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NO. 88089-1

SUPREME COURT OF THE STATE OF WASHINGTON

FRIENDS OF THE COLUMBIA GORGE, INC., and SAVE OUR
SCENIC AREA,

Petitioners,

v.

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

Respondents,

and

WHISTLING RIDGE ENERGY LLC, SKAMANIA COUNTY, and
KLUCKITAT COUNTY PUBLIC ECONOMIC DEVELOPMENT
AUTHORITY,

Intervenors-
Respondents.

BRIEF OF RESPONDENTS

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 ORIGINAL

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I. INTRODUCTION

Friends of the Columbia Gorge and Save Our Scenic Area (collectively, the “Opponents”) challenge Governor Christine Gregoire’s approval of the Whistling Ridge Energy Project (“the Project”). The Governor based her approval on a unanimous recommendation from the Energy Facility Site Evaluation Council (“EFSEC”) based on a substantial record developed through almost three years of proceedings.

According to EFSEC’s unchallenged Final Environmental Impact Statement, the Project site has been actively managed for commercial timber production for a century. On and near the site are clear-cuts, logging roads, four high voltage transmission lines, a natural gas pipeline, a compressor station, cellular towers, communications facilities, and resource mining rock pits. The Department of Fish and Wildlife analyzed the Project and concluded that it conforms to statewide guidance on minimizing and mitigating wildlife habitat impacts.

The Opponents’ challenge misrepresents the record and the applicable law. Because they have failed to sustain their burden of proof, the Governor and EFSEC respectfully request that this Court affirm the Governor’s decision.

II. COUNTER-STATEMENT OF THE ISSUES

1. Whether this Court should affirm the Governor's decision as properly protective of wildlife, when that decision was based on a substantial record, including the Department of Fish and Wildlife's determination that the Project complies with statewide guidance on the avoidance, minimization, and mitigation of wind energy facility wildlife impacts.

2. Whether this Court should affirm the Governor's decision as properly compliant with the Legislature's policy statements concerning the employment of "available and reasonable methods" to minimize environmental impacts, when the record does not contain evidence that the additional methods proposed by the Opponents are either available or reasonable.

3. Whether this Court should affirm the Governor's decision as properly compliant with requirements regarding the Project's consistency with Skamania County's comprehensive land use plan and zoning ordinances, when the County zoning code authorizes the Project outright?

4. Whether this Court should affirm the Governor's decision with regard to the site certification agreement when that agreement:

a. Properly restricts turbine construction to pre-approved construction corridors, within which micro-siting of individual turbines will occur,

b. Properly ensures that EFSEC's analysis of Whistling Ridge's forest practices will be timed to occur within a reasonable proximity to the time those activities will occur, and

c. Properly contains consistent requirements regarding Whistling Ridge's forest practices.

5. Whether this Court should deny the Opponents' request for attorneys' fees and costs when EFSEC's actions were substantially justified.

III. COUNTER-STATEMENT OF THE CASE

A. The Whistling Ridge Energy Project

Whistling Ridge Energy LLC (“Whistling Ridge”) applied to build and operate up to fifty wind turbines in six pre-approved corridors on the Project site. AR 4325-6. EFSEC ultimately recommended—and the Governor ultimately approved—a smaller, thirty-five-turbine project constructed in five pre-approved corridors. AR 29323, 29329, 36688, 29274.¹

The Project sits on 1,152 acres, of which fewer than fifty-seven acres will be required for the Project’s permanent footprint. AR 28193. The site has been logged for the last hundred years and is permanently committed to commercial forestry. AR 28251-2, 20227, 15820. The area within the pre-approved turbine construction corridors will continue to be logged in the future. AR 4333-4, 28203-5. The site contains few large conifers, no late-successional stands, and no old forest habitats. AR 28252-3, 20226-7, 14825.

The site is crisscrossed with four major Bonneville Power Administration high voltage transmission lines in two clear-cut corridors

¹ The Project consists of wind turbine generators located in pre-approved corridors; meteorological towers; access roadways; electrical connection/interconnection and communication systems; and an operations and maintenance facility. AR 29274-5 (site certification agreement), 4326 (map of project elements), 4327-30 (descriptions of project elements). The Governor denied Whistling Ridge’s request to construct turbine strings A-1 through A-7 and C-1 through C-8. AR 29323, 29329, 36688, 29274.

and contains a network of logging roads ranging in width from approximately eight to twenty feet. AR 28252. A natural gas pipeline is located on the north end of the site, a compressor station is located to the west, cellular towers and communications facilities are located nearby, and resource mining has left rock pits in the area. AR 28252.

The Department of Fish and Wildlife determined that the Project is consistent with the Department's 2009 *Wind Power Guidelines*, which provide statewide guidance to avoid, minimize and mitigate the wildlife habitat impacts of wind energy projects. AR 20227 (App. A)², 17997. According to the Department, the Project site is not a natural or native forest and has reduced suitability for wildlife habitat. AR 20222 (App. B), 20226-7 (App. A). The Department concluded that Whistling Ridge's wildlife surveys used standard nationwide protocols and best available science, and its habitat and wildlife mitigation measures fully mitigate for habitat losses for all species. AR 20222 (App. B), 20227 (App. A). The U.S. Fish and Wildlife Service determined that no Northern Spotted Owl habitat occurs on or near the site and the Project is unlikely to adversely affect the owl. AR 11519, 11522, 11508-9. The Department of Fish and Wildlife concurred. AR 20227 (App. A).

² The Department's December 20, 2010 letter is attached at Appendix A, the Department's September 17, 2010 letter is attached at Appendix B, the Department's September 22, 2009 letter is attached at Appendix C, and the Department's September 17, 2010 letter is attached at Appendix D.

The Project site is in the Columbia Gorge within seven miles of two incorporated cities and within three miles of approximately 400 residences and buildings. AR 28357-9. In the Gorge are large hydroelectric dams; high voltage transmission lines; heavily traveled highways; two rail lines; bridges spanning the Columbia River; commercial barge traffic; recreational users; industrial, commercial and residential development with thousands of residents; commercial timber harvesting; electric and natural gas transmission lines; the Camas Paper Mill and, in the distance, wind turbines. AR 29346-7, 16109, 16113, 16117, 18822.

B. The Energy Facility Site Locations Act

The Energy Facility Site Locations Act gives the Governor ultimate authority over approval of energy facilities. RCW 80.50.100(3). If the facility is approved, the Governor enters a site certification agreement as a contract between the applicant and the State regarding the location and operation of the facility. *Id.*, RCW 80.50.020(6). The Act preempts all contradictory laws and rules. RCW 80.50.110, .120.

The Act integrates the State's technical expertise into EFSEC as a single entity empowered to evaluate project applications, conduct hearings, and make site certification recommendations to the Governor.

RCW 80.50.030, .040, .071, .090, .100.³ EFSEC prescribes environmental monitoring conditions, acts as the lead agency for compliance with the State Environmental Policy Act, carries out ongoing regulation of approved facilities, and, when projects require them, issues water quality and clean air permits. RCW 80.50.040, .071, .090, .100, WAC 197-11-938(1).

EFSEC's process starts upon receipt of a sufficient application. RCW 80.50.060(6), .070(1), WAC 463-60-010. During its analysis, EFSEC obtains information from a variety of sources including an administrative adjudication, public hearings, and information gathered pursuant to the State Environmental Policy Act. RCW 43.21C. RCW 80.50.090, WAC 197-11-938(1).

EFSEC's analysis is guided by RCW 80.50.010, which articulates Washington's policy to recognize the pressing need for increased energy facilities; ensure that the location and operation of such facilities produces minimal adverse environmental effects; and balance the increasing demands for energy facilities with the broad interests of the public. Such balancing is to include 1) adequate operational safeguards,

³ When EFSEC is considering a proposed project it has six fixed members with expertise in energy facility siting and a varying number of additional members. RCW 80.50.030. For this project, EFSEC consisted of the chair appointed by the Governor and representatives of the state Departments of Fish and Wildlife, Natural Resources, Ecology, and Commerce, along with the Utilities and Transportation Commission and Skamania County. AR 29372, 29330.

2) environmental protection; 3) providing abundant energy at a reasonable cost; and 4) avoiding costly duplication and wasted time. RCW 80.50.010(1), (2), (3), (5).

C. Review of the Whistling Ridge Project

Whistling Ridge filed its application in March 2009 and an amended application in October 2009. AR 20, 4260. For almost three years, EFSEC held public information and public comment hearings, a land use consistency hearing, and an adjudicative hearing, and viewed the site and its vicinity. AR 29313-5, 29317. Pursuant to the State Environmental Policy Act, EFSEC held hearings and received comments, and in August 2010 issued a Final Environmental Impact Statement (“FEIS”). AR 29314, 28127, 23690, 24212, 24926, 25604.

Following the adjudication, EFSEC preliminarily concluded to deny Whistling Ridge’s application to build turbines in corridors A-1 through A-7 and C-1 through C-8, but otherwise approved the Project subject to the conditions in the order. AR 29331, 29372 (“Adjudication Order”) (attached as Appendix E). Based on the Adjudication Order, the FEIS and the record, in October, 2011 EFSEC unanimously recommended gubernatorial approval of a thirty-five turbine Project without corridors A-1 through A-7 and C-1 through C-8 and subject to conditions in EFSEC’s orders and the draft site certification agreement. AR 29311,

29329 (“Recommendation”) (attached as Appendix F). In December, 2011, EFSEC denied petitions for reconsideration (“Reconsideration Decision”) (attached at Appendix G).⁴ AR 36156.

EFSEC transmitted its recommendation package to the Governor. AR 29258-9. The recommendation package included EFSEC’s Adjudication Order, Recommendation, Reconsideration Decision, the FEIS, and draft site certification agreement. AR 29258-9. The site certification agreement incorporates EFSEC’s Adjudication Order and Recommendation. AR 29271 (The site certification agreement is attached at App. H).

On March 5, 2012, Governor Gregoire approved the Project and signed the recommended site certification agreement. AR 36687-8, 36689, 36730.

D. Proceedings in Superior Court

The Governor’s decision is subject to judicial review under RCW 80.50.140(1) and RCW 34.05, the Administrative Procedure Act (“APA”). On April 4, 2012, the Opponents filed a petition for judicial

⁴ Although error is not assigned to the Reconsideration Decision, the Opponents state that the order erred by discussing preemption without holding a preemption adjudication. Pet. Br. at 3 n.6. If considered, the argument should be rejected because a preemption adjudication is required only when EFSEC determines that a project site is *inconsistent* with local land use provisions. WAC 463-28-060(1). Because EFSEC determined that the site is *consistent* with local land use provisions, this requirement was not triggered. AR 36164. The Reconsideration Decision’s reference to preemption was part of a hypothetical discussion of “the full range of possible outcomes” that included the result if the site were found to be inconsistent. AR 36164, 36162.

review and in October, 2012, the superior court certified the petition to this Court. CP 4, CP 861.

The Opponents ask this Court to set aside the Governor's and EFSEC's decisions to approve the Project, reverse EFSEC's orders, and remand for further review. Pet. Br. at 3. However, in the superior court, they conceded they do not seek a "reversal of EFSEC's ultimate conclusion that the project is allowed and authorized under EFSEC statutes" and are "not asking for a declaration that this [P]roject is blatantly illegal as a whole project." RP (10/26/12) at 60-61.

IV. ARGUMENT

In this Section IV, the Governor and EFSEC present their arguments in the following order: In Section A, they describe the applicable scope and standards of review. In Sections B through F, they address the Opponents' arguments in the same sequence followed by the Opponents in their Opening Brief.

A. Scope and Standards of Review

The final reviewable decision on an application for site certification is made by the Governor exercising discretion to approve or deny the application. RCW 80.50.140(1), .100(3). The Governor's decision here was based on EFSEC's recommendation package, including the Recommendation, the FEIS, and the Adjudication Order. AR 36687-8,

28258-9. This Court considers the Governor's decision as an adjudicative proceeding under the APA. *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Coun.* ("ROKT"), 165 Wn.2d 275, 304, 197 P.3d 1153 (2008); *see* RCW 80.50.140(1).

The APA establishes the scope of judicial review for adjudicative proceedings in RCW 34.05.570(3). The Opponents challenge the Governor's decision here under the following statutory provisions of RCW 34.05.570(3):

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure; (d) The agency has erroneously interpreted or applied the law; (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, . . . ; (f) The agency has not decided all issues requiring resolution by the agency; . . . (h) The order is inconsistent with a rule of the agency, unless the agency explains the inconsistency . . . ; or (i) The order is arbitrary or capricious.

RCW 34.05.570(3)(c), (d), (e), (f), (h), (i). These standards are well established in case law.⁵

⁵ Courts review *de novo* whether an agency has **followed a prescribed procedure**. *Kittitas Cnty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 155, 256 P.3d 1193 (2011). Courts review alleged **errors of law** *de novo*. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000), giving substantial weight to the decision maker's interpretation of ambiguous statutes administered by that decision maker. *Pub. Util. Dist. No. 1 of Pend Oreille Cnty. v. Dep't of Ecology*, 146 Wn.2d 778, 790, 51 P.3d 744 (2002). Courts are especially deferential when the decision maker has subject matter expertise. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 591-95, 90 P.3d 659 (2004). Courts review findings of fact for **evidence that is substantial** when viewed in light of the whole record before the court. RCW 34.05.570(3)(e). Substantial evidence is "a

To prevail, the Opponents must prove two things: 1) under one of these statutory grounds, the Governor's action was invalid at the time it was taken, *and* 2) they have been substantially prejudiced by that action. RCW 34.05.570(1)(a), (d).

B. The Governor and EFSEC Properly Protected Wildlife

1. The Opponents incorrectly describe the law pertaining to wildlife impacts, and their description of the evidence is incomplete

In their introduction to the issue of wildlife impacts, the Opponents contend that the Governor and EFSEC failed to comply with what they

sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.” *ROKT*, 165 Wn.2d at 317. The substantial evidence standard is highly deferential to the administrative fact finder, *ARCO Prods. Co. v. Wash. Utils. & Transp. Comm'n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995), and evidence is reviewed in the light most favorable to the party who prevailed before the highest administrative fact-finder, *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001). The court will accept the fact-finder's determinations of witness credibility and the weight to be given to reasonable but competing inferences. *Id.* In reviewing mixed questions of law and fact the court applies the substantial evidence test to findings of fact and reviews questions of law *de novo*. *Tapper v. State Empl. Sec. Dep't*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993). **Failure to decide all issues requiring resolution** occurs when findings are not made on matters which establish the existence or nonexistence of determinative factual matters. *Weyerhaeuser v. Pierce Cnty.*, 124 Wn.2d 26, 36, 873 P.2d 498 (1994). If an **order is inconsistent with an agency rule**, a court may grant relief if the agency has failed to explain the inconsistency by stating facts and reasons to demonstrate a rational basis for the inconsistency. *Port of Seattle*, 151 Wn.2d at 634. **Arbitrary and capricious action** is willful and unreasoning action, without consideration and in disregard of facts and circumstances. *Pierce Cnty. Sheriff v. Civil Serv. Comm'n of Pierce Cnty.*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983) (decided under former APA which contained the same standard). The test is very narrow and those who allege arbitrary and capricious action “must carry a heavy burden.” *Id.* at 695. “Where there is room for two opinions, action is not arbitrary and capricious . . . even though one may believe the conclusion was erroneous.” *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 609, 903 P.2d 433 (1995) (citations omitted). Under this test, a court “will not set aside a discretionary decision of an agency absent a clear showing of abuse” *ARCO Prods. Co.*, 125 Wn.2d at 812, and to be overturned, a discretionary decision must be manifestly unreasonable, *Hadley v. Dep't of Labor & Indus*, 116 Wn.2d 897, 906, 810 P.2d 500 (1991).

characterize as mandatory wildlife protection requirements in EFSEC's application rules. Pet. Br. at 16.

They assert that EFSEC's regulations require a "two-tiered process" comprised solely of an application that strictly conforms with WAC 463-60 and an adjudication. *Id.* In reality, EFSEC's process is far more comprehensive. In addition to the application and adjudication, EFSEC is statutorily *required* to obtain information from a variety of other sources. RCW 80.50.090(1) (informational public hearing), RCW 80.50.090(2) (land use consistency hearing), RCW 80.50.040(9), (12) (water and air permitting processes), RCW 43.21C and WAC 197-11-938(1) (State Environmental Policy Act).⁶

EFSEC's rules concerning the contents of applications must be read in the context of these statutes. WAC 463-60-010 defines the application rules in WAC 463-60 as setting forth "*guidelines* for preparation of applications." (Emphasis added). *See also* WAC 463-60-012, -065, -105, -115. EFSEC has the discretion to determine during its deliberations whether an application contains sufficient information *for EFSEC's purposes*. RCW 80.50.060(6) (applications need only contain "such information and technical studies as [EFSEC] may require"), WAC 463-60-010 ("[t]his information shall be in such detail as

⁶ EFSEC has also been granted the discretion to acquire information through its own studies and by holding additional public hearings. RCW 80.50.040(6), .090(4).

determined by [EFSEC] to enable [EFSEC] to go forward with its application review”), WAC 463-14-080 (during its deliberations EFSEC will, whenever applicable, “[e]valuate an application to determine compliance with chapter 80.50 RCW and chapter 463-60 WAC”).

In their introduction to the issue of wildlife impacts, the Opponents also omit important information about the record. In its application, Whistling Ridge provided extensive information about wildlife and habitat. AR 4271-73, 4307-09, 4442-75, 608-939. After working with the Department of Fish and Wildlife, Whistling Ridge proffered to the Department a habitat and wildlife mitigation proposal consisting of baseline monitoring, minimization of wildlife impacts, operational monitoring, and preservation of 100 acres of Oregon White Oak woodland and coniferous forest habitat. AR 4280, 16189-95, 15791-818. The Department emphasized that, in comparison to the habitat mitigation parcel, the Project site is not a natural or native forest, contains no old growth timber or spotted owls, and has a reduced suitability as wildlife habitat. AR 20222 (App. B), 20226-7 (App. A).

The Department concluded that the Project is consistent with statewide habitat protection guidance in the Department’s 2009 *Wind Power Guidelines*. AR 20227 (App. A), 17957. The Department also reached four additional conclusions. First, the Department concluded that

Whistling Ridge's pre-project assessment and avian use surveys were consistent with the *Guidelines* and used "standard protocols utilized throughout the U.S." AR 20222 (App. B), 15820 (App. D).

Second, the Department concluded that Whistling Ridge's data "represent the best available science for predicting avian impacts." AR 20222 (App. B), 20224 (App. C), 15820 (App. D).

Third, the Department evaluated predicted wildlife impacts and concluded that it is "likely that the relationship between avian use and mortality would be similar to that evaluated in other projects" and that the Project would provide an opportunity to "better understand the relationship between wind energy development in western coniferous forests and wildlife response." AR 20222 (App. B), 15820 (App. D).

Fourth, the Department concluded that Whistling Ridge's proposed mitigation measures "fully mitigate for habitat losses for all species." AR 20227 (App. A). The Department stated that Whistling Ridge's proposed 100-acre mitigation parcel is consistent with the *Guidelines*; was developed to mitigate impacts at a 2:1 replacement ratio; contains high priority habitat qualities and wildlife species; and, unlike the Project site, is not subject to the impacts of ongoing commercial logging or wind energy operations. AR 15825, 20227 (App. A), 20223 (App. B), 15820-1 (App. D).

The United States Fish and Wildlife Service analyzed the potential impact of the Project on the Northern Spotted Owl and concluded that adverse impacts are unlikely because “[n]o designated spotted owl critical habitat occurs on or near the Project; therefore, no critical habitat will be affected.” AR 11519, 11522.⁷

EFSEC’s FEIS also analyzed the Project’s potential habitat and wildlife impacts. Significantly, the Opponents do not challenge the adequacy of the FEIS or the conclusions it reached. Pet. Br. at 3-8. The undisputed FEIS supports the conclusions reached by the Department of Fish and Wildlife and the United States Fish and Wildlife Service. Habitat on the site is “greatly compromised,” and will continue to be compromised in the future. AR 33121, 28252-3, 33171. There are no sensitive habitat features in or near the Project site and the site is not located within any known wildlife corridor, flyway, wildlife foraging area, or migratory route. AR 28255.

The FEIS also concluded that Whistling Ridge’s avian surveys used the best available standard methods. AR 33141-2. While seven federal and state species of concern were identified in the vicinity of the Project site, and two more may be present, the Project’s habitat impacts

⁷ The Department of Fish and Wildlife agreed. AR 20227 (App. A). While the Opponents comment that the Project site is within the White Salmon North Spotted Owl Emphasis Area, they fail to explain how this matters in light of the site-specific analysis and conclusions of the Fish and Wildlife Service and the Department. Pet. Br. at 9.

will not differ substantially from the commercial logging already occurring on the site. AR 28263, 28302, 33173. The Project is unlikely to kill threatened or endangered species, and is unlikely to produce population impacts to birds from turbine collisions. AR 28302, 33113 (“the National Academy of Sciences . . . committee sees no evidence that fatalities caused by wind turbines result in measureable demographic changes to bird populations in the United States, with the possible exception of raptor fatalities in the Altamont Pass area⁸ [of California]”).

During the adjudication, EFSEC received additional evidence supporting the conclusions of the Department of Fish and Wildlife, the United States Fish and Wildlife Service, and the FEIS.⁹ EFSEC received evidence that the Project site is currently in a degraded condition that is particularly suitable for wind energy development. AR 11483, 18184, 15981. Whistling Ridge’s wildlife biologist, Greg Johnson, testified that Whistling Ridge’s pre-project surveys used standard protocols and best available science. AR 11483, 15957, 15959, 15963, 15985, 15987, 15992 (“[t]he methods currently in use at Pacific Northwest wind projects apply methodologies that enjoy broad acceptance among the wind industry’s

⁸ Altamont Pass “is unique for its very high mortality of birds, especially Golden Eagles.” AR 33191.

⁹ The transcript of the adjudication is in the record at AR 16826-44, 16660-825, 17313-523, 17714-949, 18070-383, 18426-586, 18670-784, 18839-19056, 20265-364. The final witness and exhibit list is in the record at AR 21935-43.

diverse stakeholders with the exception of [Opponents' witness]”), 18075, 18077-8, 18091-2, 18132. EFSEC heard evidence that the predicted impacts of the Project would be similar to other projects even though the Project is the first project proposed in a coniferous forest habitat. AR 11483, 15957.

Based on this record, EFSEC concluded that 1) Whistling Ridge’s wildlife biologists were more credible than the Opponents’ witness, 2) the Project complies with the *Wind Power Guidelines*, 3) Whistling Ridge’s pre-project studies are consistent with nationwide standards, present data that represent best available science, and comply with the *Guidelines*, and 4) the studies and mitigation measures required in the site certification agreement comply with the *Guidelines*. AR 29355, 36167, 36168, 29368, 29324. EFSEC’s vote on these findings and conclusions was unanimous, including the Department of Fish and Wildlife’s designated member.¹⁰ AR 29372, 29330, 36170.¹¹

In light of this substantial and compelling background, and as explained in more detail below, the Opponents have not proven any of

¹⁰ The EFSEC member designated by the Department of Fish and Wildlife was not involved in the Department’s review of the Project. RCW 34.05.458.

¹¹ EFSEC also unanimously reaffirmed in its Reconsideration Decision that the Project and Whistling Ridge’s pre-project studies comply with the *Guidelines*. AR 36167-8. EFSEC emphasized that “while it may not call out for discussion in this Order every specific issue and argument raised by the petitions for reconsideration and answers, this does not mean the issue or argument was not considered by [EFSEC]. Limited or no discussion of a specific issue or argument simply means [EFSEC] finds it to be without sufficient merit to warrant discussion.” AR 36158.

their specific allegations about wildlife impacts.

2. EFSEC properly considered avian surveys performed during all seasons of the year, in compliance with the avian survey rule, WAC 463-62-040(2)(f)

The Opponents contend that EFSEC violated WAC 463-62-040(2)(f) (“the avian survey rule”) because Whistling Ridge did not perform avian surveys during the mid-August to mid-September¹² time period.¹³ Pet. Br. at 17. The avian survey rule is one of the rules in

¹² The Opponents appear to focus on this particular sub-season of the year based on one internal email by a single Department of Fish and Wildlife employee named James Watson. Pet. Br. at 17 (citing AR 17996). The Opponents do not explain why Mr. Watson’s email should be read to supersede the ultimate Department conclusion expressed by Renewable Energy Section Manager Travis Nelson that the Project’s avian surveys used nationwide protocols, represented best available science, and were consistent with the *Wind Power Guidelines*. AR 20222-3 (App. B). They also appear to focus on this sub-season because the Olive-Sided Flycatcher migrates in August. Pet. Br. at 17-18 (citing AR 28273-4). However, they fail to disclose the unchallenged FEIS’s conclusion that the Project site is “not very conducive for this species,” AR 28273 and that “the data do not suggest that the site is in an area where [Olive-Sided Flycatchers] are concentrated [and t]herefore, no population impacts would be expected.” AR 33202.

¹³ The Opponents make two additional arguments about the avian survey rule that are both meritless and improperly before this Court. Pet. Br. at 19. First, the Opponents allege that EFSEC issued no findings or conclusions about Whistling Ridge’s compliance with the avian survey rule, in violation of RCW 34.05.580(3)(f) (evidently referring to RCW 34.05.570(3)(f)), which authorizes judicial review when an agency has not decided all issues requiring resolution. This allegation is meritless because the unchallenged FEIS (which is part of EFSEC’s recommendation package, AR 29259) specifically found that Whistling Ridge performed avian surveys during “all seasons” of the year, which is what the avian survey rule requires. AR 28277. The APA does not require extensive analysis. *US W. Commc’ns, Inc. v. Wash. Util. & Transp. Comm’n*, 86 Wn. App. 719, 731, 937 P.2d 1326 (1997); accord, *Nationscapital Mortgage Corp. v. State Dep’t of Fin. Insts.*, 133 Wn. App. 723, 751-52, 137 P.3d 78 (2006). Explicit reconciliation of every conflicting shred of testimony is not required. *Miles v. Harris*, 645 F.2d 122, 124 (2d Cir. 1981); accord, *Graham v. Heckler*, 580 F. Supp. 1238, 1242 (S.D.N.Y. 1984).

Second, the Opponents contend that EFSEC’s “failure” to make findings on Whistling Ridge’s compliance with the avian survey rule means that it failed to “resolve all issues before making its recommendation” as required by WAC 463-30-320(6) (“the

WAC 463-62, which applies to the ongoing construction and operations of energy facilities. WAC 463-62-010. The avian survey rule requires wildlife surveys “during all seasons of the year.”

EFSEC’s unchallenged FEIS stated that Whistling Ridge performed avian surveys during “all seasons” of the year, i.e., “fall of 2004, summer of 2006, winter 2008-09 and spring of 2009.” AR 28277. While the Opponents read the avian survey rule to require *particular sorts of surveys* during *particular sub-seasons* of the year, that is not what the rule says—the phrase used in the rule is “all seasons,” not “all sub-seasons.” As the Department of Fish and Wildlife concluded, Whistling Ridge’s pre-project assessment and avian surveys represent the best available science, use nationally accepted standard protocols, and are consistent with the *Wind Power Guidelines*. AR 20222 (App. B).

In addition, WAC 463-62 (including the avian survey rule) establishes performance standards applicable to site certification

recommendation rule.” Pet. Br. at 19. The recommendation rule actually requires something slightly different, i.e., that every recommendation dispose of all contested issues. EFSEC’s recommendation package did dispose of the avian survey rule issue when its unchallenged FEIS stated that Whistling Ridge’s avian surveys were performed during “all seasons of the year.” AR 28277. As described above, the APA does not require extensive analysis and reconciliation of all conflicting testimony is not required.

In addition, neither of these issues is properly before the Court. With regard to both issues, the Opponents failed to 1) exhaust their administrative remedies under RCW 34.05.534, AR 22202, 22288, 23197, 23242, 28768, 28808, 29092, 29180, and 2) assign error under RAP 10.3(a)(4). Pet. Br. at 4-8. In addition, their second argument is additionally flawed because they also failed to include the issue in their Petition for Judicial Review, CP 15 (§ 7.2.3), as required by RCW 34.05.546.

agreements and the ongoing construction and operation of energy facilities. WAC 463-62-010(1), (2). As a result, the avian survey rule continues to apply to the Project during its construction and operation¹⁴ and will be considered when Whistling Ridge works with the Department of Fish and Wildlife to develop its habitat mitigation plan for EFSEC's approval and when the Project's Technical Advisory Committee does its work. AR 29285, 29288.

Based on this record, the Opponents have not demonstrated that EFSEC violated the avian survey rule, that it failed to decide issues requiring resolution, or that its recommendation failed to dispose of all contested issues.

3. EFSEC properly considered the potential for nighttime collision risk to songbirds, in compliance with the collision risk assessment application rule, WAC 463-60-332(2)(g)

The Opponents contend that EFSEC violated WAC 463-60-332(2)(g) ("the collision risk assessment application rule") because Whistling Ridge's application lacked an assessment of the nighttime collision risks for songbirds (passerines). Pet. Br. at 20-21. The collision risk assessment application rule refers to "[a]n assessment of risk of

¹⁴ Although the site certification agreement supersedes other "negotiations, representations, or agreements," it specifically states that EFSEC may suspend or revoke the agreement if Whistling Ridge fails to comply with *EFSEC's rules*. AR 26279.

collision of avian species with any project structures, during day and night.”

The Opponents’ contention is meritless for three reasons. First, Whistling Ridge did assess the risk of collision of avian species during day and night, which is what the rule requires. While their *surveys* were done during the daytime, they *assessed the risk of collisions—both day and night*—by reference to existing data on the relationship between daytime survey information and subsequent post-construction mortality data, and using this relationship calculated a total (*day and night*) range of avian mortality. AR 857, 859, 861-2, 872-4, 4466, 4471-2.

Second, as discussed above at pages 12-13, EFSEC’s application rules are not rigid, self-effectuating requirements, and EFSEC has multiple sources of information upon which to base its recommendation. The unchallenged FEIS concluded that no large-scale mortality of night migrating songbirds has been documented at wind energy facilities similar to what has occurred at communication towers. AR 33176, *see also* 15971. Most nocturnal songbird mortality occurs at lighted communication towers over 500 feet tall with supporting guy wires. AR 33176. The Project’s turbines, in contrast, are substantially lower and have no guy wires, and turbine lighting has not been shown to increase songbird fatality. AR 29274, 33176, *see also* 15971.

The Counsel for the Environment’s wildlife biologist, Don McIvor, confirmed that the Project site lacks geographic features warranting nocturnal avian migrant data collection. He stated that “there are not any obvious features which would funnel songbirds to concentrate in [the Project] area.” AR 18283.¹⁵ While noting that extenuating circumstances such as inclement weather might force songbirds to migrate at abnormally low elevations, he conceded that such events are difficult to sample and “very unlikely” to occur. AR14829, 18283. Mr. McIvor recommended post-project monitoring and adaptive management by a Technical Advisory Committee. AR 18283-4. This is what the site certification agreement requires. AR 29288, 29300.

The Department of Fish and Wildlife confirmed these conclusions when it found that Whistling Ridge’s pre-project assessment and avian use surveys utilize standard nationwide protocols, represent the best available science for predicting avian impacts, and are consistent with the *Wind Power Guidelines*. AR 20222 (App. B). Don McIvor confirmed that “the fact that [Whistling Ridge’s wildlife biologist] did not [conduct surveys for nighttime migration] is actually pretty consistent with the wind energy [G]uidelines” AR 18282-3 (italics added).

¹⁵ When EFSEC receives an application, the Attorney General appoints a Counsel for the Environment to represent the public interest in environmental protection. RCW 80.50.080.

Based on this record, EFSEC had ample reason to conclude that Whistling Ridge's wildlife studies complied with WAC 463-60-332, which includes the collision risk assessment application rule, and that "additional measures . . . add little additional protection." AR 29368.¹⁶ EFSEC explained its decision, specifically referring to the FEIS, and to the studies' compliance with the *Wind Power Guidelines*, AR 29355-6, 29320, 29368.¹⁷

Based on this record, although WAC 463-60 does not rigidly mandate the contents of Whistling Ridge's application, EFSEC properly found that Whistling Ridge's studies had complied with the collision risk assessment application rule. EFSEC's conclusions thus both complied with the rule and were supported by substantial evidence.¹⁸

¹⁶ As the Opponents recognize, EFSEC's reference to WAC 463-60-362, rather than to WAC 363-60-332, was a typographical error. Pet. Br. at 21 n.54.

¹⁷ While the Opponents complain that EFSEC made no specific findings or conclusions on the collision risk assessment application rule (WAC 463-60-332(2)(g)), they concede that EFSEC found that Whistling Ridge complied with WAC 463-30-332 and acknowledge that this finding could have been intended to include the collision risk assessment application rule. Pet. Br. at 21. EFSEC's finding indeed encompasses the rule. The APA does not require extensive analysis. *US W. Commc'ns, Inc.*, 86 Wn. App. at 731, *accord*, *Nationscapital*, 133 Wn. App. at 751-52. In addition, this question is not properly before this Court because the Opponents failed to 1) exhaust their administrative remedies as required by RCW 34.05.534 (AR 22202, 22288, 23197, 23242, 28768, 28808, 29092, 29180); 2) include this issue in their Petition for Judicial Review, CP 14 (§ 7.2.2), as required by RCW 34.05.546; or 3) properly assign error under RAP 10.3(a)(4). Pet. Br. at 4-8.

¹⁸ In footnote 55, the Opponents challenge Finding 27 in the Adjudication Order as impermissibly stating a general principle that "post-construction remedial measures would 'provide greater wildlife preservation' benefit than ... pre-application studies." Pet. Br. at 22, n.55. Finding 27 did not address the general topic of "post-construction remedial measures" versus "pre-application studies." Finding 27 narrowly stated that "post construction *mortality studies* will provide a greater benefit than *preconstruction*

4. EFSEC properly determined that the Project complies with the *Guidelines* application rule, WAC 463-60-332(4)

The Opponents contend that EFSEC violated WAC 463-60-332(4) (“the *Guidelines* application rule”) because Whistling Ridge’s application did not include what the Opponents describe as mandatory information required by the *Wind Power Guidelines*. Pet. Br. at 22-23.

This contention is without merit because, as described above at pages 12-13, EFSEC’s application rules, including the *Guidelines* application rule, do not establish self-effectuating mandatory requirements. Moreover, the *Guidelines* rule itself does not state that applications “must comply with” the *Wind Power Guidelines*, but instead states that applications shall give “due consideration to” and “shall consider” them. WAC 463-60-332(4). Thus, the *Guidelines* application

studies” when evaluating injuries from physical risks such as turbine blade strikes. AR 29368 (emphasis added). The Counsel for the Environment’s wildlife biologist, Don McIvor, stated that the Project site lacks features warranting pre-construction nocturnal avian migrant studies because the circumstances that might force abnormally low elevation songbird migration are unpredictable and rare. AR 14829. He therefore recommended a combination of post-construction studies and adaptive management. AR 18283-4. In other words, the best time to study the impact of actual physical hazards is when actual physical structures are in place. Based on the record, EFSEC correctly concluded that post-construction mortality studies, combined with adaptive management, will provide more benefit than pre-construction studies performed in a vacuum. As result, the Opponents have not demonstrated that Finding 27 is unsupported by substantial evidence or that it violates a rule. In addition, this issue is not properly before the Court because the Opponents failed to 1) exhaust their administrative remedies under RCW 34.05.534, AR 22202, 22288, 23197, 23242, 28768, 28808, 29092, 29180, 2) include the issue in their Petition for Judicial Review, CP 15 (§ 7.2.2), as required by RCW 34.05.546, or 3) assign error under RAP 10.3(a)(4). Pet. Br. at 4-8.

rule, by its own terms, requires consideration of, not strict compliance with, the *Wind Power Guidelines*.

Moreover, the *Wind Power Guidelines* are themselves not written in mandatory terms. They have no regulatory effect, but instead provide an “overview of . . . considerations” and “guidance.” AR 17998, 18003. They state that the goal of pre-project assessments is to collect “suitable” information, that such assessments “may” use relevant information from projects in comparable habitat types, and that the site-specific components and duration of such assessments will vary depending on a variety of factors, including the availability of “applicable” information. AR 18005. Existing information on species and potential habitats in the vicinity of the project area “should” (not “must”) be reviewed, and one or two years of avian use studies is “recommended” (not “required”). AR 18005, 18006.

The Department of Fish and Wildlife—the author of the *Wind Power Guidelines*—concluded that Whistling Ridge’s pre-project assessment and avian studies complied with the *Wind Power Guidelines* and that, because no data exists from constructed wind projects in other industrial forests, represent the best available science for predicting impacts. AR 20222 (App. B).

Although the Opponents complain that the Department did not explain how such compliance could have occurred without analysis of

“existing sources of data, and . . . less than one full year of avian surveys,” Pet. Br. at 27, they fail to understand that the *Wind Power Guidelines* do not contain mandatory requirements. The *Wind Power Guidelines* do not constrain the Department’s ability to analyze this Project at this location and to conclude—as it did—that Whistling Ridge’s pre-project assessment and avian surveys were “consistent with standard protocols utilized throughout the U.S.,” that Whistling Ridge’s “data represent best available science,” and that “no similar data exist[s] for constructed wind energy projects in managed coniferous forest habitats that might help inform impact predictions.” AR 20222 (App. B).

The Opponents challenge the Department’s conclusion that the Project’s avian use and mortality would be similar to other projects because that use/mortality relationship has been reasonably consistent across habitat types, and assert that it is impossible to predict mortality without knowing the level of avian use at the Project site. Pet. Br. at 27-28. The Opponents fail to disclose, however, that the Department *did* specifically address the level of avian use at the Project site, concluding that Whistling Ridge’s pre-project assessment and *avian use surveys* are consistent with standard nationwide protocols, represent best available science, and are consistent with the *Wind Power Guidelines*. AR 20222

(App. B). EFSEC's unchallenged FEIS confirmed this conclusion. AR 33141, 33142, 33167.

The Opponents point to Whistling Ridge's wildlife biologist, Greg Johnson's, statement that he did not collect existing avian use data at other commercial forestlands, including commercial forestlands managed by the Department of Natural Resources and the United States Forest Service. Pet. Br. at 24-25, AR 18156. They fail to disclose that Whistling Ridge did obtain Northern Spotted Owl survey data from the Department of Natural Resources and avian survey data from the Klickitat County Energy Overlay Draft and Final EIS. AR 11507, 4456-7, 4272. They also fail to disclose the balance of Mr. Johnson's testimony that "data collected on site is always going to be the best predictor of risk," AR 18157, and that any off-site data would "have little value," AR 18156, due to methodological differences between wind farm surveys and commercial forestland surveys. AR 18155. Not only have the Opponents not demonstrated that useful commercial forestland data actually exist, but they undercut their own argument by paradoxically contending that Whistling Ridge should have performed two years of avian surveys due to the "*dearth* of existing information." Pet. Br. at 27 (emphasis added).

The Opponents criticize Whistling Ridge for not including data from other wind energy facilities proposed in the Pacific Northwest,

Pet. Br. at 26, but fail to show that such data exists or that the sites for such proposed facilities bear any scientifically valid similarity to the Project site.

The Opponents complain that Whistling Ridge failed to perform avian use surveys for a consecutive twelve-month period. *Id.* They have not demonstrated that the Department interprets the *Wind Power Guidelines* in this fashion. To the contrary, Whistling Ridge's biologist, Greg Johnson, stated that the *Wind Power Guidelines* are referring to surveys performed in four *seasons*. AR 15968. The unchallenged FEIS concurs. AR 33182, 33195.

The Opponents contend that Whistling Ridge should have collected Partners in Flight breeding data for two bird species (the Olive-Sided Flycatcher and the Vaux's Swift) but fail to explain how this data would have added anything of merit to the other information that Whistling Ridge provided about these species. Pet. Br. at 24, AR 15985-6, 868, 875, 884.

Based on this record, EFSEC did not violate the *Guidelines* application rule, and EFSEC's conclusion that the Project complied with the *Wind Power Guidelines* was not arbitrary and capricious or

unsupported by substantial evidence.¹⁹

5. EFSEC properly addressed habitat mitigation through ongoing regulation in response to current site conditions and scientific analysis, in compliance with the mitigation planning application rule, WAC 463-60-332(3)

The Opponents contend that EFSEC violated WAC 463-60-332(3) (“the mitigation planning application rule”) because Whistling Ridge’s application at AR 4474-75 lacked a detailed habitat mitigation plan. Pet. Br. at 29.²⁰ The mitigation planning application rule asks applicants

¹⁹ As a result, contrary to the assertion at Pet. Br. at 29 n.68, there was no “inconsistency” with the *Guidelines* rule necessitating an explanation by EFSEC pursuant to RCW 34.05.570(3)(h).

²⁰ The Opponents complain that EFSEC failed during its deliberations to evaluate Whistling Ridge’s application for compliance with the mitigation planning application rule under WAC 463-14-080(1) (“the deliberations rule”). Pet. Br. at 30, 32. The Court should reject their complaint for three reasons. First, the deliberations rule is part of a chapter intended “to publicize significant policy determinations and interpretations by which [EFSEC] is guided.” WAC 463-14-010. The deliberations rule, by its own terms, publicizes certain components of EFSEC’s *internal analytic process* during its *deliberations*, stating that “whenever applicable” EFSEC will “[e]valuate an application to determine compliance with chapter 80.50 RCW and chapter 463-60.” (Emphasis added.) Nothing in the rule expresses an intent to create enforceable rights or legal liabilities or to otherwise expose EFSEC’s internal deliberations to public scrutiny. Second, the Opponents have not demonstrated how the presence or absence of an internal EFSEC evaluation about the application would be material to the ultimate question of Project approval based on the entire record before the Governor. Findings are not required on issues that are immaterial to the outcome of a dispute. *See In re Welfare of A.B.*, 168 Wn.2d 908, 924-25, 232 P.3d 1104 (2010); *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 707, 592 P.2d 631 (1979). Third, EFSEC’s compliance with the deliberations rule is not properly before this Court because the Opponents failed to 1) exhaust their administrative remedies under RCW 34.05.534 (AR 22202, 22288, 23197, 23242, 28768, 28808, 29092, 29180); 2) include this issue in their Petition for Judicial Review, CP 16-17 (§ 7.2.6), as required by RCW 34.05.546; or 3) properly assign error under RAP 10.3(a)(4). Pet. Br. at 4-8.

Based on their mistaken assumption that the application rules are rigid requirements, and that EFSEC failed to force Whistling Ridge’s application to include an elaborate (and speculative) habitat mitigation plan in its application, the Opponents also argue that EFSEC therefore failed to “decide issues requiring resolution” citing

to discuss habitat and species measures such as avoiding, minimizing, and mitigating impacts. WAC 463-60-332(3). Whistling Ridge's application contained such information. AR 4453-4, 4456, 4470-1, 4474-5. The FEIS also described the design, construction, and operation activities that would mitigate impacts to biological resources. AR 28172-83.

In addition, like EFSEC's other application rules, the mitigation planning application rule imposes no inflexible mandates and EFSEC treated it accordingly. Instead of requiring Whistling Ridge to speculate in its application about what comprehensive, ongoing habitat mitigation actions might ultimately satisfy EFSEC and the Governor, EFSEC approached habitat mitigation planning as it has at the other wind energy facilities it regulates, by adopting an adaptive management approach.

WAC 463-30-320(6) ("the recommendation rule"). Pet. Br. at 32. As described above in footnote 13, the recommendation rule actually requires that recommendations dispose of all *contested* issues. EFSEC's recommendation package disposed of compliance with the habitat mitigation planning application rule, and all other habitat related issues, for the reasons described in the text of this brief. Moreover, EFSEC's compliance with the recommendation rule is not properly before this Court because the Opponents failed to exhaust their administrative remedies under RCW 34.05.534 (AR 22202, 22288, 23197, 23242, 28768, 28808, 29092, 29180).

On the same basis, the Opponents contend that EFSEC should have issued findings and conclusions about whether Whistling Ridge's application complied with the mitigation planning application rule, citing RCW 34.05.580(3)(f). Pet. Br. at 32. They again evidently intend to refer to RCW 34.05.570(3)(f), which authorizes judicial review when an agency has not decided all issues requiring resolution. However, the application rules are not mandatory, so they have not demonstrated that any findings on this question were required. They have also not demonstrated how the presence or absence of such a decision is material in light of all of the multiple sources of information available to EFSEC. As described above in footnote 20, findings are not required on issues that are immaterial to the outcome of a dispute. In addition, EFSEC's compliance with RCW 34.05.570(3)(f) is not properly before this Court because the Opponents failed to exhaust their administrative remedies under RCW 34.05.534 (AR 22202, 22288, 23197, 23242, 28768, 28808, 29092, 29180).

AR 36158. EFSEC regulates such facilities on an on-going basis by requiring and responding to pre- and post-construction studies and by consulting with subject matter experts such as the Departments of Fish and Wildlife, Ecology, Natural Resources, affected tribes, and the United States Fish and Wildlife Service. AR 29283, 29285-86, 29284, 29299, 29300, 29301, 29287, 29294, 29291, 29300. This use of post-approval plans and programs is “consistent with [EFSEC’s] long established and successful procedures . . . requir[ing] development of specific compliance provisions during the final design stages of project development, and during and after project construction, with prescribed [EFSEC] oversight.” AR 36158.²¹

The Department of Fish and Wildlife recommended this regulatory approach to ensure that “pre-construction predictions of wildlife impacts are, in fact, monitored over time and evaluated in order to manage adaptively in response to the facts as they are borne out” by the Project. AR 15961-2, accord AR 37038-9. The United States Fish and Wildlife Service and the Counsel for the Environment’s wildlife biologist similarly

²¹ See also AR 29354, 29368 (“[a]daptive management utilized through a Technical Advisory Committee will provide benefit by bringing appropriate interests and skills to studies and development of remedial measures”); AR 29356 (EFSEC “provides mitigation measures through . . . ongoing study aimed at providing continuing improvement.”); AR 29357 (the site certification agreement will include “post-construction . . . studies to increase understanding . . . and to pursue and recommend suggestions to reduce . . . mortality” and “adaptive management strategies to optimize the balance between measures that work and effective operation of the facility” and EFSEC “support[s] performance analysis . . . in forest environments. . .”).

endorsed adaptive management strategies. AR 29356-7, 14838. Intervenor below, Seattle Audubon Society, “strongly agrees with having [EFSEC] including this type of adaptive management requirement in its site certification.” AR 22362-3.²²

To implement this regulatory choice, the site certification agreement requires Whistling Ridge to undertake four major habitat mitigation activities: 1) coordinate with the Department of Fish and Wildlife to develop for EFSEC approval a habitat mitigation plan that satisfies the *Guidelines*, AR 28285-6; 2) monitor post-construction avian impacts, AR 29300; 3) create a Technical Advisory Committee to evaluate avian and other monitoring data and make recommendations to EFSEC about additional studies or mitigation, AR 28288; and 4) supply supplemental compensatory mitigation if actual impacts exceed predicted

²² The record illustrates the wisdom of this approach. Upon the realignment of transmission feeder lines at the already-constructed, EFSEC-regulated, Wild Horse Power Project, the Department of Fish and Wildlife recommended raptor perch guards to avoid sage grouse predation. AR 37036. At the time installation was to occur, emerging scientific information called into question the effectiveness of this approach. *Id.* The Technical Advisory Committee thereupon required studies that ultimately suggested that perch guards could exacerbate predation. *Id.* Based on the study results, the Department of Fish and Wildlife and the United States Fish and Wildlife Service recommended that EFSEC implement alternative protective measures. AR 37037-8. The Department’s biologist specifically recommended such a “function based outcome rather than to be fixated on a potential option that doesn’t seem to have support of the science on the ground today. . . .” AR 37038. The Department’s designated EFSEC member stated, “I appreciate the ability for the experts to get out there on the ground and try to not be stuck with decisions that we made several years ago on a new industry that’s just now really coming on in the shrub steppe [habitat] but be able to adapt over time and maneuver the mitigation in the best way possible.” AR 37038-9.

impacts. AR 29286.²³

While the Opponents complain that this approach defers regulatory decisions to the future, they do not offer a legally valid justification for their contention that doing so is impermissible. Pet. Br. at 31. They point to the habitat mitigation planning application rule but, as described above, this rule does not impose mandatory requirements on Whistling Ridge's application. They point to the requirement that EFSEC hold one adjudicative hearing, but RCW 80.50 and the APA do not require—and logic would not allow—EFSEC to accelerate to the adjudication all regulatory decisions that could occur over the thirty-year life span of the Project. AR 4333.²⁴ The Governor and EFSEC manage on-going

²³ The site certification agreement also requires Whistling Ridge to take a host of additional steps to protect wildlife and habitat: protect wetlands, AR 29287; develop in consultation with the Department of Fish and Wildlife a habitat restoration plan for temporarily disturbed areas, AR 29288; comply with the Forest Practices Act, AR 29294, 29302; pay for a full-time, on-site environmental monitor, AR 29295-6; develop an environmental compliance program including habitat restoration and other mitigation measures, AR 29295; provide weekly environmental monitoring reports to EFSEC that include habitat mitigation, AR 29295; implement best management practices to minimize impacts to habitat and wildlife, AR 29296-7, 29301-2; implement post-construction avian monitoring in consultation with the Department of Fish and Wildlife to quantify and address impacts to avian species and assess the adequacy of mitigation measures, AR 29300; implement compliance with the Bald and Golden Eagle Protection Act in consultation with the Department of Fish and Wildlife and the United States Fish and Wildlife Service, AR 29300; implement pre- and post-construction bat monitoring and mitigation activities, AR 29301; develop and implement post-Project site restoration plans, AR 29284-5, 29304; comply with the Wind Power Guidelines, AR 29356; use low-impact lighting to reduce the attraction of insect-feeding species, AR 29357; mitigate impacts through micro-siting, AR 29357; and avoid turbine locations that separate nesting areas from food gathering areas, AR 29357, 29368.

