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3 BEFORE THE STATE OF WASHINGTON  
4 ENERGY FACILITY SITE EVALUATION COUNCIL  
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10 In the Matter of Application No. 99-1:  
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13 SUMAS ENERGY 2 GENERATION  
14 FACILITY  
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**SUMAS ENERGY 2'S  
MOTION FOR RECONSIDERATION**

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20 **I. INTRODUCTION**  
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22 The Applicant, Sumas Energy 2, Inc. (SE2), was surprised and disappointed by the  
23 Council's recommendation against certifying the Sumas 2 Generating Facility (S2GF). As  
24 Council members Carelli and Ray acknowledged, SE2 "set a new standard for preparing  
25 applications for this type of project" and SE2's "offers to mitigate impacts with this facility go  
26 farther than any previous application received by EFSEC for this type of facility." Order at  
27 62. SE2 firmly believes that the evidence in the record supports certification of the S2GF as  
28 originally proposed. Nonetheless, it is clear from the Council's Order that the Council  
29 believes more must be done to mitigate the facility's impacts. The eleven impacts identified  
30 by the Council can all be avoided or mitigated. In this time of severe energy need, the  
31 Council should recommend certification of the project subject to appropriate conditions that  
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1 address those concerns.<sup>1</sup> Accordingly, SE2 asks the Council to reconsider its decision, and to  
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3 issue a new order recommending certification of the S2GF.  
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5 **II. THE COUNCIL SHOULD RECONSIDER ITS**  
6 **ORDER AND RECOMMENDATION**  
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8 SE2 bases its motion for reconsideration on two basic premises. First, the Council's  
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10 conclusion that increasing the state's generating capacity through the development of  
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12 privately owned "merchant" power plants provides little, if any, public benefit is contrary to  
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14 the Council's governing statute, the Council's prior decisions, and the evidence presented in  
15  
16 these proceedings. Second, the Council could address the environmental concerns articulated  
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18 in Order No. 754 by imposing conditions and requirements in the Site Certification  
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20 Agreement (SCA).  
21

22 **A. The Council Should Reconsider Its Premise That "Merchant" Plants**  
23 **May Only Be Approved if They Have Nominal Impact on the**  
24 **Environment and Fully Internalize Environmental Costs.**  
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26 The Council's Order begins with an explanation of its framework for making  
27  
28 decisions. The Council writes that:  
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31 The need and consistency issue poses a broader question of whether an  
32 energy facility at a particular site will produce a net benefit after  
33 balancing the availability and costs of energy to consumers and the  
34 impact to the environment.  
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42 <sup>1</sup> SE2 realizes that there is significant public opposition to the project in British Columbia as  
43 well as some vocal opposition in Washington, but SE2 also appreciates the Council's  
44 acknowledgement that some of the public opposition does not appear to be based on completely  
45 accurate scientific information. *See* Order at 29. To the extent that the public shares the Council's  
46 concerns about the project, the public's concerns would also be addressed through the SCA  
47 conditions discussed herein.

1 Order at 13. In applying this principle to a power plant being developed by a private  
2  
3 company, the Council concluded that:

4  
5           Although merchant plants may eventually be the norm in this country,  
6 they must be built in such a way that the people in a region do not bear  
7 the costs of environmental degradation and the concomitant health  
8 risks without receiving the benefits of the generated power. The  
9 citizens of those areas of the country that are choosing not to site  
10 power generating plants locally, because of their negative  
11 environmental impacts, must not be allowed to impose on the people  
12 of the locale of the site the external and inevitable pollution costs. . . .  
13 While it may be legitimate to accept some environmental impacts in  
14 order to compensate for demonstrated energy benefits, this is not the  
15 case when the locale where the plant is sited is not assured of energy  
16 benefits.  
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20 Order at 14-15. As we understand the Order, the Council has essentially concluded that  
21 increasing generating capacity in Washington through the development of privately-owned  
22 "merchant" power plants provides no benefit to the state or region, and, therefore, the Council  
23 will not recommend certification of a "merchant" power plants unless it has virtually no  
24 impact on the environment and fully internalizes its environmental costs.  
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29           SE2 asks EFSEC to reconsider this starting point for its decision. It is inconsistent  
30 with Washington's Energy Siting Statute and the Council's previous certification decisions,  
31 and it is not supported by the evidence in the record for these proceedings.  
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36           **1. The Council's conclusion that increasing generating capacity will**  
37 **not benefit the state or region is inconsistent with the Facility**  
38 **Siting Statute and the overwhelming evidence presented during**  
39 **these proceedings.**  
40

41           In Order No. 754, the Council acknowledges that more power generating capacity is  
42 needed in Washington, but it nonetheless bases its ruling on the premise that increasing  
43 capacity through the development of privately-owned "merchant" plants would provide no  
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1 benefit to the state or region. This premise is inconsistent with the Council's governing  
2 statute. In RCW 80.50.010, the Legislature expressly found that there is a "pressing need for  
3 increased energy facilities," a finding that the Council agrees remains true today. *See* Order  
4 at 15. With this finding, the Legislature did not distinguish between public and private  
5 facilities, and the Legislature did not differentiate among facilities based upon how their  
6 power output would be marketed. On the contrary, the Legislature understood the basic  
7 economic principle that increasing supply places downward pressure on prices. Implicit in  
8 the Legislature's findings is an understanding that permitting more energy facilities will help  
9 to ensure that "abundant energy" is available "at a reasonable cost." RCW 80.50.010(4).  
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18 In addition to conflicting with the Facility Siting Statute, the Council's conclusion that  
19 there is "only speculative evidence concerning any potential benefits to consumers in terms of  
20 energy costs and availability" is inconsistent with the undisputed evidence contained in the  
21 record of these proceedings. *See* Order at 16. Expert witnesses appearing on behalf of the  
22 Council for the Environment, the Energy Division of OTED, and SE2 all testified that  
23 additional generating capacity is needed in the region.<sup>2</sup> Every available study concludes that  
24 the region currently has an energy deficit and that the deficit is growing.<sup>3</sup> The past and  
25 present Directors of Power Planning for the Northwest Power Planning Council (NWPPC)  
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38 <sup>2</sup> *E.g.*, Tr. 2886, 2888 (Richard Watson, Director of Power Planning for the Northwest Power  
39 Planning Council); Tr. 2984 (Tony Usibelli, Senior Energy Policy Specialist in OTED's Energy  
40 Division); Tr. 3147-48 (Dave Warren, Director of OTED's Energy Division); Ex. 28 at 3-7 (James  
41 Litchfield, former Director of Power Planning for the NWPPC).  
42

43 <sup>3</sup> *E.g.*, Ex. 28.4 at 2-14 (CTED and WUTC report concludes that "the magnitudes [of the  
44 deficits] are increasing and the time available in which to take action to avert a shortfall is become  
45 more limited"); Ex. 28.2 at 2-7 (BPA and PNUCC studies concluded that regional loads exceed  
46 regional resources by 2600 MW to 4000 MW and the deficit is growing); Ex. 42.2 at 3 (Northwest  
47 Power Planning Council study concluded that 3000 MW of additional generating capacity is needed).

1 both testified that the region faces the possibility of supply shortages and blackouts.<sup>4</sup> They  
2  
3 also agreed that insufficient generating supplies were causing price instability.<sup>5</sup> At the time  
4  
5 of the hearing, power emergencies, threatened blackouts and unprecedented price spikes were  
6  
7 occurring,<sup>6</sup> and one need only have occasionally read the newspaper in recent months to  
8  
9 realize how much worse the situation has become. Since last summer, there have been  
10  
11 "voluntary" curtailments and involuntary rolling blackouts along the West Coast; industrial  
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13 facilities have shut down unable to pay power costs; residential customers have faced  
14  
15 dramatic increases in power bills; and Washington's Governor has declared energy alerts to  
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17 permit facilities to generate more power in violation of existing environmental requirements.

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19 The Council acknowledges these undisputed facts in its Order: "The record leaves  
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21 little doubt that the state and the region face a need for increased energy and/or capacity in  
22  
23 the very near term . . . . There is also a consensus that one of the resources of choice for  
24  
25 meeting this need is combined cycle combustion turbines." Order at 15. Nonetheless, the  
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27 Council concludes that "the Applicant has not shown that construction and operation of the  
28  
29 plant will confer direct benefits on an identifiable segment of that market or lead to lower  
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34 <sup>4</sup> *E.g.*, Ex. 28 at 7-8 (James Litchfield testifying that shortages and losses of load are  
35 becoming more likely); Tr. 2570-73 (J. Litchfield testifying that supply was inadequate last summer  
36 and curtailments were necessary); Tr. 2879-81 (Richard Watson testifying that supply was  
37 inadequate last summer, emergencies were declared, the hydro system was operated in excess of  
38 salmon protection requirements in an attempt to meet load, and BPA sought industrial power use  
39 curtailments); Tr. 2886 (R. Watson testifying that the probability of supply problems is  
40 "unacceptably large" and that 3000 MW of new generation is needed in the region); *see also* Ex. 42.2  
41 at 3 (NWPPC study concluding that there is a 24% probability of supply inadequacy).  
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44 <sup>5</sup> *E.g.*, Tr. 2862 (R. Watson); Tr. 2736-39 (J. Litchfield).

