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BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

IN RE APPLICATION NO. 2002-01

BP WEST COAST PRODUCTS, LLC.

BP CHERRY POINT COGENERATION
PROJECT

Motion for Reconsideration

The Applicant, BP West Coast Products, LLC ("BP") was very pleased with the Council's unanimous decision to recommend certification of the Cherry Point Cogeneration Project (Cogeneration Project) to the Governor. In reviewing the Site Certification Agreement (SCA) accompanying Council Order No. 803, however, BP identified some provisions that seemed unclear and a few that seemed problematic. BP has since spoken at length with the Council's manager and staff, and they were able to clarify many of the provisions and resolve most of BP's concerns. At this time, BP requests that the Council reconsider the language found in three specific provisions of the SCA.

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3 **Article III. A. 1. General Conditions - Legal Relationship**
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5 In the SCA accompanying Council Order No. 803, article III.A.1. states as follows:
6

7 This Agreement shall bind the Certificate Holder, its subsidiary
8 corporations, affiliated partnerships, contractors, subcontractors, and
9 their successors in interest, and the state and any of its departments,
10 agencies, divisions, bureaus, commissions, boards, and its political
11 subdivision, subject to all the terms and conditions set forth herein, as
12 to the approval of the Site, the Facility, the associated facilities, the
13 Wetland Compensatory and Restoration areas, and the construction
14 and operation of the Facility.
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17 SCA p.17.
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19 BP understands that the SCA takes the place of the state and local permits that would
20 otherwise be required for the Cogeneration Project. BP also understands that construction
21 and operation of the Cogeneration Project must comply with the SCA. Nonetheless, the
22 SCA is an agreement that will become effective upon the signature of the Governor, on
23 behalf of Washington, and a corporate officer, on behalf of BP. An officer of BP West
24 Coast Products, LLC, lacks the legal authority to bind other corporate entities or individuals
25 ("subsidiary corporations, affiliated partnerships, contractors, subcontractors") by his
26 signature.
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29 BP has discussed this concern with the Council's attorney and staff. We have agreed
30 upon the following alternative wording for this provision, and BP requests that the Council
31 revise the SCA accordingly.
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35 This Agreement shall bind the Certificate Holder and its successors in
36 interest, and the state and any of its departments, agencies, divisions,
37 bureaus, institutions, commissions, boards, and its political
38 subdivisions, subject to all of the terms and conditions set forth
39 herein, as to the approval of, and all activities undertaken with respect
40 to, the Project or the Site. The Certificate Holder shall ensure that any
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1 activities undertaken with respect to the Project or the Site by its
2 agents (including affiliates), contractors, and subcontractors comply
3 with this Agreement. The term "affiliates" includes any other person
4 or entity controlling, controlled by, or under common control of or
5 with the Certificate Holder.
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10 **Article V. G. 1. & 2. Cultural and Archeological Resources.**

11 The potential for construction of the Cogeneration Project to impact cultural and
12 archeological resources has been thoroughly evaluated. *See* Application Part II, § 3.14. BP
13 contracted with the Lummi Nation Cultural Resources Department, which in turn retained
14 BOAS, Inc., to conduct a comprehensive investigation of potential cultural and
15 archeological resources located at the Project Site, Laydown Areas and east and west access
16 roads to the transmission line corridor. *See* Application, Part II, p.3.14-1. BOAS researched
17 historic maps, aerial photographs and surveys, and conducted field work including ground
18 observations and shovel probes along 30-meter transect grids. *See id.* at 3.14-4. In total,
19 BOAS excavated more than 400 shovel probes. BOAS identified one area of small,
20 ephemeral lithic scatter. However, it concluded that the site lacked integrity because of
21 previous plowing and farming activities, and would not meet the qualifying criteria for
22 inclusion in the National Register of Historic Places. *Id.* at 3.14-6. BOAS also concluded
23 that the site is unlikely to yield new or unique archeological information. *Id.*
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37 Based on this extensive investigation, BOAS and the Lummi Nation concluded that
38 the Cogeneration Project was not expected to adversely affect any cultural resources. *See id.*
39 at 3.14-6. The Lummi Tribe and its consultants determined that relatively little additional
40 monitoring needed to be required during construction. Specifically, they recommended:
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- Construction monitoring of the area within 30-meters of the area in which lithic scatter was located.
- Any lithic material discovered should be collected.
- In the event of an inadvertent archaeological discovery during the construction or the unlikely event that buried human remains are discovered, all ground disturbing activities will cease in the vicinity of the discovery and the area surrounding the discovery will be secured. Proper notifications shall be made to the Lummi Cultural Department, BOAS, Inc., Washington State Police Department, Medical Examiners Office, and the State Historic and Preservation Office. An assessment team will be assembled to address the discovery and to develop a mutually agreeable plan forward. Lummi Indian Nation will participate in the inadvertent discovery process and help to coordinate a cultural management plan.