²⁴ RCW 80.50.090(3) requires EFSEC to hold one adjudicative proceeding so that “any person shall be entitled to be heard in support of or in opposition to the application” but RCW 80.50 contains no requirements regarding the substantive contents

mitigation needs at the other EFSEC-regulated wind energy facilities by adaptive management, and the Legislature has not restricted the Governor and EFSEC's authority to do so. RCW 80.50.010; RCW 80.50.040.²⁵

Although the Opponents contend that an adaptive management approach to regulation “preclude[es] meaningful participation in a public review of a proper mitigation plan, Pet. Br. at 31, 32, the Opponents have had—and will continue to have—ample opportunity for input on habitat mitigation activities at the Project site. If the site certification agreement is amended, EFSEC will hold at least one public hearing. WAC 463-66-030. If an EFSEC decision triggers review under the State Environmental Policy Act, the Opponents will have opportunities to comment. WAC 463-47-020 (citing WAC 197-11-502, -510, -535). EFSEC also provides additional public comment opportunities. RCW 80.50.090, WAC 463-06-050, AR 37119, 37206, 37261. Legal mechanisms also exist for seeking judicial review of EFSEC's decisions. *ROKT*, 165 Wn.2d at 295.

of such an application. RCW 80.50.020(3) simply defines “application” as “any request for approval of a particular site or sites filed in accordance with the *procedures* established pursuant to this chapter.” (Emphasis added.) The Opponents do not challenge EFSEC's interpretation or application of these statutes on constitutional due process grounds, nor do they contend that these statutes dictate the contents of Whistling Ridge's application.

²⁵ The APA specifies that judicial review of such a discretionary choice is limited to assuring that the choice has been made in accordance with the law, with the reviewing court declining to itself undertake the exercise the discretion placed by the legislature on the executive branch. RCW 34.05.574.

EFSEC fully complied with the habitat mitigation planning application rule. The legislature did not restrict the Governor's discretion to approve an adaptive management approach to project regulation, and the Opponents have not demonstrated that they lack meaningful opportunities for input into future regulatory decisions.

6. EFSEC complied with the project impact application rule, WAC 463-60-332(3)(e), by properly identifying the amount of potentially impacted habitat

The Opponents contend that EFSEC violated WAC 463-60-332(3)(e) ("the project impact application rule") by making allegedly inconsistent findings about the amount of potentially impacted habitat.

Pet. Br. at 32.²⁶ The project impact rule refers to the identification and

²⁶ The Opponents also contend that EFSEC failed to determine "whether the calculations in the application are correct," as allegedly required by WAC 463-14-080(1) ("the deliberations rule"), and that EFSEC therefore violated RCW 34.05.570(3)(f), which authorizes judicial review when an agency has not decided all issues requiring resolution. Pet. Br. at 32, 34. The Opponents have not identified which calculations in the application they think EFSEC failed to double-check. Moreover, as described above in footnote 20, the deliberations rule publicizes EFSEC's internal analytic process during its deliberations but does not open those deliberations to attack. Even if it did, the rule refers to evaluating the application to determine compliance with EFSEC's statutes and rules. It does not state that EFSEC must double-check all of the many scientific and mathematical calculations in large energy facility siting applications. As a result, EFSEC "failure" to double-check the calculations in the application could not have violated the deliberations rule. The Opponents have also failed to draw any logical connection between alleged unchecked calculations in Whistling Ridge's application and their claim that EFSEC made inconsistent findings about the amount of impacted habitat. They therefore failed to demonstrate how any lack of findings under the deliberations rule could be material. See *In re Welfare of A.B.*, 168 Wn.2d at 924-25 (findings are not required on issues that are immaterial to the outcome of the dispute); *Daughtry*, 91 Wn.2d at 707. EFSEC did not violate either the deliberations rule or RCW 34.05.570(3)(f). In addition, EFSEC's compliance with these provisions of law is not properly before this Court because the Opponents failed to 1) exhaust their administrative remedies under RCW 34.05.534 (AR 22202, 22288, 23197, 23242, 28768,

quantification of compensation for impacts or losses to existing species due to project impacts and mitigation measures. WAC 463-60-332(3)(e).

The Opponents’ attempt to cherry-pick portions of the record to support their argument should be rejected. As with decisions of the courts,²⁷ administrative decision should be read as a whole.²⁸ This table illustrates that EFSEC’s findings about potentially impacted habitat were consistent with each other and with the unchallenged FEIS:

Project Element	FEIS	Adjudication Order	Recommendation
Project Area ²⁹	1,152 acres (AR 28193)	“approximately 1152 acres” (AR 29335)	“about 115 acres” ³⁰ (AR 29311) “approximately 1000 acres” (AR 29313)

28808, 29092, 29180); 2) include this issue in their Petition for Judicial Review, CP 18-19 (§ 7.2.8), as required by RCW 34.05.546; or 3) properly assign error under RAP 10.3(a)(4). Pet. Br. at 4-8.

²⁷ See *Bennett Veneer Factors, Inc. v. Brewer*, 73 Wn.2d 849, 853, 441 P.2d 128 (1968) (appellate court will read ambiguous finding of trial court “in context with the court’s other findings”); *In re Marriage of Smith*, 158 Wn. App. 248, 256, 241 P.3d 449 (2010) (appellate court reads divorce decree “in its entirety and construe it as a whole”); *Callan v. Callan*, 2 Wn. App. 446, 449, 468 P.2d 456 (1970) (“judgment must be read in its entirety”).

²⁸ See *Office of Pub. Util. Counsel v. Texas-New Mexico Power Co.*, 344 S.W.3d 446, 450-51 (Tex. App. 2011) (“In construing orders of an administrative agency, we apply the same rules as when we interpret statutes”); *Philip Morris USA Inc. v. Tolson*, 176 N.C. App. 509, 515, 626 S.E.2d 853, 858 (2006) (“In interpreting an agency order, the order ‘should be read as a whole.’”); *Cedar Rapids Steel Transp., Inc. v. Iowa State Commerce Comm’n*, 160 N.W.2d 825, 838 (Iowa 1968) (“in the interpretation of an adjudicatory order the entire instrument must be considered . . . in order to determine its intent and purpose”).

²⁹ Defined in the FEIS, AR 28193 n.“a,” as the area shown in Figure 2-1, AR 28192, which delineates a very large overall project site boundary, the majority of which will undergo no Project-related development.

³⁰ Defined in the Recommendation as “a site” of about 115 acres. AR 29311. The omission of a “2” as the last digit is an obvious typographical error, as confirmed by the later reference in the Recommendation to “approximately 1000” acres. AR 29313.

Wind Facility Footprint ³¹	384 acres (AR 28193)	384 acres (AR 28335) ³²	N/A
Total Area to be Developed Within Project Area	56.15 acres (permanent impact) and 52.1 acres (temporary impact) (AR 28193)	N/A	“[a]bout 50 acres...for... the permanent footprint [and] “about 50 additional acres temporarily affected” (AR 29313) “[a]bout 100 acres would be affected in all, with about half...temporarily (AR 29320) “About 100 acres will be impacted by temporary construction activities, ³³ the permanent...footprint will be about 50 acres” (AR 29323)

According to the unchallenged FEIS, the overall “project area” is 1,152 acres, with the actual “wind facility footprint” restricted to 384 of those 1,152 acres. AR 28193 (“Area Proposed for EFSEC Certification and Micrositing”). In other words, 1,152 acres are subject to EFSEC regulation as the Project “area” but only 384 acres of the larger project area is subject to *potential* on-the-ground development. Of those 384

³¹ Defined in the FEIS as “the total area of all corridors and development study areas in the Project boundary with overlapping areas removed, in which development potentially could take place.” AR 28193, n.“b.”

³² Defined in the Adjudication Order as “permanently developed for placement of the turbine towers, access roads, substations, underground and overhead transmission lines, and an operations and maintenance facility.” AR 28335.

³³ Because temporary construction activities will also occur in the permanently impacted areas, about 100 acres will be impacted by temporary construction activities.

acres, *actual* on-the-ground development is restricted to less than fifty-seven acres of permanent impacts and less than fifty-three acres of temporary impacts, AR 28193 (“Impacts” and “Total Area to be Developed within Project Area”).

The Opponents express confusion about whether these numbers reflect Whistling Ridge’s original fifty-turbine application or the smaller thirty-five-turbine project ultimately approved by the Governor. Pet. Br. at 33. The unchallenged FEIS expressly states that it analyzed the original project conformation of up to fifty turbines. AR 28191.

The Opponents also allege in passing that EFSEC failed to determine which portions of the Project site require mitigation. Pet. Br. at 32.³⁴ This assertion is contradicted by the portion of the table above labeled “Total Area to be Developed Within Project Area,” which shows that fewer than fifty-seven acres will be permanently impacted and

³⁴ The Opponents’ related contention that Whistling Ridge proposes height restrictions on “hundreds of acres of forestland to provide wind clearance” and that such height limitations might be maintained by “frequent clear-cuts or by replacing forested habitat with grass or shrubs” Pet. Br. at 34, is inaccurate. AR 4333-6, 11331. As both the application and the unchallenged FEIS stated, many of the remaining stands of trees in the turbine corridors are near maturity and already subject to existing harvest plans. AR 4333-4, 28204-6. A cleared area will be maintained approximately fifty feet in all directions from each turbine and planted with native grasses and low-growing shrubs. AR 4333, 28204. Trees will be planted between fifty and 500 feet around each turbine. *Id.* From fifty to 150 feet from each turbine tree heights will be restricted to fifty feet above the base of the turbine; between 150 and 500 feet from the turbine tree heights will be restricted to approximately fifty feet above the turbine base within an area formed by a ninety-degree angle centered on the prevailing wind. AR 28204, 28206. However, it is expected that many of the replanted trees will grow at a rate that will not require any artificial limits. *Id.*, AR 11331.

fewer than fifty-three acres will be temporary impacted. The *exact* size and locations of such impacts within the 384-acre Project footprint will be determined through micro-siting as final construction plans are developed and the on-the-ground habitat mitigation planning is completed. AR 4316, 36700, 29313.

Based on this record, EFSEC complied with the project impact rule, made consistent findings, was not arbitrary and capricious, and decided all issues requiring resolution.

7. EFSEC complied with the no-net-loss rule, WAC 463-62-040(2)(a)

The Opponents contend that EFSEC violated WAC 463-62-040(2)(a) (“the no-net-loss rule”), which requires no-net-loss of fish and wildlife habitat function and value. Pet. Br. at 34.³⁵ The no-net-loss rule is part of the chapter that sets ongoing performance standards for the construction and operation of energy facilities. WAC 463-62-010.

³⁵ The Opponents’ assignments of error and specification of related issues pertaining to the amount of impacted habitat also recite the following issue: did Respondents err by approving the Project without first ensuring that the ratio of replacement habitat to impacted habitat would be greater than 1:1. Pet. Br. at 5. Although the Opponents make a passing reference to the rule that refers to the 1:1 mitigation ratio (WAC 463-62-040(2)(d)), the Opponents provide no argument or citation to authority in support of their contention. Pet. Br. at 32-34, 36-40. Courts generally do not consider such arguments that violate RAP 10.3(a)(5). *Hollis v. Garwell, Inc.*, 137 Wn.2d 683, 689 n.4, 974 P.2d 836 (1999). If the Court nonetheless considers this issue, the Court should reject the Opponents’ contention because, as described above at pages 19-20, rules in WAC 463-62 (such as the 1:1 mitigation ratio rule) have ongoing force and will be considered during the preparation and implementation of a habitat mitigation plan. AR 29285-6. The Opponents have therefore not demonstrated that EFSEC violated the 1:1 mitigation ratio rule.

The Opponents have failed to demonstrate that EFSEC violated the no-net-loss rule.³⁶ The Department of Fish and Wildlife deemed the Project to “*fully* mitigate for habitat losses for *all species*,” noting that the 100-acre habitat mitigation parcel proposed by Whistling Ridge is calculated at a 2:1 replacement ratio.³⁷ AR 20227 (emphasis added), 20223.³⁸ In its recommendation package, EFSEC’s specifically stated that this parcel complies with the no-net-loss rule. AR 31259.³⁹

Moreover, even if this showing was inadequate (which it is not), as described above at pages 19-20, rules such as no-net-loss rule continue to

³⁶ The Opponents also misrepresent the record by stating that “the facility itself may be more than 1,100 acres in size, resulting in a virtual wall of turbines stretching across multiple forested ridgelines.” Pet. Br. at 35. As described in the preceding subsection of this brief, the overall Project *area* is 1,152 acres but the portion of that area within which proposed development may potentially occur is 384 acres, of which fewer than fifty-seven acres will be permanently impacted by no more than thirty-five turbines built on land already logged for a century.

³⁷ The Opponents describe WAC 463-62-010(1) as stating that “the agency ‘shall apply’ this standard during its administrative adjudications.” Pet. Br. 34. To the contrary, WAC 463-62-010(1) simply states that it “sets . . . performance standards and mitigations requirements . . . associated with site certification for construction and operation of energy facilities” and that EFSEC “shall apply these rules to site certification agreements. . . .” WAC 463-62-010(2) states that the chapter “shall apply to the construction and operation of energy facilities.”

³⁸ At the time the Department made this statement, Whistling Ridge was still proposing a fifty-turbine project. During the adjudication, Whistling Ridge committed to reduce the number of turbines to thirty-eight. AR 16732-3. In its Recommendation, EFSEC recognized that this reduction mitigates the effect of the Project. AR 29313 n.2. EFSEC and the Governor ultimately further reduced the allowable number of turbines to no more than thirty-five. AR 29274. Presumably, a thirty-five-turbine project could have fewer impacts than a fifty turbine project and produce a ratio even higher than 2:1.

³⁹ The Opponents have pointed to no requirement in the Energy Facility Site Locations Act that would restrict the location of findings to only one portion of EFSEC’s recommendation package. To the contrary, EFSEC’s recommendation package included the FEIS and its Recommendation specifically stated that, except with respect to aesthetics and heritage, it considered the FEIS as “proper basis for [EFSEC’s] Recommendation.” AR 29259, 29314.

apply to the Whistling Ridge's preparation of habitat mitigation plan and the Project's Technical Advisory Committee. AR 29285-6, 29288-9.

Thus, EFSEC's recommendation package complied with the no-net-loss rule.⁴⁰

8. EFSEC provided the Opponents with an opportunity to evaluate and provide evidence about the proposed habitat mitigation parcel

The Opponents contend that by allowing Whistling Ridge to offer its proposed 100 acre habitat mitigation parcel in pre-filed rebuttal testimony EFSEC violated RCW 34.05.449(2), RCW 80.50.090(3), and WAC 463-30-020, which accord to parties in adjudications certain rights to be heard. Pet. Br. at 36-38.⁴¹

⁴⁰ The Opponents make two additional contentions that are neither correct nor properly before this Court. First, they allege that by failing to make findings about the no-net-loss rule, EFSEC failed to "dispose of contested issues" (citing WAC 463-30-320(6) ("the recommendation rule")) and its orders are inconsistent with an agency rule (citing RCW 34.05.580(3)(h)). Pet. Br. at 35-6 (presumably they intended to cite to RCW 34.05.570(3)(h)). As discussed in the text of this subsection of this brief, EFSEC's recommendation package specifically cited the no-net-loss rule and stated that the mitigation parcel complied with it. As a result, EFSEC did not violate the recommendation rule or RCW 34.05.570(3)(h).

Second, the Opponents contend that EFSEC failed to decide all issues requiring resolution, citing RCW 34.05.580(3)(f) (evidently intending to cite to RCW 34.05.570(3)(f)). Pet. Br. at 35. RCW 34.05.570(3)(f) authorizes judicial review when agencies do not decide all issues requiring resolution. For the same reasons that EFSEC complied with the recommendation rule and RCW 34.05.570(3)(h)), it also complied with RCW 34.05.570(3)(f).

In addition, EFSEC's compliance with these provisions of law is not properly before this Court because the Opponents failed to 1) exhaust their administrative remedies under RCW 34.05.534 (AR 22202, 22288, 23197, 23242, 28768, 28808, 29092, 29180); or 2) properly assign error under RAP 10.3(a)(4). Pet. Br. at 4-8.

⁴¹ The Opponents also comment that EFSEC should have required Whistling Ridge to include the 100 acre habitat mitigation parcel in its application, and that by not doing so EFSEC violated the mitigation planning application rule (WAC 463-60-332(3))

The Opponents' argument is meritless. Whistling Ridge submitted its pre-filed rebuttal testimony about the mitigation parcel on December 16, 2010. AR 11301, 16188-16195, 15791-818, 15825, 15823. The adjudication did not begin until January 3, 2011. AR 16662.⁴² EFSEC specifically provided the Opponents with an opportunity to object to pre-filed rebuttal testimony, but they elected not to do so with regard to the habitat mitigation parcel.⁴³ AR 11875, 14580-1, 15868-70, 16358-410. In now contending that they asked to present evidence or testimony on the adequacy of the parcel, Pet. Br. at 37 (citing AR 22263), the Opponents oddly cite to the Opponent Friends of the Columbia Gorge's *post-adjudication* brief, filed almost two months after the adjudication ended. AR 22267, 20359. Moreover, at the time of the adjudication,

and EFSEC's "procedures." Pet. Br. at 40. The Court should reject this passing comment because it violates RAP 10.3(a)(6). Courts will not consider alleged errors when the party fails to provide argument and citation to authority. *Hollis*, 137 Wn.2d at 689 n.4. If the Court considers the Opponents' comment, it should be rejected because, as described above at pages 12-13, EFSEC's application rules such as the habitat mitigation planning rule are not inflexible self-effectuating requirements. EFSEC regulates through adaptive management, in concert with subject matter experts such as the Department of Fish and Wildlife, and the site certification agreement specifically requires Whistling Ridge to propose habitat mitigation measures such as the mitigation parcel and does not require the entire process start over with the inclusion of mitigation measures in the application. AR 29286, 29288.

⁴² The record shows that Whistling Ridge first proposed the mitigation parcel to the Department five months prior to the adjudication. AR 15792-5. EFSEC authorized the parties to engage in discovery "at any time in the process." AR 08630, 08628. The Opponents evidently chose not to ask Whistling Ridge about the existence of a mitigation parcel.

⁴³ The Opponents comment in passing that Whistling Ridge offered the pre-filed mitigation parcel testimony through Jason Spadaro but do not allege that this constituted reversible error. Pet. Br. at 37.

Opponent Friends of the Columbia Gorge addressed Whistling Ridge's pre-filed testimony about the parcel with its own pre-filed cross-examination exhibits, AR 16846-8, 16849-51, and with extensive briefing. AR 22261-66. In addition, along with intervenor Seattle Audubon Society, Opponent Friends of the Columbia Gorge extensively cross-examined multiple witnesses about the mitigation parcel. AR 18179-81, 18273-5, 18445-52.

The Opponents are equally incorrect that EFSEC made inconsistent statements about the suitability of the parcel and the degree to which the parcel affected its recommendation.⁴⁴ Pet. Br. at 39. EFSEC stated that Whistling Ridge did not formally offer the parcel to EFSEC as mitigation. AR 29331-2, AR 29357. EFSEC stated that it would therefore not "address" the parcel in its findings. AR 29331-2, AR 29357. While in its findings, EFSEC commented in the context of discussing establishment of the Technical Advisory Committee that the parcel was "appropriate," EFSEC repeatedly emphasized here and elsewhere that the parcel "may" satisfy Whistling Ridge's mitigation obligation. AR 29368,⁴⁵ 29331,

⁴⁴ This issue is not properly before this Court because the Opponents failed to 1) exhaust their administrative remedies under RCW 34.05.534 (AR 22202, 22288, 23197, 23242, 28768, 28808, 29092, 29180); 2) include this issue in their Petition for Judicial Review, CP 17-18 (§ 7.2.7), as required by RCW 34.05.546; or 3) properly assign error under RAP 10.3(a)(4). Pet. Br. at 4-8.

⁴⁵ In this regard, the Opponents cite to a related oral statement by EFSEC Manager Al Wright that EFSEC had "considered and favorably regarded" the parcel. Pet. Br. at 39. The Opponents omitted the rest of his statement, which is consistent with

29357. Nowhere did EFSEC state that the parcel actually *satisfied* Whistling Ridge's mitigation obligation. The site certification agreement requires that Whistling Ridge submit a habitat mitigation plan and EFSEC stated that Whistling Ridge's mitigation obligation "may" (not "must") be satisfied by the purchase of a mutually acceptable mitigation parcel or by contributing money or fees for mitigation. AR 29286, 29320, 29324, 36167-8.⁴⁶ As described above at footnotes 28 and 29, administrative decisions, like decisions of the courts, must be read as whole. Contrary to the Opponents' contention, EFSEC's statements about the mitigation parcel cannot fairly be read as inconsistent regarding EFSEC's acceptance of the parcel or as prohibiting Whistling Ridge from offering the parcel as part of its mitigation plan. EFSEC did not accept the parcel but did not prohibit Whistling Ridge from offering it in the future.

the balance of EFSEC's treatment of the parcel. The complete sentence is: "[EFSEC] considered and favorably regarded that proposal; however, it was never really presented to [EFSEC] in the form of a stipulated agreement between the parties, and so therefore [EFSEC] simply acknowledged in the adjudicative process and its consideration but did not make a finding on that particular issue because it was never culminated into a stipulated agreement to [EFSEC]." AR 28720.

⁴⁶ The Opponents also comment in passing that the proposed mitigation parcel may not provide habitat for the same species of wildlife that would be impacted by the Project. Pet. Br. at 37 n 37. This passing comment violates RAP 10.3(a)(6) and the Court should disregard it. *Hollis*, 137 Wn.2d at 689 n.4. If the Court considers the comment, the Department of Fish and Wildlife specifically approved the parcel as appropriate mitigation and consistent with the *Wind Power Guidelines*, which do not mandate identical forest habitat. AR 15825, 20227, 18010 (the *Guidelines* "should not be viewed as preventing or discouraging . . . 'customized' or 'alternative' mitigation packages"). In addition, this issue is not properly before this Court because the Opponents failed to 1) include this issue in their Petition for Judicial Review, CP 17-18 (§ 7.2.7), as required by RCW 34.05.546; or 3) properly assign error under RAP 10.3(a)(4). Pet. Br. at 4-8.

Based on this record, EFSEC properly allowed the Opponents to be heard pursuant to RCW 34.05.449(2), RCW 80.50.090(3), and WAC 463-30-020 and did not act in an arbitrary and capricious fashion in making consistent findings about the habitat mitigation parcel.

C. The Governor and EFSEC Properly Implemented the Legislative Policy to Minimize Adverse Environmental Effects Through Available and Reasonable Methods

1. Increased cut-in speeds

The Opponents contend that EFSEC violated RCW 80.50.010 and WAC 463-14-020(1) when it did not require Whistling Ridge to implement increased turbine cut-in speeds (i.e., the speed at which turbine blades begin spinning) to protect birds and bats. Pet. Br. at 40-41.⁴⁷ RCW 80.50.010 and WAC 463-14-020(1) state the Legislature's policy that EFSEC minimize adverse environmental effects "through available and reasonable methods."

⁴⁷ The Opponents also comment in passing that Whistling Ridge "may have" underestimated the likely fatality rates for birds and bats. Pet. Br. at 41 n.77. This passing comment violates RAP 10.3(a)(6) and the Court should disregard it. *Hollis*, 137 Wn.2d at 689 n.4. In addition, this issue is not properly before the Court because the Opponents failed to 1) include it in their Petition for Judicial Review, CP 19 (§ 7.2.10), as required by RCW 34.05.546; or 2) properly assign error under RAP 10.3(a)(4). Pet. Br. at 4-8. If the Court elects to consider the comment, it should be rejected because the Opponents do not contend that EFSEC committed reversible error. EFSEC received and considered testimony regarding predicted avian, and bat fatalities from both Whistling Ridge and the Opponents. The Opponents' testimony was also submitted as a comment on the Draft Environmental Impact Statement. AR 26774-78. As the unchallenged FEIS recognized, the Opponents' testimony overestimated fatality rates and relied on a flawed assumption. AR 33174 ("[T]he inflated estimates of raptor mortality by Smallwood are flawed[.]"); AR 33180 ("Not accounting for this probability of finding carcasses during multiple searches leads to an overestimate of fatality rates in Smallwood's estimator.")

The Opponents' contention is meritless because their witness, Shawn Smallwood, admitted that increased cut-in speeds have not been adopted at *any* wind energy facility and that the only specific design he identified is "experimental." AR 15408.

Based on this record, RCW 80.50.010 and WAC 463-14-020(1) did not require EFSEC to treat increased cut-in speeds as an available and reasonable method of minimizing impacts. EFSEC also was not required to specifically address increased cut-in speeds because, for an issue to be properly raised before an agency, there must be more than a slight reference to the issue in the record. *King Cnty. v. Wash. State Boundary Review Bd. for King Cnty.*, 122 Wn.2d 648, 670, 860 P.2d 1024 (1993); *Miles v. Harris*, 645 F.2d 122, 124 (2d Cir. 1981) (agencies are not "require[d] . . . explicitly to reconcile every conflicting shred of . . . testimony").

2. Radar-activated safety lighting

The Opponents allege that when EFSEC did not require radar-activated safety lighting, it violated the requirement to use available and reasonable methods to reduce effects on the environment, including esthetic, heritage and recreational resources. Pet. Br. at 43-44.⁴⁸

⁴⁸ EFSEC analyzed the Project area's scenic heritage, the implications of the nearby National Scenic Area (16 U.S.C. § 544o(a)(10)), the significant development that has already occurred in the Gorge, and the competing testimony on the question of visual

Although the Opponents contend that EFSEC should have required radar-activated aviation lighting to protect scenic resources, they have not demonstrated that such technology was either available or reasonable. The unchallenged FEIS described the Project's aviation safety lighting as small blinking points of red light that would not light up the sky or the surrounding landscape, and concluded that compliance with the Federal Aviation Commission's lighting requirements provided appropriate mitigation, noting that such lights are to some degree shielded from ground level view due their vertical beam. AR 28416-8. By comparison, the Columbia Gorge "already contains lighting on massive hydro-electric dams, high-voltage transmission lines, antennas, highways, [and] in cities. . . ." AR 16097.

The Opponents imply that radar-activated aviation lighting is available and reasonable but the evidence they cite contradicts their position. Pet. Br. at 47 n.89. Their witness, Dean Apostol, did not address availability and reasonableness; he merely suggested that Whistling Ridge should have analyzed radar-activated lighting technology. AR 14609. The Counsel for the Environment expressed no opinion on availability or

impacts. AR 29346-54, 28357-9, 29317-19. After spending two days viewing the Project site, and doing a detailed viewing site analysis, EFSEC ultimately adopted the recommendation of the Counsel for the Environment to eliminate turbine corridors A-1 through A-7. AR 29336, 29352-3. EFSEC also went *beyond* that recommendation and prohibited turbine corridors C-1 through C-8. AR 29352, 29367, 29317 n.12.

reasonableness, instead suggesting only that Whistling Ridge should have investigated such technology. AR 22286. The Opponents cite to Opponent Friends of the Columbia Gorge's petition for reconsideration of EFSEC's recommendation, and excerpts attached to it from a 2011 permit for a Wyoming wind farm. AR 28831-32, 28869-73. Even assuming that information presented for the first time in a motion for reconsideration can be considered notwithstanding WAC 463-30-335(2)'s requirement that petitions for reconsideration be based on evidence in the record, the Wyoming permit required that developer to seek Federal Aviation Administration approval for radar-activated aviation lighting but did not indicate that such lighting was reasonable or available (or that it would ever receive FAA approval). AR 28871, 28872, 28873. What the record also showed—and the Opponents do not challenge—is that radar-activated lighting *may actually pose a risk to planes* due to concerns about lighting system failures. AR 16096.

The Opponents also fail to mention the testimony of Michael Lang, Opponent Friends of the Columbia Gorge's Conservation Director. AR 16009. Although he testified to his "understanding" that an unnamed project somewhere in the northeastern United States used radar-activated lighting, he did not testify that such lighting was part of the settlement

between Friends and another turbine project developer in the vicinity of the Gorge. AR 19025-6, 16014, 19035.

Based on this record, EFSEC was not required to treat radar-activated safety lighting as an available and reasonable method under RCW 80.50.010 and the Opponents have not demonstrated that EFSEC erroneously applied the law, that EFSEC's decision was unsupported by substantial evidence, or that EFSEC violated a rule.

3. Measures to reduce turbine blade spin time

The Opponents also allege that EFSEC should have required unspecified "measures to reduce the amount of time that the turbine blades spin when not generating energy." Pet. Br. at 49. They neither identify such measures nor demonstrate that they are available and reasonable. Based on this record, EFSEC was not required to treat unidentified measures to reduce blade spin time as available and reasonable methods under RCW 80.50.010 and the Opponents have not demonstrated that EFSEC failed to decide an issue that was properly raised before it or failed to dispose of a properly contested issue.

D. The Governor and EFSEC Properly Addressed Land Use Consistency

1. The Opponents have not overcome Skamania County Resolution 2009-54, which is *prima facie* proof of land use consistency

The Energy Facility Site Locations Act required EFSEC to determine whether the Project's site "is consistent and in compliance with" Skamania County's comprehensive land use plan and zoning ordinances" (collectively "land use provisions"). RCW 80.50.090(2), WAC 463-26-050, -060, -110. EFSEC's rules gave Whistling Ridge the opportunity to submit to EFSEC a certificate from Skamania County certifying consistency of the site with the County's land use provisions. WAC 463-26-090. Whistling Ridge submitted Skamania County Resolution 2009-54 which, under EFSEC's rules, constituted *prima facie* proof of consistency "absent contrary demonstration by anyone present at the hearing." AR 11596-11624, WAC 463-26-090. As the entity empowered to implement and interpret its land use provisions, Skamania County's interpretation is worthy of deference. *Ford Motor Co. v City of Seattle, Executive Servs. Dep't*, 160 Wn.2d 32, 42, 156 P.3d 185 (2007) (reviewing courts give considerable deference to a local government's construction of its zoning ordinances). As explained below, EFSEC

correctly concluded that the Opponents did not overcome this presumption. AR 29342-3, 29366, 29314.

2. Background on the legal relationship between Skamania County’s Comprehensive Plan and its zoning ordinances

Skamania County developed its comprehensive plan and zoning ordinances pursuant to the Planning Enabling Act, RCW 36.70. AR 11601. That Act and decades of settled case law define the nature of—and establish a hierarchy between—those documents.

The Planning Enabling Act defines comprehensive plans as the “beginning step” in planning, as “policy guide[s],” and as a “source of reference to aid in the developing, correlating and coordinating official regulations and controls.” RCW 36.70.020(6). The Act mandates that “[i]n no case shall the comprehensive plan, whether in its entirety or area by area or subject by subject[,] be considered to be other than in such form as to serve as a guide to the later development and adoption of official controls.” RCW 36.70.340. Washington courts have thus consistently held that comprehensive plans have no project-specific regulatory effect. *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 873-74, 947 P.2d 1208 (1997); *Cougar Mountain Assocs. v. King Cnty.*, 111 Wn.2d 742, 757, 765 P.2d 264 (1988); *Westside Hilltop Survival Comm. v. King Cnty.*, 96 Wn.2d 171, 175-176, 634 P.2d 862 (1981);

Cathcart-Maltby-Clearview Cmty. Coun. v. Snohomish Cnty.,
96 Wn.2d 201, 212, 634 P.2d 853 (1981).⁴⁹

Zoning ordinances, in contrast, are one of the “official controls” on “the physical development of a county . . . and are the means of translating into regulations and ordinances all or any part of the general objectives of the comprehensive plan.” RCW 36.70.020(11), .550, .570; *Viking Properties, Inc. v. Holm*, 115 Wn.2d 112, 126, 118 P.3d 322 (2005) (“ . . . it is local development regulations . . . which act as a constraint on individual landowners.”). Zoning ordinances are presumed to be valid. *Cathcart-Maltby-Clearview*, 96 Wn.2d at 211.

⁴⁹ Exceptions to this principle are when the zoning ordinance itself requires compliance with the comprehensive plan, *Weyerhaeuser v. Pierce Cnty.*, 124 Wn.2d 26, 43, 873 P.2d 498 (1994), or the legislature creates a statutory exception by giving comprehensive plans direct regulatory effect, as is the case of the State Environmental Policy Act in RCW 43.21C.060. *West Main Assocs. v. City of Bellevue*, 49 Wn. App. 513, 524-25, 742 P.2d 1266 (1987). The Opponents describe this latter exception somewhat inaccurately by stating that comprehensive plans are enforceable standards when “specifically called out” as the basis for exercising regulatory authority. Pet. Br. at 50 n.93. This is only correct if by “specifically called out” the Opponents mean “the legislature has enacted a statute, such as the one discussed in *West Main Assocs.*, which expressly mandates that comprehensive plans be given regulatory effect.” RCW 80.50.090(2) is not such a statute. RCW 80.50.090(2) requires EFSEC to “determine” whether the site is “consistent and in compliance with” the comprehensive plan and zoning ordinances. In contrast to the statute addressed in *West Main Assocs.*, RCW 80.50.090(2) does *not* state that it gives direct regulatory effect to comprehensive plans. In addition, RCW 80.50.090(2) should be read in concert with the rest of RCW 80.50. *State, Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). Notwithstanding the State’s power to preempt local land use provisions, RCW 80.50.100(2) states that EFSEC “shall include conditions in the draft certification agreement . . . to protect . . . local government or community interests . . .” The Opponents’ reading would disrupt the settled expectations of local governments and the public that comprehensive plans have no project-specific regulatory effect and would create a senseless dichotomy between energy facilities sited by EFSEC and energy facilities sited by local governments, with the former—but not the latter—subject to direct regulation by the comprehensive plan.

In the event of a conflict between a zoning ordinance and a comprehensive plan, the specific zoning ordinance prevails. *Citizens for Mount Vernon*, 133 Wn.2d at 874 (citing *Cougar Mountain*, 111 Wn.2d at 757); *Nagatani Bros., Inc. v. Skagit Cnty. Bd. of Comm'rs*, 108 Wn.2d 477, 480, 739 P.2d 696 (1987). If a comprehensive plan prohibits a particular use but the zoning code permits it, the use is permitted. *Citizens for Mount Vernon*, 133 Wn.2d at 874. These principles have been enforced by courts both prior to and following the enactment of the Growth Management Act (“GMA”) in 1991.⁵⁰

The Project is located within the Skamania County comprehensive plan’s Conservancy land use designation.⁵¹ AR 11604. The designation is “intended to provide for the conservation and management of existing natural resources in order to achieve a sustained yield of these resources, and to conserve wildlife resources and habitats.” AR 22012. Within the Conservancy designation “[l]ogging, timber management, agricultural and

⁵⁰ *Citizens for Mount Vernon*, 133 Wn.2d at 873-74 (post-GMA); *Cougar Mountain*, 111 Wn.2d at 757 (pre-GMA); *Nagatani Bros.*, 108 Wn.2d at 480 (pre-GMA); *Timberlake Christian Fellowship v. King Cnty.*, 114 Wn. App. 174, 183, 61 P.3d 332 (2002), *review denied sub nom.*, *Citizens for a Responsible Rural Area Dev. v. King Cnty.*, 149 Wn.2d 1013, (post-GMA); *Lakeside Indus. v. Thurston Cnty.*, 119 Wn. App. 886, 894-5, 83 P.3d 433, *review denied*, 152 Wn.2d 1015 (2004) (post-GMA).

⁵¹ Skamania County approved its first comprehensive plan in 1977, AR 21994, and adopted zoning ordinances between 1989 and 1991. AR 21996. In 2007, the County adopted a new comprehensive plan. AR 16866. In 2008, the County prepared new zoning ordinances, but they cannot go into effect until the County prepares an Environmental Impact Statement. AR 16864, 16892. As a result, the County’s current zoning ordinances predate its 2007 comprehensive plan.

mineral extraction” are the “main use activities” and the plan enumerates particular uses that are appropriate “depending upon . . . adopted zoning classifications.” AR 22012-3.

Consistent with the Planning Enabling Act, the comprehensive plan defines itself as a policy guide implemented through development regulations and not as a self-effectuating regulatory enactment. AR 21993, 22009 (Land Use Element “provides policy guidance” for uses of land with “[p]recise standards, such as . . . permitted uses . . . included in the various implementing ordinances. . .”).

Policy LU.1.2 in the plan provides that the comprehensive plan is not intended “to foreclose on future opportunities that may be made possible by technical innovations, new ideas and changing attitudes [so] other uses that are *similar to* the uses listed here should be allowable uses, review uses or conditional uses, only if the use is specifically listed in the official controls of Skamania County for that particular land use designation.” AR 22013 (emphasis added). One of the uses enumerated as appropriate within the Conservancy designation is “[p]ublic facilities and utilities, such as . . . utility substations . . .” *Id.* In accordance with Policy LU.1.2, the County considered the Project to be a semi-public utility facility that is similar to such public facilities and utilities. AR 11603-4.

Consistent with the comprehensive plan's statement that appropriate uses within the Conservancy designation depend upon adopted zoning classifications, the Project is within the County's unmapped ("UNM") zoning classification. AR 22012, 11608.⁵² In the UNM zoning classification, "all uses which have not been declared a nuisance by statute, resolution or court of jurisdiction are allowable." Skamania County Code 21.64.020, AR 22127. The County's list of public nuisances does not include wind energy projects. Skamania County Code 8.30.010, AR 11608.

3. The Opponents have not overcome the presumption of land use consistency created by Resolution 2009-54

The Opponents contend that the Project is inconsistent with the comprehensive plan's Conservancy designation because wind projects are not specifically enumerated as allowed uses and because the Project is inconsistent with the purpose of the Conservancy designation. Pet. Br. at 52. Their argument fails to overcome the presumption of consistency attached to Skamania County Resolution 2009-54. AR 11596-11624, WAC 463-26-090.

First, as discussed above, it is settled law that Skamania County's comprehensive plan is not a self-effectuating regulatory document that can

⁵² The only exception is a five-acre parcel in the R-5 zone devoted to an alternative location for the operations and maintenance facility. AR 28365. This parcel plays no role in the Opponents' appeal.

directly “allow” or “prohibit” the Project. As a result, it is irrelevant whether or not the plan enumerates wind projects as an allowed use.

Second, even if the comprehensive plan has direct regulatory effect (which it does not), the Project complies with the plan. The Opponents base their argument to the contrary on the plan’s Policy LU.6.1. Pet. Br. at 52-53. By its own term, Policy LU.6.1 does not invalidate previously enacted zoning ordinances such as Skamania County Code 21.64.020, which allows within the UNM zoning classification any use that is not a nuisance. Consistent with the status of the comprehensive plan as a *plan*, based upon which *future* zoning ordinances will be developed, Policy LU.6.1 addresses *future* zoning ordinances: “[t]hree types of uses *should be* established for each land use designation under this plan and for any zone established to implement this plan.” AR 22017 (emphasis added), RCW 36.70.340.⁵³

Policy LU.6.1 must also be read in the context of the goal that it supports: the public participation Goal, LU.6, is “[t]o provide opportunities for citizen participation in the government decision process and in planning activities regarding land development.” AR 22017. Reading the policy to invalidate automatically Skamania County

⁵³ As discussed above at footnote 51, Skamania County’s 2007 comprehensive plan post-dates its zoning ordinances, so its implementing ordinances have yet to be enacted.

Code 21.64.020 violates not only this public participation goal but also the Planning Enabling Act's public notice and comment requirements for zoning ordinance amendments. RCW 36.70.580, .630.

Moreover, a separate policy, Policy LU.1.2, allows uses *similar to* those enumerated in the Conservancy designation, so by its own terms the plan does not require all allowed uses to be expressly enumerated.⁵⁴ AR 22013. The County considered the Project to be a semi-public facility contemplated by Policy LU.1.2 as a use that is similar to the public facilities and utilities specifically enumerated as allowed uses. AR 11604, 22013.⁵⁵ While the Opponents contend that this reading of Policy LU.1.2 is incorrect because it also contains "operative, regulatory language"

⁵⁴ The Opponents may argue in reply that RCW 36.70.545 invalidates zoning ordinances that are inconsistent with a comprehensive plan. RCW 36.70.545 provides that "development regulations of each county that does not plan under RCW 36.70A.040 [the GMA] shall not be inconsistent with the county's comprehensive plan." RCW 36.70.545 does not invalidate inconsistent zoning ordinances. The Court should construe RCW 36.70.545 together with the related statutes in the Planning Enabling Act. *Tracfone Wireless, Inc. v. Wash. Dep't of Rev.*, 170 Wn.2d 273, 281, 242 P.3d 810 (2010). The Opponents' reading of RCW 36.70.545 would contradict RCW 36.70.340, which defines comprehensive plans as guides to later development of zoning ordinances, and RCW 36.70.580 and .630, which require public notice and comment before zoning ordinances are amended. Automatic invalidation of existing zoning ordinances upon adoption of a new and allegedly inconsistent comprehensive plan would disrupt the settled expectations of local governments, landowners, and the public, and (depending on the scope and content of an amended comprehensive plan) could leave some local governments and landowners unexpectedly lacking zoning ordinances. The Court should avoid such an unlikely, absurd and strained construction. *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002).

⁵⁵ Skamania County Code 21.08.010 defines "semi-public facilities" as "facilities intended for public use which may be owned and operated by a private entity." The record reflects that Whistling Ridge has requested connection to the Bonneville Power Administration's transmission lines for use by public utilities. AR 25181, 15933, 16819.

mandating that similar uses are only allowed if specifically listed in a zoning ordinance, comprehensive plans by definition do not contain “operative, regulatory language.” Moreover, Policy LU.1.2, like Policy LU.6.1, is contemplating *future* zoning ordinances.

The Opponents are equally incorrect that the Project is inconsistent with the purpose of the Conservancy designation, which is to “provide for the conservation and management of existing natural resources in order to achieve a sustained yield of these resources, and to conserve wildlife resources and habitats.” Pet. Br. at 55-6, AR 22012. The Opponents assert that by referring to *Wikipedia* rather than looking at RCW 36.70A.060(1)(a) in the Growth Management Act, EFSEC misconstrued the term “natural resource” as including wind power. Their contention is meritless for three reasons.

First, the Growth Management Act provision cited by the Opponents, RCW 36.70A.060(1)(a), requires counties planning under the Growth Management Act to adopt regulations to conserve agricultural, forest, and mineral resource lands.⁵⁶ But since Skamania County does not plan under the Growth Management Act, the statute is inapplicable to the County. AR 11601.

⁵⁶ RCW 36.70A.060(1)(a) refers to RCW 36.70A.170, which requires all counties to designate agricultural, forest, and mineral resources lands.

Second, even if RCW 36.70A.060(1)(a) applied to the County, the Opponents have not demonstrated that the legislature intended in the Growth Management Act to prevent local governments and EFSEC from considering wind to be a natural resource.⁵⁷ To the contrary, state law specifically defines wind as a natural resource. RCW 19.29A.090(3) (“qualified alternative energy resources means . . . [w]ind”); RCW 19.285.030(20) (“[r]enewable resource . . . means . . . wind”).⁵⁸

Third, given that state law defines wind as a natural resource, the Opponents cannot credibly argue that EFSEC committed reversible error when it stated that “[a]ir and the force of wind are identified as natural resources. *See, e.g., Wikipedia.*” AR 29343 n.23 (emphasis in original). *Webster’s Third New Int’l Dictionary* defines “natural resources” as “materials (as mineral deposits or waterpower) supplied by nature.” *Webster’s Third New Int’l Dictionary*, 1507 (2002). Wind power meets

⁵⁷ Based on their arguments before EFSEC, the Opponents may argue in their reply that RCW 36.70A.020(8) and RCW 36.70A.170 in the Growth Management Act restrict consideration of wind as a natural resource. AR 28793-4. Neither statute pertains to the definition of “natural resource” in the Conservancy designation’s purpose statement. RCW 36.70A.020 describes goals that are to be used exclusively by counties planning under the Act but, as already explained, Skamania County does not plan under the Act. Moreover, RCW 36.70A.020(8) encourages counties to maintain and enhance “natural resource industries,” not “natural resources.” RCW 36.70A.170 requires all counties to designate “resource lands,” including “[f]orest lands that are not already characterized by urban growth and that have long-term significance for the commercial production of timber.” However, nowhere does RCW 36.70A.020(8) or RCW 36.70A.170 prohibit wind from being identified as a natural resource for other purposes.

⁵⁸ The Director of Washington’s State Energy Office, Tony Usibelli, testified that “[e]nergy policy and law in Washington have been evolving to strengthen . . . support for renewable resources, including wind.” AR 15346, 15345.

this definition.

For all of these reasons, the Opponents did not overcome the presumption of land use consistency created by Skamania County Resolution 2009-74. They therefore have not demonstrated to this Court that EFSEC's finding of land use consistency was reversible error.

4. EFSEC properly construed Skamania County's moratorium

The Opponents contend that EFSEC misinterpreted the County's moratorium by concluding that it is not a zoning ordinance. Pet. Br. at 58. The Opponents are incorrect for three reasons.

First, the Opponents misrepresent the moratorium as directly "prohibiting" forest practices conversions. Insofar as it is applicable to this case, the moratorium applies, not directly to forest practice conversions, but to the County's acceptance and processing of State Environmental Policy Act ("SEPA") checklists related to certain forest practices conversions.⁵⁹ AR 16856.

Second, under the Skamania County Code, a SEPA checklist is "not needed if . . . SEPA compliance has been initiated by another agency." Skamania County Code 16.04.070(A). EFSEC initiated SEPA

⁵⁹ The moratorium also applies to the County's acceptance and processing of certain permits for larger parcels created by deed after January 2006 and for subdivisions and short subdivisions, but these portions of the moratorium play no role in this case. AR 16856.

compliance for the Project, so the County's moratorium on its own acceptance and processing of a SEPA checklist is facially inapplicable to the Project.⁶⁰ AR 1015.

Third, even if the moratorium had any bearing on the Project's SEPA checklist (which it did not), the moratorium is not a zoning ordinance as defined in the Energy Facility Site Locations Act. The Act defines "zoning ordinance" as a local government ordinance "regulating the use of land." RCW 80.50.020(22). The moratorium does not regulate land use because to "regulate" means to "govern or direct according to rule," and Skamania County's acceptance and processing—or moratorium on acceptance and processing—of SEPA checklists does not govern or direct land use. *Webster's Third New Int'l Dictionary*, 1913 (2002). SEPA checklists provide information that governments use to determine whether a proposal's environmental impact requires preparation of an Environmental Impact Statement. WAC 197-11-315, -960. Such environmental information assists governments make decisions about

⁶⁰ This result with regard to EFSEC projects is consistent with the purpose of the County's moratorium, which the County enacted in response to encroaching *residential* development. AR 16854 ("most of the area . . . not . . . covered by a zoning classification is . . . used as commercial forest land . . . and . . . the Growth Management Act requires counties to protect commercial forest land from *encroaching residential use*"), AR 16855 ("[t]he County Commissioners are determining which areas will be designated as commercial forest land and protected from the encroachment of *residential uses*"; "uncontrolled *residential growth* in the areas of commercial forest lands . . . could . . . increase the risk of forest fires; and "information was gathered to help determine . . . the best locations . . . for future *residential development*") (emphasis added).

proposals. WAC 197-11-055(2), *Norway Hill Pres. & Prot. Ass'n v. King Cnty.*, 87 Wn.2d 267, 277-78, 552 P.2d 674 (1976). The environmental information does not, however, itself impose any self-effectuating regulatory controls, i.e., it does not “regulate” land use within the meaning of Energy Facility Site Locations Act.⁶¹

Based on this record, the Opponents have not demonstrated that EFSEC improperly interpreted the County’s moratorium.

