



March 25, 2011

***Via Certified Mail***

Olympic Region Clean Air Agency  
2940 B Limited Lane NW  
Olympia, WA 98502  
(360) 539-7610, Fax (360) 491-6308

**Re: NOC #10NOC748 (ADAGE Mason LLC)**

Dear Sir or Madam:

Please accept the following comments on behalf of the Center for Biological Diversity (the “Center”) regarding the above-referenced Notice of Construction (“NOC”) requesting approval to construct a 65-MW biomass-fueled power plant near Shelton, Washington (the “Project”), and the Staff Recommendation issued by the Olympic Region Clean Air Agency (“ORCAA”) on December 21, 2010 (the “Staff Recommendation”).<sup>1</sup>

The Center is a non-profit organization with more than 320,000 members and online activists, and offices throughout the United States, including in Seattle, WA. The Center’s mission is to ensure the preservation, protection, and restoration of biodiversity, native species, ecosystems, public lands and waters, and public health. The Center also has worked for many years to protect the biodiversity and ecological integrity of the nation’s forests. In furtherance of these goals, the Center’s Climate Law Institute seeks to reduce U.S. greenhouse gas emissions and other air pollution to protect biological diversity, the environment, and human health and welfare.

One of the Center’s top priorities is ensuring that the Clean Air Act is implemented in an expeditious and effective manner to reduce emissions of the pollutants causing global warming. Although scientists and policy-makers have now thoroughly debunked the long-standing myth that biomass combustion is “carbon neutral,” industry proponents continue to seek special treatment for biomass projects based on the dangerously false contention that biogenic GHG emissions do not affect the climate. Public incentives for biomass, embodied in renewable energy standards and other policies, are both threatening to exacerbate greenhouse pollution and putting increased pressure on the nation’s forests by increasing the demand for woody fuel. In the absence of strong regulatory standards—including those mandated by the Clean Air Act—the

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<sup>1</sup> We recognize that the comment submission deadline has technically passed. However, ORCAA has not yet issued a decision, and the agency has indicated that it will not complete its review of the NOC until Mason County’s environmental review is complete. As that process is still underway, ample time remains for the agency to consider these comments. Further, ADAGE Mason LLC recently announced plans to abandon the project, suggesting further delays, if not outright withdrawal of the NOC. Accordingly, if review continues (or resumes) despite ADAGE’s announcement, we request that ORCAA consider these comments as part of the record.

increased use of woody biomass for energy generation will undermine the nation's climate goals and damage its ecosystems.

Approval of the NOC for this Project would violate the plain text of the Clean Air Act and applicable regulations. In particular, the NOC improperly characterizes the Project as a "synthetic minor" source for purposes of the Clean Air Act's Prevention of Significant Deterioration ("PSD") program. See 42 U.S.C. § 7479(1). As a result, ORCAA lacks jurisdiction to approve this Project; the Washington Department of Ecology is the agency with jurisdiction. WAC 173-400-700 *et seq.*; ORCAA Rule 1.4 (defining "Prevention of Significant Deterioration" program). Moreover, the NOC and Staff Recommendation fail to evaluate best available control technology ("BACT") for carbon dioxide and other greenhouse gases, as required by statute and regulation. 42 U.S.C. § 7475; 40 C.F.R. §§ 51.166(b)(48), (49), 52.21(b)(49), (50). ORCAA cannot lawfully approve the NOC for this Project.

### **The Project Must Obtain a PSD Permit.**

This Project has the potential to emit several criteria pollutants in amounts exceeding 100 tons per year ("tpy"). NOC at 7-5 (Table 7-2); Staff Recommendation at 34. The Clean Air Act defines specific categories of major stationary sources that must obtain PSD permits if they have the potential to emit more than 100 tpy of any regulated pollutant. See 42 U.S.C. § 7479(1). These categories include "fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input" and "fossil-fuel boilers (or combinations thereof) totaling more than 250 million British thermal units per hour heat input." *Id.*; see also 40 C.F.R. §§ 51.166(b)(1)(i)(a), 52.21(b)(1)(i)(a); WAC 173-400-720(4)(a)(v) (incorporating 52.21(b) by reference); ORCAA Rule 1.4 (defining "Major Stationary Source"). Congress intended the 100-tpy threshold to apply to the kinds of large facilities that are "primarily responsible" for the nation's air quality problems. *Alabama Power Co. v. Costle*, 636 F.2d 323, 353 (D.C. Cir. 1979).

Here, the NOC proposes to burn not only biomass fuels, but also fossil fuels (natural gas, propane, and diesel) during startup, shutdown, and "bed stabilization" operations. NOC at 7-3. The Project will have an overall heat input rate of 758 MMBtu/hr. *Id.* EPA regulations define "heat input" as "the total gross calorific value . . . of all fuels burned." 40 C.F.R. § 52.01(g) (emphasis added). Under the plain language of the Clean Air Act and applicable regulations, therefore, this Project is a fossil-fuel fired steam electric plant and a fossil-fuel boiler with a total heat input rate exceeding 250 MMBtu/hr. The 100-tpy PSD threshold is therefore applicable. According to the NOC, however, the 100-tpy PSD threshold does not apply because the applicant has proposed design features that will limit fossil fuel heat input to less than 250 MMBtu/hr. See NOC at 7-3 (proposing limitation to 240 MMBtu/hr). The only authority identified in the NOC for this interpretation is an email from EPA Region VI staff purporting to interpret a provision of New Mexico's State Implementation Plan ("SIP"). An email from a different EPA region, concerning a different project and interpreting another state's SIP, cannot override the plain text of the statute and applicable regulations.