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47 <sup>6</sup> *E.g.*, Tr. 2570-72 (J. Litchfield); Ex. 155.3 (article entitled "Puget Sound region on brink of  
blackouts"); Exs. 155.4 and 155.5 (articles describing dramatic price increases and resulting  
industrial shutdowns and lay-offs).

1 energy cost in the state or regionally." Order at 16. Unfortunately, this conclusion fails to  
2 appreciate the magnitude and complexity of the region's power problem. SE2 has never  
3 claimed that construction of the S2GF will alone solve the region's generating capacity  
4 shortage or dramatically reduce power prices. Available studies indicate that 3000 MW or  
5 more of new generation is needed in the region. *See, supra*, n. 3. The 660 MW provided by  
6 the S2GF will be a substantial part of the solution to this deficit, and, therefore, will be a  
7 substantial factor in leading to lower energy costs in the region. Moreover, because the S2GF  
8 is one of the only projects positioned to come on line in Washington within the next two  
9 years, the S2GF presents one of the only "near term" solutions available. Therefore, we ask  
10 the Council to reconsider its conclusion that the S2GF offers no direct benefit to the region in  
11 light of the statutory command to increase energy facilities and the overwhelming evidence in  
12 the adjudicatory record.  
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25 **2. The Council's conclusion that the S2GF must fully mitigate**  
26 **environmental impacts and fully internalize environmental costs is**  
27 **inconsistent with the Facility Siting Statute and the Council's past**  
28 **decisions.**  
29

30 Based on its finding that increasing capacity through "merchant" plants would provide  
31 little benefit, the Council concludes that it could only recommend certification of the S2GF if  
32 the project had virtually no environmental impact and fully internalized its environmental  
33 costs. This conclusion is inconsistent with the Council's governing statute and the Council's  
34 past decisions regarding other power facilities. The Facility Siting Statute directs the Council  
35 to recommend "available and reasonable methods" to minimize environmental impacts; it  
36 does not authorize the Council to impose extraordinary requirements to ensure that a project  
37 has no impact on the environment. *See* RCW 80.50.010. In its Order, the Council contends  
38 that the State Energy Policy requires that it "internalize to the extent feasible the costs of  
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1 impacts." Order at 16. The State Energy Policy, however, contains no such requirement.  
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3 RCW 43.21F.015. Although it emphasizes the importance of maintaining a sufficient supply  
4  
5 of energy, it makes no mention of internalizing environmental costs. *Id.*

6  
7 The Council's previous decisions have never required energy facilities to demonstrate  
8  
9 full mitigation of environmental impacts. As certified, the Satsop, Cowlitz, Chehalis and  
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11 Creston facilities would all have an impact on the environment, despite the Council's  
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13 imposition of reasonable requirements to mitigate the environmental effects. Perhaps most  
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15 striking is the Council's recent recommendation to certify the Chehalis Generating Facility.  
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17 A week before the Council issued Order No. 754, the Council issued an order recommending  
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19 that the Chehalis Project be permitted to operate as a merchant power plant, without making  
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21 any attempt to require the applicant to fully mitigate environmental impacts or fully  
22  
23 internalize all environmental costs. On the contrary, although the Council included several  
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25 reasonable environmental mitigation measures in the proposed Chehalis SCA, it also  
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27 recommended (among other things) that the Chehalis Project be permitted to emit five times  
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29 as much NOx as the S2GF without requiring any offset of its emissions,<sup>7</sup> to operate on diesel  
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31 fuel for twice as long as SE2 had proposed,<sup>8</sup> and to maintain more than twice as much diesel  
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33 storage on site as SE2 ultimately proposed.<sup>9</sup> Indeed, although the Order in the Chehalis case  
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38 <sup>7</sup> The Chehalis facility would emit 9.9 ppm NOx. *See* Council Order No. 753 at 22. The  
39 Chehalis facility is permitted to emit 795 tons of NOx per year, whereas the S2GF, without diesel  
40 firing, would emit only 151 tons per year.

41  
42 <sup>8</sup> The Chehalis Draft Amended SCA permits operation on back up diesel fuel for 720 hours  
43 for each turbine (30 days) per year. *See* Draft Amended Site Certification Agreement Between the  
44 State of Washington and Chehalis Power Generating, L.P., Attachment 2 at 2.

45  
46 <sup>9</sup> The Chehalis facility would have two 1.7 million-gallon diesel tanks compared to SE2's  
47 proposal to reduce the size of its diesel tank to 1.5 million gallons. *See* Council Order No. 753 at 6.

1 mentions the Council's desire to have the project internalize its environmental costs, the only  
2  
3 actual attempt the Council appears to have made to do so is the requirement that the applicant  
4  
5 offset less than 8% of the greenhouse gas emissions from that facility, an amount less than  
6  
7 the Council originally planned to require. *See* Council Order No. 753 at 28; Order No. 752 at  
8  
9 22-24 (Dec. 5, 2000).

10  
11 In its previous decisions, the Council has recognized its statutory duty to meet the  
12  
13 pressing need for increased energy facilities and has drawn an appropriate balance in  
14  
15 permitting facilities and requiring reasonable mitigation of environmental impacts. In this  
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17 case, however, the Council has not done so, despite the acknowledgment of some Council  
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19 members that SE2's environmental protection and mitigation efforts have gone far beyond all  
20  
21 previous applicants. *See* Order at 62-63 (Councilmembers Carelli and Ray concurring).

### 22 23 **3. Need and Consistency Requirements**

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25 Although the Council's basic approach is inconsistent with its governing statute, its  
26  
27 prior decisions, and the evidence in the record in this case, if the Council is concerned about  
28  
29 operation of the S2GF as a merchant plant, SE2 is prepared to accept as conditions in the Site  
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31 Certification Agreement "need and consistency requirements" similar to those EFSEC has  
32  
33 included in previous SCA's. They would require as follows:

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35 1. **Need.** Prior to beginning construction of the S2GF, SE2 will  
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37 enter one or more power purchase agreements that provide in the  
38  
39 aggregate for the purchase and sale of at least 60% of the design  
40  
41 capacity of the S2GF. Any such power purchase agreement shall have  
42  
43 a term of at least five (5) years.

44  
45 2. **Consistency.** SE2 will ensure that at least one of the following  
46  
47 conditions is satisfied prior to beginning construction of the S2GF.  
For purposes of this provision, "Purchaser" means any entity that has  
entered a power purchase agreement with SE2, for a term of at least

1 five (5) years, providing for the purchase and sale of more than 40% of  
2 the S2GF's design capacity:  
3

4 a. If the Purchaser has adopted an integrated resource plan:  
5 (a) the project is of the type included in the Purchaser's preferred  
6 resource acquisition strategy; (b) the plan has reviewed commercially  
7 available supply and demand side resources and evaluated them on a  
8 consistent basis; (c) the plan was developed with public participation;  
9 and (d) the plan was reviewed by the utility's regulatory body.  
10

11 b. If the Purchaser has not formally adopted an integrated  
12 resource plan: The Purchaser has reviewed commercially available  
13 supply and demand side resources, or is located in the service territory  
14 of a utility that has an integrated resource plan meeting the criteria set  
15 forth in section 2.a. (above), or the project is consistent with the  
16 priorities and principles expressed in the relevant Northwest  
17 Conservation and Electric Power Plan.  
18  
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21 **Notice:** At least 60 days prior to beginning construction of the S2GF,  
22 SE2 shall provide EFSEC with sufficient evidence to enable EFSEC to  
23 determine that SE2 has satisfied its obligations under this agreement  
24 relating to need and consistency. Within 30 days after receiving such  
25 evidence, EFSEC shall determine whether such obligations have been  
26 satisfied. EFSEC's failure to make an express determination within  
27 30 days shall be deemed to be a determination that the obligations have  
28 been satisfied.  
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31  
32 *See* Draft SCA Art. III § I. The Council included these types of provisions in SCAs for the  
33 original Chehalis Project and the Satsop CT Project,<sup>10</sup> and OTED advocated them in these  
34 proceedings.  
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37  
38 SE2 has always hoped to secure long-term power purchase agreements for a  
39 significant portion of the output of the facility prior to beginning construction, but the nature  
40 of the power market in recent years made power purchasers extremely reluctant to enter into  
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<sup>10</sup> *See* Original Chehalis SCA, Attachment 7; Satsop SCA, Amendment No. 3 at 3-4.