E. The Site Certification Agreement Does Not Allow the Project Layout to Be Impermissibly Undetermined, Properly Addresses Forest Practices Decision Making, and Contains Consistent Forest Practices Provisions

1. The site certification agreement does not allow the final Project layout to be impermissibly undetermined

The Opponents contend that the Project’s layout and impacts are impermissibly undetermined because individual turbines may be located “almost anywhere within the 1,150-acre Project site.” Pet. Br. at 65. In reality, the site certification agreement requires that construction and operation “shall be located within the areas designated herein and in the modifications to revised Application for Site Certification.” AR 29273.

⁶¹ The meaning of the zoning ordinance definition in RCW 80.50.020(22) is plain on its face. However, if the statute were deemed ambiguous, application of the canons of construction would still result in the exclusion of SEPA activities from the ambit of the statute. Expressing one thing in a statute implies the exclusion of the other and statutory omissions are deemed to be exclusions. *In re Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002). If the legislature intended to include SEPA activities in the definition of “zoning ordinance” it would have included a reference to RCW 43.21C in RCW 80.50.020(22). The lack of such a reference indicates legislative intent to exclude such activities from the definition.

EFSEC's Recommendation, as incorporated into the site certification agreement, specifically states that "[w]ind turbine towers would be distributed among five turbine corridors, identified as Corridors A through E on Application Revised Fig. 2.3-1" (and excluding construction of turbine corridors A-1 through A-7 and the C-1 through C-8). AR 29271, 29323-4 (turbine corridor map), 29319, 29317 n.12.⁶² Thus, the scope of the Project is not impermissibly undetermined.

The Opponents now point to language in the agreement stating that the turbines' final locations may vary from the locations shown on the conceptual drawings in the application. Pet. Br. at 65, n.108. This does not support their argument that turbines may therefore be located anywhere within the 1,152-acre site. The Opponents have selectively omitted the balance of the sentence, which states "but [the turbine locations] shall be consistent with the conditions of this Agreement and . . . the final . . . plans approved by EFSEC." AR 29274. Read in the context of the provisions described above, this language allows turbines to be located within the five corridors, but does not allow the corridors to change location or allow turbine construction outside the corridors.

⁶² See also AR 29350 (tower placement in the corridors is subject to micro-siting), AR 4316 (application sought approval for construction within corridors), AR 25325 (FEIS analyzed turbines in corridors), AR 16818 (Whistling Ridge testimony regarding turbine corridors).

The Opponents also argue that by deferring final approval of specific turbine locations to a future date, the Governor has violated public participation requirements. As described above, this contention is meritless because the Opponents have multiple meaningful opportunities for future participation, including the option of seeking judicial review.

Based on this record, the Governor's decision was supported by substantial evidence, complied with all rules and procedures, and the Opponents have not demonstrated substantial prejudice.

2. The site certification agreement properly addresses forest practices decision making

The Opponents contend that EFSEC erred by deferring regulatory decision making under the Forest Practices Act.⁶³ Pet. Br. at 67-68.

The Opponents are incorrect. The Energy Facility Site Locations Act supersedes the Forest Practices Act for EFSEC-regulated projects but the Governor and EFSEC have elected to regulate the Project's forest practices by applying the latter Act. RCW 80.50.110, AR 29294, 29302. The site certification agreement states that Whistling Ridge's forest practices activities must be permitted by a forest practices application and

⁶³ The Forest Practices Act regulates the growing, harvesting, or processing of timber on forest land. RCW 76.09.010; RCW 76.09.020(15), (17). Landowners must submit forest practices notifications or application prior to beginning most forest practices. RCW 76.09.050(2); WAC 222-20-010(1). Depending on the classification of the forest practice, the landowner must either obtain regulatory approval of a forest practices application or wait for the expiration of a specified number of days after filing a notification. *Id.*; WAC 222-20-020.

that this obligation applies “to activities during the construction phase of the project and to subsequent activities on land remaining in forestry for the duration of the project.” AR 29294. As discussed in more detail in the succeeding section of this brief, the site certification agreement requires Whistling Ridge to submit forest practices applications sixty days prior to beginning forest practices associated with construction, and again sixty days prior to beginning any forest practices on land remaining on forestry for the duration of the Project. AR 29294, 29283, 29276, 29302.

This structure ensures that EFSEC’s analysis of Whistling Ridge’s forest practices will occur within a reasonable proximity to the time of the activities, rather than months or years previously, and that EFSEC’s analysis is based on the most precise and current information about on-the-ground conditions. This approach is consistent with the relatively short timeframes applicable to forest landowners who are not regulated by EFSEC⁶⁴ and with the adaptive management approach to Project regulation discussed in detail above.

The Opponents are equally incorrect that by deferring forest practices decisions to the future, EFSEC has deprived them of public participation opportunities. As described above, the law accords the

⁶⁴ Under the Forest Practices Act, the timeframe between filing a forest practices application and the time landowners may begin operations is generally short. WAC 222-20-010(1), -020(1) (generally fourteen to sixty days).

Opponents multiple meaningful opportunities for public participation in future decision making and the Opponents have pointed to no requirement that the site certification agreement recite those provisions.

Based on this record, the Governor's decision properly decided all issues, complied with EFSEC's rules, was based on substantial evidence, and is not arbitrary and capricious, and the Opponents have not demonstrated substantial prejudice.

3. The site certification agreement contains consistent forest practices provisions

The Opponents contend that site certification agreement Articles IV(M) and VII(E) are inconsistent. Pet. Br. at 69.⁶⁵ The Opponents are incorrect because Articles IV(M) and VII(E) are consistent where consistency is required.

Both articles require Whistling Ridge to comply with the Forest Practices Act throughout the life of the Project. AR 29294, 29302. Article IV(M) applies to the construction phase of the Project and therefore requires compliance "during the construction phase of the project and to subsequent activities on land remaining in forestry for the duration of the [P]roject." AR 29283, 29294. Article VII(E) applies to Project operations and therefore requires compliance only for "activities

⁶⁵ This issue is not properly before this Court because the Opponents failed to exhaust their administrative remedies as required by RCW 34.05.534. AR 22202, 22288, 28768, 28808, 29092, 29180.

on land remaining in forestry for the duration of the [P]roject.”
AR 29301, 29302.

Both articles contain a sixty-day deadline for submitting forest practices applications but, because the articles come into play at different points during the Project’s lifespan, each contains a different trigger for the start of the sixty-day clock. Article IV(M) applies to the construction phase, so it requires submission of a forest practices application sixty days prior to “initiating ground disturbance activities.”⁶⁶ AR 29294. Article VII(E), in contrast, requires submission of the application 60 days prior to actually “initiating forest practices” on “land remaining in forestry for the duration of the [P]roject.” AR 29302.

While Section VII(E) states that the Department of Natural Resources will conduct forest practices compliance and enforcement on EFSEC’s behalf, and Section IV(M) does not, the Adjudication Order (which is part of the site certification agreement, AR 29271) explicitly

⁶⁶ This is consistent with the agreement’s definition of “construction” as “any foundation construction including hole excavation, form work, rebar, excavation and pouring of concrete for the [turbines and other structures] and erection of any permanent, above-ground structures” and with the incorporated Recommendation’s requirement that Whistling Ridge submit a forest practices application sixty days prior to construction. AR 29276, 29327. The Opponents’ comment that the definition of “construction” does not include activities governed by the Forest Practices Act misses the point. Pet. Br. at 70. It is true that regulation under the Forest Practices Act concerns forest practices as defined in RCW 76.09.020(17) and does not regulate activities such as hole excavation and pouring of concrete. However, forest practices *associated with* these types of construction activities are regulated, usually as conversion-related forest practices defined as Class IV-Generals. *See* RCW 76.09.050(1)(Class IV(a)); WAC 222-16-050(2)(Class IV-Generals described).

stated that EFSEC “retains the Department of Natural Resources . . . as a subcontractor to assist [EFSEC] in ensuring that a Project meets all applicable requirements of the [Forest Practices Act].” AR 29360, 29370. As a result, there can be no legitimate doubt about forest practices enforcement under both articles.

Contrary to the Opponents’ reading, Article IV(M) does *not* enumerate as requiring a forest practices application “road construction and reconstruction, reforestation, gravel and rock removal, and slash disposal.” Pet. Br. at 70. Article IV(M) requires a forest practices application for “all forest practices, including, but not limited to, timber harvest, road construction/reconstruction and reforestation activities,” with the full scope of such coverage determined by the overarching citation to the Forest Practices Act and rules, which regulate forest practices associated with such activities. AR 29294. The references to “gravel and rock removal, and slash disposal” cited by the Opponents are in the *next* portion of Article IV(M), which specifies that “*other activities . . . may require additional permits*” such as a surface mining reclamation permit or a burn permit. AR 29294-5 (emphasis added). While the Opponents complain that Article VII(E) does not contain these requirements, Article

VII(E) specifically requires Forest Practices Act compliance for “all” forest practices.⁶⁷

Based on this record, the Opponents have not demonstrated that the site certification agreement contained inconsistent references to forest practices, that EFSEC failed to decide all issues, or that the Governor’s decision was arbitrary and capricious.

F. The Opponents Are Not Entitled to Attorneys’ Fees and Costs

The Opponents seek attorneys’ fees and other expenses against EFSEC under RCW 4.84.350, the Equal Access to Justice Act (“EAJA”).⁶⁸ Pet. Br. at 71-72. This Court should deny the Opponents’ request. Even if Opponents were to prevail on one or more issues, EFSEC’s actions were “substantially justified,” prohibiting any EAJA award against it.⁶⁹

To be awarded EAJA fees and expenses, a party must first be a “prevailing party” because it “obtained relief on a significant issue that achieves some benefit that the qualified party sought.”

⁶⁷ The omission of a reference in Article VII(E) to additional permits such as surface mining reclamation or burn permits is reasonable because these permits are most likely to be needed during Project construction, not Project operations.

⁶⁸ RCW 4.84.350(1) states in pertinent part that “a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys’ fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust.”

⁶⁹ Any award under the EAJA would be against EFSEC, not the Governor. The Governor is not an agency for purposes of either the EAJA or the APA. RCW 4.84.340(1), RCW 34.05.010(2).

RCW 4.84.340(5).⁷⁰ See *Kettle Range Conserv. Group v. Wash. Dep't of Natural Res.*, 120 Wn. App. 434, 468-69, 85 P.3d 894 (2003), review denied, 152 Wn.2d 1026 (2004); *Citizens for Fair Share v. State Dep't of Corr.*, 117 Wn. App. 411, 436, 72 P.3d 206 (2003), review denied, 150 Wn.2d 1037 (2004) (fees denied where party “prevailed on only one relatively minor P[ublic] D[isclosure] A[ct] violation”). EFSEC’s position is that the Court should rule in favor of EFSEC on all issues. Thus the Opponents would not be a prevailing party at all. As the statute and cases make clear, however, winning on one or even more minor issues would not make the Opponents a prevailing party.

In addition, the Opponents cannot qualify as a prevailing party, even if they win on one or more significant issues, because they are asking the Court to remand the Project application for additional proceedings by EFSEC. Pet. Br. at 3, 75. Even if the Court does so, this does not mean they will have obtained any relief on the merits of any of their claims. At least one Washington case and several federal cases have held that a party is not a “prevailing party” where the only relief it obtains is a remand.⁷¹ See *Ryan v. State Dep't of Soc. & Health Servs.*, 171 Wn. App. 454, 476,

⁷⁰ The State does not dispute that the Opponents meet the requirements for being a “qualified party” as defined in RCW 4.84.340(5).

⁷¹ Washington’s EAJA is modeled after the federal act, and the definitions of the federal act are generally applicable to the Washington act. See *Plum Creek Timber Co. v. Wash. State Forest Practices Bd.*, 99 Wn. App. 579, 595, 993 P.2d 287 (2000).

287 P.3d 629 (2012) (“A party must prevail on the merits before being considered a prevailing party.”); *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990); 32 Am. Jur. 2d *Federal Courts* §§ 245-248 (2012); *but see Alpine Lakes Prot. Soc’y v. Dep’t of Natural Res.*, 102 Wn. App. 1, 19, 979 P.2d 929 (1999); *Seattle Area Plumbers v. Wash. State Apprenticeship & Training Coun.*, 131 Wn. App. 862, 882, 129 P.3d 838 (2006).

Assuming the Opponents could surmount these threshold obstacles, the Court should not award fees and costs if “the agency action was substantially justified or . . . circumstances make an award unjust.” RCW 4.84.350(1). A party does not obtain an award under the EAJA simply because it is a “prevailing party.” *Kettle Range Conser. Group*, 120 Wn. App. at 469. Rather, the burden shifts to the agency to show that its position was substantially justified.

Substantially justified means justified to a degree that would satisfy a reasonable person that the agency’s position has a reasonable basis in law and fact. *Silverstreak, Inc. v. Wash. State Dep’t of Labor & Indus.*, 159 Wn.2d 868, 892, 154 P.3d 891 (2007). Here, even if the Court concludes that one or more of the Opponents’ challenges are well taken, the Court should find that EFSEC was substantially justified. As the Court of Appeals has recognized, an agency may be substantially justified

where it makes a decision, even if overturned, in a matter that “required consideration of a complicated regulatory scheme as well as the subjective issue of esthetics.” *Plum Creek Timber Co. v. Wash. State Forest Practices Appeals Bd.*, 99 Wn. App. 579, 595, 596, 993 P.2d 287 (2000). Likewise, an agency can be found to have been substantially justified where there are no state appellate decisions addressing the issue. *Id.*

With respect to technical matters such as wildlife, EFSEC heard conflicting testimony from the Opponents’ and Whistling Ridge’s expert witnesses and outside agencies supported Whistling Ridge’s view, and the Opponents have not challenged the FEIS. With respect to land use issues, Skamania County Resolution 2009-54 constituted *prima facie* proof of consistency. EFSEC considered the Opponents’ attempts to overcome this presumption but ultimately was shown no controlling precedent requiring it to disregard the County’s stated position.

With regard to the Opponents’ challenge to the adaptive management approach of reserving some of the details of the project until the implementation phase, no Washington case law prohibits this, and this approach has been used at other wind projects and recommended by other agencies. Under these circumstances, the Court should find that EFSEC was substantially justified and the Court should deny the Opponents’ request for attorneys’ fees and expenses under the EAJA.

V. CONCLUSION

For the reasons set forth above, the Governor and EFSEC ask the Court to affirm the Governor's decision.

RESPECTFULLY SUBMITTED this 12th day of April, 2013.

ROBERT W. FERGUSON
Attorney General

/s/ Ann Essko
ANN ESSKO
WSBA No. 15472
Assistant Attorney General
Attorneys for Respondents
State Energy Facility Site
Evaluation Council and
Governor of the State of
Washington

PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

<p>Counsel for Friends of the Columbia Gorge: Gary K. Kahn Reeves, Kahn, Hennessy & Elkins 4035 SE 52nd Avenue PO Box 86100 Portland, OR 97286-0100 gkahn@rke-law.com</p>	<p>US Mail Postage Prepaid via Consolidated Mail Service eMail</p>
<p>Counsel for Friends of the Columbia Gorge: Nathan J. Baker, Staff Attorney Friends of the Columbia Gorge 522 SW 5th Avenue, Suite 720 Portland, OR 97204-2100 Nathan@gorgefriends.org</p>	<p>US Mail Postage Prepaid via Consolidated Mail Service eMail</p>
<p>Counsel for Save Our Scenic Area: J. Richard Aramburu Aramburu & Eustis LLP 720 Third Avenue, Suite 2112 Seattle, WA 98104-1860 rick@aramburu-eustis.com</p>	<p>US Mail Postage Prepaid via Consolidated Mail Service eMail</p>
<p>Counsel for Skamania County: Adam N. Kick Skamania County Prosecutor PO Box 790 Stevenson, WA 98648 kick@co.skamania.wa.us</p>	<p>US Mail Postage Prepaid via Consolidated Mail Service eMail</p>

<p>Counsel for Skamania County and Klickitat County Public Economic Development Authority:</p> <p>Susan Elizabeth Drummond Bldg. 5000, Suite 476 5400 Carillon Point Kirkland, WA 98033 susan@susandrummond.com</p>	<p>US Mail Postage Prepaid via Consolidated Mail Service</p> <p>eMail</p>
<p>Counsel for Whistling Ridge Energy LLC:</p> <p>Tim McMahan Eric Martin William B. Collins Stoel Rives LLP 900 SW Fifth Avenue, Suite 2600 Portland, OR 97204 tlmcmahan@stoel.com elmartin@stoel.com wbcollins@comcast.net</p>	<p>US Mail Postage Prepaid via Consolidated Mail Service</p> <p>eMail</p>

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 12th day of April, 2013, at Olympia, Washington.

/s/ Keely Tafoya
KEELY TAFOYA, Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Tafoya, Keely (ATG)
Cc: tlmcmahan@stoel.com; ELMARTIN@stoel.com; wbcollins@comcast.net; Essko, Ann (ATG); susan@susandrummond.com; kick@co.skamania.wa.us; rick@aramburu-eustis.com; nathan@gorgefriends.org; gkahn@rke-law.com
Subject: RE: Friends of the Columbia Gorge, et al v. State Energy Facility Site Evaluation Council et al. - 88089-1 Filing

Rec'd 4-12-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Tafoya, Keely (ATG) [mailto:KeelyT@ATG.WA.GOV]
Sent: Friday, April 12, 2013 4:43 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: tlmcmahan@stoel.com; ELMARTIN@stoel.com; wbcollins@comcast.net; Essko, Ann (ATG); susan@susandrummond.com; kick@co.skamania.wa.us; rick@aramburu-eustis.com; nathan@gorgefriends.org; gkahn@rke-law.com
Subject: Friends of the Columbia Gorge, et al v. State Energy Facility Site Evaluation Council et al. - 88089-1 Filing

Good afternoon,

Please find attached the Respondent State Energy Facility Site Evaluation Council and Governor of the State of Washington's Brief of Respondents in the Friends of the Columbia Gorge, et al v. State EFSEC matter, Supreme Court # 88089-1, on behalf of Assistant Attorney General Ann Essko, WSBA #15472, 360-586-3633, AnnE@atg.wa.gov.

Per my phone conversation with Amy at the Supreme Court, the appendices attached to this brief will be placed in the US mail today as they exceed the 25-page limit. Thank you.

Keely Tafoya

Legal Assistant

Attorney General's Office

Government Operations Division, MS 40108

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<<BriefRespEFSEC-4.12.13.pdf>>

88089-1

For Brief Filed
on behalf of
Christine Gregoire
& State Energy
Facility

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Appendix A



State of Washington
DEPARTMENT OF FISH AND WILDLIFE

Mailing Address: 600 Capitol Way N • Olympia, WA 98501-1091 • (360) 902-2200, TDD (360) 902-2207
Main Office Location: Natural Resources Building • 1111 Washington Street SE • Olympia, WA

December 20, 2010

Al Wright
Manager - Energy Facility Site Evaluation Council
Washington Department of Commerce
PO Box 42525
Olympia, Washington 98504-2525

Mr. Wright:

The Washington Department of Fish and Wildlife (WDFW) has reviewed the proposed Whistling Ridge Energy Project (WREP) as it relates to impacts to fish and wildlife resources, consistent with the WDFW Wind Power Guidelines. The WREP is located in eastern Skamania County, approximately 7 miles northwest of the City of White Salmon. The project site encompasses approximately 1,152 acres of private, commercial forestry lands owned and managed by SDS Lumber. This site has been, and will continue to be, heavily influenced by commercial forest management activities.

The biological information in the environmental documentation for the proposed project identifies five habitat types that include grass-forb stand (522 acres), brushfield/shrub stand (103 acres), conifer-hardwood forest (310 acres), conifer forest (209 acres), and riparian deciduous forest (8 acres). Temporary and permanent impacts to these habitat types will result in approximately 115 acres in temporary (54 acres; 47%) and permanent (61 acres; 53%) impacts to grass-forb (54 acres; 47%), brush/scrub (12 acres, 10%), conifer-hardwood (29 acres; 25%), and conifer habitats (21 acres; 18%). There will be no impacts to riparian habitats. Additionally, in the *Draft EIS*, Chapter 7 Appendix C, *Vegetation Technical Report* (page 3) it states, "Few large, old conifer trees occur in the project area and there are no known late-successional or "old-growth" stands within or adjacent to the project area, though small groups of big trees occur."

Habitat and wildlife impact assessment and mitigation considerations relied on the 2009 WDFW Wind Power Guidelines page 2, *Guiding Principles*, to address potential impacts to wildlife and their habitats. Temporary and permanent impacts to habitat were addressed through page 8, Section 5.1, *General Principles for Habitat Mitigation* and page 19, Section 8.2, *Habitat Classification Mitigation Chart*.

The proposed development site is managed for timber production, and as such is classified per the Wind Power Guidelines as a commercial forestry operation. This type of habitat classification requires consultation between the project owner and WDFW to address mitigation.

The mitigation offered by the developer is consistent with the wind power guideline in that habitat mitigation is presumed to fully mitigate for habitat losses for all species. No old-growth forest occurs on the proposed project site and there is none on the mitigation site. Both the proposed project site and the mitigation site support a variety of habitats and wildlife species. WDFW understands that even though the proposed project site is a commercial forest, it also provides suitable habitats for a variety of wildlife species, some of which are high priority for WDFW. However, the mitigation site has not and will not be subject to the impacts associated with commercial forestry or wind energy operations.

At the proposed project site, no spotted owls were recorded during extensive multi-years surveys following standard protocols. While spotted owls also make use of habitats other than old-growth, the types of suitable habitat are typically not present over large areas on managed commercial forest lands. Additionally, the regular disturbances to the proposed project site as a result of commercial logging operations likely further reduces habitat suitability for spotted owls, as well as other native and migratory wildlife.

On the proposed development site, temporary and permanent impacts from turbine strings, collector lines, and some facilities will occur on managed forest lands and utilize, where practical, existing roads and cleared areas. The use of existing roads and cleared (disturbed) areas is typical of many wind energy developments except for safety or engineering considerations. Additionally, the use of these previously disturbed areas minimizes the project footprint, habitat fragmentation and habitat degradation. The Wind Power Guidelines encourage development to occur on disturbed lands to minimize impacts except where such lands host significant aggregations of wildlife or are used by state or federally listed species.

The developer has acquired mitigation habitat that will be protected by a conservation easement for the life of the project. While the Wind Power Guidelines recommend like-kind mitigation (e.g., shrub-steppe for shrub-steppe; forested for forested, grassland for grassland), the mitigation habitat for the proposed project is not a direct replacement (i.e. - like-kind) for the habitat lost through temporary or permanent impacts (i.e. - commercial forest for commercial forest). However, the Wind Power Guidelines recognized that in some cases like-kind mitigation may not be beneficial to habitats and wildlife and further recommends that mitigation of equal or higher habitat value than the impacted area may be acceptable.

The habitat qualities and wildlife species of the proposed mitigation parcel are high priority for WDFW. The parcel contains WDFW Priority Habitats such as Oregon white oak, riparian habitats, and a fish-bearing stream; Silva Creek, which is a tributary to the Klickitat River. The parcel also contains WDFW Priority Species such as western grey squirrel, western bluebird, Merriam's turkey, and black tail deer. While the proposed project site also supports priority species and habitats, it does so in the context as a commercial forestry operation.

In summary, the developer, SDS Lumber, in consultation with WDFW and through the Wind Power Guidelines, has developed an acceptable mitigation strategy for temporary and permanent impacts that will occur as a result of the Whistling Ridge Wind Energy Development. The proposed mitigation parcel of approximately 100 acres of land within a portion of the SE ¼ of

Al Wright
December 20, 2010
Page 3

Section 10, Township 3 North, Range 12 East is consistent with the WDFW Wind Power Guidelines.

Thank you for the opportunity to provide this input. If you have any questions or concerns regarding the content herein, please contact Mike Ritter at 509-543-3319 or Michael.Ritter@dfw.wa.gov.

Sincerely,



Travis Nelson
Renewable Energy Section Manager

cc: Jason Spadaro SDS Lumber
Stephan Posner EFSEC
Lisa Veneroso WDFW
Mike Ritter WDFW

Appendix B



State of Washington
Department of Fish and Wildlife

Mailing Address: 600 Capitol Way N, Olympia WA 98501-1091, (360) 902-2200, TDD (360) 902-2207
Main Office Location: Natural Resources Building, 1111 Washington Street SE, Olympia WA

September 17th, 2010

Stephan Posner
EFSEC
905 Plum Street SE
Olympia, Washington 98504-3172
efsec@commerce.wa.gov

SUBJECT: Whistling Ridge Energy Project Draft Environmental Impact Statement: EFSEC Application 2009-01

Dear Mr. Posner,

The Washington Department of Fish and Wildlife (WDFW) has reviewed the above-referenced documents and offers the following amended comments at this time. This letter replaces the previously submitted August 27th, letter from WDFW. Other comments may be offered as the project progresses.

WDFW has carefully reviewed the habitat evaluation prepared by the applicant. The Whistling Ridge site is a forested site managed for over 100 years. It is not in a natural or native coniferous forest condition. The pre-project assessment and avian/bat use surveys are consistent with standard protocols utilized throughout the U.S. and are consistent with the WDFW Wind Power Guidelines (WDFW 2009). Because the relationship between avian use and mortality has been reasonably consistent across other habitat types and locations, it is likely that the relationship between avian use and mortality would be similar to that evaluated in other projects. While no similar data exist for constructed wind energy projects in managed coniferous forest habitats that might help inform impact predictions for Whistling Ridge, as we previously confirmed in the attached letters, WDFW confirms that these data represent the best available science for predicting avian impacts at Whistling Ridge. Therefore, if the WRWRA is constructed, WDFW anticipates the opportunity to better understand the relationship between wind energy development in western coniferous forests and wildlife response.

WDFW would like to emphasize that fluctuations in raptor populations, as well as other avian species, may result in greater mortality than what is predicted in the *Final Report*. As a result, operational controls may be necessary to address avian mortality that exceeds predicted mortality.

In closing, WDFW would like to acknowledge that the applicant has submitted a preliminary mitigation plan that we are currently reviewing. This mitigation proposal was developed consistent with the WDFW Wind Power Guidelines at a 2:1 replacement ratio. The preliminary mitigation plan encompasses approximately 100 acres in Klickitat County 12 miles due east of the project site. The mitigation site is forested with Oregon White Oak with some Douglas fir and Ponderosa pine and shares a portion of its northern boundary with 40 acres of WDNR land and. This mitigation site provides habitat for several PHS entries including Western gray squirrels. Additionally, the site includes the fish-bearing Silva Creek, a tributary to the Klickitat River.

We look forward to working with applicant as this project moves forward.

Sincerely,



Travis Nelson
Renewable Energy Section Manager

Appendix C



State of Washington
DEPARTMENT OF FISH AND WILDLIFE

Mailing Address: 600 Capitol Way N • Olympia, WA 98501-1091 • (360) 902-2200, TDD (360) 902-2207
Main Office Location: Natural Resources Building • 1111 Washington Street SE • Olympia, WA

September 22, 2009

Mr. Jason Spadaro
SDS Lumber Company
Post Office Box 266
Bingen, Washington 98605

Dear Mr. Spadaro:

Thank you for your letter dated August 21, 2009, concerning the Whistling Ridge Energy Project. You requested clarification on several specific issues raised in correspondence from the Washington Department of Fish and Wildlife (WDFW) on May 14, 2009, and June 11, 2009.

You are concerned that the letters from WDFW provided an incomplete and inaccurate analysis of wildlife data that has been collected for the proposed project since 2003, and that our conclusions regarding potential project impacts to birds and bats are unwarranted and unsubstantiated. It is my goal to provide clarification to our previous letters that will allow you to continue to develop your proposal for this wind power project, at Whistling Ridge, using our Wind Power Guidelines.

You raised concern of how receptive WDFW is to Best Available Science (BAS) and its application to the project. WDFW views BAS as an integral component of your project assessment, therefore, we will consider all current and future BAS related to your existing and future proposals and review the findings objectively. Your supplemental information concerning goshawks, spotted owls and other avian species and Western grey squirrel use of the project site that you included in your August 21 letter, fits this definition of BAS. We will use this information to refine our analysis of the impacts of this project. Our analysis will focus on current habitat conditions and species presence. We will also treat any additional information you may submit in the future as BAS.

I acknowledge projections of post-construction bat mortalities that we made, that were based on pre-construction activity levels, are not necessarily a good predictor of numbers of post-construction mortalities; they only provide an indicator of relative risk, as documented at other wind farms around the country. Pre-construction activity levels are also important as a

Jason Spadaro
September 22, 2009
Page 2

guide to avoid and minimize collisions (post-construction) through the placement of the wind turbines, and to assess the potential length of post-construction fatality studies.

I am encouraged by your commitments to adaptive management for this project and am certain we will agree on a plan that will ensure that avoidance, minimization, and/or mitigation goals are met once the project is completed.

I look forward in working with you to get on track and to continue towards building a collaborative working relationship and to assist you in developing a proposal for the Whistling Ridge Energy Project that will be protective of wildlife.

Sincerely,



Greg Hueckel Assistant Director
Habitat Program

cc: Governor Christine Gregoire
Phil Anderson, WDFW Director
Allen Fiksdal, EFSEC Siting Manager

Appendix D



State of Washington
Department of Fish and Wildlife

Mailing Address: 600 Capitol Way N, Olympia WA 98501-1091; (360) 902-2200, TDD (360) 902-2207
Main Office Location: Natural Resources Building, 1111 Washington Street SE, Olympia WA

September 17th, 2010

Stephan Posner
EFSEC
905 Plum Street SE
Olympia, Washington 98504-3172
efsec@commerce.wa.gov

SUBJECT: Whistling Ridge Energy Project Draft Environmental Impact Statement: EFSEC Application 2009-01

Dear Mr. Posner,

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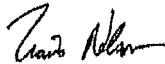
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WDFW would like to emphasize that fluctuations in raptor populations, as well as other avian species, may result in greater mortality than what is predicted in the *Final Report*. As a result, operational controls may be necessary to address avian mortality that exceeds predicted mortality.

In closing, WDFW would like to acknowledge that the applicant has submitted a preliminary mitigation plan that we are currently reviewing. This mitigation proposal was developed consistent with the WDFW Wind Power Guidelines at a 2:1 replacement ratio. The preliminary mitigation plan encompasses approximately 100 acres in Klickitat County 12 miles due east of the project site. The mitigation site is forested with Oregon White Oak with some Douglas fir and Ponderosa pine and shares a portion of its northern boundary with 40 acres of WDNR land and. This mitigation site provides habitat for several PHS entries including Western gray squirrels. Additionally, the site includes the fish-bearing Silva Creek, a tributary to the Klickitat River.

We look forward to working with applicant as this project moves forward.

Sincerely,



Travis Nelson
Renewable Energy Section Manager

Appendix E

ORIGINAL

BEFORE THE STATE OF WASHINGTON

ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of:

APPLICATION NO. 2009-01 of

WHISTLING RIDGE ENERGY PROJECT LLC
for

WHISTLING RIDGE ENERGY PROJECT

COUNCIL ORDER No. 868

Whistling Ridge Order No. 23

**Adjudicative Order Resolving
Contested Issues**

OVERVIEW

In this Order, the Energy Facility Site Evaluation Council (EFSEC or Council) determines that the adjudicative record in Application 2009-01 supports a recommendation to the Governor of the State of Washington to approve portions of a proposed site in Skamania County near Underwood, Washington, for the construction and operation of the Whistling Ridge Energy Project. The adjudicative record and decision will be forwarded to the Governor along with the Final Environmental Impact Statement (FEIS) and a separate Recommendation based upon this Order and the FEIS.¹

Conclusions. This order would approve the Application, in part, based on the facts and arguments of record. The Order makes the following principal conclusions: (1) The Project is consistent and in compliance with the zoning ordinances and land use plan current at the time the Application was filed. (2) The scenic and cultural heritage of the Columbia Gorge is a state and regional asset warranting protection from visual harm independent of the designation of portions of the territory as a National Scenic Area. Wind turbine generators should be excluded from portions of the site where they would be prominently visible. (3) The Project will comply, if recommended mitigation measures are provided, with the Washington Fish and Wildlife Guidelines for wind generation facilities, which constitute appropriate standards for wind facilities in the state. (4) A suggested mitigation parcel may satisfy applicable mitigation standards inasmuch as it provides a habitat superior to a

¹ This Order is based on a record developed during proceedings under the state Administrative Procedure Act, RCW 34.05, as required by RCW 80.50.090(3). Using the results of this Order and the FEIS, the Council will submit a Recommendation to the Governor under RCW 80.50.100. The Council will recommend approval, approval in part, or disapproval of the application. If the Council recommends approval, in full or in part, the Council will also submit to the Governor a proposed Site Certification Agreement (SCA).

commercial forest habitat.² (5) Noise from Project operations will not exceed pertinent standards. (6) Public roads are adequate and private roads will be improved to allow transportation of construction materials to the site, subject to permitting as required for public road transportation. **Note: The conclusion of this order regarding approval or denial of the Application is preliminary and subject to the Council's later concurrent consideration of the results of this order and the FEIS. If the Council recommends approval, it will forward to the Governor a separate Site Certification Agreement (SCA).³ Any SCA will be based upon both this Order and the FEIS to ensure compliance with requirements and mitigation found necessary as conditions of facility construction and operation.**

² While this suggested mitigation parcel was discussed extensively in the Adjudicative proceedings, it has not yet been offered formally to the EFSEC as a stipulated mitigation plan. Due to that fact, this Order does not address the mitigation parcel in the findings of Fact & Law.

³ This order makes references to an SCA and describes terms to be included, if the Council recommends approval. Such references must be read to refer only to a *potential* SCA that will exist *only* if the Council recommends approval of the application in whole or in part.

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I. INTRODUCTION

A. PROCEDURAL SETTING

The Energy Facility Site Evaluation Council ("EFSEC" or "Council" in this order) is a body created in RCW 80.50 to recommend to the Governor whether and if so, on what conditions, applications to construct proposed energy facilities on sites within the State of Washington should be granted. The Council conducted this adjudicative proceeding in its review of the Application pursuant to RCW 34.05, as required by RCW 80.50.090(3) and WAC 463-30.

B. THE APPLICANT AND THE PROJECT

The Application: This is an application for a Site Certification Agreement allowing the Applicant, Whistling Ridge Energy Project LLC, to construct and operate a commercial wind power generation facility in Skamania County, Washington. Applicant is a Washington special purpose corporation, wholly owned by S.D.S. Co., LLC. Ex. 20, p. I.1-1. S.D.S. Lumber Company and Broughton Lumber Company are privately held corporations that own lands on which Applicant proposes to construct the Project.

The Project: Applicant proposes to use approximately 1,152 acres of land, now principally used in commercial forestry, for the Project. Approximately 384 acres would be permanently developed for placement of the turbine towers, access roads, substations, underground and overhead transmission lines, and an operations and maintenance facility. The Application seeks authority to operate no more than 50 wind turbines that would generate up to 75 MW of wind power. The Project would also require an interconnection transmission line and new Bonneville Power Administration (BPA) substation to allow interconnection with the existing BPA transmission system.

C. THE COUNCIL AND THE EFSEC REVIEW PROCESS

The Council is created by RCW 80.50. It consists of a chair, appointed by the Governor with the advice and consent of the Senate, and members from the Departments of Ecology, Fish and Wildlife, Natural Resources, Commerce, the Utilities and Transportation Commission and from each county or city in which the project is to be sited.⁴

In reviewing an application, the Council must complete several procedural steps. Here, it gave notice of the application and conducted an informational hearing in Skamania County, a land use hearing to assist in determining the Project's consistency with local land

⁴ The Departments of Agriculture, Health, Military and Transportation have the option of sitting on the Council when it considers specific projects. RCW 80.50.030. None chose to do so in this proceeding.

use plans and zoning ordinances;⁵ scoping meetings to receive comments on the scope of environmental review; hearings to receive comments on a draft environmental impact statement, and an adjudicative hearing.⁶ It also considered written comments at each of these stages.

Council members presided at the adjudicative hearing. The Council consists of Council Chair James O. Luce and Members Richard Fryhling, Department of Commerce; Hedia Adelsman, Department of Ecology;⁷ Andrew Hayes, Department of Natural Resources; Jeff Tayer, Washington Department of Fish and Wildlife; Dennis Moss, Utilities and Transportation Commission; and Doug Sutherland, Skamania County. The Council retained C. Robert Wallis as Administrative Law Judge for purposes of this proceeding.

The Council convened an adjudicative evidentiary hearing on January 3, 2011, in Skamania, Washington, that continued through January 7, reconvened on January 10 and 11, and concluded with a session in Olympia on January 20, 2011. The Council held hearing sessions in Underwood on January 5 and Skamania on January 6, 2011, for public comments. On January 20, 2011, the Council convened a hearing session in Olympia, Washington, to receive additional cross-examination and to address procedural matters.

The Council received post-hearing briefs from the Applicant, Association of Washington Business, Counsel for the Environment, Department of Commerce, Friends of the Columbia Gorge, Seattle Audubon Society, Save Our Scenic Area (SOSA), Skamania County and Klickitat Economic Development Council, and Skamania County Economic Development Council/Port of Skamania county/Skamania County Public Utility District. Pursuant to notice to parties, the Council visited and viewed the site of the proposed project on May 2, 2011, and on May 3 it viewed the site from viewing areas identified in the Application. The issues are now ready for resolution.

D. COMPLIANCE WITH RCW 80.50 AND STATE ENVIRONMENTAL POLICY ACT;
RECOMMENDATION TO GOVERNOR

This order is required by RCW 80.50.090. The Council must also comply with the State Environmental Policy Act (SEPA), RCW 43.21C, and WAC 463-47. Before making its recommendation to the Governor, the Council must consider a Final Environmental Impact Statement (FEIS). In prior proceedings, the adjudicative order also constituted the Recommendation to the Governor. In this matter, however, production of the FEIS was delayed and it was not received in the adjudicative record. This order, therefore, does not consider the FEIS or its supporting documents, except those specifically received on the

⁵ RCW 80.50.090(2)

⁶ RCW 80.50.090(3), referencing RCW 34.05. One adjudicative hearing session was convened in Olympia. The remainder were conducted in Skamania County.

⁷ Ms. Adelsman was absent from the adjudicative hearing sessions but has read the record and reviewed the evidence presented.

record of the adjudication. This order is entered and served on parties as a discrete part of the recommendation to the Governor. RCW 34.05.473, RCW 80.50.

E. PUBLIC TESTIMONY AND COMMENT

The Council held two hearing sessions at which any person could be heard in support of, or in opposition to, the Application.³ The Council also provided an opportunity for public witnesses to testify during the hearing on land use consistency. Sixteen witnesses testified during the land use consistency hearing and 65 public witnesses testified on the application hearing record.

The Council received 396 comment letters and evidentiary submissions regarding land use consistency and 399 written submissions regarding the application adjudication. Witnesses who spoke, and the citizens who submitted comments in writing, did so eloquently and sincerely both in favor of and in opposition to the project. Here we identify some representative comments to demonstrate the variety of opinions presented.

At the Underwood public hearing, 37 witnesses testified. Among them, Wirt Maxey urged the Council that recommending approval of this project would set a precedent that no place of natural beauty would be "off limits" to the development of tall, contrasting wind towers. Anita Gahimer Crow saw the project as an opportunity to make a model for coexistence of renewable power and the Scenic Area, much as sounds of modern rail and air transportation now coexist with sounds of elk, deer, cougars and birds.

At the Skamania session, 28 witnesses testified. Don Morby presented comments supporting the Project. He noted support in the community for renewable energy, identified effects of existing traffic and development on viewscape and the conversion from natural vegetation to farming and winemaking. He described the need for the employment and tax revenue that the Project would bring. Loreley Drach spoke in opposition to the project, noting the slight margin of voters approving Initiative 937 and urging that harm to wildlife and iconic views and to the Gorge tourism industry would outweigh benefits from the Project.

Persons who submitted written comments also presented thoughtful and heartfelt comments. James Kacena, for example, called attention to the contrast between the natural beauty of the Gorge and the modern engineered shapes of wind turbine towers, calling the contrast "jarring." Theresa and Darrell Lusty, in contrast, emphasized the clean nature of wind energy, its support of state clean energy mandates and the economic benefit to the community.

The Council understands that the comments reflect careful thought and time in preparation. It has reviewed the comments and it appreciates the efforts of the many commenters.

³ RCW 80.50.090; WAC 463-14-030.

II. LAND USE CONSISTENCY

This segment of our order considers "land use consistency."⁹

A. PROCEDURAL BACKGROUND

Skamania County updated its zoning ordinances in 2005 and its comprehensive plan in 2007. In October 2008, the County's Responsible Official issued a Mitigated Determination of Non Significance (MDNS) for a proposed, updated zoning code that would have made specific provisions for wind generation facilities. The county hearing examiner ruled on February 19, 2009 (Ex. 1.17c), however, that the County's MDNS was improper. She determined that a full review under the State Environmental Policy Act (SEPA) would be required before the changes could be adopted.¹⁰ The County decided it would neither appeal the examiner's ruling nor attempt to cure the SEPA deficiency, asserting lack of funds and further expected legal challenges. Whistling Ridge then, with the County's support, filed an EFSEC application for site certification.

Applicant made its initial filing seeking Council review and approval on March 10, 2009. As required under RCW 80.50.090(2), the Council issued notice on April 22, 2009, that it would hold a public hearing on May 7, 2009, to determine whether the proposed project is consistent with local and regional land use plans and zoning ordinances governing the site. The hearing was held as noticed at Underwood, Washington, near the proposed Project site.

During the May 7 hearing, Skamania County Commissioner Jim Richardson, submitted Resolution 2009-22 from the Skamania County Board of Commissioners as a certificate of land use and zoning consistency (Land Use Exhibit 1, Ex. 2.02). Other interested persons, including parties to this adjudicative proceeding, presented statements and arguments for our consideration. The Council also received evidence regarding this issue during the adjudicative hearing on the merits of the Project. This includes a

⁹ The Council convened its Land Use Hearing on May 7, 2009 in Underwood, Washington. The Land Use hearing was conducted as an adjudication and completed, without objection, during the adjudicative proceeding identified above. We reach and announce our decision in this order. Current Council members Moss, Hayes and Sutherland did not attend the May 2009 session, but have read the record and reviewed the evidence there received.

¹⁰ The result, which was not appealed, is a fact that is binding on this proceeding. The examiner in reaching her decision made numerous findings and conclusions about the proposed code, which is not before us. The concept of *res judicata* may apply in administrative proceedings. *DeTray v. City of Olympia*, 121 Wn. App. 777, 785, 90 P.3d 116 (2004). Contrary to assertions in parties' briefing, however, the examiner's findings of fact and conclusions of law do not bind us as they are based on a different record in a different context with different elements for a different purpose involving different parties. *Res judicata* does not apply to those findings and conclusions, which have no binding or precedential effect on the Council's discretion. *DeTray, supra*; *Rains v. State*, 100 Wn.2d 660, 674 P.2d 165 (1983).

substitute certificate of land use consistency from the County in the form of Resolution 2009-54, dated December 22, 2009, which was received on January 4 as Ex. 2.03 at TR 2:195 through witness Katy Chaney and supported by the later testimony of Skamania County Commissioner Paul Pearce.

The Applicant and the County contend that the Project is consistent with local land use regulations and plans. Friends and SOSA oppose a determination of consistency. The County's representation to this effect is *prima facie* evidence of consistency, but is not determinative if there is a challenge. WAC 463-26-090, Substantial evidence is required to overcome the weight of the *prima facie* certification and the evidence supporting it. If a challenge is raised to a County's finding of consistency, however, it remains our responsibility to determine consistency based on the parties' presentations and applicable law.

The project as proposed would be situated in territory zoned "Unmapped" and in territory zoned "FOR/AG20." Other decisions in this order would restrict the Project to territory in the "Unmapped" zone. For that reason, we find it unnecessary to decide consistency within the "FOR/AG20" zone.

B. DISCUSSION OF CONTESTED ISSUES

The range and intensity of the arguments over land use consistency and preemption in this proceeding are unprecedented. This is somewhat surprising given that the question of whether a proposed project is consistent with local land use requirements is not dispositive. If EFSEC determines after a hearing that it is consistent, the Council need do no more. RCW 80.50.110(1) simply is not implicated. There is no need to declare local law preempted and no need to discuss land use issues at any length in the Council's recommendation to the Governor, the adjudicative order or, if the Council recommends that the Project be approved, the SCA. If, on the other hand, the Council determines that it is inconsistent, the local land use requirements are preempted by operation of law.¹¹ The Council's obligation then is to consider measures that might remove or mitigate the inconsistent aspects of the project and the only issue is whether local land use control continues, or the EFSEC law (and conditions that EFSEC requires) will replace local provisions.¹² Friends and SOSA, parties opposing this application, nevertheless make numerous factual and legal arguments against consistency and against the County's view of its own land use regulation. Many of these arguments have little or no relevance to the proceeding, or legal support, but we address them briefly.

Friends argues that the substituted resolution is not a valid "certificate" under WAC 463-26-090 because the County did not identify the second certificate as a "decision." The document itself and the testimony of County Commissioner Pearce verify that Resolution 2009-54 is the County's certification to the Council upon a lawful vote of the Commissioners. The Council has no procedural requirements for validation of a certificate

¹² RCW 80.50.110(2), WAC 463-28-070.

except lawful procedure, which is demonstrated here. Friends also argues that a certification of consistency is a decision requiring SEPA review under RCW 43.21C.030, citing a superior court order in another proceeding.¹³ We reject this challenge as being unsupported. The decision was not offered into evidence during the hearing and no copies were provided to the Council or to other parties.¹⁴ We nevertheless have examined the cited two-sentence order and find it does not support Friends argument. Indeed, the court *decided* that certificates of consistency are exempt from requirements of RCW 43.21C.030. *See*, RCW.80.50.110(2).

SOSA urges us to apply an "error of law," *de novo* standard that would look only to the language of the County's land use provisions and not how the county would apply them, how the courts interpret them or how the statute defines their purpose and use. It cites *Eugster v. City of Spokane*, 118 Wn. App. 484, 76 P.3d 741 (2003). We reject this notion. Our review is with a much different purpose from the review in *Eugster*. To determine whether there is consistency, we consider not only the language of the County provisions but also how the County would apply that language. *See, Freeman v. City of Centralia*, 149 Wn. App. 33, 202 P.3d 334 (2009).

SOSA disputes the County's description of the comprehensive plan as a guide rather than a mandatory standard. It notes that RCW 80.50 preempts RCW 36.70 and the Growth Management Act (citing *Residents Opposed to Kittitas Turbines v. EFSEC*, 165 Wn.2d 275, 197 P.3d 1153 (2008)) and urges us to ignore the interpretations of those elements by the body promulgating and enforcing them.

Accepting SOSA's argument would vitiate the entire purpose of the Council's consistency review, which is to recognize and validate local land use control, consistent with the purposes of RCW 80.50. *See*, RCW 80.50.100(1). Nevertheless, we recognize that our task is to determine whether the Project complies with the County's zoning ordinances and is consistent with its comprehensive plan, not whether the County might lawfully allow the Project under its own authority.¹⁵

SOSA argues that the County's adoption of comprehensive plan policies for application in SEPA review makes the policies mandatory for all applications. This is incorrect. The case SOSA cites, *West Main Associates v. Bellevue*, 49 Wn. App. 513, 742 P.2d 1266 (1987), involved a review of an application denied via a SEPA review, where the city's SEPA code *required* the application of comprehensive plan policies. The case is therefore irrelevant here. The question facing us does not involve a County SEPA review, but rather

¹³ *Columbia Riverkeeper v. Cowlitz County*, Cowlitz County Superior Court No. 07-2-00400-0, May 2, 2007).

¹⁴ *See*, RCW 34.05.461.

