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**SUPREME COURT OF THE STATE OF WASHINGTON**

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

Petitioners,

v.

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

Respondents,

and

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

Intervenors-Respondents.

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**RESPONSE BRIEF OF INTERVENOR-RESPONDENT  
WHISTLING RIDGE ENERGY LLC**

---

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 ORIGINAL

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## **NATURE OF THE CASE**

The Energy Facility Site Evaluation Council (“EFSEC”) recommended that Governor Gregoire approve in part and deny in part the Whistling Ridge Energy Project (“Project”), a wind energy facility on private land in Skamania County. The Project site is located outside the Columbia River Gorge National Scenic Area. Whistling Ridge Energy LLC (“Whistling Ridge”) had applied to build up to 50 wind turbines, but later voluntarily reduced this number to 38. EFSEC recommended further reducing the Project’s size by eliminating certain turbine corridors and cutting the maximum number of turbines to 35. After reviewing the record, the Governor approved EFSEC’s recommendation. The Friends of the Columbia Gorge, Inc. and Save Our Scenic Area (collectively, “Opponents”) filed a petition for judicial review of EFSEC’s and the Governor’s decisions. Whistling Ridge did not seek review of the decision reducing the size of the Project. The Thurston County Superior Court certified the case for review by this Court pursuant to RCW 80.50.140(1).

## **STATEMENT OF THE ISSUES**

1. Do Opponents’ claims that EFSEC violated RCW 80.50.010, WAC 463-14-020, and WAC 463-60-332, which set out legislative findings and EFSEC’s interpretative rules and application guidelines, fail because they do not confer substantive rights on Opponents?

2. Is EFSEC's finding that Whistling Ridge's application complied with the application guidelines in WAC 463-60-332 and the Washington Department of Fish and Wildlife's ("WDFW") *Wind Power Guidelines* supported by substantial evidence?

3. WAC 463-62-040 sets out performance standards for the Site Certification Agreement relating to wildlife habitat mitigation. Is the Governor's Site Certification Agreement valid because there is substantial evidence that Whistling Ridge conducted wildlife surveys during all seasons, and the Site Certification Agreement requires enforceable habitat mitigation both before and after the Project is constructed and operating?

4. RCW 80.50.040(9) empowers EFSEC to monitor the construction and operation of the Project to ensure compliance with the Site Certification Agreement. Is the Governor's Site Certification Agreement arbitrary and capricious because it authorizes turbine micro-siting within approved turbine corridors and it does not set out public participation and appeal rights related to EFSEC's oversight of the Project?

5. WAC 463-26-090 provides that Skamania County's certificate of land use consistency is *prima facie* proof of the Project's consistency and compliance with the Skamania County's land use plans and zoning ordinances. Did Opponents overcome this presumption?

6. Should Whistling Ridge be subject to costs under RCW 34.05.566(5)(a) for refusing to agree to a shortened record?

#### **STATEMENT OF THE CASE**

Whistling Ridge is an affiliate of SDS Lumber Company, which is a forest products company in Bingen, Washington, that has been locally owned and continuously operated since 1946. AR 28153, 28390. In 2009 Whistling Ridge submitted an application to EFSEC for a 75 MW wind energy facility with up to 50 wind turbines. AR 42. The Project is located on 1,152 acres of private land in unincorporated Skamania County outside the Columbia River Gorge National Scenic Area. AR 28192-93. This land has been used for commercial forestry for the last 100 years. AR 2963, 28433. Timber has been harvested from large segments of the Project site in recent years pursuant to long-established harvesting schedules. AR 18452-53, 28203-05. It is crossed by four Bonneville Power Administration long-distance, high-voltage electric transmission lines on massive lattice towers within two approximately 250-foot-wide right-of-way corridors. AR 4550, 17484, 28252, 28357. Less than 57 acres of the Project site will be used for energy generation with commercial forestry operations continuing on the rest of the site. AR 28193, 28199. There are no residences within 4,000 feet of a turbine corridor approved by the Governor. *See* App. A-1 (AR 28539); AR 28339.

Site study for a wind energy facility began on the Project site over a decade ago. AR 2962. In early 2004 Whistling Ridge began consulting with WDFW and the U.S. Fish and Wildlife Service on wildlife survey methods and results. AR 28167-68. In addition to other wildlife and habitat surveys, Whistling Ridge subsequently completed the following bird surveys: (i) northern spotted owls in 2004, 2008, 2009, and 2010; (ii) northern goshawks in 2008 and 2009; and (iii) general avian in the fall of 2004, the summer of 2006, the winter of 2008/2009, and the spring of 2009. AR 11503, 11509, 11481. Whistling Ridge conducted more pre-project assessment and baseline wildlife surveys than any other previously proposed project. AR 15791. WDFW has confirmed that Whistling Ridge's survey methods were consistent with standard survey protocols and represent the best available science. AR 28264.

EFSEC visited the Project site, held land use and adjudicative hearings, solicited public comment, and held informational and public comment meetings in Skamania County on the Project.<sup>1</sup> AR 1479, 3014,

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<sup>1</sup> Contrary to Opponents' claim, the record does not indicate that this Project is the most controversial wind project ever proposed in the State of Washington. Pet. Br. at 1 (citing AR 28772 n.1). Opponents' public comment "statistics" come from their briefing before EFSEC, which just baldly asserted these "statistics" without citing any evidence in the record. See AR 28772 n.1, 29194 n.36. Further, the Kittitas Valley Wind Power Project was previously appealed to the Washington Supreme Court. See *Residents Opposed to Kittitas Turbines v. EFSEC*, 165 Wn.2d 275, 197 P.3d 1153 (2008). Unlike that appeal, in which Kittitas County opposed that project, here Skamania County has intervened in support of this Project. Moreover, the level of controversy is irrelevant to judicial review under RCW 34.05.570(3).

28835-36, 28657-59. During EFSEC's review process Whistling Ridge stipulated that no more than 38 turbines would be constructed to minimize potential visual impacts. AR 16733. EFSEC and the Bonneville Power Administration prepared a joint final environmental impact statement ("FEIS") to satisfy their respective obligations under Washington's State Environmental Policy Act ("SEPA") and the National Environmental Policy Act. AR 28128. Based on the adjudicative record and the FEIS, EFSEC recommended, and Governor Gregoire approved, the construction of 35 turbines in the A8-A13, B1-B21, D1-D3, E1-E2, and F1-F3 turbine corridors, but denied construction in the A1-A7 and C1-C8 turbine corridors. AR 28633, 28844, 36687-88, 36697.

Opponents filed a Petition For Judicial Review in Thurston County Superior Court. CP 4. Whistling Ridge did not seek review of the Governor's decision to reduce the size of the Project. The Superior Court certified the case to this Court pursuant to RCW 80.50.140. CP 861-67.

#### **SUMMARY OF ARGUMENT**

1. EFSEC and the Governor did not violate RCW 34.05.570(3)(f), because this standard does not require that an agency address all the issues presented by the parties. Instead, it only requires an agency to resolve the issues requiring resolution. Here, the EFSEC statute and rules relied on by Opponents are legislative findings and EFSEC's interpretative and

procedural rules; they do not have the force and effect of law and do not confer substantive rights on Opponents. Thus, Opponents' issues based on them do not require resolution. For the same reason, EFSEC's adjudicative order does not conflict with these statute and rules, so there is no violation of RCW 34.05.570(3)(h).

2. WAC ch. 463-60 provides guidelines for completing an EFSEC application. To support their argument that Whistling Ridge's application did not comply with WAC 463-60-332 guidelines concerning species and habitat information, Opponents point to isolated parts of the record that Opponents take out of context. There is substantial evidence that Whistling Ridge provided the all the information called for by WAC 463-60-332, and that Whistling Ridge's pre-project assessment was consistent with WDFW's *Wind Power Guidelines*.

3. WAC ch. 463-62 sets out construction and operation standards for the Site Certification Agreement. Contrary to Opponents' arguments, WAC 463-62-040 does not require the entry of findings of fact and conclusions of law in EFSEC's orders. There is substantial evidence in the record that Whistling Ridge conducted wildlife studies during all seasons. The Site Certification Agreement imposes enforceable requirements to ensure no net loss of habitat function and value and off-site mitigation, thereby satisfying WAC 463-62-040.

4. The Site Certification Agreement authorizes post-approval micro-siting of turbine locations within the specific turbine corridors approved by the Governor. This is not arbitrary and capricious. The record contains substantial evidence about the impacts of turbines constructed within the approved corridors, so any turbine locations within the approved corridors are consistent with the Project approval. Pre-application micro-siting is not practical or desirable. For example, projects would be unable to use subsequently-developed turbines that could further reduce environmental impacts. Opponents cite no applicable authority supporting their claim that a Site Certification Agreement is invalid if it does not include post-approval public participation provisions. There is substantial public participation in EFSEC's comprehensive pre-approval review process.

5. Under WAC 463-26-090, Skamania County's certificate of land use consistency is *prima facie* proof that the Project is consistent with Skamania County's comprehensive plan and zoning ordinance. Opponents have not overcome this *prima facie* proof.

6. Opponents are not entitled to record preparation costs under RCW 34.05.566(5)(a), because Whistling Ridge's decision to not stipulate to a shortened record was reasonable given the claims in Opponents' Petition for Judicial Review and Opponents' own reliance on documents they claim are not relevant to their appeal.

## ARGUMENT

Opponents' brief raises a very large number of claims.<sup>2</sup> To support these claims, Opponents recite six of the standards of review set out in RCW 34.05.570(3) (Pet. Br. at 12-14), but their brief provides little analysis applying those standards to the facts. Opponents' submission primarily consists of a discussion of isolated parts of the record followed by a summary conclusion at the end of each section that there is a violation of RCW 34.05.570(3). The Supreme Court is not the place for Opponents to retry their case. There is substantial evidence in the record supporting EFSEC's recommendation and Governor Gregoire's decision.

### **A. The Majority Of Opponents' Claims Fail Because They Are Based On A Statute And Rules That Do Not Have The Force And Effect Of Law**

Most of Opponents' claims are based on two standards of review. Opponents allege violations of RCW 34.05.570(3)(f) because they claim EFSEC did not decide all the contested issues, and they allege violations of RCW 34.05.570(3)(h) because they claim EFSEC's recommendation

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<sup>2</sup> Opponents summarily assign error to a host of findings of fact and conclusions of law. Pet. Br. at 7-8. However, Opponents' subsequent arguments do not even cite a great number of these findings and conclusions, specifically Overview Conclusions 1, 3, 4, §§ II.B, III.D.1, III.D.7, III.E, Finding of Fact and Conclusion of Law IV.11, IV.20, IV.22, IV.28, IV.30, IV.42, and IV.43 in Order No. 868 ("Adjudicative Order"), and Finding of Fact and Conclusion of Law 6, 8, 14, 15, 17, 18, 19, 20, 21, 32, and 42, and Conclusion of Law 6 in Order No. 869 ("Recommendation Order"). The Court should not consider this assignment of error, because neither Respondents nor the Court should be obligated to decode this assignment of error. *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 624, 818 P.2d 1056 (1991) ("If a party fails to support assignments of error with legal arguments, they will not be considered on appeal.").

conflicts with EFSEC statutes and rules. These arguments fail because the statute and rules Opponents rely on do not have the force and effect of law and do not confer any substantive rights on Opponents.

**1. Standards Of Review**

Opponents carry the burden of demonstrating that EFSEC's recommendation and the Governor's decision violated RCW 34.05.570(3), RCW 34.05.570(1)(a). RCW 34.05.570(3) provides in part that the relief is to be granted only if:

(f) [t]he agency has not decided all issues requiring resolution by the agency; [or]

....

(h) [t]he order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency[.]

Neither of these standards of review supports Opponents' claims. The thrust of their claim that EFSEC violated RCW 34.05.570(3)(f) is that EFSEC's orders did not address all the arguments that Opponents made.<sup>3</sup> However, this is not the standard. The court of appeals rejected this argument in *Skagit County v. Skagit Hill Recycling, Inc.*, 162 Wn. App.

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<sup>3</sup> Opponents make a similar claim that EFSEC failed to decide all the issues in the case based on WAC 463-14-080 and WAC 463-30-320(6). Pet. Br. at 19, 30-32, 36, 48. RCW 34.05.546(7) requires that a petition for judicial review contain the "petitioner's reasons for believing that relief should be granted." The Court should not consider Opponents' claims based on WAC 463-14-080 and WAC 463-30-320(6) because those claims were not included in their Petition For Judicial Review.

308, 253 P.3d 1135 (2011). In that case Skagit Hill Recycling argued that a decision of the Pollution Control Hearings Board did not resolve all the issues requiring resolution. The court rejected this argument stating:

Skagit Hill appears to suggest that RCW 34.05.570(3)(f) requires the agency to consider all issues presented by the parties. But it provides no authority for such a proposition. In this case, the [Pollution Control Hearings Board] properly considered all of the issues “requiring resolution,” which was one primary issue: did Skagit Hill violate the conditions of its 2007 inert waste permit?

*Skagit Cnty.*, 162 Wn. App. at 321. Here, many issues that Opponents claim require resolution are based on a statute and rules that do not have the force and effect of law and do not confer any substantive rights on Opponents. The same is true of Opponents’ claims under RCW 34.05.570(3)(h) that EFSEC’s decision is in conflict with EFSEC statutes and rules.

**2. RCW 80.50.010 Sets Out A Statement Of Legislative Policy, Not Substantive Requirements**

There is no basis for Opponents’ argument under RCW 34.05.570(3)(f) and (h) that RCW 80.50.010 requires EFSEC to address radar-activated lighting on turbines (Pet. Br. at 43-48) and turbine blade spin time (Pet. Br. at 40-43, 48-49). RCW 80.50.010 sets out legislative policy, not substantive requirements. RCW 80.50.010 begins by stating:

*The legislature finds that the present and predicted growth in energy demands in the state of Washington*

requires the development of a procedure for the selection and utilization of sites for energy facilities and the identification of a state position with respect to each proposed site.

(Emphasis added.) It subsequently explains that 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.

(Emphasis added.) Policy statements by the legislature are important.

They are a “constituent part of the [law] and [are] to be considered in construing, interpreting, and administering [the law].” *Whatcom Cnty. v. Langlie*, 40 Wn.2d 855, 863, 246 P.2d 836 (1952). EFSEC relies on these policy statements to guide its decision-making. AR 28669.

However, these policy statements by the legislature do not give rise to enforceable rights by Opponents. The beginning phrase of RCW 80.50.010, “[t]he legislature finds,” conclusively establishes this point. As this Court held in *Judd v. American Telephone & Telegraph Co.*, 152 Wn.2d 195, 203, 95 P.3d 337 (2004): “When the legislature employs the words ‘the legislature finds,’ . . . it sets forth policy statements that do not give rise to enforceable rights and duties.” *See also Melville v. State*, 115 Wn.2d 34, 38, 793 P.2d 952 (1990) (“The basic principle is that statutory policy statements as a general rule do not give rise to enforceable rights and duties.” (internal quotation marks and citation omitted)).

Since the policy statements in RCW 80.50.010 do not grant Opponents any enforceable rights, EFSEC did not violate RCW 34.05.570(3)(f) and (h) by not making findings that expressly addressed Opponents' arguments related to radar-activated lighting and turbine blade spin time.<sup>4</sup>

**3. WAC 463-14-020 Is An Interpretative Rule That Does Not Have The Force And Effect Of Law**

Opponents also claim that EFSEC violated WAC 463-14-020 by not making findings addressing turbine blade spin time. Pet. Br. at 40-43. WAC 463-14-020 provides:

RCW 80.50.010 requires the council "to recognize the pressing need for increased energy facilities." *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: . . .*

(Emphasis added.) WAC 463-14-020 sets out EFSEC's policies in considering an application. As such, it is an interpretative rule. RCW 34.05.328(5)(c)(ii) defines interpretative rule as "a rule, the violation of which does not subject a person to a penalty or sanction, that sets forth the agency's interpretation of statutory provisions it administers." Such rules do not have the force and effect of law. They "are not binding on the

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<sup>4</sup> Opponents make a similar claim that WAC 463-47-110 obligates EFSEC to expressly address radar-activated lighting and turbine blade spin time. Pet. Br. at 41-49. However, WAC ch. 463-47 implements SEPA, RCW ch. 43.21C, as it applies to EFSEC. WAC 463-47-010, -030. Thus, WAC 463-47-110 deals with the preparation of the FEIS. Because Opponents have not assigned error to the FEIS, Opponents have no argument that EFSEC violated WAC 463-47-110.

public. They serve merely as advance notice of the agency's position should a dispute arise and the matter result in litigation." *Ass'n of Wash. Bus. v. State Dep't of Revenue*, 155 Wn.2d 430, 447, 120 P.3d 46 (2005). Since WAC 463-14-020 does not have the force and effect of law, Opponents have no basis to require that EFSEC make express findings addressing turbine blade spin time.

**4. WAC 463-60-332 Is A Procedural Rule That Provides Guidance For Completing An EFSEC Application**

The thrust of Opponents' claim that EFSEC violated WAC 463-60-332 is that Whistling Ridge's application did not contain enough information. *See* Pet. Br. at 19-32, 40. WAC ch. 463-60 sets "forth guidelines for preparation of applications for energy facility site certification pursuant to chapter 80.50 RCW. Applications for siting energy facilities must contain information regarding the standards required by chapter 463-62 WAC." WAC 463-60-010. Opponents' claim fails for two reasons.

