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Declaration of Mailing

I certify, under penalty of perjury under the laws of the State of Washington, that on the below date, true and correct copies of this document were sent via U.S. mail to all parties of record as specified by the Council's Service List dated January 8, 2002, at the addresses provided therein. Dated this 14<sup>th</sup> date of June, 2002, at Seattle, Washington

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BEFORE THE STATE OF WASHINGTON  
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of Application No. 99-1:  
  
SUMAS ENERGY 2 GENERATION FACILITY

**SE2'S RESPONSE TO  
MOTIONS FOR RECONSIDERATION**

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## **I. Introduction**

After four months of careful deliberation, the Council unanimously recommended certification of the Sumas Energy 2 (SE2) project. The recommended Site Certification Agreement (SCA) contains numerous requirements, conditions and mitigation obligations that go far beyond established local, state and federal regulatory requirements. In summing up the Council's decision, the Council's Chair emphasized that the SE2 project "sets a new standard of excellence for protection of the environment and the public interest." Nonetheless, intervenors have filed three motions for reconsideration. The motions do not raise any arguments that the Council has not already heard, considered and rejected. The Council should deny the motions and forward its recommendation to Governor Locke.

## **II. Argument**

Intervenors' motions do not provide any legitimate basis for the Council to reconsider its decision. The following sections address each motion in turn.

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### **A. The Council Should Deny the Joint Motion of NVEC, Whatcom County and the CFE Regarding Greenhouse Gas Mitigation.**

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The Northwest Energy Coalition (NVEC), Whatcom County and the Counsel for the Environment (CFE) ask the Council to reconsider its conclusion that SE2's greenhouse gas mitigation proposal is reasonable. They argue that the Council should require SE2 to provide 10% more funding for greenhouse gas mitigation in the form of an "administrative" charge. The Council need not, and should not, reconsider its decision on this issue.

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First, the intervenors' motion presents nothing new to justify reconsideration. On the contrary, the motion repeats arguments previously made in post-hearing briefing. The Council has already considered and rejected these arguments. Indeed, the Council's majority and concurring opinions make clear that Council members debated this very question. At the end of the day, a

1 majority of the Council concluded that requiring mitigation beyond SE2's unprecedented proposal  
2 was not appropriate given the record in this case. Intervenor's motion provides no basis for  
3 revisiting this issue.  
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6 Second, the Council's decision reflects a balancing of the desire to implement greenhouse  
7 gas mitigation measures with the desire to encourage the construction and operation of highly  
8 efficient generating facilities. *See* Order No. 768 at 58-59. The evidentiary record fully supports  
9 this decision. Undisputed evidence demonstrates that increased reliance on gas-fired combined-  
10 cycle combustion turbine facilities for electrical generation is an important part of the solution to  
11 rising greenhouse gas emissions. The U.N. Framework Convention on Climate Change, the EPA,  
12 the U.S. Department of Energy, the International Energy Agency, and the Energy Information  
13 Administration all recommend building more of these facilities.<sup>1</sup> Witnesses sponsored by the  
14 applicant and intervenors alike agreed that SE2's gas-fired combined-cycle design will result in far  
15 fewer greenhouse gas emissions than coal, oil and most gas-fired facilities now operating.<sup>2</sup> Although  
16 a generally applicable greenhouse gas mitigation requirement would create a strong incentive to shift  
17 from existing high-emitting facilities to low-emitting facilities like SE2, no federal or state law  
18 establishes a generally applicable requirement. This Council does not have the ability to impose  
19 mitigation obligations on facilities that fall below the Council's 350 MW jurisdictional threshold, that  
20 have previously been sited in Washington, or that are located or proposed out-of-state. *See, e.g.,*  
21 FSEIS at 3.1-10. As a result, imposing mitigation requirements on facilities like the SE2 places  
22 those facilities at an economic disadvantage, which is both unfair and counterproductive from the  
23 standpoint of reducing greenhouse gas emissions. *See generally*, Ex. 272 at 5-6, Ex. 270 at 10-  
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45 <sup>1</sup> *See, e.g.,* Ex. 222.8 at 8; Ex. 222.9 at 10; Ex. 272 at 3; Tr. 1716-17; Tr. 1470-71.