Application, Part II, p.3.14-8. No party to these proceedings identified archeological and cultural resources as an issue for the adjudication, and no party expressed concerned about the extent of construction monitoring recommended by the Lummi Tribe and its consultants.

Nonetheless, the SCA accompanying Council Order No. 803, appears to impose requirements in addition to those recommended by BOAS:

1. A small area within Laydown Area No. 3 was identified as containing ephemeral lithic scatter. The Certificate Holder shall monitor any construction activities that occur within 30 meters of the location within construction laydown area #3, where scattered lithic materials were found. Monitoring shall be directed by an experienced archaeologist. Should artifacts be discovered during excavation of this area, construction activities shall be halted until the archeological features are secured and removed, in consultation with the Lummi Tribe.

1 2. The Certificate Holder shall monitor construction to ensure
2 that any cultural resources are properly identified, evaluated, and, if
3 necessary, impacts are mitigated. Monitoring shall be directed by an
4 experienced archeologist. If cultural resources are discovered during
5 construction monitoring, the Certificate Holder shall halt [the]¹ work
6 in the affected area and shall contract: the Washington State Office of
7 Archaeology and Historic Preservation (OAHP); EFSEC; the Lummi
8 Cultural Department and their archeological resources contractor
9 (BOAS Inc. or successor); and Washington State or local law
10 enforcement agencies as appropriate. If a discovered site contains one
11 or more Native American burials, the monitor will notify the
12 appropriate Tribe and discuss mitigation measures with the Certificate
13 Holder, Tribal representatives and the OAHP. The Certificate Holder
14 shall invite the Lummi Indian Nation to participate in the process and
15 help to coordinate a cultural management plan.
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19 SCA p. 31.
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21 BP has a couple of concerns about this section as it is drafted. First, the meaning of
22 this section is not clear. Subsection 1 describes what should be done if "artifacts" are
23 discovered in Laydown Area No.3. Subsection 2 requires different things to be done if
24 "cultural resources" are discovered during construction, and still different things to be done
25 if a burial site is discovered. The terms "artifacts" and "cultural resources" are not defined
26 so it is not clear what types of discoveries would require which type of response.
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33 Second, depending upon how these subsections are interpreted, they may impose
34 requirements beyond those recommended by the Lummi Tribe and its consultant BOAS.
35 They seem to require some sort of monitoring directed by an archeologist whenever any
36 ground disturbing activity takes place. Based on extensive investigation, including hundreds
37 of shovel probes, BOAS determined that monitoring was only required near the area of lithic
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46 ¹ The SCA actually states "shall halt to work in affected area" but we assume the word "to"
47 was a typographical error.

1 scatter. BOAS determined that monitoring of all ground-disturbing activities was not
2 necessary to protect cultural resources.
3

4 Including this additional requirement in the SCA is not legally warranted. According
5 to the Council's implementing statute, the SCA must be developed based on an adjudicatory
6 hearing conducted according to RCW chapter 34.05. RCW 80.50.090(3). The Council's
7 recommended SCA must be based on the hearing record and supported by substantial
8 evidence in the record. RCW 34.05.461(4), 34.05.476(3) & 34.05.570(3)(e). In this case,
9 no evidence supports any requirements beyond those recommended by the Lummi Tribe and
10 proposed by BP.
11

12 Prior to the start of construction, BP intends to work with an experienced
13 archeologist to develop a plan for addressing archeological and cultural resources. As
14 recommended by BOAS and the Lummi Nation, the plan would include the careful
15 monitoring of construction activities in the area of lithic scatter found in Laydown Area
16 No.3. It would also include a detailed protocol to be followed in the event that any artifacts,
17 cultural resources, or burial sites are identified during construction of the Project. The
18 response required in the event of an unexpected discovery would logically depend upon the
19 type and significance of the discovery. BP believes that the details of the plan and protocol
20 should be developed by an experience archeologist prior to construction, rather than being
21 prescribed by the SCA.
22

23 Accordingly, BP requests that the Council revise these SCA provisions as follows:
24

25 G. Cultural and Archeological Resources
26

27 With the assistance of an experienced archeologist, BP shall
28 develop and implement a plan for monitoring construction and
29 responding to the discovery of archeological artifacts or buried
30

