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BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

<p>In the Matter of Application No. 99-1: SUMAS ENERGY 2 GENERATION FACILITY</p>	<p>CITY OF ABBOTSFORD AND ABBOTSFORD CHAMBER OF COMMERCE=S OPPOSITION TO MOTION FOR RECONSIDERATION</p>
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1 I. THE MOTION SHOULD BE DENIED BECAUSE
2 IT IS A CALCULATED MISUSE OF
3 RECONSIDERATION PROCEDURES

4 A motion for reconsideration is not the time for an applicant to suggest new
5 modifications to its project. An applicant is supposed to disclose its plans in its application
6 filed months prior to the adjudicative hearing. The application is to reflect the best available
7 current information **and intentions of the applicant.** WAC 463-42-690. Amendments to
8 the application -- including revised intentions -- are to be filed no later than 30 days prior to
9 the hearing. WAC 463-42-690(2). These procedures assure that the administrative process
10 is conducted in a fair and efficient manner. All the applicant's cards must be on the table
11 before the hearing commences and before the Council deliberates at length on the merits of
12 the proposal.

13 The process which SE2 has embarked on here is poison to an efficient, fair-minded
14 administrative process. If SE2's motion were to be considered on its merits, it would send a
15 signal not just to this applicant but to all future applicants that they need not come forward
16 with their best proposal at the beginning of the adjudicative process. If EFSEC were to
17 consider SE2's motion on its merits, it would signal to applicants that they can feel free to hold
18 back and wait to see how good of a deal they can obtain in the Council's initial
19 recommendation. The adjudicative process would be turned into a bargaining process,
20 contrary to its intended form and function.

21 The court rules for both state and federal courts authorize motions for reconsideration.
22 See CR 59; Fed. R. Civ. P. 59. It is instructive to note the disdain that federal and state court

1 judges have for motions for reconsideration premised not on errors made by the decision
2 maker (judge or jury), but on changes in the tactical position of the litigant:

3 Civil Rule 59 does not permit a plaintiff, finding a judgment
4 unsatisfactory, to suddenly propose a new theory of the case.
5 JDFJ=s motion for reconsideration was in essence an
6 inadequate and untimely attempt to amend its complaint in
7 general, violating equitable rules of estoppel, election of
remedies, and the invited error doctrine. We refuse to permit
such a perversion of the rules.

8 International Raceway, Inc. v. JDFJ Corp., 97 Wn. App. 1, 7 (1999).

9 Public policy and the court calendar are such as not to permit
10 a party litigant to gamble on reliance on one theory at the trial
11 and, after a contrary view of the evidence is adopted by the
12 court and is to be followed in its judgment on the facts of
13 record, to seek to reopen the case to meet the other issues raised
by that record, in an attempt to make for a finding in its favor
on the theory adopted by the court.

14 Rue v. Feuz Construction Company, 103 F. Supp. 499, 502 (D.C. D.C. 1952).

15 [The cases cited by the party moving for reconsideration]
16 provide no support to a party who, by his own calculated
17 choice, has put himself in the position from which he seeks
18 relief. . . . There must be an end to litigation someday, and
free, calculated, deliberate choices are not to be relieved from.

19 DeLong=s, Inc. v. Stupp Brothers Bridge and Iron Company, 40 F.R.D. 127, 130 (E.D. Mo.
20 1965) (internal quotations and citations omitted).

21 The provision [for reconsideration motions] cannot be used,
22 however, to relieve a party from the duty to take legal steps to
23 protect his interests. If a party makes a free and conscious
24 choice regarding the conduct of the litigation, he cannot be
25 granted relief under [the reconsideration rule] from the
26 consequences of that decision.

1 Bell Tel. Laboratories, Inc. v. Hughes Aircraft, 73 F.R.D. 16, 21 (D.C. Del. 1976).

2 Ordinarily, Rule 59 motions for either a new trial or a rehearing
3 are not granted by the District Court where they are used by a
4 losing party to request the trial judge to reopen proceedings in
5 order to consider a new defensive theory which could have
6 been raised during the original proceedings. . . . [T]he
7 Government had sufficient Aoccasion@ to raise all its legal
8 claims long before the District Court took the case under
9 advisement. . . . But the Government chose not to argue
10 executive privilege in the memorandum of points and
11 authorities subsequently submitted to the Court or in oral
12 argument before the District Court. . . . Just because the
13 assertion of executive privilege, with its constitutional
14 overtones, is a matter of obvious gravity, and like any
15 constitutional claim should not be used to dispose of a case
16 where a statutory claim could do equal service, **it hardly**
17 **follows that the Government should be allowed to play cat**
18 **and mouse** by withholding its most powerful cannon until after
19 the District Court has decided the case and then springing it on
20 to surprised opponents and the judge.

21 Grumman Aircraft Engineering Corp. v. Renegotiation Board, 482 F.2d 710, 721-22 (D.C. Cir.
22 1973) (internal citations and quotations omitted), reversed on other grounds, Renegotiation
23 Board v. Grumman, 421 U.S. 168 (1975).

24 Motions pursuant to RUSCC 59 are not to be used as relief
25 because an unhappy party failed to urge a theory which it could
26 have raised in original proceedings. Moreover, Motions for
27 Reconsideration will not be considered merely because counsel
28 failed to properly evaluate evidence in its possession.

29 Bernard v. United States, 12 Claim Court 597, 598 (1987) (citations omitted).

30 These cases establish that, not only should SE2=s motion be denied, but the merits of
31 it should not even be reached. The Council should not countenance this tactical maneuver by
32 SE2 nor take action here which would encourage future applicants to do the same.