1 long-term power purchase agreements. At the time of the hearing, SE2 was very concerned  
2 that requirements to enter into long-term agreements would undermine the viability of the  
3 project. The recent instability in the power market, however, has made long-term power  
4 purchase agreements more attractive to power purchasers. Although SE2 continues to  
5 believe that it should not be EFSEC's role to regulate power marketing, the market has  
6 changed such that SE2 now believes it may be possible to comply with the so-called "need  
7 and consistency" requirements. According to Order No. 754, the Council views these  
8 requirements as demonstrating need and consistency and thereby increasing the public benefit  
9 associated with the project. See Order at 13. If the Council believes that the need and  
10 consistency requirements are necessary to justify certification, the Council should include  
11 those requirements in the SCA and reconsider its decision to recommend denial of  
12 certification.  
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25 **B. The Council Could Include Requirements in the SCA to Address Its**  
26 **Concerns About the Project's Environmental Impacts.**  
27

28 The Council Order states that its recommendation for denial of the project is based on  
29 "the totality of negative impacts and dangers," Order at 22, and identifies eleven "negative  
30 impacts and dangers." Although SE2 does not agree that the evidence in the record supports  
31 the Council's findings and conclusions regarding these matters, SE2 notes that the Council  
32 could readily address all of these concerns through conditions placed on certification of the  
33 project that are discussed below. SE2 asks the Council to reconsider its recommendation in  
34 light of those conditions, and, in particular, to consider recommending approval of the project  
35 without the diesel back-up option.  
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1           **1.     Air Quality in the Lower Fraser Valley**

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3           The Council Order states that the proposed facility's impact on the Fraser Valley  
4  
5 airshed was "a significant reason why the Council decided to recommend denial" of the  
6  
7 project. Order at 30. SE2 asks the Council to reconsider its findings and conclusions  
8  
9 regarding air quality, in light of conditions eliminating the diesel back-up fuel option and  
10  
11 requiring emissions offsets. SE2 also asks the Council to reconsider its findings regarding air  
12  
13 quality in light of the specific data regarding air quality in the Fraser Valley airshed  
14  
15 introduced into evidence, and consider the evidence that, without the diesel back-up option,  
16  
17 the facility will have no significant non-mitigatable adverse impacts.

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19                   **a.     Elimination of Diesel Back-up Option**

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21           The evidence and the Council's Order are clear that elimination of the proposed diesel  
22  
23 back-up option would avoid the air quality impacts of concern. The Final Environmental  
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25 Impact Statement (FEIS), which the Council's independent environmental consultant  
26  
27 prepared and the Council unanimously adopted as its own a week before issuing Order No.  
28  
29 754, concluded that:

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31                   Although the proposed project would result in an increase in air  
32  
33 emissions, no significant adverse air quality impacts would occur when  
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35 the facility is fired with natural gas. When the facility is fired with  
36  
37 diesel oil, emissions of PM10 and ozone precursors would contribute  
38  
39 to degraded air quality and visibility in Canada.

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41           FEIS at 3.1-37. The Council's Order similarly focuses upon impacts associated with diesel  
42  
43 firing. *See* Order at 23 ("This plant, as configured by the Applicant with a back-up diesel oil  
44  
45 fuel capacity, emits too much pollution . . . "), 25-27.

46           As the Council acknowledges, SE2 "has made impressive efforts to minimize  
47  
48 environmental impacts, to incorporate the latest emission control technology, and to propose

1 measures to address the environmental concerns for this power plant proactively." Order at  
2  
3 21. In light of the Council's findings and the public opposition to the back-up fuel option,  
4 SE2 proposes that the Council condition its recommendation on the elimination of the  
5 project's back-up fuel option. Doing so may put SE2 at a competitive disadvantage with  
6 other plants approved with back-up fuel capacity and make financing the project more  
7 difficult, but the project is otherwise very attractive and the financing market is currently  
8 positive. Consequently, SE2 is willing to accept certification of the project conditioned on  
9 eliminating the back-up fuel option. *See* Draft SCA Art. I ¶ 3; Art. IV §§ A, D.  
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16  
17 Elimination of the diesel back-up option not only resolves air quality concerns about  
18 the project, but also resolves other concerns, which are discussed below. As noted by  
19 Council members Carelli, Ray and Haars, "[w]ithout backup oil firing, full mitigation or  
20 offsets of the impacts of this project would be very possible." Order at 62, 63.  
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25 **b. Offsets & Emission Reductions**

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27 To the extent the Council has remaining concerns regarding air quality, the Council  
28 could effectively address those concerns by requiring SE2 to obtain or fund offsets in the  
29 Lower Fraser Valley airshed.<sup>11</sup> As the Council acknowledges, SE2 has worked hard to obtain  
30 offsets in the airshed. Order at 21. Although offset opportunities are plainly available, SE2  
31 has been hampered in implementing an offset project by the absence of a developed offset  
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41 <sup>11</sup> Permit conditions could also address the Council's concern regarding start-up and  
42 shutdown. It is not SE2's intention to start up and shut down the facility on a frequent basis. SE2 has  
43 always intended the S2GF to be a base load facility, as opposed to a peaking plant. *See* Tr. 145, 200-  
44 01 (D. Jones). As a low cost producer, it will be in SE2's interest to maximize energy production and  
45 minimize shutdowns. SE2 understood that the Council's PSD permit writer had been in the process  
46 of developing reasonable permit conditions to address this issue, and SE2 assumes a final PSD  
47 permit will address this concern.

1 program in B.C. and the lack of cooperation from Canadian government authorities. Tr.  
2  
3 3537-48 (C. Martin).<sup>12</sup>

4  
5 The Council's Order suggests that, had SE2 been able to identify a specific offset  
6  
7 proposal, that may have tipped the balance in favor of certification of the project. Order at  
8  
9 29. The Order also states that the Council did not treat the Canadian governmental  
10  
11 authorities' positions regarding SE2 as determinative of whether the project should be cited at  
12  
13 this location. Order at 30. Yet, by recommending against the project because Canadian  
14  
15 stonewalling effectively prevented SE2 from securing offsets, the Council effectively granted  
16  
17 Canadian authorities a veto power over the SE2 project.

18  
19 SE2 remains committed to achieving emission offsets in the Lower Fraser Valley, and  
20  
21 remains willing to accept a requirement for offsets in the project's certification. However,  
22  
23 Canadian authorities should not be given an ability to veto the SE2 project by blocking SE2's  
24  
25 efforts to obtain offsets. The solution is for the Council to require SE2 to fund offset  
26  
27 programs in the Lower Fraser Valley implemented by the Washington Department of  
28  
29 Ecology (Ecology) and the B.C. Ministry of Environment, Lands and Parks (MELP) if it is  
30  
31 unable to implement offset projects privately. Specifically, SE2 proposes the following  
32  
33 requirement:

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35 Within twelve (12) months of the effective date of this Agreement,  
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37 SE2 shall submit to EFSEC for approval a plan for offsetting the NO<sub>x</sub>  
38  
39 and particulate matter (PM) emissions from the S2GF by reducing  
40  
41 actual emissions in the Fraser Valley airshed. For purposes of this  
42  
43 provision, the "Fraser Valley airshed" is defined as the triangle-shaped  
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45 Fraser Valley delta, including both United States and Canadian  
46  
47 territory, between the Strait of Georgia and the City of Hope, bounded

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46 <sup>12</sup> SE2 has also explored offset opportunities in Whatcom County. However, until the  
47 project is permitted many local industries are unwilling to enter into serious discussions with SE2.