1 human remains. The plan shall include, but not be limited to,
2 the following:

3
4 1. The Certificate Holder shall monitor any construction
5 activities that occur within 30 meters of the location with
6 construction laydown area #3, where scattered lithic materials
7 were found. Monitoring shall be directed by an experience
8 archeologist. Any lithic material discovered in construction
9 laydown area #3 during construction shall be collected.
10

11
12 2. In the event of inadvertent archeological discovery
13 during construction, or in the unlikely event that buried human
14 remains are discovered, all ground disturbing activities shall
15 cease in the vicinity of the discovery and the area surrounding
16 the discovery shall be secured. Proper notifications shall be
17 made to the Lummi Cultural Department, BOAS, Inc.,
18 Washington State Office of Archeology and Historic
19 Preservation (OAHF) and EFSEC. An assessment team will
20 be assembled to address the discovery and to develop a
21 mutually agreeable plan forward. The Certificate Holder shall
22 invite the Lummi Indian Nation to participate in the process
23 and help to coordinate a cultural management plan.
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27 This proposed language would address EFSEC staff's desire to have a protocol for
28 responding to unexpected discoveries in place, but would not impose requirements beyond
29 those recommended by BOAS and supported by the evidence in the record for these
30 proceedings.
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37 **Article V. H. 5. Public Services and Utilities**

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39 BP thoroughly evaluated the potential impacts from construction traffic in preparing
40 the Application for Site Certification. Appendix I contains a study concerning the potential
41 impact of Project's construction traffic when combined with existing and expected future
42 traffic in the vicinity.
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1 The traffic study commissioned by BP used many conservative assumptions. First, it
2 focused on the peak construction periods. Cogeneration Project construction is expected to
3 take 27 months, and the number of workers on site will vary over the course of construction.
4
5 See Application, Appendix D, table 13.2-1. The study conservatively focused on project-
6 related traffic during the peak month of construction activities. See Application, Appendix
7 I, § 1.2.1.2, p. 8. Second, the study assumed that existing "background" traffic levels would
8 increase at a rate of 5% per year. See Application, Appendix I, § 1.2.1.5, pp.9-10. The
9 traffic consultants considered this assumption to be conservative in light of Whatcom
10 County's much lower 2% population growth rate. See *id.* Third, the study focused on the
11 traffic levels during the hour of the day with the highest traffic levels. The study assumed
12 that much of the Project's afternoon vehicle trips would occur during this peak hour, and did
13 not assume that any particular efforts would be made to "schedule" Project traffic to avoid
14 "rush hour." See Application, Appendix I § 1.2.1.2, p.8.

15
16
17 Using these conservative assumptions, the study identified two possible concerns. It
18 concluded that the Project could cause the level of service (LOS) to drop from moderate to
19 low at the Grandview Road (SR 548) – Portal Way intersection during peak afternoon traffic
20 periods. Application, Appendix I, § 1.2.1.6, p.10. The study also concluded that it might be
21 appropriate construct a westbound turn storage lane at the Grandview Road-Blaine Road
22 intersection. Application, Appendix I, § 1.2.1.7, p.10.

23
24
25 After reviewing the results of the traffic study, BP acknowledged in its Application
26 that some mitigation of the potential traffic impacts would be appropriate. Application, Part
27 II, p. 3.15-17. BP stated that it would meet with the Washington Department of
28 Transportation (WSDOT) and reach an agreement with WSDOT about the appropriate
29 mitigation. *Id.* The Application identifies a number of possible mitigation options, ranging
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1 from physical improvements (e.g. traffic signals, turn lanes) to traffic management measures
2 (e.g. encouraging carpools, staggering working schedules). *Id.* at 3.15-17 to 3.15-19.

3
4 However, BP plainly stated in the Application that it intended to reach agreement with
5
6 WSDOT on the appropriate mitigation. *Id.* at 3.15-17.
7

8
9 BP and WSDOT eventually entered into a Letter of Understanding (LOU) regarding
10 traffic mitigation during construction. Exhibit 46.1. The terms of the LOU, BP will install a
11 traffic light at the Grandview Road – Portal Way intersection and create temporary left turn
12 channelization at the Grandview Road – Blaine Road intersection. In the LOU, WSDOT
13 states that these actions "will fully mitigate construction impacts for the Project." Ex. 46.1 at
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19 1.

