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September 15, 2022

The Honorable Joe Nguyen
State Senator
235 John A. Cherberg Building
Olympia, WA 98504

The Honorable Joe Fitzgibbon
State Representative
320 John L. O'Brien Building
Olympia, WA 98504

Re: Permitting for Net Zero, proposed amendments to SEPA to incentivize investment in new low-carbon projects and infrastructure in Washington state

Dear Senator Nguyen and Representative Fitzgibbon:

bp America, Inc. ("bp") shares the State of Washington's ambition to achieve net zero by 2050 and applauds the State for enacting a new, comprehensive "360-degree" regulatory approach to accomplish this goal.

bp's ambition is to become a net zero company by 2050 or sooner, and to help the world reach net zero, too. This ambition is key to our efforts to deliver the energy the world needs today, while also accelerating the energy transition. Consistent with bp's ambition, we are advocating for policies that address greenhouse gas ("GHG") emissions.

In November 2021, bp provided Representative Fitzgibbon with three recommendations for amending the State Environmental Policy Act ("SEPA"). The recommendations were intended to ensure that SEPA works together with other statutes intended to reduce the state's GHG emissions—including the Climate Commitment Act, the Clean Fuels Program and the Clean Energy Transformation Act. Together, these statues should promote the in-state investment, innovation, and job creation in clean energy projects and infrastructure that will be necessary to get Washington to net zero in less than 30 years. As we explained in that letter – and during conversations with you both last month -- a clear, consistent, and effective SEPA permitting process will attract the kinds of projects envisioned when you and your colleagues passed these game-changing pieces of legislation.

Through this letter, we provide four recommendations for amending SEPA, which include refinements to our three previous recommendations and a new recommendation based on bp's recent experience permitting projects in Whatcom County. For each of these recommendations, we explain the need for the amendments and provide proposed language for your consideration.

bp believes that these proposed amendments to SEPA would help to confirm the important, but properly defined, role for SEPA in Washington's comprehensive regulatory regime. We believe these proposed amendments would not alter SEPA's fundamental purpose or the value of environmental reviews. Rather, they would clarify the SEPA process, provide enhanced transparency that would benefit all participants in the SEPA process and help attract investment necessary to achieve the state's ambitious GHG reduction goals.

I. Clarifying the Scope of Assessment & Mitigation

bp proposes that the legislature amend SEPA to clarify the distinction between the scope of assessment and mitigation in SEPA review and agencies' authority to impose mitigation under SEPA.

- Why Amendment is Needed: SEPA requires agencies to assess the environmental impact of proposed actions. RCW 43.21C.030. The SEPA implementing regulations interpret "environmental impact" to include direct, indirect, and cumulative impacts. WAC 197-11-792. SEPA gives agencies discretion to require mitigation of "specific adverse environmental impacts." RCW 43.21C.060. The SEPA implementing regulations include language that limits agencies' discretion to require mitigation for only the new impacts caused by the proposed project.[1] However, bp and other applicants have experienced attempts to expand this authority to allow agencies to require mitigation to address both cumulative impacts and impacts associated with previously reviewed and permitted operations. Relatedly, environmental groups and agencies have argued that state agencies and local governments have the authority to impose mitigation where other agencies with jurisdiction and special expertise have already assessed the impacts and determined whether mitigation is necessary. These interpretations of SEPA are problematic because they could: (1) result in duplicative or otherwise unnecessary mitigation; (2) make it difficult for project developers to plan the investment necessary to permit, construct, and operate a clean energy project; (3) create uncertainty that might discourage proposals for capital investment in clean energy projects in Washington state.

- Recommendation: bp recommends the following revisions to RCW 43.21C.060 that will provide necessary predictability to all participants in the SEPA process about the scope of state agencies' and local governments' authority to impose mitigation.

