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STATE OF WASHINGTON

NO. 81332-9

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SUPREME COURT OF THE STATE OF WASHINGTON

CLERK

RESIDENTS OPPOSED TO KITTITAS TURBINES,
KITTITAS COUNTY, and F. STEVEN LATHROP,

Petitioners,

v.

WASHINGTON STATE ENERGY FACILITY SITE EVALUATION
COUNCIL (EFSEC) and CHRISTINE O. GREGOIRE, Governor of the
State of Washington,

Respondents.

Reply
KITTITAS COUNTY'S REBUTTAL BRIEF

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I. STATEMENT OF THE CASE

This case is about the question of “Who makes land use decisions and under what circumstances?” Apart from the issue of whether or not this Court has original appellate jurisdiction over this matter and the issue of the Superior Court’s decision as to alleged procedural irregularities below, the questions on appeal here concern whether or not the State can preempt a land use decision by a county otherwise granted by Article XI §11 of the State Constitution, and whether the facts in this case regarding the State’s preemption proceeding warrant remand or reversal.¹

What this case is not about is the merit of wind power or alternative energy. Despite Respondents’ continuous argument to the contrary, this case is not a referendum on wind power. Nowhere does the County challenge the merits of wind energy, and the Respondents’ continuous efforts to try to focus this Court’s attention upon those merits are an attempt to distract the Court from the issues in this case.

Respondents are asking this Court to engage in tasks reserved for the Legislature and the Executive branch. They ask that this Court rewrite statutes to say what they currently do not. They ask this Court to make

¹ It is the County’s position that the State lacks such authority as to wind farms. It is also the County’s position that the proceeding below was so marred by violations of the appearance of fairness doctrine, non-compliance with SEPA, failure to follow what were then EFSEC’s regulations, and misapplication of the law, that remand or reversal are warranted.

policy decisions reserved for either the Legislature or the Executive. In contrast, the County is asking questions proper to the judicial branch: whether or not jurisdiction exists, whether or not the requirements of the GMA or SEPA are met, how a statute should be interpreted, and whether certain facts give rise to violations of the appearance of fairness doctrine. The County would urge this Court to focus upon the issues on appeal, deal with the questions that are properly within the Court's ambit of control, and not be distracted by something that is neither an issue in this case nor within the realm of this Court's jurisdiction--the merits of, and policy around wind power.

II. ARGUMENT

A. Supreme Court Lacks Jurisdiction To Hear This Matter Directly.

In *Third Lake Washington Bridge v. King County Chapter*, 82 Wn.2d 280, 284, 285, 510 P.2d 216 (1973), the Washington Supreme Court described the contours of its jurisdiction related to a matter such as the one at issue here.

The import of [*North Bend Stage Line v. Dept. of Public Works*, 170 Wash. 217, 16 P.2d 206 (1932)] is that Const. art. 4, ss 4 and 6, render plain the constitutional intent to make the Supreme Court the court of general appellate jurisdiction, and to make the superior court the court of general original jurisdiction. The appellate jurisdiction of this court, we said, is jurisdiction over appeals in actions of

a purely judicial nature, which have been determined in some judicial court established by the constitution or in pursuance thereof. Citing and quoting *Winsor v. Bridges*, 24 Wash. 540, 64 P. 780 (1901), we held that jurisdiction to review actions of administrative bodies, in the first instance, is in the superior court and that the legislature may not oust that court of such jurisdiction. [emphasis added]

RCW 80.50.140 is unconstitutional in so far as it calls for Supreme Court review of a decision that is not of a “purely judicial nature,” and in so far as it calls for Supreme Court review of a decision by something other than a “judicial court established by the constitution or in pursuance thereof,” in the words of *Third Lake Washington Bridge*. While this case does contain a separate appeal of the superior court’s decision as to alleged procedural irregularities, the issues on appeal here are of the decision made by something other than a “judicial court established by the constitution” and so this case is not of a “purely judicial nature.”

The fact that the superior court may exercise a limited fact-finding role does not convert this into an appeal of the decision by a “judicial court established by the constitution,” and the statute itself makes that plain. RCW 80.50.140(1) consistently contemplates that “review” is to be done by the Supreme Court once it is determined that the record is sufficient for such review. In no sense then is the “review” by the Supreme Court contemplated as an appeal of a decision by the superior

court. The Supreme Court's "review" is instead the first, and only, "review" of the decision of the governor/EFSEC (EFSEC), neither of which is a "judicial court established by the constitution." Respondent Sagebrush Power Partner's (Sagebrush) argument that review of a record is appellate in nature, whether by the superior court or the Supreme Court (Sagebrush's brief at 16), fails to address this problem.² Similarly, EFSEC's argument that the superior court's limited fact finding role makes the Supreme Court review of the action an appeal of a superior court decision (EFSEC's brief at 11) is incorrect.