First, the WAC ch. 463-60 application guidelines do not require that an application include all the information that will eventually be developed in the adjudicative proceeding or the FEIS. Indeed, EFSEC's administrative rules recognize that the "guidelines can only be comprehensive in a relative sense." WAC 463-60-065. Thus, the "basic

guideline [is] that an applicant for site certification must identify in the application all information known to the applicant which has a bearing on site certification.” *Id.* The WAC ch. 463-60 guidelines inform potential applicants about what EFSEC believes should be included in an application so that EFSEC will be in position to begin its review.

Second, WAC ch. 463-60 does not give Opponents any substantive right to complain about the adequacy of the application. WAC 463-60-010 provides that the information in the application “shall be in such detail as determined by the council to enable the council to go forward with its application review.” In this case the application was sufficiently detailed for EFSEC to go forward with review.

Opponents’ argument also ignores the fact that the application was only the beginning of a long review process that included public hearings, an adjudicative proceeding, and the preparation of the FEIS. To require that an application contain all information that could be developed during an extensive agency and public review process would vitiate the need and opportunity for agency and public review and comment on the application. To the extent Opponents believed that EFSEC should require additional wildlife information, they had ample opportunity to argue their points in the public process that followed the submission of the application.

**B. EFSEC's Findings That Whistling Ridge's Application Satisfied WAC 463-60-332 And WDFW's *Wind Power Guidelines* Are Supported By Substantial Evidence**

Opponents allege that EFSEC erred in finding that Whistling Ridge had complied with the WAC 463-60-332 application guidelines and WDFW's *Wind Power Guidelines*. These arguments ignore substantial evidence in the record supporting EFSEC's finding.

**1. Standard Of Review**

RCW 34.05.570(3)(e) provides that relief should be granted only if the agency order "is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter." Substantial evidence is "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." *Residents Opposed to Kittitas Turbines v. EFSEC*, 165 Wn.2d 275, 317, 197 P.3d 1153 (2008) ("*ROKT*"). Courts are to view evidence in the light most favorable to the party that prevailed before EFSEC, and the review is to be deferential. *See City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001). Opponents carry the burden of demonstrating a lack of substantial evidence. RCW 34.05.570(1)(a).

**2. The Application Assessed Avian Collision Risk “During Day And Night” As Called For By WAC 463-60-332(2)(g)**

WAC 463-60-332(2)(g) calls for an application to assess the “risk of collision of avian species with any project structures, during day and night.” This guideline does not call for a separate assessment of the risk of nighttime collisions, as Opponents imply, but rather an assessment that considers the risk “during day and night.” Contrary to Opponents’ assertion, the application did *not* admit that Whistling Ridge’s “risk assessments ‘do not take into consideration flight behavior or abundance of nocturnal migrants.’” Pet. Br. at 21. In fact, the application states that “*observations* were made during daylight hours, and do not take into consideration flight behavior or abundance of nocturnal migrants.” AR 4472 (emphasis added). This statement about Whistling Ridge’s surveys—rather than its risk assessment—does not mean that the application lacked an assessment of the risk of avian collisions “during day and night.”<sup>5</sup>

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<sup>5</sup> Opponents quote testimony from two witnesses as supporting Opponents’ claim that the application did not contain a collision risk assessment during day and night. Pet. Br. at 21 n.53. However, the quoted testimony from both witnesses concerned Whistling Ridge’s survey data, not its risk assessment. Moreover, one of those witnesses, Don McIvor, testified that

Mr. Johnson did not conduct surveys for nighttime migration. And the fact that he did not do that is *actually pretty consistent with the wind energy guidelines* in the since [sic] that it’s recommended that those types of surveys be conducted if it appears that the site is one which supports an important passerine migration. And based on my understanding of the

To assess the risk that birds might collide with turbines Whistling Ridge’s wildlife experts first used avian survey data to calculate a turbine exposure index. AR 857, 859, 872-74, 4466, 4471. They recognized that because the survey data was based on daytime observations (*i.e.*, diurnal), the exposure index did not account for nocturnal activity. AR 859, 4472. To address this, the wildlife experts assessed the relationship between daytime pre-construction survey data and subsequent post-construction turbine-related mortality from existing wind energy facilities in the Pacific Northwest. AR 861, 4472. Because pre-construction observed avian use at Whistling Ridge was within the range of pre-construction observed avian use at these other facilities, the expert wildlife reports attached to the application estimated a “total”—*i.e.*, during day and night—range of avian mortality of “0.9-2.9 fatalities/MW/year.” AR 862. This was the assessment called for by the WAC 463-60-332(2)(g) application guideline and is substantial evidence supporting EFSEC’s finding.

**3. The Application Contained The Habitat And Species Information Called For By WAC 463-60-332(3)**

WAC 463-60-332(3) calls for an application to discuss measures to avoid and/or minimize habitat and species impacts and proposed

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site I would tend to concur that there are not any obvious features which would funnel songbirds to concentrate in that area.

AR 18282-83 (emphasis added).

mitigation (compensation or preservation and restoration of existing habitats and species) to compensate for impacts to these resources. The thrust of Opponents' argument is that the wildlife "mitigation measures" section of the application is too short. Pet. Br. at 29.

In response to WAC 463-60-332(3), Whistling Ridge's application described, using numerous habitat and species surveys, how the Project was designed to avoid impacts. AR 4443, 4453, 4474. Turbine corridors "avoid[] sensitive riparian areas," siting the Project "in an actively-managed commercial forest avoids impacts to higher quality habitats," and best practices will be used "to avoid introduction of noxious weeds." AR 4453-54. "[I]mproving and using existing roads [to the extent possible] instead of constructing new roads" and planting "native plant species as soon as possible after construction is complete" will minimize impacts. AR 4454. The application noted that timber harvests will occur on the Project site in absence of the Project. AR 4452. The Project's layout avoids impacts to aquatic species, and the application lists "B[est] M[anagement] P[ractice]s that would be incorporated to protect water quality and quantity" for aquatic species. AR 4456. Based on extensive surveys, the application expected effectively no impacts to federally listed or candidate species (*i.e.*, no impacts on northern spotted owls, negligible impacts on western gray squirrels, and low risk for impacts to northern

goshawks). AR 4470-71. Impacts to species would also be minimized by micro-siting, Project design features (e.g., tubular steel turbine towers), and the additional mitigation determinations made by a technical advisory committee including representatives from WDFW and the U.S. Fish and Wildlife Service based on post-construction studies.<sup>6</sup> AR 4475. Whistling Ridge's application also proposed to repair, rehabilitate, or restore affected environment in consultation with the wildlife agencies. *Id.* All of this information about avoiding, minimizing, and mitigating impacts to species and habitat is substantial evidence supporting EFSEC's finding.

Opponents' argument ignores that Whistling Ridge's habitat and wildlife surveys were completed by qualified biologists pursuant to standard protocols and used to avoid impacts. Opponents' argument ignores that avoiding impacts is sound science, it avoids cumulative impacts associated with the energy facility, and it has a 100% probability of success of full and adequate implementation. Because timber harvests will occur on the Project site with or without the Project, Opponents' argument ignores how the application's measures preserve habitat quality, value or function. Focusing solely on the wildlife "mitigation measures"

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<sup>6</sup> Technical advisory committees have proven valuable at other wind energy facilities sited by EFSEC. *See* AR 15959, 15990 (testimony from Mr. Johnson noting the monitoring and adaptive management by the technical advisory committee for the EFSEC-regulated Wild Horse project, a 149-turbine facility that was the first in Washington to be sited in an area containing rare, fractured critical shrub-steppe habitat and that also contains sage grouse and abundant raptor populations).

section of the application, Opponents ignore the habitat, vegetation, and fish “mitigation measures” sections. *See* AR 4453-54, 4456. Whistling Ridge’s application satisfied the WAC 463-60-332(3) guideline.

**4. Whistling Ridge’s Pre-Project Avian Assessments And Surveys Were Consistent With WDFW’s *Wind Power Guidelines***

The WAC 463-60-332(4) guideline calls for consistency with WDFW’s *Wind Power Guidelines*, which state that (i) “[e]xisting information on species and potential habitats in the vicinity of the project area should be reviewed” and “used to develop field and analysis protocols” and (ii) a “minimum of one full year of avian use surveys is recommended.” App. E-9-E-10 (AR 18005-06). Arguing that EFSEC erred in finding that Whistling Ridge’s pre-project assessments and surveys were consistent with these recommendations, Opponents disregard the evidence in the record, the most important of which is WDFW’s determination that

[t]he pre-project assessment and avian/bat use surveys [completed by Whistling Ridge] are consistent with standard protocols utilized throughout the U.S. *and are consistent with the WDFW Wind Power Guidelines* (WDFW 2009). . . . WDFW confirms that these data represent the best available science for predicting avian impacts at Whistling Ridge.

App. B-1 (AR 15820; emphasis added).

Quoting snippets of testimony from Whistling Ridge’s wildlife expert Greg Johnson, Opponents erroneously claim that Whistling Ridge failed to collect existing avian use information from other commercial

forestlands and from resource agencies. Pet. Br. at 24-25. In fact, Whistling Ridge did obtain northern spotted owl survey data from the Washington Department of Natural Resources (“DNR”) for the two historical northern spotted owl activity centers on DNR property north of the Project site. AR 11507. Consistent with the *Wind Power Guidelines*, Whistling Ridge used that information and elected to survey potentially suitable northern spotted owl habitat within these activity centers, which added 7,222 acres to the potential northern spotted owl survey area. AR 11504-05; *see also* AR 771-73. Whistling Ridge also considered the avian surveys performed for an energy overlay zone in Klickitat County that included two observation points in Skamania County in the vicinity of the Project site. AR 4456-57, 4272. Mr. Johnson also testified that he was not aware of any existing similar general avian use data collected on other commercial forestlands.<sup>7</sup> AR 18155, 18158.

Opponents claim Whistling Ridge should have sought out data from the Radar Ridge, Coyote Crest, and Middle Mountain wind energy projects. Pet. Br. at 26. Radar Ridge and Coyote Crest, though, are in

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<sup>7</sup> Mr. Johnson also testified how the methods used to collect avian use data for wind projects (*e.g.*, 800-meter plot radius and 20-minute time periods) differ from the point counts that are normally done in forests (*e.g.*, 50- to 100-meter plot radius and 5- to 8-minute time periods). AR 18075, 18155; *see also* AR 830, 856. These differences mean that if any “survey information on species and potential habitats in the vicinity of the project area” existed, that data would have little comparative value to the avian use data Whistling Ridge collected. AR 18155. Instead, the value of normal avian use surveys is simply that “you might know if the species occur there.” AR 18157.

extreme western Washington in a different eco-region. AR 28503; App. E-36 (AR 18032). These two projects do not constitute “nearby wind facilities” under the *Wind Power Guidelines*. App. E-9 (AR 18005). As for the Middle Mountain project, biological resource studies were never conducted for that now-discontinued project. AR 28492, 28494.

The only other existing survey information Opponents criticize Whistling Ridge for not reviewing is the Partners in Flight breeding data for the olive-sided flycatcher and the vaux’s swift. Pet. Br. at 24. However, Opponents do not explain how this data would have been relevant in developing the Project’s field and analysis protocols, which did consider both species. *See, e.g.*, AR 868, 872, 875, 884. In fact, Opponents’ own “expert” wildlife witness strongly criticized the reliability of the Partners in Flight data.<sup>8</sup> AR 15402-03, 15411. Moreover, Mr. Johnson testified that the Partners in Flight breeding data was useful for nationwide population estimates for cumulative effect analyses, not for designing field surveys. AR 15985-86. The record does not evidence that

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<sup>8</sup> By basing their argument on data their own “expert” witness Smallwood criticized, perhaps Opponents are conceding that Smallwood’s testimony was riddled with errors, as Smallwood himself acknowledged before EFSEC. *See, e.g.*, AR 18408-09 (errata sheet for Smallwood’s pre-filed testimony conceding that parts of his pre-filed testimony were “unfounded”), 18301 (Smallwood admitting that he “was in error” in criticizing Mr. Johnson’s use of nesting data), 18304 (Smallwood admitting that his testimony contained “[m]ore [bad text] than [he] would like”); *see also* AR 25138 (unchallenged FEIS noting that Smallwood’s estimates of raptor mortality “are flawed”), 25144 (unchallenged FEIS noting that studies have demonstrated a flaw in an assumption Smallwood uses in his “novel” approach to estimating bird and bat fatalities, which leads Smallwood to overestimate fatality rates).

this data would have been useful in designing Whistling Ridge's field surveys. Simply put, the record contains substantial evidence that Whistling Ridge reviewed existing information on species and potential habitats in the vicinity of the Project site and used that information to develop its survey plans, as recommended by the *Wind Power Guidelines*.

Mr. Johnson, who has worked on 10 wind projects in Washington since WDFW adopted its first wind power guidelines, also testified that Whistling Ridge's surveys were consistent with the "full year" recommendation in *Wind Power Guidelines*. AR 15957, 18126. "Wind siting guidelines such as those of the WDFW suggest that surveys cover all four seasons. Nowhere does WDFW state that these have to be consecutive seasons." AR 15968. The unchallenged FEIS also concluded:

The studies were conducted in compliance with the WDFW windpower guidelines, as *one full year* of avian baseline data were collected to cover all four seasons. In addition, the avian baseline studies were conducted in 2004, 2006, 2008 and 2009 which accounts for inter-annual variation.

AR 25146, 25159 (emphasis added). This is substantial evidence that Whistling Ridge's avian surveys constitute "a full year" of surveys under the *Wind Power Guidelines* and that the inter-annual approach added greater value to the biological significance of the data achieved over the multi-year survey period, versus a single year of data collection.

**C. The Site Certification Agreement Satisfies The Construction And Operation Standards of WAC 463-62-040**

Opponents argue that EFSEC violated the construction and operation standards in WAC 463-62-040 because they claim that Whistling Ridge did not conduct wildlife studies throughout the year and EFSEC failed to make findings of fact and conclusions of law regarding these studies (Pet. Br. at 18-19); that EFSEC failed to enter findings and conclusions regarding the net loss of wildlife habitat function and value (Pet. Br. at 34-36); and that EFSEC failed to require Whistling Ridge to include an off-site mitigation parcel in its application (Pet. Br. at 36-38). These arguments are based on Opponents' misunderstanding of the application of WAC ch. 463-62.

**1. The Construction And Operation Standards Of WAC Ch. 463-62 Apply To The Site Certification Agreement, Not The Adjudication**

There are two errors in Opponents' WAC ch. 463-62 arguments. First, Opponents claim that the standards in WAC ch. 463-62 apply to the adjudication. Opponents argue:

One of EFSEC's most fundamental rules concerning wildlife impacts is that "[a]n applicant must demonstrate *no net loss* of wildlife habitat function and value." WAC 463-62-040(2)(a) (emphasis added). EFSEC's rules further state that the agency "shall apply" this standard during its administrative adjudications. WAC 463-62-010(1).

Pet. Br. at 34. Opponents' selective quotation of the phrase "shall apply" is misleading. WAC 463-62-010 does not state that the chapter shall apply to adjudications. Instead WAC 463-62-010 states:

*This chapter sets forth performance standards and mitigation requirements specific to seismicity, noise limits, fish and wildlife, wetlands, water quality, and air quality, associated with site certification for construction and operation of energy facilities under the jurisdiction of the council. The council shall apply these rules to site certification agreements issued in connection with applications[.]*

(Emphases added.) The standards in WAC ch. 463-62 apply to the Site Certification Agreement—not the adjudication.

Opponents' second error follows from the first. Opponents claim that WAC 463-62-040 requires the entry of findings of fact. Pet. Br. at 35. WAC 463-62-040 sets out standards for wildlife in the Site Certification Agreement. The rule does not require the entry of findings of fact at the conclusion of the adjudicative proceeding.

**2. In Compliance With WAC 463-62-040(2)(f), Whistling Ridge Conducted Avian Studies "During All Seasons"**

WAC 463-62-040(2)(f) provides that "wildlife surveys shall be conducted during all seasons of the year to determine breeding, summer, winter, migratory usage, and habitat condition of the site." Opponents claim that EFSEC erred because Whistling Ridge did not conduct avian "surveys between July 15 and September 10," which is allegedly a "key

migration period.”<sup>9</sup> Pet. Br. at 17-18. Opponents’ argument does not withstand scrutiny.

Opponents admit that Whistling Ridge conducted avian surveys in the summer and cite no evidence or authority for their proposition that “during all seasons” in WAC 463-62-040(2)(f) actually means “during the entirety of all seasons.” See Pet. Br. at 18. Mr. Johnson testified that Whistling Ridge’s avian use data “covers all four seasons.” AR 11481. More importantly, the unchallenged FEIS concluded that “[b]irds were surveyed *during all seasons* of the year in the fall of 2004, summer of 2006, winter 2008–2009 and spring of 2009” and that Whistling Ridge’s “avian baseline data were collected to cover all four seasons.” AR 25146, 25159, 28277 (emphasis added). These conclusions are EFSEC’s

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<sup>9</sup> Opponents misrepresent the record when claiming that “WDFW *employees* noted during their review” that Whistling Ridge’s surveys did not include the olive-sided flycatcher migration period. Pet. Br. at 17 (emphasis added). In fact, a single WDFW employee—James Watson—made this comment in a July 19, 2010 internal email Opponents used for purposes of cross-examination. AR 17996. Opponents cite no evidence in the record as to (i) why Mr. Watson’s personal views should have any significance when they are inconsistent with WDFW’s official position, (ii) whether Mr. Watson had any formal, assigned role in the review and agency consideration of the biological sufficiency of the data, or (iii) Mr. Watson’s professional qualifications. Opponents did not have Mr. Watson testify before EFSEC, even though EFSEC had authorized counsel to subpoena witnesses under RCW 34.05.446(1). AR 15656.