1 on the north by the Coastal Mountains, and on the south by the  
2 Cascade Mountains to the northern slope of the Alger Hills south of  
3 Bellingham. In the event that SE2 is unable to privately negotiate and  
4 implement offset projects, SE2's obligation under this provision will be  
5 deemed satisfied by the payment of U.S.\$1,500,000 at the  
6 commencement of operations into a fund to be administered jointly by  
7 the Washington Department of Ecology and the British Columbia  
8 Ministry of Environment, Lands and Parks and to be used for the  
9 improvement of air quality in the Fraser Valley Airshed.  
10

11  
12 *See* Draft SCA Attachment 6 Part IV § B.<sup>13</sup>  
13

14 With this requirement, SE2 would continue to try to identify and implement offset  
15 projects in the airshed, but if SE2 were ultimately unable to do so, SE2 would nonetheless  
16 pay the full price of environmental mitigation by funding air quality efforts jointly  
17 coordinated by Ecology and MELP. Canadian government representatives have readily  
18 acknowledged that Canadians must take responsibility for addressing existing emissions  
19 sources in the Fraser Valley before they complain about facilities such as SE2. Ex. 162.10  
20 (D. Anderson letter). SE2's contribution could assist these efforts by funding new or existing  
21 air quality programs, such as the programs to end wood debris burning in the Valley and to  
22 retrofit old boilers within the Valley discussed during the hearing. The boiler retrofit  
23 program alone would eliminate more than three times the NOx emissions from SE2 at a cost  
24 of only approximately CAN \$3 million. Tr. 3542 (C. Martin). The wood debris burning  
25 program could be initiated for only about CAN \$750,000. Tr. 157 at 24 (C. Martin). With  
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43 <sup>13</sup> SE2's offset proposal continues to focus on NOx and PM because those appear to be the  
44 pollutants of concern. In its Order, the Council criticizes SE2 for failing to propose offsets of SO2,  
45 VOCs and CO2 emission. Order at 29. However, not even opponents of the project have expressed  
46 concern about SO2 and VOCs. *See* Ex. 162.12 (Joint Technical Report). SE2 has proposed to offset  
47 CO2 emissions as part of its greenhouse gas offset proposal.

1 SE2's US \$1.5 million, MELP and Ecology could implement air quality programs that would  
2  
3 make significant long-term improvements in air quality in the Lower Fraser Valley.

4  
5 In addition, recent technological advances now enable SE2 to reduce ammonia  
6  
7 emissions from the facility to a maximum of 5 ppm. SE2 is willing to accept a 5 ppm  
8  
9 ammonia limit in its PSD permit, and the Council could also include the following condition  
10  
11 in the SCA:

12 Ammonia emissions shall not exceed 5 ppm.

13  
14 See Draft SCA Attachment 6 Part IV § B.

15  
16 The SE2 facility is already the cleanest facility ever proposed in Washington State,  
17  
18 and perhaps the United States. The further mitigation proposals outlined above are  
19  
20 substantial and unprecedented. The Council should reconsider its decision on air quality  
21  
22 impacts and recommend approval of the project subject to those conditions.  
23

24  
25 **c. Air Quality Impacts**

26  
27 Although SE2 is willing to eliminate the diesel back-up option and commit to offsets  
28  
29 to resolve the Council's air quality concerns, SE2 believes that the Council's findings and  
30  
31 conclusions regarding air quality in the Lower Fraser Valley are incorrect. Throughout the  
32  
33 EFSEC proceedings, the Council heard conclusory characterizations of the air quality in the  
34  
35 Fraser Valley by opponents, public officials, public speakers, the media and even by experts.  
36  
37 The Council appears to have accepted those repeated characterizations as truth, but we ask  
38  
39 the Council to reconsider its findings based on the specific data introduced into evidence.

40  
41 First, the mantra of SE2 opponents that the Lower Fraser Valley has the second worst  
42  
43 air quality in Canada is unfounded. The BC Ministry of Environment, Lands and Parks,  
44  
45 Environment Canada, and the Greater Vancouver Regional District, in their report assessing  
46  
47 the air quality impacts of the SE2 facility, acknowledged that "[a]ir quality in the Lower

1 Fraser Valley is generally quite good compared to other urban areas of similar size in  
2  
3 Western North America." Ex. 162.12 at viii ("Joint Technical Report"). This statement and  
4  
5 the data presented in the Joint Technical Report directly refute the notion that the Lower  
6  
7 Fraser Valley has the second worst air quality in Canada (worse than major metropolitan  
8  
9 areas surrounding Quebec, Montreal, Ottawa, Toronto, and Windsor (adjacent to Detroit)).<sup>14</sup>  
10  
11 Rather, the conclusion by MELP, Environment Canada, and the GVRD supports testimony in  
12  
13 the record that the Lower Fraser Valley has better air quality than numerous air sheds in  
14  
15 British Columbia, and throughout Canada, including the Buckley Valley, and in Washington,  
16  
17 including Seattle, Lacey, Yelm, Black Forest, and Olympia, as but a few examples. Tr. 3642-  
18  
19 43 (Hansen); Tr. 3595-97, 3619 (Hrebenyk).<sup>15</sup> The Lower Fraser Valley may have some  
20  
21 topographically unique features, but the air quality in the Lower Fraser Valley is not unique  
22  
23 or extraordinary.<sup>16</sup> This point is particularly important because the Council concluded that  
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28  
29 <sup>14</sup> As noted in the Council's Order, the Joint Technical Report also states that "air quality in  
30 the Lower Fraser Valley and *many other parts of British Columbia* is frequently in the range where  
31 effects on health have been demonstrated." Order at 24 (emphasis added) (citing Joint Technical  
32 Report, Ex. 162. at 12 at ix). This is of little surprise as the levels at which health effects have been  
33 demonstrated are exceeded even in the most pristine, remote environments across Canada and British  
34 Columbia. Ex.162.12 at 17 ("Hence, even background or naturally occurring levels of ozone may be  
35 in the range where effects on health have been found."); Tr. 3613 (Hrebenyk).  
36

37  
38 <sup>15</sup> Claims about the Lower Fraser Valley having the second or worst air quality in Canada  
39 apply only to ozone when measured in one particular manner, and, even then, only "[a]pproximately  
40 1% of the ozone measurements in the eastern LfV exceed the most stringent Canadian objective."  
41 Ex. 162.12 at 15, 18; Tr. 3596 (Hrebenyk).  
42

43 <sup>16</sup> In fact, on February 14, 2001, the medical health officers for the four health regions within  
44 BC's lower mainland released a report concluding that levels of air pollutants in the lower mainland  
45 were lower than other cities of similar and larger size in Western North America. Regarding ozone,  
46 the report elaborated: "The extent to which current ambient levels of air pollutants in the lower  
47 mainland can be further reduced is questionable. For some pollutants, such as ozone, levels in the

1 Sumas was an inappropriate location for the project, Order at 23, yet neither the Council nor  
2  
3 any party to these proceedings identified a location in Washington that would be preferable.

4  
5 Second, rhetoric about potential health impacts from SE2 air emissions is overstated.  
6  
7 The data demonstrates that SE2 will not result in a significant, if any, increase in health risks.  
8  
9 See SE2 Reply Brief at 9-13, and SE2 Post-Hearing Brief at 10-16, and citations therein. The  
10  
11 Council's Order references the Joint Technical Report's statement that "any further worsening  
12  
13 of air quality will increase risks to human health," and states repeatedly that the S2GF would  
14  
15 emit 3 tons of pollutants per day. See Order at 2, 20, 24, 30. Although 3 tons sounds  
16  
17 dramatic, the evidence from Canadian sources, the FEIS, and SE2 modeling agree that,  
18  
19 without oil firing, the emissions from SE2 will not cause appreciable deterioration in ambient  
20  
21 air quality. Ex. 162.12 at vi, 19, 25; FEIS at 3.1-37; see SE2 Reply Brief at 9-13; SE2 Post-  
22  
23 Hearing Brief at 10-16. Recent occurrences in the Lower Fraser Valley support this  
24  
25 conclusion.

26  
27 This winter, the GVRD approved a switch by lower mainland industries and  
28  
29 institutions from use of natural gas to fuel oil, coal, and wood waste to meet their power and  
30  
31 heating needs even though, according to the GVRD, the switch resulted in emissions  
32  
33 increases that could be 20 to 30 times those from SE2. Nonetheless, the GVRD noted that  
34  
35 "[w]hile increased emissions have undoubtedly resulted from fuel oil firing, to date we have  
36  
37 been unable to determine a direct impact on air quality." GVRD Planning and Environment  
38  
39 Committee, Agenda: Special Meeting, January 30, 2001, at 2-3 (Attached as Appendix B).  
40  
41 Ironically, Abbotsford's star witness, *Peter Sagert*, also claimed that the substantial emissions  
42  
43 associated with the recent fuel switching "did not lead to a measurable change in air quality,"  
44

45  
46  
47 lower mainland are much lower than in other cities and in some cases not appreciably different than  
one finds at sites used as remote or background monitoring locations." See Appendix A.

1 and, in fact, the air quality index remained at a level indicating "good" air quality. Fax from  
2  
3 P. Sagert to GVRD, January 30, 2001 (Attached as Appendix C).