EFSEC's constitutional argument (EFSEC's brief at 9-11) is flawed. It argues that because, under Art II §26, the Legislature has the power to direct "in what court" suits against the state may be brought, that the provisions of RCW 80.50.140 are constitutional. The problem with that argument is that the cited constitutional provision only gives the Legislature authority to direct what County's superior court is the proper location to sue the state, not the authority to bestow jurisdiction upon different courts beyond the limits of Art. 4 of the Constitution. Similarly, EFSEC's attempt to distinguish *North Bend Stage Line* (EFSEC's brief at 11) fails because it both misunderstands Art. II §26 and essentially argues

² Sagebrush also argues that this case can be heard by the Supreme Court, like any other appeal under the APA (Sagebrush's brief at 15), despite the fact that the APA (RCW 34.05.514(1)) provides that such review is in the superior court, not the Supreme Court.

that the case was wrongly decided as the case did not consider EFSEC's flawed constitutional argument and as though Art. II §26 did not exist at the time the case was decided.

EFSEC's reliance upon *State ex rel Kurtz v. Pratt*, 45 Wn.2d 151, 156, 273 P.2d 516 (1954) is misplaced. In that case, the Supreme Court acted because, if it had not, there would have been no remedy or review available. *Id.* at 157. In this case, appeal rights have already been perfected by timely filing in the Thurston County Superior Court, and so timely and efficient remedy and review are available.³ Likewise, EFSEC's treatment of *Third Lake Washington Bridge* (EFSEC's brief at 13-14) makes little sense because, despite Justice Rosellini's statement in that case that "experience has demonstrated that review at the trial court level is more efficient than is review by an appellate court" (82 Wn.2d at 285), EFSEC argues that review in the superior court creates an unnecessary layer, it would be cheaper and quicker to proceed directly to the Supreme Court, and that the trial court review is a waste anyway because it is not considered by the appeal court unless additional evidence is taken. These arguments fly in the face of notions of judicial economy, how review under the APA is structured, and how the State Constitution

³ Similarly, EFSEC's use of *North Bend Stage Lines* and *Kitsap County Transp.* (EFSEC's brief at 11, footnote 6) is incorrect because no appeal rights will be lost in this case, unlike those, should the court decline jurisdiction.

has established the jurisdiction of our courts. Sagebrush's reliance upon *In re Elliott* is also misplaced because a statute allowing the court to provide an answer on a question of state law to a federal court, before whom a proceeding is pending and where it remains pending,⁴ does not stand for the proposition that this court may take jurisdiction of an entire proceeding, not provided for otherwise in the constitution, simply because the Legislature passes a law saying it can. The Respondents have failed to advance plausible arguments as to how the Supreme Court has jurisdiction to review this matter at this stage of the litigation as contemplated by RCW 80.50.140, and those portions of that statute so providing should be declared unconstitutional.

B. Judge Hicks Erred In Stating Threshold Showing Of Procedural Irregularities Not Met And By Not Making Factual Determinations.

To warrant taking new evidence outside the administrative record based on alleged procedural irregularities, a challenger "must come forth with evidence of actual or potential bias." *Nationscapital Mortgage Corp. v. Depart. Of Financial Institutions*, 133 Wn.App. 723, 759, 137 P.3d 78 (2006). As described in pages 14 through 17 of the County's brief, the County presented evidence of bias against the County, of bias in the form of an overwrought concern for agency self-preservation, and of prohibited

⁴ 74 Wn.2d 600, 604, 446 P.2d 347 (1968).

ex parte communications with both the applicant's attorney and intervener Renewable Northwest Project, any one of which, under *Nationscapital*, required the superior court to take additional evidence. The superior court judge stated that what the County brought forth could "fairly be described" as evidence of bias.⁵ All of this constitutes the threshold showing requiring the taking of additional evidence outside the administrative record regarding procedural irregularities, yet the superior court made no findings of fact in its order. Instead, the court stated the threshold showing had not been made⁶ and certified some documents as supplemental to the record.⁷ The superior court said "There are facts, but they're not in dispute"⁸ yet did not denominate the supplemental portions of the record as facts.