Moreover, WAC 463-62-040(2)(f) does not require surveying the migratory periods of all birds observed at a site. Instead, it calls for conducting wildlife surveys “during all seasons,” as Whistling Ridge did, and then using this information to assess wildlife usage. The record shows that WDFW did not recommend that Whistling Ridge conduct surveys in August or express any concern to EFSEC that August avian use data had not been collected. Indeed, the unchallenged FEIS concluded that “[t]he Project habitat is not very conducive for [the olive-sided flycatcher], and that is why only a few individuals were observed.” AR 28273.

resolution of this issue, as EFSEC's recommendation was expressly "[b]ased on the . . . Final EIS." AR 28650.

**3. The Site Certification Agreement Satisfies WAC 463-62-040(2)(a) and (d)'s Provisions Related To Net Loss Of Habitat Function And Value And Replacement Habitat**

The Site Certification Agreement satisfies the standards of WAC 463-62-040(2)(a) and (d). WAC 463-62-040(2) provides in part: "(a) An applicant must demonstrate no net loss of fish and wildlife habitat function and value . . . [and] (d) [t]he ratios of replacement habitat to impacted habitat shall be greater than 1:1 to compensate for temporal losses, uncertainty of performance, and differences in functions and values."

The Site Certification Agreement satisfies this rule by imposing requirements that meet these standards. Section IV.E.1 requires that Whistling Ridge submit a Habitat Mitigation Plan prior to site preparation. AR 36708-09. The plan "will be calculated using the mitigation ratios specified in the 2009 WDFW Wind Power Guidelines."<sup>10</sup> AR 36709. Under Section IV.E.1(c), Whistling Ridge may satisfy its mitigation obligation in one of three ways. First, "by purchasing a mutually acceptable mitigation parcel and deeding it to WDFW or a mutually

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<sup>10</sup> WDFW concluded that Whistling Ridge's proposed mitigation parcel is consistent with its *Wind Power Guidelines* at a 2:1 replacement ratio. App. B-2 (AR 15821); *see also* App. C-1 (AR 15825), App. D-1-D-3 (AR 20226-28).

acceptable third party[.]” *Id.* Second, “by contributing money to a mutually acceptable third-party that owns or will purchase a mitigation parcel[.]” *Id.* Third, by “the payment of a fee equivalent to the value of permanently disturbed project area to [WDFW] in lieu of mitigation.” *Id.* If Whistling Ridge “has not satisfied its Mitigation Obligation prior to commencing Site Preparation, [it] will provide a letter of credit to EFSEC in an amount sufficient to provide financial security for the Mitigation Obligation.” *Id.* Whistling Ridge must “satisfy its Mitigation Obligation prior to commencing commercial operation of the Project.” *Id.*

The Site Certification Agreement goes further to ensure mitigation because it also requires mitigation based on the actual operation of the Project, not just mitigation based on the pre-construction surveys. Section IV.E.1(d) provides that the Habitat Mitigation Plan “will include a process to determine the actual impacts to habitat following completion of construction.” *Id.* If the “actual impacts to habitat exceed the expected impacts determined prior to construction, the Habitat Mitigation Plan will include a mechanism for [Whistling Ridge] to provide supplemental compensatory mitigation[.]” *Id.*

Section VI.C. of the Site Certification Agreement also provides that prior to commercial operation of the Project, Whistling Ridge must “submit to EFSEC for review and approval a Post-Construction Avian

Monitoring Plan.” AR 36723. “The purpose of the plan shall be to quantify impacts to avian species and to assess the adequacy of mitigation measures implemented[.]” *Id.* The plan must include “an avian casualty/fatality reporting” [and] “a minimum of two breeding season’s [sic] raptor nest survey of the Project Area[.]” *Id.*

The Site Certification Agreement requires mitigation that ensures the standards in WAC 463-62-040(2)(a) and (d) will be satisfied, and EFSEC has the authority to ensure that Whistling Ridge complies with the Site Certification Agreement. EFSEC has the authority to “prescribe the means for monitoring of the effects arising from the construction and the operation of energy facilities to assure continued compliance with terms of certification.” RCW 80.50.040(9). EFSEC has the authority to suspend or revoke Whistling Ridge’s certificate “[f]or failure to comply with the terms or conditions of the original certification[.]” RCW 80.50.130(2). The “courts are authorized to grant such restraining orders, and such temporary and permanent injunctive relief as is necessary to secure compliance with this chapter and/or with a site certification agreement issued pursuant to this chapter.” RCW 80.50.150(1). In addition, “[e]very person who violates the provisions of certificates and permits issued or administered by the council shall incur, in addition to any other penalty as

provided by law, a penalty in an amount of up to five thousand dollars a day for every such violation.” RCW 80.50.150(5).

WAC 463-62-040 does not require that EFSEC make findings of fact regarding the adjudication. Instead, it requires that the Site Certification Agreement it prepares after the adjudication satisfy the mitigation standards set out in the rule. The comprehensive mitigation requirements in the Site Certification Agreement do much more to ensure mitigation than any finding of fact.

**D. The Site Certification Agreement Does Not Unlawfully Delay Requisite Decision-Making And The Law Does Not Require That It Provide For Further Public Participation**

Opponents make two claims related to EFSEC’s responsibilities to monitor the Project after it has been approved. First, Opponents contend that the Site Certification Agreement’s use of post-approval micro-siting of turbines within approved turbine corridors is unlawful. Pet. Br. at 64. Second, they contend that the Site Certification Agreement is unlawful unless it provides for notice to interested parties of post-approval decisions, opportunities for public involvement, and appeal rights. Pet. Br. at 68-69. Neither the record nor the law support these arguments.

**1. The Project's Layout Is Known And Its Impacts Comprehensively Analyzed; Post-Approval Micro-Siting Within Approved Turbine Corridors Is Not Unlawful**

Opponents contend that micro-siting cannot occur after approval of the Site Certification Agreement, because until turbines are micro-sited (i) all contested issues (*e.g.*, layout and impacts) have not been resolved, (ii) substantial evidence does not exist, and (iii) any approval is arbitrary and capricious. Pet. Br. at 64. Micro-siting is the process by which the final locations of turbines and other Project elements are established within the approved turbine corridors. AR 4316, 36700. This is a full-scale attack on the way EFSEC, like other siting entities, sites wind energy facilities. *See ROKT*, 165 Wn.2d at 292 (describing post-approval micro-siting for the Kittitas Valley project).

RCW 34.05.570(3)(i)'s arbitrary and capricious standard is a very high hurdle. An agency action is only arbitrary and capricious if

it is willful and unreasoning and taken without regard to the attending facts or circumstances. “[W]here there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous.”

*Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n*, 148 Wn.2d 887, 905, 64 P.3d 606 (2003) (citations omitted; brackets in original).

Opponents do not even attempt to explain how EFSEC and the Governor willfully disregarded the attending facts or circumstances, probably

because the record demonstrates the careful scrutiny this Project received.<sup>11</sup> Opponents' micro-siting arguments lack merit and provide no basis to remand the Project.

Whistling Ridge sought approval of six identified turbine corridors and the construction of up to 50 turbines with an installed generating capacity of 75 MW within those corridors. AR 4268. Whistling Ridge's application identified the number of turbines (up to 50), the size of the turbines (up to 426 feet tall with an installed generating capacity of between 1.2 to 2.5 MW each), and the area within which turbines would be located (six proposed turbine corridors). AR 4268, 4318, 4327.

Whistling Ridge then submitted evidence fully covering these parameters. For example, Whistling Ridge calculated the permanently and temporarily impacted areas based on constructing 50 turbines within the

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<sup>11</sup> Opponents' argument that turbines could be sited outside the approved turbine corridors without an amendment to the Site Certification Agreement is patently absurd. Pet. Br. at 65. The Site Certification Agreement requires that "construction and operation authorized in this Agreement shall be located within the areas designated herein" and in Whistling Ridge's revised application. AR 36696. The Adjudicative Order and Recommendation Order are part of the Site Certification Agreement. AR 36694. The Adjudicative Order notes that micro-siting will be used to place turbines "in the corridors." AR 28671. The Recommendation Order recommended "denial of approval for tower construction" in "the C corridor and the southerly (A-1 through A-7) portion of the A corridor" and included a site map of all corridors. AR 28638. Whistling Ridge's application also sought approval of turbine corridors, within which final turbine locations would be determined through micro-siting. AR 4316. Moreover, Whistling Ridge's President testified that turbines must be micro-sited "within those [turbine] corridors where we have the site certificate approval to do so" and that micro-siting could not change the approved turbine corridors in any way. AR 16818. Changing the approved turbine corridors would require an amendment to the Site Certification Agreement and a public review process. See WAC 463-66-030.

proposed turbine corridors. AR 4318. Thus, the record contains substantial evidence as to the maximum scope of permanent and temporary impacts. As northern spotted owls have a 1.8-mile provincial home range radius, Whistling Ridge conducted northern spotted owl surveys within all potential suitable habitat within 1.8 miles of all proposed turbine corridors (plus all potential suitable habitat within the two historic spotted owl activity centers north of the Project site) using U.S. Fish and Wildlife survey protocols. AR 11504. Thus, the record contains substantial evidence that the Project will not likely have an adverse effect on northern spotted owls regardless of where individual turbines are located within the approved corridors. To assess potential visual impacts, Whistling Ridge simulated how 50 2.5-MW, 415-foot-tall turbines (*i.e.*, the “worst” case scenario) within the proposed turbine corridors would look from 21 different viewpoints.<sup>12</sup> AR 11412, 16205, 16213. Thus, the record contains substantial evidence about visual impacts from the maximum number and size turbines for which Whistling Ridge sought approval. The Site Certification Agreement allows nothing outside of the parameters studied, and the application, testimony, and FEIS contain substantial evidence supporting EFSEC and the Governor’s decision, which was not arbitrary and capricious. EFSEC’s

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<sup>12</sup> For purposes of a visual impact analysis, 415-foot-tall turbines are equivalent to 426-foot-tall turbines. AR 16095.

recommendation resolved the contested issue posed in the application, which was whether up to 50 turbines could be constructed within the proposed turbine corridors. Post-approval micro-siting of final turbine locations within approved turbine corridors is not unlawful.

Moreover, requiring pre-approval (really pre-application) micro-siting would be entirely impractical and inconsistent with the legislative intent of considering the need for increased renewable energy generation and the public interest. RCW 80.50.010; RCW 19.285.040(2)(a)(ii), (iii) (requiring that each qualifying utility use renewable energy resources to meet at least 9% of its load by 2016 and at least 15% of its load by 2020). In addition to geotechnical and environmental considerations, permit requirements, and other factors, final turbine location depends upon the physical and operational characteristics of the turbine selected for construction. AR 4316, 16756. For example, although there are some general rules regarding turbine spacing within corridors, the exact spacing requirements for each turbine make and model differ. AR 16775. Without the ability to permit turbine corridors and subsequently micro-site turbines within those approved turbine corridors, an applicant would be forced to select the turbine make and model, micro-site, submit its application, and complete the entire EFSEC review process and any judicial review (which for this Project is now at four years) while hoping

that the identified turbine make and model will still be available when it comes time to build the facility.<sup>13</sup> However, “pricing and availability of turbines are highly variable,” and there is no way to know whether the identified turbine make and model will be available at an economically viable price. AR 4327; *see also* AR 16732 (testimony that 1.5 and 1.8 MW turbines were common in 2009 but were already less common in 2011). In addition, requiring that micro-siting precede application submission would effectively preclude projects from using subsequently-developed turbines that could incorporate technological advances further reducing environmental impacts. *See, e.g.*, AR 17723 (turbine models and blade design affect noise generation). Because the impacts of proposed energy facilities can be comprehensively assessed for purposes of the adjudicative proceeding and SEPA by analyzing turbine construction within the proposed turbine corridors, post-approval micro-siting within the approved corridors helps avoid unnecessary delay, implements the State of Washington’s energy policy, and is not unlawful.

**2. A Site Certification Agreement Is Not Legally Deficient If It Does Not Set Out A Process For Additional Public Participation**

Notwithstanding their own intense involvement in EFSEC’s review process and this appeal and the multitude of opportunities for

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<sup>13</sup> As EFSEC could modify the facility design or recommend denial, it would be foolish to buy the selected turbines at any point before judicial review is complete.

public involvement in the EFSEC review process, Opponents now argue that a Site Certification Agreement is legally deficient if it does not provide for notice to interested parties, opportunities of public involvement, and appeal rights in connection any subsequent decision-making on the Project, no matter how ministerial. Pet. Br. at 68-69.

Opponents cite RCW 80.50.090, WAC 463-14-030, RCW 34.05.434, and RCW 76.09.205 as the legal authorities supporting their claim. Pet. Br. at 68. However, RCW 80.50.090 and WAC 463-14-030 concern application review and do not require that the Site Certification Agreement include post-approval notice, participation opportunities, and appeal rights. RCW 34.05.434 concerns public notice of administrative hearings under the Administrative Procedures Act; it does not require that the Site Certification Agreement include post-approval notice, participation opportunities, and appeal rights. RCW 76.09.205 concerns appeals of Forest Practices Act (RCW ch. 76.09) approvals, but it is preempted by RCW ch. 80.50, under which Site Certification Agreements can be appealed.<sup>14</sup> RCW 80.50.110,

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<sup>14</sup> Opponents' reliance on RCW 76.09.205 is predicated on Opponents' erroneous claim that EFSEC deferred review and resolution of contested Forest Practices Act issues. Pet. Br. at 67-68. In fact, EFSEC definitively resolved the Forest Practices Act issues Opponents raised, and Opponents subsequently dropped the argument. Whistling Ridge's application identified Forest Practices Act compliance as a state requirement that would apply but for EFSEC's preemptive authority and called for EFSEC to oversee substantive compliance in coordination with the Washington Department of Natural Resources. AR 4394, 4399-4400. In the proceedings below

.140. EFSEC's three-year, multi-track review process afforded Opponents and the public ample opportunity to participate; none of the cited statutes and administrative rules are even relevant to the contents of a Site Certification Agreement.

Opponents cannot credibly argue that the Site Certification Agreement is legally deficient for not specifying how Opponents can avail themselves of second, third, and fourth opportunities to readjudicate the Project. The only impact of such process would be to further delay the Project, and increase the costs to Whistling Ridge and the state. *See, e.g.*, AR 23460 n.3 (briefing cataloging Opponents' numerous weak procedural arguments designed to cause undue delays, tax state resources, and unnecessarily drive up attorney fees and costs). Opponents fully participated in EFSEC's review, and they have availed themselves of judicial review.

Unless Opponents are "substantially prejudiced" by the lack of post-approval notice, participation opportunities, and appeal rights in the Site Certification Agreement, the Court cannot remand the Site

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Opponents argued that the Project was inconsistent with Skamania County's land use regulations due to alleged non-compliance with the Forest Practices Act. AR 21203-05. EFSEC rejected Opponents' argument: "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." AR 28662 (emphases added). This conclusion clearly resolved the substantive issues Opponents raised regarding the Forest Practices Act. Opponents did not request that EFSEC reconsider this conclusion, nor did they appeal it. Opponents had numerous opportunities to raise Forest Practices Act-related issues, and except in the context of land use consistency, they did not do so.

Certification Agreement. RCW 34.05.570(1)(d). In light of the full, fair, and numerous opportunities they had to raise issues before EFSEC, the Site Certification Agreement does not substantially prejudice Opponents. To ensure that the public is assured abundant, affordable power, the legislature created EFSEC to provide timely, comprehensive, or “one-stop” energy facility permitting with finality at its conclusion. RCW 80.50.010, .100(1)(a), .110, .120, .140. The opportunity for redundant and serial litigation of issues large and small sought by Opponents is aimed at destroying the fundamental foundation of the public policy mandates embedded in RCW ch. 80.50.

**E. Opponents Have Not Overcome The *Prima Facie* Proof That The Project Is Consistent With Skamania County’s Land Use Regulations**

Opponents argue that EFSEC erred in concluding that the Project was consistent and in compliance with Skamania County’s land use provisions. There is no basis for Opponents’ arguments.

**1. Skamania County’s Certificate Of Land Use Consistency Is *Prima Facie* Proof That The Project Is Consistent With Skamania County’s Land Use Regulations**

RCW 80.50.090(2) provides that EFSEC is to determine “whether or not the proposed site is consistent and in compliance with city, county, or regional land use plans or zoning ordinances.” An applicant may submit “certificates from local authorities attesting to the fact that the

proposal is consistent and in compliance with land use plans and zoning ordinances.” WAC 463-26-090. The “certificates will be regarded as *prima facie* proof of consistency and compliance with such land use plans and zoning ordinances absent [a] contrary demonstration.” *Id.*

To overcome a *prima facie* presumption, this Court has required a demonstration that “actually, factually and substantially preponderate[s] *against*” the evidence upon which the presumption rests. *Gogerty v. Dep’t of Insts.*, 71 Wn.2d 1, 8, 426 P.2d 476 (1967) (describing the import of the presumption in the context of judicial review of a State Personnel Board decision).

[B]efore the superior court could upset the board’s findings it would have to demonstrably appear, from the record as a whole, that the quantum of competent and supportive evidence upon which the personnel board predicated a challenged finding or findings of fact was so meager and lacking in probative worth, and the opposing evidence so overwhelming, as to dictate the conclusion that the pertinent finding or findings did not rest upon any sound or significant evidentiary basis.

*Id.*

As contemplated by WAC 463-26-090, Whistling Ridge submitted a certificate of land use consistency—Skamania County Resolution No. 2009-54—for the Project. AR 11596-624. It was adopted by the Skamania County Board of Commissioners and concluded that the Project was consistent with Skamania County’s “land use plans and applicable

zoning ordinances.” AR 11597. Under WAC 463-26-090, Skamania County’s certificate is *prima facie* proof the Project is consistent with applicable Skamania County land use regulations.