  > The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of all branches of government of this state, including state

[1] *See* WAC 197-11-060(4)(e) ("The range of impacts to be analyzed in an EIS (direct, indirect, and cumulative impacts, WAC 197-11-792) may be wider than the impacts for which mitigation measures are required of applicants (WAC 197-11-660). This will depend upon the specific impacts, the extent to which the adverse impacts are attributable to the applicant's proposal, and the capability of applicants or agencies to control the impacts in each situation.").

agencies, municipal and public corporations, and counties. Any governmental action may be conditioned or denied pursuant to this chapter: PROVIDED,

(1) That such conditions or denials shall be based upon policies identified by the appropriate governmental authority and incorporated into regulations, plans, or codes which are formally designated by the agency (or appropriate legislative body, in the case of local government) as possible bases for the exercise of authority pursuant to this chapter. Such designation shall occur at the time specified by RCW 43.21C.120.

(2) Such action may be conditioned only to mitigate specific adverse environmental impacts which are identified in the environmental documents prepared under this chapter. The range of impacts, including cumulative impacts, to be analyzed in environmental documents prepared under this chapter may be wider than the impacts for which mitigation measures may be required of applicants. Mitigation measures may be required to address only the additional environmental impacts that are attributable to and caused by the applicant's proposal itself. State agencies and local governments may not re-open, reconsider, or otherwise modify mitigation that was required in connection with a permit or authorization for a project previously reviewed under the state environmental policy act or the national environmental policy act of 1969. These conditions shall be stated in writing by the decision maker. Mitigation measures shall be reasonable and capable of being accomplished.

(3) In order to deny a proposal under this chapter, an agency must find that:

(~~1~~a) The proposal would result in significant adverse impacts identified in a final or supplemental environmental impact statement prepared under this chapter; and

(~~2~~b) reasonable mitigation measures are insufficient to mitigate the identified impact.

(4) Except for permits and variances issued pursuant to chapter 90.58 RCW, when such a governmental action, not requiring a legislative decision, is conditioned or denied by a nonelected official of a local governmental agency, the decision shall be appealable to the legislative authority of the acting local governmental agency unless that legislative authority formally eliminates such appeals. Such appeals shall be in accordance with procedures established for such appeals by the legislative authority of the acting local governmental agency.

II. Pre-Threshold Determination Consultation

bp proposes that the legislature amend SEPA to provide applicants an opportunity to revise their applications and environmental checklists before the state agency or local government makes a threshold determination of significance.

- Why Amendment is Needed: SEPA requires agencies to issue a determination of whether a proposal will have a significant impact and, relatedly, whether an Environmental Impact Statement ("EIS") is required. RCW 43.21C.033; WAC 197-11-310, 330. Currently, there is no guaranteed opportunity for applicants to consult with the agency before the agency issues the threshold determination of significance. Therefore, applicants may not have an opportunity to correct potential misunderstandings or offer mitigation measures to address those impacts prior to the agency releasing the threshold determination for public review.

- **Recommendation:** bp appreciates Rep. Fitzgibbon's sponsorship of HB 2002 (2021-22), which would have provided applicants with an opportunity for consultation prior to issuance of a determination of significance. We recommend making two key edits to the text proposed in HB 2002 that would amend RCW 43.21C.033, which are shown below. First, we recommend edits to clarify that an applicant can resolve a lead agency's concerns without having to offer mitigation. The revisions to the second and third sentences of subsection (2) will allow applicants to submit additional information about the potential impacts that could lead to a determination of non-significance. Second, we recommend adding a sentence to clarify how withdrawal and revision of an application and environmental checklist will impact the time provided for agencies to issue a threshold determination in subsection (1).

  (1) Except as provided in subsection (3) of this section, the responsible official shall make a threshold determination on a completed application within 90 days after the application and supporting documentation are complete. The applicant may request an additional 30 days for the threshold determination. The governmental entity responsible for making the threshold determination shall by rule, resolution, or ordinance adopt standards, consistent with rules adopted by the department to implement this chapter, for determining when an application and supporting documentation are complete.