1 EFSEC=s statute makes plain the avenue available to an applicant whose initial
2 proposal has been rejected. RCW 80.50.100(3) provides that rejection of an application shall
3 not preclude submission of a subsequent application for the same site on a basis of changed
4 conditions or new information.@ The Council should not read into the statute a
5 reconsideration remedy when the statute expressly provides a different remedy (re-filing a new
6 application). This reading of the statute is consistent with the numerous cases quoted above
7 which exclude from the proper scope of a reconsideration motion requests based on changes
8 in the project or the tactical position of the parties.
9

10 SE2=s motion for reconsideration is based primarily on proposed modifications to its
11 project. With regard to most of those belatedly proposed changes, SE2 offers nothing in the
12 way of new evidence or changed circumstances to justify its 25th hour modifications -- nothing,
13 that is, other than the Council=s announcement of its recommendation. SE2 proposes to
14 modify its proposal by incorporating new provisions regarding offsets for air pollution in the
15 Fraser River Valley; new conditions to mitigate greenhouse gas emissions; new water quality
16 monitoring provisions; new noise monitoring conditions; new site restoration provisions; new
17 flood modeling; and new noise monitoring. SE2 offers absolutely no justification for holding
18 back its proposals with regard to each and every one of these items until after EFSEC
19 announced its recommendation. None of these proposed changes should be given any
20 consideration in the context of a motion for reconsideration.
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24 In a few instances, SE2 does suggest the presence of new circumstances (other than the
25 Council=s decision), but it does so in a very unpersuasive manner. For instance, SE2 now
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1 proposes to reduce ammonia emissions from its facility and states that it is offering the
2 reduction because new technology is available (Motion at 14), yet it cites no evidence (old or
3 new) to support this claim. SE2 states in passing that it can now delete the diesel fuel
4 component because the financing market is currently positive. Motion at 11. Again, this
5 assertion is not supported by citation to any evidence. Nor is there even an assertion, let alone
6 evidence, that the financing market is any more positive now than it was three, six, or
7 twelve months ago. Similarly, SE2 briefly mentions that the energy markets have changed and
8 thus it is in a position to offer the need and consistency modifications. See Motion at 9-10.
9 Again, SE2 cites no evidence -- old or new -- to support its apparent contention that the need
10 and consistency provisions are economically viable now but were not before.

11 The primary basis of SE2's motion is not that there is substantial new evidence nor that
12 the Order is based on errors of fact or law. The primary basis of SE2's motion is that it seeks
13 now to modify its project to eliminate some of its impacts. This is not a proper basis for a
14 motion for consideration. The motion should be denied.

15 II. SE2 SATISFIES NONE OF THE LEGITIMATE 16 GROUNDS FOR RECONSIDERATION

17 While motions for reconsideration are not to be used as a tactical device giving a party
18 a second bite at the apple, there is an appropriate role for motions for reconsideration.
19 Motions for reconsideration are appropriate where a decision maker has committed an error
20 of law, made a mistake in ascertaining the facts, or where new evidence is available that could
21 not have been submitted at the time of the hearing and which, if admitted, would likely change
22

1 the outcome. These legitimate bases for a motion for reconsideration are found in the court
2 rules applicable to state and federal courts around the country. See, e.g., CR 59 and Fed. R.
3 Civ. P. 59.¹

4 Notably absent from SE2=s motion is any statement of the applicable standards for a
5 motion for reconsideration or how its motion might satisfy such standards. We presume that
6 discussion is missing because SE2 recognizes that it cannot possibly meet the legitimate
7 standards for a motion for reconsideration. The factual and legal determinations encompassed
8 in EFSEC=s recommendation are sound. Most of SE2=s motion for reconsideration is simply
9 re-arguing points it has made in the past. There is no new significant information or analysis
10 provided in SE2=s motion. It fails to satisfy the legitimate grounds for a motion for
11 reconsideration.
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14 A. Air Quality Issues

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16 ¹ Neither the Administrative Procedures Act (Chapter 34.05 RCW) nor EFSEC rules
17 address specifically the grounds for a motion for reconsideration. In the absence of specificity
18 in those rules, reference is being made to the analogous civil rules applicable to state and
19 federal court. In addition, the APA expressly directs that in construing APA requirements,
20 consideration should be given to how courts construe the provisions of similar state and
21 federal acts. RCW 34.05.001.
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1. Elimination of the back-up diesel has a negligible impact on emission of pollutants of concern

SE2 asserts that the Aevidence and the Council=s order are clear that elimination of the proposed diesel back-up option would avoid the air quality impacts of concern.@ Motion at 11. SE2 provides no analysis of the air emissions or air quality data to support this contention. Id. The reasons for SE2 avoiding that analysis are clear: the analysis demonstrates that eliminating diesel will have a negligible impact on the pollutants of concern.

In simplest terms, eliminating diesel will have a significant reduction in emissions of sulfur dioxide (an acid rain precursor), but the Council will probably recall that there was almost no focus on SO₂ and acid rain in conjunction with this project. In terms of impacts to the Fraser Valley air shed and the City of Abbotsford, the focus has been on NO_x and particulates. With regard to these primary pollutants of concern, the elimination of diesel has virtually no impact. Assuming that diesel were to operate for the full ten days proposed by

1 SE2, the elimination of diesel would cause annual emissions of particulates and NO_x to drop
2 by just five to nine percent.²

3
4 ² These percentages are calculated based on the emission data included in SE2=s
5 application (Table 6.1-24). We have adjusted the NO_x emissions by one-third to account for
6 SE2's proposal (made subsequent to the application but prior to the hearing) to reduce NO_x
7 emissions from 3 ppm to 2 ppm. The calculations (derived from Table 6.1-24) are shown
8 below:

Pollutant	Emission Rates	Case 1 Dual Fuels	Case 2	Change With Latest SE2 Proposal
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	Natural Gas tons/day	#2 Oil tons/day	Natural Gas 355 days tons/yr	#2 Oil 10 days tons/yr	Total 365 days tons/yr	Natural Gas 365 days tons/year	Tons/Year	Percentage
NO _x	0.395	1.90	140	19	159	144	-15	-9%
PM ₁₀ (EC + OC)	0.571	1.59	203	16	219	208	-10	-5%

1 The five to nine percent maximum reduction in NO_x and particulate emissions that
2 would be obtained if diesel is eliminated from the project is based on the assumption that SE2
3 would have used its full ten day (or 240 hour) allotment. But SE2 has emphasized that the ten
4 day limit was a maximum and that it might not need to burn diesel that much. Indeed, in its
5 Motion for Reconsideration (when arguing that its belated changes do not constitute a
6 significant revision of its project), SE2 explains that even if it had been allowed to burn diesel,
7 it still would have burned natural gas 97 to 100 percent of the time.³ Motion at 32, line 15.

8 Thus, the five to nine percent reduction in NO_x and particulate emissions represents a
9 maximum reduction. According to SE2, the real reduction would be somewhere between zero
10 and five percent for particulates and zero and nine percent for NO_x.

11 In suggesting that elimination of diesel fuel should cause the Council to reverse its
12 recommendation, SE2 attempts to recharacterize the air quality portion of the Council's Order
13 as being based exclusively on impacts associated with the use of diesel fuel. See Motion at
14 11. SE2 quotes selectively from the Council's Order and the FEIS to create that
15 misimpression. SE2 ignores those portions of the Council's Order which reflected the
16 Council's understanding that air pollution concerns were not limited to the use of diesel fuel.

17 The Council begins its findings and conclusions regarding air quality by referring to
18 the three tons per day of pollution that would be emitted by the plant. Order at 20. The three
19 tons a day figure is based on the plant's burning natural gas, not diesel.³ The Board then

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25 ³ Mr. Eric Hansen (SE2's air consultant) acknowledged that when burning oil, the

1 discussed the highly significant nature of this level of pollution given the particular site chosen
2 by SE2 and the air shed into which these pollutants would be emitted:

3 The Lower Fraser Valley already is an environmentally
4 sensitive and polluted area. Residents in this air shed currently
5 suffer health effects from the existing air pollution. This air
6 shed which would receive S2GF=s polluting emissions has
7 topographical and meteorological features that promote the
8 retention of pollutants. . . .

9 The Council finds that, because of the nature of the air shed
10 into which the pollutants would be emitted, this is not an
11 appropriate location for a power facility with these levels of
12 emissions.

13 Order at 20-21. The Council then goes on to quantify the plant=s emissions of NO_x,
14 particulates, and a variety of other pollutants. Id.

15 The Council spends nearly ten pages of its Order discussing the air pollution issues and
16 very little of that (probably less than ten percent) is related to the diesel burning issue. Indeed,
17 when the Council summarized its findings on air quality, there was not a single word
18 mentioned about the use of diesel fuel. Order at 30.

19 SE2 also cites selectively from the FEIS to support its assertion that the plant will not
20 have significant air quality impacts when burning natural gas. See Motion at 11 (quoting FEIS

21 emissions would be more like 7.5 tons per day. TR 1599. When burning natural gas, the
22 emission rate would be 2.5 tons per day. TR 1598. The weighted average of the two would
23 be 2.7 tons per day. TR 1599.

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1 at 3.1-37). While the FEIS does state in conclusory terms that no significant adverse air
2 quality impacts would occur when the facility is fired with natural gas, ultimately it is for this
3 Council to determine how significant the impacts are and whether they are justified. The
4 facts provided in the FEIS fully support the Council's determination. Among other things,
5 the FEIS documents that the project will probably cause an additional death per year for every
6 100,000 exposed. See FEIS at 3.1-33. (Abbotsford's population is approximately 120,000
7 and the metropolitan region is approximately 300,000. Testimony of Mayor Ferguson.)
8 Moreover, the FEIS acknowledges that a potential impacts related to exacerbation of illnesses
9 such as asthma and other respiratory conditions **are orders of magnitude higher.** FEIS at
10 3.1-33 (emphasis supplied).

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13 In sum, SE2 is wrong in contending that elimination of diesel fuel backup will cause
14 a significant reduction in the emission of pollutants of greatest concern and SE2 is wrong in
15 characterizing the Council's air quality analysis as being driven primarily by the diesel fuel
16 component of the project. SE2's belated proposal to eliminate diesel from the project does
17 not provide adequate grounds for reconsideration. SE2 has pointed to no error of law nor
18 erroneous factual finding that the Council made in this regard.

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20 2. SE2's attack on the Council's finding that the Fraser River Valley has
21 the second worst air quality in Canada is both mistaken and irrelevant

22 SE2 spends considerable effort disputing the Council's statement that the air quality
23 in the Fraser River Valley is the second worst in Canada. See Motion at 15-16. SE2's attack
24 on this finding is flawed both factually and legally.

1 First, SE2 concedes that the Council=s statement that Athe Lower Fraser Valley is
2 considered to have the second worst air quality of any urban area in Canada,@ Order at 25, is
3 accurate for ozone. Motion at 16, n.15. Furthermore, the Council=s finding is consistent with
4 the evidence. See, e.g., Ex. 131 at 24:22-25:2 (Sagert Prefiled Testimony).

5 Second, to rebut the statement more generally, SE2 cites a statement that air quality
6 in the Lower Fraser Valley is good Acompared to other urban areas of similar size in Western
7 North America.@ Motion at 15 (citing Ex. 162.12 at viii). As far as we know, all Aother urban
8 areas of similar size in Western North America@ are in the United States, not Canada. That
9 the air quality in the Lower Fraser Valley may be better than it is in Los Angeles sheds no light
10 on the issue of whether it is the second worst in Canada. Contrary to SE2=s claim, the
11 comparison to other urban areas in Western North America does not Adirectly refute@ the
12 comparison to air quality in other Canadian air sheds. Motion at 15.