Opponents ignore the fact that Skamania County’s certificate of land use consistency is *prima facie* proof of consistency.<sup>15</sup> Instead, they argue that the interpretation of Skamania County’s comprehensive plan and land use ordinances is a legal question subject to *de novo* review. Pet. Br. at 51. This argument is foreclosed by WAC 463-26-090, which establishes the certificate of land use consistency as *prima facie* proof.

## **2. The Project Is Consistent With The Conservancy Designation In Skamania County’s Comprehensive Plan**

Opponents argue that EFSEC erred in concluding that the Project “is consistent and in compliance” with the Conservancy designation in Skamania County’s 2007 comprehensive plan. Pet. Br. at 52. Opponents’ arguments are wrong for two reasons.

First, in light of the Planning Enabling Act and the purpose of EFSEC’s local land use review, EFSEC correctly concluded that it needed to assess the Project’s consistency—rather than its compliance—with Skamania County’s comprehensive plan. As a matter of state and county

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<sup>15</sup> Opponents have waived any argument that Resolution No. 2009-54 is not a certificate of land use consistency, because their brief makes no argument that it is not a proper certificate of land use consistency. See *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (when error is assigned to a finding but no argument is made, the assignment of error is waived).

law Skamania County's comprehensive plan has no regulatory effect. Skamania County plans under the Planning Enabling Act, RCW ch. 36.70. AR 11601. Planning Enabling Act comprehensive plans "serve as a policy guide" only. RCW 36.70.020(6). They do not regulate development. RCW 36.70.340; *Barrie v. Kitsap Cnty.*, 93 Wn.2d 843, 848, 613 P.2d 1148 (1980). Skamania County's comprehensive plan states that it "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." AR 21993. Further, the purpose of EFSEC's land use review is to "recognize and validate local land use control, consistent with the purposes of RCW 80.50." AR 28661. As such, EFSEC properly concluded that here it needed to assess the Project's "consistency" with Skamania County's guide rather than apply a stricter "compliance" standard that applies to "regulatory provisions that mandate performance."<sup>16</sup> AR 28661 n.15. To determine consistency, EFSEC "consider[s] not only the language of the County provisions but also how the County would apply that language." AR 28661.

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<sup>16</sup> Although comprehensive plans do not have a regulatory effect under state law, a county could, as a matter of county law, make compliance with its comprehensive plan mandatory. For example, in *West Main Associates v. City of Bellevue*, 49 Wn. App. 513, 525, 742 P.2d 1266 (1987), the court gave regulatory effect to a comprehensive plan because the city "enacted SEPA ordinances which expressly adopt the Comprehensive Plan as a local SEPA policy, [so] the [city] council was entitled to rely on the Comprehensive Plan in denying the proposal under SEPA." If Skamania County had made compliance with its comprehensive plan mandatory, EFSEC would have needed to determine whether the Project complied with the plan.

Second, EFSEC correctly interpreted the comprehensive plan. Opponents' arguments to the contrary ignore that Policy L.U. 1.2 and Policy L.U. 6.1 concern *future* county zoning regulations and overlook EFSEC's conclusion that Conservancy designation support a finding of consistency because "its operation will help to support the continued sustained use of the majority of the site for timber production."

AR 28664. Policy L.U. 1.2 states:

The [comprehensive] plan is created on the premise that the land use areas designated are each best suited for the uses proposed therein. However, it is not the intention of this plan to foreclose on future opportunities that may be made possible by technical innovations, new ideas and changing attitudes. Therefore, 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. In the area Skamania County's zoning ordinance currently classifies as "unmapped," which includes the approved turbine corridors, "all uses which have not been declared a nuisance by statute, resolution, ordinance, or court of jurisdiction are allowable." Skamania County Code 21.64.020. Because allowable, review, and conditional uses are not "specifically listed" for the unmapped area, Opponents contend that the only uses consistent with the Conservancy designation are those uses within the 12 use categories listed under the Conservancy designation.

Pet. Br. at 53-55. However, Policy L.U. 6.1 provides, in relevant part, that allowable, review, and conditional uses are the

[t]hree types of uses [that] *should be established* for each land use designation under this plan and for any zone established to implement this plan. If any use is not listed as [an allowable use, a review use, or a conditional use], *then* the use is prohibited within that land use designation[.]

AR 22017 (emphases added). EFSEC properly read Policy L.U. 1.2 in conjunction with Policy L.U. 6.1, concluding that “unmentioned uses” are not necessarily inconsistent with the 2007 comprehensive plan because Policy L.U. 1.2 and Policy L.U. 6.1 concern the “future zoning regulations” that will be adopted to implement the comprehensive plan. AR 28663-64. EFSEC correctly construed these policy statements.

The future zoning regulations contemplated by the comprehensive plan have not yet been adopted. AR 18825-26. Thus, to determine whether the Project was consistent with the Conservancy designation, EFSEC properly considered whether the Project was consistent with the intent of the Conservancy designation. AR 28664. As stated in the comprehensive plan, the Conservancy 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. EFSEC found that the Project was consistent with this intent for two reasons: (i) wind is a natural resource

and (ii) the Project “will help support the continued use of the majority of the site for timber production.” AR 28664. Opponents’ criticism focuses solely on the first rationale; Opponents entirely ignore the second rationale. Pet. Br. at 55-57. Regardless of the propriety of the first rationale, EFSEC’s second rationale is supported by the Conservancy designation’s express intent and the record.<sup>17</sup> Indeed, Opponents admit that logging and timber management are natural resources properly considered under the Conservancy designation. Pet. Br. at 55-56. EFSEC did not err when it concluded that the Project was consistent with the Conservancy designation.

**3. Skamania County’s Moratorium On Processing SEPA Checklists Is Not A “Zoning Ordinance” Under RCW Ch. 80.50**

Skamania County Ordinance No. 2010-10 imposed a moratorium on, among other things, the “acceptance and processing of State Environmental Policy Act (SEPA) checklists related to forest practice conversions for any parcel located within unincorporated Skamania County that is not currently located within a zoning classification[.]”

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<sup>17</sup> EFSEC’s conclusion is further supported by the fact that Skamania County, after adopting the comprehensive plan in 2007, sought to adopt a new section of zoning regulations that would have zoned all land and allowed wind energy facilities as a conditional use in zones consistent with the Conservancy designation. AR 16870, 18825, 22010. Further, the Project is more consistent with the Conservancy designation’s express intent than certain uses, such as recreational vehicle parks, private schools, religious facilities, meeting halls, and aircraft landing strips, that the comprehensive plan identifies as “appropriate” uses in the Conservancy designation. AR 22012-13.

AR 16856. Opponents argue that EFSEC erred in concluding that this moratorium is not a “zoning ordinance.” Pet. Br. at 63. The Court should reject this argument for two reasons.

First, EFSEC correctly concluded that the moratorium was “neither [a] zoning ordinance[] nor [a] land use plan[] within the meaning of RCW 80.50.” AR 28662. RCW 80.50.090(2) calls for EFSEC to determine whether the Project is consistent with Skamania County’s “land use plan[] or zoning ordinance[.]” Land use plan means a local government’s comprehensive plan. RCW 80.50.020(14). In contrast, a “zoning ordinance” is “an ordinance of a unit of local government *regulating the use of land* and adopted pursuant to,” among other statutes, the Planning Enabling Act, RCW ch. 36.70. RCW 80.50.020(22) (emphasis added). Consistent with RCW 80.50.020(22), the Planning Enabling Act provides that zoning ordinances “[r]egulate the use of buildings, structures, and land as between agriculture, industry, business, residence, and other purposes[.]” RCW 36.70.750(1) (emphasis added). Similarly, interim zoning ordinances temporarily “classify or *regulate uses* and related matters.” RCW 36.70.790 (emphasis added).

Skamania County’s moratorium ordinance, though, was neither a zoning ordinance nor an interim zoning ordinance under the Planning Enabling Act. It was a moratorium. RCW 36.70.795 authorizes counties

to adopt “a moratorium, interim zoning map, interim zoning ordinance, or interim official control without holding a public hearing.” By listing different types of controls in RCW 36.70.795, the legislature clearly distinguished moratoria from interim zoning ordinances and by extension zoning ordinances.<sup>18</sup> Skamania County’s moratorium does not regulate the use of land; it regulates Skamania County’s own “acceptance and processing” of SEPA checklists. This distinction is reflected in the fact that the adoption of ordinances “relating solely to governmental procedures, and containing no substantive standards respecting use or modification of the environment shall be exempt” from SEPA compliance, including threshold determinations. WAC 197-11-800(19). Skamania County’s moratorium was not reviewed under SEPA. *See* AR 16854-57. Thus, it cannot be deemed to regulate the use of land. EFSEC correctly concluded that the moratorium ordinance did not constitute a zoning ordinance under RCW 80.50.020(22).

Second, Opponents’ argument fails because the moratorium does not apply to the Project. Under RCW 36.70.795 when a county adopts a

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<sup>18</sup> Further, the definition of zoning ordinances now codified at RCW 80.50.020(22) was enacted in 1977. Laws of 1977, Ex. Sess., ch. 371, § 2. At that time, the Planning Enabling Act contemplated the adoption of zoning ordinances, but did not address moratoria. RCW 36.70.795 was not enacted until 1992. Laws of 1992, ch. 207, § 4. Although the legislature has since amended RCW 80.50.020(22) to include zoning ordinances adopted under other laws, such as the Growth Management Act, it never expanded this definition to include moratoria.

moratorium, it is required to “adopt findings of fact justifying its action.” In this case the findings adopted by the Skamania County Commissioners focused on a narrow problem. Skamania County was concerned that “continued unplanned and uncontrolled residential growth in the areas of commercial forest lands and the Gifford Pinchot National Forest could potentially increase the risk of forest fires and other emergency events[.]” AR 16855. During the visioning process for the comprehensive plan, “information was gathered to help determine where the best locations are for future residential development, taking into considerations the terrain, access roads, location of critical area resources, location of commercial forest lands, future service needs of residents, and future water usage for residential development[.]” *Id.* Thus, the moratorium was not directed at all conversions of forest land to a non-forest purpose.

Consistent with these findings, the moratorium does not apply to the Project. The moratorium prohibits Skamania County from “accept[ing] and processing of State Environmental Policy Act (SEPA) checklists related to forest practice conversions[.]” AR 16856. But as a matter of county law, the Project was not required to submit a SEPA checklist to Skamania County. Skamania County Code 16.04.070(A) provides that a SEPA checklist is “not needed if . . . SEPA compliance has been initiated by another agency.” Here, EFSEC was the agency

responsible for the SEPA process. The moratorium was intended to apply to projects where the SEPA checklist was filed with Skamania County. For these reasons, the Court should reject Opponents' argument concerning the moratorium.

**F. Whistling Ridge's Refusal To Stipulate To A Shortened Record Was Reasonable**

The Court should deny Opponents' request for an order requiring that Whistling Ridge pay Opponents \$4,000 under RCW 34.05.566(5)(a), under which this Court has discretion to make such an order if a party "unreasonably refuse[d] to stipulate to shorten . . . the record." Opponents' own argument, though, demonstrates that Whistling Ridge's refusal was reasonable.

Opponents identify "[e]xamples of the many issues and documents not relevant on appeal" that they apparently believe could have readily been excluded, notwithstanding the fact that their Petition For Judicial Review alleged errors pertaining to, and their brief now cites, these very same "not relevant" documents. Pet. Br. at 73 n.120. For example, Opponents now claim that EFSEC's "orders on procedural issues and related pleadings" are not relevant to their appeal. Yet their own Petition For Judicial Review alleged error with a procedural order. CP 6. Moreover, other orders on procedural issues and related pleadings help put

Opponents' current arguments—particularly those demanding that the Site Certification Agreement set out public notice, participation opportunities, and appeal rights—in context.<sup>19</sup> Similarly, Opponents claim that documents related to “cultural resources” are not relevant, yet Opponents’ Petition For Judicial Review and their brief allege errors concerning “[a]esthetic, [h]eritage, and [r]ecreational [r]esources.” CP 20-22. “Heritage” is synonymous with cultural resources. *See* WAC 463-60-362 (providing that an application should address aesthetics, historic and cultural preservation, and recreation). In fact, cultural resources evidence must be relevant because Opponents’ own brief describes cultural heritage around the Project site and cites to various public comments concerning potential impacts to cultural resources. *See* Pet. Br. at 8 n.13.

Opponents’ argument is particularly lacking in merit when one considers they successfully asked Thurston County Superior Court to include in the administrative record the over 500 pages of transcripts, summaries, and wind speed maps appearing at AR 36735-37317 that Opponents claimed at the time were relevant or essential to their appeal. *See* CP 365-68. These additional documents proved to be so relevant that Opponents did not cite or rely on them in their brief. Unlike Opponents,

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<sup>19</sup> *See, e.g.*, AR 2431 (Order No. 865: “Particularly troubling is Friends’ acknowledgment that its incorporations by reference are made expressly to avoid the Council’s briefing limitations, to which it had agreed at the January 20 post-hearing conference.”).

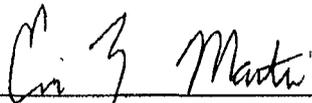
Whistling Ridge desired to expedite the superior court proceedings consistent with RCW 80.50.140 rather than engage in costly and unnecessary negotiations and judicial hearings regarding the “relevancy” of documents in the record, which would only serve to further Opponents’ goals of increasing delays and costs. For all these reasons, Whistling Ridge’s refusal to stipulate to a shortened record is reasonable and the Court should not order Whistling Ridge to pay Opponents \$4,000.

**CONCLUSION**

For the reasons set forth above, Whistling Ridge asks the Court to affirm the Governor’s decision.

RESPECTFULLY SUBMITTED this 12th day of April, 2013.

STOEL RIVES LLP



Timothy L. McMahan, WSBA #16377

William B. Collins, WSBA #785

Eric L. Martin, WSBA #45147

Attorneys for Whistling Ridge Energy LLC

**PROOF OF SERVICE**

I, Kali Turner, hereby certify that I served the foregoing Response Brief of Intervenor-Respondent Whistling Ridge Energy LLC on the parties listed below by email and first class, U.S. Mail, postage prepaid:

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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, in Portland, Oregon.



Kali Turner  
Practice Assistant to Timothy L. McMahan  
On behalf of Whistling Ridge Energy LLC

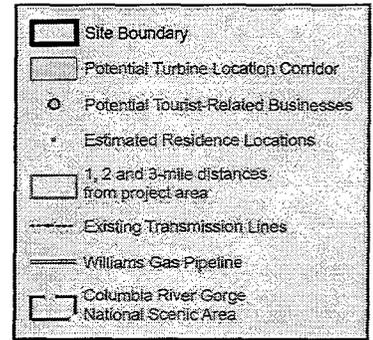
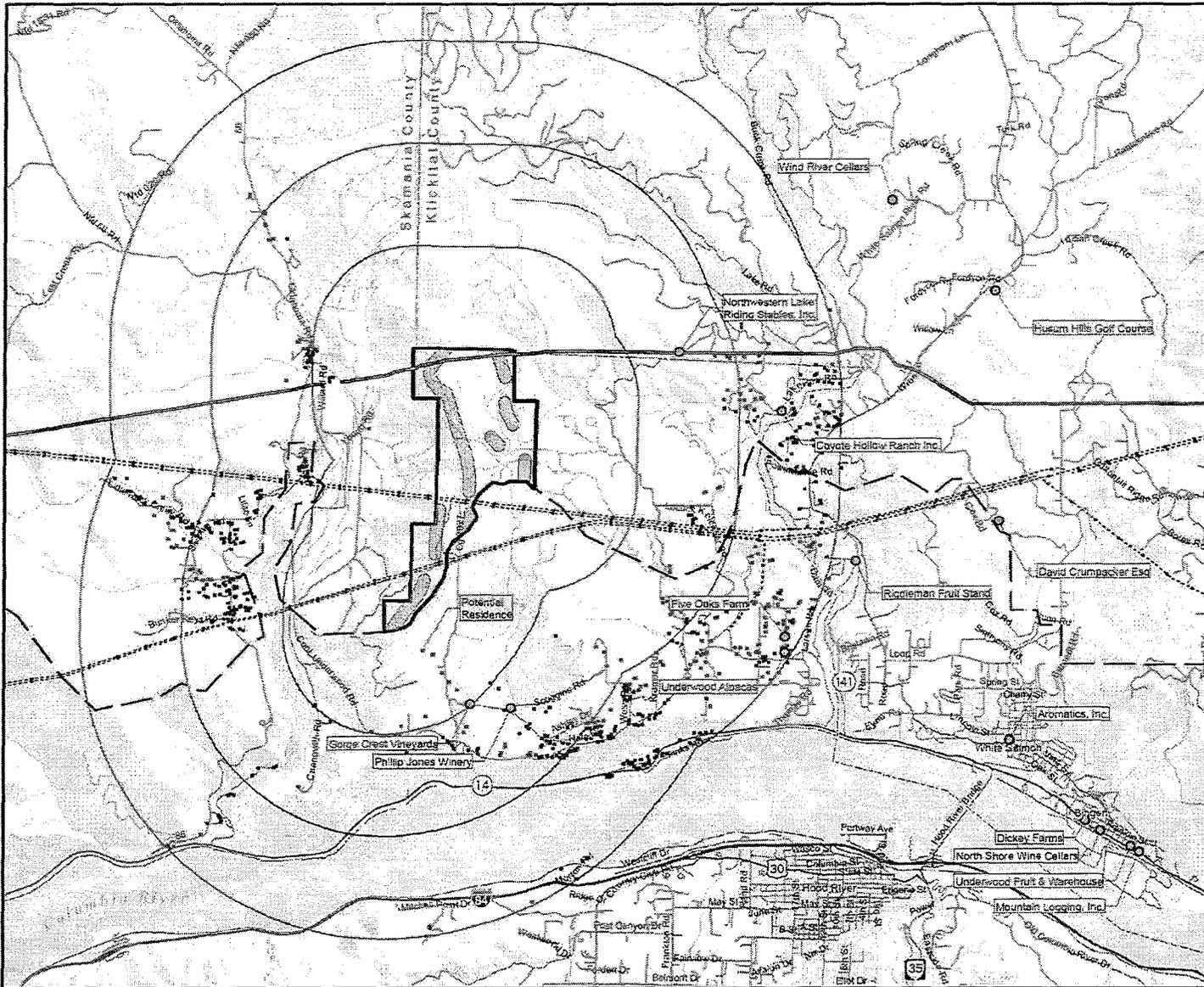
**APPENDIX A**

Residences within Three Miles of  
the Project Site

(Excerpted from FEIS)

(AR 28539)

A-1



Data Source: Publicly available data from USGS NED, BLM, Washington DOT, City of Bingen, City of White Salmon, and ESRI.