The superior court did not follow the law. The law is, under RCW 34.05.562 and *Nationscapital*, if there is a threshold showing of procedural irregularities, then new evidence is taken and factual determinations made, but if there is no threshold showing of procedural irregularities, then review is limited to the certified administrative record. In this case, the superior court said both that what was presented could

⁵ Transcript attached and incorporated into Order Certifying Petitions at 7.

⁶ *Id.* at 9, 10.

⁷ *Order Certifying Petitions For Review to Supreme Court for Direct Review* at 4, 5.

⁸ Transcript attached and incorporated into Order Certifying Petitions at 11.

“fairly be described” as evidence of bias and that there was no threshold showing of procedural irregularities, and went on to both certify material additional to the administrative record but made no factual determinations, even though the judge had said that “There are facts, but they’re not in dispute.” This error has created confusion in the record. This error of law requires a remand to the superior court for factual determination.⁹

C. Standard of Review

The proper standard of review is found in RCW 34.05.570(3) because, as EFSEC admits at page 17 of its brief, the appealed decision is the product of an adjudication, and EFSEC’s arguments to the contrary are not support by statute or case law. EFSEC argues, on pages 15 through 19 of its brief, that the appropriate standard of review is RCW 34.05.570(4) titled “other agency action,” rather than RCW 34.05.570(3) titled “agency orders in adjudicative proceedings.”

The statutory scheme of Ch. 34.05 RCW does not support EFSEC’s argument. EFSEC argues that, because the governor is not an “agency” under RCW 34.05.010(2) “except to the extent otherwise

⁹ Respondents argue that the threshold determination is discretionary with the superior court and seek to characterize the evidence of procedural irregularities as “internal deliberative expressions” so as to justify such an exercise of discretion. (Sagebrush’s brief at 20-22; EFSEC’s brief at 46-49). The County will discuss the legal significance of this evidence in conjunction with the appearance of fairness doctrine. The chief point the County seeks to make as to the superior court’s ruling at this point, and that the Respondents have not rebutted, is that the law essentially requires the superior court to do one of two things in this circumstance, yet it appears to have done both.

required by law,” that the standard of review cannot be RCW 34.05.570(3) because it relates to “agency orders.” (EFSEC’s brief at 15). EFSEC fails to explain how that leads to the conclusion that RCW 34.05.570(4) must therefore apply, because that subsection is limited in its applicability to “other agency action.” EFSEC neglects to explain how the Governor is an “agency” for purposes of subsection (4) but not (3).

Perhaps more importantly, RCW 80.50.140(2) describes how, and requires that, objections regarding procedural errors of EFSEC be preserved for judicial review. RCW 34.05.570(3)(c) provides that the court shall grant relief from agency action when “The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure.”¹⁰ If EFSEC’s argument that the appropriate standard for review of an action like this is in RCW 34.05.570(4), rather than (3), then RCW 80.50.140(2) is rendered meaningless because engagement in an unlawful procedure is not one of the criteria that the court would consider under RCW 34.05.570(4) in deciding whether or not to grant relief, and not one of the occurrences from which a court could grant relief. If the proper standard of review is RCW 34.05.570(4), then there actually is no way to preserve or raise an issue regarding engagement in an unlawful procedure because the court will neither consider that nor

¹⁰ Arguably, subsections (g) and (h) would similarly be available.

grant relief from it. Obviously, the proper standard of review for an action under Ch. 80.50 RCW must be RCW 34.05.570(3), because, otherwise, one of the specific issues one is guaranteed review of under RCW 80.50.140(2) could not be reviewed.

The case law related to RCW 34.05.570(4) does not support EFSEC's position either. These cases relate to internal and administrative decisions, not those stemming from adjudications.¹¹ These cases are inapposite to the matter before this court because this case stems from an adjudication, and so the standard of review is actually RCW 34.05.570(3), not (4).