4  
5 Third, the belief that anticipated rapid growth in the Abbotsford area should preclude  
6  
7 any further emission sources on the U.S.-side of the border is unjustified. Like Abbotsford,  
8  
9 Sumas hopes to grow in the future, and has planned for such growth in significant part  
10  
11 through full development of its industrial zone. Ex. 80 at 3-4 (D. Davidson). Sumas'  
12  
13 economic growth should not be sacrificed to permit continued economic development north  
14  
15 of the border, particularly when SE2's offset proposal would allow responsible growth to  
16  
17 continue on both sides of the border.

18  
19 Finally, the Council is clearly concerned about public sentiment towards the proposed  
20  
21 power plant.<sup>17</sup> Project opponents have been very effective in spreading their views of the  
22  
23 project and rallying support for their cause. Unfortunately, as recognized in the Council's  
24  
25 Order, the public's concern often reflects inaccurate information. Order at 29. The SE2  
26  
27 project, particularly with the conditions proposed in this motion, will benefit the local  
28  
29 communities, will not degrade air quality, and may in fact make a substantial contribution to  
30  
31 improved air quality in the Lower Fraser Valley. SE2 asks the Council to reconsider its  
32  
33 decision.

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42 <sup>17</sup> Regarding Canadian governmental entities' positions, SE2 is compelled to note that, with  
43  
44 the exception of the City of Abbotsford, all of these entities refused to participate in the EFSEC  
45  
46 process in a way that allowed the applicant any meaningful opportunity to test or question their views  
47  
and positions. The Council has given great weight to the letter received from former B.C. Minister  
of the Environment Joan Sawicki, yet neither Minister Sawicki nor MELP staff were willing to  
appear during the adjudicatory hearings to be subject to cross-examination regarding their  
unsupported assertions.

1                   **2.       Greenhouse Gas Emissions**

2  
3           No federal or state law requires power projects in Washington to offset greenhouse  
4 gas emissions, and unlike the Oregon Energy Facility Siting Council, this Council has not  
5 adopted any regulations that establish standards for assessing greenhouse gas offset  
6 proposals. In its application, SE2 made an unprecedented offer to fund \$1 million in  
7 greenhouse gas offset projects, but the Council has criticized the amount of funding that SE2  
8 proposed as well as SE2's decision not to specify, in its Application, exactly how the funds  
9 would be spent. The Council's Order concluded that "SE2's failure to present a plan that  
10 actually proposes to reduce its projected greenhouse gas emissions, including CO2, thus  
11 contributed to our decision to recommend against site certification." Order at 39.  
12  
13 Unfortunately, the Order does not articulate what sort of offset plan would be acceptable to  
14 the Council.

15  
16           SE2 continues to maintain that the Council should not impose greenhouse gas offset  
17 requirements on highly-efficient combined cycle combustion turbine projects such as the  
18 S2GF. However, if the Council is unwilling to permit the SE2 project without further  
19 greenhouse gas mitigation, the Council should condition its recommendation for certification  
20 on a requirement that SE2 obtain offsets. The Council imposed such a condition in the  
21 Chehalis proceedings over the applicant's opposition. In this case, the Council could follow  
22 the suggestion of OTED and include a provision in the SCA requiring compliance with the  
23 functional equivalent of the Oregon greenhouse gas program monetary path payment  
24 requirement:

25                   SE2 shall mitigate and offset greenhouse gas emissions from the S2GF  
26 according to the monetary path payment requirements established the  
27 Oregon Energy Facility Siting Council, Oregon Administrative Rules  
28 chapter 345, except as otherwise provided herein. Ninety days prior to  
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1 commencing operation of the S2GF, SE2 shall submit for EFSEC's  
2 approval a calculation of the payment that would be required if the  
3 S2GF were subject to the Oregon Energy Facility Siting Council's  
4 Standards for Energy Facilities that Emit Carbon Dioxide. *See* Oregon  
5 Admin. Rules Chap. 345, Div. 24. Upon EFSEC's approval of SE2's  
6 calculation, SE2 shall make the first of five equal payments totaling  
7 the amount due under this provision to the Oregon Climate Trust. SE2  
8 shall make each of the four subsequent payments on annual intervals.  
9

10  
11 *See* Draft SCA Attachment 6 Part IV § C.  
12

13 As the Council is aware, the Oregon greenhouse gas program requires a project  
14 developer to pay \$0.57 per ton of CO2 over a net CO2 emissions rate of 0.675 pounds of  
15 CO2 per kilowatt hour of net electric power output (with CO2 emissions and net electric  
16 power output measured on a new and clean basis). OAR 345-024-0550; 345-024-0560(3).  
17 The developer makes the funds available to a qualifying organization, such as the Oregon  
18 Climate Trust, to implement offsets. ORS 469.503(2)(d); OAR 345-024-0710. Although the  
19 Oregon statute and regulations also permit power plant developers to implement their own  
20 offset projects, the ability to satisfy the statutory and regulatory requirements through the  
21 monetary path makes sense because power plant developers often lack the expertise to  
22 identify and implement effective offset programs. SE2 is not an expert in such matters, and  
23 therefore believes that any requirement the Council might impose to offset greenhouse gas  
24 emissions should provide a monetary path to allow SE2 to satisfy the requirement by funding  
25 the work of an organization, such as the Oregon Climate Trust, that is an expert in identifying  
26 and implementing greenhouse gas offsets. Ex. 121 at 20-21 (P. West); Tr. 2210-12 (P.  
27 West).  
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43 Needless to say, the requirement outlined above would go far beyond any greenhouse  
44 gas offset requirement the Council has imposed to date. Indeed, prior to this year, the  
45 Council had never required greenhouse gas offsets as a condition for certifying a power  
46  
47

1 project. In its recent decision regarding the Chehalis project, the Council required the  
2 applicant to develop a plan to offset greenhouse gases for the first time, but required the  
3 offset of less than 8% of the facility's total greenhouse gas emissions. *See* Draft Amended  
4 Chehalis SCA at 19.  
5  
6

7  
8  
9 **3. Water Quantity**

10 Uncontroverted evidence in the record demonstrates that the City of Sumas possesses  
11 sufficient water rights to supply water to the S2GF, that the City intends that volume of water  
12 to be used by future industrial customers (whether or not it is SE2), that withdrawal of water  
13 for the S2GF would not deplete the aquifer, and that eight years of pump tests show that  
14 withdrawal of water for the S2GF will not impair well owners' ability to fully exercise their  
15 water rights. *See* SE2 Post-Hearing Brief at 18-19 and citations therein. If any well owners  
16 suffered impairment of their water rights, they would already have legal recourse to remedy  
17 that impairment under the laws ordinarily governing water rights in this State. SE2 does not  
18 believe that the Council should second guess the City's decision regarding the use of its water  
19 rights, or that the Council should require SE2 to provide broad mitigation for use of water  
20 consistent with the City's valid rights.  
21  
22

23 Nonetheless, the Council's concerns could be remedied easily by placing additional  
24 conditions in the SCA. To confirm the scope of wells potentially influenced by increased  
25 pumping of water from the City's wellfields and to provide mitigation for any well adversely  
26 impacted by increased water withdrawals for the S2GF, SE2 proposes that the Council insert  
27 the following condition in the SCA:  
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At least twelve (12) months prior to operation, SE2 shall perform a  
baseline survey of all wells within the potential zone of influence  
identified by the Council's Final Environmental Impact Statement  
(approximately a one-mile radius around the City of Sumas' municipal

1 wellfield). The survey shall include wells on both sides of the  
2 international border. SE2 will identify all wells within this zone and  
3 determine their distance from the City of Sumas municipal and May  
4 Road wellfields that will supply water to the S2GF. Where well  
5 construction and geologic information is available for individual wells,  
6 such information will also be collected. With the consent of the well  
7 owners, the water level in each well surveyed will be measured to  
8 identify a background condition.  
9

10  
11 In addition, at least twelve (12) months prior to operation, SE2 shall  
12 install a set of dedicated monitoring wells for the City of Sumas  
13 municipal and May Road wellfields. These monitoring wells will be  
14 outfitted with pressure transducers and data loggers to provide  
15 continual monitoring of the water level response resulting from  
16 wellfield production. The monitoring wells will be located to provide  
17 both near and distant water level responses, according to the wellfield  
18 characteristics.  
19

20  
21 Prior to S2GF operation, SE2 shall also perform a controlled test of the  
22 two City wellfields to confirm the zone of influence from withdrawals  
23 for SE2. Any additional areas of influence identified through this  
24 testing shall be added to the pre- and post-operation well monitoring  
25 network.  
26

27  
28 The continuous measurement of the monitoring wells and quarterly  
29 measurements from wells within the zone of influence baseline survey  
30 will define the water level changes over time that are occurring at these  
31 sites due to seasonal fluctuations and water use patterns prior to  
32 operation of the S2GF.  
33