¹⁵ The statute does not define the phrase "consistency and compliance." The terms apply to land use processes, however. Zoning ordinances require compliance; they are regulatory provisions that mandate performance. Comprehensive plan provisions, however, are guides rather than mandates and seek consistency.

consistency with the comprehensive plan. Comprehensive plan goals are not mandatory without clear indication that such is required by the local jurisdiction.¹⁶

SOSA argues that the County's more recently adopted comprehensive plan takes precedence over its older zoning ordinance. SOSA relies on a case, also irrelevant here, where the more recent of two overlapping statutes was held to control.¹⁷ In contrast, the comprehensive plan is by definition a guide to future action (RCW 36.70.020(6)) while the zoning regulation is by definition a current regulatory requirement. The statute is clear¹⁸ and the courts agree.¹⁹ When the two directly conflict, the zoning regulation applies for regulatory purposes, rather than the Plan's guide for future regulation. Skamanla's comprehensive plan did not repeal or invalidate the zoning code.

SOSA argues that some language in the comprehensive plan could be read as mandatory. This argument is misplaced because, while the County could empower the Comprehensive Plan with mandatory general application, it is abundantly clear that it did not do so. The County prefaces the plan by defining its function clearly, as follows:²⁰

A comprehensive plan is an official public document that *guides policy decisions* related to the physical, social and economic growth of a county. It provides a *framework for future growth, development and decision-making*. A comprehensive plan is *not a regulatory document*. Rather, it is a *guiding document* which includes goals and policies that are *implemented through development regulations and other official controls*. (Emphasis added.)

Taking a second tack, the project's opponents challenge various state and local provisions relating to forest practices, which are also irrelevant here as being neither zoning ordinances nor land use plans within the meaning of RCW 80.50. These include a moratorium (Ex. 1.15c) on certain types of development of forest areas. Friends argues that allowing wind generation violates the Forest Practices Act, RCW 76.09, which is irrelevant to land use consistency. Friends also argues that past Forest Practices Act violations by a company related to Applicant affects Applicant's eligibility for future

¹⁶ SOSA argues that the County intended its comprehensive plan to be mandatory, citing *Cingular Wireless LLC v. Thurston County*, 131 Wn. App. 756, 129 P.3d 300 (2006). There, the court ruled that a County has the power to adopt general standards requiring compliance with its comprehensive plan. SOSA does not argue that Skamanla did so, but that it *intended* to do so. SOSA's examples however, from Page 6 of the comprehensive plan, reinforce the County's position that the plan is a guide rather than a mandate.

¹⁷ *Turnstall v. Bergeson*, 141 Wn.2d 201, 5 P.3d 691 (2000).

¹⁸ RCW 36.70.340 says, "In no case shall the comprehensive plan, whether in its entirety or area by area or subject by subject be considered to be other than in such form as to serve as a guide to the later development and adoptions of official controls."

¹⁹ See, e.g., *Westside Hilltop v. King County*, 696 Wn.2d 171, 634 P.2d 862 (1981).

²⁰ Skamanla County 2007 Comprehensive Plan, page 6.

conversions, basing this irrelevant contention on asserted documentation that is outside the record.

SOSA argues that the County, in limiting certain specific development applications, "effectively recognized that it would not tolerate the absence of any zoning" on lands in the "unmapped" zone. The allegation makes a leap of logic not required by any statute and not supported by evidence or reason:

Friends argues in its Land Use response brief that uncertainty exists about the capacity of access roads to carry construction loads to the site. This has no bearing on consistency, is not identifiably offered in response to any argument in opening briefs and is without support.

The Growth Management Act (GMA) sets a schedule in RCW 36.70A.130(4)(b) for the updating of land use provisions in every county. Friends urges that Skamania's apparent failure to meet the schedule requires automatic invalidation of the existing plan and codes. Friends cites no authority for this proposition and we find none.

Summary as to Zoning. We find that the Project is compliant with current zoning in the unmapped zone because wind generation has not been found a nuisance by a court having jurisdiction over the site.

Consistency with the Comprehensive Plan's Conservancy Designation. The Comprehensive Plan gives "designations" to territories within zones in the County. The Project falls within a zone that is designated as "conservancy." The Comprehensive Plan notes at page 22 that:

The Land Use Element provides a *guide* to public development toward which public utilities and public services planning can be directed and provides a *guide* to private development by indicating those areas *most* suitable and economical for development. (*Emphasis added.*)

Taken together with the preface (Plan, p. 6, quoted above) and the statutory language (RCW 36.70.340, quoted above), as well as the County's certification of consistency and its representations in the hearing and briefing, it is unmistakable that the County intends its comprehensive plan to be a guide and not a regulatory mandate.

SOSA cites a hearing examiner finding that the comprehensive plan "does not contemplate" wind power. It argues this failure to "contemplate" wind-powered electricity generation in the comprehensive plan bars the County from allowing the use. It cites no authority for this assertion. "Contemplation" of a use in a comprehensive plan is not a mandatory prerequisite for approval of that use. The Plan is a guide, not a mandate; it does not set out regulations for specific uses (2007 Comprehensive Plan Introduction, p. 7, first paragraph) and by its own terms it does not foreclose unmentioned uses (Comprehensive

Plan Policy LU.1.2; limitations to specific uses are required in that section under *future* regulations that "should be established" as defined in Policy L.U.6.1 at page 30 of the Plan).

The comprehensive plan thus does contemplate that future zoning regulations will establish specific uses within "designated" areas. It directs that if a use is not listed as allowable, review, or conditional (in such future regulations), "then the use is prohibited." (Policy L.U.6.1, emphasis added.) Opponents argue instead that the illustrations of potential uses given in the Comprehensive Plan have regulatory force; we reject that notion and its corollary that if wind turbine generators facilities are not listed, they are forbidden. In the absence of specific regulations, we examine the County's stated interpretations and analogize to existing provisions.

The guiding purpose for this use designation, according to the Plan, is to "conserve and manage existing natural resources in order to maintain a sustained resource yield and/or utilization." The proposed use appears entirely consistent with that purpose.²¹

The wind generation facility will maintain a sustained resource yield and utilization of wind energy, a natural resource. In addition, as the Applicant contended, its operation will help to support the continued sustained use of the majority of the site for timber production. In many ways, wind production is a less intensive use than industrial agriculture, which requires intensive harvest activities and sometimes on-site processing. It appears to be a less intensive use than a surface mine (mentioned as an example of a conditional use in the Conservancy designation), which throughout its lifetime requires onsite workers, noisy equipment and transportation of product in heavy equipment and may leave permanent scars on the landscape.

The project is permitted as of right in the underlying unmapped area. The County's valid certification provides *prima facie* support for a finding of consistency. The language of the Conservancy designation supports a finding of consistency. The County's attempt to update zoning ordinances to better mesh with the comprehensive plan was rejected on review for failure to complete an environmental review, which the Council is conducting for this Project. Opponents offer a large number of citations and arguments, but we find not one referenced authority that requires the result they advocate.

We conclude that the evidence and applicable law support the County's certificate of consistency, that Project opponents have failed to present a credible case against it, and that the Project is therefore consistent with the Conservancy designation in the Comprehensive Plan. The County will be prohibited from changing the land use plan and zoning ordinances applicable to project lands for the life of the Certificate. RCW 80.50.090(2).

²¹ Air and the force of wind are identified as natural resources. See, e.g., *Wikipedia, the Free Encyclopedia*. We find no definition of "natural resource" in the Skamania County comprehensive plan or land use code chapter.

III. ADJUDICATIVE PROCEEDING

The Application was filed on March 10, 2009 and a revised application on October 12, 2009. The Council issued its Notice of Intent to Hold Adjudicative Proceeding, Notice of Opportunity and Deadline to File Petitions for Intervention, and Notice of Prehearing Conference on June 25, 2009. Numerous prehearing conferences were held pursuant to notices to parties. The hearing on the application was heard in formal adjudicative sessions, pursuant to notice, on January 3-7, 10-11 and 20, 2011, in Stevenson, Underwood, and Olympia, Washington.

A. PARTIES

The parties appeared and were represented as follows:

Applicant, Whistling Ridge Power Project LLC: Timothy McMahan, attorney, Stoel Rives, Vancouver, Washington and Erin Anderson, attorney, Stoel Rives, Seattle, Washington and Darrell Peoples, attorney, Olympia, Washington.

Counsel for the Environment: Bruce Marvin, Assistant Attorney General, Olympia, Washington.

Department of Commerce: Dorothy H. Jaffe, Assistant Attorney General, Olympia, Washington.

Friends of the Columbia Gorge: Gary K. Kahn, attorney, Reeves, Kahn & Hennessy, Portland, Oregon, and Nathan Baker, attorney, Portland, Oregon.

Save Our Scenic Area: J. Richard Aramburu, Attorney, Aramburu & Eustis, LLP; Seattle, Washington.

Skamania County: Susan Drummond, attorney, Seattle, Washington.

Seattle Audubon Society, by Shawn Cantrell, Executive Director, Seattle, Washington.

Economic Development Group of Skamania County: Ron Criddlebaugh, Executive Director, Skamania, Washington.

Skamania County Public Utility District No. 1, Kenneth B Woodrich, attorney, Stevenson, Washington.

Skamania County Economic Development Council, Peggy Bryan-Miller, Stevenson, Washington.

Skamania County Agri-Tourism Association, John Crumpacker, Underwood, Washington.

Association of Washington Business, by Chris McCabe, Olympia, Washington.

City of White Salmon, by David Poucher, Mayor, White Salmon, Washington.

Klickitat County Public Economic Development Authority, Michael Canon, Executive Director, Goldendale, Washington.

Klickitat and Cascades Tribes of the Yakama Nation, Wilbur Slockish, Jr., Bingen, Washington.

Port of Skamania County, Bradley W. Andersen, Schwabe, Williamson & Wyatt PC, Vancouver, Washington.

Confederated Tribes and Bands of the Yakama Nation, by George Colby, attorney, Toppenish, Washington.

Two of the parties, Friends and SOSA, consistently presented arguments generally and specifically opposing the Application on various grounds. The two parties generally argued different issues in the final adjudicative briefing process, but each party affirmed the arguments of the other for a unified position. Consequently, we occasionally refer to them collectively as "Opponents."

B. NEED FOR THE PROJECT AND COMFORMITY WITH LAW

State law establishes policies on which the Council's authority is based. With regard to need for energy facilities and broader interests of the public, RCW 80.50.010 provides as follows:

It is the policy of the state of Washington to recognize the pressing need for increased energy facilities, and to ensure through available and reasonable methods that the location and operation of such facilities will produce minimal adverse effects on the environment, the ecology of the land and its wildlife, and the ecology of state waters and their aquatic life. It is the intent of the law to seek courses of action that will balance the increasing demands for energy facility location and operation in conjunction with the broad interests of the public.

Another aspect of need, regarding the economic viability of an applicant's project and aspects of market demand, was resolved in *Residents Opposed to Kittitas Turbines v. EFSEC*, 165 Wn.2d 275, 197 P.3d 1153 (2008). Need in this regard is an applicant's business decision outside the scope of the Council's review.

In this proceeding, Project opponents argue that there is no need for this project because there is an abundance of wind power, a renewable resource. SOSA opening brief, pp. 32ff. However, as Mr. Schwartz's testimony reflects, a state policy supports the development of power that satisfies renewable energy requirements. See, RCW 19.29A and RCW 19.29A.090. Chapter 19.285 RCW (Initiative 937) establishes a renewable portfolio standard (RPS) that requires 15 percent of the energy provided by major utilities in Washington to be from renewable resources by 2020. Thus, irrespective of the region's ability to meet much of its power growth requirements through conservation and existing resources, there is a legal requirement to increase the proportion of power obtained from renewable resources and to reduce reliance on carbon-based fuels.

Consistent with the state's policy and legal requirement to support renewable resources, the Council must consider whether this project will produce a net benefit after balancing the legislative directive to provide for abundant energy at a reasonable cost with the impact to the environment and the broad interests of the public. Here, on the basis of the entire adjudicative record, with the findings and conclusions set out below and with the project's conditions and modifications required in this Order and the Recommendation to the Governor, the Council finds that the Project conforms to the legislative intent expressed in RCW 80.50.010.

C. APPROPRIATE CONDITIONS

As the Applicant has pointed out, the hearings in this aggressively litigated proceeding appear to have set a record for length, volume, and number of issues addressed for a facility of this type. Subject matter experts and local lay witnesses - who often have valuable personal and practical awareness of particular concerns - have shared their views about such specific issues as effect on aesthetics, avian and terrestrial wildlife, cultural heritage, noise, and infrastructure demands, as well as the scenic heritage and the potential economic consequences that could be affected by allowing or rejecting the Project.

As our response to specific evidence and argument on this record, we identify required location, construction and operating limitations in this Order and will refine them as needed in our Recommendation to the Governor and in its accompanying Site Certification Agreement, according to our review of the final EIS. These conditions also respond to expressed public concerns.

D. ENVIRONMENTAL DETERMINATIONS

1. AESTHETICS AND CULTURAL HERITAGE

The most hotly contested issue involved in this application, raising the greatest degree of public and intervenor attention, is aesthetics and cultural heritage. This is explained in significant part by the proximity of the project to the Columbia Gorge National Scenic Area.

The Setting. The Whistling Ridge Project is proposed for siting, in part, on a ridgeline above the community of Underwood in the Gorge. Turbines proposed for this ridgeline (A-1 through A-7) and a nearby ridge area (C-1 through C-8) would be prominently visible from certain locations within the Gorge. A majority of the proposed turbines, however, would be only partially visible from only a few viewing locations due to intervening terrain conditions. *See*, Table 1, page 23.

Significance of the scenic heritage issue. Portions of the Columbia Gorge between Washougal and Wishram, Washington are designated as a National Scenic Area (NSA) by Congress, and are administered in part through an interstate compact between Oregon and Washington. The Gorge is within the westernmost part of the trail established by the Lewis and Clark Expedition, which is recognized as a National Historic Trail. The Historic Columbia River Highway, designated a National Historic Landmark, is also within the NSA.

The scenic environment in the Gorge is a reflection of national heritage, but it is not a preservation of pristine heritage as it existed during periods of native civilization, periods of exploration, or periods of first settlement. A series of dams now slow the river, generate power for the Northwest and permit commercial barge transportation. Heavily traveled highways and rail lines follow both sides of the Columbia River, and commercial barge

traffic shares the river with divers, fishers and windsurfers. Industrial, commercial and residential development exists along the river. Electric and natural gas transmission lines, requiring clear cuts through forests their rights-of-way are visible in the vicinity of the proposed project and directly through the proposed site.

Yet, the resulting vistas support and maintain the area's designation as a National Scenic Area. Totally independent of its NSA designation, the Gorge remains a part of the heritage of Washington, Oregon and the native and resident peoples of the entire United States.

Effect of the National Scenic Area. Congress designated portions of the Gorge as a NSA in 1986. Management of the NSA includes participation by the U. S. Forest Service and, through an interstate compact between Washington and Oregon, the Columbia River Gorge Commission. Creation of the NSA required setting definite political boundaries. Authority under the Act stops at those boundaries. Development within the NSA is carefully restricted. The NSA restrictions, however, expressly do not apply to the land surrounding the NSA. Lands surrounding the NSA host "low intensity" uses including residences and farms. More intensive use for commercial forestry, including periodic clear cuts of significant acreages, also is evident. There is some urban development, including industrial development, both inside and outside the NSA.

The parties' positions. The most active parties - the applicant and its opponents, Friends and SOSA -take very different views as to the propriety of siting wind turbines on lands outside, yet prominently visible from points inside and outside, the Scenic Area.²² Applicant points to the clear language of the Act that stops the NSA's jurisdiction at the NSA boundaries. Opponents of the Project agree that the proposed site is outside the NSA and that the Act creating it does not by its terms have direct legal application outside that boundary. However, they argue (to paraphrase) that the proposed facility will damage the scenic area and irreparably scar the natural scenic and cultural heritage it contains. They propose to apply NSA-like standards to enforce their position.

a). Challenge to Council Authority.

Applicant argues for the first time in its reply brief that consideration of aesthetic issues should be exclusively within the SEPA process because there are no performance standards for aesthetics in WAC 463-62, meaning the Applicant need only satisfy the informational standards set out in WAC 463-60-362(3).²³ Applicant nevertheless put on a

²² SOSA in its answering brief does comment favorably on certain mitigation measures including suggestions by Counsel for the Environment, which we describe below.

²³ WAC 463-60-362(3) reads as follows: (3) Aesthetics. The application shall describe the aesthetic impact of the proposed energy facility and associated facilities and any alteration of surrounding terrain. The presentation will show the location and design of the facilities relative to the physical features of the site in a way that will show how the installation will appear relative to its surroundings. The

full case concerning aesthetics in the adjudicative process and devotes significant portions of its briefs to such issues.

RCW 80.50.010(2), however, includes specific reference to aesthetics and recreation.²⁴ RCW 80.50.040(8)²⁵ recognizes the Council's responsibility to develop site-specific criteria for approval, consistent with its obligation to take actions necessary to protect community interests without regard to preemption. RCW 80.50.100(1),²⁶ RCW 80.50.110 (declaring provisions in RCW 80.50 preemptive of inconsistent laws and rules)²⁷ and WAC 463-14-020²⁸ support the regulation of turbine aesthetics. Prior EFSEC orders include the regulation of views and viewscapes.

Indeed, the Council has directed modification of proposed turbine siting in response to viewscape concerns. In the Kittitas Valley application, 2003-1, the Supreme Court approved doing so, accepting the Council's consideration of standards presented via witnesses' testimony and the Council's exercise of judgment.²⁹ In deciding to accept the Council's overall recommendation in Kittitas Valley, but prior to final authorization, the Governor required the Council to review certain portions of the application with regard to view. The Council did so and required further alterations of turbine siting. The Council also considered and resolved aesthetic issues in the Desert Claim application, No. 2006-02.³⁰

In this proceeding, the Council considers the testimony and documentary evidence, including each expert viewscape witness's discussion of standards, and decides the issues by applying the standards to the evidence in the record. The evidence in this matter

applicant shall describe the procedures to be utilized to restore or enhance the landscape disturbed during construction (to include temporary roads):

²⁴ Council "action will be based on these premises: . . . (2) To preserve and protect the quality of the environment; to enhance the public's opportunity to enjoy the esthetic and recreational benefits of the air, water and land resources; to promote air cleanliness; and to pursue beneficial changes in the environment."

²⁵ RCW 80.50.040(8): To prepare written reports to the governor which shall include: . . . (b) *criteria specific to the site*. . . (Emphasis added).

²⁶ RCW 80.50.100(1): The council shall include conditions in the draft certification agreement to implement the provisions of this chapter, including, but not limited to, conditions to protect state or local governmental or community interests affected by the construction or operation of the energy facility

²⁷ See, also, WAC 463-14-050

²⁸ In acting upon any application for certification, the council action will be based on the policies and premises set forth in RCW 80.50.010 including, but not limited to: (2) Enhancing the public's opportunity to enjoy the esthetic and recreational benefits of the air, water and land resources

²⁹ Order No. 826; *Residents Opposed to Kittitas Turbines*, above, p. 8; Order 831, following remand and review. Unlike a neighborhood or a town seeking an interrelated design emphasis, or heritage sites such as national parks or forests that are relatively consistent in their function and purpose there is no cohesive milieu into which Council-jurisdictional projects may be sited, so a single standard based on common principles is impossible to identify.

³⁰ Order No. 843, pages 16-19.

provides a range of analytical methodologies for scenic management that employ somewhat consistent principles of line, form and texture, interpreted by witnesses with identifiable perspectives. The reasoned application of an appropriate methodology is within our responsibility as a Council. We find no barrier to resolving the issue in this Order.

b) Testimony and Argument

Two principal expert witnesses appeared. The Applicant presented Dautis Pearson, an environmental planner who has testified regarding other wind projects. He defined the visual effect of the Project as moderate to moderately high from some viewpoints based largely on the Federal Highway Service Manual guide to scenic evaluation and elements of his own judgment. He concluded that the Project would not intrude significantly into the scenic value of the Gorge.

Dean Apostol testified for the project opponents. He criticized Mr. Pearson's analysis and stated his own judgment that visibility of the proposed facility would be highly intrusive into scenic values in the Columbia Gorge. He relied largely on the Bureau of Land Management (BLM) and National Forest Service analyses.

Mr. Pearson chose the highway manual as his principal reference in part because its analysis is applicable in any setting, developed or undeveloped. This contrasts with typical situations anticipated in the BLM (for public lands such as national parks) and National Forest Service (for national forest lands) manuals supporting the testimony of Mr. Apostol. Mr. Pearson observed that the scenery in the Gorge is not pristine; it includes industry, commercial forests and agriculture, residential, retail and urban uses. He found the proposed facility slightly to moderately intrusive overall and concluded that it would not constitute an undue intrusion into Gorge scenery.

Friends challenges Mr. Pearson's use of a hybrid methodology to evaluate scenic effects. We, however, find value in Mr. Pearson's presentation, which draws on three different methodologies. It follows methodologies used in prior applications although it inappropriately discounts the intrusive nature of full-tower and significant prominent-tower views on skyline views in the Columbia Gorge setting. We do not find fault with Applicant's failure to provide animated illustrations, criticized by Mr. Apostol; Council members are familiar with views including towers with generators in operation as well as towers whose blades are docked.

Mr. Pearson offered detailed and credible rebuttal testimony with criticism of Mr. Apostol's analysis and testimony. In particular, Mr. Apostol's use of Forest Service and BLM manuals is not wholly appropriate because they are aimed toward preservation of property owned by the Government that generally has not been extensively developed. In our view of the evidence, Mr. Apostol's testimony does not support barring wind turbines from the entire site.

c) Discussion

We agree with observations by Mr. Apostol as well as many public witnesses that entire wind production towers rising more than 40 stories above the skyline on a prominent ridge, with smooth modern designs contrasting markedly with rugged natural formations, would be readily noticeable and intrusive into the surrounding view. Mr. Pearson understates the visual intrusion of the most-prominent "A-string" and "C-string" towers.

On the other hand, in using visual standards designed for application to projects in national parks and forests, Mr. Apostol did not address any relationship between less-visible portions of the Project and the surroundings. Neither did he account for the present state of commercial and industrial development existing within and immediately outside the NSA boundaries. He thus overstates the contrasts and the negative effects associated with the Project. Comments by the Forest Service and the National Park Service share this flaw and do not recognize that the site location is outside the NSA boundaries and therefore not subject to NSA standards or the related Skamania County ordinances³¹ applicable to sites within the NSA.

We disagree with the idea that the visibility of a relatively small number of partially-to wholly-obscured towers from a relatively small number of viewing areas would be so contrasting and so intrusive that they must be totally forbidden.

We have reviewed the proposed site map with the hypothetical turbine locations and have compared those with the simulations presented in Ex. 8.08r. During the Council's view of the site, the Council found that the simulations accurately represent the landscapes from their viewpoints and we therefore discount Mr. Apostol's criticisms relating to photographic perspective and stitching of composite images into a panorama.

From Figure 4.2.5 in Ex. 20 and the simulations in Ex. 8.08r we are able to identify the hypothetical tower sites in the proposed corridors. We understand that tower placement in the corridors is subject to "micrositing," but the tower locations on the map and depicted in the simulations range throughout the corridors and therefore adequately represent the visibility of towers within those corridors for purpose of this exercise.

In its brief, the Applicant reiterates its earlier opposition to any change in the Project site. Friends opposes authorization of any portion of the Project.

³¹ See, Skamania County Code, Title 22 generally, and SCC 22.06.010; this code is applicable only to properties within the NSA.

Counsel for the Environment (CFE), in contrast, presented an opening brief with a thoughtful and balanced argument on visual impacts. He suggests, at a minimum, elimination of the lower portion of the A string (turbines A-1 through A-7), citing adverse visual effects that are noted in the record.³² SOSA responds favorably to this proposed measure, although characterizing it in its answering brief³³ as "only a start," and urging denial of the entire A-string.

d) Conclusion

Both expert witnesses offer helpful observations about the evaluation of landscape elements. Mr. Apostol's testimony would be more on point if we were addressing a pristine area or an area totally within the boundaries of the NSA, a national park, or a national forest. The choice of reference manuals and assumptions may tend to point toward a desired result. We noted above, and Mr. Pearson's testimony recognized, that the Columbia Gorge is not a pristine area and the proposed project is *not* within the NSA. The scenic values claimed by Mr. Apostol are not pristine, but are already diminished by industrial agriculture, regional utility, commercial and industrial development and historical elements such as those we note above.

On the other hand, we reject Mr. Pearson's notion that these elements so degrade the entire scenic setting that we should all but entirely discount the aesthetic, cultural and historical significance of the Gorge and the scenic attributes that it possesses today and allow all proposed tower corridors despite the contrast and intrusion of complete towers across prominent ridgelines.

Friends is the sole party stating unwavering opposition to the proposed project on all points. It notes that the Scenic Area Act does not limit the Council's authority under other provisions of law. However, as we state above, neither does it require or permit use of its protections outside of the Scenic Area; by terms of the federal law, the scenic area standards have no application outside that area. Our decision recognizes this distinction and rests its validity on the scenic, historical and cultural values associated with the Gorge, including territory without as well as within the NSA, and not on its Scenic Act designation. Therefore, we will apply neither the NSA restrictions nor the County's NSA-based restrictions to the Project site.

Our decision is not inconsistent with that of the U. S. Forest Service in the *Northwest Motorcycle*³⁴ case cited by the parties. *Northwest Motorcycle* involved a challenge to a

³² Three of the statements recommend elimination of all towers visible from any key viewing area. Ex. 21.04 (Mr. Westberg, National Park Service), Ex. 21.05 (statement of Mr. Sleeper, U. S. Dept. of the Interior), and Ex. 21.02 (Mr. Harkenrider).

³³ p. 20.

³⁴ *Northwest Motorcycle Ass'n v. U.S. Dept. of Agriculture*, 18 F.3d 803 (9th Cir. 1994).

Forest Service decision to restrict off-road vehicles from certain trails in light of a studied analysis of relevant facts. The Forest Service decision was affirmed because the record showed an adverse effect of such vehicles upon a wilderness area. Here, we find an adverse effect of the original proposal upon a scenic and cultural heritage area. We also find, however, that this adverse effect can be mitigated to an acceptable degree.

We adopt the suggestion of Counsel for the Environment, supported by SOSA to eliminate the portion of the A corridor containing Turbines A-1 through A-7 from the approved siting area. In light of our site view and our analysis of tower visibility based on Fig. 4.2-5 and simulations, we also find the entire C corridor, tower locations C-1 through C-8, to be impermissibly intrusive into the scenic vista unique to the Columbia Gorge and the heritage associated with it and it is also denied. Therefore, we find this portion of the site to be unsuitable for the proposed project.

We agree with CFE's analysis of several other points supporting this measure - it will reduce impact to residences to the south and west (see also SOSA answering brief, p. 20, l. 21); it will reduce potential noise impacts (see SOSA ans. br. p. 20, ll. 2-3); and it will reduce further the possibility of geologic hazards by eliminating the use of a relatively narrow ridge with the least surface area for tower foundations of any in the Application (see SOSA ans. br. p. 21 ll. 9-13).

The following Table 1, "Viewing Site Analysis," reflects the Council's evaluation of allowable tower visibility. It is based on examination of tower views from the record (maps, simulations and testimony of expert and lay witnesses) and as verified during the view of the site from identified viewing areas. The degree of reduced visibility is not a mathematical calculation but rather the Council's subjective effort to approximate the reduced visibility obtained from tower reductions.

TABLE 1
Viewing Site Analysis

VIEW SITE	OPTION 0 (All Turbines) Resulting Visibility	OPTION 1 Turbines Reduced: A1-7 Resulting Visibility	OPTION 2 Turbines Reduced: C1-8 Resulting Visibility	SELECTED OPTION 3 Turbines Reduced: A1-7, C1-8 Resulting Visibility
1	B11-21, C1-8, D1-3, E1-2	No Change, No A-String Visible	Approximately 1/2 Reduction in Turbine Visibility	Approximately 1/2 Reduction in Turbine Visibility
2	B5-21, C1-8, D1-3, E1-2	No Change, No A-String Visible	Approximately 1/3 Reduction in Turbine Visibility	Approximately 1/3 Reduction in Turbine Visibility
3	B1-16, C1-8, D1-3, E1-2, F1-3	No Change, No A-String Visible	Approximately 1/3 Reduction in Turbine Visibility	Approximately 1/3 Reduction in Turbine Visibility
4	A1-8	Approximately Zero Turbine Visibility	No Change	Approximately Zero Turbine Visibility
5	A10-13, B1-16, F1-3	No Change	No Change	No Change
7	A1-13, B1-13, F1-3	Approximately One Third Reduction in Turbine Visibility	No Change No C-String Visible	Approximately 1/3 Reduction in Turbine Visibility
8	A1-4, C1-8	Zero A-String Turbine Visibility	Zero C-String Turbine Visibility	Zero Turbine Visibility
10	A1-7, C1-8	Zero A-String Turbine Visibility	Zero C-String Turbine Visibility	Zero Turbine Visibility
11	B9-21, C1-8, D1-3, E1-2	No Change, No A-String Visible	Approximately 1/3 Reduction in Turbine Visibility	Approximately 1/3 Reduction in Turbine Visibility
12	B13-21, C1-8, D1-3, E1-2	No Change, No A-String Visible	Approximately 3/4 Reduction in Turbine Visibility	Approximately 3/4 Reduction in Turbine Visibility
13	A1-5, B13-21	Approximately One Half Reduction in Turbine Visibility	No Change No C-String Visible	Approximately 1/2 Reduction in Turbine Visibility
14	A1-13, B1-9	Approximately One Half Reduction in Turbine Visibility	No Change No C-String Visible	Approximately 1/2 Reduction in Turbine Visibility
15	A1-10	Approximately 3/4 Reduction in Turbine Visibility	No Change No C-String Visible	Approximately 3/4 Reduction in Turbine Visibility
16	A1-8	Approximately Zero Turbine Visibility	No Change No C-String Visible	Approximately Zero Turbine Visibility
17	A3-6	Zero Turbine Visibility	No Change No C-String Visible	Zero Turbine Visibility
18	A5-7	Zero Turbine Visibility	No Change No C-String Visible	Zero Turbine Visibility
19	B16-21, C1-8, D1-3	No Change No A-String Visible	Approximately 3/4 Reduction in Turbine Visibility	Approximately 3/4 Reduction in Turbine Visibility
20	A1-13, F1-3	Approximately 1/2 Reduction in Turbine Visibility	No Change No C-String Visible	Approximately 1/2 Reduction in Turbine Visibility
21	A1-4	Zero Turbine Visibility	No Change No C-String Visible	Zero Turbine Visibility
22	A1-8	Zero Turbine Visibility	No Change No C-String Visible	Zero Turbine Visibility
23	A1-8	Zero Turbine Visibility	No Change No C-String Visible	Zero Turbine Visibility
	Full 50 Turbines (100%)	43 Turbines (86% Remaining)	42 Turbines (84% Remaining)	35 Turbines (70% Remaining)

The Council is empowered by law to consider the aesthetic aspects of projects within its jurisdiction and to consider the total and surrounding scenic and cultural heritage entirely apart from the existence of the NSA, and to apply unique limitations on proposed energy facilities. We conclude that a portion of the proposed Project's visual effect would intrude impermissibly into the heritage view and that use of portion(s) of the site for wind generation towers should not be allowed. We also conclude that other portions, as to which some of the towers and/or blades would be visible, are not impermissibly intrusive into overall viewscape or the area's heritage, and must be allowed.

Micrositing adjustments for scenic values. Counsel for the Environment called attention to Mr. Spadaro's testimony at TR. 1:148 ll. 3-7 that micrositing is an appropriate mechanism for minimizing visual impacts on sensitive resources. The Site Certification Agreement will require Applicant to prepare approval a micrositing plan that minimizes visual impacts from the Project on sensitive resources (viewing areas identified in this record plus Mitchell Point).³⁵

2. WILDLIFE AND HABITAT

Introduction

Questions involving habitat and wildlife form the second-largest cluster of issues presented by the parties. Counsel for the Environment and Audubon Society identify concerns and suggest remediation; Friends and SOSA challenge numerous points.

WDFW has indicated that this project, with the appropriate mitigation measures, is consistent with WDFW 2009 Guidelines for Wind Power Projects (Ex. 609c). CFE observes that this is the first wind project in a conifer forest in the western United States on land currently managed as a commercial forest. The WDFW 2009 Guidelines for Wind Power Projects (Ex. 609c) recommend that the projects should be sited on highly disturbed and roaded areas with existing transmission lines. (pp. 5 & 8 of Ex. 609c). The Whistling Ridge Project is consistent with that approach since it occurs on a tract of industrial timberland that has been heavily disturbed for many decades and has an extensive road system and an existing transmission line bisecting the project.

It has been established that there is a need to acquire information on this Project if it is built and operated because of its potential usefulness to the Council, operators, applicants, landowners, and interests such as DNR, Audubon, and WDFW in the future siting and operations of wind projects in forest environments. Therefore, we do support taking the opportunity to establish pre- and post-construction studies and reporting

³⁵ We understand that topography will restrict views from Mitchell Point and that elimination of the C and lower A corridors may eliminate all tower visibility from that point. However, as no simulations were provided to demonstrate likely visibility, we include the site as a referenced viewing point for review.

requirements that will enable ongoing adjustments to continue to reduce adverse environmental consequences.

a) Avian Issues

As CFE notes, more than 90 species of birds (a majority associated with forests) have been observed on the site, including several sensitive species. Sensitive species identified on or near the site include northern spotted owl, northern goshawk, olive sided flycatcher, Vaux's swift, pileated woodpecker, keens myotis (bat), Townsends big ear bat, bald eagle, golden eagle, and the western gray squirrel. Audubon, CFE and Opponents state concerns about or challenge the adequacy of the studies presented in the application.

Protected species do not appear, on the basis of the record of this adjudicative proceeding, to be an issue. Considering the totality of information on the record, we conclude that there is a low risk to critical habitat for state or federally listed species and a low likelihood of state or federally listed species being killed by a turbine collision. Available information indicates that a single male northern spotted owl was seen outside the Project area but not within it. The area theoretically affected, within the species typical breeding range, has recently been logged and is not its typical breeding habitat.

We reject Friends' contention that the Applicant's avian studies were "wrong or missing on every measure." Particularly given the relatively unique nature of the surrounding habitat as a potential wind farm site, an abundance survey and a literature review (noted by Audubon) may have been helpful. Their importance is not critical and their absence is not fatal, however.

WDFW noted in Ex. 1.20r that Applicant's studies meet the WDFW Wind Power Guidelines. Among other things, WDFW observes that avian use and mortality is accepted as reasonably consistent across habitat types and locations, and the use of a population estimator is recognized and accepted. While not negating some possible additional value of efforts to increase available information, we accept the studies as satisfying our requirement.

Mr. Smallwood's testimony for opponents urges rejection of WDFW guidelines. The guidelines incorporate the point of view of a broad range of stakeholders, including several participants from Washington State and Seattle Audubon and The Nature Conservancy, which allows consideration of the collective wisdom of all the experts who participated in their development. They are accepted statewide as appropriate and are identified in our rules as proper authority for application presentations. WAC 463-60-332. No standard might receive universal acclaim, but we are satisfied that the WDFW guidelines have sufficient credibility and authority that Mr. Smallwood's criticisms are rejected. Applicant's experts Reams and Johnson recognized and, as pertinent, followed the guidelines. They presented credible testimony regarding their work and the Project's compliance.

Audubon urges additional preconstruction study if the Application is approved. In lieu of that, particularly given WDFW's acceptance of the existing analysis, the Council

believes that there is a more productive approach. The SCA instead will require additional post-construction monitoring for avian impacts, including three years' post-construction monitoring for avian impacts. Doing so satisfies another request of both CFE and Audubon and could avoid or reduce avian mortality by observing patterns of injury, to control operations of individual towers or develop other means to minimize adverse impacts to avian species. We identify appropriate mitigation measures below for inclusion in the SCA. The SCA will, as noted elsewhere, also include requirements based on the Final Environmental Impact Statement.

b) Bat Issues

Bat species of concern have been observed on site, although species identification may be incomplete. Concerns regarding bats parallel those regarding birds. Both rely on flight for principal mobility and both may collide with rotor blades or be caught in pressure changes in the vortex of revolving rotors.

Additional study appears to be appropriate for bats as well as birds. The Council will incorporate a condition in the Site Certification Agreement to require such appropriate studies and consideration of corrective measures identified in those studies. In addition, the mitigation measures identified below will provide protections aimed at specific points addressed in the hearing record.

c) Mitigation Measures

The Council provides mitigation measures through specific one-time requirements, long-term obligations, and ongoing study aimed at providing continuing improvement. Counsel for the Environment proposed several potential SCA requirements. We agree that the following measures are appropriate and intend to incorporate them into the Recommendation and the Site Certification Agreement. Measures iii through viii are described in the WDFW Guidelines and the US Fish and Wildlife Service Avian Protection Plan Guidelines.

- i. Compliance with 2009 WDFW guidelines (Ex. 609c). WAC 463-60-332.
- ii. Creation of a Technical Advisory Committee (TAC) to suggest and review studies and to make recommendations based on the studies regarding steps that may be recommended to EFSEC if the TAC deems additional studies or mitigation necessary to address impacts that were either not foreseen in the Application or the EIS, and to accept a representative of Seattle Audubon Society as a member of the TAC. Other members shall include the certificate holder, EFSEC Staff, WDFW, USFWS, Department of Natural Resources, Skamania County and the Yakama Nation and additional representatives to be identified at the Council's discretion.

- iii. Conduct post-construction mortality studies to increase understanding of at-risk species and to pursue and recommend suggestions to reduce avian and bat mortality.
- iv. Use of adaptive management strategies to optimize the balance between measures that work and effective operation of the facility.
- v. Public availability of reports and study results.
- vi. Low-impact lighting to reduce the attraction of insects and consequently insect-feeding species.
- vii. Mitigation through micro-siting; avoid as practical turbine locations that separate nesting areas from food gathering areas; avoid flight paths; consider other factors as identified by the TAC. Mitigation as well from study of post-construction surveys.
- viii. Development and compliance with best management practices, including the possibility of minimizing operations such as low rotor speed that may present greater hazards to some species.

For reasons noted above, we decline to require pre-construction studies as additional mitigation measures.

d) Mitigation Parcel

A suggested mitigation parcel may satisfy applicable mitigation standards in as much as it provides a habitat superior to a commercial forest habitat. This mitigation parcel was discussed extensively in the Adjudicative proceedings, but it has yet to be offered as a formal mitigation plan. Due to that fact, this Order does not address the mitigation parcel in the findings of Fact & Law.

e) Conclusion

We find support for the application adequate as it pertains to habitat and wildlife, subject to development of and compliance with elements of a Site Certification Agreement incorporating the protections identified above and others that may be suggested through review of the FEIS. We have considered the criticisms and counter-suggestions of the opponents and determine that they should be rejected. We are persuaded to support performance analysis of wind farm impacts in forest environment if the project is on heavily disturbed, highly roaded forest lands with existing transmission infrastructure such as presented here. (see Ex 609c, pp 5 & 8). We do not find support in the record for the assumption that forestlands are by definition more worthy of protection than the shrub steppe lands in Eastern Washington.

3. NOISE ISSUES

The Council's regulations require compliance with the maximum noise limits set forth in regulations promulgated by the Department of Ecology.³⁶ The evidence demonstrates that the noise created by Project operation would fall beneath those limits under normal operating conditions. Any noise exceeding applicable state standards (which are measured at the property line of the affected use) will constitute a violation. Neither the Council nor the Department of Ecology regulate on the basis of ambient noise. The results of predictive modeling (Ex. 7) indicate reliably, considering the laws of physics and Mr. Storm's testimony (which we find credible), that the Project will comply with applicable noise limits. The Site Certification Agreement will, and the regulations do, require compliance with regulatory noise limits and the Council will enforce compliance.

4. GEOLOGY

The Applicant presented witness Dan Meier, a licensed engineering geologist. He testified (Ex. 3) that he had reviewed available information and literature and had visited the site. He stated his opinion that it would be geologically suitable for wind facility construction and operation. Opponents challenged this evaluation, urging that the witness spent less than one day at the site and failed to drill test bores or undertake other verifications at points of tower construction.

The challenge is not well taken. The task at this stage is not to complete pre-construction site preparation following warning signs that there are geological problems, but to assess the structural stability of the corridors for future site-specific determinations. The witness, a professional engineering geologist, presented credible testimony supplementing the Application, in which he described the geology of the site based on researching available literature and visiting the site. The study was not exhaustive, but did provide adequate information to meet the requirements of WAC 463-60-302. No known earthquake faults cross the site. No Class I (severe) or II (high) landslide hazard areas are known to exist at the site. Class III landslide areas are present on the site, but the designation of low potential hazard is assigned only because of the degree of slope and not because of geological evidence of actual prior or potential future hazard. That issue appears moot, however, because of our decision to reject a portion of the Project for other reasons. Tower foundations will be solidly constructed to anchor the towers, at sites chosen after micrositing review of their geological stability.

No evidence of record supports a finding of instability of the proposed corridor sites. The Site Certification Agreement will establish specific, appropriate pre-construction and construction requirements relating to site exploration and preparation.

³⁶ WAC 463-62-030 (referencing WAC 173-60). The standard is stated in WAC 173-60-030 and -040.

5. ROADS AND TRANSPORTATION

a) Public Roads:

The public roads necessary for site access by workers, materials and turbine/tower parts received considerable attention during the hearing. Skamania's county engineer, Mr. Homann, testified that the roads could bear loads of the height and weight required without modification, and that loads up to 150 feet in length could be accommodated without modification. During the hearing, the Applicant indicated that turbine blades up to 164 feet in length might be required, and the Applicant agreed to file a subsequent exhibit with information about the public roads' ability to accommodate the loads between 150 and 164 feet long. TR III:505. The record does not show that this was later addressed. The Site Certification Agreement will specify that transportation must be lawfully accomplished according to the applicable standards current at the time of transportation. To the extent that long, wide and/or overweight loads are involved, permits must be obtained and their terms complied with. If the road capacity prohibits transportation of the longloads on the public roads, the Applicant may choose a shorter component, choose an alternative delivery method or forego construction.

Some public witnesses expressed concern over possible periodic traffic blockages during construction when long, wide or overweight loads are transported to or from the site. There is no evidence of record identifying such delays, only that mitigation would limit any traffic delays to 20 minutes. The duration of such blockages, therefore, is estimated to be measured in minutes or seconds (*see*, Ex. 20, p. I-11); the result will not substantially impede traffic.

An SCA condition will require coordination with emergency providers and public notice, and that timing of transportation avoid or be coordinated with commuter, school bus or other traffic. In addition, a traffic management plan, traffic control plan, and signing plan will be required by the County to satisfy its requirements.

b) Internal Access Roads

The Project expects to have approximately 7.9 miles of internal access roads,³⁷ allowing construction and maintenance vehicles to travel to each Project turbine. The SCA will require that Applicant minimize new road construction to avoid unnecessary impacts to habitat and disturbance of soil and will be required to comply with Washington Forest Practices road standards of the Department of Natural Resources (DNR) and water quality standards of the Department of Ecology.

³⁷ Ex. 20, p. I-10; reductions proposed in other portions of this order will reduce the total area.

6. CULTURAL AND ARCHCAEOLOGICAL

The prefiled testimony of Sarah McDaniel, archaeologist, was admitted without objection as Ex. 10. Ms. McDaniel's testimony states that no known significant cultural or archaeological sites are known to exist within the bounds of the Project. The Washington State Department of Archaeology and Historic Preservation (DAHP) concurs (Ex. 10.02). The Applicant will address cultural resources in the final design and micro-siting process. It has committed to work with the DAHP and Native American tribal authorities to identify, preserve, and as necessary mitigate, culturally significant sites. Applicant will be required to halt relevant construction if any artifacts are discovered. An SCA provision will specify processes to work with DAHP, Yakama Nation and other Native American tribal authorities to identify, preserve, and as necessary mitigate, culturally significant sites.

The Council finds that with implementation of appropriate mitigation measures in the SCA, no impacts on known culturally sensitive areas will occur due to construction or operation of the Project WAC 463-60-362(5).

7. HEALTH AND SAFETY

The Applicant must prepare Health and Safety, and emergency plans for both construction and operation phases to protect public health, safety and the environment on and off the site. WAC 463-60-085; *see also*, WAC 463-60-265 and -352. The plans must anticipate a comprehensive list of major natural disasters or other incidents that could relate to or affect the proposed Project. The Applicant will be responsible for implementing the plans in coordination with the local emergency response organizations. The Project operating and maintenance group and all contractors must receive emergency response training as part of the regular safety-training program to ensure that effective and safe response actions would be taken to reduce and limit the impact of emergencies at the Project site. With appropriate provisions in the SCA, health and safety concerns will be adequately addressed.

WASHINGTON FOREST PRACTICES ACT Under RCW 80.50.110, the Council takes jurisdiction over requirements of the Forest Practices Act (FPA), RCW 76.09, once a Project is approved and an SCA is signed. The SCA will contain pertinent provisions to ensure compliance. The Council retains the Department of Natural Resources (DNR) as a subcontractor to assist the Council in ensuring that a Project meets all applicable requirements of the FPA.

8. SOCIOECONOMICS

The Project will result in increased employment in Skamania County, both during construction and, to a lesser extent, during operation. The Project's economic impacts are not expected to be limited to jobs and the salaries of employees. The Project will purchase goods and services, some of them in Skamania and neighboring counties. The Project will increase the total valuation of real property in Skamania County and substantially increase

tax revenues. The resulting revenues will be available for the support of schools and local public services in the area, including county roads and county government. WAC 463-60-535.

Opponents challenged the asserted degree of economic need in the county and the degree of potential benefit from the project. The record is clear that such need exists and that Skamania County is uniquely challenged financially. The economic benefits from the project will be real and, to the county, the school system and the public, not insignificant. See, Ex. 42 and 42.01r; Ex. 48 and 48.01; Ex. 36; Ex. 41.02. That the Project is not huge by other standards, or that other areas may also be suffering economically, do not lessen the reality of the Project's benefits.

9. SITE RESTORATION

WAC 463-72-040 requires an Applicant, prior to beginning site preparation, to provide an initial plan for site restoration in sufficient detail to identify, evaluate, and resolve all anticipated major environmental, public health, and safety issues. The rule requires that this plan address provisions for funding or bonding arrangements to meet the site restoration and management costs. The Application outlines the scope of activities that would be undertaken at the end of the Project's useful life. Ex. 20, Sec. 2.3.7. These activities include removal of Project structures, removal of foundations to four feet below grade, and restoration of soil surfaces as close as reasonably possible to their original condition. The Applicant has committed to posting funds or guarantees sufficient for decommissioning, to ensure the availability of decommissioning funds when needed.

The Council has considered the Applicant's commitments and finds them to be appropriate. The SCA will require Applicant to provide an initial site restoration plan to the Council prior to construction of the Project, and a detailed site restoration plan must be approved by the Council prior to decommissioning at the end of the useful life of the Project.

10. FIRE HAZARDS

Given the forested nature of the site, adequate fire protection is a necessity. Although evidence in the record appears to indicate that wind turbines rarely cause fires and would be unlikely to affect (or be affected by) a fire started by some other cause, fires could be started by turbine or other activities on the site. Fires originating off-site could spread onto the site. In either event, emergency response would be required on-site. The SCA will require fire prevention and response plans as a condition of construction and operation.

11. PROJECT CONSTRUCTION

The Council finds that there is a benefit to the public to have permitted facilities ready to be constructed whenever it becomes known that more generation capacity is

needed. This project also requires construction of a power substation before it will have access to the grid for power sales.

The Applicant proposes to construct the Project in the manner set out in the Application and the Agreements. Ex. 20. Its application suggests a 19-month period after application approval for site-specific design and for construction, but commits to providing a schedule following gubernatorial approval. Ex. 20; Sec. 2.12. 2. The Council recognizes that there may be remaining uncertainty regarding approval and construction of the proposed substation, which could delay the start of construction.

In any event, an unlimited "build window" for a proposed project is not appropriate as, over time, technology or mitigation measures presented in an application may no longer be protective of environmental standards and conditions at the time the facility is constructed. Therefore, we set a five-year window for substantial completion following gubernatorial approval. The Applicant may seek one additional five-year extension.

The Applicant is not restricted from operating and generating power from individual strings of turbines that are completed prior to others, so long as all needed infrastructure, safety and mitigation measures are in place. These measures provide flexibility for construction but also address needs to complete the project in a timely manner.

