

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

In the Matter of Application No. 99-01

SUMAS ENERGY 2 GENERATION  
FACILITY (S2GF)

MOTION FOR RECONSIDERATION OF  
ORDER 768 BY PARTIES NW ENERGY  
COALITION AND WASHINGTON  
ENVIRONMENTAL COUNCIL;  
WHATCOM COUNTY; AND COUNSEL  
FOR THE ENVIRONMENT

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**I. INTRODUCTION**

The moving parties were disappointed because Council Order 768 accepts the Applicant's limited greenhouse gas emissions mitigation proposal rather than requiring full mitigation as this record documents is both reasonable and necessary. However, we limit the scope of this motion to one aspect of Order 768, namely the failure by the Council to require the applicant to pay an administrative fee as part of the CO2 emissions mitigation requirement.

We ask the Council to adopt the reasoning of concurring Council members Carelli and McShane in supporting a 10% administrative fee. The testimony in the record, both in direct examination and cross-examination, and the referenced Oregon statute clearly substantiate that requiring an administrative fee is a necessary part of an effective CO2 emissions mitigation program. Joint Intervenors NW Energy Coalition and Washington Environmental Council (NWEK/WEC), Intervenor Office of Trade and Economic Development Energy Policy Group (OTED), and Counsel for the Environment (CFE) each referred in their closing briefs to the

necessity of requiring the Applicant to pay an administrative fee. No party, including the Applicant, testified or indicated that this fee is unnecessary or that 10% is an unreasonable amount to charge for administration. Not requiring the Applicant to pay this administrative fee is inconsistent with the Council's stated interest in offsetting greenhouse gas emissions.

The moving parties therefore respectfully request that the Council reconsider its order, pursuant to RCW 34.05.470, and WAC 463.30.335. The Council should amend Order 768 to require a CO2 emissions mitigation administrative fee of 10%, consistent with the administrative fee requirement in the Oregon CO2 standard, findings from the Climate Trust regarding actual administrative costs and good business practices. Reconsideration is the appropriate process to use because the Council made an error in its review of the existing record when it failed to require the applicant to assume responsibility for the administrative fee associated with a mitigation plan implemented by a qualified third party.

## **II. THE RECORD SUPPORTS THE ADMINISTRATIVE FEE**

Peter West's undisputed testimony clearly establishes that administrative costs are a key component of following the monetary path to mitigating CO2 emissions. A qualified contractor must be paid for its work in identifying and selecting appropriate mitigation projects. Absent an appropriate administrative fee requirement, the amount allocated for partial mitigation is further eroded by the costs associated with administration because there is no other entity who will absorb these costs.

Witness West stated, "In addition to the rate per ton set by Oregon EFSC, initially 57 cents and now 85 cents, the law requires the developer to pay an administrative fee to cover costs for contracting and selecting. This fee is roughly an extra 5% of total payments" (Ex. 251

at 7). He went on to tell the Council that “the administrative fee is an essential part of the overall requirement in the Oregon standard” (Id.). Mr. West also discussed problems with setting the administrative fee too low. “The Climate Trust notes that contracting and selection costs appear to be running close to 10%, twice the level currently charged” (Ex. 251 at 8). He added: “not including administrative costs would directly translate into less money going directly to projects and less CO2 offsets actually being acquired”(Id.). No one questioned these statements in opposing testimony or in Mr. West’s cross-exam. His experience and expertise are unquestioned, unchallenged and unrefuted in this record. There is no basis for EFSEC to not accept the assertions. The evidence in the record clearly demonstrates that a 10% administrative fee is necessary.

The Draft Supplemental Environmental Impact Statement (DSEIS) also references the administration fee associated with Oregon’s CO2 standard (Ex. 204 at 3.1-4). Table 3.1-2 provides an estimate of the number of tons of CO2 emitted from the S2GF that would be mitigated under the Oregon standard. The Table further shows that a mere 6% of the S2GF’s CO2 emissions would be offset if the applicant pays \$0.57/ton plus a 5% administrative fee, using an assumed elimination unit cost of \$2 per ton of CO2. These figures are updated further in the Final Environmental Impact Statement (FEIS) dated May 2002. Table 3.1-3 estimates actual emissions mitigated based on \$0.57 per ton and a 10% administrative cost at 2.5% - 5% of emissions **assuming the administration fee is deducted from the actual funds available for mitigation.** There is no explanation for why the administrative fee is added to the amount in the DSEIS and deleted from the amount in the FEIS. The impact however is very clear. As discussed further below, there is no dispute that the administrative fee of 10% is not realistic or

that actual mitigation costs are \$2- \$4 per ton. It is only who pays. This Council is tasked with balancing the costs with the benefits.

The applicant's own witnesses recognize the administrative fee associated with Oregon's monetary path to mitigating CO2 emissions, and incorporate that fee into their analyses (see for example Tr. at 1523, Montgomery; Tr. at 1648, Keefe). Dr. Montgomery goes so far as to say that he is not criticizing the Oregon Trust for the amount of its fee. Even more telling, Mr. Martin agrees that applicants who follow the direct path to mitigation in Oregon internalize the cost of administration, while those who follow the monetary path

pay an additional amount for this purpose.<sup>1</sup> However, when crossed on who should bear this cost necessary for mitigating CO2 emissions in the case of the S2GF, he prefers that it be “borne, paid or experienced by the public” (Tr. at 2246-2247). However, because there is no mechanism that allows the public to pay such administrative costs, the inevitable result of not holding the applicant responsible will be to reduce the emissions offset. If the Council is following Oregon’s example, it must order the applicant to pay necessary administration expenses *in addition to* offset funds as a condition of certification.