  (2) (a) After the submission of an environmental checklist and prior to issuing a threshold determination that a clean energy project proposal is likely to cause a significant adverse environmental impact, the lead agency must notify the project applicant and explain in writing the basis for its anticipated determination of significance. Prior to issuing the threshold determination of significance, the lead agency must give the project applicant the option of withdrawing and revising its application and the associated environmental checklist ~~to clarify or make changes to features of the proposal that are designed to mitigate the impacts that were the basis of the lead agency's anticipated determination of significance~~. The lead agency shall make its threshold determination based upon the changed or clarified ~~proposal~~ application and associated environmental checklist~~following the applicant's submittal~~.

  (i) Unless the applicant makes material changes that substantially modify the impacts of the proposal, the responsible official shall have no more than 30 days from the date of re-submission to make a threshold determination.

  (ii) If there are material changes that substantially modify the impacts of the proposal, the revised application shall be treated as new and the timeline established in subsection (1) shall apply.

III. Deadline for SEPA Completion & Other Process Improvements

bp proposes that the legislature amend SEPA to establish more ambitious timelines to complete EISs for projects necessary to achieve the state's GHG reduction goals and provide greater transparency regarding the time required to complete all EISs.

- **Why Amendment is Needed:** The legislature has set ambitious targets for reducing the state's GHG emissions—both in the timeline and extent of the reduction. RCW 70A.45.020. Achieving those targets will require massive investment in and rapid

development of new infrastructure projects that will require review under SEPA. SEPA should not be an impediment to achieving the state's GHG reduction goals. Currently, preparation of an EIS under SEPA can take years. The only provisions in SEPA to counteract this trend are: (1) a goal for completion of EISs within two years of issuing a threshold determination, and (2) a requirement to report on the time required to complete EISs every two years. RCW 43.21C.0311. The legislature can and should provide stronger direction to state agencies and local governments to complete SEPA in a timely manner. This direction would provide greater assurance to project developers that environmental review can be completed in Washington in a timely manner. We believe the legislature can also require more transparency about the time required to complete EISs without materially increasing the administrative burden for the Department of Ecology ("Ecology"). SEPA currently only requires Ecology to report on EISs completed in the two previous years, which fails to provide a complete picture on the status of EISs—particularly those that have not been completed.[2]

- **Recommendation:** bp recommends amending RCW 43.21C.0311 in two ways. First, we recommend adding a two-year limit on EISs for "clean energy projects," which could be defined in a similar manner as proposed in HB 2002. This two-year period could be exceeded only if the applicant agrees to a longer time period that is announced publicly by the agency, after taking into consideration the potential impacts of the delay. Second, we recommend enhancing transparency regarding the status of all EISs in progress by maintaining a publicly available dataset and issuing more detailed reports on an annual basis. The potential public benefit should far outweigh the administrative burden for Ecology given that Ecology already maintains publicly available datasets—for example, the GHG Reporting Program Publication.[3]

(1) A lead agency shall ~~aspire to~~ prepare a final environmental impact statement required by RCW 43.21C.030(2) in as expeditious a manner as possible while not compromising the integrity of the analysis.

(a) For even the most complex government decisions associated with a broad scope of possible environmental impacts, a lead agency shall aspire to prepare a final environmental impact statement required by RCW 43.21C.030(2) within twenty-four months of a threshold determination of a probable significant, adverse environmental impact.

(b) A lead agency shall prepare a final environmental impact statement required by RCW 43.21C.030(2) for clean energy projects within twenty-four months of a threshold determination of a probable significant, adverse environmental impact unless:

(i) the applicant agrees to a longer time limit; and

(ii) the responsible official for the lead agency issues public notice of the longer time limit and any necessary extensions to that time limit.

[2] Ecology, Average Time to Complete Final Environmental Impact Statements (EIS) (Dec. 2020), available at: https://apps.ecology.wa.gov/publications/documents/2006018.pdf.