Figure 3.8-1  
Residences within Three Miles of the Project Site

**APPENDIX B**

September 17, 2010 Washington  
Department of Fish and Wildlife letter

(AR 15820 - 821)



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 17<sup>th</sup>, 2010

Stephan Posner  
EFSEC  
905 Plum Street SE  
Olympia, Washington 98504-3172  
[efsec@commerce.wa.gov](mailto: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 27<sup>th</sup>, letter from WDFW. Other comments may be offered as the project progresses.

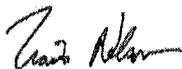
WDFW has carefully reviewed the habitat evaluation prepared by the applicant. The Whistling Ridge site is a forested site managed for over 100 years. It is not in a natural or native coniferous forest condition. The pre-project assessment and avian/bat use surveys are consistent with standard protocols 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**

November 24, 2010 Washington  
Department of Fish and Wildlife letter

(AR 15825)



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

November 24, 2010

Mr. Jason Spadaro  
President  
SDS Lumber Company  
P.O. Box 266  
Bingen, WA 98605

Mr. Spadaro,

In response to the proposed mitigation parcel for impacts associated with the proposed development of the Whistling Ridge Energy Project, the Washington Department of Fish and Wildlife (WDFW) offers the following input at this time. Additional input may be provided in the future.

The proposed mitigation parcel (parcel) of approximately 100 acres of land within a portion of the SE ¼ of Section 10, Township 3 North, Range 12 East is hereby deemed consistent with the WDFW Wind Power Guidelines. The parcel includes the following habitats and species, Oregon white oak, western grey squirrel, western bluebird, Merriam's turkey, blacktail deer, riparian habitats, and a fish-bearing stream (Silva Creek, tributary to the Klickitat River).

The intent of the proposed mitigation is to provide for conservation and protection of habitats and species affected by the proposed project development, which are found in the proposed aforementioned parcel. This parcel will be protected by way of a conservation easement for the life of the project, to be granted to Klickitat County by SDS Lumber (landowner).

Once the conservation easement is executed on the land as described here, the mitigation will be considered acceptable and complete per the WDFW Wind Power Guidelines.

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

Sincerely,

Travis Nelson  
Renewable Energy Section Manager

cc: Stephan Posner      EFSEC  
    Lisa Veneroso      WDFW  
    Mike Ritter         WDFW

**APPENDIX D**

December 20, 2010 Washington  
Department of Fish and Wildlife letter

(AR 20226 - 228)



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](mailto:Michael.Ritter@dfw.wa.gov).

Sincerely,



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Renewable Energy Section Manager

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**APPENDIX E**

Washington Department of Fish and  
Wildlife's *Wind Power Guidelines*

(AR 17997 - 18033)

# Washington Department of Fish and Wildlife Wind Power Guidelines



April 2009



Washington  
Department of  
**FISH and  
WILDLIFE**

## DISCLAIMER

The Washington Department of Fish and Wildlife (WDFW) does not have regulatory authority specific to wind power development at this time. WDFW is an agency with environmental expertise as provided for through the Washington Administrative Code (WAC) 197-11-920. Comments related to environmental impacts are provided to regulatory authorities through the State Environmental Policy Act (SEPA) Revised Code of Washington (RCW) 43.21C review process.

Recommended citation:

Washington Department of Fish and Wildlife. 2009. Wind Power Guidelines. Olympia, WA. 30pp.

Cover photo:

Big Horn Wind Farm – Bickleton, WA. / Travis Nelson - Washington Department of Fish and Wildlife

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# WASHINGTON DEPARTMENT OF FISH AND WILDLIFE WIND POWER GUIDELINES

April 2009

Washington Department of Fish and Wildlife  
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WIND POWER GUIDELINES ON-LINE:

[http://wdfw.wa.gov/hab/engineer/major\\_projects/wind\\_power.htm](http://wdfw.wa.gov/hab/engineer/major_projects/wind_power.htm)



STATE OF WASHINGTON

**Department of Fish and Wildlife**

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May 1, 2009

**A Message from the Director**

Thanks to the efforts of a dedicated work group consisting of Department staff and a broad range of wind power stakeholders, the 2003 Wind Power Guidelines have undergone an intensive review and revision. The revised 2009 Wind Power Guidelines provide consistent direction for development of this renewable energy resource while protecting the state's wildlife and habitat.

The 2009 Wind Power Guidelines will be used by the Washington Department of Fish and Wildlife (Department) as we collaborate with the industries that are planning wind power projects, and when we formulate comments and recommendations through state and local public comment and permitting processes. Our Wind Power Guidelines are divided into the following six chapters:

- 1) Baseline and Monitoring Studies call for pre-project assessments of wind power sites with the goal of avoiding and minimizing bird and bat impacts related to wind turbines.
- 2) Minimization of Wildlife Impacts outline the path for avoiding and minimizing potential impacts related to construction methods and sensitive habitat areas.
- 3) Operational Monitoring details the post-construction monitoring recommendations and the role of the Technical Advisory Committee.
- 4) Research Oriented Studies are recommendations and examples for research needs related to wind power development as it relates to wildlife habitats and species.
- 5) Habitat Mitigation encourages development into disturbed and developed areas, away from undeveloped fish and wildlife habitat; provides ratios for replacement habitat as mitigation for temporary and permanent wind project impacts; adheres to the principle of no loss of habitat functions and values.
- 6) Habitat Types provides statewide ecoregional definitions of habitat types throughout Washington State.

Our intent is to provide wind project applicants with clarity and streamlined processes while obtaining appropriate mitigation to avoid the long term loss of our native wildlife and their habitats. The guidelines also provide wind power developers and regulatory authorities the opportunity to partner with the Department to preserve, protect, and restore valuable native habitats in Washington State. These revised guidelines will be reviewed for effectiveness and relevance and then modified as needed after five years.

Thank you for your dedication and efforts to preserve and steward habitat and wildlife. This essential investment will help to sustain future generations of wildlife in Washington State.

Sincerely,

A handwritten signature in black ink, appearing to read "Philip Anderson".

Philip Anderson  
Interim Director



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## INTRODUCTION

These guidelines have been developed collaboratively through a representative stakeholder group comprised of environmental representatives, county planners, wind energy developers, State and Federal natural resource managers and biologists, and the public with consideration for fish and wildlife habitat protection, conservation and mitigation related to the development of wind energy facilities. These guidelines are intended to provide permitting agencies and wind project developers with an overview of the considerations are made by Washington Department of Fish and Wildlife (WDFW) in the review of wind energy project proposals.

The purpose of the WDFW Wind Power Guidelines is to provide consistent statewide guidance for the development of land-based wind energy projects that avoid, minimize and mitigate impacts to fish and wildlife habitats in Washington State.

In 2006, Washington voters approved legislation to require 15 percent of the electricity sold in Washington is derived from renewable energy resources by 2020 with a reduction in greenhouse gas emissions to 50 percent below 1990 levels by the year 2050. Wind energy is expected to play a key role in meeting this renewable energy standard for energy production and reducing greenhouse gas emissions.

WDFW serves as Washington's principal agency on species protection and conservation (RCW - Title 77). Legislative Mandate RCW 77.04.012 establishes that wildlife, fish, and shellfish are property of the state and that WDFW is entrusted by and through the Fish and Wildlife Commission to ... "*preserve, protect, perpetuate, and manage the wildlife and food fish, game fish, and shellfish...*" and "... *attempt to maximize the public recreational game fishing and hunting opportunities of all citizens...*" Therefore, these wind power guidelines acknowledge the need for increased energy production in Washington, while attempting to balance natural resource protection with the broad interests of the public.

In Washington State, the developer of a new wind power generation facility has the option of pursuing a permit through either the local jurisdiction (cities and counties) or the state ([Energy Facility Site Evaluation Council \(EFSEC\)](#)).

Compliance with the State Environmental Policy Act (SEPA) is required for wind energy proposals. WDFW is considered an agency with environmental expertise through SEPA and provides review and comments on environmental documents. The permitting authority is responsible for SEPA review before issuing a project permit. However, wind project developers and permitting agencies are encouraged to consult with WDFW as early as possible in the siting process to discuss the potential environmental impact of the development prior to formal SEPA review. Early consultation with WDFW can ultimately result in a more efficient review of the proposal with upfront discussion of potential impacts.

## GUIDING PRINCIPLES

Wind-generated electricity is recognized to be a viable option for augmenting current and future energy needs for the residents of Washington. As a renewable source of energy, with specific consideration to avoid or minimize environmental impacts, wind power can have a lesser impact on the environment compared to most conventional energy sources. Environmental impacts of concern include those to wildlife species or their habitats that may result from placement or operation of wind turbines. In some instances, the Department may conclude that a proposed project should not be constructed due to excessive and unavoidable wildlife impacts.

This document is based upon the premise that project proponents, permitting authorities and other stakeholders desire the best possible information with which to make decisions about turbine placement, impact assessment, mitigation strategy development, and monitoring. With this in mind, WDFW recommends the following guiding principles for addressing potential wildlife impacts based on the ecology and behavior of wildlife species of the Pacific Northwest.

1. Several categories of wildlife species – including various categories of listed species and those that aggregate during any season – are potentially impacted by wind project development.
2. Various aspects of the ecology and behavior of potentially vulnerable species should be considered in risk assessments and management work. For example, wildlife can be present during one or more seasons or life stages at a project site, and this seasonality should be taken into account. Also, some species may not breed or be present every year, and this would require that more than one year of surveys be conducted to better understand their use of or occurrence at the site. Similarly, some species may be difficult to detect or varying times of occurrence from one year to the next that might require multiple survey visits to provide data on site use. In addition, some species have substantially larger home ranges than others, and assessments should take these species-specific differences into account.
3. Protection of certain species may be accomplished by protection of sensitive habitats, whereas other species will be best protected by certain management actions involving degraded or more common habitats. This occurs when species or species groups – for example, sandhill cranes, waterfowl, shorebirds, and raptors – aggregate in areas that are not considered sensitive or special habitats. As a result, both habitat value and species needs should be considered.
4. From a wildlife conservation perspective, a species in decline may be absent from an area with specific consideration to avoid or minimize environmental impacts it formerly occupied, yet the habitat remains important for the conservation or recovery of that species.

5. Potential effects of wind turbine development may be direct (e.g. turbine collision resulting in mortality) or indirect (e.g. displacement from territory) and may have cumulative effects. These effects potentially include those related to road construction or maintenance, the loss or degradation of territories, and alteration of community dynamics (e.g. predator-prey interactions). These types of factors should be addressed in assessments, monitoring and mitigation strategies.
6. There are a number of important considerations related to information needed to inform management decisions. First, even the most basic information is lacking for many species in major agency databases. Consequently, the absence of data does not necessarily indicate the absence of a particular species at the site. Second, although application of some off-site information (including information on disturbance buffers) may be appropriate, multiple factors may complicate extrapolation and result in the need for local information. Finally, information used to assess impacts and upon which to base management decisions should be judged as to both the standards with which it was generated and its ability to credibly and appropriately inform the decision-making process.

## **1.0 BASELINE AND MONITORING STUDIES**

### **1.1 PRE-PROJECT ASSESSMENT**

The primary purposes of pre-project assessment studies are to 1) collect information suitable for predicting the potential impacts of the project on wildlife, habitat and plants and 2) design the project layout (e.g., turbine locations) so that impacts on biological resources are avoided and/or minimized. Species status or the potential to impact large numbers of common species should be taken into consideration when developing a target list of species to be surveyed. The pre-project assessment may utilize relevant information from projects in comparable habitat types in locations close to the proposed project. The site-specific components and the duration of the assessment should depend on the size of the project, the availability and extent of existing and applicable information in the vicinity of the project, the habitats potentially affected, the likelihood and timing of occurrence of threatened, endangered and other special- status species at the site, the magnitude of impacts to other species (e.g., bats, passerines, etc.) and other factors such as issues and concerns identified during the SEPA public process. Each component is discussed below. The results of the information review and baseline studies should be reported to the affected stakeholders (e.g., state and federal wildlife agencies) in a timely fashion.

### **1.2 Information Review**

Existing information on species and potential habitats in the vicinity of the project area should be reviewed and if appropriate, mapped. Sources of existing information should include resource agencies, local experts, recognized databases (e.g., Priority Habitats and Species [PHS] database, Wildlife Program Wildlife Resources Data System [WRDS]), and data gathered at other nearby wind facilities or other types of projects.

This information should be used to develop field and analysis protocols reviewed and approved by the WDFW.

### 1.3 Habitat Mapping

Key information about general vegetation and land cover types, wildlife habitat, habitat quality, extent of noxious weeds, and physical characteristics within the project area should be collected and compiled using *current protocols*<sup>1</sup>.

### 1.4 Raptor Nest Surveys

At a minimum, one raptor nest survey during the breeding season within 1 mile of the project *site*<sup>2</sup> should be conducted to determine the location and species of active nests potentially disturbed by construction activities, and to identify active and potentially active nest sites with the highest likelihood of impacts from the operation of the facility. A larger survey area (e.g., a 2-mile buffer around project site) is recommended if there is some likelihood of the occurrence of nesting state and/or federally threatened and endangered raptor species (e.g., ferruginous hawk, bald eagle, golden eagle), or if empirical data on displacement impacts may be monitored after construction (see Research-Oriented Studies below).

### 1.5 General Avian Use Surveys

A minimum of one full year of avian use surveys is recommended following current protocols to estimate the use of the project area by avian species/groups of interest during the major migratory seasons or season of most concern. This information should be used to guide decisions regarding appropriate survey intensity.

Two or more years of relevant data are recommended in the following cases: 1) risk to avian groups of concern is estimated to be high, 2) there is limited or no relevant data regarding seasonal use of the project site (e.g., data from nearby areas of similar habitat type), and/or 3) the project is significantly diverse in habitat and species. This additional avian use data should be collected to refine impact predictions and make decisions on project layout.

If a project is an *infilling*<sup>3</sup> or expansion of an existing operating wind project or is sited in close proximity to an existing operating wind project in a similar habitat type, the wind

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<sup>1</sup> Current protocols are developed using Best Available Science in consultation with WDFW.

<sup>2</sup> Site – a project “site” for the purposes of addressing potential raptor nest disturbances is defined as the furthest extent of a ground disturbing activity and includes gravel sites used for construction, overhead and underground electrical routes, new and upgraded buildings and substations.

<sup>3</sup> Construction of turbines within existing project area.

<sup>4</sup> WDFW and the permitting authority should consult regarding this determination.

project developer should consult with WDFW to *determine*<sup>4</sup> if existing relevant/adequate data may be used to determine potential impacts.

## **1.6 Bat Surveys**

An assessment, possibly including a literature review, and consultation with WDFW should be conducted to determine if bat surveys are needed. Appropriate methods, including species-discriminating bat detectors and radar, survey periods and locations depend on local habitat, environmental conditions and elevation, and vary by species and/or life stage.

Site-specific bat surveys are recommended in the following cases: 1) use of the site by bat species is estimated to be high relative to other projects and/or 2) there are limited or no relevant data regarding seasonal use of the project site (e.g., data from nearby areas of similar habitat type).

## **1.7 Surveys for Threatened, Endangered and Sensitive Species**

If existing information suggests the probable occurrence of state and/or federal threatened, endangered (T&E) or sensitive-status species on the project site at a level of concern, focused surveys are recommended during the appropriate season to determine the presence or likelihood of presence of the species. For example, if T&E species were expected to overwinter in concentrations in the project vicinity, targeted surveys to estimate T&E species use of the site would be appropriate. For ESA listed species, early consultation with the US Fish and Wildlife Service for species specific survey protocols is highly recommended.

## **2.0 MINIMIZATION OF WILDLIFE IMPACTS**

One goal of the pre-project assessment is to help design the project to avoid and minimize impacts to habitat and wildlife. Below are some considerations for avoiding and minimizing impacts to wildlife.

### **2.1 Impact Avoidance and Minimization**

- Where appropriate develop in agricultural and other disturbed lands, including using existing transmission corridors and roads where possible.
- Avoid high bird and bat aggregation areas, and areas used by sensitive status species.
- Encourage the protection of Priority Habitats and Species (PHS).
- Minimize use of overhead collector lines, unless underground collector lines are not appropriate or feasible due to environmental conditions (e.g.-topography, soil conductivity, environmental impacts, etc.).
- When overhead lines are used, use designs that avoid and minimize impacts to raptors and other birds (refer to Avian Power Line Interaction Committee [APLIC] guidelines regarding adequate conductor spacing and use of perch guards).