13 Third, SE2=s quibbling over the Asecond worst@ characterization has no relevance
14 legally. The issue, as correctly framed by the Council, is to assess the impact of almost three
15 tons of additional pollutants a day being introduced into this confined, heavily populated air
16 shed. Whether this air shed is the worst, second worst, or enjoys some other ranking in
17 Canada matters little to the residents in the air shed. What matters to them (and presumably
18 the Council) is the impact of this facility on the air they breathe. If that be better or worse than
19 other areas in Canada, then so be it.

20 SE2 continues to ignore the Canadian objective to reduce, not increase, pollution in
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1 this already heavily polluted, heavily populated air shed. As we stated in our Post-Hearing
2 Brief:

3 Because of the existing air pollution problems in the Fraser
4 Valley, the various Canadian governments are actively pursuing
5 a wide range of strategies that would result in air pollution
6 levels in the valley being reduced. See Exhibits 132.21 at 6-8;
7 Exhibit 133.1g; TR 2798 (Sagert). The Air Quality
8 Management Plan adopted by the Greater Vancouver Regional
9 District (GVRD) includes more than 50 emission reduction
10 measures and commits to **lowering** annual emphasis of
11 common air contaminants by 38 percent. Exhibit 132.21 at 7
12 (emphasis supplied). . . .

13 Even in areas where air quality does not currently exceed
14 Canada-wide standards, Canada is committed to **reducing** air
15 pollution levels to below the lowest observable effects
16 levels. Jurisdictions should take remedial and preventative
17 actions to reduce emissions from anthropogenic sources in
18 these areas to the extent practicable. Exhibit 159.4 at 6
19 (Annex A, & a).

20 City of Abbotsford's Post-Hearing Br. at 7-8 (emphasis in original).

21 SE2's three tons of emissions per day will move this air shed in precisely the opposite
22 direction than that sought by Canadian authorities. SE2's motion does not even try to respond
23 to this point.

24 3. SE2 will have a significant adverse impact on air quality and health

25 The real issue -- and the one on which the Council focused in its Order -- is whether
26 the projected emissions from SE2 would have an adverse impact on air quality and human
27 health. On this score, SE2's motion offers no new insights. Primarily, SE2 reverts to
28 regurgitating the arguments it advanced in its post-hearing briefs. That is not an adequate

1 basis for a motion for reconsideration. SE2=s entire argument on this point consists of a
2 restatement of its prior arguments followed by citations to its post-hearing brief (twice), its
3 post-hearing reply brief (twice), and several pages from two exhibits cited and discussed in
4 those briefs. See Motion for Reconsideration at 17. SE2 provides no new analysis.

5 SE2 does attempt to introduce -- without first obtaining leave of the Council -- new
6 evidence to support its claim that air quality impacts will not be great. We move to strike
7 SE2=s unilateral offering of new evidence after the adjudicatory hearing has closed without
8 first obtaining permission of the Council to do so and with no opportunity for cross-
9 examination or rebuttal. As Whatcom County explains in its response, consideration of that
10 new evidence without an opportunity for cross-examination and rebuttal would violate due
11 process guarantees.

12 Ignoring for the moment SE2=s brazen flouting of the rules, we note that the improper
13 exhibits provide no support for SE2=s position. The exhibit identified as Appendix B is a
14 Greater Vancouver Regional District memo discussing the issue of some greenhouses and
15 other facilities switching to diesel and other relatively dirty fuels when natural gas was priced
16 high this winter. SE2 again reverts to the process of selective quotation to mischaracterize the
17 exhibit. SE2 quotes one line from the multi-page report, which states Awhile increased
18 emissions have undoubtedly resulted from fuel oil firing, to date we have been unable to
19 determine a direct impact on air quality.@ Motion at 17 (quoting Appendix B at 2-3). When
20 the report is reviewed in its entirety, the misleading nature of this selective quote is evident.

21 SE2 fails to inform the Council that this statement is followed by several qualifications

1 including ones explaining that Arelatively few operations@ made the switch; that there was
2 good ventilation (i.e., winds) to disperse the pollution; and -- most importantly to the residents
3 of Abbotsford -- that while adverse impacts have not been picked up by the regional
4 monitoring system, there may well have been Alocalized air quality impacts.@

5 As the report summarized:

6
7 Recent fuel switching has been limited to those relatively few
8 operations that are equipped for immediate switching. Weather
9 conditions have also provided a reasonable level of ventilation
10 to more quickly disperse the resulting emissions. There may be
11 some areas where a relatively high number of switched sources
12 has caused localized air quality impacts. However, region-wide
13 impacts have either not occurred, or have been lost in the year-
14 to-year air quality fluctuations caused by weather conditions.

15 However, it is probably safer to say that we have dodged an air
16 quality bullet than to assume a cavalier and Kevlar immunity to
17 such bullets.

18 Appendix B at 005 (Mills Memo at 3 of 7).

19 SE2 follows its misleading, selective quoting of the GVRD memo with a
20 mischaracterization of another improperly submitted exhibit (Appendix C).⁴ Appendix C is
21 a fax cover sheet from Mr. Sagert forwarding to the GVRD a four page letter from R. Brian
22 Wallace. SE2 characterizes the letter as if it were written by Mr. Sagert, when it was written
23 by Mr. Wallace. See Motion at 17. Regardless of author, SE2 selectively cites from the
24 document. While Mr. Wallace (like the author of the GVRD memo) acknowledged that fuel
25 switching last winter did not result in a Ameasurable change in air quality,@ SE2 failed to
26 quote or summarize portions of Mr. Wallace=s letter that put that statement in context. Like

27 ⁴ We move to strike this improperly submitted exhibit, too.