12. PROJECT BENEFITS

The environmental benefits of this project include generation of energy from a source that does not produce carbon dioxide emissions. RCW 19.285. Economic benefits also result, as the Project will provide construction jobs, employment during operation, tax revenues to local governments, and payments to landowners and service providers. The available generation will have economic value. Ex. 41, Ms. Bryan-Miller; Ex. 48, Mr. Canon; Ex. 51, Mr. Pytel.

E. CONCLUSION ON ADJUDICATIVE ISSUES

The Council carefully considers its statutory duties, applicable administrative rules, and all of the evidence in the record in exercising its duty to balance the state's need for energy at a reasonable cost with the need to protect the environment and the health and safety of the residents of the local area.

One of the Council's principal duties is to ensure that the location of energy facilities will produce minimal adverse effects on the environment. We have considered the exhibits of record and the testimony of numerous expert witnesses and members of the public in determining whether this Project, with its proposed mitigation measures, is appropriate for this location. As a result of this review, the Council has rejected turbine locations that are prominently visible from numerous viewing sites within the Columbia Gorge. The remaining towers for the most part are only partially visible, and from fewer locations.

Our disapproval of proposed turbine strings preserves the Applicant's ability to achieve the generation capacity it requests while substantially reducing the project's visual impacts from the Gorge, including the NSA.

The record before us, including elements in the Application (Ex. 20) that received no cross examination, supports decision to recommend approval of the project, subject to the restrictions on tower locations and the other mitigations and protective measures identified in this order. Review of the Final Environmental Impact Statement may alter the result of our adjudicative review, as noted earlier in this Order. However, we determine on the record in this proceeding that including these elements in a Site Certification Agreement will adequately protect the public, including members of the public who reside in and use the areas surrounding the Project.

As currently proposed, with mitigation for a number of impacts and the conditions identified for inclusion in a Site Certification Agreement, consistent with applicable laws and rules, the Project will have a minimal impact on the environment.

The Council considered whether the total package of mitigation measures offset the environmental impacts of the Project. Viewed on balance, with respect to this Project, and in the context of mitigation proposed, the package for the Whistling Ridge Project satisfies the legislative policy of RCW 80.50.

For all of the reasons discussed in the body of this Order, the Council finds that this Project may properly be recommended for approval, based on the adjudicative record. The result of this order is subject to a review of the Final Environmental Impact Statement and, if approval is recommended, development of a Site Certification Agreement consistent with the provisions of this Order and such other measures as the Council may identify from its review of the Final Environmental Impact Statement.

IV. FINDINGS OF FACT and CONCLUSIONS OF LAW

Note: the Council intersperses conclusions of law with its findings of fact for the convenience of the reader. Any finding in the nature of a conclusion of law should be interpreted as a conclusion, and any conclusion in the nature of a finding should be interpreted as a finding of fact.

Nature of the Proceeding

1. This proceeding involves Application No. 2009-01 before the Washington State Energy Facility Site Evaluation Council (EFSEC or Council) for certification to construct and operate the Whistling Ridge Energy Project (also "Project" in this order). The Project is a wind-powered electrical energy generation facility with a maximum of 50 wind turbines and a maximum installed nameplate capacity of 75

megawatts (MW). The Project is to be located north of the community of Underwood, Skamania County, Washington.

The Applicant and the Application

2. The Applicant is Whistling Ridge Energy Project LLC. It is a Washington limited liability corporation formed to develop, permit, finance, construct, own and operate the Project. Applicant is in turn owned by S.D.S. Co., LLC. Both entities, and their successors, will be defined as Site Certificate Holders as defined in the Site Certificate Agreement (the Certificate or "SCA".)
3. The Skamania County Commission adopted a zoning code amendment that would have allowed wind powered generation facilities in certain county areas, including the site of the proposed Project. Opponents appealed the adoption to the Skamania County Hearing Examiner, who reversed the county in a decision February 19, 2009. The basis for the Examiner's decision was the county's failure to conduct a programmatic environmental review before adopting the zoning code amendment.
4. On March 10, 2009, Applicant submitted an Application for Site Certification Agreement to EFSEC, seeking authority to construct and operate the Project. It submitted a Revised Application, on October 10, 2009.

Compliance with the State Environmental Policy Act (SEPA)

5. EFSEC is the lead agency for environmental review of project proposals within its jurisdiction under terms of the State Environmental Policy Act, RCW 43.21C. The Council Manager is the SEPA responsible official. WAC 463-47-051.
6. An electrical substation would be required to convert power from the Project to the voltage necessary for inclusion into a transmission line. The Bonneville Power Administration ("BPA"), a federal agency, agreed to provide such a substation. Its construction would require an environmental review under the National Environmental Policy Act ("NEPA").
7. BPA and the Council agreed to prepare a joint federal-state environmental statement to satisfy the requirements of both laws. EFSEC will use the documentation for purposes of SEPA and BPA will use it for purposes of NEPA.
8. A draft environmental impact statement (DEIS) was circulated for public review on May 21, 2010. Numerous comments were received. They were made available to Council members and were publicly available on September 16, 2010. The Responsible Official issued the Final EIS on August 12, 2011. This order does not consider the results of the SEPA FEIS. The SEPA results are incorporated into a Recommendation order and a proposed Site Certification Agreement, which three

documents, together with this Order, will constitute the Recommendation to the Governor under RCW 80.50.100.

Compliance with Procedural Requirements

9. The Council published and, when required by law or rule, served notices of events in the application process, including receipt of the Application, public meetings, commencement of the Adjudicative Proceeding and opportunity to file petitions for intervention, prehearing conferences, land use hearings, and the adjudicative hearing sessions regarding Application No. 2009-01.
10. The Council afforded the parties to the adjudication the opportunity to present oral and written evidence, object to evidence, and fully brief issues. The Council resolved procedural issues prior to hearing through orders based on numerous prehearing conferences at which parties had the opportunity to present arguments; the Council decided such matters through decisions from the bench and through procedural orders, to which parties had the opportunity to object.
11. *The Council concludes* that it has complied with applicable procedural law and regulation, including RCW 80.50, RCW 34.05, WAC 463-26 and WAC 463-30 in conducting the Adjudication and the land use consistency inquiry.

Land Use Consistency

12. The Council conducted a Land Use Hearing under RCW 80.50.090, WAC463-26-050 on May 9, 2009 in Underwood, Washington. Sixteen persons appeared and, under oath, presented facts and legal argument to the Council on the issue of land use consistency. Applicant presented a certificate of land use consistency from Skamania County. Applicant submitted a revised certificate of land use consistency on December 22, 2009.
13. Completion of the land use consistency proceeding was incorporated into the adjudicative hearing on the merits without objection by the parties. Further evidence was there received regarding land use consistency, including the revised certificate of consistency and the testimony of witnesses Spadaro, Chaney and Skamania County Commissioner Paul Pearce. The parties briefed land use consistency issues separately from other issues.
14. The zone in which turbine locations A-1 through A-7 are depicted is Skamania's FOR/AG20 zone, in which semi-public uses are permitted; uses such as a privately-owned logging railroad have been found to be semi-public and uses including aircraft landing facilities and surface mines are permitted of right or conditionally. The remainder of the proposed project is within the county's "Unmapped" area, in which any use is permitted that has not been found a nuisance by a court with jurisdiction over the site.

15. The stated purpose of the applicable conservancy designation of the comprehensive plan is to "conserve and manage existing natural resources in order to maintain a sustained resource yield and/or utilization." Allowing wind generation facilities within the designation will assist in conserving and managing commercial timber harvests by adding diversity of consistent uses to land used for commercial forestry.
16. *The Council concludes that*
- a. Zoning code provisions are regulatory in nature and RCW 80.50 requires compliance. A comprehensive plan is a guide for future action, not a regulation requiring compliance, RCW 36.70.340; RCW 80.50 requires consistency.
 - b. A certificate of land use consistency is *prima facie* evidence that the use is consistent and in compliance with local land use provisions. WAC 463-26-090.
 - c. The Project complies with provisions of the Unmapped area, which permits wind generation facilities as a use that has not been found a nuisance by a court with jurisdiction. Sec. 21.64.020, Skamania County Code.
 - d. The Project is consistent with the Conservancy designation of the Comprehensive Plan. The County certification is *prima facie* correct. The proposed use is consistent with the stated purpose of the designation as a use that provides for the management and harvest of the forces of wind, a natural resource. It is a use that assists in conserving commercial timber operations on portions of the site not used for energy production. The comprehensive plan is a guide and not a mandate. (Comprehensive Plan, Introduction, p. 7) The specific illustrative uses in the conservancy designation of the comprehensive plan have not been adopted in a zoning ordinance and do not regulate land use. 2007 Comprehensive Plan, Chapter 2, pp. 25, 30.

The Adjudicative Proceeding - Process

17. The Council duly noticed and conducted prehearing conferences and entered Prehearing Orders to govern the course of the proceeding. Statutory parties appeared and participated. The Council received petitions for intervention, which were granted, as shown in the body of this Order. The Council served and published notice of the hearing on the merits. Hearings were held on January 3-7, and 10-11 in Stevenson, Washington and January 20 in Olympia, Washington.
18. The Applicant and a majority of other parties submitted post-hearing briefs.
19. On the date shown below as the date of signing, the Council voted unanimously that the evidence and argument in this record supports approval of the Project, in part, and rejection in part, as set out herein. The Council's Order of Recommendation to the

Governor will be based upon all of the following: a) the findings, conclusions and result of this order; b) review of the Final Environmental Impact Statement and c) a Site Certification Agreement based upon this order and the FEIS.

20. *The Council concludes* that the process of this adjudicative order complies with applicable provisions of law, including RCW 80.50 and RCW 34.05.

Views and Cultural Heritage

21. The Columbia Gorge in the vicinity of the Project has significance for cultural heritage and natural beauty long predating the advent of European exploration. Portions of the Gorge to the south, east and west of the Project have been designated a National Scenic Area (NSA) by federal legislation, and are subject to restrictions on development. Portions of the Project site are visible from the NSA but the entire Project site is outside NSA boundaries.
22. Applicant's witness Dautis Pearson urged that the portions of the Project visible from the NSA or territory surrounding it would not be unduly intrusive and that no aesthetic restrictions should apply. Opponents' witness Dean Apostol urged that the Project would have a severe impact on view, would irreparably damage the values of the NSA and should be judged by standards generally used for heritage sites with little development. The Council finds that Mr. Apostol overstated the natural conditions within the Gorge and the NSA while Mr. Pearson inappropriately discounted those factors.
23. *The Council concludes* that it has the authority to consider aesthetics and cultural heritage in its adjudicative proceeding. WAC 463-62 contains no provision barring that consideration. RCW 80.50.010(2) lists aesthetics and recreation as principal values to be advanced or preserved in implementation of the chapter. RCW 80.50.040(8) states our responsibility to develop *site-specific* criteria for approval. RCW 80.50.110 declares the chapter's preemptive power over inconsistent laws and rules. The Council has implemented viewscape restrictions in application 2006-02 of Desert Claim Wind Power LLC, as well as in Application 2003-1 of Sagebrush Power Partners LLC for Kittitas Valley Wind Power Project, the latter decision affirmed in *Residents Opposed to Kittitas Turbines*, cited above.
24. *The Council concludes* that the aesthetic and cultural values of the Gorge, irrespective of its designation as a NSA, require protection from pronounced visual intrusion, but do not require exclusion of the entire Project. Removing towers from corridors in which they would be prominently visible from numerous key viewing areas within and near the Gorge will adequately protect the scenic and cultural heritage of the Gorge. While remaining towers may be partially visible from some viewing areas, and significantly visible from a small number of locations, the substantially reduced overall visibility does not constitute an undue distraction from or to the aesthetic and cultural values of the Gorge.

Wildlife and Habitat

25. The Project is among the first four wind energy generation projects to be seriously proposed in a Northwest forest habitat. Ex. 6.04r, p. 33. The site is habitat for more than 90 species of birds, including sensitive species, and to bats.
26. Applicant's wildlife studies comply with the requirements of the WDFW Guidelines and WAC 463-60-362, Ex. 1.04r. Other parties urged additional measures that add little additional protection, and failed to discredit the validity of studies used in the application.
27. Hazards to flying species (birds and bats) have been found to include striking or being struck by turbine blades and becoming disoriented or injured by the vortex of moving blades. Post-construction mortality studies will provide greater benefit to wildlife preservation than preconstruction studies. Adaptive management utilized through a Technical Advisory Committee will provide benefit by bringing appropriate interests and skills to studies and development of remedial measures.
28. Micrositing prior to tower construction, considering avian and bat flight patterns as well as feeding and nesting areas will be required to optimize tower locations to minimize injuries to flying creatures.
29. *The council concludes* that establishing a Technical Advisory Committee (TAC) and implementation of WDFW guidelines for wind power projects should be required as conditions of operation for the Whistling Ridge project and that the mitigation parcel discussed in the record is appropriate and may be accepted.
30. The Council further concludes that, within the constraints of the information in Adjudicative record, the wildlife and habitat mitigation measures recommended herein, will result in no significant unavoidable adverse impacts to wildlife. WAC 463-62-040.

Noise

31. The Project will comply with WAC 463-62-030 and thereby with Washington State noise standards including WAC 173-60-040.
32. *The Council concludes* that the Application meets applicable noise requirements. The SCA will require compliance with Washington State noise standards and correction of any conditions resulting in noncompliance.

Geology

33. The Applicant's geological presentation is adequate for preconstruction review. There is no evidence of record indicating that actual geological hazards exist that might preclude siting of the Whistling Ridge Project as applied for.
34. *The Council concludes* that the Application satisfies requirements for geological detail. The SCA should require appropriate preconstruction investigation of selected tower locations. The Applicant should be required to report to the Council any indications of hazards that appear in such investigation or during construction and propose appropriate location change or construction measures, subject to Council approval, to ensure safety at the site and potential downslope hazard areas.

Roads and Transportation

35. Construction of the Project will require transportation of tower segments and blades that exceed standards for transportation over public roads. To the extent required, by law and conditions of the SCA, Applicant will obtain or ensure that its transportation services obtain all required overweight, over-height or over-length transportation permits for public road transportation. Local access roads are capable of handling loads up to 150 feet in length and may be capable of transporting loads up to 164 feet in length.
36. Transportation of Project components over public local access roads may result in temporary blockages. Timing of such deliveries will not create more than temporary minor inconveniences. Prior to beginning construction, Applicant must prepare and present for approval contingency plans for maintaining access in the event of an unexpected circumstance blocking public road access.
37. Private roads for internal access within property owned by or under the control of Applicant or an affiliate must be improved as needed to carry required loads safely. Improvements must be accomplished by or under the control of the Applicant and subject to prior approval and supervision by officials with jurisdiction.
38. *The Council concludes* that Applicant should be required to verify carriers' possession of appropriate permits for transportation on Washington roads. Transportation on local public roads must be coordinated with appropriate local officials and must involve Applicant or county consultation with schools, emergency services, and other potentially affected interests. If components requiring loads exceeding 150 feet in length are selected, Applicant must verify that such loads may be lawfully delivered on existing roads within the National Scenic Area without road construction or improvement, or must select smaller components. Work on private roads must be completed pursuant to regulations, and under the supervision of the Council through Department of Natural Resources or other regulatory agency under contract with the Council.

Cultural and Archaeological Resources

39. The testimony within the Adjudicative Record indicates that the likelihood of Project impacts to known archaeological sites, or discovery of unidentified sites, is low. The site is in an area of historical Native American habitation, and artifacts or indication of habitation may be discovered during Project site preparation or construction.³⁸
40. Appropriate provisions in the Site Certification Agreement, requiring monitoring and reporting of discoveries and cessation of construction at the site of discovery, will satisfy the requirements of the National Historic Preservation Act, 16 USC 470.

Forest Practices Act

41. Upon implementation of a site certification agreement, the Council becomes responsible through its agent, the Department of Natural Resources to ensure Applicant's compliance with the requirements of the Forest Practices Act (FPA), RCW 76.09. RCW 80.50.110.
42. *The Council concludes* that the SCA should provide specific requirements that operations on site be required to comply with pertinent provisions of the FPA.
43. *The Council concludes* that the SCA should provide specific requirements that operations on site be required to comply with pertinent provisions of the FPA.

Socioeconomics

44. The Project will provide a benefit to Skamania County through property and other tax payments and through employment during construction and operation. Workers are expected to live within Skamania County or to commute to the job from outside the county; workers will make some purchases in the county. Through taxes and employment, the Project will benefit the county and residents of the county. RCW 80.50.010 ; WAC 463-60-535.

Site Restoration

45. The Applicant's proposal for site restoration and funding as set out in Ex. 20 is adequate. The Site Certification Agreement will require preparation of a detailed plan, and performance pursuant to the plan. *The Council concludes* that this will be adequate to protect the public and other interests potentially affected. RCW 80.50.100(1).

³⁸ Depending on the outcome of Council deliberations elsewhere in this Order, some or all of the archaeological sites of concern may no longer be subject to disturbances of this project.

Fire Hazards and Control

46. The applicant will be required to prepare a Fire Protection and Response Plan in coordination with the appropriate fire response agency or agencies prior to beginning construction. The plan is subject to approval by the Council. *The Council concludes* that this will be adequate to protect the public and other interests potentially affected. WAC 463-60-535 ((4)(a)).

Project Benefits

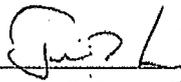
47. Project benefits include the production of energy through means not creating carbon dioxide or other greenhouse gases as well as the economic benefits of construction activities and the energy produced.

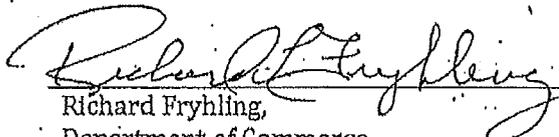
Considering the entire adjudicative record, including the summary findings and conclusions listed above, the Council finds and concludes that the Application, with the modifications specified above, may be forwarded to the Governor of the State of Washington with a recommendation that the Application may be granted, subject to modifications and conditions noted herein and as identified in the Council's review of the Final Environmental Impact Statement and the Council's determination in the Order of Recommendation.

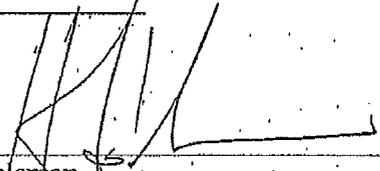
V. ORDER

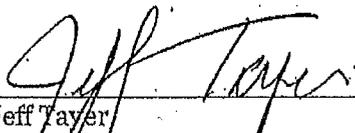
The Council hereby Orders that the Application for the portion of the Project site located adjacent and to the south of the Bonneville Power Administration North Bonneville - Midway transmission line corridor (Tower string A-1 through A-7) be denied, and that the portion of the Project identified as Corridor C (Tower string C-1 through C-8) be denied. The Council hereby Orders that the Adjudicative record in other respects supports a grant of authority, subject to implementation of the environmental requirements of this order and subject to supplement or modification in the Recommendation to the Governor based on the Council's review of the Final Environmental Impact Statement and development of a proposed Site Certification Agreement for the Project.

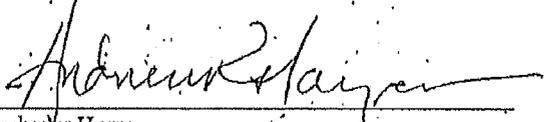
DATED and effective at Stevenson, Washington, this sixth day of October, 2011

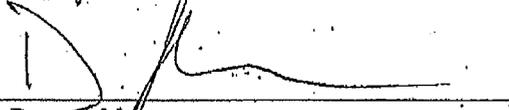

James O. Luce, Chair³⁹

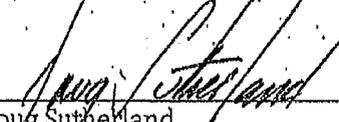

Richard Fryhling,
Department of Commerce


Hedia Adamsman,
Department of Ecology


Jeff Tayer,
Department of Fish and Wildlife


Andrew Hayes,
Department of Natural Resources


Dennis Moss,
Utilities and Transportation Commission


Doug Sutherland,
Skamania County

³⁹ Council Chair Luce also presents a concurring opinion, attached to this order and an integral part hereof.

NOTICE TO PARTIES: Administrative relief may be available through a petition for reconsideration, filed within 20 days of the service of the Orders within the Recommendation Package to the Governor. If any such petition for reconsideration is filed, the deadline for answers is 14 days after the date of service of each such petition. Since all Orders contained within the Recommendation Package to the Governor are integral components of the recommendation and served as a package to the parties, the Council requires any request(s) for reconsideration to be filed on the full Recommendation Package, and not on individual elements of the package. The formatting of the petitions shall be governed by WAC 463-30-120 and shall be limited to 50 pages.

CONCURRING OPINION OF CHAIRMAN JAMES LUCE

September 14, 2011

For reasons explained below, I concur with the Council's recommendation.

This case is a microcosm of how well-intentioned, incrementally developed, Federal and State law can have significant, unintended consequences for both our existing energy system and our environment.

Because these are important subjects with far reaching consequences beyond this case, I take judicial liberty to comment on actions that I believe could better serve to protect this system and the environment. My comments are drawn from a lifetime of public service in the energy area, first as senior counsel for the Bonneville Power Administration and for the past ten years as Council Chair. And they bear directly upon our Council's future, and the region's need to better plan for a renewable resource future.

What is needed is a new commitment; a commitment that will allow us to thoughtfully plan where renewable resources should be developed, and where they should not, and to provide expeditious siting with clear and uniform standards across all political subdivisions.

At the outset, all will agree that we seek low cost, abundant, and clean energy. It is good for our economy and for our environment. Our goal should be to protect what we have, and to get more of it.

Energy efficiency is low cost, abundant, and clean, and testimony confirms that eighty five percent of our needs can be met with energy efficiency.¹ Certainly that is consistent with our goal. And we are also in a "surplus" condition. Nothing could be lower cost than having "a surplus."² But energy efficiency is finite, and surplus does not last forever.

We are now in a time of transition; transitioning to a future of renewable resources, in this case wind power. And transition presents both opportunities and challenges.

Wind power has much to commend it. There are no fuel costs, and no air emissions. And it furthers our state's energy policy, with which the Council is committed to act consistently. Wind projects, nevertheless, present challenges. They can cause avian mortality, impact wildlife habitat, leave a long lasting footprint on the landscape, in this case the Columbia River Gorge,ⁱⁱⁱ and complicate the operation of our most valuable, and already existing renewable resource, the Federal Columbia River Hydro System.^{iv}

Turning to the instant case, the Council is challenged by the fact that it has no rules for siting renewable resources.^v This fact, coupled with our requirement to provide an adjudicatory hearing,^{vi} has, in my opinion, contributed to an unnecessarily lengthy and costly proceeding where a comprehensive Environmental Impact Statement might well have sufficed.^{vii}

For guidance, we look to our previous decisions, organic statutes and regulations developed primarily for thermal projects.^{viii} And we use our best judgment to "balance" competing considerations. Our laws and regulations presuppose a compelling need for energy resources, tempered by a requirement that the resource enhance the esthetic and recreational opportunities available to the public while providing abundant power at reasonable cost.^{ix} All of this is to be done "in the public interest."^x And yet what is "the public interest?" Absent rules, the Council proceeds on a case-by-case basis and our decisions inevitably leave room for questioning whether the correct result was reached.^{xi}

Whistling Ridge is just such a case. The Council recommends approval of 35 wind turbines just outside the boundaries of the Columbia Gorge National Scenic Act (NSA). The NSA is one of only two such "National Scenic Areas" authorized by Congress;^{xii} its relevance to this case speaking primarily to the fact that the Gorge is recognized as an environmental wonder.^{xiii} The applicant is a well-respected steward of the land, seeking to diversify its business and provide employment to

the community. Skamania County will benefit from increased tax revenues, as much as \$700,000 yearly.^{xiv} These are legitimate and reasonable aspirations.

On the other hand, tens of thousands visit the Gorge yearly to recreate and enjoy the beauty of a natural landscape, a landscape also treasured by many who live in the area and oppose this project. Wind turbines are not part of the natural landscape. That landscape will now be altered during the day by 430 foot towers,^{xv} and by night with warning lights required by the Federal Aviation Administration. How many visitors will be dissuaded from coming if this project is built, or how many may now be attracted by it, is unknown. Some local residents may choose to relocate, while others may welcome positive economic benefits. But there is no question that there will be a significant impact in this environmentally sensitive area, especially to its unparalleled views and possibly to its avian and other wildlife populations.

As concerns the Council's "balancing directive," I cannot say that this project "enhance [s] ... esthetic and recreational opportunities..." It is, as modified by the Council's Order, at best arguably neutral in this regard. And, as earlier noted, the Legislature's directive to the Council to assure "abundant power at reasonable cost" seems somewhat less forceful when the region has an existing surplus. However, the economics of a particular project are not an appropriate subject for Council inquiry and, for reasons explained below, the "esthetics" issue is not determinative.

Nor is it the Council's role to say to the developer "find a different site" or "start an energy efficiency business." We are a siting Council, charged by law with the responsibility to act on the application before us.

So considered, the Council's recommendation reduces or eliminates viewscape impact from the vast majority of important viewing areas within the NSA. It is consistent with and in some respects exceeds the Council for the Environment's recommendations. Moreover, there is no assurance that these protections would occur if the project were sited locally, and Skamania County has asked the

Governor, acting through the Council, to make the decision. Finally, the project furthers our state's strong policy and legal commitment to renewable resources, which in turn reduces our carbon footprint. These factors, for me, support a recommendation of approval.

As for the future, and as noted above, there are critical issues regarding the Council's role and the region's ability to effectively plan for continued renewable resource development.

First, as to the Council's role.

Reasonable questions can be asked regarding the Council's siting role, beginning with but not limited to renewable resources, and the requirement that the Council's public hearing be conducted as an adjudicative proceeding under the Administrative Procedure Act (APA).^{xvi}

As exemplified by this case, the Council is currently little more than a renewable resource forum of "last resort."

Jurisdiction is the major issue. It is important to understand that the law does not confer jurisdiction on the Council, but on the developer. The developer can "opt in" to the EFSEC process initially, or after local jurisdictions deny siting, or project opposition materializes. A developer can even "opt in" after a Court of competent jurisdiction upholds the denial of a project by a local governing body. See Desert Claim Wind Power LLC v. Kittitas County, No. 05-2-00243-6, slip. Op at 11 (Kittitas Cty Super Ct. November 4, 2005). This means that the Council reviews only a small fraction of the total number of wind projects licensed in our state.^{xvii}

In practice, initial "opt in's" don't happen.^{xviii} The Council is used only "if all else fails," and only then because a Council license preempts all other state and local law and provides expedited review by the Supreme Court.^{xix}

Stated bluntly, the resources that currently have the greatest impact on our state's energy future and environment are, for all practical purposes, not subject to state siting review.^{xx} The same is increasingly true of non-nuclear thermal resources.^{xxi}

Second, as to the region's role.

Continued development of renewable resources is likely.^{xxii} And as earlier noted, these projects will need to be carefully integrated into an existing resource base. So considered, a comprehensive plan would seem appropriate. Such a plan could take a programmatic approach considering reasonably foreseeable impacts associated with such development. The plan could assess renewable resource sites and prioritize their potential for development. Potential esthetic, wildlife, and cultural resource impacts, all of which may bear upon site selection, and related issues, such as the need for new transmission, could be examined.

Currently no such plan exists. Our Council lacks authority to either undertake or fund such a plan,^{xxiii} and our state's Growth Management Act has not been used for this purpose. In any case, because renewable resource development is regional in scope, it would seem that a regional plan would be appropriate.

The Bonneville Power Administration (BPA) and the Northwest Power and Conservation Council (NWPCC), working in partnership, are the logical entities to undertake this task. They have regional responsibility and, as described below, they have previously developed an effective plan in an analogous situation.

BPA has the financial means and the operational interests to do this job. The renewable resource industry's growth is a significant factor in driving Bonneville's multi-billion dollar transmission program, and in addressing issues related to integrating wind projects with the existing Federal Columbia River Hydro Power System. And the NWPCC is responsible for the regional Power Plan which guides Bonneville actions.

Such a plan would "bank" potential renewable resource sites and designate "protected areas" for environmentally sensitive locations. Absent such protection, such sites are likely to be developed if the economics warrant.

A "site banking" plan successfully protected anadromous fish in the mid-1980's.^{xxiv} Relying on the plan, the Council and BPA adopted "protected areas" to discourage small hydro development that threatened this resource. Developers who chose to build small hydro facilities in "protected area" streams were unable

to access BPA transmission.^{xxv} Denial of transmission access because of environmental impacts is within BPA's authority.

In summary, renewable resource development is likely to continue its robust growth. The Whistling Ridge project, as modified, should be approved. The Council's siting role and the need for the adjudication process deserves discussion. And to provide a regional structure which could assist Council's such as ours in future cases, I look to those with authority to consider a "site banking" plan to designate appropriate renewable resource sites, and adoption of "protected areas" to discourage development of those not so designated. Absent such a plan, admittedly not easy and not without controversy, economic considerations will be paramount and the broader public interest in protecting the environment could finish second. This is in no one's interest, least of all renewable resource developers.

ⁱ Testimony of Howard Schwartz, a senior Department of Commerce employee and energy policy analyst for the Northwest Power Planning Council, January 7, 2011, hearing transcript on pages 1025-1026 and 1044. Exhibit 35-02 from the Council's Sixth Power Plan also concludes that, "The plan finds enough conservation to be available and cost-effective to meet 85 percent of the region's load growth for the next 20 years. If developed aggressively, this conservation, combined with the regions past successful development of energy efficiency could constitute a resource comparable in size to the Northwest federal hydroelectric system..." Implicitly recognizing that it is state mandates that are the driving force behind wind projects, the Council's Program Summary continues, "Aggressive pursuit of this conservation is the primary focus of the power plan's actions for the next five years. Combined with investments in renewable generation as required by state renewable portfolio standards..."

ⁱⁱ Id.

ⁱⁱⁱ The project is located in the Columbia River Gorge. The Gorge is a natural wonder created through millennium by the repeated great Glacial Lake Missoula floods beginning 12,000 years ago. It has sheltered Native American peoples, and served as the gateway to the Pacific for Lewis and Clark and homesteading pioneers. Today it is the destination for tens of thousands of visitors who hike, ski, fish and recreate within its majestic boundaries. Recognized as an environmental treasure by Congress's passage of the National Scenic Act, 16 U.S.C. 544, the Gorge in 2009 was ranked 6th Internationally and 2nd in North America for sustainable destinations by the National Geographic Society's Center for Sustainable Destinations, which called it "the USA's Rhineland." <http://traveler.nationalgeographic.com/2009/11/destinations-rated/north-america-text/18>

^{iv} See Bonneville Power Administration's Interim Environmental and Negative Pricing Policy http://www.bpa.gov/corporate/pubs/RODS/2011/ERandNegativePricing_FinalROD_web.pdf. See also, Memorandum of April 28, 2011 prepared by Steve Kern of the Pacific Northwest Utilities Conference Committee

(PNUCC), "Capabilities of Electric Power Resources" The PNUCC was formed in 1946 as a voluntary, informal group of Northwest public and private utilities to assess power and power planning needs.

^v A Council notice of proposed rulemaking was issued in January 2009 but withdrawn in April 2009 because of limited stakeholder support and because under the existing "opt-in" jurisdiction EFSEC receives so few applications for siting wind projects <http://www.efsec.wa.gov/rulerev.shtml#Alt>.

^{vi} RCW 80.50.090(3).

^{vii} My experience as Council chair convinces me that the adjudicatory process is not always needed when an EIS is prepared.

The original language for a public hearing conducted as an adjudicatory hearing under the Administrative Procedure Act dates to 1970 and was intended to cover thermal power plants, especially nuclear plants that were being planned by Energy Northwest. The original language in RCW 80.50.090(3) stated, "(3) Prior to the issuance of a council recommendation to the governor under section 10 of this act a public hearing, conducted as a contested case under chapter 34.04 RCW, shall be held. At such public hearing any person shall be entitled to be heard in support of or in opposition to the application for certification." That section of RCW 80.50.090(3) was amended in 1989, chapter 175, to the language that presently exists.

The State Environmental Policy Act (SEPA) and its requirement for preparation of an Environmental Impact Statement (EIS) when a project may have "significant impact" came later. SEPA (Senate Bill 545, 1971, 1st Ex Sess. Chapter 109) was signed into law on May 19, 1971.

^{viii} See WAC Chapter 463-62

^{ix} See RCW 80.50.010 and WAC 463-14-020.

^x *Id.*

^{xi} This is particularly true with respect to viewscape. See prefiled testimony of Dean Apostol, Exh. 21.00. Applicant used the Federal Highway Administration model which was designed for visual assessments of "highway projects." Testimony highlighted three models for evaluating aesthetic impacts: The Federal Highway Administration, the Forest Service, and the Bureau of Land Management. All have merit.

^{xii} See 16 U.S.C. 544. The Columbia River Gorge National Scenic Act. See also Lake Tahoe Basin Act of 1980 (94 Stat. 3383). The NSA also recognizes that there are boundaries beyond which its restrictions are not relevant, as well as the fact that it is in many ways a developed landscape supporting industry and commerce for its residents.

^{xiii} See *lit*, *supra*.

^{xiv} Testimony of Eric Hovee, Exhibit 41.02.

^{xv} Measured ground to turbine blade tip. See section 1.4.1.1. Environmental Impact Statement for Whistling Ridge Energy Project.

^{xvi} See vii, supra.

^{xvii} The Council has approved three wind projects, totaling 563 MW. Of these only 373 MW are on line. By comparison, Washington wind projects online, under construction, or with transmission access rights total more than 7,000 MW, with 2,357 MW online. In other words, the Council's role is minimal. See American Wind Association "Energy Facts" for Washington State. Percentage <http://www.awea.org/learnabout/publications/upload/10-11-Washington.pdf>

Currently online: 2,357 Megawatts (MW)

Added in 2011: 151 MW

Added in 2010: 297 MW

Under construction: 343 MW

Wind projects in queue: 5,831 MW

Washington currently ranks fifth in total overall wind power installation.

^{xviii} The Council has considered four wind projects, three in Kittitas County and the current case in Skamania County. In the Kittitas County cases, preemption was sought because of County Commission opposition to the project or final decisions. In the current case, preemption is sought because the County is challenged by intervenors in its local land use planning and zoning.

^{xix} RCW 80.50.110 (1)(2) provides that EFSEC licenses govern and supersede all other State laws and regulations while RCW 80.50.140 allows for direct review by the Washington State Supreme Court.

^{xx} See footnote xv, supra.

^{xxi} The 350 MW threshold triggering Council jurisdiction frequently appears to form the basis for developers planning power plants that fall just below this threshold. Energy Northwest (ENW) is currently planning a combined cycle natural gas facility in Kalama, Washington. Council correspondence with ENW evinces its intent to size the plant as 346 MW. The Clark County's River Road plant, sized at approximately 248 MW when the Council's jurisdiction was 250, is another example.

^{xxii} See xvii, supra

^{xxiii} RCW 80.50.071.

^{xxiv} See section II, "Site Ranking and Protected Areas," PROPOSED WORK PLAN, PACIFIC NORTHWEST HYDRO ASSESSMENT STUDY, PREPARED BY THE NORTHWEST POWER PLANNING COUNCIL, 700 S. W. Taylor, Portland, Oregon 97205, August 1984. The plan affirmed the fact that site banking and protected areas designations were important to allow hydro development while protecting important fisheries. The analogy is clear: wind and renewable resources are important but should be prioritized and protect important environmentally sensitive areas, whether for views, wildlife, or otherwise. See <ftp://ftp.streamnet.org/pub/streamnet/ProtectedAreas/Documents-Other/Background/ProposedWorkPlanPNWHydroAssessment.pdf>

^{xxv} Id.

DATED and effective at Stevenson, Washington, this sixth day of October, 2011



James O. Luce, Chair

Appendix F

ORIGINAL

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of:

APPLICATION NO. 2009-01
of
Whistling Ridge Energy Project, LLC
for
WHISTLING RIDGE ENERGY PROJECT

COUNCIL ORDER No. 869

Whistling Ridge Order No. 24

Order and Report to the Governor
Recommending Approval of Site
Certification in Part, on Condition

Application: Whistling Ridge Energy, LLC, ("Applicant") filed with the Washington Energy Facility Site Evaluation Council (EFSEC or Council) on March 10, 2009 (revised October 12, 2009), Application No. 2009-01 for a Site Certification Agreement (SCA) to construct and operate up to 50 wind turbines, to generate up to 75 megawatts (MW) of energy. It proposes a site of about 115 acres near the community of Underwood, Washington, to build and operate the Whistling Ridge Energy Project ("Project"), consisting of a series of "strings" or lines of turbines, with associated infrastructure.

Recommendation: The Council hereby recommends approval, in part, and denial, in part, of the Whistling Ridge Energy Project in Skamania County. The Council also recommends that certain conditions be imposed insofar as the application is approved, as discussed below.

Parties: Parties to the review of the application appeared and were represented as follows:

Applicant, Whistling Ridge Power Project LLC: Timothy McMahan, attorney, Stoel Rives, Vancouver, Washington and Erin Anderson, attorney, Stoel Rives, Seattle, Washington and Darrell Peeples, attorney, Olympia, Washington.

Counsel for the Environment: Bruce Marvin, Assistant Attorney General, Olympia, Washington.

Department of Commerce: Dorothy H. Jaffe, Assistant Attorney General, Olympia, Washington.

Friends of the Columbia Gorge: Gary K. Kahn, attorney, Reeves, Kahn & Hennessy, Portland, Oregon, and Nathan Baker, attorney, Portland, Oregon.

Save Our Scenic Area: J. Richard Aramburu, attorney, Aramburu & Eustis, LLP, Seattle, Washington.

Skamania County: Susan Drummond, attorney, Seattle, Washington.

Seattle Audubon Society: Shawn Cantrell, Executive Director, Seattle, Washington.

Economic Development Group of Skamania County: Ron Criddlebaugh, Executive

Director, Skamania, Washington.

Skamania County Public Utility District No. 1: Kenneth B Woodrich, attorney, Stevenson, Washington.

Skamania County Economic Development Council: Peggy Bryan-Miller, Stevenson, Washington.

Skamania County Agri-Tourism Association: John Crumpacker, Underwood, Washington.

Association of Washington Business: Chris McCabe, Olympia, Washington.

City of White Salmon: David Poucher, Mayor, White Salmon, Washington.

Klickitat County Public Economic Development Authority: Michael Canon, Executive Director, Goldendale, Washington.

Klickitat and Cascades Tribes of the Yakama Nation: Wilbur Slockish, Jr., Bingen, Washington.

Port of Skamania County: Bradley W. Andersen, attorney, Schwabe, Williamson & Wyatt PC, Vancouver, Washington.

Confederated Tribes and Bands of the Yakama Nation: George Colby, attorney, Toppenish, Washington.

Executive Summary: The Council carefully considered: 1) the statutory policies on need for energy at a reasonable cost and need to minimize environmental impacts; 2) the record, findings and conclusions of the Adjudicative Order; 3) the Final Environmental Impact Statement; 4) commitments of the Applicant made in the Application, at hearings, and in relevant documents; and 5) the draft Site Certification Agreement accompanying this order with proposed restrictions, conditions and requirements relating to construction, operation and mitigation of the proposed Project.

We conclude that the Whistling Ridge Energy Project, with modifications we recommend, will provide the region with energy benefits and will not result in significant, unmitigated adverse environmental impacts. Most significantly, the Council proposes in mitigation a reduced Project footprint to reduce its visibility from and visual intrusion into points within and outside the Columbia Gorge. The result is a Project that is significantly reduced in presence and much less prominently visible. With the recommended mitigation measures, the proposed Project meets the requirements of applicable law and comports with the policy and intent of Chapter 80.50 RCW.

INTRODUCTION

The Applicant and the Project

The Applicant is Whistling Ridge Energy, LLC, wholly owned by S.D.S. Co., LLC. Applicant proposes a renewable energy generation facility with a maximum of 50 wind turbines and a maximum installed nameplate capacity of 75 megawatts (MW). The Project would be constructed in designated corridors on or near ridge tops on the northern rim of the Columbia River Gorge, near the border between Washington and Oregon. The Project would interconnect with Bonneville Power Administration (BPA) transmission lines (which transect the site) through a substation to be constructed.

The proposed Project covers approximately 1,000 acres. About 50 acres are needed for the permanent footprint of the proposed turbines and support facilities, with about 50 additional acres temporarily affected. The Council's Adjudication Order determines that the Project is consistent and in compliance with local land use plans and zoning regulations.¹

The Project would utilize a series of 3-bladed wind turbines on tubular steel towers to generate electricity. Turbines would range from 2.0 MW to 2.5 MW (generator nameplate capacity),² placed on towers up to 425 feet high, including the blade height. The Applicant will select the turbine capacity and manufacturer prior to beginning Project construction. Regardless of which capacity turbine is finally selected for the Project, all construction activities would occur within corridors found acceptable in the Adjudicative Order. Final determination of specific turbine locations ("micrositing") must be conducted within parameters identified in the adjudication order and SCA.

The Council and the EFSEC Review Process

EFSEC was created to advise the Governor in deciding which proposed locations are appropriate for the siting of new large energy facilities. RCW 80.50. The Council's mandate is to balance need for abundant energy at a reasonable cost with the broad interests of the public. RCW 80.50.010; *see also* WAC 463-47-110.

Council representatives participating in this proceeding are James O. Luce, Council Chair; Richard Fryhling, Department of Commerce; Hedi Adelsman, Department of Ecology; Jeff Tayer, Department of Fish and Wildlife; Andrew Hayes, Department of Natural Resources; Dennis J. Moss, Washington Utilities and Transportation Commission; and Doug Sutherland, Skamania County.³ C. Robert Wallis, Administrative Law Judge, was retained by the Council to facilitate the adjudicative process.

The Council conducted public and adjudicative hearings pursuant to Chapter 34.05 RCW, as required by RCW 80.50.090(3) and Chapter 463-30 WAC. The Council completed a separate review of environmental factors as set out in the Final Environmental Impact Statement (FEIS) as required by Chapter 43.21C RCW. This Order, considering both Order No. 868 resolving adjudicative issues and the FEIS, recommends that the Governor of the Washington State approve the Application, in part, and deny it, in part, and enter into a SCA with the Applicant authorizing the same production capacity through a smaller number of turbines by excluding towers from the site that are prominently visible from points within the Columbia Gorge.

1 Adjudicative Order, Conclusion No. 17.

2 The Applicant committed in Mr. Spadaro's testimony at hearing (TR I:73) that the minimum turbine size in the project would increase from 1.5 to 2.0 MW, which mitigates the effect of the project by reducing the maximum necessary number of towers from 50 to 38.

3 Mr. Moss, Mr. Hayes and Mr. Sutherland replaced former Council members after this Application was filed, during its review. They have reviewed the portions of the record that occurred before they joined the Council.

Compliance with the State Environmental Policy Act

The State Environmental Policy Act (SEPA), Chapter 43.21C RCW, requires consideration of probable adverse environmental impacts of governmental action and possible mitigation. EFSEC SEPA rules are set out in Chapter 463-47 WAC. The Council complied with SEPA requirements by issuing a Determination of Significance and Scoping Notice on April 21, 2009; conducting scoping hearings on May 6, 2009, in Stevenson and Underwood, Washington; issuing a Draft Environmental Impact Statement (DEIS) for public comment on May 24, 2010; conducting public hearings on the draft on June 16 and 17, 2010 in Underwood and Stevenson, and accepting written comments on the Draft EIS until August 27, 2010 (extended from July 19). The Council's SEPA responsible official, the Council Manager, issued a Final EIS (FEIS) containing responses to comments, on August 12, 2011.

The Adjudicative Order, pursuant to RCW 34.05.461(4), confined its scope to the matters of record and did not consider the SEPA process. Council members were familiar with the SEPA process from its beginning, however, attending scoping and comment meetings for the DEIS, and have received and reviewed the DEIS and the FEIS.

The adjudicative and SEPA records are now both before the Council. There is a considerable overlap in topics, issues and substance between the FEIS and the adjudicative record. The specific content differs between the records and the details are sometimes different, allowing the FEIS to populate or confirm specific conditions in the SCA. Our evaluation differs from the FEIS conclusion relating to aesthetics and heritage, for reasons we specified in the Adjudication Order and identify below. On balance, however, we accept the FEIS as complete, generally consistent with the adjudicative record, and a proper basis for our Recommendation.

Land Use Consistency

The Council held a public hearing on May 7, 2009 to determine whether the Project's use of the proposed site is consistent with local or regional land use plans and zoning ordinances in effect at the time the Application was submitted⁴. RCW 80.50.090, WAC 463-14-030. Additional material was received without objection in the adjudication. The Council determined the Project to be consistent with Skamania County land use plans and zoning ordinances.⁵

Adjudicative Proceeding

The Council's adjudicative process, its participants and its result are set out in detail in the Adjudication Order, Order No. 868, Attachment I to this Recommendation. That Order, based only on the adjudicative record, concludes that the Council should recommend approval in part and denial in part, subject to review of the FEIS, completion of this Recommendation Order and preparation of a Site Certification Agreement containing mitigation requirements identified in both Orders. This Recommendation Order will generally cite, rather than restate, Adjudicative

⁴ The Applicant presented a revised application after the hearing, containing minor changes to its support for the land use decision. The May, 2009 record was supplemented, inquiries permitted of witnesses and the parties subsequently briefed land use issues on the complete, corrected record.

⁵ Council Order No. 868, Section III.

Order content, describing the content briefly as needed for understanding and context. The condensed description here does not change the language or substance in the Adjudicative Order.

Public Notice and Comment

EFSEC provided public notices, pursuant to statute or rule, of numerous events: receipt of the Application; public comment meetings; land use hearing; initiation of adjudicative proceedings; notice of opportunity and deadline for filing of petitions for intervention; notice of adjudicative hearing sessions; Determination of Significance and request for comments on scope of the Environmental Impact Statement (EIS); DEIS comment period and public comment hearing. In addition, notice was given of Special EFSEC Meetings regarding the Recommendation to the Governor. The Council provided notices by publication when legally required.

The Council held adjudicative hearing sessions in Underwood and Skamania during the adjudication at which any person could be heard in support of, or in opposition to, the Application. RCW 80.50.090. The Council also provided opportunities for public witnesses to present oral and written comments in those two communities on environmental considerations during the SEPA process and in Underwood on land use consistency.

This proceeding engendered extensive public participation. The Council received more than 1000 written or oral comments from members of the public during the initial, scoping, environmental and adjudicative aspects of this application review. The Council considers the written submissions and oral comments of the witnesses and the topics they addressed as indications of matters significant to the public. The Council expresses its appreciation for these witnesses' testimony and all written comments. The commenters engaged in thoughtful and often extensive preparation.

Council Recommendation to Governor

In accordance with the requirements of 80.50 RCW, the Council on October 6, 2011, at a special meeting in Stevenson, Washington, voted unanimously to recommend to the Governor the approval of the Project in part and denial in part. The Council describes its recommendation in this Order, which is accompanied by Attachments (I) the Council's Adjudicative Order No. 868, Order Resolving Contested Issues in the adjudicative proceeding; (II) the proposed Site Certification Agreement, with its own Attachments; and (III) the FEIS.⁶

Interests of the State as Expressed in RCW 80.50.010

This statute sets out four principal premises for the site selection process, including sufficient operational safeguards, environmental mitigation, provision of abundant energy at reasonable cost, and avoiding duplication in process.

⁶ Because of the volume of the FEIS and its digital availability, that document is not included in the print version of this Order. Persons desiring a copy may view it and download it from the Council website or request a copy on disc.

Sufficient Operational Safeguards: The Council finds that the mitigation measures contained herein, in the Adjudicative Order and in the SCA are adequate to ensure that the Project will operate under stringent criteria designed to protect the public welfare.

Environmental Mitigation: The Final EIS and the Adjudicative Order identify numerous mitigation measures. They are described briefly in this Recommendation Order and specified in the accompanying SCA to ensure that the WR Project is built and operated in a way that preserves and protects the quality of the environment. The Project's environmental studies are in compliance with the Council's requirements and (as pertinent) the standards of the 2009 WDFW Wind Power Guidelines.

The Applicant suggests the dedication of a mitigation parcel chosen to offset impacts to habitat, which has been favorably viewed by WDFW. As noted in the Adjudicative Order, the parcel must be submitted as part of a mitigation plan as the SCA requires. It may be formally proposed in the required Plan if the Applicant desires. The generation of wind power to meet current and future energy demands promotes air cleanliness and helps to meet increasing demand from utility customers and state law⁷ for renewable energy.