D. EFSEC Lacks Subject Matter Jurisdiction To Site Or Preempt Siting Of Wind Farms.

1. Ch. 80.50 RCW Does Not Confer Subject Matter Jurisdiction To Site Or Preempt Siting Of A Wind Farm.

Ch. 80.50 RCW does not give EFSEC or the governor subject matter jurisdiction for siting or preempting the siting of wind farms, and the Respondents' arguments to the contrary violate the rules of statutory

¹¹ *Fort v. State, Dept. of Ecology*, 133 Wn.App. 90, 135 P.3d 515 (2006)(State Department of Ecology ordered all rights junior to class 5 to be shut off, diverters were enjoined from interfering with other diversions in the order of the respective priorities.); *Rios v. WA Dept. of L&I*, 145 Wn.2d 483, 39 P.3d 961 (2002)(Dept. of L&I acted arbitrarily when it denied agricultural pesticide handler' request that it exercise its authority under WA Industrial Safety and Health Act and promulgate rule implementing cholinesterase monitoring); *Brighton v. WA State Dept. of Transp.*, 109 Wn.App. 855, 38 P.3d 344 (2001)(Transportation department decision regarding design of limited access highway was not arbitrary and capricious); *Skokomish Indian Tribe v. Fitzsimmons*, 97 Wn.App. 84, 982 P.2d 1179(1999)(DOE's refusal to object to a project that it acknowledged to be in violation of the Shoreline Management Act directly undercut the act).

construction. RCW 80.50.110 states that “the state hereby preempts the regulation and certification of...the energy facilities included under RCW 80.50.060.” RCW 80.50.020(15), via RCW 80.50.020(11), defines an “energy facility” as essentially (1) either a thermal power plant, liquid natural gas facility, petroleum receiving facility, underground natural gas storage facility, or a petroleum processing plant, (2) each with capacity thresholds, and (3) often requiring that the fuel first travel over the ocean. The opening sentence in RCW 80.50.020 states that “The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.” RCW 80.50.060(2) states that the chapter also applies to (1) “energy facilities” that (2) exclusively use alternative energy sources, (3) that choose to be certified under this chapter (4) regardless of generating capacity.

As the County has demonstrated in its brief on pages 18-27, this definition does not include a wind farm. RCW 80.50.020 says that its definitions apply “unless the context clearly requires otherwise.” The phrase in RCW 80.50.060(2) “regardless of generating capacity” is clearly an exception to the criteria for an “energy facility” found in RCW 80.50.020(15). (There is no reason to mention “generating capacity” unless one is referring to, incorporating, or creating an exception to those criteria found in RCW 80.50.020(15).) As the County has argued, this

creates a context clearly requiring an altered definition of “energy facility” as provided in the opening sentence of RCW 80.50.020. This specifically-called-out exception provides that one of the criterion for being an “energy facility”-generating capacity-is to be disregarded. The remaining criteria-that the emplacement be one of the five listed structures and that fuel has been transported over the ocean-are still in effect. “Where a statute provides for a stated exception, no other exceptions will be assumed by implication.” *Jepson v. Dept. of L&I*, 89 Wn.2d 394, 404, 573 P.2d 10 (1977). Hence, a wind farm is still not included in the set of things described as “energy facilities” under RCW 80.50.060(2) because it is not one of the five listed emplacements from RCW 80.50.020(15), and because the rules of statutory construction will not countenance the assumption of exceptions beyond the one specifically called out.

Respondents’ attempts at explaining how a wind farm does fit within RCW 80.50.060(2)’s definition violate the rules of statutory construction. Respondents argue (EFSEC’s brief at 23, Sagebrush’s brief at 23, 24) that RCW 80.50.060(2)’s exception to generating capacity licenses the wholesale disregard of RCW 80.50.020(15) and thereby includes wind farms in the set of “energy facilities” covered by Ch. 80.50 RCW because all RCW 80.50.060(2) means is any plant that generates power using alternative energy resources. Respondents’ argument is that,

by calling out the exception to generating capacity, the Legislature meant for all criteria, not just generating capacity, found in RCW 80.50.020(15) to be disregarded. If all the criteria can be disregarded, then a wind farm would fit within the chapter's definition of an energy facility, Respondents argue.

“Where a statute provides for a stated exception, no other exceptions will be assumed by implication.” *Jepson v. Dept. of L&I*, 89 Wn.2d 394, 404, 573 P.2d 10 (1977). RCW 80.50.060(2) clearly calls for just one exception to the criteria in RCW 80.50.020(15), and does not license the disregard of the others. By disregarding the criteria that were not excepted, in their attempt to force a wind farm into Ch. 80.50 RCW's definition of “energy facility,” respondents have violated the rules of statutory construction and their arguments are legally unsound. A wind farm does not fit within the set of things Ch. 80.50 RCW gives subject matter jurisdiction over for either siting or preemption.