1 the GVRD, Mr. Wallace recognized that the increased emissions from fuel switching were
2 masked by a variety of other factors including:

3 § Many businesses which do not switch fuels chose instead to temporarily shut
4 down or cut back their operations while natural gas prices remain high. These
5 businesses thus reduce their emissions at the same time that other businesses
6 and institutions temporarily switch fuels and increase their emissions. A
7 significant net increase in emissions did not occur . . .@

8 § A[F]uel switching is almost exclusively a winter occurrence and weather
9 conditions in the lower mainland at this time of year provide good ventilation
10 to disperse any increased emissions more quickly than during other times of the
11 year.@

12 § A[I]nstitutional and industrial gas users (i.e., those potentially switching fuels)
13 contribute only a small percentage of the total emissions in the GVRD . . .@

14 Read in context, neither Appendix B nor Appendix C adds anything of substance to
15 SE2=s case.

16 The other improperly submitted piece of new evidence is a reprint from the South
17 Fraser Health Region website (Motion for Reconsideration, Appendix A).⁵ SE2 quotes a
18 broadly worded statement on the website to the effect that ozone levels in the lower mainland
19 are much lower than in other cities and in some cases not appreciably more than one finds
20 at sites used as remote or background monitoring locations.@ Motion at 16, n.16
21 (quoting Appendix A). This general statement is not nearly as probative as the more specific
22 data and analysis provided to EFSEC during the adjudication. The evidence duly submitted
23 to EFSEC (through witnesses who could be cross-examined) demonstrated that ozone levels
24 are above healthy levels all twelve months of the year. Exhibit 132.21 at 3. The cited exhibit
25

26 ⁵ We move to strike this improperly offered exhibit, too.

1 reveals that the average hourly readings for ozone at selected Fraser Valley sites in 1999 was
2 almost always over the 20 parts per billion threshold defined by the Canadian government as
3 the lowest ambient concentrations at which statistically significant increases in human health
4 effects have been detected. @ Exhibit 132.21 at 2.

5 Moving past the improper and irrelevant exhibits, the rest of SE2's attack on air quality
6 issues offers nothing of substance either. Remarkably, SE2 attacks Abbotsford (and all other
7 parties to the proceeding) for not having identified a location in Washington that would be
8 preferable @ to Sumas. Motion at 16. First, it is not Abbotsford's burden to identify a
9 preferable site. This burden falls on SE2 (and EFSEC). SE2 was to provide an analysis of
10 alternatives for site, route, and other major elements of the proposal @ in its application. WAC
11 463-42-645. It failed to do so. (A similar burden falls on EFSEC pursuant to the requirements
12 of SEPA. See WAC 197-11-440(5).) Abbotsford (and other parties) have continuously
13 pointed out the failure of SE2 to undertake an adequate alternatives analysis. See, e.g.,
14 Abbotsford Post-Hearing Br. at 16-21. Whereas we have cited those EFSEC and SEPA
15 regulations which require an adequate alternatives analysis to be prepared by the applicant and
16 the reviewing agency, SE2 has cited no legal authority for the proposition that the public or
17 other interested parties have the responsibility to prepare an alternative site analysis on their
18 own.
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23 Moreover, while Abbotsford had no such burden, Abbotsford did point to the existence
24 of numerous other natural gas facilities already permitted in the State as evidence that
25 alternative sites were viable and apparently were less constrained by air quality concerns. See,
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1 e.g., Abbotsford Post-Hearing Br. at 19. The evidence also demonstrated that new power
2 plants in British Columbia are being built outside of this air shed. TR 1601 (Hansen); TR
3 2788, 2841 (Sagert); TR 3620:24-3621:1 (Hrebenyk). The existence of these already
4 permitted sites in both countries undermines both SE2's claim that alternative sites are not
5 available and SE2's related claim that this site must be permitted to respond to energy
6 production needs. The other permitted sites and other sites in the permitting process can
7 respond to that need with far less apparent impact to the environment.
8

9 SE2 next argues that economic growth in the Town of Sumas Ashould not be
10 sacrificed@ to permit continued economic development north of the border. Motion for
11 Reconsideration at 18. No one is suggesting that appropriate economic development in Sumas
12 Ashould be sacrificed.@ On both sides of the border, citizens and governments need to make
13 good decisions on how to best use limited resources. One of those resources is the air shed
14 common to both countries. That air shed has a limited capacity to absorb pollution. That
15 capacity has already been exceeded. Additional pollution will cause harm to citizens on both
16 sides of the border. Additional pollution also will make it difficult for new industrial
17 development and commercial development to be sited on both sides of the border. In terms
18 of economic development, the City of Sumas gets very little in return for the massive
19 consumption of the air shed=s ability to absorb additional pollution represented by the SE2
20 plant.
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23 We also remind the Council that the Canadians have treated major new pollution
24 sources equally regardless which side of the boundary they are proposed. In addition to the
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1 previously mentioned testimony that B.C. Hydro is keeping new power plants out of this air
2 shed, Abbotsford Mayor Ferguson testified to several other large emission sources that were
3 denied permits on the Canadian side of the line. TR 3434-35 (Mayor Ferguson).

4 SE2's Adon=t sacrifice Sumas@ argument continues a theme advanced by SE2 in its
5 post-hearing brief. There, SE2 asserted that Mr. Sagert had testified that there should be no
6 further economic development anywhere in Whatcom County north of Alger Hills. See SE2
7 Post-Hearing Br. at 41:33-35. In our response brief, we demonstrated the falsity of that
8 accusation. See Abbotsford Br. at 20, n.11. SE2 has trotted the argument out again in this
9 motion for reconsideration, modifying it only by omitting Mr. Sagert=s name in this rendition.