Notwithstanding the lack of adequate legal support, ORCAA staff has apparently accepted the applicant's position. The Staff Recommendation does so, moreover, without any

meaningful analysis or discussion. See Staff Recommendation at 15, 34 (declaring in conclusory fashion that the 250-tpy PSD threshold applies). Although the Staff Recommendation proposes some additional limitations on fossil fuel input, it provides no explanation or rationale as to why ORCAA might find these limitations adequate. For example, staff recommends limiting the Project's fossil fuel heat input rate to 160 MMBtu/hr and annual consumption of fossil fuels to 10 percent of the fuel total. See *id.* at 37. The Staff Recommendation cites EPA regulations in Part 60 of Title 40 as authority for these limitations, but the cited regulations govern applicability of New Source Performance Standards, not PSD permitting thresholds. In any event, these limitations are not practically enforceable. See *e.g.*, WAC 173-400-30 (84) (“‘Synthetic minor’ means any source whose potential to emit has been limited below applicable thresholds by means of a *federally enforceable* order, rule, or approval condition”) (emphasis added).

However, a fossil fuel heat input rate of 160 MMBtu/hr is more than 20 percent of the Project's overall heat input rate, indicating that staff's proposed design limitations would not achieve the 10 percent annual limit also recommended by staff. Such inconsistent recommendations are likely unenforceable. Additionally, there is no apparent monitoring in place to document the amount of fossil fuels consumed by the project, also making enforcement of any such limitation impractical if not impossible.

In sum, the applicant's and staff's efforts to shoehorn this Project—a major industrial facility with significant air pollutant emissions—into a “synthetic minor” permit lack any legal foundation. The 100-tpy PSD threshold was intended to apply to Projects like this one, as the plain text of the Clean Air Act, applicable regulations, and well-established case law indicate. ORCAA cannot approve this NOC, but rather must refer the application to the Washington Department of Ecology for a PSD permit.

### **The Project Must Demonstrate Application of BACT for Greenhouse Gases.**

Major emitting facilities required to obtain PSD permits also must demonstrate application of “best available control technology for each pollutant subject to regulation” under the Clean Air Act. 42 U.S.C. § 7475(a)(4). EPA has defined “subject to regulation” for purposes of greenhouse gases in its so-called “Tailoring Rule.” Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (codified at 40 C.F.R. §§ 51.166(b)(48), (49), 52.21(b)(49), (50)). As the Staff Recommendation recognizes, Staff Recommendation at 34, EPA is implementing the Tailoring Rule in two initial phases. After January 2, 2011, new major sources that must obtain PSD permits for conventional pollutants, and that have the potential to emit more than 75,000 tpy of greenhouse gases (as CO<sub>2</sub>-equivalent or “CO<sub>2</sub>e”), must demonstrate application of BACT for greenhouse gases. See 75 Fed. Reg. at 31,523. For permits issuing after July 1, 2011, all new sources with the potential to emit more than 100,000 tpy CO<sub>2</sub>e must obtain PSD permits and demonstrate greenhouse gas BACT compliance, regardless of their conventional pollutant emissions. *Id.*

This Project's greenhouse gas emissions far exceed these thresholds. Staff Recommendation at 34 (identifying 687,248 tpy in CO<sub>2</sub> emissions alone). As explained above, a PSD permit is required for this Project anyway due to its potential to emit conventional pollutants in excess of 100 tpy; accordingly, this Project also must obtain a PSD permit and

demonstrate BACT for its greenhouse gas emissions under Tailoring Rule Phase 1. Even if a PSD permit were not needed for conventional pollutants, a greenhouse gas PSD permit will still be required under Tailoring Rule Phase 2, if the final permit issues after July 1, 2011.<sup>2</sup> Any Title V operating permit for the Project also will be required to address greenhouse gases, under either Phase 1 or Phase 2 of Tailoring Rule implementation.

The NOC cannot be approved as submitted because it fails to demonstrate BACT for greenhouse gases. ORCAA also lacks jurisdiction to issue the required PSD permit for this Project, and must refer the NOC to the Washington Department of Ecology for further proceedings.

## **Conclusion**

For the foregoing reasons, ORCAA may not approve the NOC for this Project.<sup>3</sup> In addition, it is our understanding that ORCAA's processing of this application has been suspended temporarily pending completion of environmental review pursuant to the State Environmental Policy Act ("SEPA"). Accordingly, we respectfully request that ORCAA reopen the public comment period on the NOC following completion of SEPA review. In any event, given that ORCAA's decision on the NOC is not yet final and may not be completed for some time, we ask that ORCAA include these comments in the administrative record of proceedings for the Project and consider the points raised herein in making its final determination.

Sincerely,

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<sup>2</sup> EPA has indicated its intent to defer application of Phase 2 of the Tailoring Rule to greenhouse gas emissions from biomass combustion and recently has initiated rulemaking for that purpose. 76 Fed. Reg. 15249 (March 21, 2011). However, as of the date of this letter, no regulation implementing the proposed deferral has been adopted. In any event, deferral of regulation in the manner apparently intended by EPA would be unlawful and in excess of the agency's statutory authority. By the same token, neither ORCAA nor any other agency in the State of Washington may exempt emissions of pollutants otherwise "subject to regulation" from PSD requirements on the basis of their "biogenic" character.

<sup>3</sup> The Center also has reviewed the comments submitted by David A. Bricklin on behalf of the Concerned Citizens of Mason County; the Center concurs with these comments and hereby incorporates them by reference.

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