46 <sup>2</sup> *See, e.g.,* FSEIS at 3.1-4; Ex. 222.8 at 4; Ex. 222.12; Tr. 1707-11.  
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1 11; Tr. 1455-56, 1561-65, 2163-65, 2123-25, Prev. Tr. 2891-93. Indeed, the FSEIS adopted  
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3 by the Council concludes:

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5 Requiring greenhouse gas emission fees only on combined-cycle proposals  
6 under EFSEC jurisdiction could impose a slight financial penalty for the  
7 newer, more efficient plants compared to the older, less efficient plants  
8 already operating. If the greenhouse gas fees were applied as an up-front  
9 capital cost (as in the case of SE2's proposal for the S2GF plant), it is  
10 conceivable that the cost increase could discourage investors and thus delay  
11 the construction of the new power plants, thereby favoring operation of the  
12 older plants. Alternatively, if the greenhouse gas fees were applied as a  
13 variable "emission tax" based on the plant's actual emissions, then it could  
14 incrementally increase the dispatch cost of the new power plants, thus  
15 favoring increased hours of operation of existing power plants with higher  
16 emissions. It is conceivable that either scenario could result in higher  
17 greenhouse gas emissions within the region.  
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22 FSEIS at 3.1-10 to 3.1-11. Recognizing the downside of imposing mitigation requirements on low-  
23 emitting generating facilities like SE2, the Council struck an appropriate balance by accepting SE2's  
24 unprecedented mitigation proposal and not imposing further mitigation obligations.  
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28 Third, the intervenors' proposed "administrative" charge is nothing more than a request for  
29 more money. In their motion, the intervenors argue that because the Climate Trust has had  
30 administrative expenses equal to about 10% of the mitigation funds it administers, a project  
31 developer would have to pay for 110% of the cost of its offsets in order to "fully offset" a project's  
32 emissions. This argument misses the point. The Council rejected NWECC's and the CFE's proposal  
33 that SE2 be required to "fully offset" greenhouse gas emissions – a proposal which, according to the  
34 intervenors' witnesses, would cost \$130 to \$400 million. *See* Ex. 270 at 15; Ex. 273 at 2. Instead  
35 of requiring "full offset," the Council decided "*to begin*" to address the issue, by accepting SE2's  
36 proposal as "reasonable" in light of the balance discussed above. *See* Order No. 768 at 57-59. In  
37 this context, a request for a 10% administrative surcharge is simply a request that SE2 pay  
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1 approximately \$800,000 in addition to its unprecedented offer to provide \$8 million in offset  
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3 funding. Increasing the mitigation requirement by almost a million dollars would further disadvantage  
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5 SE2 relative to all of the existing facilities in the region that emit more greenhouse gases and are not  
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7 required to implement *any* mitigation. According to the Council's own consultants, doing so would  
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9 risk increasing regional greenhouse gas emissions.<sup>3</sup>

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11 The Council has already considered intervenors' arguments, and rejected them in a decision  
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13 that is fully supported by the evidentiary record. The Council should, therefore, deny the motion for  
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15 reconsideration.

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17 **B. The Council Should Deny the Joint Motion of Whatcom County, Abbotsford**  
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19 **and the CFE Regarding Air Emission Offsets.**

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21 The joint motion of Whatcom County, Abbotsford and the CFE similarly rehashes issues  
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23 that the Council has already considered and resolved regarding air emission offsets. The record  
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25 before the Council contains overwhelming evidence that the project's emissions will not adversely  
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27 affect air quality, public health or visibility. *See generally* SE2 Post-Hearing Brief at 9-28; SE2  
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29 Reply Brief at 28-45. SE2 nonetheless volunteered to try to implement projects to fully offset its  
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31 NO<sub>x</sub> and PM<sub>10</sub> emissions, or to provide \$1.5 million in funding for air quality improvement in the  
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36 <sup>3</sup> Moreover, contrary to intervenors' claims, the record is sparse and inconclusive regarding  
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38 the administrative expenses that are actually reasonable, appropriate and necessary in connection with  
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40 implementing greenhouse gas offset projects. The intervenors did not present a comprehensive survey  
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42 of administrative costs incurred by various qualified organizations administering mitigation funds.  
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44 Instead, Mr. West simply testified that the Oregon statute imposes a administrative fee that is roughly  
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46 an extra 5% of the mitigation funds, and that, in the Climate Trust's very limited experience to date,  
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48 costs "appear to be running close to 10%." *See Ex. 251* at 8. (In fact, the Oregon EFSC's rules  
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50 indicate that the administrative fee for an \$8,000,000 mitigation fund would be only about 4.6%. *See*  
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52 OAR 345-024-0710(4).) Meanwhile, Mr. Martin testified that providing the selected organization with  
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54 a fixed amount of funding would create an incentive to minimize expenses and maximize mitigation.  
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56 *See Ex. 270* at 8.