10 The argument has no more validity now than it did then.⁶

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13 4 The proposed offset program remains inadequate
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17 ⁶ That Abbotsford has not generally been antagonistic to development on the American
18 side of the line also is reflected by the lack of any evidence that Abbotsford opposed several
19 new significant pollution sources, including the IKO Asphalt Roofing Plant which has a
20 substantial particulate emission rate (albeit still less than SE2's). See Application at 6.1-39
21 (Table 6.1-15).
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1 SE2's new offset program contains the same fundamental flaw that was present in the
2 old one. As several Canadian witnesses explained (and as detailed in our Post-Hearing Brief),
3 Canadian authorities are attempting to reduce total air pollution in this air shed. Abbotsford
4 Post-Hearing Br. at 7-8. There are limited opportunities for accomplishing that reduction by
5 cutting back on existing emission sources. When those opportunities arise, they can either be
6 used to achieve a real (net) reduction in air pollution in the air shed or they can be traded off
7 in exchange for new pollution sources. Canada has made the choice that it wants to attempt
8 to obtain an absolute reduction in air pollution, not tread water by trading off those reductions
9 for new emission sources. See, e.g., TR 3395 (MLA John van Dongen); TR 3412 (Randy
10 Hawes).⁷
11

12 Beyond this fundamental problem, the new proposal has additional problems specific
13 to it. First, the area within which offsets could be obtained is far too large. All parties agree
14 that SE2's air quality impacts will be most pronounced in the immediate vicinity of the plant,
15 that is, within the city limits of Abbotsford and eastward. There is no benefit to 130,000
16 Abbotsford residents if improvements in air quality elsewhere in the air shed occur as their air
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21 ⁷ The amount of offset available by eliminating burning of Fraser River wood debris
22 remains over-stated. See PSD- Comment Letter 18 (Letter from Sagert to Fiksdal (Oct. 5,
2000)) and enclosure 3 thereto (Letter from Debris Management Group (Oct. 3, 2000)).
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1 gets dirtier and unhealthier. See, e.g., Ex. 131 at 28:3-28:20 (SE2's NO_x emissions too large
2 to allow for offset of equal amount in immediate area).

3 Second, the default option in the offset program is for SE2 to pay \$1.5 million in the
4 event that offset projects cannot be found and funded. If real pollution reduction projects
5 cannot be found and funded, then there will be no air quality benefits obtained simply by SE2
6 making a cash payment into an inactive fund. Moreover, even if those funds are used later to
7 reduce air pollution, there has been no evidence supplied (to our recollection) that links that
8 sum of money (\$1.5 million) to projects that would reduce air pollution by an amount equal
9 to that emitted by SE2's plant. To our knowledge, there is no evidence establishing that that
10 size of a financial contribution will result in air pollution reductions elsewhere offsetting SE2's
11 emissions on a one-to-one basis.⁸

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13
14 5 Need for new hearings and taking of additional evidence on air issues

15 Abbotsford has a three part response to the questions posed by the Council in Order
16 No. 756 regarding the need for additional hearings and the taking of additional evidence. First,
17 because SE2 is not using the motion for reconsideration for proper purposes (i.e., to correct
18 an error made by the Council in its decision or because of significant new evidence not
19

20
21 ⁸ If the funds were to be used to finance operational changes, then the funding would have
22 to be sufficient to maintain those operational changes in place for the life of the SE2 project.
23 If the project is assumed to have a life of 50 years, then the \$1.5 million contribution means
24 only \$30,000 is available in any single year on average. It seems highly unlikely that SE2
25 would be able to provide evidence demonstrating that a \$30,000 a year contribution would be
26 sufficient to offset the plant's emissions of nearly three tons a day.

1 previously available), but instead is using the motion to revise its project and reveal its true
2 intentions in an untimely manner, the motion for reconsideration should be denied outright.
3 There is no need to take additional evidence nor to hold additional hearings.

4 Second, to the very limited extent to which SE2 has tried to meet legitimate standards
5 for a reconsideration motion, SE2 has fallen far short of the mark. It has offered only limited
6 new evidence of questionable value and has not provided cogent explanations of how the
7 Council erred in its factual or legal conclusions in Order No. 754. Because SE2 has not met
8 its *prima facie* burden, the motion should be denied without the need for taking further
9 evidence or holding additional hearings.
10

11 Third, if the Council were to determine that SE2 had made a *prima facie* case that the
12 changes it proposes are worth further consideration and/or that the arguments SE2 makes
13 challenging the Council=s original findings and conclusions have some potential merit, then
14 the Council should reopen the hearings on the air issues (including BACT) for the purpose of
15 taking additional evidence and considering additional argument. Abbotsford would want to
16 submit additional evidence not merely to rebut the three exhibits submitted (improperly) by
17 SE2 as attachments to its motion, but also to address other arguments SE2 makes throughout
18 its discussion of the air issues.⁹ For instance, as noted above, SE2 contends that eliminating
19 diesel will result in significant improvements for air quality. Abbotsford is prepared to present
20 expert testimony and argument to the contrary. Not only does the elimination of diesel work
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24 ⁹ With regard to the proffered exhibits (Appendices A-C), Abbotsford would call
25 witnesses to refute SE2’s selective and incorrect characterization of their content as supportive
26 of SE2’s position.

1 only a minor reduction in NO_x and particulates, Abbotsford would be prepared to demonstrate
2 that for certain toxic pollutants (e.g., arsenic and formaldehyde) the total emissions would
3 **increase** if diesel is eliminated.