- Use tubular towers to reduce the likelihood that birds will perch on towers and to possibly reduce the risk of collision. Avoid use of lattice towers, particularly those with horizontal cross-members.
- Avoid using permanent tower types that employ guy wires. If guy wired towers are approved, encourage the requirement of bird flight diverters on the guy wires.
- Discourage the use of rodenticides to control rodent burrowing around towers.
- Minimize the use of lights on towers and facilities structures, in accordance with federal, state, and local requirements.
- Control noxious weeds in accordance with federal, state, and local laws.
- Encourage the control of detrimental weedy species that invade as a result to disturbance from construction, maintenance and operation.
- Encourage the permitting authority to require a fire protection plan and a complete road siting and management plan that includes vehicle-driving speeds that minimize wildlife mortality.
- Reduce availability of carrion (animal carcasses).
- Minimize roads and stream crossings.
- Encourage a decommissioning condition for restoration of the site to approximate or improved pre-project conditions that would require removal of the turbines and infrastructure when the project ceases operation.

### 3.0 OPERATIONAL MONITORING

Mortality of birds and bats is expected to result from wind power projects. However, it is anticipated that significant impacts to wildlife can be avoided or minimized if these guidelines are employed. Monitoring studies, such as carcass surveys, using current protocols are required to determine the estimated direct impacts of the wind farm on birds and bats. The duration and scope of the monitoring should depend upon, but are not limited to, the size of the project and the availability of existing monitoring data at projects in similar habitat types. Proponents should work with WDFW to develop and/or determine acceptable monitoring protocols for use. Project operators are encouraged to develop incidental fatality reporting protocols to coincide with regular on-going operational activities.

A Technical Advisory Committee (TAC) is recommended to function as a post-construction advisory committee to the project owner and the permitting authority. The TAC is responsible for reviewing results of post-construction monitoring data and making suggestions to the project owner and permitting authority regarding the need to adjust mitigation and monitoring requirements based on results of monitoring data and relevant data. Potential members include stakeholders from environmental groups, wind project owners and/or developers of the project, landowners, and county representatives, tribes, state and federal resource agencies.

The range of potential adjustments to the monitoring and mitigation requirements should be clearly stated in the project permit. Adjustments should be made if unanticipated impacts become apparent from monitoring data. Such changes may include but are not limited to the following examples: reducing or eliminating the source of the impact, management plans, additional monitoring or research focused on

understanding the identified impacts to particular species (e.g. bats), and creation of raptor nesting structures (artificial or natural, on or off-site). TACs should review and comment on the protocols for conducting the monitoring study and the procedures and form for reporting the information. Progress reports summarizing the monitoring results should be reported to the TAC on a regular basis, as agreed to by TAC members. Information from these meetings and mitigation and monitoring suggestions will be summarized by the WDFW TAC member and reported regularly to WDFW Headquarters in Olympia.

TACs generally function for the duration of the operational monitoring period. However, a TAC may reconvene to address an unforeseen circumstance outside the regular operational monitoring schedule.

Reporting of Endangered Species Act (ESA) species impacts to Federal and State agencies and the TAC are the operator's responsibility. The operator shall contact the United States Fish and Wildlife Service or National Marine Fisheries Service to determine the appropriate measures to resolve un-authorized take of ESA listed species or species covered by other federal regulations.

#### **4.0 RESEARCH-ORIENTED STUDIES**

Standard pre-project assessment surveys and studies and standard fatality operational monitoring are separate from research-oriented studies. At some projects, additional studies that utilize pre-construction data may be conducted to test specific research hypotheses about impacts to a particular species or group of species. Rather than being necessary for pre-project assessment, such studies are focused on research, such as indirect impacts (e.g. displacement, cumulative impacts, etc.), that potentially provide information for future projects.

Examples of research oriented studies include the use of gradient analysis in understanding the level of displacement of grassland nesting birds (e.g., greater sage-grouse, long-billed curlew) as a function of distance from turbines, construction and operations effects on resident and migratory bats, and raptor nest monitoring comparing density and nest success before and after operation of the wind facility. If such studies are determined to be important to the overall understanding of wind energy/wildlife interactions, they should be designed to follow appropriate experimental designs (Anderson et al. 1999, Morrison et al. 2002). Funding and/or support for these more research-oriented studies should be solicited from multiple sources, including the wind industry, environmental groups, state and federal agencies, advocacy groups and other sources.

## 5.0 HABITAT MITIGATION

### 5.1 General Principles for Habitat Mitigation

These principles are intended for land-based projects proposed throughout Washington State. These principles are not intended for evaluating offshore wind facility proposals and would likely require review and revision for relevance and applicability as such.

- Implementation of the habitat mitigation measures contained in this proposal are presumed to fully mitigate for habitat losses for all species, including species classified as “protected,” in the Washington Administrative Code (WAC 232-12-011), with the exception of species classified as state “threatened” or “endangered” and/or federally “threatened” or “endangered,” for which additional species- and site-specific mitigation may be necessary.
- Wind project developers should be encouraged to site wind power projects on disturbed lands (i.e., developed, cultivated, or otherwise disturbed by road or other corridors), except where such lands host significant aggregations of wildlife or are used by state or federally listed species.
- Wind project developers should be encouraged to place linear facilities (such as collector cable routes, transmission line routes, or access roads) in or adjacent to existing disturbed corridors in order to minimize project footprint, habitat fragmentation and habitat degradation.
- Wind project developers should be discouraged from using or degrading high value habitat areas, and habitat areas that are difficult to restore.
- Wind project developers are responsible for acquiring replacement habitat under this proposal and for management of such lands for the life of the project, unless otherwise indicated.
- Mitigation packages should be negotiated in consultation with WDFW and the permitting authority.
- The functions and values of the mitigation package should meet the extent of the impact on habitat.

#### Exception for Habitat in “Excellent” Condition

Where a wind project will affect habitat in “excellent” condition (based on methods acceptable to WDFW), wind project developers should engage in additional consultation with WDFW and the permitting authority regarding suitable mitigation requirements for such habitat.

#### Customized Acquisition or Other Mitigation Options

This Habitat Mitigation guidance should not be viewed as preventing or discouraging WDFW, the permitting authority and wind project developers from negotiating “customized” or “alternative” mitigation packages. Where appropriate, parties may use *current protocols*<sup>1</sup> for other mitigation options.

## **Habitat Mitigation agreements**

Copies of finalized mitigation agreements are provided to WDFW and filed with the WDFW Olympia Headquarters.

## **Habitat Classification**

Class I and Class II habitats are considered the highest priorities for current statewide conservation action in Washington. Class I habitats have a greater number of associated Species of Greatest Conservation Need (SGCN) than the Class II habitats and Class II habitats have a greater number of associated SGCN than the Class III habitats. Class IV habitats are generally low value habitats.

## **5.2 MITIGATION FOR PERMANENT HABITAT IMPACTS**

Permanent impacts to habitat are those that are anticipated to persist and cannot be restored within the life of the project. Permanent impacts may include new permanent roads, operations and maintenance facilities, turbine pads, impervious and/or areas devoid of native vegetation resulting from project operations. See Habitat Mitigation Classification Chart (*Appendix 8.2*), for mitigation ratios.

### **A. No Mitigation Required for Class IV**

No mitigation will be required for impacts to lands that have low habitat value. (*Exception: Deliberate intent to convert habitat to avoid mitigation*).

Examples generally include lands that are:

- Currently being cultivated;
- Developed; or
- Disturbed by an active road or other corridor that eliminates natural habitat values.

### **B. Criteria for Mitigation by Acquisition of Replacement Habitat**

In each of the mitigation categories listed below, the criteria indicate that the replacement habitat should be negotiated in consultation with WDFW and the permitting authority and include the following considerations:

- Like-kind (e.g., shrub-steppe for shrub-steppe; forested for forested, grassland for grassland) and/or of equal or higher habitat value than the impacted area, noting that an alternative ratio may be negotiated for replacement habitat that differs from impacted habitat;
- Given legal protection (through acquisition in fee, a conservation easement, or other enforceable means);

- Protected from degradation, including development, for the life of the project to improve habitat function and value over time;
- In the same geographical region as the impacted habitat;
- At some risk of development or habitat degradation and the mitigation results in a net habitat benefit.

### **1. Acquisition of Replacement Habitat Subject to Imminent Development – 1:1**

One acre of functionally equitable replacement habitat will be accepted as mitigation for one acre of permanently impacted habitat where the replacement habitat is subject to imminent development – that is, there is a credible plan to develop the replacement habitat within five years and WDFW concurs with this assessment.

There is no assumed net loss of habitat function or value where the replacement habitat would be lost but for its acquisition as mitigation. In fact, there should be a net gain in habitat value over time since protection of the replacement habitat (of equal or better value than the impacted area) will usually result in improved habitat value.

### **2. Acquisition of Class III Replacement Habitat – 1:1**

Habitat values are protected under this approach because:

- Development of the above-listed habitat types is preferable to development of other high value habitats.
- The replacement habitat was at some risk of development and is now given permanent protection.
- The replacement habitat is likely to improve in habitat function and value over time as degrading forces are removed.
- The value of the replacement habitat is equal to or better than the habitat value of the impacted area.
- The 1:1 ratio combines a number of factors -- which could require much time, effort, and expense to analyze and process -- in a simple and equitable approach.

### **3. Acquisition of Class II Replacement Habitat – 2:1**

Two acres of functionally equitable replacement habitat will be accepted as mitigation for one acre of permanently impacted habitat. In this context high-value habitat could include lithosol/shrub matrix (plant communities on lithosol soils intermixed with other plant communities on deeper soils).

A net gain in habitat value is likely under this approach because the replacement habitat:

- Was at some risk of development and is now given permanent protection.
- Is likely to improve in habitat function and value over time as degrading forces are reduced on the protected area.
- Value is equal to or better than the habitat value of the impacted area.

- The 2:1 ratio combines a number of factors -- which could require much time, effort, and expense to analyze and process -- in a simple and equitable approach.

### 5.3 MITIGATION FOR TEMPORARY IMPACTS TO HABITAT

Temporary impacts to habitat are those that are anticipated to end when construction is complete and the impacts have been restored. Temporary impacts include trenching for placement of underground cables, construction staging areas, lay-down areas, and temporary construction access. Temporary impacts also include the portions of road corridors that are used during construction but that are re-vegetated at the end of construction, but do not include the portions of roads that continue to be used for project operations (which are considered permanently affected). The goal of restoration of temporary impacts should be to restore the disturbed habitat to a condition that is at least as good as its pre-project condition. A reduced mitigation ratio may be considered if restoration results in a higher level of habitat function than pre-project conditions. See Habitat Mitigation Classification Chart (*Appendix 8.2*), for mitigation ratios.

**A. No Mitigation Required for impacts to cropland, pasture, developed or disturbed areas** (The same as for permanent impacts and as provided for in general principles described above.)

#### **B. Restoration, Mitigation for impacts to Class III Habitat – 0.1:1**

Temporary impacts to these habitats should be mitigated by:

- Implementing a WDFW approved restoration plan for the impacted area. A restoration plan should include site preparation, reseeding with appropriate vegetation, noxious weed control, and protection from degradation (irrigation or planting with live plants will not be required).
- Acquiring 0.1 acres of suitable replacement habitat for every acre temporarily impacted by the project.
- A good faith effort should be made to restore the impacted area. However, if restoration efforts of temporary habitat impacts are not successful within 10 years of impact, a permanent loss should be assumed with a minimum replacement ratio of 1:1 for all unsuccessful restoration areas. (*Exception: Long-term performance targets should not be imposed if temporal losses and the possibility of restoration failure are incorporated into the acquisition and improvement of replacement habitat*).
- WDFW and a wind developer may agree on other ratios and terms where doing so is mutually beneficial.

### **C. Restoration, Mitigation for impacts to Class II Habitat – 0.5:1**

Temporary impacts to shrub-steppe or other high-value habitat can be mitigated by:

- Implementing a WDFW approved restoration plan for the impacted area. A restoration plan should include site preparation, reseeding with appropriate vegetation, noxious weed control, and protection from degradation (irrigation or planting with live plants will not be required).
- Acquiring 0.5 acres of suitable replacement habitat for every acre temporarily impacted by the project.
- A good faith effort should be made to restore the impacted area. However, if restoration efforts of temporary habitat impacts are not successful within 10 years of impact, a permanent loss should be assumed with a minimum replacement ratio of 1:1 for all unsuccessful restoration areas. *(Exception: Long-term performance targets should not be imposed if temporal losses and the possibility of restoration failure are incorporated into the acquisition and improvement of replacement habitat).*
- WDFW and a wind developer may agree on other ratios and terms where doing so is mutually beneficial.

### **5.4 MITIGATION “BY FEE” OPTION**

After determination by the wind project developer, in consultation with WDFW, of the project’s impact on habitat (in terms of acres permanently and temporarily impacted, and the type and general quality of habitat impacted), the wind project developer, permitting authority, and WDFW will identify an appropriate annual fee for the life of the project. This fee will be based upon the estimated cost of probable habitat conservation properties identified by WDFW. The properties used to determine the mitigation fee should be representative of the types of habitat that were impacted by the wind energy development. A wind project developer, through consultation with WDFW and the permitting authority, may choose to use “By Fee” mitigation or a combination of habitat acquisition and “By Fee” mitigation.

- The fee is based on habitat in “average” condition and can be increased or decreased to account for differences in habitat quality.
- The wind project developer should implement an approved restoration plan for temporarily impacted areas (in accordance with WDFW Guidelines).
- In cases where the project impacts a mixture of habitat types, the fee schedule will be applied according to the habitat mixture (to the nearest acre).
- The annual fee will be used primarily to support “stewardship” (management, monitoring, restoration, protection from degradation) of high-value habitat in the same ecological region as the project. It is envisioned that these annual stewardship funds will be applied to strategically important habitat acquired by WDFW throughout Washington. The annual fees will be deposited into a dedicated WDFW account and may also be used for acquisition.

- A “lump-sum” up-front payment may be applied in-lieu of annual fees. To be determined by the number of acres impacted, both temporary and permanent multiplied by the life of the project, which is assumed to be the term of the permit for the project.

### **Default for Unresolved “By Fee” Mitigation**

If the wind project developer, permitting authority and WDFW cannot agree on a mutually advantageous mitigation package under the “By Fee” mitigation option, acquisition of replacement habitat should be pursued to fulfill the mitigation requirements.

## **6.0 HABITAT TYPES**

The following habitat types are found throughout the nine ecoregions in Washington (Appendix IV). These habitat descriptions are based upon the *Washington’s Comprehensive Wildlife Conservation Strategy (WDFW 2005)* and the *Wildlife-Habitat Relationships in Oregon and Washington (WHROW) (Johnson and O’Neil 2001)*. Useful information related to habitat and species for each ecoregion are listed in Appendix V.

### **6.1 EASTERN WASHINGTON HABITAT**

#### **Eastside (Interior) Grasslands**

Eastside [Interior] Grasslands are primarily found in Washington at mid- to low elevations (500 to 6,000 feet) and on plateaus in the Blue Mountains. Most grassland habitat occurs in two distinct large landscapes: plateau and canyon grasslands. This habitat is dominated by short to medium-tall grasses (<3.3 ft). Total herbaceous cover can be closed to only sparsely vegetated. Annual plants are a common spring and early summer feature of this habitat. The soil surface between perennial plants can be covered with a diverse cryptogamic or microbiotic layer of mosses, lichens, various soil bacteria, and algae. Native perennial bunchgrasses can be common but degraded sites may have a residual native grass component dominated by annual non-native grasses and forbs.

#### **Shrub-steppe (includes Dwarf Shrub-steppe and Eastside [interior] Canyon Shrublands, Wyoming Big Sagebrush and Three-tip Sagebrush)**

Shrub-steppe habitat defines a biogeographic region and is the major vegetation on average sites in the Columbia Plateau. Elevation range is wide (300-9,000 ft with most habitats occurring between 2,000 and 6,000 feet). This habitat forms mosaic landscapes with woodland habitats and native perennial Eastside Grasslands, Dwarf Shrub-steppe. In an undisturbed condition, shrub cover varies between 10 to 30 percent and greater. Shrub height typically is medium tall (1.6-3.3 ft) although some sites support shrubs approaching 9 feet tall.

Dwarf shrub-steppe habitat is found across a wide range of elevations from 500 to 7,000 ft characterized by low shrub (<1.6 ft high) communities with undergrowth of short native perennial grasses and forbs with extensive exposed rock and cryptogamic crusts. Includes stiff sagebrush/Sandberg bluegrass. Dwarf shrub-steppe habitat is widely distributed in the Columbia Basin, particularly associated with the channeled scablands, High Lava Plains, and in isolated spots throughout the Blue Mountains and the Palouse.

Eastside [interior] Canyon Shrublands habitat occurs from 500 to 5,000 feet in elevation and primarily on steep canyon slopes in the Blue Mountains and along the margins and as isolated patches across the Columbia Basin. Sites are generally steep (>60%) on all aspects but most common on northerly aspects in deep, dry canyons. This habitat type is generally a mix of tall (5 feet) to medium (1.6 feet) deciduous shrublands in a mosaic with bunchgrass or annual grasslands. Shrub canopies are almost always closed (>60% cover).