1 airshed. The record is undisputed that this offer goes far beyond existing regulatory requirements or  
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3 voluntary practices in either Washington State or British Columbia. *E.g.*, Ex. 182 at 12-13; Tr.  
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5 688. Indeed, this is another of the many instances in which SE2 has set a new standard of  
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7 environmental excellence.<sup>4</sup>

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9 Not satisfied, however, Whatcom County, the City of Abbotsford and the CFE ask the  
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11 Council to reconsider its decision and to require SE2 to provide more than \$10 million in funding for  
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13 air quality improvement if SE2 is unable to implement specific offset projects. The Council should  
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15 reject this motion for several reasons.

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17 First, as with the previous motion, intervenors present no basis to justify revisiting this issue.  
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19 The intervenors' motion simply repeats the same arguments made before. It is apparent from Order  
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21 No. 768 that Council members considered and debated these very issues. However, a clear  
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23 majority of the Council has rejected those arguments. There is no need for the Council to re-trace  
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25 this ground.

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27 Second, but for SE2's voluntary offer, the evidentiary record would not support imposition  
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29 of any air emission offset requirement. As explained above, with the modifications to the project,  
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31 including the elimination of diesel firing, SE2 emissions will not adversely affect air quality, public  
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33 health or visibility. Neither state nor federal law requires emissions offsets in these circumstances.  
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40 <sup>4</sup> The record indicates that the Goldendale Energy project – another project developed by a  
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42 NESCO affiliate -- is the only other generating facility that has funded any air quality improvement  
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44 projects. The intervenors incorrectly suggest that BPA required the Goldendale project to provide  
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46 more funding for air quality improvement projects than SE2 has offered. On the contrary, the  
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Goldendale project (248MW) provided a total of \$175,600 in funding for the life of the project. Ex.  
180 at 11. If the Goldendale formula were applied to SE2, SE2 would only have to make a single  
payment of \$353,500. *See* Ex. 182 at 13. BPA did not, as Intervenor suggest, request offsets from  
Goldendale in the amount of \$1000 per ton per year. *Id.*