34  
35 After S2GF commences operation, monitoring of all wells within the  
36 updated potential zone of influence whose owners consented to pre-  
37 operation monitoring will be performed monthly for the first year of  
38 plant operation.  
39

40  
41 At the end of the S2GF's first operational year, SE2 will submit a  
42 report to the Council, providing the monitoring results. If a well is  
43 identified as adversely impacted by the City's increased water  
44 withdrawals, SE2 will submit for the Council's approval a mitigation  
45 plan to replace lost well production capacity and prevent further loss.  
46 Such mitigation plan may include lowering of the pump in the well,  
47

1 providing additional water reserve, well redevelopment or  
2 rehabilitation to improve efficiency of production, drilling a new well,  
3 or paying for hook-up to public water, as warranted and appropriate.  
4

5 After the initial year of operation, monitoring will be performed semi-  
6 annually except any areas of concern noted in the initial annual  
7 summary, which will be monitored more closely. Annual summaries  
8 will be provided to EFSEC for the following four years of plant  
9 operation.  
10

11  
12 *See* Draft SCA Attachment 6 Part V § A.3. This requirement should fully address the  
13 Council's concerns.  
14

#### 15 16 **4. Water Quality** 17

18 In its Order, the Council identifies two concerns regarding water quality. Order at 32-  
19  
20 33. First, the Council expressed concern about the possibility that diesel fuel stored on site  
21 could be released and end up contaminating ground water or surface water near the facility.  
22  
23 By eliminating the back-up diesel option and the on-site storage of diesel fuel, this risk would  
24 be completely avoided. *See* Draft SCA Art. IV §§ A, D.  
25  
26  
27

28 Second, the Council expressed concern that the City's withdrawal of water might  
29 affect contamination in the aquifer. Although the Council mentions the possibility of  
30 unspecified contamination, its concern appears to focus primarily on nitrate contamination.  
31  
32 As the Council is aware, the nitrate contamination in the aquifer is known to be caused by  
33 agricultural practices in British Columbia and Western Whatcom County. *See* Tr. 915 (B.  
34 Clothier). The record is clear that SE2 has nothing to do with causing this or other existing  
35 contamination in the aquifer. Other parties are responsible for this contamination and those  
36 parties should be the ones responsible for remedying any adverse impacts it causes.  
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44 Even though SE2 bears no responsibility for existing contamination in the aquifer, in  
45 its settlement negotiations with the City of Sumas, SE2 has already volunteered to provide  
46  
47

1 the City of Sumas with \$25,000 per year to fund aquifer protection efforts and water rights  
2 acquisition, and SE2 has volunteered to pay for a nitrate treatment facility if such a facility  
3 became necessary. *See* Ex. 4 § 4 (City of Sumas Stipulation). SE2 has done so, not because  
4 it bears any responsibility for existing contamination, but because SE2 has always attempted  
5 to be a "good neighbor" and to help in solving problems otherwise affecting the Sumas  
6 community. *See* Ex. 80 at 5 (D. Davidson); Ex. 155 at 9 (D. Jones).  
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12 The Council's Order suggests, however, that SE2's offers to the City are not good  
13 enough, and that SE2 should remedy existing contamination in the aquifer caused by other  
14 parties. We ask the Council to reconsider this conclusion. The Facility Siting Statute  
15 provides no authority for the Council to require an applicant to mitigate or remedy the effects  
16 of other parties' actions. In fact, the Council has recently acknowledged that it has no  
17 authority to require an applicant to remedy an existing problem caused by other parties.<sup>18</sup>  
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## 25 **5. Wetlands**

26 The Washington Departments of Ecology and Fish and Wildlife were the only parties  
27 to the adjudication that identified wetlands as an issue. Both of those parties entered into  
28 stipulations requiring an expanded wetland mitigation plan that fully resolved their concerns.  
29 Although the Council's Order notes that the wetland issue did not form a basis for its  
30 recommendation, the Council's Order does note that its 401 Certification contractor raised  
31 concerns about the adequacy of the wetland mitigation plan and that the Council was itself  
32 concerned about the sufficiency of mitigation ratios and the adequacy of buffers. *See* Order  
33 at 33. Following the adjudicatory hearing, SE2 continued discussions with the Council's 401  
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44  
45 <sup>18</sup> The Council's Order regarding the amendment to the Chehalis SCA acknowledges that  
46 "the Council cannot require the applicant to remedy the City's waste disposal problem." Council  
47 Order No. 753 at 17.

1 Certification contractor, and was in the process of identifying additional mitigation projects  
2 that would have satisfied the contractor's concerns regarding mitigation ratio and buffers.  
3

4 Unfortunately, the Council apparently instructed its contractor to stop working on the project  
5 before SE2 and the contractor could finalize the supplemental mitigation plan. SE2 is  
6 confident that it would be able to address the concerns of the contractor and the Council  
7 through the 401 Certification process.  
8  
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12 The Council's Order also expresses concern about the location of the proposed oil  
13 tank relative to proposed wetland mitigation. That concern would be avoided by eliminating  
14 the oil back-up option and the associated tank.  
15  
16  
17

## 18 **6. Flood Hazard**

19 SE2 presented the results of detailed flood modeling during the hearing. Ex. 150 at 3-  
20 5 (Carlton). The Whatcom County flood witness, to whom the Council's Order gives great  
21 credence, acknowledges that "[t]he amount of floodwater which would be displaced by the  
22 fill proposed for the Sumas Energy 2 site may not be large enough to significantly affect  
23 flood levels and velocities off-site" and said that unsteady flood modeling should be required  
24 merely to provide "better assur[ance]" that additional mitigation would not be necessary.<sup>19</sup>  
25 Ex. 91 at 4 (Cooper). Nonetheless, the Council Order indicates that the Council would prefer  
26 more detailed flood analysis.  
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36 To satisfy the Council's concern, SE2 proposes requiring such analysis and any  
37 appropriate mitigation in the SCA:  
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<sup>19</sup> As noted in the concurring opinion by Council members Carelli and Ray, elimination of the diesel tank and surrounding berm will further reduce the possibility of flood impacts. Order at 62.

1 In consultation with the Whatcom County Public Works Department,  
2 River and Flood Section and the City of Sumas, SE2 shall perform  
3 unsteady flood modeling of the Site for 10, 25, 50 and 100-year flood  
4 events, and evaluate potential adverse off-site impacts. At least six  
5 months prior to construction, SE2 shall submit for the Council's  
6 approval a report of the unsteady modeling results and  
7 recommendations for reasonable mitigation of any adverse off-site  
8 impacts.  
9

10  
11 *See* Draft SCA Attachment 6 Part V § A.6.  
12

13 **7. Fire Risk**  
14

15 The Council's Order expresses concerns about risk of fire associated with the large  
16 diesel storage tank at the facility site. *See* Order at 42-43. This perceived risk is avoided by  
17 eliminating the back-up fuel oil option and the on-site storage tank. *See* Draft SCA Art. IV  
18 §§ A, D.  
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22  
23 **8. Noise**  
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25 The Council's Order identified concerns regarding the adequacy of the noise analysis  
26 for the SE2 facility and post-construction mitigation. Whatcom County's witness, Ioana Park,  
27 a specialist in environmental noise studies, testified that the noise analysis for SE2 is  
28 "thorough and consistent with professional standards," the "[m]easurement and analysis  
29 methodologies and mitigation approaches are appropriate for the purpose of the study," and  
30 "the analysis addresses all main acoustical concerns related to the project, with one  
31 exception . . . the consideration of low frequency noise, which is not regulated by  
32 Washington State." Ex. 92 at 1, 2 (Park). Mr. Lily, Abbotsford's witness acknowledged that  
33 low frequency noise and tones can be mitigated after construction. Tr. 2270-71. SE2  
34 therefore disagrees with the Council's findings.  
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1           Nonetheless, SE2 has previously committed to perform pre- and post-operation  
2  
3 monitoring to assess the plant's compliance with noise regulations and is willing to accept an  
4  
5 expanded monitoring requirement. *See* Ex. 4 § 4 (City of Sumas Stipulation). To address the  
6  
7 Council's additional concerns regarding SE2's noise analysis and impacts of low frequency  
8  
9 noise and tones, SE2 proposes that the Council consider including the following condition in  
10  
11 the SCA:

12  
13           SE2 will monitor sound levels before construction and after operation  
14 of S2GF. In addition to monitoring sound metrics related to  
15 demonstrating compliance with County and City noise regulations,  
16 SE2 will evaluate low frequency sounds and tones. The monitoring  
17 shall include a minimum of 12 locations up to a distance of 3.5 miles  
18 from the plant. SE2 will select measurement locations in concert with  
19 City of Sumas or Whatcom County staff, focusing on residential  
20 locations.  
21