4 Elimination of diesel has other impacts on the BACT analysis which requires
5 reopening the hearings. The Council will recall that a superior form of reducing NO_x
6 emissions is available through the SCONOX technology. One reason why the SCONOX
7 technology was not favored is that it does not work well with diesel:
8

9 [A] disadvantage of SCONOX is that it is not very compatible
10 with oil firing. Limiting SE2 to the oil storage on-site would
11 large eliminate the potential adverse effects of using SCONOX
12 when S2GF is oil fired, thus increasing the net benefit of using
13 SCONOX. Totally prohibiting the use of oil firing would
14 totally eliminate those potential adverse effects.

15 Exhibit PSD-Comment Letter 18 (letter from Peter Sagert to Allen Fiksdal, Oct. 5, 2000).

16 Abbotsford also would be prepared to introduce additional evidence demonstrating
17 necessary changes in the BACT analysis to take into account non-oil firing and emission
18 control at lower operating temperatures. This also will require new testimony regarding
19 necessary revisions to the dispersion modeling.

20 Additionally, the hearing would need to be reconvened to consider SE2's new
21 contentions regarding ammonia emission limitations. SE2's motion refers to Arecent
22 technological advances@ which enable SE2 to reduce ammonia emissions to a maximum of
23 5 ppm. Motion at 14. However, SE2 provides no evidence or explanation regarding these
24 Atechnological advances.@ It is impossible to determine on this record whether 5 ppm for
25

1 ammonia is the appropriate standard and whether there are any side effects of the new
2 technology which could impact emissions of other pollutants.

3 Testimony also would need to be taken regarding SE2's new proposal to fund an offset
4 program with a one time payment of \$1.5 million. Far more explanation and analysis is
5 required to determine what air quality impacts such a program would have in the Lower Fraser
6 Valley generally and, more importantly, for those people living in Abbotsford who would be
7 most impacted by SE2's pollution.
8

9 Finally, we adopt the analysis provided by the Department of Ecology in its response
10 to the Motion for Reconsideration regarding the statutory and regulatory bases for requiring
11 additional hearings on air (and water) issues.
12

13 III NOISE

14 The Council's Order recognized the potential for significant adverse noise impacts
15 with respect to SE2's proposal and found that the applicant's analysis of these impacts was
16 insufficient because it was not possible to know whether the facility would comply with
17 relevant legal standards and the Council could not assess whether mitigation construction
18 would be feasible. Order at 39, 42. In its Motion, SE2 proposes noise monitoring for the first
19 time. As discussed at length in Part I of this memorandum, this is not the time for SE2 to be
20 proposing new modifications to its project. The mitigation program is not advanced by SE2
21 on the basis that it suddenly has new evidence available to it which warrants this modification.
22

23 Because the proposed noise monitoring program is something that SE2 could have and should
24 have made a part of its proposal at least 30 days prior to the hearing, it is simply too late for
25

1 SE2 to propose it now in the context of a motion for reconsideration.

2 Even if the Council were to consider the merits of SE2's belated noise mitigation
3 proposal, the Council would find that it does not address the Council's concerns. Expanded
4 noise monitoring (if it is properly designed and implemented) will only detect the magnitude
5 of the problem after it occurs. SE2 did not agree to actually mitigate the impacts, rather it only
6 offers a means to confirm they exist. Motion at 27. Modifying its proposal to provide for
7 monitoring without a commitment to remedy any problem detected is an inadequate basis for
8 reconsidering the Council's decision.
9

10 While the foregoing discussion demonstrates that SE2 has not provided good cause for
11 the Council to reconsider its decision based on the belated offer of a noise monitoring
12 program, if the Council does delve into this issue, there is a need for the hearings to be
13 reopened so that Abbotsford can present evidence responsive to SE2's new proposal. For
14 instance, even if the monitoring program is coupled with a requirement that SE2 eliminate any
15 noise or tonal problems identified by the monitoring, the Council still must consider how long
16 residents would have to suffer with the noise or tone problems before a remedy were devised
17 and implemented.
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20 SE2 proposes a waiting period of up to two months (after plant start-up) before noise
21 monitoring begins. Id. Then, once a problem is found, it will take additional time to diagnose
22 the problem, evaluate possible noise-mitigation alternatives, and make a decision as to what
23 to do. Following that period there will be additional time spent to manufacture and install any
24 additional noise control products that may be required. Additional evidence is required to
25

1 assess the duration of residents= exposure to noise even if a monitoring and remediation
2 program is employed.

3 Abbotsford is prepared to demonstrate that between the time a monitoring program
4 identifies a problem and a remedy is designed and implemented, the residents could be
5 exposed to excessive noise and tones for up to a year or more. Evidence (and argument) are
6 necessary to develop appropriate incentives to assure demonstrated noise problems do not drag
7 on unmitigated for excessively long periods.
8

9 Another major problem with the SE2 proposal requiring additional evidence is the lack
10 of detail with regard to its proposed monitoring plan. There is considerable information
11 missing, the details of which could only be addressed by expert testimony. The main missing
12 element is the duration of the pre- and post-measurements at each location. The proposal gives
13 no measurement duration for each location. For example, Abbotsford would expect to
14 demonstrate that a 5-minute measurement using standard octave bands at each location is not
15 sufficient. Also, the proposal does not indicate how (or whether) the monitoring will take into
16 account variable weather conditions (which can greatly impact sound levels at receiving
17 locations). See, e.g., Ex. 130 at 3 (Lilly Pre-Filed Testimony). The proposal also does not
18 indicate the bandwidth and frequency range of the proposed noise monitoring effort.
19

20 Abbotsford would expect to present testimony on those subjects, too.
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22 The proposal also suggests that the criteria for excessive low frequency noise or tones
23 be an arbitrary decision by the City and County noise regulation staff. Motion at 27. The
24 noise criteria should be objective, not subjective. There are certainly acceptable thresholds
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that can be quantified by experts for both low frequency noise and tones.