### **Montane Mixed Conifer Forest**

Montane Mixed Conifer Forests occur in mountains throughout Washington, including the Cascade Range, Olympic Mountains, Okanogan Highlands, Coast Range (rarely), and Blue Mountains. Elevation is middle to upper montane, as low as 2,000 feet in northern Washington. On the west side, it occupies an elevational zone of about 2,500 to 3,000 vertical feet, and on the eastside, it occupies a narrower zone of about 1,500 vertical feet. This is a forest, or rarely woodland, dominated by evergreen conifers. Mosses are a major ground cover and epiphytic lichens are typically abundant in the canopy.

### **Eastside (Interior) Mixed Conifer Forest**

Eastside Mixed Conifer Forest habitat appears primarily in the Blue Mountains, East Cascades, and Okanogan Highland ecoregions of Washington. The Eastside Mixed Conifer Forest habitat is primarily mid-montane with an elevation range of between 1,000 and 7,000 feet, mostly between 3,000 and 5,500 feet.

### **Ponderosa Pine Forest and Woodlands (includes Oak Woodlands)**

Ponderosa Pine Forests and Woodlands occur in much of eastern Washington, including the eastern slopes of the Cascades, the Blue Mountains and foothills, and the Okanogan Highlands. This habitat can be found at elevations of 100 feet in the Columbia River Gorge to dry, warm areas over 6,000 feet. This habitat is typically woodland or savanna with tree canopy coverage of 10-60 percent, although closed canopy stands are possible. Shrub-steppe shrubs may be prominent in some stands and create a distinct tree shrub-sparse-grassland habitat.

### **Lodgepole Pine Forest and Woodlands**

Lodgepole Pine Forests and Woodlands appears primarily along the eastern slope of the Cascade Range and occasionally in the Blue Mountains and Okanogan Highlands. This habitat is located mostly at mid- to higher elevations from 3,000-9,000 ft. These environments can be cold and relatively dry, usually with persistent winter snowpack.

### **Upland Aspen Forest**

Upland Aspen Forests are found at elevations from 2,000 to 9,500 feet with Quaking aspen (*Populus tremuloides*) as the characteristic and dominant tree. Habitat structure is usually tall (<48 ft) with forb-, grass-, or low-shrub-dominated undergrowth.

## **6.2 WESTERN WASHINGTON HABITAT**

### **Westside Grasslands**

Westside Grasslands are restricted primarily to the Puget Lowland ecoregion, with most now occurring in Pierce, Thurston and San Juan counties, Washington. This includes prairies and savannas. Elevation is mostly low and ranges up to a maximum of about 3,500 feet. Many other small sites, often called "balds", have shallow soils overlying bedrock and typically are on south- or west-facing slopes. This habitat is native perennial grassland or, less commonly, savanna, with <30% tree or shrub cover. Bunchgrasses predominate in native-dominated sites. Montane balds are sometimes dominated by short forbs or dwarf shrubs. Scattered trees are either evergreen conifers or deciduous broadleaves. Shrubs may be absent, scattered, or very prominent.

### **Westside Lowlands Conifer-Hardwood Forest**

Westside Lowland Conifer-Hardwoods are traditionally the most extensive habitat throughout low elevation western Washington. These forests range from early to late successional stands with occasional old growth. Elevation ranges from sea level to a maximum of approximately 2,000 feet. This habitat is forest, dominated by evergreen conifers, deciduous broadleaf trees, or both. However, while sub-mature stands are quite common, mature stands are not and late successional stands are critically limited to scattered public ownership, mostly parks and regulatory leave areas. Additionally, older stands typically exhibit a much higher occupancy of conifer rather than hardwood species. In younger stands sword fern and salal comprise the preponderance of ground cover with increasing moss cover with increasing stand age. Lichens are abundant only in the canopy of old stands.

### **Subalpine Parkland**

Subalpine Parkland habitat occurs throughout the high mountain ranges of Washington (e.g., Cascade crest, Olympic Mountains, and Okanogan Highlands). Elevation varies from 4,500 to 6,000 feet in the western Cascades and Olympic Mountains and from 5,000 to 8,000 feet in the eastern Cascades. The habitat appears either a mosaic of treeless openings and small patches of trees often with closed canopies, or as woodlands or savanna stands of scattered trees.

## **Westside Oak and Dry Douglas-fir Forest and Woodlands**

This habitat is common in and around the San Juan Islands and in parts of Thurston, Pierce and Mason counties. Elevation ranges from sea level to approximately 3,500 feet in the Olympic Mountains, but is mainly below 1,500 feet. This is a forest or woodland dominated by evergreen conifers, deciduous broadleaf trees, and evergreen broadleaf trees. Deciduous broadleaf shrubs are perhaps most typical as understory dominants in the existing landscape.

## **Coastal Headlands and Islets**

Coastal Headland and Islet habitat occurs mainly on coastal headlands, bluffs, and islands with steep slopes or cliffs typically from sea level to about 500 feet. This habitat is always located adjacent to, or in the case of the rock islets ("sea stacks"), within the Marine Nearshore habitat.

## **Coastal Dunes**

Coastal Dune habitat occurs primarily in wet, mild outer coastal climates at elevations at and very near sea level and only extending as high as the highest dunes. Topography is mildly to strongly undulating in the form of mostly north-south trending dune ridges and troughs. These dunes, spits, and berms are derived from sand carried by longshore drift and wind erosion. This habitat consists of a variable mosaic of structures ranging from open sand with sparse herbaceous vegetation to dense shrublands. Medium-tall grasslands, typically closed, are a major component in the current landscape. Coniferous evergreen trees and tall broadleaf evergreen shrubs, typically dense, are also a significant component of the mosaic.

## **Alpine Grassland and Shrublands**

This habitat always occurs above the upper treeline in the mountains or a short distance below from 5000 feet to over 10,000 feet in elevation. It is the most predominant habitat type in the Cascade Mountains between 5000ft to 10,000ft and is the coldest of any habitat type.

## **6.3 COMMON HABITATS**

### **Pasture and Mixed Environs**

Pasture and Mixed Environ habitat is oftentimes, but is not exclusive to landscapes in flat or gently rolling terrain, on well-developed soils, broad river valleys, and generally in areas with access to irrigation water. Pastures are improved lands used to produce perennial herbaceous plants for grass seed and hay and unimproved pastures are predominately non-native grassland sites, often abandoned fields that have little or no active management such as irrigation, fertilization, or herbicide applications. These sites may or may not be grazed by livestock. Various out buildings, barns and isolated "brushy" fencerows are common. Pasture does not have a forest canopy.

## Conservation Reserve Program (CRP)

CRP encourages farmers to convert highly erodible cropland or other environmentally sensitive acreage to perennial vegetative cover, such as native grasses, forbs and shrubs, wildlife plantings, trees, filterstrips, or riparian buffers. This program reduces soil erosion, reduces sedimentation in streams and lakes, improves water quality, establishes wildlife habitat, and enhances forest and wetland resources. Farmers receive an annual rental payment for the term of the multi-year contract. Cost sharing is provided to establish the vegetative cover practices.

## Urban and Mixed Environs

Urban habitat occurs throughout Washington and mostly on the west side of the Cascade Mountains, with the exception of Spokane in eastern Washington. Urban development occurs within or adjacent to nearly every habitat type in Washington, and often replaces habitats that are valuable for wildlife.

## 7.0 REFERENCES

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Washington Department of Fish and Wildlife. 2005. Washington's Comprehensive Wildlife Conservation Strategy. 780pp. <http://wdfw.wa.gov/wlm/cwcs/cwcs.htm>

Washington Department of Fish and Wildlife. 2008. Priority Habitat and Species List. Olympia, Washington. 172 pp. [http://wdfw.wa.gov/hab/phs/phs\\_list\\_2008.pdf](http://wdfw.wa.gov/hab/phs/phs_list_2008.pdf)

Good references for designing survey protocols are the National Wind Coordinating Collaborative Guidance Documents ([www.nationalwind.org](http://www.nationalwind.org)), listed below. Please note that these documents undergo frequent revisions.

Anderson et al. 1999. Studying Wind Energy/Bird Interactions: A Guidance Document on Metrics and Methods for Determining or Monitoring Potential Impacts On Birds At Existing And Proposed Wind Energy Sites.

National Wind Coordinating Committee

[http://www.nationalwind.org/publications/wildlife/avian99/Avian\\_booklet.pdf](http://www.nationalwind.org/publications/wildlife/avian99/Avian_booklet.pdf)

Anderson et al. 2003. The Proper Use of "Studying Wind Energy/Bird Interactions: A Guidance Document" (addendum to the 1999 document). National Wind Coordinating Committee. [http://www.nationalwind.org/publications/proper-use\\_mm.pdf](http://www.nationalwind.org/publications/proper-use_mm.pdf)

Kunz et al. 2007. Assessing Impacts of Wind Energy Development on Nocturnally Active Birds and Bats: A Guidance Document. National Wind Coordinating Committee. [http://www.nationalwind.org/pdf/Nocturnal\\_MM\\_Final-JWM.pdf](http://www.nationalwind.org/pdf/Nocturnal_MM_Final-JWM.pdf)

## 8.0 APPENDICES

### 8.1 OTHER POTENTIAL LEGAL REQUIREMENTS:

- *State Environmental Policy Act (SEPA) RCW 43.21.C*
- *Fish and Wildlife Title 77 RCW*
- *Growth Management Act (GMA) RCW 36.70A*
- *Hydraulic Project Approval (HPA) RCW 77-55*
- *Critical Area Ordinance (CAO)*
- *Migratory Bird Treaty Act (MBTA)*
- *Endangered Species Act (ESA) Sections 7&10*
- *Army Corps of Engineers (ACOE) 404*
- *Clean Water Act (CWA) 401*
- *Bald Eagle / Golden Eagle Protection Act (BGEPA)*
- *National Environmental Policy Act (NEPA)*

## 8.2 HABITAT CLASSIFICATION MITIGATION CHART

Where a wind project will affect habitat in “excellent” condition (based on methods acceptable to WDFW) or Species of Greatest Conservation Need (SGCN)<sup>8</sup>, wind project developers should engage in additional consultation with WDFW and the permitting authority regarding suitable mitigation requirements for such habitat.

CLASSIFICATION <sup>1</sup>	HABITAT TYPE <sup>2,4</sup>	MITIGATION	
		Temporary Impact	Permanent Impact
Class I West side	Westside Grasslands/ Herbaceous Balds, Westside Lowland Conifer-Hardwood (Mature) Forest, Westside Oak and Dry (Non-commercial) Douglas-fir Forest and Woodlands, Coastal Dunes	CONSULTATION <sup>3</sup>	CONSULTATION
Class I East side	Ponderosa Pine Forest and Woodlands (includes Eastside Oak Woodlands)		
Class II West side	Coastal Headlands and Islets, Subalpine Parkland	0.5:1 MITIGATION/ RESTORATION <sup>7</sup>	2:1 ACQUISITION
Class II East side	Eastside (Interior) Mixed Conifer Forest, Lodgepole Pine Forest and Woodlands, Montane Mixed Conifer Forest, Upland Aspen Forest, Shrub- steppe		
Class III West side	Alpine Grassland and Shrublands, Conservation Reserve Program (CRP) Lands	0.1:1 MITIGATION/ RESTORATION	1:1 ACQUISITION
Class III East side	Eastside (Interior) Grasslands, CRP Lands		
Class IV	Croplands <sup>5</sup> , Pasture, Urban and Mixed Environs	No Mitigation Required	No Mitigation Required
FORESTRY	Conversion of Commercial Forest Lands <sup>6</sup>	CONSULTATION	CONSULTATION

<sup>1</sup> Class 1 and Class II habitats are considered the highest priorities for current statewide conservation action in Washington. Class I habitats have a greater number of associated Species of Greatest Conservation Need (SGCN) than the Class II habitats and Class II habitats have a greater number of associated Species of Greatest Conservation Need (SGCN) than the Class III habitats

<sup>2</sup> Habitat characteristics defined in Chapter 3, *Wildlife-Habitat Relationships in Oregon and Washington (WHROW)* (Johnson and O'Neil 2001) and habitats mapped by Ecoregion in Chapter VI, Washington's *Comprehensive Wildlife Conservation Strategy (CWCS)* (WDFW 2005).

<sup>3</sup> Non-regulatory meeting between industry, county, consultants, EFSEC, WDFW, etc. to discuss impacts to habitat and species and mitigation options. Regulatory compliance with terms of mitigation may be identified in permit issued by EFSEC or county.

<sup>4</sup> Class I-II (CWCS Priority One and Two) wetlands are not included as they are regulated under the authority of the Department of Ecology and Army Corps of Engineers, and other applicable regulations and policies.

<sup>5</sup> Short-rotation hardwoods as defined in Chapter 76.09 Revised Code of Washington (RCW), Christmas trees and lands farmed or cultivated by agricultural methods in growing cycles shorter than fifteen years and characterized are by a homogenous, cultivated, and maintained stand or are considered croplands. This does not include commercial Forests and state forest lands which are regulated under the Forest Practices Act [Chapter 76.09 RCW] and Forest Practice Rules [Title 222 Washington Administrative Code (WAC)].

<sup>6</sup> Commercial forests are defined and regulated under the Forest Practices Act (FPA) [Chapter 76.09 RCW]. Wind project developers should consult with WDFW when an FPA conversion is anticipated. Wind project developers are encouraged to minimize conversion.

<sup>7</sup> The mitigation ratio for temporary impacts to native shrub-steppe lithosols is 1:1 due to the increased length of time for restoration. A reduced mitigation ratio may be considered if restoration of native shrub-steppe lithosols results in a higher level of function than pre-construction conditions.

<sup>8</sup> SGSN includes only native Washington fish and wildlife species that are listed as endangered, threatened, or sensitive, or as candidates for these designations. The list also incorporates all federally listed threatened and endangered fish and wildlife species. Endangered, threatened, and sensitive species are legally established in Washington Administrative Codes. Candidate species are established by WDFW policy. Washington State monitor species are those that require management, survey, or data emphasis for one or more of the following reasons: 1) they were classified as endangered, threatened, or sensitive within the previous five years; 2) they require habitat that is of limited availability during some portion of their life cycle; 3) they are indicators of environmental quality; and 4) there are unresolved taxonomic questions that may affect their candidacy for listing as endangered, threatened or sensitive species.

### 8.3 COARSE SCALE ASSESSMENT

Consideration of the following questions during pre-survey review may not address comprehensive pre-project evaluation needs, but can provide valuable pre-project planning information to wind project developers to guide preliminary discussions with WDFW:

1. Are federal or state threatened, endangered, candidate or sensitive species, known or likely to occur on or near the proposed project area?
2. Does the project area include priority habitats identified in Washington's Comprehensive Wildlife Conservation Strategy (WDFW 2005) and Priority Habitats and Species (WDFW 2008) (<http://wdfw.wa.gov/wlm/cwcs/>, <http://wdfw.wa.gov/hab/phshabs.htm>, i.e. - caves, shrub-steppe, cliffs, estuary, juniper savannah, marine/estuarine shorelines, Oregon white oak woodlands, prairies and steppe, vegetated marine/ estuarine, etc. or other habitats that might attract birds or bats for foraging, roosting, breeding, or cover)
3. Is the project area within two miles of a raptor nest, or are large numbers of raptors known or likely to occur at or near the site during portions of the year?
4. Does the site or do areas adjacent to the site include unique habitat types?
5. Will development of the project area contribute to habitat fragmentation and loss of habitat connectivity for federal and/or state listed, sensitive, or PHS species?
6. Does the project area contain topographical and/or hydrological features that could concentrate fish or wildlife resources (for example, ridges, peninsulas, aquatic or other landforms that influence fish, bird, bat, or other wildlife movement)?
7. Is the project area at or near a known or likely migrant stopover site, staging areas, migration corridor, or area where wildlife aggregate during one or more season?
8. Is the project area an isolated patch composed of mostly native habitat(s) in a landscape that could concentrate native plants and animals?
9. Is the project area regularly characterized by seasonal weather conditions such as dense fog or low cloud cover that might increase collision risks at times when birds and bats may be aggregated?
10. Is the project area in proximity to habitats normally associated with bats (e.g. wetlands, hibernacula)? (<http://www.pgc.state.pa.us/pgc/cwp/view.asp?a=483&q=171755>)
11. Are there other wind projects in the area?
12. Is the site contained within or near an Important Bird Area (IBA)? See: ([http://www.audubon.org/chapter/wa/wa/science\\_IBAWashington.html](http://www.audubon.org/chapter/wa/wa/science_IBAWashington.html))

## 8.4 REFERENCE WEBLINKS:

- Comprehensive Wildlife Conservation Strategy <http://wdfw.wa.gov/wlm/cwcs/>
- Wildlife research publications  
([http://wdfw.wa.gov/wlm/research/songbird/shrub\\_p.htm](http://wdfw.wa.gov/wlm/research/songbird/shrub_p.htm))
- Species of concern (<http://wdfw.wa.gov/wlm/diversty/soc/concern.htm>)
- Wildlife science (<http://wdfw.wa.gov/wildlife.htm>,  
<http://wdfw.wa.gov/hab/phsrecs.htm>)
- Priority habitats and species maps and digital information  
(<http://wdfw.wa.gov/hab/release.htm>)
- The Washington Department of Natural Resources  
([http://www.dnr.wa.gov/ResearchScience/Topics/NaturalHeritage/Pages/amp\\_nh\\_products.aspx](http://www.dnr.wa.gov/ResearchScience/Topics/NaturalHeritage/Pages/amp_nh_products.aspx)),
- The National Audubon Society  
([http://www.audubon.org/chapter/wa/wa/science\\_IBAWashington.html](http://www.audubon.org/chapter/wa/wa/science_IBAWashington.html)),
- The Nature Conservancy  
([http://support.nature.org/site/PageServer?pagename=preserve\\_map](http://support.nature.org/site/PageServer?pagename=preserve_map)),
- Washington's Gap Analysis Program (GAP)  
(<http://www.wdfw.wa.gov/wlm/gap/dataproduct.htm>),
- Tribal Nations  
<http://www.hanksville.org/sand/contacts/tribal/states.php?whichstate=WA&title=Washington>
- Renewable Northwest Project ([www.rnp.org](http://www.rnp.org))
- National Wind Coordinating Collaborative ([nationalwind.org](http://nationalwind.org))
- National Renewable Energy Laboratory ([www.nrel.gov](http://www.nrel.gov))
- American Wind Energy Association ([www.awea.org](http://www.awea.org))

## 8.5 SMALL WIND

In Washington, the development of small wind local ordinances with input from WDFW will aid in natural resource assessment and impact avoidance with recognition of public safety considerations, aesthetics, permitting and construction, and monitoring, etc., of small wind projects at residential and commercial properties. WDFW can assist citizens with project planning by providing valuable information regarding environmentally sensitive areas.