Provision of Abundant Energy at Reasonable Cost. The Whistling Ridge Adjudicative Order acknowledges the statutory statement of need for power, RCW 80.50.010. Renewable sources of electrical generation are identified by statute as required to meet future consumption goals to supplant or supplement non-renewable energy.⁸ Power generated by the Whistling Ridge project will be offered to buyers at rates determined by market forces. After reviewing all available information in the record of this decision, the Council finds that the Project will contribute to the availability of abundant energy at reasonable cost.

Avoiding Duplication of the Siting Process. This Application was brought to the Council, with the support of the local jurisdiction, to enable site review when local processes encountered procedural challenges. The Application allowed simultaneous consideration of topics otherwise under different state and local jurisdictions and thereby avoided duplication of the process.

Blending Adjudicative and SEPA Findings and Requirements

This Recommendation draws from both the adjudicative proceeding and the SEPA process. The Council identifies on the following pages, the aspects of each that bear upon its decisions, and points to these resources and to their contribution to the proposed Site Certification Agreement. The Council carefully weighs the results of each process in small as well as large aspects of its decisions. There is a high degree of consistency between the results of the processes – which is to be expected in parallel reviews of the same elements with objective data and standards. And, on matters with widely divergent subjective views, the Council makes necessary recommendations within a record that enables thoughtful decisions by the Governor.

⁷ Initiative I-937, RCW 19.285

⁸ Ibid.

ISSUES

Visual Resources – Aesthetics and Views

The FEIS finds that towers and scenic heritage would coexist with only moderate impact.⁹ The Council, however, considered visual resources extensively in the Adjudicative Order, finding that towers placed on portions of the proposed site would intrude impermissibly into the cultural and scenic heritage of the state and the region. The Council recommends denial of approval for tower construction on those portions.¹⁰

The ability of the Project to enhance “the public’s opportunity to enjoy the esthetic and recreational benefits of the air, water and land resources”¹¹ is inevitably subject to differing views and debate. Construction of fifty wind turbines where none have previously existed, some of them prominently visible, would alter the local visual environment for residents and travelers. There is a plethora of evidence on this topic, including expert testimony, exhibits and extensive public comment.

Using maps and simulations from the adjudicative record, given context by the Council’s two-day’s viewing of the site from many perspectives, the Council finds that turbine placement on certain portions of the proposed site would impermissibly intrude into the heritage view of the Columbia Gorge.¹² These portions should not be approved for development. The Council recommends approval for the remaining portions, which present less intrusive visibility from a majority of studied points inside and outside the National Scenic Area.

The FEIS states that neutral paint and muted lighting (the minimum needed to comply with Federal Aviation Administration rules) would mitigate adequately the visual effects of the Project. FEIS, Sec. 3.9.4. The Council disagrees. Nothing in the FEIS persuades the Council to alter the adjudicative decision on this issue.

Project opponents urge protections similar to NSA standards. It would be improper to apply NSA standards to territory outside the NSA. The unique attributes of the Columbia Gorge, however, are clearly within the meaning of RCW 80.50.010(2) regarding aesthetics and the mandates in RCW 80.50.040(8) to provide site-specific protections. Considering both the adjudicative record and the FEIS, we remain persuaded that the C and southern A corridors intrude impermissibly into the aesthetic, cultural and natural heritage of the state, the region, Native Peoples and the United States, thus requiring denial of use of those portions for tower construction or generation. The remainder of the Project, which is visible much less or not at all from most viewing areas, does not pose a threat to the integrity of the Columbia Gorge aesthetic or heritage values and may be permitted.

⁹ FEIS, Sec. 3.9.

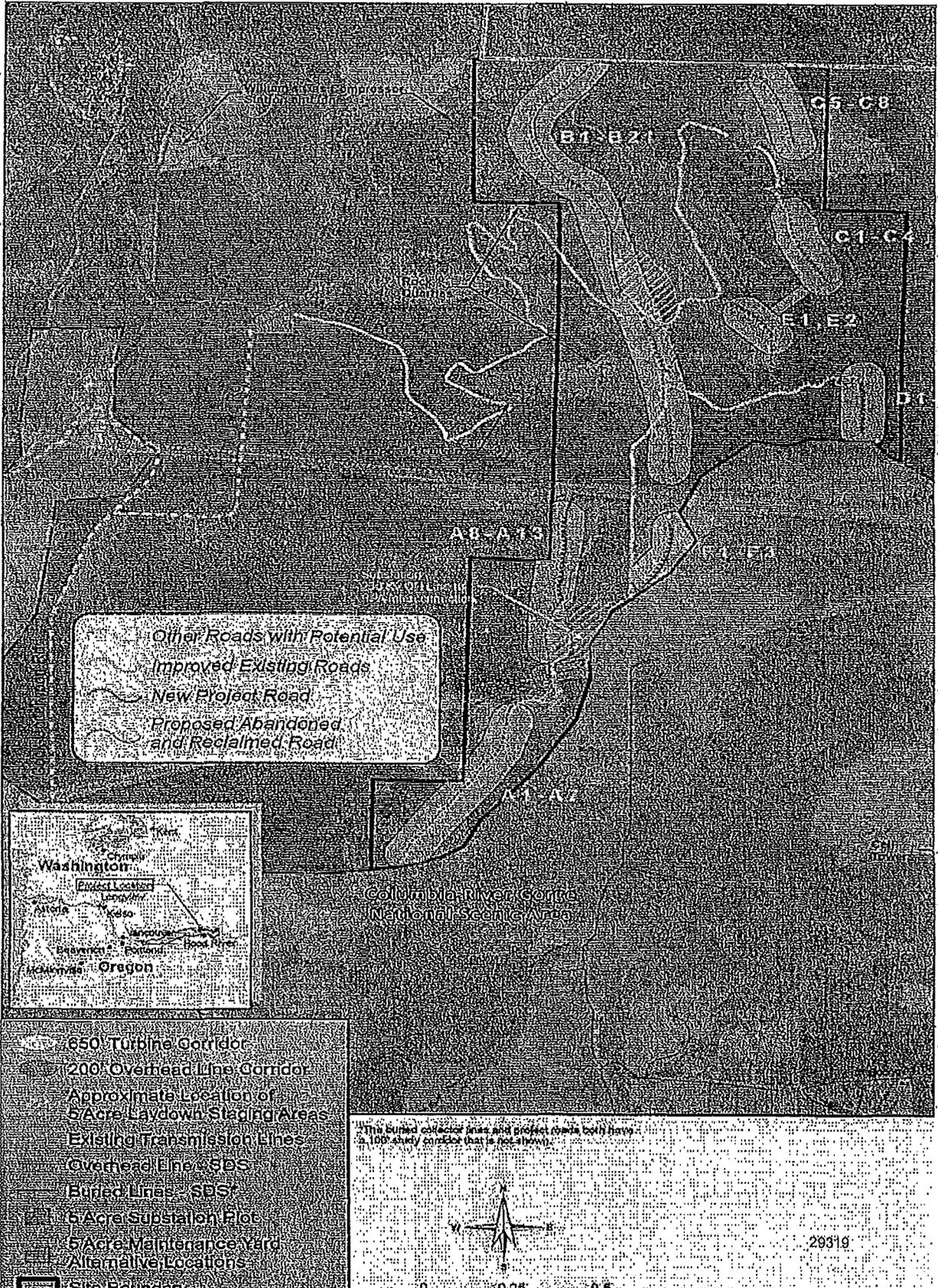
¹⁰ Order 868. A diagram of the proposed site, with corridors labeled, is presented below.

¹¹ RCW 80.50.010(2)

¹² The Council would exclude the C corridor and the southerly (A-1 through A-7) portion of the A corridor from the site. Our rationale and its basis are set out in detail in the adjudication order, Sec. IV.D.1.

The FEIS identifies Chemewa Hill (the site of the lower "A" corridor)¹³ as being of sensitive Native American cultural and heritage concern. FEIS, Sec. 3.10.2.3, p. 3-216. The Council recognizes those concerns, and Applicant has pledged to work with the Yakama Nation with regard to them. We note that with the elimination of the southern A corridor, there will be no towers or other structures located on Chemewa Hill.

¹³ The Council in this Order recommends against approval of tower placement in that portion of the Application.



Wildlife

Avian and bat mortality. The Adjudicative Order finds that project operation may affect wildlife through collisions with towers or rotor blades or flights through the vortex of turning blades.¹⁴ The FEIS acknowledges that mortality will occur but finds no evidence that it is likely to pose a threat to populations.¹⁵ The FEIS also finds no evidence that mortality to threatened or endangered species is expected. The order requires mitigation measures including compliance with WDFW guidelines and creation of a Technical Advisory Committee ("TAC") to consider ongoing operating experience.¹⁶ In addition, avian flight paths, habitat and locations of food must be considered during micro-siting to minimize risk of injury and death.¹⁷

Habitat. The Applicant is responsible for providing mitigation for habitat disturbance.¹⁸ The majority of the site will remain largely undisturbed by Project operations, with less than 60 acres permanently altered to accommodate the turbine foundations, the substation, roads and the O&M facility. About 100 acres would be affected in all, with about half of that affected only temporarily. The SCA requires Applicant to present a specific habitat mitigation plan.¹⁹

REMAINING SUBSTANTIVE MATTERS

The Council finds substantial consistency between the adjudicative record and the FEIS on the remaining substantive matters. The proposed SCA, taking both the adjudicative record and the FEIS into account, contains numerous provisions that bear on Project safety and environmental impact. We itemize these matters in the findings of fact and conclusions of law below in accordance with RCW 80.50.100 and WAC 463-30-320, with citations to the Adjudicative Order, the FEIS and the Site Certification Agreement ("SCA") to identify and support the recommendation.

CONFORMITY WITH LAW

The Council finds that operational safeguards in the SCA will be at least as stringent as the criteria established by the federal government and will be technically sufficient for welfare and protection of the public.²⁰

The Applicant must agree to construct and operate the Project in accordance with commitments in the Application, commitments by authorized witnesses on the record and commitments made in legal briefing. Applicant's authorized signature on the SCA is an

¹⁴ Adjudicative Order, Finding 28

¹⁵ FEIS, Sec. 3.4.2.1

¹⁶ Adjudicative Order, Conclusion 31.

¹⁷ Adjudication Order, Finding 29; FEIS.citation

¹⁸ 2009 WDFW Guidelines

¹⁹ SCA Art. IV.E.1

²⁰ RCW 80.50.010 (1)

agreement to comply with the SCA that is a condition of State authorization to complete and operate the Project.

Taken together, the required mitigations preserve and protect the quality of the environment. It is the policy of the state of Washington to support the development of wind energy facilities.²¹ This Project will produce electrical energy without generating greenhouse gas emissions.²²

As a renewable energy source wind power generation facility, the Project will contribute to the diversification and reliability of the state's electrical generation capacity.

CONCLUSION

The Council has considered its statutory duties, applicable administrative rules, all of the evidence of record and the contents of the Final Environmental Impact Statement in exercising its duty to balance the state's need for abundant energy at a reasonable cost with the need to protect the environment and the health and safety of the residents of the local area.

One of the Council's principal duties is to ensure that the location of energy facilities will produce minimal adverse effects on the environment. We have considered the adjudicative record, the testimony of expert witnesses and members of the public, and the Draft and Final EIS in determining whether this Project, with its proposed mitigation measures, is appropriate for this location. As limited in geographic scope pursuant to the determination in the Adjudicative Order, and with the proposed mitigation requirements, the Project would have a minimal impact on the environment.

One of the Council's additional duties is to ensure that the supply of energy, at a reasonable cost, is sufficient. The record shows that this Project would contribute to that goal.

The Council considered whether the total package of mitigation measures offset the environmental impacts of the Project. Viewed on balance, with respect to this Project, and in the context of mitigation proposed, the package recommended to the Governor in this Order comports with the legislative policy of Chapter 80.50 RCW.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having discussed in detail above the facts relating to material matters, and the conclusions flowing from those facts, the Council now makes the following summary Findings of Fact and Conclusions of Law and states its Recommendation. Any Finding of Fact that is found to be a Conclusion of Law, and vice-versa, should be treated as appropriate to the context, considering that many Council determinations involve mixed findings and conclusions.

21 RCW 19.285, I-937.

22 RCW 80.50.010 (2).

Nature of the Proceeding

1. This matter involves Application No. 2009-01 to the Washington State Energy Facility Site Evaluation Council (EFSEC or Council) for certification to construct and operate the Whistling Ridge Energy Project (Project), a wind powered energy generation facility with a proposed maximum of 50 wind turbines and a maximum installed nameplate capacity of 75 megawatts (MW). The Project is to be located near the community of Underwood, Washington.

The Applicant and the Application

2. The Applicant, Whistling Ridge Energy LLC, is a Washington Limited Liability Company (LLC) formed to develop, permit, finance, construct, own and operate the Project. Whistling Ridge Energy, LLC is owned by S.D.C. Co., LLC, which is also considered to be a Site Certificate Holder as defined in the Site Certification Agreement, SCA, Sec. III.A.1.

3. Applicant submitted its initial Application for Site Certification on March 10, 2009, and its revised Application on October 12, 2009, seeking certification pursuant to RCW 80.50.060 to construct and operate the Whistling Ridge Energy Project in Skamania County, Washington.

Compliance with the State Environmental Policy Act (SEPA)

4. EFSEC is the lead agency for environmental review of jurisdictional siting projects under the State Environmental Policy Act (SEPA), RCW 43.21C. The Council Manager is the SEPA responsible official. WAC 463-47-051. A necessary element of this Project is a substation to be built by the Bonneville Power Administration (BPA), to transfer Project power to transmission lines for delivery to loads. BPA is the lead agency for compliance with the National Environmental Policy Act (NEPA). EFSEC and BPA conducted a joint review to satisfy both laws, allowed in RCW 80.50.040(10) and encouraged in WAC 463-47-150.

5. The SEPA review was completed on the schedule set out in the body of this order and at length in FEIS, Sec. I.5. On August 12, 2011, the responsible official issued the FEIS.

The Adjudicative Proceeding

6. The Council conducted an adjudicative proceeding and determined by a vote of 7-0 that the adjudicative record supported a grant of the Application, in part, and denial, in part, as set forth in Council Order No. 868. The Adjudicative Order also resolved the issue of Land Use Consistency, ruling that the project is consistent and in compliance with the land use plan and zoning ordinances applicable to the portion of the Project recommended for approval.

7. The Council considered the Final Environmental Impact Statement and the Adjudicative Order, along with a Draft Site Certification Agreement implementing required mitigations and the Applicant's commitments, in this Order of Recommendation to the Governor.

8: On October 6, 2011, the Council voted 7-0 in separate votes, to enter and serve the Adjudicative Order and to issue this Recommendation Order, recommending that the Governor the Washington State approve the Application in part and deny it in part.

Site Characteristics

9. The Project will be constructed across a land area of approximately 1000 acres in Skamania County. About 100 acres will be impacted by temporary construction activities; the permanent facility footprint will be about 50 acres. The Project site and the proposed electric transmission interconnect points lie on privately owned lands.

10. The proposed site is located within Unmapped and FOR/AG-20 land use zoning classifications in Skamania County. The site has been used for commercial forestry for more than a century. Wind turbine towers would be distributed among five turbine corridors, identified as Corridors A through E on Application Revised Fig. 2.3-1.

Visual Resources-Aesthetics

11. The Project is located on the northern rim of the Columbia Gorge. It is outside, but adjacent to, the Columbia Gorge National Scenic Area (NSA). The NSA has strict requirements for construction within its borders, implemented through local regulation such as Skamania County's NSA ordinances. The NSA regulations are effective only within the boundaries of the NSA and have no application to construction outside those boundaries. Adjudicative Order p. 13; Conclusion 25.

12. Apart from the existence of the National Scenic Area, the Columbia Gorge in the region of the proposed Project has a unique spot in the history, heritage, and culture of indigenous inhabitants, American national exploration and development, and current citizens of Washington, Oregon and the entire United States.

13. The Adjudicative Order determined that construction of towers on portions of the Project identified as the lower segment of the A corridor and the C corridor²³ would intrude impermissibly into the aesthetic view, the cultural heritage and the historical significance of the State and the region. Adj. order, Conclusion 25. The Order therefore determined that the lower-A and C corridors should be denied, and should be eliminated from the Project. Adj. Order, Ibid. The FEIS, however, found that the visual effects of the Project were moderate and could be mitigated through the use of flat, neutral gray or light-color paint and the minimum night lighting acceptable to the Federal Aviation Administration. FEIS Sec. 3.9.4.

23 The corridor designations are taken from the map reprinted herein, Rev. Fig. 2.3-1 in the Application, Ex. 20. The Council treats the designations in this illustration as finite descriptions of territory as though they were specifically set out as a legal description for purposes of a land deed. Applicant shall no later than the time for filing petitions for reconsideration file legal descriptions of the affected land for inclusion in the Site Certification Agreement as territory prohibited from use for turbine towers or other Project structures.

14. Considering the adjudicative record and order and the FEIS together, the Council finds that the Adjudicative Order's analysis accurately reflects the Project impacts and appropriately assesses the required mitigation for those impacts.

15. The portion of the Project containing the lower A corridor with suggested turbine sites A-1 through A-7 and the C corridor would, if constructed, be of high impact, appearing starkly and in great contrast with the natural ridge lines of the rim of the Columbia Gorge, attracting attention, disrupting the aesthetics of the Gorge and interfering with the natural, cultural, historical heritage of the scenic vistas. The visual impact of partial tower views as specified in this Order, will be low. Adj Order, Sec. IV.D.1.d.

16. The Project as recommended herein, including those turbines required by the FAA to display aviation warning lights, will not add significant light or glare to the immediate surroundings or unduly detract from scenic values. FEIS, Sec. 3.9.5; SCA Art. IV.J.

Wildlife and Habitat

17. Bird mortality will result from operation of the Project. Adj. Order, finding 28; FEIS Sec. 3.4.4. It is not, however, expected to impact populations. Nor is any mortality to threatened or endangered species expected. *Ibid.*

18. Mitigation measures, including avoidance of placement in flight paths and travel patterns between nesting and feeding areas, will be implemented during micro-siting. Adj Order, findings 30 and 33, Order. The Applicant must develop post-construction wildlife and habitat mitigation plans in consultation with WDFW and Washington Dept. of Natural Resources (DNR). SCA Article IV.E.

19. A Technical Advisory Committee (TAC) will be established to review pertinent monitoring and scientific data and to develop appropriate recommendations for responses to impacts that exceed avian mortality projections made in the Application and FEIS, SCA, Sec. IV.E.7. The TAC will monitor all mitigation measures and recommend whether further mitigation measures would be appropriate. The Council will retain the authority to require additional mitigation measures, including any recommended by the TAC.

20. A habitat mitigation plan (SCA Art. IV.E.1) and a habitat restoration plan, SCA Art. IV.E.6, must be presented for Council approval.

21. The Council finds that the studies and mitigation measures required in the SCA are consistent with WDFW Wind Power Guidelines. The measures in the adjudication order, in this order and in the SCA will mitigate adequately the effects of the Project. The Council further finds that the Project will result in no significant unavoidable adverse impacts to wildlife.

Socioeconomics

22. The Adjudicative Order finds that Project construction and operation would have an economic benefit through employment and tax revenues. Order No. 868, Sec. IV.D.9. Construction and operation would have a limited adverse burden on local resources and would increase the total valuation of real property for tax purposes in Skamania County. The additional revenues would benefit local and state schools, county government, roads and local services. FEIS, Sec. 3-13.

Noise

23. The Project will be designed, constructed and operated in compliance with applicable Washington State Environmental Noise Levels, WAC 463-62-030, WAC 173-60. Order No. 868, Sec. IV.D.3; The Council finds no significant adverse noise impacts from construction or operation of the Project. *Id.*, Sec. IV.D.3.

Air Quality

24. During construction, primary sources of air pollution will be vehicle and equipment exhaust emissions and fugitive dust particles from construction activity. The SCA (Article V.H.) requires preventive measures to minimize dust. Operation of the Project will not result in any direct air emissions. Exhaust emissions and fugitive air emissions from construction and travel on Project roads during operation of the Project sites are exempt from air emission permitting requirements. FEIS, Sec. 3.2.3.

Water Resources

25. Water for construction will be purchased off-site and delivered by truck. During operation, water use will be less than 1,000 gallons per day. This water will be obtained from an exempt well to be installed by a licensed installer consistent with applicable regulation. FEIS, Sec. 3.3.2.1. During construction, sanitary wastewater will be collected in portable tanks, and disposed of off-site at locations permitted to accept such waste. A septic system will be installed for use during operation at the O&M facility, in compliance with local requirements. There will be no significant adverse impacts to water resources or water quality from the Project. FEIS, Sec. 3.3.4.

Geological Resources and Hazards

26. There are no significant impacts on soil, topography, or geology resulting from construction of the Project if risks are mitigated by steps to prevent erosion. Volcanic ash fall could affect the Project, but would be mitigated by turbine design. The Project is located within a relatively active seismic territory and could be affected by earth movement in an earthquake, although there are no known faults within the site. Project buildings, structures, and associated systems shall be designed and constructed consistent with requirements, including seismic standards, of the Uniform Building Code (UBC) or the International Building Code (IBC). FEIS Section 3.1 generally; Sec. 3.1.2.1.

Traffic and Transportation

27. Worker commuting and deliveries of equipment and materials during Project construction will result in a short-term increase of local traffic. Local roads will be blocked for short periods during transportation of long or wide loads. Applicant must coordinate such movements with local officials to avoid impeding school or other peak traffic. Adj Order, Sec. IV.D.5.a. Project operation will increase peak one-hour local traffic by an estimated 275 vehicles, but is expected to have no major unavoidable adverse impacts. FEIS Sec. 3.11.5.

28. Traffic impacts and mitigations are identified in the FEIS, Sec. 3-11. Applicant will comply with construction traffic issues as directed in the SCA, Art. V.F, including presentation of a Construction Traffic Management Plan (SCA, Art. V.F.4) before beginning construction. The Plan must include documentation of pavement conditions before construction begins, allowing Skamania County to monitor any road deterioration associated with the Project. The Applicant will be responsible for correction of any such road damage within a reasonable time after construction. Ex. 20, p. 4.3-24. The Council finds that the required measures will appropriately mitigate construction traffic impacts.

Cultural and Archeological Resources

29. The Adjudicative Order finds that the likelihood of Project impacts to known archaeological sites, or discovery of unidentified sites, is low but that Native American artifacts or indication of habitation may be discovered during site preparation or construction. FEIS Sec. 3.10.3.1. The FEIS (Sec 3.10.2) indicates Yakama Nation interest in Chemewa Hill (the lower A corridor) and acknowledges Applicant's intention to work with the Nation. The Council requires Applicant to work with the Nation regarding those concerns. The Council's decision in the Adjudicative Order, Sec. IV.D.1.d and Conclusion No. 25 to recommend rejection of that portion of the site appears to reduce the concerns. The Site Certification Agreement (Art. IV.H.) requires monitoring and reporting of discoveries and cessation of construction at the site of discovery. Such measures will satisfy the requirements of the National Historic Preservation Act, 16 USC 470. One historical period site is subject to possible effects, according to the FEIS - the Haran homesite - although it appears to be ineligible for the National Register of Historic Places. FEIS, Sec. 3.10.3.1.

30. The Applicant, in consultation with the State Department of Archeology and Historic Preservation (DAHP) and the Yakama Nation, will develop a cultural resources monitoring plan for monitoring construction activities and responding to the discovery of archeological artifacts or buried human remains. SCA, Art. IV.H.

31. With implementation of these mitigation measures and required consultations, construction will have minimum impacts on identified archaeological or historical sites or culturally sensitive areas. Operation of the Project will not impact any of the identified archaeological or historical sites.

Forest Practices Act Compliance

32. The Applicant must prepare a Forest Practices Application Notification coordinated with the Department of Natural Resources (DNR) sixty days prior to construction.

Health and Safety

33. The Applicant must prepare a fire control plan and an emergency plan, coordinated with the Department of Natural Resources (DNR) and other affected state and local agencies, to ensure efficient response to emergency situations. Project site roads will allow access for fire trucks and personnel. The Applicant must enter into a fire protection contract with DNR and other pertinent provider(s) of the service. SCA, Sec. IV.I.3 and Sec. VI.B.3. Compliance with the National Electric Code (NEC) mitigates fire risk in the forested location. FEIS, Art. IV.I.2, 3.

34. Applicant will be required to develop a Construction Emergency Plan for the Project to address emergencies involving medical, construction, fire, extreme weather, earthquake, volcanic eruption, facility blackout, hazardous material spills, blade or tower failure, aircraft impact, terrorism or vandalism, and bomb threat. SCA, Art. IV.I. Preparedness will mitigate the effects of such events. FEIS, Art. 3.6.

35. Unavoidable public health impacts are minimal. FEIS Art. 3.6.4.

Public Services

36. Based on the evidence of record, the FEIS and the adoption of the terms of the SCA, the Project will not have a significant adverse effect on any public services, including law enforcement, fire, water, medical, recreational, or schools. FEIS, Sec. 3.12.2.1.

Decommissioning and Site Restoration

37. Prior to initiating construction activities, the Applicant must post sufficient security to ensure decommissioning²⁴ of the Project and provide the Council with an initial site restoration plan as required by SCA Article IV.D. At the end of the useful life of the facility, the equipment will be removed and the entire area returned to as near its original condition as reasonably possible. See, Application Sec. 2.3.7, SCA, Art. VIII.

Cumulative Impacts

38. The FEIS in Sec. 3.14 reviewed cumulative impacts with a wide range of project development. The review indicates, and we find, no significant cumulative impacts when considered with expected development within 20 miles of the Project.

Term of the Site Certification Agreement

39. The Site Certification Agreement will authorize the Certificate Holder to construct the Project such that substantial completion is achieved no later than five (5) years from the date

²⁴ The term "decommissioning" herein means conclusion of operations as an authorized project and completion of site restoration activities.

that all state and federal permits necessary to construct the Project are obtained. The Applicant may seek an additional 5 year extension subject to terms and conditions found in the SCA.

40. Construction of the entire Project shall be completed within eighteen (18) months after beginning construction. SCA, Art. I.B.

Conformance with Law

41. The Applicant proposes to construct the Project in accordance with applicable national and international building codes, in compliance with international design and construction standards; and to implement a comprehensive employee safety plan. The Council finds that operational safeguards will be at least as stringent as the criteria established by the federal government and will be sufficient for welfare and protection of the public. RCW 80.50.010(1).

42. The Applicant has agreed to appropriate environmental mitigation requirements. The mitigation package, whose elements are set out in the Site Certification Agreement, will preserve and protect the quality of the environment. RCW 80.50.010 (2).

43. As a renewable energy source wind power generation facility, the Project will contribute to the diversification of the state's electrical generation capacity and to requirements under Initiative-937 relating to renewable energy. It will therefore support legislative intent to provide abundant energy at a reasonable cost. RCW 80.50.010(3).

44. The Council finds that this course of action will balance the increasing demands for energy facility location and operation in conjunction with the broad interests of the public.

CONCLUSIONS OF LAW

Based on the result of the Adjudicative Order, the testimony received, and evidence admitted during the adjudicative and land use hearings, the environmental record including public testimony, Draft Environmental Impact Statement, the Final Environmental Impact Statement and environmental determinations made by the Council, the preceding overall Findings of Fact and the entire record in this matter, the Council makes the following Conclusions of Law:

1. The Washington State Energy Facility Site Evaluation Council has jurisdiction over the persons and the subject matter of Application No. 2009-01, pursuant to Chapter 80.50 RCW.

2. The Council conducted its review of the Whistling Ridge Application 2009-01 in an adjudicative proceeding pursuant to RCW 34.05 as required by RCW 80.50.090(3), in compliance with WAC 463-30, in SEPA proceedings pursuant to RCW 43.21C and WAC 463-47, and a land use hearing pursuant to RCW 80.50.090(2). This order is prepared pursuant to RCW 80.50.100(1) and is in the form designated for recommendation orders in WAC 463-30-320.

3. EFSEC is the lead agency for environmental review of the Whistling Ridge Application pursuant to the requirements of Chapter 43.21C RCW. The Council complied with Chapter 43.21C RCW, Chapter 197-11 WAC, and Chapter 463-47 WAC.

4. The Council is required to determine whether a proposed Project site is consistent with county or regional land use plans or zoning ordinances. RCW 80.50.090; WAC 463-14-030. The Council concludes that the proposed use of the portion of the site recommended herein for approval is consistent and in compliance with Skamania County land use plans and zoning laws.

5. It is the policy of the state of Washington to recognize the pressing need for increased energy facilities and to ensure through available and reasonable methods that the location and operation of such facilities will produce minimal adverse effects on the environment, ecology of the land and its wildlife, and the ecology of state waters and their aquatic life. RCW 80.50.010.

6. The Council concludes that portions of the Project containing the lower A corridor with suggested turbine sites A-1 through A-7 and the C corridor must be deleted from the Project in mitigation of the aesthetic and visual resource effects of the original proposal. The Council concludes that the certification of the remainder of the Whistling Ridge Project, as described in Application 2009-01 and as limited in scope as described in this Order, will further the legislative intent to provide abundant energy at reasonable cost. The mitigation measures, conditions and requirements of the proposed Site Certification Agreement ensure that through available and reasonable methods, the construction and operation of the Project will produce minimal adverse effects to the human environment, the ecology of the land and its wildlife, and the ecology of state waters and their aquatic life.

ORDER AND RECOMMENDATION

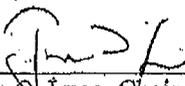
Based on the Findings of Fact and Conclusions of Law in this order, the Draft and Final EIS, the Adjudicative Order and the entire record in this matter, the Council enters the following Order:

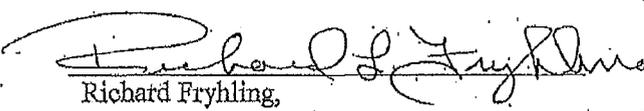
1. The Council recommends that the Governor of the state of Washington approve certification in part, and deny certification in part as specified herein, for the construction and operation of the Whistling Ridge Power Project located in Skamania County, Washington.

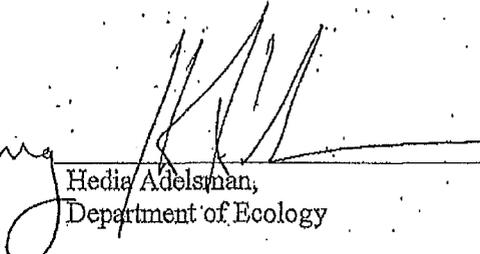
2. The Council orders that its recommendations as embodied in the Findings of Fact, Conclusions of Law and this Order, together with the Adjudicative Order, the Final Environmental Impact Statement and the proposed Site Certification Agreement that are appended to this Order, be reported and forwarded to the Governor of Washington State for review, consideration and action.

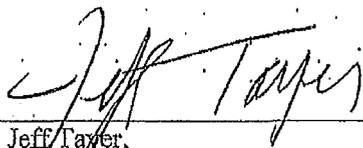
SIGNATURES

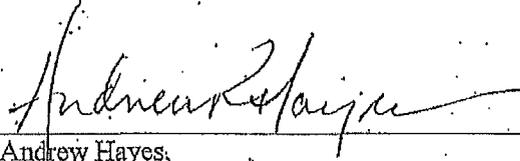
DATED and effective at Olympia, Washington, this sixth day of October, 2011.

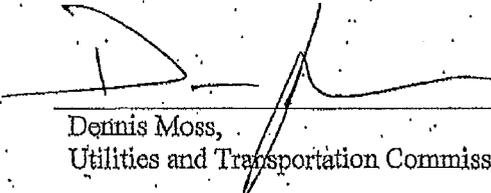

James O. Luce, Chair

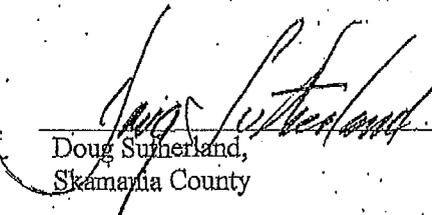

Richard Fryhling,
Department of Commerce


Hedia Adelman,
Department of Ecology


Jeff Tayer,
Department of Fish and Wildlife


Andrew Hayes,
Department of Natural Resources


Dennis Moss,
Utilities and Transportation Commission


Doug Sumnerland,
Skamania County

NOTICE TO PARTIES: Administrative relief may be available through a petition for reconsideration, filed within 20 days of the service of the Orders within the Recommendation Package to the Governor. If any such petition for reconsideration is filed, the deadline for answers is 14 days after the date of service of each such petition. Since all Orders contained within the Recommendation Package to the Governor are integral components of the recommendation and served as a package to the parties, the Council requires any request(s) for reconsideration to be filed on the full Recommendation Package, and not on individual elements of the package. The formatting of the petitions shall be governed by WAC 463-30-120 and shall be limited to 50 pages.

Appendix G

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BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of Application No. 2009-1: COUNCIL ORDER No. 870
Whistling Ridge Energy Project, LLC
for

WHISTLING RIDGE ENERGY
PROJECT

ORDER DENYING PETITIONS FOR
RECONSIDERATION OF ORDER 868
AND ORDER 869

SUMMARY

NATURE OF THE PROCEEDINGS: This matter involves Whistling Ridge Energy Project, LLC's ("Applicant"), Application to the Energy Facility Site Evaluation Council ("EFSEC" or "the Council") for certification to build and operate the Whistling Ridge Energy Project in Skamania County, Washington. The project and procedural history regarding this application and adjudication are discussed in detail in Council Order Nos. 868 and 869, approved unanimously at a public meeting on October 6, 2011, and served on all parties on October 7, 2011.

Council Order No. 868 ("Order 868") resolves all contested issues in the land use and adjudicative proceedings conducted in accordance with the requirements of RCW Chapter 80.50. Council Order No. 869 ("Order 869") recommends that the Governor approve in part, and deny in part, the Whistling Ridge Energy Project subject to conditions set out in Order 868, Order 869, and the draft Site Certification Agreement (SCA).

PETITIONS FOR RECONSIDERATION: On October 27, 2011 the Council received five petitions for reconsideration from¹:

- Whistling Ridge Energy, LLC
- Friends of the Columbia Gorge
- Save Our Scenic Area
- Skamania County and Klickitat County Public Economic Development Authority
- Seattle Audubon Society

¹ WAC 463-30-335 describes the process to request reconsideration of a recommendation to the Governor.

ANSWERS TO PETITIONS FOR RECONSIDERATION: The Council received answers from all of the petitioners listed above and the Department of Commerce.

COUNCIL DETERMINATIONS: We have considered the petitions and answers and determine for the reasons discussed in this Order that the petitions should be denied. Both Friends of the Columbia Gorge and Save Our Scenic Areas have requested Oral Argument; in light of the extent and detail of the Adjudicative proceedings, requests for Oral Argument are denied. The Council clarifies several matters raised by the petitions and answers.

INTRODUCTION

EFSEC, when considering applications for siting energy projects, must balance a number of competing interests. In this instance, we have on the one hand the Applicant who has definite ideas about the economic, financial, engineering, and development aspects of the project it proposes. The Applicant is supported by local government and the Department of Commerce because of perceived economic benefits to Skamania County.

We have, on the other hand, the project opponents who care in particular about the environmental and aesthetic impacts they perceive the project would have, if authorized. The Applicant is cognizant of its opponents' concerns and has made efforts to accommodate them. Having done so, the Applicant's position is nonetheless that its proposal should be approved without the imposition of any requirements beyond those it expressed a willingness to accept during the application review process. The opponents, however, are firm in their view that the project is completely unacceptable under any conditions.

Both sides, ably represented by counsel and supported by various expert and lay witnesses, presented well-articulated cases, pro and con, constructed largely within the constraints of governing law, precedent, and experience with the siting process. The Council, in seeking to balance competing interests as required under its governing statutes, satisfied neither the proponents nor the opponents. Hence, we face at this juncture petitions for reconsideration that praise recommendations favoring each individual petitioner's positions on some issues while denigrating recommendations that are inconsistent with their positions on other issues.

The parties' individual advocacy at this late stage shares certain attributes. They are, first, largely predictable and foreseeable.² That is to say the Council finds little or nothing in the arguments not previously and carefully considered. Some are marginally or not at all relevant to the issues that must be determined.³ Nor does it surprise the Council to see arguments again that, even if accepted for purposes of discussion, would not alter the results announced in Orders 868 and 869 because their outcome is not determinative.⁴ The question of land use consistency or inconsistency is one such issue. Other arguments such as esthetics and viewscape, while centrally important to the Council's determinations, have been exhaustively considered and are discussed in detail in Orders 868 and 869. For these reasons, we treat such issues summarily.⁵

Both Friends and SOSA raise objections to our orders and the draft SCA with respect to various requirements for post approval of plans and programs: requirements under the Forest Practices Act, road construction and transportation control, wildlife and avian impacts mitigation, the formation of a Technical Advisory Committee, turbine micro-siting, and construction management. The Council's approach to the use of post-approval plans and programs is consistent with its long established and successful procedures. We require development of specific compliance provisions during the final design stages of project development, and during and after project construction, with prescribed Council oversight. Public involvement and public response provisions are aspects of the Council's ongoing oversight responsibilities and the Council has significant experience in providing adequate

² This is not uniformly true. Some of the petitions and answers present novel arguments. These are, however, largely irrelevant and even inappropriate. *See, e.g.*, Skamania County Petition at 3-7 [arguments by Skamania County that we are bound by local land use ordinances], Applicant's Petition at 9:2-4 [argument by Applicant that "the state's energy facility siting process is irreparable [sic] broken."]

³ *See, e.g.*, Applicant's Petition at 2 [arguments re: ability of project to succeed financially]; SOSA Petition at 11-13 [arguments re: need for power]; Skamania County Petition at 11-13 [arguments re: the county's need for "an economic life raft"].

⁴ *See, e.g.*, SOSA Petition at 21-29; SOSA Answer at 15-19; Friend's Petition at 2-13; Skamania County Petition, *passim*; Skamania County Answer 7-12 [arguments re: land use].

⁵ The Council emphasizes that while it may not call out for discussion in this Order every specific issue and argument raised by the petitions for reconsideration and answers, this does not mean the issue or argument was not considered by the Council. Limited or no discussion of a specific issue or argument simply means the Council finds it to be without sufficient merit to warrant discussion. Examples of such issues and arguments are: 1) Friends' arguments that Order 868 at page 24 should use the word "may" rather than "must" and that turbine strings A 1-7 and C 1-8 are not eliminated by legal description from the project boundary; 2) SOSA's arguments that wind generation is variable and unpredictable, that wind energy requires burning carbon based fuels, and that wind energy likely will be sold outside the state 3) Skamania County's arguments that it is economically depressed, and will be plunged into deeper economic depression if the project does not go forward as proposed and that EFSEC has an obligation to help improve standards of living within the county.

opportunities for public participation. Friends' and SOSA's asserted concerns in this regard are simply unfounded.

We address below in the Memorandum section of this Order, several specific arguments raised by the various petitions for reconsideration and answers. While we find no basis in these arguments, we believe a brief response from the Council may serve to clarify the decisions made in those orders.

MEMORANDUM

A. Land Use Consistency

Considering that "[t]he range and intensity of arguments over land use consistency and preemption in this proceeding are unprecedented,"⁶ the Council addressed the issue at some length in Order 868. Devoting eight pages to the subject, the Council determined in light of its extended discussion that: "the evidence and applicable law support the county's certificate of [land use] consistency, [and the] Project opponents have failed to present a credible case against it."⁷ A county's certificate of land use consistency establishes "*prima facie* proof of consistency and compliance with land use plans and zoning ordinances absent contrary demonstration by anyone present at the hearing."⁸

The legal effect of this determination is that Skamania County cannot "change [its] land use plans or zoning ordinances so as to affect the proposed site."⁹ As we observed in Order 868, such a determination brings the Council's land use inquiry to an end, and RCW 80.50.110, which provides for preemption in the event any inconsistency with existing land use plans or zoning ordinances is found, is not required.¹⁰

The Council, however, is impressed by the subtle and complex, albeit largely misdirected, arguments the project opponents have constructed around the issue of land use consistency. While the Council addresses the merits of the parties' land use arguments in Order 868, and

⁶ *In the Matter of: Application No. 2009-01 of Whistling Ridge Energy Project LLC for Whistling Ridge Energy Project*, Council Order No. 868 (Whistling Ridge Order No. 23), Adjudicative Order Resolving Contested Issues ("Order 868") at 9.

⁷ *Id.* at 13.

⁸ WAC 463.26.090

⁹ RCW 80.50.090(2).

¹⁰ Order 868 at 9.

sees no reason to repeat the discussion here, it may help to lay this issue to final rest for us to discuss the course of our deliberations concerning land use issues. Our purpose, in part, is to clarify and underscore the significance of our observation in Order 868 that “the question of whether the proposed project is consistent with local land use requirements is not dispositive.”¹¹

We begin by observing that the statutes and rules concerning the Council’s responsibilities relative to land use consistency recognize, and provide the means to resolve, the sometimes conflicting concerns that arise when a proposed project of statewide significance conflicts with a local government’s authority and responsibility for regulating land use within the boundaries of its jurisdiction.¹² RCW 80.50.090(2), which requires the Council to conduct a public hearing to determine land use consistency, is intended fundamentally to protect the local government’s right to regulate land use within its jurisdiction. That is, it provides a process for *the local government* to be heard when such conflicts must be resolved.

In this case, however, two nongovernmental parties—Friends of the Columbia Gorge (Friends) and Save Our Scenic Area (SOSA)—make novel use of the relevant law in their effort to persuade the Council that it should, or even must, recommend to the Governor that she reject the Whistling Ridge Energy Project application. While we do not question the propriety of these parties availing themselves of every possible legal avenue in the zealous pursuit of their cause, we observe that their novel use of the law is ironic in that it would frustrate and defeat, if successful, the local government’s strong and unwavering support for the Whistling Ridge project.¹³ We find it ironic, too, that it is most unlikely that this project would ever have been brought to the Council were it not for the successful challenge by Friends and SOSA to Skamania County’s effort in 2008 to revise its zoning ordinance to specifically allow for such projects.¹⁴ Indeed, it was with the advice and support of county government officials given in the wake of a Hearing Examiner’s rejection of the county’s effort to revise its zoning ordinance, that the Applicant brought this project to the Council.¹⁵

¹¹ Order 868 at 9.

¹² See, e.g., *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wn.2d 275 (2008).

¹³ See generally Skamania County and Klickitat County Development Authority’s Land Use Brief; Skamania County and Klickitat County Development Authority’s Land Use Response Brief; County Petition for Reconsideration; County Answer to Petitions for Reconsideration.

¹⁴ Adjudicative Hearing Transcript at 87-88 (Spadaro).

¹⁵ *Id.*; Adjudicative Hearing Transcript at 1343-45 (Pearce).

Whistling Ridge Energy, LLC, submitted its application to the Council on March 10, 2009. One of the Council's first obligations when it receives an application such as this one is to conduct a public hearing to determine whether the proposed site is consistent and in compliance with city, county, or regional land use plans or zoning ordinances.¹⁶ On May 7, 2009, the Council convened a land use hearing, as required under RCW 80.50.090 and Chapter 463-26 WAC, in Underwood, Washington, near the proposed project site. Skamania County Commissioner, Jim Richardson, submitted a resolution from the Skamania County Board of Commissioners, Resolution 2009-22,¹⁷ which he described as "a certification of land use consistency review of the Whistling Ridge Energy Project which passed unanimously by the Board of Commissioners on May 5, including this letter of consistency from our planning director and staff report."¹⁸

The Council elected not to enter an early order determining the question of land use consistency. Instead, the Council allowed the parties to present additional evidence and argument concerning land use consistency and preemption during the adjudicative hearings conducted during January 2011 and, subsequently, in briefs devoted exclusively to the subject of land use consistency. This approach of combining the "proceeding for preemption" with "the adjudicative proceeding held under RCW 80.50.090(3)" is expressly authorized under WAC 463-28-060(2). It is an efficacious means to proceed, allowing the Council to consider the full range of arguments concerning land use consistency. If the Council determines under WAC 463-26-110 that a site is inconsistent with local land use requirements, this approach allows the Council to exercise its preemption authority under RCW 80.50.110(2) and determine what conditions, if any, should be included in a site certification to protect the interests of the local government or community affected by the proposed facility, as required by RCW 80.50.100(1), without the need for yet another adjudicative proceeding.

The parties briefed the land use issues during February 2011. The Council initiated deliberations on these issues during March 2011. The Council recognized that Friends and SOSA had put in play the question of burden of proof by challenging the proponents' evidence that Skamania County had issued a valid Certificate of Land Use Consistency.

¹⁶ RCW 80.50.090(2).

¹⁷ Land Use Hearing Exhibit 1, Adjudicative Hearing Exhibit 2.02.

¹⁸ Land Use Hearing Transcript at 5:18-22. During the subsequent adjudicative hearing, the Applicant submitted a substitute Certificate of Land Use Consistency, County Commissioners' Resolution 2009-54, dated December 22, 2009, which was received into evidence on January 4, 2011, as Adjudicative Hearing Exhibit 2.03. Adjudicative Hearing Transcript at 195:13-21.

That is, Friends and SOSA argued that Adjudicative Hearing Exhibit 2.03, the Certificate of Land Use Consistency, County Commissioners' Resolution 2009-54, dated December 22, 2009, failed to meet the requirements for such certificates under WAC 463-26-090. This would mean the hearing record included no prima facie proof of consistency. In that circumstance, the burden to show consistency by substantial, competent evidence remained with those parties advocating it in the face of opposition from parties asserting inconsistency.

The Council put the dispute concerning the Certificate of Land Use Consistency to one side and considered the record and arguments as if it did not exist. The Council agreed in this context that the project opponents presented evidence and argument that, while insufficient independently to demonstrate inconsistency, instilled sufficient doubt on the question to preclude a definitive determination one way or the other. Given that the burden of proof remained with the project advocates absent a certificate of land use consistency, the Council settled on a conservative approach in its deliberations. It treated the project as being inconsistent with local land use requirements and considered what such a result would mean in the context of RCW 80.50.110. The Council's conclusion at the end of this analytical path was that to the extent of any inconsistency or failure to comply with Skamania County's zoning ordinance or Comprehensive Plan, it would be appropriate for the state to preempt the regulation and certification of the location, construction, and operational conditions of certification of the energy facilities at issue, as authorized by RCW 80.50.110(2).

The Council discussed that a determination of inconsistency, coupled with a determination in favor of preemption under RCW 80.50.110(2), would be a satisfactory outcome and, were the project to be otherwise approved, had the advantage of potentially avoiding further controversy over land use issues in a county with a comprehensive plan and zoning ordinances that arguably are less than fully developed works of planning art.19 On the other hand, this outcome would be unsatisfactory to the extent it relied on the Council declining to expressly resolve the dispute over whether the Certificate of Land Use Consistency, County Commissioners' Resolution 2009-54, dated December 22, 2009, should be accepted as prima facie proof of land use consistency. If so, the Council would need to deliberate again, considering the evidence and argument in light of the project opponents having the burden of proof.

19 The county's challenges in this regard are entirely understandable, considering the complexity of land use statutory requirements, the county's financial challenges, the impediments imposed by federal and state forest lands and the National Scenic Area, the critical need for economic development and the costs of staffing and litigation that could be required in order to bring the county comprehensive plan and zoning ordinances into a clear and comfortable congruence.

The Council agreed that given its legal significance, determining as it does the burden of proof on the question of land use consistency, the dispute over the validity of the Certificate of Land Use Consistency must be resolved. This the Council did, finding the Certificate of Land Use Consistency, County Commissioners' Resolution 2009-54, dated December 22, 2009, valid, as addressed in Order 868:

Friends argues that the substituted resolution is not a valid "certificate" under WAC 463-26-090 because the county did not identify the second certificate as a "decision." The document itself and the testimony of County Commissioner Pearce verify that Resolution 2009-54 is the county's certification to the Council upon a lawful vote of the Commissioners. The Council has no procedural requirements for validation of a certificate except lawful procedure, which is demonstrated here.²⁰

WAC 463-26-090 provides:

This rule contemplates that applicants will enter as exhibits, at the land use hearing, certificates from local authorities attesting to the fact that the proposal is consistent and in compliance with land use plans and zoning ordinances. In cases where this is done, such certificates will be regarded as *prima facie* proof of consistency and compliance with such land use plans and zoning ordinances absent contrary demonstration by anyone present at the hearing.