[3] GHG Reporting Program Publication, available at: https://data.wa.gov/Natural-Resources-Environment/GHG-Reporting-Program-Publication/idhm-59de/data.

(c) When setting or extending a time limit longer than twenty-four months under subsection (1)(b), the agency must take into consideration and explain in the public notice the impact of delay in light of:

(i) the proposal's potential contributions to the state of Washington's achievement of the greenhouse gas limits at RCW 70A.45.020;

(ii) other public need for the proposal; and

(iii) the applicant's need for decisions from state agencies and local governments due to other regulatory or financing constraints.

(~~b~~d) Wherever possible, a lead agency shall aspire to far outpace the twenty-four month time limit ~~established in this section for more commonplace government decisions associated with narrower and more easily identifiable environmental impacts~~.

(~~2~~3) The department of ecology shall undertake the following measures to promote transparency regarding the timely completion of the state environmental policy act process, enhance interagency coordination, and provide the public with easily accessed information regarding participation opportunities.

(i) The department of ecology must establish and update on at least a quarterly basis a publicly available dataset for environmental impact statements that identifies, at a minimum: (A) the state agency or local government licenses or other decisions that are necessary for a clean energy project, (B) the lead agency, (C) the dates of issuance of the threshold determination and any draft, final, or supplemental environmental impact statements for the proposal, (D) the dates of any public meetings, public hearings, and public comment periods, and (E) for clean energy projects, the time limit established under subsection (1) if longer than twenty-four months. All dates in the dataset must be updated within at least 90 days of the public notice of the relevant event.

(ii) Beginning December 31, 2023~~18~~, and every ~~two~~ year~~s~~ thereafter, the department of ecology must submit a report on the environmental impact statements being prepared and completed~~produced~~ by state agencies and local governments to the appropriate committees of the legislature. The report must include data on the average time, and document the range of time, ~~it took to complete~~ for all environmental impact statements being prepared and completed within the previous ~~two~~ year~~s~~. For any environmental impact statement that requires more than twenty-four months to prepare, the department of ecology must include in the report an explanation for the exceedance from the lead agency.

(~~3~~4) Nothing in this section creates any civil liability for a lead agency or creates a new cause of action against a lead agency.

IV. Similar Actions

bp proposes that the legislature add a new section to SEPA that ensures that agencies take into consideration the potential impacts of analyzing "similar actions" in a single SEPA review.

- **Why Amendment is Needed:** Local governments in the state of Washington have expansive authority over industrial facilities, including refineries like bp's Cherry Point Refinery. Therefore, facilities may require multiple permits a year from their local government that each require SEPA review. The SEPA implementing regulations require agencies to analyze "closely related" documents in a single SEPA document. WAC 197-11-060(3)(b). The SEPA implementing regulations also give agencies discretion to analyze "similar actions" in a single document. WAC 197-11-060(3)(c). While appreciating the potential administrative efficiencies for state agencies and local governments, combining projects that are not "closely related" can cause unintended consequences. At a facility like bp's Cherry Point Refinery, projects are often planned to occur throughout the year at opportune times based on scheduled maintenance activities and available funding. Meaning, if an agency attempts to review together projects it deems to be "similar actions" that each have different implementation timelines, the agency can cause unnecessary, detrimental delays. Scheduled windows for construction activities can be missed, potentially leading to significant delays in implementation of projects that could improve public safety or reduce environmental impacts.

- **Recommendation:** We recommend adding the following section regarding the scope of the proposal that is subject to review.

  Agencies must analyze closely related actions in a single environmental document. Agencies may analyze similar actions in a single environmental document only if the agency verifies through consultation with the applicant that doing so will not cause financial harm or delay potential environmental, safety, and health improvements.

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We hope these suggestions are helpful in your deliberations. Please feel free to contact me at thomas.wolf@bp.com or 360-483-7438 if you would like to discuss further.

Sincerely,

Tom Wolf
bp America Inc.