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21 The SCA accompanying Order No. 803 would nonetheless impose an additional
22 mitigation requirement. Article V. H. 5 provides:

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24
25 Construction vehicle trips in and out of the immediate construction
26 zone shall be coordinated and scheduled away from "rush-hour"
27 periods, to minimize general traffic disruption, consistent with the
28 requirements of the construction traffic management plan required by
29 Article IV. E. of this Agreement.
30

31 SCA p.32.

32
33 In light of BP's commitments to install a traffic light at the Grandview Road – Portal
34 Way intersection, and install temporary left-turn channelization at the Grandview Road –
35 Blaine Road intersection, scheduling construction vehicle trips away from rush hour is not
36 necessary to minimize potential traffic impacts during construction. WSDOT did not
37 recommend this requirement. Indeed, the LOU states that traffic impacts are adequately
38 addressed without this or any other additional mitigation measure. Ex. 46.1. Nor was any
39 evidence introduced during the adjudicative hearing that would support this requirement.
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1 According to the Council's governing statute, the SCA must be developed based on
2 an adjudicatory hearing conducted according to RCW chapter 34.05. RCW 80.50.090(3).
3
4 The Council's recommended SCA must be supported by substantial evidence in the record.
5
6 *E.g.*, RCW 34.05.461(4), 34.05.476(3), & 34.05.570(3)(e). The record contains no support
7
8 for Article V. H. 5. Moreover, the term "rush-hour" used in this section is not defined, and it
9
10 is difficult to understand in the rural context of the traffic site. The traffic study indicated
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12 peak traffic levels currently occur at different hours at different intersections. A requirement
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14 to alter traditional work schedules would increase the cost of Project construction, and is not
15
16 necessary. BP, therefore, requests that the Council reconsider this requirement and delete
17
18 Article V. H. 5 from the SCA.
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22 **Clerical Corrections**

23
24 In reviewing the SCA accompanying Order No. 803, BP also noticed two clerical
25
26 errors that should be corrected:
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28 Pages 19-20. There are two sections J. on this page. The second of these, and the
29
30 section that follows, should be re-lettered.
31

32 Page 22, Article VI. B. 1. This section refers to the wetland mitigation plan
33
34 submitted to the Corps on June 2, 2004. In a Memorandum of Record dated September 13,
35
36 2004, the Corps has requested that BP incorporate some minor changes in mitigation plan
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38 and resubmit it. BP intends to submit the revised plan within the next week, and anticipates
39
40 (based on the Memorandum of Record) that the Corps will approve that plan. In order to
41
42 avoid confusion, this section of the SCA could be revised:
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1 Compensatory Plan Goals: The Certificate Holder shall implement
2 the wetland mitigation plan provided in the Final Cogeneration
3 Project Compensatory Mitigation Plan (Compensatory Plan),
4 Appendix H-7 of the Application as revised and submitted to the U.S.
5 Army Corps of Engineers on June 2, 2004, as revised again and
6 submitted to the Army Corps of Engineers on October, 2004, and
7 finally approved by the Army Corps of Engineers.² The goals of the
8 Compensatory Plan are:
9

10
11 BP respectfully requests that the Council modify the SCA before forwarding it to the
12 Governor along with the Council's recommendation.
13

14
15 DATED: October 7th, 2004.
16

17
18 **PERKINS COIE LLP**
19

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21 By 
22 Karen McGaffey
23 Attorneys for the Applicant
24 BP West Coast Products, LLC
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² BP will soon be able to inform the Council of the precise submission date.



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BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

IN RE APPLICATION NO. 2002-01

CERTIFICATE OF SERVICE

BP WEST COAST PRODUCTS, LLC

BP CHERRY POINT COGENERATION
PROJECT

I, Jessica Hottell, hereby certify that the BP's **Motion for Reconsideration** was sent
this 7th day of October, 2004, by the method indicated as follows:

ORIGINAL AND FIFTEEN COPIES VIA HAND DELIVERY TO:

Irina Makarow/Allen Fiksdal
Energy Facility Site Evaluation Council
925 Plum Street SE, Building 4
Olympia, WA 98504-3172

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ONE COPY VIA FIRST CLASS MAIL TO:

Ann Essko
Assistant Attorney General
P.O. Box 40108
Olympia, WA 98504-0108

Julian Dewell
Law Judge
Office of Administrative Hearings
609 Maulsby Lane
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Office of the Attorney General
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David M. Grant
Whatcom County Prosecutor's Office
Courthouse
311 Grand Avenue
Bellingham, WA 98225

Dated: October 7th, 2004



Jessica Hottell