22  
23           Post operational noise measurements shall begin within two months of  
24 the commencement of operation. If monitoring indicates that the plant  
25 is not in compliance with City and County noise regulations or that  
26 S2GF generates low frequency sounds or tones that City and County  
27 noise regulation staff jointly agree are reasonably objectionable, SE2  
28 engineers will investigate the source of the noise and identify one or  
29 more means of mitigating the noise. At the end of the S2GF's first  
30 operational year, SE2 will submit for the Council's approval a report  
31 providing the pre- and post-operation monitoring results and any  
32 mitigation plan found to be necessary.  
33  
34

35  
36           Once post operational monitoring indicates that the plant is in  
37 compliance with City and County noise regulations and that there is no  
38 reasonably objectionable low frequency noise or tones, the noise-  
39 monitoring program will be deemed complete.  
40

41  
42 *See* Draft SCA Attachment 6 Part IV § A. This requirement should fully address the  
43  
44 Council's concerns.  
45  
46  
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1           **9. Diesel Supply & Pricing**

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3           The Council's Order expresses concern that the use of back-up diesel fuel may  
4 adversely affect diesel supply and pricing. *See* Order at 43. Elimination of the diesel back-  
5 up option would resolve this concern. *See* Draft SCA Art. IV §§ A, D.  
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9           **10. Traffic**

10           The Council's Order expresses concern about the impacts associated with transporting  
11 diesel fuel to the facility site. *See* Order at 43-44. These risks would be fully mitigated by  
12 eliminating the back-up diesel fuel option. *See* Draft SCA Art. IV §§ A, D.  
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15           **11. Site Restoration**

16           During the hearing, SE2 witnesses testified that a combined-cycle natural gas-fired  
17 power plant was fundamentally different than a nuclear facility. Tr. 3174 (C. Martin).  
18  
19 Although nuclear facilities present the difficult and expensive problem of addressing  
20 radioactive waste and contamination, facilities such as the S2GF present little risk of  
21 hazardous substance contamination and leave a valuable developed site that is capable of  
22 being used for a variety of industrial purposes at the end of the power plants' useful life.  
23 Ex. 157 at 34 (C. Martin); Tr. 3174 (C. Martin). *See also* Tr. 139-40 (D. Jones). This  
24 evidence was unrefuted. In fact, no witness explained how "the public" or "the taxpayers"  
25 might be forced to pay for site restoration. On the contrary, the only testimony presented  
26 indicated that SE2 would maintain at least ten million dollars of pollution liability insurance  
27 that could be used to address an hazardous substance contamination – a possibility that is  
28 even less likely now that SE2 has proposed eliminating the large oil storage tank from the  
29 site. Tr. 1889 (M. Woltersdorf). Nonetheless, the Council's Order concludes that SE2 has  
30 not provided sufficient financial assurance regarding site restoration.  
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1 SE2 suggests that the Council could address its concern by including the following  
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3 requirement in the SCA:

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5 SE2 is responsible for site restoration pursuant to Council rules. At  
6 least ninety (90) days prior to commencement of construction, SE2  
7 shall present to the Council its initial site restoration plan, which will  
8 provide for the funding of site restoration at the end of the S2GF's  
9 useful operating life or in the event of the S2GF being terminated  
10 before it has completed its useful operating life. Such funding shall  
11 include pollution liability insurance coverage in an amount not less  
12 than ten million dollars (\$10,000,000), and a site closure bond in an  
13 amount to be determined and justified in the site restoration plan  
14 submitted for the Council's approval. SE2 shall submit a more detailed  
15 site restoration plan at a later date, consistent with the Council's rules.  
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18  
19 *See* Draft SCA Art. III § H. Such a provision is consistent with the recommendations of  
20 other parties and would go much further than requirements the Council has included in past  
21 SCAs. *See* Satsop SCA § II.G.; Proposed Amended Chehalis SCA § III. I.  
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## 24 **12. Seismic Risks**

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26 Lastly, although not a consideration in the Council's Order, Counsel for the  
27 Environment and Whatcom County recently raised concerns regarding seismic risks at the  
28 proposed SE2 site based on work by Dr. Easterbrook. As the evidence during the  
29 proceedings demonstrated, the site is in an area classified as seismic zone 3, and the facility  
30 will be designed to seismic zone 3 standards. Tr. 1886-87 (Woltersdorf). Concerns about  
31 seismic risks have focused on the diesel storage tank at the site, which SE2 now suggests the  
32 Council eliminate. Nonetheless, in light of their concerns, SE2 suggests the Council consider  
33 the following additional condition be included in the SCA:  
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43 **Prior to construction, the Sponsor shall perform a probabilistic**  
44 **seismic hazard analysis (PSHA) based on site specific geologic**  
45 **conditions. In the final project design, the Sponsor shall**  
46 **develop site specific seismic design criteria for the S2GF for**  
47

1 foundation and major equipment design. Such design  
2 criteria shall be developed based on the results of the PSHA,  
3 and, at a minimum, the proposed facility and water pipelines shall  
4 be designed to comply with Seismic Zone 3 standards of the Uniform  
5 Building Code (UBC).  
6

7  
8 *See* Draft SCA Art. V § B-2. This condition should resolve any remaining concerns about  
9 unknown seismic conditions at the Site.  
10

#### 11 **IV. THE COUNCIL NEED NOT REOPEN THE HEARINGS**

12  
13 The Council should reconsider its prior decision, and recommend certification of the  
14 S2GF subject to the conditions addressed above if it deems them necessary, without  
15 reopening the hearings. Although the other parties should have an opportunity to respond to  
16 this motion, reopening the hearings is neither required, necessary, nor appropriate. The  
17 Council's governing statute plainly authorizes the Council to include appropriate mitigation  
18 requirements in its draft SCA, and all of the possible mitigation requirements discussed  
19 above were already discussed by parties and witnesses in the proceedings before the Council.  
20  
21

22 The Energy Facility Siting Statute not only authorizes, but directs, the Council to  
23 develop reasonable requirements to minimize the project's impacts and to incorporate those  
24 requirements into its draft SCA. RCW 80.50.110 directs the Council "to include conditions  
25 in the draft certification agreement to implement the provisions of this chapter, including but  
26 not limited to, conditions to protect the state or local government or community interests  
27 affected by the construction or operation of the energy facility . . . ." The Council's  
28 regulations acknowledge the authority to condition approval on the imposition of mitigation  
29 requirements. WAC 463-47-110(2)(b)(i). Indeed, the Council has always maintained that it  
30 has authority to include conditions in a proposed site certification agreement that are  
31 designed to minimize and mitigate a proposed project's impact. In fact, during the course of  
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1 the adjudicatory hearings concerning the S2GF, the Council emphasized that it had the  
2 authority to include conditions in the site certification agreement that went beyond those  
3 advocated by any party to the proceedings. *See, e.g.*, Prehearing Order No. 2, Council Order  
4 No. 744, at 2 ("The Council is not foreclosed from adopting requirements more stringent than  
5 stated in the settlement agreements"); Prehearing Order No.6, Council Order No. 749 at 2  
6 (same); Order No. 754 at 33 (indicating that the Council would have imposed additional  
7 requirements regarding wetland mitigation had it recommended certification).  
8  
9

10  
11 In Order No. 754, the Council expressly acknowledged its ability to condition a  
12 recommendation for certification on additional mitigation requirements. Order at 8. At the  
13 same, time, however, a majority of the Council concluded that there were certain types of  
14 conditions that the Council could not impose. The only condition that the Council majority  
15 appears to place in this category is a condition prohibiting the S2GF from operating on back-  
16 up distillate fuel oil:  
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19  
20 Although the Council is authorized by statute to impose conditions on  
21 the issuance of a Site Certification Agreement, there comes a point at  
22 which a condition so dramatically changes the nature of a project that  
23 it essentially becomes a different project. The Applicant made it  
24 abundantly clear that it does not view removal of the oil tank or oil  
25 backup as a viable possibility. The Council considered the Applicant's  
26 consistent position that it needed to have dual fuel capacity to gain  
27 financing and be competitive. Additionally, the other parties and the  
28 public have responded to this project as an integrated dual fuel facility.  
29 The Council decided that it is not appropriate to consider a  
30 fundamentally different project with a fuel capability different from the  
31 one designed, and applied for, by the Applicant. Therefore, the  
32 Council declines to condition a Site Certification Agreement on the  
33 removal of the oil-burning capability. The Council concludes that it  
34 would be fundamentally unfair to recommend certification of the  
35 project with such a major change without allowing the parties and  
36 public to respond to such a different project.  
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1 Order at 9 (citations omitted). Three council members disagreed with this conclusion. *See*  
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3 Order at 62-63. Taking each of the majority's articulated reasons in turn, SE2 asks the  
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5 Council to reconsider its conclusion on this point.