### **III. THE COUNCIL SHOULD ORDER THE ADMINISTRATIVE FEE**

The Council states in its Order (p. 60) that it “possesses the legal authority to impose such a payment obligation,” and that in general, it is appropriate for a “Site Certification holder to help pay administrative costs.” WAC 463-47-110 enables the Council to require reasonable mitigation measures to mitigate significant adverse impacts. Administrative fees are an integral component of appropriate and reasonable mitigation requirements. For example, WAC 463-39-105 requires holders of air operating permits to “pay annual fees to recover the costs

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<sup>1</sup> The Council can take judicial notice of the Oregon statute, ORS 469.503 (2)(d)(A) (ii), which provides, in relevant part, that if the applicant elects to meet the applicable carbon dioxide emissions mitigation standard in whole or in part through providing funds in an amount deemed sufficient to produce the reduction in CO2 emissions necessary, then:

At the request of the qualified organization and in addition to the offset funds, the Site certificate holder shall pay the qualified organization an amount equal to 10% of the first \$500,000 of the offset funds and 4.286% of any offset funds in excess of \$500,000. This amount shall not be less than \$50,000 unless a lesser amount is specified in the site certificate. This amount compensates the qualified organization for its costs of selecting offsets and contracting for the implementation of offsets. (ORS 469.503(2)(d)(A)(ii))

This statute was referred to repeatedly in the proceedings before the Council.

associated with program development, monitoring, compliance, and administration of the air operating permit program.”

The Council’s Order indicates that the evidentiary record in this case doesn’t provide a “principled basis” to identify the appropriate level of administrative costs SE2 should bear (Order 768 at 60). However, in addition to Oregon’s statutory formula, there is ample evidence in the record showing that a 10% administrative fee represents the most appropriate level in line with actual costs. Peter West’s testimony is very explicit on the amount needed to fund CO2 emissions mitigation through the Climate Trust. This testimony is unchallenged. All parties, including the Applicant, acknowledge that a fee is required, and only differ on who should pay.

In their post-hearing briefs submitted in January 2002, NWEW/WEC, CFE, and OTED each identified the requisite administrative fee associated with requesting an independent qualified third party to assume responsibility for mitigating CO2 emissions from the S2GF. NWEW/WEC refer to the inadequacy of Oregon’s 5% administrative fee and point to testimony about actual costs being closer to 10% (NWEW/WEC Brief at 12). CFE states, “If the Oregon standard is used, it should be used in its entirety. The rate should be based upon the rate per ton, which exists at the time the facility commences commercial operation so as not to put this Plant at a competitive advantage over plants operating in Oregon and selling into the same market area. Said path shall include the administrative fund and up-front payment based on a stipulation for capacity or default 100% capacity”(CFE Brief at 40). OTED also argues in its Brief that the Council should require the applicant to pay at least a 5% administrative adder,

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stating that “the applicant has not disputed that there will be administrative costs associated with the implementation of mitigation activities” (OTED Brief at 6).

As their concurring opinions demonstrate, Council members Charles Carelli and Dan McShane believe there is sufficient evidence in the record to support an order requiring an administrative fee to accompany the CO2 emissions mitigation requirement. Both write that the Applicant chose the Oregon monetary path as its model, but then did not include the administrative costs in its revised application. Both ask the Council to go beyond the Applicant’s offer to include these fundamental costs. Mr. McShane states that it is his opinion that “based on the record from our hearings, . . .the lack of an administrative fee and the amount of money offered by the applicant are inadequate”(Order 768 at 103). He goes further to offer that “a 10% fee is appropriate and should be part of the costs paid by the Applicant. In the overall cost of building this plant, the administrative fee represents a very small cost to the Applicant” (Order 768 at 104). Mr. Carelli states with regard to mitigation of CO2 emissions, “There is evidence that administrative costs easily equal, and in most instances exceed, ten percent of the costs of providing offsets. The Council should assess administrative fees for conducting mitigation and offset programs, and those fees should be based upon actual costs necessary for any given organization to manage such a program.” (Order 768 at 101)

#### **IV. CONCLUSION**

The applicant must bear the administrative costs of CO2 emissions mitigation. It is not a significant burden for the applicant, and only fair that it, not the public, should pay, as the public is already bearing the environmental costs of the unmitigated CO2 emissions. Just because the applicant did not offer to pay this fee, does not mean the Council cannot require it.

We therefore ask the Council to amend its Order and carry out its mandate to avoid or mitigate environmental damage by requiring an administrative fee as outlined in the concurring opinions of Mr. Carelli and Mr. McShane and the testimony of Peter West. The record is more than sufficient to support a 10% administrative fee requirement.

Signed this 6<sup>th</sup> day of June, 2002, by:

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Roger M. Leed,  
Attorney for NW Energy Coalition and Washington Environmental Council

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Mary Barrett,  
Counsel for the Environment, Washington State Attorney General's Office

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David Grant,  
Whatcom County