1 Third, the Council has recommended a framework that is supported by the record and  
2 establishes appropriate incentives for all stakeholders. The Council has required SE2 to make good  
3 faith efforts to identify and implement offset projects, and in particular, to develop and issue an RFP  
4 under the Council's supervision. See SCA at 19-20; see Order No. 768 at 35. This framework  
5 requires SE2 to do its part, while also creating an incentive for other stakeholders to do theirs. See  
6 Order No. 768 at 35.  
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12 This approach is fully supported by evidence in the record, which provides a strong basis  
13 for believing that specific offset projects can be implemented, and that substantial air quality  
14 improvement can be made with \$1.5 million. Mr. Martin testified that "with cooperation and  
15 creativity, offsets should be achievable." Ex. 270 at 4; see also Ex. 180 at 10. There is undisputed  
16 evidence in the record discussing two examples of projects in the airshed. The first example was  
17 the Fraser River Debris Burning Project. Finding an alternative to debris burning would have more  
18 than fully offset SE2 emissions at an estimated cost of approximately \$750,000 Canadian, or  
19 \$487,500 (using the \$0.65 exchange rate intervenors suggest). See Ex. 180 t 10; Ex. 157 at 24;  
20 Ex. 162.13. The second example was the boiler retrofitting program SE2 discussed with the  
21 GVRD. See Prev. Tr. 3542-44. It would offset 3 times as much NO<sub>x</sub> as the SE2 facility will emit  
22 at a cost of approximately \$3 million Canadian (which means SE2 emissions could be offset for  
23 approximately \$650,000 U.S.). Ex. 180 at 10. These are just two examples. SE2 is committed to  
24 trying to identify others that could be implemented to offset the project's emissions. The RFP  
25 process provides a valuable mechanism for doing so.  
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41 In sum, the intervenors' motion provides no basis for revisiting the air offset issue. SE2 has  
42 set a new standard in emission control, will not adversely affect air quality, and has gone far above  
43 and beyond existing regulatory requirements by offering to implement emission offset projects or  
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1 fund air quality improvement programs. The Council's decision is supported by the evidentiary  
2 record, and therefore, the motion for reconsideration should be denied.  
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5 **C. The Council Should Deny Constance Hoag's Motion.**  
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7 Ms. Hoag's motion for reconsideration – much of which ranges beyond the scope of her  
8 intervention – merely repeats arguments made previously by her or other intervenors. After  
9 extensive hearings, the Council has considered all of these arguments, imposed mitigation conditions,  
10 and concluded that site certification is appropriate with the proposed and required mitigation. The  
11 Council should not reconsider these issues.  
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16 Prior to the Council's decision, SE2 submitted lengthy opening and reply briefs addressing  
17 the issues raised by Ms. Hoag. The Council then issued a 107-page decision that thoughtfully and  
18 thoroughly explained its conclusions with respect to these issues. We are reluctant to belabor these  
19 same issues further, and so will provide only the briefest summary of some of the evidence  
20 presented to the Council on these points. As with the issues addressed in the previous motions,  
21 SE2 encourages the Council to consult SE2's post-hearing briefing if it desires a more detailed  
22 discussion of the evidence in the record.  
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31 Transmission Lines. This issue is beyond the scope of Ms. Hoag's intervention. On at least  
32 four occasions, the Council has ruled that issues about Whatcom County transmission lines, which  
33 SE2 does not propose to construct, are outside the scope of these proceedings. The proposed  
34 transmission line through Abbotsford falls under the jurisdiction of Canada's National Energy Board,  
35 not EFSEC. The only transmission line at issue in these proceedings is the ½- mile line proposed  
36 from the facility to the U.S.-Canada border. No party has raised any issue about this line or  
37 introduced any evidence about any adverse impact resulting from this line.  
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45 Flooding. This issue is beyond the scope of Ms. Hoag's intervention. No evidence  
46 suggests the SE2 facility will cause barns and cows to be flooded out, as Ms. Hoag claims. On the  
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1 contrary, the evidence indicates that fill at the SE2 site would not result in any significant effect on  
2 the flow of flood waters off the project site. *See generally* SE2 Post-Hearing Brief at 35-38; SE2  
3 Reply Brief at 54-57. The Council has required further modeling, and mitigation if "unreasonable  
4 adverse impacts" are identified. SE2 is confident that the Council is capable of determining what  
5 impacts (if any) are unreasonable.  
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10 Water Consumption. This issue is beyond the scope of Ms. Hoag's intervention because  
11 there is no evidence of any impact to her residential well. The City of Sumas owns a substantial  
12 amount of water and the City has decided to sell some of its water to SE2. The evidence is  
13 undisputed that SE2's water use will not "mine" or "deplete" the aquifer because the cumulative  
14 water withdrawals are a small fraction of the annual recharge. *See, e.g.*, Tr. 845, Ex. 279 at 5; Ex.  
15 204 at 3.3-2. The City's withdrawals to supply SE2 could have some very localized effects on  
16 ground water levels, but SE2 has volunteered to mitigate effects (if any) on nearby wells – even  
17 though Washington's water law does not require senior water right holders to mitigate impacts to  
18 junior water right holders. SE2 also volunteered to provide the City with funding for aquifer  
19 protection, water rights acquisition and a nitrate treatment system if it ever becomes necessary. Ms.  
20 Hoag argues that a City treatment system will not protect her water from nitrate contamination, but  
21 she misses the point that others have caused the nitrate contamination in the aquifer, and the Council  
22 determined it would not be appropriate to require SE2 to mitigate a problem caused by others. *See*  
23 Order No. 768 at 47.  
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38 Noise. The record demonstrates that the facility will comply with state regulatory  
39 requirements and is not likely to result in significant low-frequency noise or tones. *See* SE2 Post-  
40 Hearing Brief at 44-47; SE2 Reply Brief at 59-62. Again, SE2 has volunteered to go well beyond  
41 existing regulatory requirements to conduct extensive pre- and post-operation monitoring, to  
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address noise issues through an iterative process of final engineering design, and to ensure that the facility causes no reasonably objectionable low frequency noise or tones.

The evidentiary record supports the Council's decision on all of these issues.<sup>5</sup> Ms. Hoag's motion provides no basis – no new or different argument – for reconsideration.

**III. Conclusion**

The Council has conducted a very thorough adjudicatory process, and spent four months deliberating before issuing Council Order No. 768. The motions for reconsideration do nothing more than repeat arguments the Council has already heard and thoughtfully rejected. The evidentiary record supports the Council's decision. Accordingly, the Council should deny the motions for reconsideration, and forward its recommendation to the Governor.

DATED: June 14, 2002

**PERKINS COIE LLP**

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Sumas Energy, 2, Inc.

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<sup>5</sup> Ms. Hoag also criticizes the Council's ruling on air offsets. This issue is beyond the scope of her intervention, and is discussed above in connection with one of the other motions.