The Council ultimately agreed, again after considerable internal discussion and debate, that the project opponents failed to rebut by their evidence and arguments the presumption of consistency established by the Certificate of Land Use Consistency. That is, the project opponents failed to demonstrate that the project is specifically inconsistent, or demonstrably not in compliance, with applicable zoning law in Skamania County or with the county's 2007

²⁰ Order 868 at 9-10. Friends also argues that a certification of consistency is a decision requiring SEPA review under RCW 43.21C.030, citing a superior court order in another proceeding. Order 868 rejects this challenge as being unsupported. The decision was not offered into evidence during the hearing and no copies were provided to the Council or to other parties. The Council nevertheless examined the order and found it does not support Friends' argument. Indeed, given the lack of context (*e.g.*, neither the "opinion letter" to which the brief order refers, nor the "defendants' motions to dismiss" are included), and references to statutes that do not exist (*i.e.*, RCW 30.70C.020 and .040), it is not possible to divine any meaning at all from the face of the court's order. The order makes no reference at all to RCW 43.21C.030.

Comprehensive Plan. Under this analysis, then, with an un rebutted presumption of consistency under WAC 463-26-090, a determination that the project is consistent and in compliance with existing land use plans or zoning ordinances is the only possible outcome. As previously discussed, such a determination brings the Council's land use inquiry to an end.

In sum, the Council considered the full range of possible outcomes in terms of land use consistency. The Certificate of Land Use Consistency, County Commissioners' Resolution 2009-54, dated December 22, 2009, accepted into our record as Adjudicative Hearing Exhibit 2.03, is prima facie proof of land use consistency, creating a rebuttable presumption to that effect. Friends and SOSA failed to present evidence and argument overcoming the presumption. It follows that the project is consistent and in compliance with existing land use plans or zoning ordinances. Even had the Council reached the opposite result, however, it would have determined that presumption under RCW 80.50.110(2) is appropriate and required, subject to the imposition of appropriate conditions, such as are imposed in any event, in other sections of Order 868. It is for these reasons that the question of whether the proposed project is consistent with local land use requirements is not dispositive. Under either outcome, local land use requirements would impose no barrier to approval of the Whistling Ridge Energy Project, as recommended by the Council in Orders 868 and 869.

B. Aesthetics, Viewscape and Turbine Reduction Issues

Context on this and other issues is important.

The Council's enabling statute and rules specifically direct it to consider and balance the interests of all Washington State citizens. RCW 80.50.010(1). These interests frequently but not always are well aligned with those who live in the area where the project is proposed. The Council has an obligation to all citizens, both those who live in the area and others throughout the state, to "...preserve and protect the quality of the environment [and] to enhance the public's opportunity to enjoy the esthetic and recreational benefits of the air, water, and land resources..." RCW 80.50.010(2). There is virtually identical language in the Council's rules making the legislative intent of RCW 80.50.010 binding upon the Council in considering the siting of projects. WAC 463-14-020(2). Notwithstanding arguments to the contrary, it is not required that the Council adopt regulations on these issues to consider them in its siting decisions. These and other issues can be, and are, frequently addressed on a case-by-case basis, often applying standards brought before and considered by the Council during its adjudicative process and in its deliberations.

Against this backdrop, Friends argues that the Council erred by not considering that the approved turbine strings will result in a "cluttered and chaotic" appearance from certain viewing locations. The Council considered the overall visual impact of the project and did not focus on a single criterion. The Applicant initially proposed a 50 turbine project, later reduced to 38 turbines. Conditions established in Order 868 further reduced the number of turbines to 35. The Council made its determination to eliminate certain proposed turbine strings after reviewing all relevant evidence in the record and considering its own viewscape analysis, including the Council members' two-day site visit on May 2-3, 2011. The Council remains convinced that the conditions it imposed reduce the visual impact of the Project to an acceptable degree.

Skamania County and the Department of Commerce (Commerce) argue that the Council has no established aesthetic siting standards and is therefore prohibited from imposing conditions to mitigate aesthetic concerns. This is simply incorrect. There is no requirement that EFSEC must establish specific standards by which to evaluate every conceivable impact a proposed project may have. It is generally well accepted that siting criteria are project specific to a significant degree. For example, there are no standards adopted for consideration of economic or recreational impacts, yet such issues are frequently considered by the Council.

Skamania County and Commerce also argue that the Council impermissibly applied the National Scenic Area (NSA) aesthetic standards to justify elimination of certain tower strings. Skamania County also argues that the Council recognizes the project area is not "pristine," yet uses NSA standards for pristine areas to prohibit development. Finally, in this connection, the county argues that the Council has impermissibly redrawn the NSA boundaries, created a buffer zone outside the NSA, or has reinterpreted the NSA Law in some fashion.

The Council clarifies that it did not rely on NSA standards in its deliberations and decisions. The Council considered the historic and scenic values of the broader Columbia River Gorge. The Council agrees that it would be improper to apply NSA standards to areas outside of the NSA (Order No. 869 at 7).

Indeed, if the Council used the NSA criteria to evaluate the Whistling Ridge Project, it would have rejected the project during scoping. The Council specifically recognized, in its orders, that the Whistling Ridge area is partially developed, not pristine, and that maintenance of a pristine landscape is not an applicable standard. The assertions that the Council uses NSA

criteria, redraws NSA boundaries, establishes NSA buffer zones, or reinterprets the NSA statute are simply incorrect.

Skamania County and the Department of Commerce argue that the FEIS supports approval of a 50-turbine project and that the Council's recommendation to the Governor is inconsistent with this FEIS "mandate". The State Environmental Protection Act (SEPA) and the FEIS guide, but do not "mandate"; they inform the Council's decisions but the Council's FEIS contains no "mandates for action." The FEIS provides analysis and estimates of various impacts to the environment from proposed actions, as required under SEPA. The FEIS does not evaluate and document all of the possible effects and considerations that inform the Council's decisions. The Council considered the FEIS in its recommendation to the Governor, but the FEIS is only one consideration.²¹ On the basis of the adjudicative record and the FEIS, the Council determined that the C and southern A turbine corridors intrude impermissibly into the aesthetic, cultural and natural heritage of the state, the region, and adversely affect Native People's interests, thus requiring denial of use of those portions for tower construction or wind-power generation (Order 869 at 7.)

The Applicant argues that the Council substituted its own "subjective" evaluation of visual impacts for the impliedly "objective" determination in the FEIS. The challenge that the Council's visual impact analysis is a "one man opinion" or a "subjective" amateur attempt at science, while the analysis in the FEIS is an interdisciplinary, qualified and quantified determination misses the mark. The Council's analysis in the adjudicative proceeding shares with the expert analysis in the FEIS both qualitative and quantitative aspects. Both analyses have objective and subjective qualities. The FEIS reflects the judgment of one consultant applied to the criteria he selected. The seven members of the Council applied their individual and collective judgments considering the same criteria, informed further by the extensive evidence on this issue presented in the adjudicative proceeding and their independent view of the project in May, 2011, which was based in significant part on the viewscape analysis performed by the FEIS consultant. Additionally, it is worth noting that the evidence in the adjudicative proceeding included testimony by both proponents and opponents that offered different "standards" for evaluating visual effects. The Council weighed these standards of the Federal Highway Administration and the US Forest Service in considering the case.

²¹ SEPA does not require that an EIS be an agency's only decision making document (WAC 197-11-448) See *Solid Waste Alternative Proponents v. Okanogan Cnty.*, 66 Wn. App. 439, 832 P.2d 503 (1992).

The Applicant argues that the Council erred in Order 868 by stating that approval of 35 turbines preserves the project's ability to achieve a 75 MW Generating Capacity and be economically feasible. The Council's observation that 35 turbines are sufficient to achieve a 75 MW capacity is consistent with the Applicant's testimony during the adjudicative hearing showing that 38 turbines could produce a 75 MW capacity and with other evidence in the record. However, even if the Council is incorrect in observing that 35 turbines can produce 75 MW, this is not a determinative factor and would not result in any change in the Council's orders. The Council's decision does not turn on questions of whether the project would be economically feasible for the Applicant.

C. Economics, Need for Power, and Reasonable Cost Issues

SOSA argues that the Council failed to consider the requirement of "reasonable cost" in its orders and recommendation as required by RCW 80.50.010(3). The Council had previously determined that it does not need to conduct an independent evaluation of this issue.²² The market determines what constitutes power at reasonable cost in the context of an application by an independent power merchant to build a power generation facility.

D. Avian and Wildlife Issues

Friends argues that the Council failed to address in its orders the issues of species identification and project impacts mitigation as required by the Washington Department of Fish and Wildlife (WDFW) wind power guidelines. The Seattle Audubon Society argues that the Applicant's habitat mitigation plan is inadequate by not including definitive information about the mitigation parcel discussed during the adjudicative hearing.

The proposed Project complies with all applicable requirements of the WDFW Wind Power Guidelines.²³ During the application review process, the Applicant and WDFW discussed a potential mitigation parcel; however, the final details were not offered to the Council. The SCA requires the Applicant to present a specific habitat mitigation plan to EFSEC for approval at least 60 days prior to the beginning of site preparation. The mitigation obligation can be satisfied by purchasing a mutually acceptable mitigation parcel and deeding it to WDFW or a mutually acceptable third party, by contributing money to a mutually acceptable third party that owns or will purchase a mitigation parcel, or by payment of a fee to WDFW

²² See *Residents, supra*, at page 321, "... we believe EFSEC was within its authority to refuse to review the economic viability of the KVVPP."

²³ Exhibit No. 6.09c, *letter from WDFW*.

in lieu of mitigation. If the fee option is selected, it must be in an amount equivalent to the value of permanently disturbed project areas. The Council remains satisfied that the Habitat Mitigation Plan requirements in the SCA are adequate to their purpose and to meet statutory requirements.

We believe the FEIS provides sufficient information on preexisting project species abundance and distribution as described in detail in FEIS Section 3.4, Section 4.2-4.7, Appendices C-F.

Friends argues that the Council failed to require the Applicant to provide adequate information concerning avian and bat usage and that the findings by the USFWS, related to the determination of no significant impacts, should be reassessed. The Seattle Audubon Society also argues that pre-project avian assessments are inadequate and do not comply with the WDFW guidelines.

Again, the Council is satisfied that the FEIS provides adequate information on the subject of avian and bat usage at the site. The pre-project assessment and avian/bat use surveys are consistent with standard protocols utilized throughout the United States and are consistent with the WDFW Wind Power Guidelines. WDFW confirmed that data presented by the Applicant represents the best available science for predicting avian impacts at the proposed Project. The FEIS acknowledges that some avian mortality will occur but finds no evidence that it is likely to pose a threat to populations.

In regard to the determination of no significant impacts, the FEIS finds no evidence that mortality to a threatened or endangered species is expected. The protection of endangered species remains in the hands of the USFWS and they have not indicated the need for any changed conditions justifying additional action on the part of EFSEC.

The Seattle Audubon Society also argues that the post-construction avian monitoring plan is inadequate because it does not require the applicant to conduct a three-year post-construction avian displacement monitoring study. The WDFW Guidelines require post-construction mortality studies be conducted but do not require post-construction research-oriented avian displacement studies. In lieu of additional preconstruction study, particularly given WDFW's acceptance of the existing analysis, EFSEC determined that three years of post-construction mortality studies would be more productive. The purpose of the post-construction avian monitoring plan is to quantify impacts to avian species and to assess the adequacy of mitigation measures implemented, including any mitigation necessary under the Migratory Bird Treaty Act.

E. SCA Issues

Friends argues that the SCA does not adequately address construction duration, unexpected impacts from turbines, noise, roads and transportation. This is incorrect. The SCA provides an 18-month construction period with a force majeure limitation. The SCA also includes a provision allowing for an extension of time, subject to EFSEC approval. The SCA includes provisions for addressing unexpected impacts from the Project that were not previously analyzed or anticipated. The SCA also has provisions for addressing wildlife issues if additional studies or mitigation are warranted to address impacts not foreseen in the Application or the FEIS.

Specific requirements for noise are contained in Article 5 of the SCA, which requires compliance with all local and state regulations. In addition, the SCA requires that all noise mitigation measures identified in the FEIS must be implemented during construction and operation of the Project.

Article IV F. of the SCA establishes road and transportation requirements that must be satisfied during construction and operation of the Project. Compliance with all local and state regulations is required.

DISPOSITION: The Council has considered all petitions for reconsideration as required under RCW 34.05.470 and WAC 463-30-335. EFSEC finds and concludes that none of the petitions raises any factual or legal arguments that EFSEC has not already heard during the adjudication and in post-hearing briefs, deliberated upon, and discussed in Orders 868 and 869 and the draft Site Certification Agreement. No basis has been provided to justify any changes in the Council's findings, conclusions, or recommendations. Hence, the Council denies all motions for reconsideration.

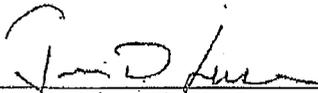
ORDER

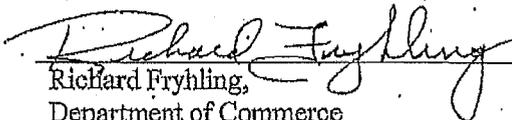
THE COUNCIL ORDERS that the motions for reconsideration by Friends of the Columbia Gorge, Save Our Scenic Areas, Seattle Audubon, Skamania County, and Whistling Ridge Energy LLC are denied.

WASHINGTON STATE ENERGY FACILITY SITE EVALUATION COUNCIL

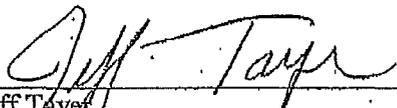
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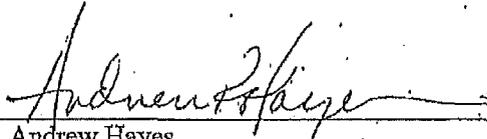
DATED and effective at Olympia, Washington, this 27th day of December, 2011


James O. Luce, Chair

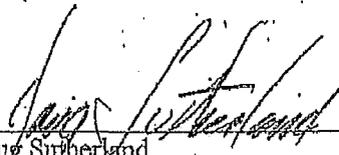

Richard Fryhling,
Department of Commerce


Hedra Adelsman,
Department of Ecology


Jeff Taylor,
Department of Fish and Wildlife


Andrew Hayes,
Department of Natural Resources


Dennis Moss,
Utilities and Transportation Commission


Doug Sutherland,
Skamania County

Appendix H

SITE CERTIFICATION AGREEMENT
BETWEEN

THE STATE OF WASHINGTON

AND

WHISTLING RIDGE ENERGY LLC



For the

WHISTLING RIDGE ENERGY PROJECT

SKAMANIA COUNTY, WASHINGTON

ENERGY FACILITY SITE EVALUATION COUNCIL

OLYMPIA, WASHINGTON

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FOR THE WHISTLING RIDGE ENERGY PROJECT
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1. Project Legal Description
2. Tower Configuration Review
3. Council Order No. 868, Order Recommending Conditions; Finding of Fact; and Conclusions of Law based on the Whistling Ridge Adjudicative Proceeding entered October 6, 2011
4. Council Order No. 869, Order Recommending Approval of Site Certification on Condition entered October 6, 2011.

**SITE CERTIFICATION AGREEMENT
FOR THE WHISTLING RIDGE ENERGY PROJECT**

between

THE STATE OF WASHINGTON

and

WHISTLING RIDGE ENERGY LLC.

This Site Certification Agreement (Agreement) is made pursuant to Revised Code of Washington (RCW) 80.50, by and between the State of Washington, acting by and through the Governor of Washington State, and Whistling Ridge Energy LLC, (WRE or Certificate Holder).

WRE filed, as permitted by law, an application with the Energy Facility Site Evaluation Council (EFSEC or Council) for site certification for the construction and operation of a wind powered generation facility to be located in Skamania County, Washington. The Council reviewed Application 2009-01, conducted public meetings and adjudicative hearings, and by order recommended approval of a modified version of the application by the Governor. On _____, 20__, the Governor approved the Site Certification Agreement authorizing Whistling Ridge Energy to construct and operate the Whistling Ridge Energy Project (Project).

The parties hereby now desire to set forth all terms, conditions, and covenants in relation to such site certification in this Agreement pursuant to RCW 80.50.100(1).

ARTICLE I: SITE CERTIFICATION

A. Site Description

The site on which the Whistling Ridge Energy Project (Project) is to be constructed and operated is located in unincorporated Skamania County, and is described more particularly in Attachment 1 to this Agreement.

B. Site Certification

The State of Washington hereby authorizes Whistling Ridge Energy LLC (WRE or Certificate Holder), any and all parent companies, and any and all assignees or successors approved by the Council to construct and/or operate the Project, as described in Article I.A. of this Agreement, subject to the terms and conditions set forth in Council Order No. 869, Council Order Recommending Site Certification on Condition (Attachment 4 to this Agreement), and this Site Certification Agreement.

The construction and operation authorized in this Agreement shall be located within the areas designated herein and in the modifications to Revised Application for Site Certification submitted by WRE on October 12, 2009 (Revised Application).

This Site Certification Agreement authorizes the Certificate Holder to construct the Project such that Substantial Completion is achieved no later than ten (10) years from the date that all final state and federal permits necessary to construct and operate the Project are obtained and associated appeals have been exhausted.

If the Certificate Holder does not begin construction of the Project within five (5) years of the execution of the SCA, the Certificate Holder will report to the Council their intention to continue and will certify that the representations in the application, environmental conditions, pertinent technology and regulatory conditions have remained current and applicable, or identify any changes and propose appropriate revisions to the Site Certification Agreement to address changes. Construction may begin only upon prior Council authorization and approval of such certifications. If the Certificate Holder does not begin construction of the Project within ten (10) years of the execution of the SCA, all rights under this SCA will cease.

However, providing that such construction is not delayed by a *force majeure* event, and that the construction schedule that the Certificate Holder submits pursuant to Article IV.K of this Agreement demonstrates its intention and good faith basis to believe that construction shall be completed within eighteen (18) months of beginning Construction.

The Certificate Holder may begin Commercial Operation of some wind turbine generators prior to completing construction of all wind turbine generators and other Project components, provided all necessary Project elements are in place for safe operation of the completed wind turbine generators and their operation will not adversely affect any obligations under this Agreement.

C. Project Description

The Whistling Ridge Energy Project will consist of: wind turbine generators (WTGs); permanent meteorological towers; access roadways; electrical collection/interconnection and communication systems and their respective corridors and rights of way; electrical step-up and interconnection substations; an operations and maintenance (O&M) facility; temporary construction-related facilities; other related Project facilities as described in the Revised Application, as modified within this Site Certification Agreement.

The location of Project facilities including, but not limited to, the turbines, roadways, electrical collection and distribution system, operations and maintenance facility, electrical substations, electrical feeder lines and other related Project facilities, is generally described in the Revised Application, as modified within the Site Certification Agreement. The final location of the WTGs and other project facilities within the Project Area may vary from the locations shown on the conceptual drawings in the Revised Application, but shall be consistent with the conditions of this Agreement and in accordance with the final construction plans approved by EFSEC pursuant to Article IV.L.

1. Wind Turbine Generators (WTGs). The Project shall consist of a maximum of 35, 3-bladed, X-megawatt (MW) nameplate-rated wind turbines on tubular steel towers, not to exceed a maximum height (hub height plus blade tip height) of four hundred and thirty (430) feet. The WTGs will be equipped with turbine control, safety and braking systems, and will be interconnected to a central Supervisory Control and Data Acquisition (SCADA) system.
2. Meteorological Towers. The Project will include up to four (4) free-standing (non-guyed) permanent meteorological towers. The height of the meteorological towers shall not exceed the hub height of the WTGs selected.
3. Internal Access Roads. The Project will include approximately six (6) miles of internal roads for access to the WTGs and other Project facilities.
4. Electrical Collection/Interconnection and Communication Systems.
 - a) Collector System. The electrical output of the WTGs will be collected and transmitted to the Project Substation via a system of underground and overhead electric cables. Fiber optic or copper communication wires will also link the individual WTGs to a central computer monitoring system.
 - b) Project Step-Up Substation(s). Power from the Project will be collected and fed to the Bonneville Power Administration (BPA) high voltage transmission lines through a Project step-up substation. The step-up substation would connect to the BPA interconnect.
 - c) Interconnecting Transmission Systems. The Project will interconnect with the BPA transmission systems on or adjacent to the Project site.

5. Operations and Maintenance Facility.

- a) The Operations and Maintenance (O&M) facility will include a main building with offices, restrooms, reception area, outdoor parking facilities, turn-around area, laydown area, outdoor lighting and gated access. The O&M facility building will have a foundation footprint of approximately 3000 sq. ft. and will be placed on a site of approximately five (5) acres.
- b) The O&M facility will include a water supply, permit-exempt well, withdrawing less than 5000 gallons of water per day. Sanitary wastewater from the maintenance facility will be discharged to an on-site septic system.

6. Turbine Setbacks.

Turbines shall be set back from existing built residences (if any) as follows:

- Distance from residences, existing as of October 12, 2009, of adjacent landowners without signed agreements with the Certificate Holder authorizing a reduced setback, shall be a minimum of 2500 feet. Prior to commencing construction, the Certificate Holder shall provide the Council with documentation demonstrating its engineering and micro-siting efforts to site the applicable turbine locations at least 2,500 feet from the residences, indicating the factors reviewed and the results of the review for each micro-siting recommendation.

For purposes of this Article, "residence" means the primary physical structure on a residential lot utilized as a single family home; the term "envelope" includes the entire structure within the main walls and the eaves of the roof, but does not include uncovered decks, uncovered patios, or outbuildings.

Distance shall be measured horizontally from the centerline of the turbine tower to the outermost "edge of the" envelope of the residence considered.

Turbines shall meet all of the following setback requirements, in addition to those identified above:

- Distance from property lines of adjacent land that is not covered by signed agreements with the Certificate Holder: 650 feet.
- Distance from Bonneville transmission lines: 650 feet.
- Distance from county and state roads: 650 feet.

As noted above, distance shall be measured horizontally from the centerline of the turbine tower to the property line or the outermost edge of the road or other feature considered.

ARTICLE II: DEFINITIONS

Where used in this Site Certification Agreement, the following terms shall have the meaning set forth below:

1. "Application" means the *Application for Site Certification: Whistling Ridge Energy Project*, designated No. 2009-01, submitted March 10, 2009, as supplemented in the Revised Application filed in October 12, 2009.
2. "Approval" (by EFSEC) means an affirmative action by EFSEC or its authorized agents regarding documents, plans, designs, programs, or other similar requirements submitted pursuant to this Agreement.
3. "Begin Commercial Operation" or "Beginning of Commercial Operation" means the time when the Project begins generating and delivering electricity to the electric power grid, other than electricity that may be delivered as a part of testing and startup of the Project.
4. "BMPs" means Best Management Practices.
5. "Bonneville" or "BPA" means Bonneville Power Administration.
6. "Certificate Holder" means Whistling Ridge Energy LLC, any and all parent company(s), or an assignee or successor in interest authorized by the Council.
7. "CFE" means the Counsel for the Environment serving by appointment pursuant to RCW 80.50.080.
8. "Construction" means any of the following activities: any foundation construction including hole excavation, form work, rebar, excavation and pouring of concrete for the WTGs, the operations and maintenance facility building, or the substations and erection of any permanent, above-ground structures including any transmission line poles, substation poles, meteorological towers, or turbine towers.
9. "County" means Skamania County, Washington.
10. "DAHP" means the Washington State Department of Archaeology and Historic Preservation.
11. "Whistling Ridge Energy Project" or "Project" means: wind turbine generators (WTGs) and their construction areas; permanent meteorological towers; access roadways; electrical collection/interconnection and communication systems and their respective corridors and rights-of-way;

electrical step-up and interconnection substations; an operations and maintenance facility; temporary construction-related facilities; other related Project facilities as described in the Revised Application. The specific components of the Project are identified in Article I.

12. "DNR" means the Washington State Department of Natural Resources.
13. "Ecology" means the Washington State Department of Ecology.
14. "EFSEC" or "Council" means the State of Washington Energy Facility Site Evaluation Council, or such other agency or agencies of the State of Washington as may hereafter succeed to the powers of EFSEC for the purposes of this Agreement.
15. "EFSEC Costs" means any and all reasonable costs, both direct, and indirect, associated with EFSEC activities with respect to this Site Certification Agreement (SCA), including but not limited to monitoring, staffing and SCA maintenance.
16. "EIS" or "Final EIS" means the Whistling Ridge Energy Project Final Environmental Impact Statement (August, 2011) issued by EFSEC pursuant to the requirements of the State Environmental Policy Act, and adopted by EFSEC.
17. "End of Construction" means the time when all Project facilities have been substantially constructed and are in operation.
18. "FAA" means the Federal Aviation Administration.
19. "Force Majeure Event" means any event beyond the control of the Party affected that directly prevents or delays the performance by that Party of any obligation arising under this Agreement, including an event that is within one or more of the following categories: condemnation; expropriation; invasion; plague; drought; landslide; tornado; hurricane; tsunami; flood; lightning; earthquake; fire; explosion; epidemic; quarantine; war (declared or undeclared), terrorism or other armed conflict; material physical damage to the Project caused by third parties; riot or similar civil disturbance or commotion; other acts of God; acts of the public enemy; blockade; insurrection, riot or revolution; sabotage or vandalism; embargoes; and, actions of a governmental authority other than EFSEC.
20. "IBC" means the International Building Code.
21. "Micro-siting" means the final technical and engineering process by which the Certificate Holder shall recommend to the Council the final location of each wind turbine generator.

22. "NPDES permit" means National Pollutant Discharge Elimination System permit.
23. "RCW" means the Revised Code of Washington.
24. "Revised Application" means the Whistling Ridge Energy Revised Application for Site Certification submitted on October 12, 2009.
25. "Site," "Project Site" or "Project Area" means the approximately 1150 acre property identified in Attachment 1, located in Skamania County, on which the Project is to be constructed and operated.
26. "Site Certification Agreement," "SCA" or "Agreement" means this formal written agreement between the Certificate Holder and the State of Washington, including all attachments hereto and exhibits, modifications, amendments, and documents incorporated herein.
27. "Site Preparation" means any of the following activities: Project Site clearing, grading, earth moving, cutting or filling, excavation, and preparation of roads and/or laydown areas.
28. "State" or "state" means the state of Washington.
29. "Substantial Completion" means the Project is generating and delivering energy to the electric power grid.
30. "TAC" means Technical Advisory Committee as described in Article IV.E.7.
31. "UBC" means the Uniform Building Code of 1997.
32. "WAC" means the Washington Administrative Code.
33. "WDFW" means the Washington Department of Fish and Wildlife.
34. "WSDOT" means the Washington State Department of Transportation.
35. "WTG" means wind turbine generator.

ARTICLE III: GENERAL CONDITIONS

A. Legal Relationship

1. This Agreement shall bind the Certificate Holder, and its successors in interest, and the State and any of its departments, agencies, divisions, bureaus, commissions, boards, and its political subdivisions, subject to all the terms and conditions set forth herein, as to the approval of, and all activities undertaken with respect to, the Project or the Site. The Certificate Holder shall ensure that any activities undertaken with respect to the Project or the Site by its agents (including affiliates), contractors, and subcontractors comply with this Agreement. The term "affiliates" includes any other person or entity controlling, controlled by, or under common control of or with the Certificate Holder.
2. This Agreement, which includes those commitments made by the Certificate Holder in the Revised Application and in the testimony and exhibits in the Applicant's direct case, constitutes the whole and complete agreement between the State of Washington and the Certificate Holder, and supersedes any other negotiations, representations, or agreements, either written or oral.

B. Enforcement

1. This Agreement may be enforced by resort to all remedies available at law or in equity.
2. This Agreement may be suspended or revoked by EFSEC pursuant to RCW 34.05 and RCW 80.50, for failure by the Certificate Holder to comply with the terms and conditions of this Agreement, for violations of RCW 80.50 and the rules promulgated thereunder or for violation of any applicable resolutions or orders of EFSEC.
3. When any action of the Council is required by or authorized in this Site Certification Agreement, the Council may, but shall not be legally obligated to, conduct a hearing pursuant to RCW 34.05.

C. Notices and Filings

Filing of any documents or notices required by this Agreement with EFSEC shall be deemed to have been duly made when delivery is made to EFSEC's offices at Energy Facility Site Evaluation Council, 1300 S. Evergreen Park Dr. SW, P.O. Box 43172, Olympia, WA 98504-3172, in Thurston County.

Notices to be served by EFSEC on the Certificate Holder shall be deemed to have been duly made when deposited in first class mail, postage prepaid, addressed to the Certificate Holder at Whistling Ridge Energy, LLC, P.O. Box 266, Bingen, WA 98605, Attn: Jason Spadaro, with a copy to Tim McMahan, Stoel Rives LLP, 900 SW Fifth Ave., Suite 2600, Portland, OR 97204.

D. Rights of Inspection

Throughout the duration of this Agreement, the Certificate Holder shall provide access to the Site, the Project structures, buildings and facilities, underground and overhead electrical collector lines, and all records relating to the construction and operation of the Project to designated representatives of EFSEC in the performance of their official duties. Such duties include, but are not limited to, environmental monitoring as provided in this Agreement and monitoring and inspections to verify the Certificate Holder's compliance with this Agreement. EFSEC personnel or any designated representatives of EFSEC shall follow all worker safety requirements observed and enforced on the Project site by the Site Certificate Holder and its contractors.

E. Retention of Records

The Certificate Holder shall retain such records as are necessary to demonstrate the Certificate Holder's compliance with this Agreement.

F. Consolidation of Plans and Submittal to EFSEC

Any plans required by this Agreement may be consolidated with other such plans, if such consolidation is approved in advance by EFSEC. This Site Certification Agreement includes time periods for the Certificate Holder to provide certain plans and other information to EFSEC or its designees. The intent of these time periods is to provide sufficient time for EFSEC or its designees to review submittals without delay to the Project construction schedule, *provided* submittals made to EFSEC and/or its designees are complete.

G. Site Certification Agreement Compliance Monitoring and Costs

The Certificate Holder shall pay to the Council such reasonable monitoring costs as are actually and necessarily incurred during the construction and operation of the Project to assure compliance with the conditions of this Agreement as required by RCW 80.50. The amount and manner of payment shall be prescribed by EFSEC pursuant to applicable rules and procedures.

The Certificate Holder shall deposit or otherwise guarantee payment of all EFSEC Costs as defined in Article II.15, for the period commensurate with the activities of this Agreement. EFSEC shall provide the Certificate Holder an annual estimate of such costs. Any instrument guaranteeing payment of EFSEC's costs shall be structured in such a manner as to allow EFSEC to collect from a third party and without approval of the Certificate Holder any such costs which the Certificate Holder fails to pay to EFSEC during any preceding billing period.

H. Site Restoration

The Certificate Holder is responsible for site restoration pursuant to the Council's rules, WAC 463-42, in effect at the time of submittal of the Application.

The Certificate Holder shall develop an Initial Site Restoration Plan in accordance with the requirements set out in Article IV.D of this Agreement and in consultation with WDFW and DNR, and submit it to EFSEC for approval. The Certificate Holder may not begin Site Preparation or Construction until the Council has approved the Initial Site Restoration Plan, including the posting of all necessary guarantees, securities or funds associated therewith.

The Certificate Holder shall submit a detailed site restoration plan to EFSEC for approval in accordance with the requirements of Article VIII.A of this Agreement.

I. EFSEC Liaison

No later than thirty (30) days from the effective date of this Agreement, the Certificate Holder shall designate a person to act as a liaison between EFSEC and the Certificate Holder.

J. Changes in Project Management Personnel

The Certificate Holder shall notify EFSEC of any change in the primary management personnel, or scope of responsibilities of such personnel, for the Project.

K. Amendment of Site Certification Agreement

1. This Agreement may be amended pursuant to EFSEC rules and procedures applicable at the time of the request for amendment. Any requests by the Certificate Holder for amendments to this Agreement shall be made in writing.
2. No change in ownership or control of the Project shall be effective without prior Council approval pursuant to EFSEC rules and procedures.
3. Unless otherwise required by EFSEC, any change in the terms or conditions of the following Sections or Attachments to this Agreement shall not require amendment of this Site Certification Agreement in the manner prescribed in Section K.1 above: Attachment 1, Project legal description, provided the change does not result in a material alteration of the size or location of the Project.
4. Repair, maintenance and replacement of Project Facilities
 - a) The Certificate Holder is permitted, without any further amendment to this agreement, to repair and maintain Project Facilities described in Article I.C, including the WTGs, consistent with the terms of this Agreement.
 - b) The Certificate Holder is permitted to replace the WTGs without amendment to this Agreement provided the replacement meets the following conditions:
 - (i) the WTG is being replaced with the same make and model WTG originally used in the Project ("Replacement Turbine"); or the WTG is being replaced with a wind turbine that is within the size limits and general configuration defined in Article I.C, Project Description ("Comparable Turbine");
 - (ii) the Replacement Turbine or Comparable Turbine is located in the same location as the WTG being replaced; and
 - (iii) the Replacement Turbine or Comparable Turbine meets all other conditions set out in this Agreement.

- c) The Certificate Holder shall notify EFSEC of the replacement of a WTG no later than thirty (30) days prior to the replacement occurring.

5. In circumstances where the Project causes a significant adverse impact on the environment not previously analyzed or anticipated by this Agreement, including wildlife impacts that significantly exceed projections anticipated in the Revised Application, the Final EIS, or where such impacts are imminent, EFSEC shall take all steps it deems reasonably necessary, including imposition of specific conditions or requirements on the Certificate Holder as a consequence of such a situation in addition to the terms and conditions of this Agreement. Such additional conditions or requirements initially shall be effective for not more than ninety (90) days, and may be extended once for an additional ninety (90) day period if deemed necessary by EFSEC to pursue ongoing, or continuing temporary, arrangements under other authority, including but not limited to RCW 34.05, RCW 80.50 RCW or Title 463 WAC.

L. Order of Precedence

In the event of an inconsistency or apparent ambiguity in this Agreement, the inconsistency or ambiguity shall be resolved by giving precedence in the following order:

1. Applicable State of Washington statutes and regulations;
2. Applicable Federal statutes and regulations;
3. The body of this Site Certification Agreement, including any other provision, term or material incorporated herein by reference or otherwise attached to, or incorporated in, this Site Certification Agreement;
4. Representations in Applicant's testimony and exhibits in the adjudicative proceeding in this matter;
5. The application of common sense to effect a result consistent with law and the principles effected in this document.

M. Review and Approval Process; Exceptions

1. Except for the Initial and Final Site Restoration Plans, prior to any site work, the Council may delegate to the EFSEC Manager authority to approve or deny the construction and operational plans required by the this Agreement. The EFSEC Manager shall ensure the Council that the construction and operational plans have been sufficiently reviewed prior to approval.
2. The Council Manager may allow temporary exceptions from plan requirements or provisions of the SCA when such exceptions are not contrary to the purposes of the SCA, provided that a record is kept and Council members are immediately notified.

Any Council member may within seven days of the notice put the item on a Council meeting agenda for review.

ARTICLE IV: PLANS, APPROVALS AND ACTIONS REQUIRED PRIOR TO CONSTRUCTION

A. Notice of Federal Permit Approvals

No later than thirty (30) days after the effective date of this Agreement, the Certificate Holder shall notify the Council of all Federal permits, not delegated to EFSEC, that are required for construction and operation of the Project, if any, and the anticipated date of permit issuance to the Certificate Holder. The Certificate Holder shall notify the Council when all required federal permits have been obtained, no later than ten (10) business days after the last permit has been issued.

B. Mitigation Measures

During construction, operation, decommissioning, and site restoration of this Project, the Certificate Holder shall implement the mitigation measures set forth in this Agreement, including, but not limited to, those presented in the revised Application or identified in the final FEIS as commitments made by Whistling Ridge Energy.

No later than sixty (60) days prior to the beginning of Site Preparation, the Certificate Holder shall file with EFSEC a comprehensive list of these mitigation measures. For each of these mitigation measures, the Certificate Holder shall in the same filing further identify the construction plan and/or operation plan addressing the methodology for its achievement.

The specific plans and submittals listed in the remainder of this Article IV, and Articles V, VI, VII and VIII, shall incorporate these mitigation measures as applicable.

C. Construction Stormwater Plans

1. Notice of Intent. No later than sixty (60) days prior to the beginning of Site Preparation the Certificate Holder shall file with EFSEC a Notice of Intent to be covered by a General National Pollutant Discharge Elimination System (NPDES) Permit for Stormwater Discharges Associated with Construction Activities.
2. Construction Stormwater Pollution Prevention Plan. No later than sixty (60) days prior to the beginning of Site Preparation, the Certificate Holder shall submit to EFSEC a Construction Stormwater Pollution Prevention Plan (Construction SWPPP), and provide a copy to WDFW for comment. The Construction SWPPP shall meet the requirements of the Ecology stormwater pollution prevention program (WAC 173-230), and the objectives and requirements in Special Condition S.9 of the *National Pollutant Discharge Elimination System and State Waste Discharge General Permit for Stormwater Discharges Associated with Construction Activities* issued by the Department of Ecology on January 1, 2011 or as revised. The Certificate Holder shall not begin Site Preparation prior to obtaining Council approval of the Construction SWPPP.

The Construction SWPPP shall identify a regular inspection and maintenance schedule for all erosion control structures. The schedule shall include inspections after significant rainfall events. Any damaged structures shall be addressed immediately. Inspections, and subsequent erosion control structure corrections, shall be documented in writing and available for EFSEC's review on request. The SWPPP shall provide special attention to control of any and all runoff from the project and its roads into the Little White Salmon River.

3. Temporary Erosion and Sediment Control Plan. The Certificate Holder shall develop a Temporary Erosion and Sediment Control (TESC) Plan. No later than sixty (60) days prior to the beginning of Site Preparation, the Certificate Holder shall submit the TESC Plan to the Council for approval and provide a copy to WDFW and Ecology for comment. The Certificate Holder shall not begin Site Preparation prior to obtaining Council approval of the TESC Plan. As an alternative to submitting a separate TESC Plan, the Certificate Holder may include measures for temporary erosion and sedimentation control in the Construction SWPPP required in Article IV, Section C.2, above.
4. Construction Spill Prevention, Control and Countermeasures Plan. The Certificate Holder shall develop a Construction Spill Prevention, Control, and Countermeasures Plan (Construction SPCCP), consistent with the requirements of 40 CFR Part 112. The Construction SPCCP shall include the Site, feeder line corridors, and all access roads. The Certificate Holder shall require all contractors working on the facility to have a spill prevention and countermeasure program consistent with 40 CFR Part 112. No later than sixty (60) days prior to the beginning of Site Preparation, the Certificate Holder shall submit the Construction SPCCP to the Council for approval and provide a copy to WDFW and Ecology for comment. The Certificate Holder shall not begin Site Preparation prior to obtaining Council approval of the Construction SPCCP. All applicable elements of the Construction SPCCP shall be implemented prior to the beginning of Site Preparation.

D. Initial Site Restoration Plan

The Certificate Holder is responsible for Project decommissioning and site restoration pursuant to Council rules: The Certificate Holder shall develop an Initial Site Restoration Plan, pursuant to the requirements of WAC 463-42-655 in effect on the date of Application, in consultation with WDFW and DNR. The Certificate Holder shall submit the Initial Site Restoration Plan to the Council for review at least sixty (60) days prior to the beginning of Site Preparation. The Certificate Holder shall not begin Site Preparation prior to obtaining approval of the Initial Site Restoration Plan from the Council.

The Initial Site Restoration Plan shall be prepared in sufficient detail to identify, evaluate, and resolve all major environmental and public health and safety issues reasonably anticipated by the Certificate Holder on the date the Plan is submitted to EFSEC. The Initial Site Restoration Plan shall describe the process used to evaluate the options and select the measures that will be taken to restore or preserve the Project site or otherwise protect the public against risks or danger resulting from the Project. The Initial Site Restoration Plan shall include a discussion of economic factors regarding the costs and benefits of various restoration options versus the relative public risk, and shall address provisions for funding or bonding arrangements to meet

the Project site restoration or management costs. The Initial Site Restoration Plan shall be prepared in detail commensurate with the time until site restoration is to begin. The scope of proposed monitoring shall be addressed in the Initial Site Restoration Plan.

The objective of the Plan shall be to restore the site to approximate pre-Project condition or better. The Plan shall require removal of the wind turbine nacelles, blades, towers, foundations, cables and other facilities to a depth of four feet below grade, regrading of areas around the Project facilities and final restoration of disturbed land.

The Plan shall include the following elements:

1. Decommissioning Timing and Scope, as required by Article VIII.C of this Agreement.
2. Decommissioning Funding and Surety, as required by Article VIII.D of this Agreement.
3. Mitigation measures described in the Revised Application, Final EIS, and this Agreement that will be implemented for decommissioning of the Project.
4. An Initial Site Restoration Plan, which shall address both the possibility that site restoration will occur prior to, or at the end of, the useful life of the Project and also the possibility of the Project being suspended or terminated during construction.
5. A description of the assumptions underlying the plan. For example, the plan should explain the anticipated useful life of the Project, the anticipated time frame of site restoration, and the anticipated future use of the site.
6. An initial plan for demolishing facilities, salvaging equipment, and disposing of waste materials.
7. Performing an on-site audit, and preparing an initial plan for disposing of hazardous materials (if any) present on the site and remediation of hazardous contamination (if any) at the site.
8. An initial plan for restoring the site, including the removal of structures and foundations to four feet below grade and the regrading of the site.
9. Provisions for preservation or removal of Project facilities if the Project is suspended or terminated during construction.

E. Habitat, Vegetation, and Fish and Wildlife Mitigation

1. Habitat Mitigation Plan. Prior to the beginning of Site Preparation, the Certificate Holder shall develop a Habitat Mitigation Plan in consultation with WDFW, based upon the 2009 WDFW Wind Power Guidelines, including the compensatory

mitigation ratios. The Certificate Holder shall submit the Habitat Mitigation Plan to EFSEC for approval at least 60 days prior to the beginning of Site Preparation.

- a) The Certificate Holder and WDFW will agree upon a map of habitat types found within the Project Area ("Habitat Map"). This Habitat Map will be based upon the Natural Resources Conservation Service (NRCS) maps of soils and ecological sites, and field investigations of the Project Area.
- b) The Habitat Mitigation Plan will specify the Certificate Holder's Mitigation Obligation. The Certificate Holder's Mitigation Obligation will be calculated using the mitigation ratios specified in the 2009 WDFW Wind Power Guidelines. For purposes of calculating the Mitigation Obligation, expected habitat impacts will be determined based upon the pre-construction Project Layout drawings and the habitat types shown on the Habitat Map. Pre-construction Project Layout drawings will show expected permanent and temporary land disturbances.
- c) The Certificate Holder may satisfy its Mitigation Obligation either by purchasing a mutually acceptable mitigation parcel and deeding it to WDFW or a mutually acceptable third party, by contributing money to a mutually acceptable third-party that owns or will purchase a mitigation parcel, or the payment of a fee equivalent to the value of permanently disturbed project areas to WDFW in lieu of mitigation. If the Certificate Holder has not satisfied its Mitigation Obligation prior to commencing Site Preparation, the Certificate Holder will provide a letter of credit to EFSEC in an amount sufficient to provide financial security for the Mitigation Obligation. The Certificate Holder will be required to satisfy its Mitigation Obligation prior to commencing commercial operation of the Project.
- d) The Habitat Mitigation Plan will include a process to determine the actual impacts to habitat following the completion of construction. In the event that actual impacts to habitat exceed the expected impacts determined prior to construction, the Habitat Mitigation Plan will include a mechanism for the Certificate Holder to provide supplemental compensatory mitigation (Supplemental Mitigation). Supplemental Mitigation, if any, may take the form of an additional mitigation parcel, the contribution of additional funds to a third-party who owns or will purchase an additional mitigation parcel, or the payment of an additional fee equivalent to the value of permanently disturbed project acres to WDFW in lieu of mitigation. During the Application review process, the Applicant and WDFW discussed a potential mitigation parcel, however, the final details were not offered to the Council. Continued work on the mitigation parcel by the Applicant and WDFW is encouraged.

2. Rare Plants. The Certificate Holder shall complete a rare plant survey of the Project Area, following the Washington Heritage Program's suggested rare plant survey guidelines (<http://dnr.wa.gov/nhp/redesk/pubs/rareplantsurveyguidelines.pdf>) at least 60 days prior to beginning Site Preparation. If any plant species considered Endangered, Threatened, or Sensitive by the Washington Heritage Program is identified on the Project site the Certificate Holder shall develop a Plant Conservation Plan in consultation with the Washington Natural Heritage Program and submit it to EFSEC for approval no later than 60 days prior to the beginning of Site Preparation.

3. Wetlands, Streams and Riparian Areas.
 - a) Construction of the Project shall not result in any temporary or permanent disturbance of wetlands or other surface waters considered to be Waters of the United States by the Department of the Army Corps of Engineers for purposes of the Clean Water Act, 33 U.S.C. §.1301 et seq. If any unanticipated disturbance of wetlands occurs, the Certificate Holder shall prepare a Wetlands Restoration Plan in consultation with WDFW and submit it to EFSEC for approval.

 - b) Prior to any construction work affecting the bed or flow of in waters of the state (including seasonally dry channels), the Certificate Holder will consult with and obtain approval from WDFW, and provide documentation of such approval to EFSEC. At least sixty (60) days prior to beginning any such channel work, the Certificate Holder shall submit construction drawings to EFSEC for review and approval. The drawings shall specify the exact locations of work to be conducted, buffers that are required, and best management practices and mitigation measures that will be implemented as required by this article.

 - c.) Activities in riparian forests are considered forest practices under the Washington Forest Practices Act. Such activities shall be conducted in accordance with the applicable Forest Practices Rules and be permitted through a Forest Practices Application. - Section M

4. Construction Soil Management and Vegetation Plan. In consultation with WDFW and Ecology, the Certificate Holder shall develop a Construction Soil Management and Vegetation Plan. No later than sixty (60) days prior to the beginning of Site Preparation, the Construction Soil Management and Vegetation Plan shall be submitted to the Council for review and approval. The Certificate Holder shall not begin Site Preparation prior to obtaining EFSEC approval of the Soil Management and Vegetation Plan. The Soil Management Plan shall provide special attention to control of any runoff from the project and its roads into the Little White Salmon River.

5. Wet Season Construction. Construction activities are not restricted to particular seasons. However, the Certificate Holder shall attempt to sequence construction activities in order to minimize temporary earth disturbances during the wet season where practical. In particular, the Certificate Holder shall avoid earth-disturbing activities that result in distinct areas of temporary habitat disturbance (e.g. cross-county trenching to install electric collector system lines) in areas when soils are saturated (which commonly occurs from mid-November through April) to the greatest extent possible. If such activities are to take place during periods of soil saturation, the Certificate Holder shall consult with WDFW to develop a specific plan incorporating strategies and best management practices to minimize the environmental impacts of the activities and additional restoration measures to ensure successful restoration of the disturbed habitat. Forest practice activities shall be conducted in accordance with the applicable Forest Practices Rules and be permitted through a Forest Practices Application - See Section M

6. Habitat Restoration Plan. In consultation with WDFW, the Certificate Holder shall develop a Habitat Restoration Plan for temporarily disturbed areas.

The Habitat Restoration Plan shall require that all temporarily disturbed areas be reseeded with an appropriate mix of native, locally-adapted plant species in a manner and sequence that will maximize the likelihood of successful restoration of the area and prevent the spread of noxious weeds. The Plan shall include a pre-identified reference site or sites that the Certificate Holder, WDFW and DNR can use to gauge the success of the habitat restoration and revegetation efforts. The Habitat Restoration Plan shall include a restoration schedule that identifies timing windows during which restoration should take place, and an overall timeline for when all restoration activities will be completed. WDFW and DNR may suggest modifications to the initial Habitat Restoration Plan as new information becomes available.

No later than sixty (60) days prior to the beginning of Site Preparation, the Habitat Restoration Plan shall be submitted to the Council for review and approval. The Certificate Holder shall not begin Site Preparation prior to obtaining EFSEC approval of the Habitat Restoration Plan.

Forest practices activities, including reforestation of forestlands, shall be conducted in accordance with the applicable Forest Practices Rules and be permitted through a Forest Practices Application.- See Section M

7. Technical Advisory Committee. The purpose of the Technical Advisory Committee (TAC) is to ensure that monitoring data collected pursuant to the required Avian Monitoring Plan (see Article VI.C), the Bat Monitoring Plan (see Article VI.E) and other related monitoring data are considered in a forum in which independent and informed parties can collaborate with the Certificate Holder. The TAC will make recommendations to EFSEC if it deems additional studies or mitigation are warranted to address impacts that were either not foreseen in the Revised Application, the Final EIS, or significantly exceed impacts that were projected. In order to make advisory recommendations to EFSEC, the TAC will review and consider results of Project

monitoring studies, including post-construction avian and bat mortality surveys, and new scientific findings made at wind generation facilities with respect to the impacts on habitat and wildlife, as they may relate to the Whistling Ridge Energy Project. The TAC will assess whether the post-construction restoration and mitigation and monitoring programs for wildlife that have been identified and implemented merit further studies or additional mitigation, taking into consideration factors such as the species involved, the nature of the impact, monitoring trends, and new scientific findings.