On page 23, without any citation to authority, EFSEC asserts that “A thermal plant could not be exclusively powered by wind or wave or tidal action.” Based on this unsupported assertion, EFSEC attempts to challenge the validity of the County's statutory construction. The problem is that, if there is no support in the record for the proposition that certain

alternative energy resources could or could not exclusively power one of the five listed uses found in RCW 80.50.020(15), one cannot arrive at the conclusion that the legislature intended some use other than the five listed in RCW 80.50.020(15) to be considered “energy facilities.”

On pages 23 and 24 of EFSEC’s brief, there appears an opaque argument that at most adds nothing to answering the question of whether a wind farm fits within Ch. 80.50 RCW’s definition of an “energy facility,” and, in the County’s opinion, actually demonstrates that EFSEC and the governor do not have preemption authority over a wind farm. EFSEC appears to argue that, because of an amendment to RCW 80.50.075 in 2006, which added the phrase “alternative energy resource facility” to the list of things that could seek expedited review, the Legislature indicated that a more expansive definition of energy facility needed to be employed in RCW 80.50.060(2) than in (1), and that, though those things in (2) may not strictly meet the chapter’s definition of “energy facility,” they are to be treated as such for purposes of seeking expedited review.

This argument suffers many problems. There is no definition of “alternative energy resource facility” or any indication that the phrase refers to RCW 80.50.060(2). There is nothing stating what things are considered “alternative energy resource facilities,” specifically whether or

not wind farms are amongst them. Nowhere in Ch. 80.50 RCW is there any authority for the proposition that preemption authority exists over “alternative energy resource facilities.” As argued above, the idea that an “energy facility” under RCW 80.50.060(1) and (2) are different is not new or in dispute.

The Legislative calling-out of “alternative energy resource facilities” for eligibility for expedited review actually, under the maxim *expressio unius est exclusio alterius*, argues against the presence of preemption authority over them (whatever they are). Under this canon of statutory construction, “where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature...specific inclusions exclude implication.” *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 571, 980 P.2d 1234 (1999).

Both RCW 80.50.060(1) and (2) state that “the provisions of this chapter apply to” them. Similarly, RCW 80.50.110 (2) indicates state preemption over “energy facilities” as defined in RCW 80.50.060. In 2006, the legislature amended RCW 80.50.075 to provide that anyone “filing” (previously “required to file”) an application for certification of an energy facility or an alternative energy resource facility (previously just an

“energy facility”) could seek expedited review.¹² Hence, by changing the language from “required to file” to “filing,” those “energy facilities” that merely chose certification under Ch. 80.50 RCW, rather than the ones under RCW 80.50.060(1) that required such certification, could have sought expedited review. If one makes the enormous assumption that “alternative energy resource facilities” is what is described in RCW 80.50.060(2), then the legislature’s special calling-out of it for eligibility for expedited review indicates that, while this set of things may not have met the strict definition of “energy facilities” otherwise, the legislature wanted to make sure that, for purposes of expedited review, they were so considered. Under the doctrine of *expressio unius est exclusio alterius*, the legislature has indicated that the one set of things is to be treated as another for purposes of eligibility for expedited review, but has never stated that the first set of things is to be treated as the other for purposes of preemption. By calling out one set of things for equal treatment for expedited review purposes, and remaining silent as to the treatment of that set of things for preemption purposes, the inference arises in law that similar treatment for preemption purposes was intentionally omitted by the legislature. Again, Ch. 80.50 RCW does not grant subject matter

¹² 2006 Session Laws Ch. 205 §2. Please remember that the provisions of Ch. 80.50 RCW apply to the “energy facilities” described in RCW 80.50.060(2) that choose to seek certification under that chapter, as opposed to being required to do so.

jurisdiction for EFSEC or the governor to site or preempt the siting of wind farms.

2. The Legislature Has Not Clearly, Expressly, And Unambiguously Preempted Local Siting Of Wind Farms.

Article XI §11 of the Washington Constitution states “Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.” This constitutionally guaranteed right to regulate cannot be preempted by state statute unless that statute is clear, express, and unambiguous, and preemption will not be implied.¹³ As has been demonstrated by the County above in section D.2, and in its brief on pages 18-27, if Ch. 80.50 RCW contains an attempt by the Legislature to preempt County regulation of wind farms,¹⁴ that attempt is neither clear, express, or unambiguous, and so fails to preempt the County’s constitutionally guaranteed right to regulate within its borders. Ch. 80.50 RCW may well grant preemption authority over “energy facilities” but does not clearly, expressly, or unambiguously grant such authority over wind farms as wind farms are not clearly, expressly, or unambiguously an “energy facility” under Ch. 80.50 RCW.