In sum, the proposed monitoring program is both too little and too late. It does not provide a legitimate basis for reconsideration. If the Council determines otherwise, the hearings should be re-opened to take evidence on several issues raised by the belatedly offered noise monitoring program.

1 IV THE NEED FOR ADDITIONAL POWER GENERATION

2 In its motion to reconsider, SE2 argues that its plant A will be a substantial part of the
3 solution@ to the energy shortage. Motion at 6. In one sense, this contention has little to do
4 with the Council=s decision (and Abbotsford=s concerns). Fundamentally, the Council=s
5 decision was not founded on a determination that additional power generating supplies were
6 not necessary. Rather, the Council concluded that Sumas is not the right **location** for a new
7 power generating facility of this type and size:
8

9 **Conclusion**

10 * * *

11 One of our principal duties is to ensure that the *location* of
12 energy facilities will produce minimal adverse effects on the
13 environment. We have listened at length to both expert
14 witnesses and to the public and considered thousands of pages
15 of evidence and the FEIS on whether this plant, as proposed, is
16 appropriate **for this location**. In light of the lack of a
17 demonstrated energy benefit to consumers or to others who
18 would suffer the consequences of environmental degradation
19 and the hazards of this plant, **and in light of the nature of the**
20 **location** in which the Applicant seeks to site this facility, we
21 must recommend denial of the application.

22 While the project in the abstract has many positive attributes,
23 **the location is simply not appropriate for this type of**
24 **project for all of the reasons discussed above . . .**

25 While the Council is keenly aware that one of our duties is to
26 ensure that the supply of energy, at a reasonable cost, is
27 sufficient to ensure people=s health and economic welfare, the
28 record before us does not show that this merchant plant, **sited**
29 **in this location**, would serve these goals. For all the reasons
30 discussed in the body of this Order, we cannot recommend to
31 the Governor that this project be approved for site certification.

1 Order at 45 (italics in original; bolding supplied).

2 We have cited to the Council evidence in the record that demonstrates that there are
3 already many other power plants that have received permits that could respond to the energy
4 shortage. See, e.g., Abbotsford Post-Hearing Brief at 19 (citing Exhibit 42 and Exhibit 42.2
5 at 26). Indeed, SE2's witness, James Litchfield, acknowledged on cross-examination that his
6 testimony supportive of constructing this new power generating plant should not be construed
7 as a preference for this particular site. TR 2707.

8 SE2 claims that it is Aone of the only projects positioned to come on line within the
9 next two years.@ Motion at 6. SE2 cites no evidence in support of this contention. SE2 cites
10 no evidence regarding what other facilities are likely to be built; how much power each would
11 generate; and how quickly each would come on line. Without such evidence, there is no way
12 to assess the validity of SE2's claim.

13 Further, SE2 continues to refuse to commit to bring its own facility on line in the next
14 two years. While it states that it is Apositioned@ to come on line within the next two years,
15 it does not commit to do so. To the contrary, both in its original proposed Site Certification
16 Agreement and in its modified proposed Site Certification Agreement, SE2 continues to insist
17 on a ten year Abuild window.@ See Proposed SCA, ' II.B.

18 No one disputes that there is a need for a response to our current energy woes. But that
19 response must be reasoned. The Council is to be commended for its refusal to provide knee
20 jerk approval to any and all energy projects that come before it during these difficult times.

1 The Council rightly recognized that regardless of the extent to which new natural gas fired
2 generating plants are needed, we need to be smart about deciding where to locate them. The
3 Council correctly decided that this site is not the right site.

4 Finally, we turn to the issue of whether there is a need for additional hearings and the
5 taking of additional evidence on this issue. As we stated with respect to the air quality issues,
6 we believe the motion for reconsideration should be denied outright both because it is too late
7 for SE2 to be modifying its proposal and because SE2 has not demonstrated any errors in the
8 Council=s findings or conclusions nor demonstrated the existence of significant new evidence.

9 Nonetheless, if the Council believes that SE2 has made a *prima facie* case that the need (or
10 consistency) issues need further evaluation, then certainly the Council should reopen the
11 hearings to take additional evidence in that regard. The evidentiary hearing would be
12 necessary to test the strength of SE2's currently unsupported assertions like its proposal is
13 Aone of the only projects@ positioned to come on line within the next two years and the extent
14 to which this Atime of severe energy need@¹⁰ demands approval of a new power plant at this
15 particular site.

16 SE2 claims that its plant Awill be a substantial factor in leading to lower energy costs
17 in the region.@ Motion at 6. However, unlike other facilities permitted by EFSEC (or the
18 counties and cities if below EFSEC=s threshold), SE2's point of sale (i.e., the point at which
19 its electricity is delivered onto the grid) will be outside of the United States. Application at

20 ¹⁰ Motion at 1.

1 3.5.2. Consequently, it is questionable whether SE2's power sales would be subject to price
2 controls that have been discussed in the wake of recent price run ups. The hearings should be
3 reopened to take evidence on that issue, too.

4 V CONCLUSION

5 For the foregoing reasons, the Motion for Reconsideration should be denied. If, to the
6 contrary, the Council believes that SE2 has made a *prima facie* case for reconsideration of any
7 of its contentions, then the hearings should be reopened so that a full record can be made with
8 regard to those matters.
9

10 Dated this _____ day of March, 2001.

11 Respectfully submitted,

12 BRICKLIN & GENDLER, LLP

13 By: _____

14 David A. Bricklin
15 WSBA No. 7583
16 Attorneys for City of Abbotsford and
17 Abbotsford Chamber of Commerce
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