6  
7 First, eliminating the ability to operate the facility on back-up fuel oil would not  
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9 fundamentally alter the S2GF project. In its application, SE2 proposed to use natural gas as  
10  
11 its primary fuel, but it also sought permission to operate on back-up fuel oil for a maximum  
12  
13 15 days per year.<sup>20</sup> In response to concerns by some parties, SE2 later offered to limit the use  
14  
15 of diesel to a rolling average of 10 days per year. Ex. 157 at 24 (C. Martin); Tr. 331 (D.  
16  
17 Jones). In fact, the back-up fuel is even less important because natural gas is rarely curtailed  
18  
19 more than 3-4 days per year and often not at all. Tr. 129-30 (D. Jones); *see also* Draft PSD  
20  
21 Permit at 5 (restricting oil firing to periods of natural gas curtailment). At most, therefore,  
22  
23 this issue concerns the fuel used at the facility a very small percentage of the time.  
24  
25 Significantly, a Council decision to prohibit oil firing would not result in the S2GF using  
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27 some entirely different fuel that was not considered during the course of the hearing. It  
28  
29 would simply mean that the S2GF would burn natural gas 100% of the time, instead of 97-  
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31 100% of the time. It is difficult to understand why they Council deems this difference as  
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33 "dramatically chang[ing] the nature of [the] project."

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35 Second, the parties to the adjudicatory hearing did not address the project as "an  
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37 integrated dual fuel facility." On the contrary, the possibility of the Council prohibiting  
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42 <sup>20</sup> For convenience, SE2 has routinely referred to this proposal in terms of the number of  
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44 days. Although people often speak in terms of numbers of days, the Council's previous SCA's have  
45  
46 addressed back-up oil firing more precisely in terms of hours of operation per turbine. *See, e.g.,*  
47  
Chehalis SCA, Attachment 2 at 2; Satsop SCA at 2. SE2 followed the example of these prior SCAs  
in drafting its proposed SCA. SE2 did not intend to mislead anyone, and, in fact, would have gladly  
accepted an SCA and PSD permit written either in terms of days or hours.

1 diesel firing was considered during the hearing and expressly advocated by some parties. *See*  
2  
3 Ex. 80-Supplemental at 2 ("the City's ideal scenario would be construction of the project with  
4  
5 single-fuel capability, natural gas fired only"); Post-Hearing Brief of the City of Sumas at 2-4  
6  
7 ("SE2 should be certified for natural-gas fired operation only"); Council for the Environment's  
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9 Post Hearing Memorandum at 8-9 (advocating disapproval of the project, but advocating in  
10  
11 the alternative that "[n]o back-up oil should be permitted"); Post-Hearing Brief of Intervenors  
12  
13 NW Energy Coalition and Washington Environmental Council at 20-21 (advocating  
14  
15 limitations on oil firing). This is not a situation in which the Council is considering an SCA  
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17 condition that the parties never contemplated or discussed. On the contrary, the City of  
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19 Sumas advocated the very outcome now being considered – a Council recommendation in  
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21 favor of the project but conditioned on the elimination of the back-up diesel option.

22  
23 Third, the Council's ability to consider including an SCA condition advocated by  
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25 parties to the adjudication is not affected by the Applicant's testimony regarding the proposed  
26  
27 condition's financial implications. The Council ultimately might decide that a proposed  
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29 condition is inappropriate because its financial implications are disproportionate to its  
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31 benefits. On the other hand, the Council might decide to include a proposed condition  
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33 despite an applicant's testimony about its financial implications either because the Council  
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35 finds that the financial implications will not be as significant as the applicant has claimed, or  
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37 because the Council concludes that the project should not go forward unless it can be built  
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39 subject to the condition. For the Council to instead claim that the Applicant's testimony  
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41 about financial impact somehow deprives the Council of authority to impose condition is  
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43 contrary to the statute,<sup>21</sup> and inconsistent with past Council's decisions.<sup>22</sup>

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<sup>21</sup> *See* RCW 80.50.110.

1 Fourth, fairness does not require the Council to provide parties with an additional  
2 opportunity to present evidence on this subject. The advantages and disadvantages of back-  
3 up diesel operations were fully litigated by the parties during the hearing. Indeed, as the  
4 Council acknowledged, "several intervenors have urged the Council to condition any Site  
5 Certification Agreement on removal of the tank and oil backup." Order at 8. Surely, fairness  
6 does not oblige the Council to allow those intervenors another opportunity to present  
7 testimony before granting their request. Significantly, although some parties advocated  
8 prohibiting diesel firing, no party contended that the Council would be required to hold  
9 additional hearings before imposing such a condition.  
10

11 Fifth, the Council does not require additional evidence to evaluate the implications of  
12 eliminating the back-up diesel option. The existing record provides a clear basis to evaluate  
13 the impact of diesel versus natural gas operation. The Application and draft PSD permit  
14 contain air emissions information that allows the easy comparison of emissions associated  
15 with natural gas versus diesel. *See* Application § 6.1, Ex. 170.1 (Draft PSD Permit).  
16 Moreover, it is clear from the record, the Council's FEIS, and the Council's Order that the  
17 concerns about air quality, diesel spills, fire safety, and diesel truck traffic would be  
18 eliminated by eliminating diesel operations and the diesel storage tank. There is simply no  
19 need to conduct further proceedings before imposing this or other conditions in the SCA.  
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42 <sup>22</sup> In considering other projects, the Council has recommended certain SCA conditions  
43 despite testimony from applicants indicating that the conditions would undermine the project's  
44 competitiveness. For example, in issuing its recent order regarding the Chehalis Project, the Council  
45 decided to impose greenhouse gas mitigation requirements despite Applicant testimony that such  
46 requirements would reduce the economic competitiveness of the facility. *See* Council Order No. 753  
47 at 27-28.

1 Finally, in their oppositions to SE2's motion for a stay, Whatcom County and Ms.  
2  
3 Hoag also argue that the Council could not reconsider its decision based on "changes" to the  
4  
5 project because WAC 463-42-690 does not permit amendments to the application at this  
6  
7 time. This concern is misplaced. SE2 is not attempting to amend its application, rather SE2  
8  
9 is asking the Council to reconsider its decision because the Council could impose conditions  
10  
11 and requirements in the SCA that would fully address the concerns articulated in Order No.  
12  
13 754. The Facility Siting Statute grants the Council the authority to impose conditions and  
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15 requirements on its own initiative, and the Council's regulations and past decisions plainly  
16  
17 acknowledge that authority. In this case, the conditions and requirements at issue have  
18  
19 already been addressed by the parties during the adjudicatory hearings and they would all  
20  
21 reduce, not increase, impacts associated with the project.

22  
23 Ms. Hoag also argues that she would be prejudiced because she has already "gone to  
24  
25 great personal expense" to participate in this process, but ironically Whatcom County  
26  
27 suggests and Ms. Hoag implies that the Council should require SE2 to file a new application  
28  
29 containing additional project conditions and mitigation measures. Starting the process over  
30  
31 from the beginning - with another Application, another EIS, another adjudicatory hearing and  
32  
33 more public hearings – would be far more expensive, time-consuming, and burdensome for  
34  
35 everyone involved. It would also continue to delay an important part of the solution to the  
36  
37 State's acknowledged power needs. Rather than requiring a new application or reopening the  
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39 hearings, the Council should rely upon the record already developed and impose appropriate  
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41 conditions to address the concerns it articulated in its Order.

## 42 43 **V. CONCLUSION**

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45 The Council's Order states: "It is the totality of negative impacts and dangers that has  
46  
47 lead the Council to recommend denial of the application for siting." Order at 22. SE2 has

1 identified conditions and requirements that the Council could include in the SCA to address  
2  
3 all of the "negative impacts and dangers" on which the Council based its denial. As  
4  
5 proposed, the S2GF already set a new standard for minimizing and mitigating environmental  
6  
7 impacts. By imposing the additional requirements outlined in this motion, the Council could  
8  
9 raise the bar further on the environmental measures required in power projects in Washington  
10  
11 State while at the same time fulfilling its statutory mandate to respond to the need for more  
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13 power facilities. For these reasons, SE2 respectfully requests the Council reconsider Council  
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15 Order  
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1 No. 754, and recommend approval of the S2GF to the Governor. A revised Draft SCA  
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3 incorporating the conditions discussed in this motion is filed herewith.

4  
5 DATED: March \_\_\_, 2001  
6  
7

8 **PERKINS COIE LLP**  
9

10  
11 By \_\_\_\_\_  
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