¹³ *State v. Everett District Justice Court*, 92 Wn.2d 106, 108, 594 P.2d 448 (1979); *Northwestern Industries, Inc. v. City of Seattle*, 33 Wn.App. 757, 759, 760, 658 P.2d 24 (1983); *Nelson v. City of Seattle*, 64 Wn.2d 862, 866, 395 P.2d 82 (1964).

¹⁴ It is the County’s position that it does not.

The case law cited by Respondents is inapposite. Respondents cite to various cases (EFSEC's brief at 20, 21; Sagebrush's brief at 24, 25) for the proposition that the court will give meaning to a statute if the legislature's intent can be divined, despite the statute's inept wording, and that the court will avoid interpretations yielding strained results.¹⁵ None of the cases cited by Respondents involve statutes whose potential intent was to preempt a municipality's otherwise constitutionally guaranteed right to regulate within its borders. Indeed, in *City of Seattle v. Williams*, this Court explicitly stated that the case did not involve preemption.¹⁶ Nothing cited or argued by Respondents challenges the notion that, to preempt otherwise constitutionally guaranteed regulation rights of a municipality, the statute needs to do so clearly, expressly, and unambiguously. The cases cited by Respondents merely stand for the proposition that, in the absence of intended preemption, if the intent of the legislature can be divined, that is close enough. However, if the statute seeks to preempt, there is no such thing as "close enough." It must be clear, express, and unambiguous, and, as has been demonstrated above, this statute does not clearly, expressly, or unambiguously preempt the siting of wind farms.

¹⁵ The County's interpretation of the applicable statutes described above is not strained.

¹⁶ 128 Wn.2d 341, 353, 908 P.2d 359 (1995).

E. EFSEC Violated Its Own Regulations In Recommending Preemption.

Then-current WAC 463-28-040 prescribed the four preemption criteria EFSEC was to consider-(1) good faith effort to resolve local land use inconsistency, (2) inability to achieve land use consistency, (3) unacceptability of alternative sites, and (4) that the proposed project promotes state interests. Instead of basing the preemption recommendation upon evaluation of these criteria, EFSEC admitted at page 26 of Order 826 that “the Council’s main motivation in recommending preemption of Kittitas County’s Wind Farm Overlay Ordinance” was EFSEC’s perception that this local ordinance duplicated and usurped EFSEC’s role. This misapplication of the law is fully discussed in the County’s brief in pages 29-36, compels remand, and has been unchallenged in Respondent’s briefing.

F. Siting The Kittitas Valley Wind Power Project Violates The State Environmental Policy Act (SEPA).

SEPA requires that impacts and mitigation measures be analyzed in the environmental documents.¹⁷ The Final Environmental Impact Statement (FEIS) in this matter fails to analyze turbine setback as a mitigation measure, it fails to analyze visual impacts closer than one half mile, and it fails to analyze turbine setback of four times turbine height-the

¹⁷ RCW 43.21C.030; RCW 43.21C.060; WAC 197-11-402; WAC 197-11-440(2) and (6).

setback ultimately proposed and adopted. Instead, EFSEC's sole basis for choosing four times turbine height as an acceptable mitigation measure was the testimony of an expert hired by the applicant.¹⁸ In failing to analyze the most contentious issue in this matter, turbine setback as a mitigation, SEPA was violated and the decision based upon the defective SEPA, must be remanded.

Instead of addressing the County's challenge, the Respondents try and misconstrue the County's position. At page 43 of Sagebrush's brief they assert the County's position is that all impacts must be mitigated and that "separate environmental analysis of mitigation measures" must be done. The County's position is rather that mitigation measures must relate to impacts and their effectiveness must be analyzed as part of the FEIS. It is unrefuted that setbacks were never analyzed. Sagebrush states that SEPA is an "evaluative tool," yet setbacks were never evaluated in the environmental documents as SEPA requires. Similarly Respondents seek to confuse over-all visual impact with the specific visual impacts upon non-participating property owners.¹⁹ Whether these impacts could be mitigated by setbacks was never analyzed in the FEIS. EFSEC stated that SEPA requires that it "review the extensive analysis in the record and

¹⁸ CP 14287; Deposition of James O. Luce page 103, 104.