The TAC, or individual members thereof, will be authorized to consult, exchange information, and collaborate with TACs from other wind turbine projects, including the Kittitas Valley Wind Power Project, Desert Claim Wind Power Project, and the Wild Horse Wind Power Project, for purposes of identifying and monitoring cumulative environmental impacts, and, if necessary, developing mitigation recommendations addressing known or newly identified cumulative impacts related to the construction and operation of wind power projects.

The TAC may include, but need not be limited to, representatives from WDFW, U.S. Fish and Wildlife Service, Audubon Washington or its member chapters, EFSEC, Skamania County, DNR, and the Certificate Holder. EFSEC, at its discretion, may add additional representatives to the TAC from state, local, federal and tribal governments. All TAC members must be approved by EFSEC.

No representative to the TAC may be party to a turbine lease agreement, or any other contractual obligation with the Certificate Holder.

No later than sixty (60) days prior to the beginning of Site Preparation, the Certificate Holder shall contact the agencies and organizations listed above requesting that they designate a representative to the TAC, and that the agencies or organizations notify EFSEC in writing of their TAC representative and of their member's term of representation. No later than sixty (60) days prior to the beginning of Commercial Operation, the Certificate Holder shall convene the first meeting of the TAC.

No later than sixty (60) days after the beginning of Construction, the Certificate Holder shall submit to EFSEC proposed Rules of Procedure describing how the TAC shall operate, including but not limited to a schedule for meetings, a meeting procedure, a process for recording meeting discussions, a process for making and presenting timely TAC recommendations to the Council, and other procedures that will assist the TAC to function properly and efficiently. The Certificate Holder will provide a copy of the proposed Rules of Procedure at the first TAC meeting for review and comment. The TAC may suggest modifications of the plan; any such modifications must be approved by EFSEC.

The TAC will be convened as determined by EFSEC, except that EFSEC may terminate the TAC if: the TAC has ceased to meet due to member attrition; or, the TAC determines that all of the pre-permitting, operational and post-operational monitoring has been completed and further monitoring is not necessary; or the TAC

members recommend that it be terminated. If the TAC is terminated or dissolved, EFSEC may reconvene and reconstitute the TAC at its discretion.

The ultimate authority to require implementation of additional mitigation measures, including any recommended by the TAC, shall reside with EFSEC.

8. Pre-Construction Raptor Nest Survey. During the nesting season immediately prior to beginning Site Preparation, the Certificate Holder shall conduct a raptor nest survey. The results of the survey shall be submitted to EFSEC and will be used to determine timing restrictions and/or buffer distances to active raptor nests.

F. Construction Traffic Development Standards

Development Standards: The Certificate Holder shall incorporate the following development standards into the design and construction of the Project.

1. Project Access Roads. Access to the turbines will be achieved via graveled roads within the Project Area.

Access from county roads shall be constructed with the appropriate slopes and culverts in accordance with Skamania County standards in effect on the date of the Application in this matter. All roads within the site shall be designed in consultation with the DNR and other fire services providers, and emergency suppliers to ensure that fire vehicles can gain safe access to the site as necessary to provide emergency services.

2. Video Monitoring. County roads, including shoulder pavement, shall be video monitored before and after construction of the Project. The Certificate Holder shall repair any damage to county roads, such that the roads meet or exceed Skamania County standards.
3. Project Site Access. In order to coordinate access to any public lands in accordance with DNR State Land management practices, the Certificate Holder will implement an adaptive management approach. Adaptive management allows for changes over time to the level of control and types of activities, as needed. In general, the Certificate Holder will permit controlled access to any public lands, as long as it does not interfere with or introduce adverse impacts to Project operations or personnel. The Certificate Holder will have no obligation to provide access on or across private lands.
4. Construction Traffic Management Plan. At least sixty (60) days prior to the beginning of Site Preparation, the Certificate Holder shall submit to EFSEC for review a Construction Traffic Management Plan. The Certificate Holder shall not begin Site Preparation prior to obtaining Council approval of the Construction Traffic Management Plan. This plan will incorporate those items outlined in Article IV.F.1 through 3, above.

5. Oversize or Overweight Hauls. The Certificate Holder shall notify EFSEC, at the earliest time possible, of any permits or approvals required to conduct oversize or overweight hauls.

G. Federal Aviation Administration Review

No later than thirty (30) days prior to the beginning of Construction, the Certificate Holder shall provide to EFSEC copies of the Determination of Non-Hazard certificates issued by the Federal Aviation Administration (FAA).

H. Cultural and Archaeological Resources Plan

With the assistance of an experienced archaeologist, and in consultation with the Department of Archaeology and Historic Preservation (DAHP) and the Yakama Nation, the Certificate Holder shall develop a Cultural Resources Monitoring and Mitigation Plan for monitoring construction activities and responding to the discovery of archaeological resources or buried human remains. The Certificate Holder shall provide copies of the draft Plan for comment to other potentially affected tribes, prior to submitting the plan for EFSEC approval. The Certificate Holder shall submit the Plan to EFSEC for review and approval no later than sixty (60) days prior to the start of Site Preparation. The Certificate Holder shall not begin Site Preparation prior to obtaining approval of the Plan from the Council. All applicable elements of the Plan shall be implemented prior to the start of Site Preparation. The Plan shall include, but not be limited to, the following:

1. The Plan shall provide for the avoidance of significant archaeological sites where practical. For sites to be avoided, the boundaries of identified cultural resources and buffer zones shall be staked in the field and flagged as no-disturbance areas to avoid inadvertent disturbance during construction. These site markings will be removed following construction. The Plan shall address alternative mitigation measures to be implemented if it is not practical to avoid archaeological sites or isolates. Special attention shall be given to the identified significant cultural site known as Chemawa Hills and the concerns of the Yakama Nation regarding this site.
2. The Plan shall address the possibility of the unanticipated discovery of archaeological artifacts during construction. If any archaeological artifacts, including but not limited to human remains, are observed during construction, disturbance and/or excavation in that area will cease, and the Certificate Holder shall notify the DAHP, EFSEC, the Yakama Nation and the affected tribes and, in the case of human remains, the County Coroner or Medical Examiner. At that time, appropriate treatment and mitigation measures shall be developed in coordination with the agencies and tribes cited above, and implemented following approval by EFSEC. If Project facilities cannot be moved or re-routed to avoid the resources, the Certificate Holder shall contact EFSEC and DAHP for further guidance which may require the implementation of a treatment plan. If a treatment plan is required, it shall be developed in consultation with DAHP and any affected tribes.
3. Potentially affected tribes shall be notified of earth-disturbing construction activities and if a tribe requests to have its representatives present during earth-disturbing

construction activities, the Certificate Holder shall accommodate reasonable requests. In all cases the Certificate Holder shall inform EFSEC of each such tribal request.

I. Construction Emergency Plan

1. Construction Emergency Plan. The Certificate Holder shall retain qualified contractors familiar with the general construction techniques and practices to be used for the Project and its related support facilities. The construction specifications shall require contractors to implement a safety program that includes an emergency plan. The Certificate Holder shall prepare and submit a Construction Emergency Plan to EFSEC for review at least sixty (60) days prior to the beginning of Site Preparation. The Certificate Holder shall coordinate development and implementation of the Plan with applicable local and state emergency services providers. The Certificate Holder shall not begin Site Preparation or Construction prior to obtaining EFSEC approval of the Construction Emergency Plan. The Construction Emergency Plan shall include consideration of:

- a) Medical emergencies;
- b) Construction emergencies;
- c) Project Area evacuation;
- d) Fire protection and prevention;
- e) Flooding;
- f) Extreme weather abnormalities;
- g) Earthquake;
- h) Volcanic eruption;
- i) Facility blackout;
- j) Hazardous materials spills;
- k) Blade or tower failure;
- l) Aircraft impact;
- m) Terrorism, sabotage, or vandalism;
- n) Bomb threat.

2. Fire Protection Services. Prior to commencing Site Preparation, the Certificate Holder shall verify continuing protection for Whistling Ridge Energy and shall execute a fire protection services agreement with fire services providers for the Project site to ensure that adequate fire protection services are in place during the construction and operation of the Project. Cost for fire protection services shall be borne by Whistling Ridge Energy.
3. Fire Control Plan. The Certificate Holder shall develop and implement a Fire Control Plan in coordination with state and local agencies to minimize risk of accidental fire, during construction and to ensure effective response to any fire that does occur on the Project Site at any time. The Certificate Holder shall submit the Fire Control Plan to EFSEC for review and approval at least sixty (60) days prior to Site Preparation and provide a copy to WDFW, DNR, Southwest Region and other local and state service providers for comment. The Certificate Holder shall not begin Site Preparation prior to obtaining Council approval of the Fire Control Plan.

J. Construction Management Plan

The Certificate Holder shall, with the assistance of Council staff, develop a detailed Construction Management Plan in consultation with WDFW and other affected State and local agencies. The Plan shall address the primary Site Preparation and Construction phases for the Project, and shall be generally based on the mitigation measures contained in this Agreement and the Revised Application. At least sixty (60) days prior to the start of Site Preparation, the Certificate Holder shall submit the Construction Management Plan to the Council for review and approval. The Certificate Holder shall not begin Site Preparation prior to obtaining Council approval of the Construction Management Plan.

K. Construction Schedule

No later than thirty (30) days prior to the beginning of Site Preparation, the Certificate Holder shall submit to EFSEC an overall construction schedule. Thereafter, the Certificate Holder shall notify EFSEC of any significant changes in the construction schedule.

L. Construction Plans and Specifications

1. At least sixty (60) days prior to the beginning of Construction, the Certificate Holder shall submit to EFSEC or its designated representative for approval those construction plans, specifications, drawings and design documents that demonstrate the Project design will be in compliance with the conditions of this Agreement. The Certificate Holder shall also provide copies to WDFW, DNR, Ecology and other agencies as EFSEC may direct, for comment. The plans shall include overall Project site plans, foundation drawings, equipment and material specifications, and vendor guarantees for equipment performance as appropriate. The Certificate Holder shall not begin Construction prior to obtaining Council approval of the construction plans and specifications.
2. The Certificate Holder shall consult with WDFW on ways to minimize road construction and other habitat impacts prior to preparing final construction plans. The Certificate Holder shall also consult with emergency services suppliers prior to preparing final road construction plans, to ensure that interior Project roads are sufficient to provide reliable access by emergency vehicles. In its final design for construction, the Certificate Holder shall maximize the use of existing roads and pathways, and minimize the construction of new roads as much as reasonable and practical, and without disrupting wetlands or other sensitive habitat. The final design shall be subject to approval by EFSEC.
3. The Certificate Holder shall provide a final project layout plan to demonstrate that project structures comply with the setback conditions of Article I.C.6.
4. Project buildings, structures, and associated systems shall be designed and constructed consistent with requirements, including the seismic standards, of the Uniform Building Code (UBC) or the International Building Code (IBC), but no less stringent than those found in the UBC of 1997.

5. The Certificate Holder shall design, install, operate and maintain the domestic on-site septic system in accordance with Skamania County requirements.
6. The Certificate Holder shall purchase water only from sources that have been certificated or otherwise authorized by the Department of Ecology. At least thirty (30) days prior to the beginning of Site Preparation, the Certificate Holder shall provide to EFSEC proof of contract for the water supply source it intends to use during Site Preparation, Construction and Operation. The Certificate Holder shall notify EFSEC of any changes in the source of supply no later than fifteen (15) days before the change.
7. Prior to the beginning of Site Preparation, the Certificate Holder shall present to EFSEC copies of any signed and executed lease(s) with other land owners.
8. For each turbine located within 2,500 feet of a non-participating landowner's existing residence, micro-siting determinations shall give highest priority to increasing the distance of the turbine from that non-participating landowner's residence, so as to further mitigate and minimize any visual impacts on that non-participating landowner. At least 60 days prior to commencement of construction, the Applicant shall provide EFSEC with documentation demonstrating its efforts to site the applicable turbine locations in this manner and identifying specific reasons if Applicant considers this not to be feasible.

M. Forest Practices Act Compliance

Forest practices activities conducted on non-federal and non-tribal forestlands are governed by the Washington Forest Practices Act and are subject to the Forest Practices Rules (WAC 222). Such activities associated with this project on forestlands are required to be permitted by a Forest Practices Application. This applies to activities during the construction phase of the project and to subsequent activities on land remaining in forestry for the duration of the project.

1. At least 60 days prior to initiating ground disturbance activities, the Certificate Holder shall submit to EFSEC for review and approval a complete Forest Practices Application/Notification that addresses all forest practices, including, but not limited to, timber harvest, road construction/reconstruction and reforestation activities. Prior to submittal to EFSEC, the Certificate Holder shall coordinate with Southwest Region of the Department of Natural Resources (DNR) to ensure the application is completed in compliance with DNR requirements.
2. Other activities that may require additional permits include:
 - a.) Gravel and rock removal from pits or quarries may require a Surface Mining reclamation permit normally issued by the Geology Division of DNR in Olympia.

- b.) Slash disposal may require a Burn Permit normally issued by the DNR Southeast Region office.

ARTICLE V: PROJECT CONSTRUCTION

A. Environmental Monitoring During Construction

1. Environmental Monitor (EM). EFSEC will provide full-time on-site environmental monitoring for the construction phase of the Project, at the Certificate Holder's cost. The EM shall be an independent, qualified engineering firm (or a person) selected by EFSEC, and shall report directly to EFSEC.
2. Environmental Compliance Program for Construction Activities. The Certificate Holder shall identify and develop environmental monitoring and "stop-work" criteria in consultation with the EM and other EFSEC designees prior to beginning Site Preparation. EFSEC will review and approve the final stop-work criteria to be implemented for the Project. The Environmental Compliance Program will cover avoidance of sensitive areas during construction, waste handling and storage, stormwater management, spill prevention and control, habitat restoration efforts begun during the construction phase of the project and other mitigation measures required by this Agreement. The Certificate Holder shall implement the program to ensure that construction activities meet the conditions, limits and specifications set out in the Site Certification Agreement, all Attachments thereto, and all other applicable state and federal environmental regulations.
3. Forest Practices Compliance. EFSEC will provide Washington Forest Practices compliance and enforcement on all approved Forest Practices Applications, at the Certificate Holder's expense. Compliance shall be conducted by a DNR Forest Practices Forester selected by DNR.
4. Preconstruction Meeting. A preconstruction meeting shall be held between the Environmental Monitor and the construction team to review and clarify construction related plans, special concerns, and construction techniques prior to beginning work.
5. Copies of Plans and Permits Kept On Site. A copy of the Site Certification Agreement, Plans approved by the Council or its designees, and all applicable construction permits will be kept at the Project Site. The lead Project construction personnel and construction project managers will be required to read, follow, and be responsible for all required compliance activities. The EM will be responsible for monitoring that all construction permit requirements are adhered to, and that any deficiencies are promptly reported and that corrective measures are initiated.
6. Environmental Monitor Weekly Reports. The EM will provide weekly reports to EFSEC regarding adherence to BMPs, the implementation of environmental mitigation plans, and environmental problems reported or discovered as well as corrective actions taken by the Certificate Holder to resolve these problems. The EM will provide copies to the Certificate Holder of reports submitted to EFSEC.

7. Environmental Violations and Stop-Work Orders. Upon identification of an environmental noncompliance issue, the EM will work with the responsible subcontractor or direct-hire workers to correct the violation; if non-compliance is not corrected in a reasonable period of time the EM shall request that EFSEC issue a "stop-work" order for that portion of the work not in compliance with Project environmental requirements. EFSEC will promptly notify The EM of any "stop work" orders that have been issued.
8. Environmental Monitor Availability. No excavation, filling or re-grading work shall be performed at any time unless the EM is available for full, concurrent and independent environmental monitoring on-site.

B. Quarterly Construction Reports

The Certificate Holder shall submit quarterly construction progress reports to EFSEC no later than thirty (30) days after the end of each calendar quarter. Such reports shall describe the status of construction and identify any changes in the construction schedule.

C. Construction Inspection

EFSEC shall provide plan review and inspection of construction for all Project buildings, structures, underground and overhead electrical lines, sanitary waste water discharge systems, and other Project facilities to ensure compliance with this Agreement. Construction shall be in accordance with the approved design and construction plans, the IBC or UBC and other relevant regulations. EFSEC may contract with Skamania County, another appropriate agency or an independent firm to provide these services.

D. As-Built Drawings

The Certificate Holder shall maintain a complete set of as-built drawings on file for the life of the Project, and shall allow the Council or its designated representative access to the drawings on request following reasonable notice.

E. Habitat, Vegetation, Fish and Wildlife

1. The Certificate Holder shall use construction techniques and Best Management Practices (BMPs) to minimize potential impacts to habitat and wildlife;
2. The Certificate Holder shall ensure that the construction team includes a qualified staff person or persons with experience in construction in sensitive coniferous forest environments similar to that found in the Project Area.
3. Construction teams shall stake work and clearing limits prior to construction and ground clearing.
4. The Certificate Holder shall avoid the installation of above-ground collector lines where practical. To the extent practical, collector lines shall be installed in or alongside roadways, in areas currently disturbed, in other areas that will be permanently disturbed by Project construction, or by directionally drilling under surface waters. When it is not practical to avoid the installation of above-ground collector lines, the Certificate Holder

shall consult with WDFW to determine the most practical alternative with the least adverse environmental impacts. Any above-ground collector lines will be designed to comply with the current Avian Power Line Interaction Committee Guidelines.

5. The Certificate Holder shall post, maintain and enforce reasonable driving speed limits within the Project Area to minimize potential collisions with wildlife during construction.
6. All permanent meteorological towers shall be free-standing monopoles without guy wires. The Certificate Holder shall use bird markers on all temporary meteorological towers with guy wires.

F. Construction Noise

The Certificate Holder and its contractors and subcontractors shall use industry standard noise attenuation controls during construction to mitigate noise impacts and shall comply with applicable state and local noise emission regulations. The Certificate Holder shall limit blasting and loud construction activities to daytime hours (7 a.m. to 10 p.m.), and shall comply with the applicable requirements of WAC 173-60-040 (2) (b) during the hours of 10:00 p.m. and 7:00 a.m.

G. Construction Safety and Security

1. Federal and State Safety Regulations. The Certificate Holder shall comply with applicable federal and state safety regulations (including regulations promulgated under the Federal Occupational Safety and Health Act and the Washington Industrial Safety and Health Act), as well as local and state industrial codes and standards (such as the Uniform Fire Code). The Certificate Holder, its general contractor, and all subcontractors shall make every reasonable effort to maximize safety for individuals working at the Project.
2. Construction Phase Health and Safety Plan. The Certificate Holder shall develop and implement a Construction Phase Health and Safety Plan prior to the beginning of Site Preparation. The Certificate Holder shall consult with local and state organizations providing emergency response services during the development of the plan to ensure timely response in the event of an emergency. The Certificate Holder shall submit the plan to EFSEC for review and approval no later than sixty (60) days prior to Site Preparation.
3. Construction Phase Site Security Plan. The Certificate Holder shall develop and implement a construction phase site security plan to effectively monitor the Project Site. The Certificate Holder shall consult with local and state organizations providing emergency response services during the development of the plan to ensure timely response in the event of an emergency. The Certificate Holder shall submit the plan to EFSEC for review and approval no later than sixty (60) days prior to Site Preparation.

4. Visitors Safety. Visitors shall be provided with safety equipment where and when appropriate.

H. Fugitive Dust

The Certificate Holder shall implement appropriate mitigation measures to control fugitive dust from roads and construction activities. The Certificate Holder shall use water or a water-based, environmentally safe dust palliative such as lignin, for dust control on unpaved roads during Project construction. The Certificate Holder shall not use calcium chloride for dust suppression.

I. Contaminated Soils

In the event that contaminated soils are encountered during construction, the Certificate Holder shall notify EFSEC and Ecology as soon as possible. The Certificate Holder shall manage, handle, and dispose of contaminated soils in accordance with applicable local, state and federal requirements.

J. Light, Glare and Aesthetics

The Certificate Holder shall implement mitigation measures to minimize light and glare impacts. Project buildings shall be constructed of local materials and in local building styles to maximize their fit into the local landscape, and shall be landscaped with native vegetation around buildings and equipment boxes to integrate the structures into the surrounding landscape. Project structures shall be painted with neutral/low reflectivity finishes to the extent feasible. The Certificate holder shall neither place nor allow advertising, logos, cellular antennas, or other clutter on the turbines, nacelles, or buildings of the Project. The O&M facility buildings shall be painted with a low reflectivity colored finish. The only lighting on the turbines will be the aviation lighting required by FAA. Outdoor lighting at the O&M facility and substation(s) will be minimized to safety and security requirements, motion sensors will be used to keep lighting turned off when not required, and lighting will be equipped with hoods and directed downward. If compliance with any of these requirements is not feasible, the Certificate Holder may seek a waiver from the Council.

K. Construction Wastes and Clean-Up

The Certificate Holder shall dispose of sanitary and other wastes generated during construction at facilities authorized to accept such wastes.

The Certificate Holder shall properly dispose of all temporary structures not intended for future use upon completion of construction. The Certificate Holder also shall dispose of used timber, brush, refuse or flammable materials resulting from the clearing of lands or from construction of the Project in a manner and schedule approved by EFSEC.

**ARTICLE VI: SUBMITTALS REQUIRED PRIOR TO THE
BEGINNING OF COMMERCIAL OPERATION**

A. Operations Stormwater Pollution Prevention Plan

1. Operations Stormwater Pollution Prevention Plan. The Certificate Holder shall prepare an operations stormwater pollution prevention plan (Operations SWPPP) in consultation with WDFW and Ecology and submit it to EFSEC for approval at least sixty (60) days prior to the beginning of Commercial Operation. The Operations SWPPP shall include an operations manual for permanent BMPs. The Operations SWPPP shall be prepared in accordance with the guidance provided in the Ecology *Stormwater Management Manual for Western Washington, September 2005 or as revised*. The Certificate Holder shall periodically review the Operations SWPPP against the guidance provided in the applicable Ecology Stormwater Management Manual, and make modifications as necessary to the Operations SWPPP to comply with current requirements for BMPs.
2. Operations Spill Prevention, Control and Countermeasure Plan. The Certificate Holder shall prepare an Operations Spill Prevention, Control and Countermeasures Plan (Operations SPCCP) in consultation with WDFW and Ecology and submit it to EFSEC for review and approval at least thirty (30) days prior to the beginning of commercial operation. The Operations SPCCP shall be prepared pursuant to the requirements of 40 CFR Part 112, Sections 311 and 402 of the Clean Water Act and Section 402 (a)(1) of the Federal Water Pollution Control Act (FWPCA) and RCW 90.48.080. The Operations SPCCP shall include the Site, all Project structures and facilities on the site, substations(s), feeder line corridors, and all access roads. The Operations SPCCP shall be implemented within three (3) months of the beginning of Commercial Operation. The Operations SPCCP must be updated and submitted to the Council every two (2) years.

B. Emergency Plans

1. Operations Emergency Plan. No later than sixty (60) days prior to the beginning of Commercial Operation, the Certificate Holder shall submit for the Council's approval an Operations Emergency Plan for the Project to provide for employee safety in the event of emergencies, such as those listed below. The Certificate Holder shall coordinate development of the plan with local and state agencies that provide emergency response services in the Project Area. Periodically, the Certificate Holder shall provide the Council with updated lists of emergency personnel, communication channels and procedures. The Emergency Response Plan shall address in detail the procedures to be followed in the event of emergencies listed in Article IV.I.1.
2. Fire Protection Services. The Certificate Holder shall maintain fire protection services agreement(s) pursuant to IV.I.2 of this Agreement for the entire Project, for the life of the Project or until and to the extent that the Project site is annexed into a Fire District or other municipal entity that provides fire protection services.

3. Operations Fire Control Plan. The Certificate Holder shall develop an operations phase Fire Control Plan in consultation with WDFW and DNR, Southwest Region and in coordination with other state and local agencies to minimize risk of accidental fire during operation and ensure effective response to any fire that does occur. No later than sixty (60) days prior to the beginning of Commercial Operation the Certificate Holder shall submit the Plan to EFSEC for review and approval.

C. Post-Construction Avian Monitoring Plan

No later than one hundred twenty (120) days prior to beginning Commercial Operation, the Certificate Holder shall submit to EFSEC for review and approval a Post-Construction Avian Monitoring Plan. The Post-Construction Avian Monitoring Plan shall be developed in consultation with the WDFW. The Avian Monitoring Plan shall be based upon the 2009 WDFW Wind Power Guidelines, although the Certificate Holder and WDFW may agree to depart from the Guidelines if circumstances warrant. The purpose of the plan shall be to quantify impacts to avian species and to assess the adequacy of mitigation measures implemented, including any mitigation necessary under the Migratory Bird Treaty Act. Results shall be reported to EFSEC and the TAC. The monitoring plan shall include the following components:

1. The Certificate Holder shall implement an avian casualty/fatality reporting and handling system by Project personnel (operations and maintenance staff) for the life of the Project following a detailed written protocol developed for the Project and similar to that used by other wind projects in the region.
2. The Certificate Holder shall perform a minimum of two breeding season's raptor nest survey of the Project Area, including a 1 mile buffer, to locate and monitor active raptor nests potentially affected by construction and operation of the Project.
3. The Council will commission or review for approval a three-year monitoring study by a third-party consultant to evaluate impacts to avian species. This study will include, at a minimum, standardized casualty searches, searcher efficacy trials and scavenger removal trials.
4. The Post-Construction Avian Monitoring Plan for the Project will follow a detailed written protocol that will document the monitoring measures being conducted.
5. EFSEC shall reconvene the TAC if unanticipated circumstances arise during incidental monitoring.

D. Post-Construction Bald Eagle – Golden Eagle Plan

In consultation with WDFW and USFWS, the Certificate Holder shall develop a plan describing actions taken to comply with the Bald and Golden Eagle Protection Act (16U.S.C. 668-668c). This plan shall be submitted to EFSEC for approval no later than 60 days prior to commencing Commercial Operation.

E. Pre-Operation Bat Survey and Bat Monitoring Plan

Prior to beginning commercial operation, the Certificate Holder, in consultation with WDFW, shall conduct a bat monitoring survey during the bat migration period. The survey shall utilize current technology and methodology to document bat use of the site, including which if any species are at risk from site operation. Detectors shall be placed at an appropriate elevation to monitor migrating bats within the rotor sweep zone. The Certificate Holder shall consult with WDFW in developing the protocol for the survey. The Certificate Holder shall present the results of the survey to the TAC. If, based on the survey results, the TAC concludes that the Project presents a significant risk to bats that is substantially greater than the risk described in the Final EIS, the TAC may recommend to EFSEC that additional mitigation measures be required.

The Certificate Holder shall develop a post-construction Bat Monitoring Plan in consultation with WDFW and the TAC and submit the plan to EFSEC for approval no later than sixty (60) days prior to commencing Commercial Operation. The plan shall include two years of bat fatality monitoring.

ARTICLE VII: PROJECT OPERATION

A. Water Discharge

The Certificate Holder shall ensure that all stormwater control measures and discharges are consistent with the Operations SWPPP, required by Article XX.XX and the Ecology *Stormwater Management Manual for Western Washington, September 2005* or as revised.

Domestic sewage generated at the O&M facility shall be discharged to an on-site septic system.

B. Noise Emissions

The Certificate Holder shall operate the Project in compliance with applicable Washington State Environmental Noise Levels, WAC 173-60.

C. Fugitive Dust Emissions

The Certificate Holder shall continue to implement dust abatement measures as necessary.

D. Habitat, Vegetation and Wildlife BMPs

During Project operations, the Certificate Holder shall implement appropriate operational BMPs to minimize impacts to plants and animals, especially impacts to special listed species such as Northern Spotted Owl, Western Gray Squirrel, Northern Goshawk, Olive Sided Flycatcher, Vaux's Swift, Piliated Woodpecker, Keen's Nyctos (Bat), Townsend Big Eared Bat, Bald and Golden Eagles.

In addition to those mitigation measures presented in the Revised Application and FEIS, these include the following:

1. Implementation of the Operations Fire Control Plan developed pursuant to Article VI.B.3, in coordination with local fire districts, to avoid accidental wildfires and respond effectively to any fire that might occur.
2. Implementation of the Certificate Holder's agreement with fire services providers to provide fire protection services during the construction and operation of the Project.
3. Operational BMPs to minimize storm water runoff and soil erosion.
4. The Certificate Holder shall avoid the use of rodenticides to control rodent burrowing around wind turbine towers as much as possible. In the event that the Certificate Holder believes the use of rodenticides is necessary, the Certificate Holder shall consult with WDFW and Ecology to develop a plan for appropriate application and use, and submit the plan to EFSEC for approval prior to implementation.
5. The Certificate Holder shall cooperate with WDFW in its efforts to manage deer and elk in the Project vicinity.

E. Forest Practices

All forest practices activities on private forestlands are governed by the Washington Forest Practices Act and are subject to the Forest Practices Rules (WAC 222). Such activities associated with this project on forestlands are required to be permitted by a Forest Practices Application. This applies to activities on land remaining in forestry for the duration of the project.

1. At least 60 days prior to initiating forest practices, the Certificate Holder shall submit to EFSEC for review and approval a complete Forest Practices Application/Notification that addresses all proposed Forest Practices. Prior to submittal to EFSEC, the certificate holder shall coordinate with Southwest Region of the Department of Natural Resources (DNR) to ensure the application is completed in compliance with DNR requirements.
2. EFSEC will provide Forest Practices compliance and enforcement on all approved Forest Practices Applications, at the Certificate Holder's cost. Compliance shall be conducted by a DNR Forest Practices forester selected by DNR.

F. Safety and Security

1. Personnel Safety. The safety of operating personnel is governed by regulations promulgated under the Federal Occupational Safety and Health Act and the Washington Industrial Safety and Health Act. The Certificate Holder shall comply with applicable federal and state safety laws and regulations (including regulations under the Federal Occupational Safety and Health Act and the Washington Industrial Safety and Health Act) as well as local and industrial codes and standards (such as the Uniform Fire Code).

2. Operations Phase Health and Safety Plan. No later than sixty (60) days after the beginning of Commercial Operation, the Certificate Holder shall develop and, after EFSEC approval, implement an Operations Phase Health and Safety Plan. The Certificate Holder shall consult with local and state organizations providing emergency response services during the development of the plan to ensure timely response in the event of an emergency.
3. Operations Phase Site Security Plan. The Certificate Holder shall develop and implement an Operations Phase Site Security Plan. The Certificate Holder shall submit the Plan to EFSEC for review and approval no later than sixty (60) days before the beginning of Commercial Operation. The Plan shall include, but shall not be limited to, the following elements: controlling access to the site by any visitors, contractors, vendors, or suppliers; security lighting of the operation and any visitor's center and maintenance facility buildings; fencing of the substation(s); and securing access to wind turbines, pad transformers, pad-mounted switch panels and other outdoor facilities. A copy of the final Security Plan shall be provided to EFSEC and other agencies involved in emergency response.
4. Visitors Safety. The Certificate Holder shall require visitors to observe the safety plans and shall provide them with safety equipment where and when appropriate.

G. Dangerous or Hazardous Materials

The Certificate Holder shall handle, treat, store, and dispose of all dangerous or hazardous materials in accordance with Washington state standards for hazardous and dangerous wastes, WAC 463-40 and WAC 173-303. Following any abnormal seismic activity, volcanic eruption, severe weather activity, flooding, vandalism or terrorist attacks the Certificate Holder shall inspect areas where hazardous materials are stored to verify that containment systems are operating as designed.

H. Decommissioning of Individual Wind Turbine Generators

During the lifetime of the project, the Certificate Holder may choose, or be otherwise required to, decommission individual WTGs without the entire project being terminated pursuant to Article VIII of this agreement.

In accordance with Article III, Section K, paragraph 5, of this agreement, individual WTGs found to cause unanticipated significant adverse impact(s) on the environment may have further operating conditions imposed by EFSEC, including permanent shutdown, decommissioning, and removal from the Project Area. In addition, EFSEC retains the authority to order removal of any individual WTG that remains inoperable or is not used for more than six months.

The Certificate Holder will disassemble and remove from the Project Area the WTG being decommissioned within one year of the last date the WTG produced power for sale. Decommissioning of the WTG does not require removal of the WTG foundation.

The Certificate Holder shall notify EFSEC of its intent to decommission the turbine, and shall provide a schedule for decommissioning activities.

I. Shadow Flicker Mitigation Measures

To mitigate for shadow flicker effects, the Certificate Holder shall shut down the operation of a WTG, for the duration of such impact, upon the written request of a landowner whose residence:

- was constructed as of October 12, 2009, or was located on a property with vested rights to build as of October 12, 2009; and
- is located within 2,500 feet of the offending turbines; and
- has a line of sight view of the turbine.

Within five (5) business days of receipt of any such request, the Certificate Holder shall notify EFSEC of the request received to mitigate shadow flicker effects. In addition, within two (2) weeks of original receipt of any such request, the Certificate Holder shall notify EFSEC of the actions taken in response. EFSEC shall retain authority to review and override the Certificate Holder's denial(s) of any non-participating landowner's request(s) in this regard.

ARTICLE VIII: PROJECT TERMINATION, DECOMMISSIONING AND SITE RESTORATION

A. Detailed Site Restoration Plan

The Certificate Holder shall submit a Detailed Site Restoration Plan to EFSEC for approval within ninety (90) days from the time the Council is notified of the termination of the Project. The Detailed Site Restoration Plan will provide for restoration of the Site within the timeframe specified in Article VIII.C, taking into account the Initial Site Restoration Plan and the anticipated future use of the Site. The Detailed Site Restoration Plan shall address the elements required to be addressed by WAC 463-42-665 (in effect at the date of submittal of the Application), and the requirements of the Council approved Initial Site Restoration Plan pursuant to Article IV.D of this Agreement. The Certificate Holder shall not begin Site Restoration activities without prior approval from the Council. The Certificate Holder shall consult with WDFW, DNR, and Ecology in preparation of the Detailed Site Restoration Plan.

B. Project Termination

1. Termination of this Site Certification Agreement, except pursuant to its own terms, is an amendment of this Agreement.
2. The Certificate Holder shall notify EFSEC of its intent to terminate the Project.
3. The Certificate Holder shall terminate the Project if, at the written request of the Council, the Certificate Holder demonstrates that the energy generated by the Project for the past twelve (12) month period is less than 10% of the Historical Energy Production (as defined below) and the following exemptions do not apply: the twelve (12) month reduced energy output period described above is the result of (i) a repair, restoration or improvement to an integral part of the Project that affects the generation of electricity that is being diligently pursued by the Certificate Holder, or

(ii) a force majeure event, including, but not limited to, an extended low wind period. Historical Energy Production means the sum of all energy generated by the Project divided by the number of months since the beginning of Commercial Operation multiplied by twelve, starting twelve months after Commercial Operation commences.

4. The Council may initiate proceedings leading to SCA amendment pursuant to WAC 463-66-090.

C. Decommissioning Timing and Scope

1. Timing. The Certificate Holder shall commence decommissioning of the Project within twelve (12) months following the termination described in Article VIII.B above.

The period to perform the decommissioning may be extended if there is a delay caused by conditions beyond the control of the Certificate Holder including, but not limited to, inclement weather conditions, equipment failure, wildlife considerations or the availability of cranes or equipment to support decommissioning.

2. Scope. Decommissioning the Project shall involve removal of the Turbines; removal of foundations to a depth of four (4) feet below grade; regrading the areas around the Project Facilities; removal of Project access roads and overhead cables (except for any roads and/or power cables that Project Area landowners wish to retain); and final reseeded of disturbed lands (all of which shall comprise "Decommissioning"). Decommissioning shall occur in the order of removing the Turbines as the first priority and performing the remaining elements immediately thereafter.
3. Monthly Reports. If requested by EFSEC, the Certificate Holder will provide monthly status reports until this decommissioning work is completed.

D. Decommissioning Funding and Surety

1. Except as provided in Art.VIII.D.3 below, the Certificate Holder or any Transferee, as the case may be, shall provide financial assurance sufficient, based on detailed engineering estimates, for decommissioning costs in the form of a performance bond, guaranty or a letter of credit to ensure the availability of funds for such costs (the "Decommissioning Security") to EFSEC. The Certificate Holder shall include a detailed engineering estimate of the cost of decommissioning in its Initial Site Restoration Plan submitted to EFSEC.

The Initial Site Restoration Plan shall provide that the decommissioning costs shall be reevaluated annually during construction of the Project and once every five (5) years thereafter from the date of Substantial Completion to ensure sufficient funds for decommissioning. If deemed appropriate at that time, the amount of decommissioning funds may be adjusted by EFSEC accordingly.

2. The duty to provide such security shall commence thirty (30) days prior to the beginning of Construction of the Project, and shall be renewed on an annual basis. On or before the date on which financial security must be established, the Certificate Holder shall provide EFSEC with one of the following security devices that is reasonably acceptable to EFSEC:

Performance Bond. The Certificate Holder or any Transferee, as the case may be, shall provide financial security for the performance of its decommissioning obligations through a Performance Bond issued by a surety registered with the Washington State Insurance Commissioner and which is, at the time of delivery of the bond, on the authorized insurance provider list published by the Insurance Commissioner. The Performance Bond shall be in an amount equal to the decommissioning costs. The Performance Bond shall be for a term of one (1) year, shall be continuously renewed, extended, or replaced so that it remains in effect for the remaining term of this Agreement or until the secured decommissioning obligations are satisfied, whichever occurs sooner. In order to ensure continuous renewal of the Performance Bond with no lapse, each Performance Bond shall be required to be extended or replaced at least one month in advance of its expiration date. Failure to secure such renewal or extension shall constitute a default of the Applicant under this Agreement and under the Bond provisions; or

Letter of Credit. The Certificate Holder or any Transferee, as the case may be, shall provide financial security for the performance of its decommissioning obligations through a letter of credit issued by a bank whose long-term debt is rated "A" or better by a Rating Service. The letter of credit shall be in an amount equal to the decommissioning costs. The letter of credit shall be for a term of 1 year and shall be continuously renewed, extended, or replaced so that it remains in effect for the remaining term of this Development Agreement or until the secured decommissioning obligations are satisfied, whichever occurs sooner. The State of Washington, by and through EFSEC or its successor or designees, shall be authorized under the letter of credit to make one or more sight drawings thereon upon certification to the issuing bank of the Applicant's or Transferee's (as the case may be) failure to perform its decommissioning obligations when due; or

Guaranty. Applicant or any Transferee, as the case may be, shall provide financial security for the performance of its decommissioning obligations by delivering a payment guaranty guaranteeing its decommissioning obligations hereunder from an entity (i) having, at the time of delivery of such guaranty, a senior unsecured long term debt rating ("Credit Rating") of (1) if such entity has a Credit Rating from Standard and Poor's but not from Moody's, BBB- or better from Standard and Poor's or (2) if such entity has a Credit Rating from Moody's but not from Standard and Poor's, Baa3 or better from Moody's or (3) if such entity has a Credit Rating from both Standard and Poor's and Moody's, BBB- or better from Standard and Poor's and Baa3 or better from Moody's; or (ii) having audited financial statements, prepared by a nationally-recognized firm of independent auditors and indicating a financial net worth of at least \$75,000,000.

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3. If Project ownership is transferred after the effective date of this Agreement pursuant to applicable EFSEC laws and regulations, EFSEC has the right to require, consider and approve other financial instruments and/or assurances that would provide for the Certificate Holder's performance of its decommissioning obligations pursuant to Article VIII.C and VIII.D of this Site Certification Agreement.

ARTICLE IX: SITE CERTIFICATION AGREEMENT - SIGNATURES

Dated and effective this _____ day of _____, 20__.

FOR THE STATE OF WASHINGTON

Christine Gregoire, Governor

FOR WHISTLING RIDGE ENERGY LLC

Jason Spadaro, President
Whistling Ridge Energy LLC

ATTACHMENT I
Whistling Ridge Energy Project
Legal Descriptions & Ownership Interests

The land description below is from the Whistling Ridge Application with notes reflecting the Council's decision to eliminate tower construction on the ridge areas proposed to contain the Tower Strings A1 - A7 & C1 - C8, as prescribed in the Recommendation Order and the Site Certification Agreement.

1. Introduction:

The proposed Whistling Ridge Energy Project would be located on private land approximately seven miles northwest of the City of White Salmon in Skamania County, Washington. The project would be located on commercial forestland owned by S.D.S. Co., LLC and Broughton Lumber Company in an unincorporated area of Skamania County, outside of the Columbia River Gorge National Scenic Area.

An alternative site is proposed for a maintenance and operations facility, located outside of and to the west of the project site along West Pit Road. This land is owned by the Broughton Lumber Company.

Whistling Ridge Energy LLC, a special purpose corporation operating in the State of Washington, is developing and would own the project.

The total project area encompasses approximately 1,152 acres in Sections 5, 6, 7, 8, and 18 of Township 3 North, Range 10 East, and in Section 13 of Township 3 North, Range 9 East.

The alternative operations and maintenance yard along West Pit Road would encompass approximately 5 acres in Section 1 of Township 3 North, Range 9 East.

2. Legal Description of Property:

Real property situated in the County of Skamania, State of Washington, hereby described as follows:

Township 3 North, Range 10 East of the Willamette Meridian:

Section 5: The West Half of the Southwest Quarter (No Tower construction in Section 5)

Section 6: All except for the West Half of the Southwest Quarter (No Tower construction in the North Half of the Southeast Quarter and the Northeast Quarter.)

Section 7: The South Half of the Southwest Quarter, the Northeast Quarter of the Southwest Quarter, the West Half of the Southeast Quarter, the East Half of the Northwest Quarter and the Northeast quarter excluding lands within the Columbia River Gorge National Scenic Area.

Section 8: The West Half of the Northwest Quarter excluding lands within the Columbia River Gorge National Scenic Area.

Section 18: The Northwest Quarter, and the Northwest Quarter of the Southwest quarter excluding lands within the Columbia River Gorge National Scenic Area. (No Tower Construction in the South half of the Northwest Quarter & the Northwest Quarter of the Southwest Quarter)

Township 3 North, Range 9 East of the Willamette Meridian:

Section 13: The East Half of the Southeast Quarter excluding lands within the Columbia River Gorge National Scenic Area. (No Tower Construction in Section 13)

3. Legal Description of Alternative Maintenance & Operation Facility:

Township 3 North, Range 9 East of the Willamette Meridian:

Section 1: Portions of the Southeast Quarter of the Southeast Quarter, and the Southwest Quarter.

**Attachment 2
Tower Configuration Review**

Based on a project site review and visits to all of the viewing areas referenced in the Application, as well as extensive Council discussions regarding the various tower simulations provided in the Application, the Council concluded that both the A1 thru A7 Tower String and the C1 thru C8 Tower String would result in unacceptable impacts to a number of viewsapes reviewed in the process. Therefore, the Council, based on its review including the analysis found in Table 1 below, recommended that proposed Tower String A1 – A7 and Tower String C1 – C8 be eliminated from the project as a condition of its approval. The proposed SCA accordingly authorizes the Applicant to site turbines in the areas designated in the Application for strings A-8 – A-13, B-1 – B-21, D-1 – D-3, E-1 – E-2 and F-1 – F-3.

TABLE 1 - Viewing-Site Analysis

VIEW SITE	OPTION 0 (All Turbines) Resulting Visibility	OPTION 1 Turbines Reduced: A1-7 Resulting Visibility	OPTION 2 Turbines Reduced: C1-8 Resulting Visibility	SELECTED OPTION 3 ² Turbines Reduced: A1-7, C1-8 Resulting Visibility
1	B11-21, C1-8, D1-3, E1-2	No Change, No A-String Visible	Approximately ¼ Reduction In Turbine Visibility	Approximately ¼ Reduction In Turbine Visibility
2	B5-21, C1-8, D1-3, E1-2	No Change, No A-String Visible	Approximately 1/3 Reduction In Turbine Visibility	Approximately 1/3 Reduction In Turbine Visibility
3	B1-16, C1-8, D1-3, E1-2, F1-3	No Change, No A-String Visible	Approximately 1/3 Reduction In Turbine Visibility	Approximately 1/3 Reduction In Turbine Visibility
4	A1-8	Approximately Zero Turbine Visibility	No Change	Approximately Zero Turbine Visibility
5	A10-13, B1-16, F1-3	No Change	No Change	No Change
7	A1-13, B1-13, F1-3	Approximately One Third Reduction In Turbine Visibility	No Change No C-String Visible	Approximately 1/3 Reduction in Turbine Visibility
8	A1-4; C1-8	Zero A-String Turbine Visibility	Zero C-String Turbine Visibility	Zero Turbine Visibility
10	A1-7, C1-8	Zero A-String Turbine Visibility	Zero C-String Turbine Visibility	Zero Turbine Visibility
11	B9-21, C1-8, D1-3, E1-2	No Change, No A-String Visible	Approximately 1/3 Reduction In Turbine Visibility	Approximately 1/3 Reduction in Turbine Visibility
12	B13-21, C1-8, D1-3, E1-2	No Change, No A-String Visible	Approximately ¼ Reduction In Turbine Visibility	Approximately ¼ Reduction In Turbine Visibility
13	A1-5, B13-21	Approximately One Half Reduction In Turbine Visibility	No Change No C-String Visible	Approximately ¼ Reduction In Turbine Visibility
14	A1-13, B1-9	Approximately One Half Reduction In Turbine Visibility	No Change No C-String Visible	Approximately ¼ Reduction In Turbine Visibility
15	A1-10	Approximately ¼ Reduction In Turbine Visibility	No Change No C-String Visible	Approximately ¼ Reduction In Turbine Visibility
16	A1-8	Approximately Zero Turbine Visibility	No Change No C-String Visible	Approximately Zero Turbine Visibility
17	A3-6	Zero Turbine Visibility	No Change No C-String Visible	Zero Turbine Visibility
18	A5-7	Zero Turbine Visibility	No Change No C-String Visible	Zero Turbine Visibility
19	B16-21, C1-8, D1-3	No Change No A-String Visible	Approximately ¼ Reduction In Turbine Visibility	Approximately ¼ Reduction In Turbine Visibility
20	A1-13, F1-3	Approximately ¼ Reduction In Turbine Visibility	No Change No C-String Visible	Approximately ¼ Reduction In Turbine Visibility
21	A1-4	Zero Turbine Visibility	No Change No C-String Visible	Zero Turbine Visibility
22	A1-8	Zero Turbine Visibility	No Change No C-String Visible	Zero Turbine Visibility
29	A1-8	Zero Turbine Visibility	No Change No C-String Visible	Zero Turbine Visibility
	Full 50 Turbines (100%)	43 Turbines (86% Remaining)	42 Turbines (84% Remaining)	35 Turbines (70% Remaining)

Tafoya, Keely (ATG)

From: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Sent: Friday, April 12, 2013 4:44 PM
To: Tafoya, Keely (ATG)
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Subject: RE: Friends of the Columbia Gorge, et al v. State Energy Facility Site Evaluation Council et al. - 88089-1 Filing

Rec'd 4-12-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Tafoya, Keely (ATG) [<mailto:KeelyT@ATG.WA.GOV>]
Sent: Friday, April 12, 2013 4:43 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: tlmcmahan@stoel.com; ELMARTIN@stoel.com; wbcollins@comcast.net; Essko, Ann (ATG); susan@susandrummond.com; kick@co.skamania.wa.us; rick@aramburu-eustis.com; nathan@gorgefriends.org; gkahn@rke-law.com
Subject: Friends of the Columbia Gorge, et al v. State Energy Facility Site Evaluation Council et al. - 88089-1 Filing

Good afternoon,

Please find attached the Respondent State Energy Facility Site Evaluation Council and Governor of the State of Washington's Brief of Respondents in the Friends of the Columbia Gorge, et al v. State EFSEC matter, Supreme Court # 88089-1, on behalf of Assistant Attorney General Ann Essko, WSBA #15472, 360-586-3633, AnnE@atg.wa.gov.

Per my phone conversation with Amy at the Supreme Court, the appendices attached to this brief will be placed in the US mail today as they exceed the 25-page limit. Thank you.

Keely Tafoya

Legal Assistant

Attorney General's Office

Government Operations Division, MS 40108

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