has not yet ruled. The issue becomes whether EFSEC seizes the
23 opportunity for a complete record at the agency level or waits for an appeal and a party's
24 request to the court to either take evidence there or remand it to the agency. This would be a
25 waste of time and judicial resources, so it seems easiest to address the issue now.

¹ CFE was authorized to meet with the applicant and the Ecology contractor to try to clarify remaining
issues. This meeting occurred on October 17,2000. Also in attendance was Rich Heath, Sr. AAG, David
Davidson on behalf of the City of Sumas, Deb Mull, AAG for contractor Ecology, Chuck Blumenthal and Karen
McGaffey council for applicant and Katy Chaney, consultant for applicant. As of this writing, CFE has no
information about the status of the draft permit.

1 So, what is this new evidence, why didn't we deal with it sooner and why should EFSEC
2 consider it at this juncture?

3 At the outset, we want to make clear that we are not attempting to address issues we were
4 on notice about during the proceedings but failed or chose not to address. Specifically in the
5 application (2.15.2) and DEIS (3.2-7), the data was wrong concerning the known existence of the
6 faults as was the applicant's testimony on seismic activity (see references generally above). We
7 could conjecture about whether the applicant knew or should have known or the drafters of the
8 DEIS relying on this information knew or should have known about these faults when they
9 prepared their documents or intervenors knew or should have known. This is academic at this
10 point.

11 What is new and could not have been known to any party at the time of the proceedings
12 was the research which was being conducted but not reported concerning the **extent** of the known
13 faults (Vedder and the unnamed AKA Sumas), the recent seismic activity **along** these faults and
14 **nature and depth** of the subsurface. Reopening the record to allow testimony concerning this
15 new information is crucial before a recommendation is made because the hazards associated with
16 building a large industrial complex which stores hazardous materials **on** or in **close proximity** to
17 **active** faults is not something one can engineer around. If this were the situation, how to build to
18 accommodate the known risks would be an issue of engineering solely and properly left for study
19 and design post SCA. Dr. Easterbrook makes clear that you cannot engineer around the risks
20 associated with building a large industrial complex on or near an active fault, therefore its not a
21 question of how to build but can or should it be built at all.

22 If Dr. Easterbrook's affidavit suggests that the entire area is at risk because of the other
23 industrial uses, how much more harm could the Sumas 2 Generating Facility add to the problem?
24 The answer is twofold. First, EFSEC is required to balance the environmental risk with the need
25 for energy. Its jurisdiction is limited to what **this** facility's impact is or could be on the

1 environment. Clearly, as currently proposed there are numerous tanks, pipelines for volatile
2 agents and an option for an oil backup with a tank size between 1.5 and 2.5million gallons. In the
3 event of a quake along the Sumas fault which is directly under the proposed facility or on the
4 Vedder fault which is 1.5 miles away, the risks of ground shaking, ground failure, offset along the
5 fault and/or landslides has substantially increased the possible risks now that we know these faults
6 have been very active since at least 1964. Second, if we do not have a full airing of evidence on
7 this sensitive issue, how can any of us have confidence that the EFSEC procedures worked when
8 we have not completed the risk analysis necessary to decide whether building on this site is or is
9 not within acceptable risk? If we wait until an engineering design is completed (post SCA) we
10 also lose the opportunity for the analytical debate and public access to the process. Neither
11 efficiency nor justice would be served.

12 CFE and County respectfully request that EFSEC seize the opportunity so that it can
13 make a recommendation to the Governor which reflects all relevant information at its disposal.
14 Having this new evidence will be extremely helpful if there is any confusion during subsequent
15 appeals concerning the risk associated with building on an active fault.

16 CFE and County apologize for the inconvenient nature of the motion. However, we
17 would have brought this information into the proceedings had it existed prior to or during the
18 hearings. As the Affidavit of Dr. Easterbrook explains, the data gathering and analysis was not
19 completed and publicly available after the record in this matter was closed on October 5, 2000.
20 Applicant's evidence shows that the last report they were aware of was McCrumb 1989
21 (application 2.15.2).

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1 To minimize further delay and costs, we propose the following process.

2 EFSEC require all interested parties to provide pre-filed testimony. A hearing shall be
3 scheduled shortly thereafter for cross-examination of all witnesses with an opportunity for
4 simultaneous briefs and/or oral argument. This process will allow full discussion of this issue of
5 great public concern and safety while minimizing delay.

6 Respectfully submitted this _____ day of _____, 2000.

7
8 _____
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