

**Exhibit 3.4.2.1-3**  
**Letter From C. Merker To K. Smayda**

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Exhibit 3.4.2.1-3

STATE OF WASHINGTON

## DEPARTMENT OF ECOLOGY

4601 N. Monroe, Suite 202 • Spokane, Washington 99205-1295 • (509) 456-2926

May 9, 2001

Ms. Cathy Smayda  
Smayda Environmental Associates  
139 NE 61st St.  
Seattle, WA 98115

Dear Ms. Smayda:

Re: Wallula Power Project Wetland Evaluation Report

Following a site review with you and others, I have reviewed the above referenced document regarding wetlands and the proposed gas fired power plant. Please accept my comments below.

I agree with you that wetlands labeled A and E are clearly not jurisdictional. This is due to the fact that:

- 1) They were created intentionally.
- 2) They were created in uplands.
- 3) Their sole purpose was/is to store and convey irrigation water needed for agriculture during seasonal use periods, as evidenced by artificial pipes and ditches that move water to them, without which they would not hold water.

All of these factors are necessary to determine jurisdiction. An argument that man-induced drainage appears to feed a wetland is not evidence of lack of jurisdiction. As such, wetlands labeled B, C, and D have not been proven to be exempt from wetland protection laws. Based on my site visit, and a review of your report, I do not conclude they are exempt. Under the enabling legislation of the Columbia Basin Irrigation Project (CBIP), Congress listed fish and wildlife habitat to be a purpose. Pre-project photos that do not show wetlands are insufficient evidence for exemption because Congress intended to create habitat through the CBIP. As a result, both the US Army Corps of Engineers and Washington State Department of Ecology do not recognize wetland exemption in the CBIP based on rising ground water levels or indirect seepage on a broad scale. The water source must be illustrated as being direct and artificial. This can best be illustrated in a situation where a valve is turned off or on, and the adjacent wetland in question shows an immediate response in its water level. In this

Ms. Cathy Smayda

Page 2

May 3, 2001

specific case, proof of jurisdiction could be determined by turning off the circle irrigation tower on site. If the wetlands disappeared within the season, then that would be sufficient evidence.

Though the excavated ponds were artificially created, they appear to have been created in wetlands B, C, and D that are jurisdictional, and are therefore themselves protected. As further proof, the wetlands have complex vegetation communities outside of the excavated basins. These communities appear identical to the adjacent wildlife area along the Columbia River across Highway 12, which would also be considered jurisdictional.

The wetlands in question clearly have confirmed hydraulic continuity through surface connection to the wildlife area wetlands along the Columbia River, and probably subsurface connection, and identical and continuous vegetation community on both sides of the highway. This means they would be considered "associated" with a shoreline of the state. This then affords them protection under the Shoreline Management Act (SMA) of 1971. The county, in conjunction with Ecology, implements the SMA. Please contact the Planning Department at the Walla Walla County Courthouse or Mike Maher in our office (509-625-5185) for further discussion of this issue.

Though wetland labeled F is off-project, all my comments above appear relevant to it. Similar vegetation community, at similar elevation on the landscape as wildlife area wetlands and wetlands B, C, and D, and a lack of a direct and artificial water source are evidence for its protection unless proven otherwise.

In conclusion, Wetlands A and E are not jurisdictional. Wetlands B, C, D, and F all appear to be afforded protection under at least the Critical Areas Ordinance of the Growth Management Act implemented by Walla Walla County, the SMA referenced earlier, and the federal Clean Water Act implemented by the US Army Corps and Ecology.

As the wetlands are located along the periphery of the project lands, and well away from the proposed power plant to the east, it seems very easy to avoid the jurisdiction issue by avoiding work in or near the wetlands. There is plenty of room for avoidance, the first and most important step in mitigation. I would also suggest that the power plant owner/operator use the wetlands to their advantage. This region is rapidly becoming devoid of wildlife habitat due to the industrial quality of the land use under

Ms. Cathy Smayda  
Page 3  
May 3, 2001

modern agriculture and the adjacent pulp mill. It will not be long it seems that the only aesthetically pleasing landscape remaining in the area will be on public lands associated with the Columbia and Walla Walla Rivers. The wetlands on-site should be protected and managed as an illustration of development working in harmony with nature.

If you wish to discuss the issues further please call me at (509) 456-6174.

Sincerely,



Christopher Merker  
Wetlands Biologist  
Shorelands and Environmental Assistance

CM:ka

cc: M. Maher, DOE  
S. Ackerman, ASACE  
Walla Walla Co. Planning Dept.

wallula.doc