¹⁹ EFSEC, at page 39 of its brief, and Sagebrush at page 47 of its brief.

render a reasonable conclusion to mitigate the perceived environmental impacts.” However there was no analysis as to setbacks so as to render a “reasonable conclusion.”²⁰ Remand is compelled.

G. Proceedings Violate Appearance of Fairness Doctrine.
1. Appearance of Fairness Doctrine Applies to EFSEC.

Despite its failure to rebut the County’s arguments, EFSEC continues to assert it is not subject to the appearance of fairness doctrine because it is not a decision-maker and because it asserts that its function is not quasi-judicial. EFSEC’s brief at 40. As has already been pointed out by the County, and stands unrebutted, recommending bodies are subject to the appearance of fairness doctrine.²¹

EFSEC, at page 40 of its brief, then presents a very limited definition of quasi-judicial and then proceeds to try and show how its activities are not. The easiest way of exposing the limitations of EFSEC’s

²⁰ At page 47 of its brief, Sagebrush states that “EFSEC and the Governor are authorized to balance the moderate impact to a small number of nonparticipating residences against the overwhelming statewide public benefit of the project.” However there is nothing in the record showing that the setback requirements will reduce the impacts to “moderate.” At page 49 of Sagebrush’s brief it states “The substantive conditions [setbacks] preserve project viability and the important interest served by the project while giving due consideration to the County’s concerns.” What actually happened in the case is the County was told any setback greater than 1,300 would render the project economically unviable, then the applicant accepted EFSEC’s 1,600 foot setbacks, and eventually accepted setbacks of 1,600 feet plus micro-siting, thereby calling into question the applicant’s truthfulness and good faith before the County. CP 14277.

²¹ *Buell v. City of Bremerton*, 80 Wn.2d 518, 525, 495 P.2d 1358 (1972); *Save a Valuable Environment v. City of Bothell*, 89 Wn.2d 862, 874, 576 P.2d 401 (1978); *Chrobuck v. Snohomish County*, 78 Wn.2d 858, 870, 480 P.2d 489 (1971).

definition of quasi-judicial is to remember that this case, under RCW 80.50.110(2), is about the state potentially preempting “the regulation and certification of the location, construction, and operational conditions of certification of the energy facilities included under RCW 80.50.060.” Simply speaking, this case is about preempting a land use decision. This case is about substituting the land use decision of the state for that of the county. Land use decisions are quasi-judicial because one is “in effect an adjudication between the rights sought by the proponents and those claimed by the opponents.”²² There is extensive case law standing for the proposition that land use decisions are quasi-judicial.²³ The definition of quasi-judicial proffered by EFSEC is obviously inadequate as it would not consider land use decisions quasi-judicial, and the law of this state is that they are. The preemption of a local land use decision with a different land use decision made by the state is certainly quasi-judicial, and the appearance of fairness doctrine applies to it.

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²² *Kerr-Belmark Construction Company v. City of Marrayville*, 36 Wn.App. 370, 373, 674 P.2d 684 (1984).

²³ *Hilltop Terrace Homeowners Assoc. v. Island County*, 126 Wn.2d 22, 31, 891 P.2d 29 (1995); *James v. Kitsap*, 154 Wn.2d 574, 584, 115 P.3d 286 (2005); *Chelan County v. Nykreim*, 146 Wn.2d 904, 940, 53 P.3d 1 (2002); *Reynes v. City of Leavenworth*, 118 Wn.2d 237, 247, 821 P.2d 1204 (1992); *Woodcrest Investment Corp. v. Skagit County*, 39 Wn.App. 622, 627, 694 P.2d 705 (1985).

2. Mr. Luce Violated The Appearance of Fairness Doctrine.

Contrary to EFSEC's mischaracterization of the County's position on page 47 of its brief, the County does not contend that Mr. Luce violated the appearance of fairness doctrine because he thought preemption necessary. As early as two years prior to the adjudication on the merits of this matter, in an email, Mr. Luce described the County's position as "very unpersuasive" and thought preemption was necessary just to maintain EFSEC's status and credibility, and that the County's process for siting wind farms "circumvented" and "subverted" EFSEC.²⁴ This concern for EFSEC's self-preservation came to the point where he believed that if the County's land use was not preempted that EFSEC would be out of business, it would "lose any credibility it has as a state siting council" amongst the industry it both regulates and is completely funded by, "should turn siting power projects totally over to local jurisdictions," and be disbanded.²⁵ This obsession with EFSEC's self-preservation became the driving force in the deliberation, whipping the council towards a decision to preempt the County's lawful and GMA-compliant land use regulation and decision.²⁶ This bias towards agency self-preservation that

²⁴ Deposition of James O. Luce Exhibit 14.

²⁵ *Id.* at page 106 and Exhibit 8.

²⁶ *Id.* at 36-38; Order 826 page 26.

that drove the decision to preempt caused him in one email to exclaim
“Shame on us for not forcing this issue earlier.”²⁷

EFSEC, at pages 48 and 49 of its brief, identifies the incorrect statute defining prohibited ex parte communication under the APA. RCW 34.05.455(2) states in pertinent part that “a presiding officer may not communicate, directly or indirectly, regarding any issue in the proceeding, with any person not employed by the agency who has a direct or indirect interest in the outcome of the proceeding, without notice and opportunity for all parties to participate.” Hence, the admitted contacts between Mr. Luce and the applicant’s attorney Darrel Peeples and Renewable Project Northwest regarding THE central issue in the case, preemption, when the only application for preemption before EFSEC was in this case, are un rebutted violations of the prohibition on ex parte communication, and violate the appearance of fairness doctrine.²⁸ Similarly un rebutted is the bias exhibited by Mr. Luce as he commented negatively on the testimony of Darryl Piercy while Mr. Luce cross examined Mr. Piercy during the public hearings.^{29,30} The totality of the circumstances would not pass the

²⁷ *Deposition of James O. Luce* Exhibit 8 [emphasis in original].

²⁸ *Id.* at 8, 17-20, 24, 28, Exhibit 2.

²⁹ CP 15815-6, Exhibit “D” to County’s Opening Brief

³⁰ At page 43 of EFSEC’s brief, it argues that, because the legislature knew that DNR leased “common school trust land” and yet made it a statutory member of EFSEC, it cannot violate the appearance of fairness doctrine. The problem with this argument is that the legislature would need to have foreseen that a project would be upon such land, and there is no evidence of this. In contrast, the inclusion of a county representative on

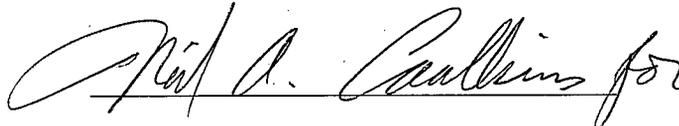
test for a violation of appearance of fairness doctrine that asks whether “a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing.”^{31, 32}

III. CONCLUSION

Respondents have failed to rebut the errors identified by the County and the County is entitled to the remedies it seeks.

Respectfully submitted this 4th day of June, 2008.

Kittitas County Prosecuting Attorney



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the EFSEC council would have been made with the foreknowledge that the county would stand to gain from taxation of the proposed project.

³¹ *Nationscapital Mortgage Corp. v. State of Washington Dept. of Financial Institutions*, 133 Wn.App. 723, 758, 137 P.3d 78 (2006).

³² Both Renewable Northwest Project’s brief, beginning on page 5, and the approval letter from the governor (beginning at CP 11909), identify the passage of I-937 as reason for approving this project, but this project is actually contrary to the goals of I-937. I-937 was passed on November 7, 2006, and requires utilities to provide 15% of their power from renewable resources by 2020. (RCW 19.285.050) This initiative passed after the close of the hearing in this matter, and so was never law during that hearing. Consequently, the relation of that initiative to this project was never briefed, and the evidence to support that relation was never established. As part of its later motion for reconsideration, the County (CP 11289, 11290) alleged that the power produced by this project was actually going to be sold to California. Neither during the reconsideration briefing nor during the remand from the governor has that allegation been challenged. Hence, the only thing in the record relevant to I-937 is the still-unchallenged allegation that the power generated from this project is to be sold to California. So, contrary to the goals of I-937, not only does the power potentially generated from this project not appear available for Washington energy needs and the needs of Washington utilities in meeting their legal obligations under RCW 19.285.050, but one of the State’s allegedly prime wind farm locations will be taken up with a project sending its power out of the region.

Attorney for Kittitas County

A handwritten signature in cursive script, reading "Neil A. Caulkins", written over a horizontal line.

NEIL A. CAULKINS WSBA#31759

Attorney for Kittitas County