The American Wind Energy Association (AWEA) defines small wind power as electric generators (turbines), having rated capacities of 100 kilowatts and less, that utilize wind energy to produce clean, emissions-free power for individual homes, farms, and small businesses. On-site consumption of utility power is a characteristic of small wind that allows property owners to offset commercially provided electrical power. Small wind turbines can also serve as a primary electrical source or be combined with a solar, battery system, or generator.

The siting of small wind turbines outlined in local (county) building codes and ordinances typically contains such considerations as:

- Setback Distances and Height
- Lot Size
- Aesthetics
- Sound
- Property Values
- Insurance
- Abandonment
- Multiple Turbines
- Urban and Building-Integrated Installations
- Potential of Structural or Electrical Failure
- Soil Studies

Generally, small wind systems require a land area of at least an acre, Class 2 winds (Class 1 are weakest), and at least 30 feet above any physical wind barriers (i.e., trees, buildings, or bluffs) within 300-500 feet to avoid air turbulence. Tower heights from 65 to 140 are common but particular site conditions should be the primary factor when determining tower height. Winds are faster at higher elevations, and wind power increases by a factor of three as speed increases, so even a small boost in height greatly enhances a turbine's output. Other considerations include the appropriate distance from physical barriers, and setback from the property line, inhabited neighboring structures, utility lines, and/or road right-of-ways. Typically these "set-back" distances are the tower height plus the length of one blade (the turbine's "total extended height")

### **WDFW Environmental Technical Assistance**

Impacts to native habitats and species, as well as migratory species, from guy wires and lattice-type towers that are characteristic of small wind systems, should be considered, especially near or within environmentally sensitive areas. These risks can be significantly reduced by using monopole towers without guy wires and/or using flight diverters on structures constructed with guy wires.

While small wind power projects are generally small and dispersed, construction of multi-small turbine systems on a property or adjacent properties, and numerous single systems within a favorable wind resource area, could have the potential to adversely impact natural resources. Consultation with WDFW is encouraged to avoid and mitigate these impacts.

### **Small Wind Weblinks:**

*Model Zoning Ordinance:*

[http://www.awea.org/smallwind/toolbox/improve/model\\_zoning.pdf](http://www.awea.org/smallwind/toolbox/improve/model_zoning.pdf)

*In the Public Interest, How and Why to Permit for Small Wind Systems: A Guide for State and Local Governments:*

<http://www.awea.org/smallwind/pdf/InThePublicInterest.pdf>

### **Small Wind Information Resources Specific to Washington State:**

- <http://www.awea.org/smallwind/washington.html>
- <http://www.dsireusa.org/library/includes/map2.cfm?CurrentPageID=1&State=WA&RE=1&EE=1>

## **8.6 SPECIES AND HABITAT PLANS**

In consultation with other governmental and nongovernmental organizations, WDFW has developed a Comprehensive Wildlife Conservation Strategy (CWCS) with the intention to create a new management framework for the protection of Washington's species and habitats in greatest need of conservation.

Guiding principles for Washington's CWCS include conservation of species and habitats with greatest conservation need while recognizing the importance of keeping common species common, and to build and strengthen conservation partnerships with other conservation agencies, tribes, local governments, and non-governmental organizations.

The following planning and conservation efforts in the nine Washington Ecoregions are an important part of the CWCS and may provide guidance and alternatives for mitigation opportunities and project planning:

### **East Cascades Ecoregion**

[East Cascades Ecoregional Assessment](#)

[Interior Columbia Basin Ecosystem Management Project](#)

[Intermountain West Joint Venture Coordinated Bird Conservation Plan \(2005\)](#)

[Northwest Forest Plan \(1994\)](#)

[USFWS Draft Bull Trout Columbia River DPS Recovery Plan \(2004\)](#)

[USFWS Northern Spotted Owl Recovery Plan \(2008\)](#)

[USFWS Grizzly Bear Recovery Plan \(1993\)](#)

[Washington Forest Practices Board Wildlife Strategy \(in progress\)](#)

[Washington Forests and Fish Agreement \(1999\)](#)

[WDFW Bald Eagle Status Report \(2001\)](#)

[WDFW Bull Trout and Dolly Varden Management Plan \(2000\)](#)

[WDFW Draft East Cascades Regional Wildlife Area Management Plan](#)

[WDFW Fisher Recovery Plan \(2005\)](#)

[WDFW Game Management Plan \(2003\)](#)

[WDFW Lynx Recovery Plan \(2001\)](#)

[WDFW Mardon Skipper Status Report \(1999\)](#)

[WDFW Outline for Salmon Recovery Plans \(2003\)](#)

[WDFW Peregrine Falcon Status Report \(2002\)](#)

[WDFW Western Gray Squirrel Recovery Plan \(2005\)](#)

[WDFW Western Pond Turtle Recovery Plan \(1999\)](#)

[Yakima, Lake Chelan, Wenatchee and Klickitat Subbasin Plans](#)

## **Okanogan Ecoregion**

Interior Columbia Basin Management Project  
Okanogan Ecoregional Assessment  
Methow, Okanogan, Upper Columbia, Sanpoil and Spokane Subbasin Plans (2004)  
Northwest Forest Plan (1994)  
USFWS Draft Bull Trout Columbia Basin DPS Recovery Plan (2002)  
USFWS Grizzly Bear Recovery Plan (1993)  
Washington Forest Practices Board Wildlife Strategy (in progress)  
Washington Forests and Fish Agreement (1999)  
WDFW Bald Eagle Status Report (2007)  
WDFW Bull Trout and Dolly Varden Management Plan (2000)  
WDFW Draft Okanogan Regional Wildlife Area Management Plan  
WDFW Ferruginous Hawk Recovery Plan (1996)  
WDFW Fisher Recovery Plan (2005)  
WDFW Game Management Plan (2003)  
WDFW Lynx Recovery Plan (2001)  
WDFW Northern Leopard Frog Status Report (1999)  
WDFW Outline for Salmon Recovery Plans (2003)  
WDFW Peregrine Falcon Status Report (2002)  
WDFW Pygmy Whitefish Status Report (1998)  
WDFW Sandhill Crane Recovery Plan (2002)  
WDFW Sharp-tailed Grouse Management Plan (1995)  
WDFW Sharp-tailed Grouse Status Report (1998)  
WDFW Western Gray Squirrel Recovery Plan (2005)

## **Canadian Rockies Ecoregion**

Canadian Rockies Ecoregional Assessment  
Pend Oreille, Spokane, and Columbia Upper Subbasin Plans (2004)  
Selkirk Mountains Woodland Caribou Herd Augmentation in Washington Cooperative Interagency Plan (1996)  
USFWS Draft Bull Trout Columbia Basin DPS Recovery Plan (2002)  
USFWS Grizzly Bear Recovery Plan (1993)  
USFWS Northern Rocky Mountain Wolf Recovery Plan (1991)  
USFWS Selkirk Mountains Woodland Caribou Recovery Plan (1994)  
Washington Forest Practices Board Wildlife Strategy (in progress)  
Washington Forests and Fish Agreement (1999)  
WDFW Bald Eagle Status Report (2007)  
WDFW Bull Trout and Dolly Varden Management Plan (2000)  
WDFW Common Loon Status Report (2000)  
WDFW Fisher Recovery Plan (2005)  
WDFW Fisher Status Report (1998)  
WDFW Game Management Plan (2003)  
WDFW Le Clerc Wildlife Area Plan (2006)  
WDFW Lynx Recovery Plan (2001)  
WDFW Northern Leopard Frog Status Report (1999)  
WDFW Outline for Salmon Recovery Plans (2003)

WDFW Peregrine Falcon Status Report (2002)  
WDFW Pygmy Whitefish Status Report (1998)

### **Blue Mountains Ecoregion**

Asotin, Tucannon, Walla Walla and Grande Ronde Subbasin Plans (2004)  
Blue Mountains Ecoregional Assessment  
Interior Columbia Basin Management Project  
Intermountain West Joint Venture Coordinated Bird Conservation Plan (2005)  
Land and Resource Management Plan (Umatilla National Forest)  
USFWS Draft Bull Trout Columbia Basin DPS Recovery Plan (2002)  
Washington Forest Practices Board Wildlife Strategy (in progress)  
Washington Forests and Fish Agreement (1999)  
WDFW Bald Eagle Status Report (2007)  
WDFW Bull Trout and Dolly Varden Management Plan (2000)  
WDFW Draft Blue Mountain Regional Wildlife Area Management Plan  
WDFW Game Management Plan (2003)  
WDFW Margined Sculpin Status Report (1998)  
WDFW Outline for Salmon Recovery Plans (2003)  
WDFW Peregrine Falcon Status Report (2002)

### **Columbia Plateau Ecoregion**

Columbia Plateau Ecoregional Assessment  
Interior Columbia Basin Management Project  
Intermountain West Joint Venture Coordinated Bird Conservation Plan (2005)  
U.S. Army Yakima Training Center Cultural and Natural Resource Management Plan (2002)  
USFWS Draft Bull Trout Columbia Basin DPS Recovery Plan (2002)  
WDFW Bald Eagle Status Report (2007)  
WDFW Bull Trout and Dolly Varden Management Plan (2000)  
WDFW Draft Columbia Plateau Regional Wildlife Area Management Plan  
WDFW Ferruginous Hawk Recovery Plan (1996)  
WDFW Game Management Plan (2003)  
WDFW Greater Sage-Grouse Recovery Plan (2004)  
WDFW Margined Sculpin Status Report (1998)  
WDFW Outline for Salmon Recovery Plans (2003)  
WDFW Peregrine Falcon Status Report (2002)  
WDFW Pygmy Rabbit Recovery Plan and Amendments (1995,2001, 2003)  
WDFW Sandhill Crane Recovery Plan (2002)  
WDFW Upland Sandpiper Recovery Plan (1995)  
*Yakima, Crab Creek, Palouse, Columbia Lower and Upper Middle, Walla Walla, and Snake Lower Subbasin Plans (2004)*

### **Northwest Coast Ecoregion**

Forest Practices Habitat Conservation Plan (WDNR)  
Grays Harbor Estuary Management Plan  
Lower Columbia River Estuary Program  
National Estuary Program (NEP) Comprehensive Conservation Management Plan

NOAA Fisheries Draft Killer Whale Conservation Plan (2005)  
Northwest Coast Ecoregional Assessment  
Northwest Forest Plan (1994)  
Pacific County Dune Management Plan  
USFWS Columbian White-tailed Deer Recovery Plan (1983)  
USFWS Draft Bull Trout Coastal/Puget Sound DPS Recovery Plan (2004)  
USFWS Northern Spotted Owl Recovery Plan (2008)  
USFWS Marbled Murrelet Recovery Plan (1997)  
USFWS Oregon Silverspot Butterfly Recovery Plan (2001)  
Washington Forests and Fish Agreement (1999)  
Washington Forest Practices Board Wildlife Strategy (in progress)  
Washington State Coastal Zone Management Plan  
WDFW Aquatic Nuisance Species Management Plan  
WDFW Bald Eagle Status Report (2007)  
WDFW Bull Trout and Dolly Varden Management Plan (2000)  
WDFW Common Loon Status Report (2000)  
WDFW Fisher Recovery Plan (2005)  
WDFW Fisher Status Report (1998)  
WDFW Forage Fish Management Plan (1998)  
WDFW Killer Whale Status Report (2004)  
WDFW Marbled Murrelet Status Report (1993)  
WDFW Draft Mazama Pocket Gopher, Streaked Horned Lark and Taylor's Checkerspot Status Report (2005)  
WDFW Draft Northwest Coast Regional Wildlife Area Management Plan  
WDFW Olympic Mudminnow Status Report (1999)  
WDFW Outline for Salmon Recovery Plans (2003)  
WDFW Peregrine Falcon Status Report (2002)  
WDFW Sea Otter Recovery Plan (2004)  
WDFW Snowy Plover Recovery Plan (1995)  
WDFW Steller (Northern) Sea Lion Status Report (1993)  
WDFW Pygmy Whitefish Status Report (1998)

### **Puget Trough Ecoregion**

Elochoman and Cowlitz Subbasin Plans (2004)  
Forest Practices Habitat Conservation Plan (WDNR)  
National Estuary Program (NEP) Comprehensive Conservation Management Plan  
Nearshore Fishery Management Plan  
Partners in Flight Conservation Plans  
Puget Sound and Adjacent Waters Program  
Puget Sound Restoration Program  
Puget Sound Water Quality Work Plan  
Puget Trough Ecoregional Assessment  
Shared (Salmon) Strategy for Puget Sound  
USFWS Columbian White-tailed Deer Recovery Plan (1983)  
USFWS Draft Bull Trout Coastal/Puget Sound DPS Recovery Plan (2004)  
USFWS Northern Spotted Owl Recovery Plan (2008)  
USFWS Marbled Murrelet Recovery Plan (1997)  
Washington Forest Practices Board Wildlife Strategy (in progress)

Washington Forests and Fish Agreement (1999)  
WDFW Aquatic Nuisance Species Management Plan  
WDFW Bald Eagle Status Report (2007)  
WDFW Bull Trout and Dolly Varden Management Plan (2000)  
WDFW Draft Mazama Pocket Gopher, Streaked Horned Lark and Taylor's Checkerspot Status Report (2005)  
WDFW Draft Puget Trough Regional Wildlife Area Management Plan  
WDFW Fisher Recovery Plan (2005)  
WDFW Fisher Status Report (1998)  
WDFW Forage Fish Management Plan (1998)  
WDFW Larch Mountain Salamander Status Report (1993)  
WDFW Marbled Murrelet Status Report (1993)  
WDFW Mardon Skipper Status Report (1999)  
WDFW Oregon Spotted Frog Status Report (1997)  
WDFW Outline for Salmon Recovery Plans (2003)  
WDFW Peregrine Falcon Status Report (2002)  
WDFW Puget Sound Groundfish Management Plan (1998)  
WDFW Sea Otter Recovery Plan (2004)  
WDFW Steller (Northern) Sea Lion Status Report (1993)  
WDFW Western Gray Squirrel Recovery Plan (2005)  
WDFW Western Pond Turtle Recovery Plan (1999)  
Willamette Valley-Puget Trough-Georgia Basin Ecoregional Assessment

#### **North Cascades Ecoregion**

Mt. Baker-Snoqualmie General Management Plan  
North Cascades Ecoregional Assessment  
North Cascades National Park General Management Plan  
Northwest Forest Plan (1994)  
USFWS Draft Bull Trout Coastal/Puget Sound DPS Recovery Plan (2004)  
USFWS Northern Spotted Owl Recovery Plan (2008)  
USFWS Grizzly Bear Recovery Plan (1993)  
USFWS Marbled Murrelet Recovery Plan (1997)  
Washington Forest Practices Board Wildlife Strategy (in progress)  
Washington Forests and Fish Agreement (1999)  
WDFW Bald Eagle Status Report (2007)  
WDFW Bull Trout and Dolly Varden Management Plan (2000)  
WDFW Common Loon Status Report (2000)  
WDFW Draft North Cascades Regional Wildlife Area Management Plan  
WDFW Fisher Recovery Plan (2005)  
WDFW Fisher Status Report (1998)  
WDFW Game Management Plan (2003)  
WDFW Lynx Recovery Plan (2001)  
WDFW Marbled Murrelet Status Report (1993)  
WDFW North Cascade (Nooksack) Elk Herd Management Plan (2002)  
WDFW Oregon Spotted Frog Status Report (1997)  
WDFW Outline for Salmon Recovery Plans (2003)  
WDFW Peregrine Falcon Status Report (2002)  
WDFW Pygmy Whitefish Status Report (1998)

## **West Cascades Ecoregion**

West Cascades Ecoregional Assessment

Cowlitz and Lewis Subbasin Plans (2004)

Northwest Forest Plan (1994)

USFWS Draft Bull Trout Coastal/Puget Sound DPS Recovery Plan (2004)

USFWS Northern Spotted Owl Recovery Plan (2008)

USFWS Marbled Murrelet Recovery Plan (1997)

Washington Forest Practices Board Wildlife Strategy (in progress)

Washington Forests and Fish Agreement (1999)

WDFW Bald Eagle Status Report (2007)

WDFW Bull Trout and Dolly Varden Management Plan (2000)

WDFW Draft West Cascades Regional Wildlife Area Management Plan

WDFW Fisher Recovery Plan (2005)

WDFW Fisher Status Report (1998)

WDFW Game Management Plan (2003)

WDFW Larch Mountain Salamander Status Report (1993)

WDFW Marbled Murrelet Status Report (1993)

WDFW Mardon Skipper Status Report (1999)

WDFW Outline for Salmon Recovery Plans (2003)

WDFW Peregrine Falcon Status Report (2002)

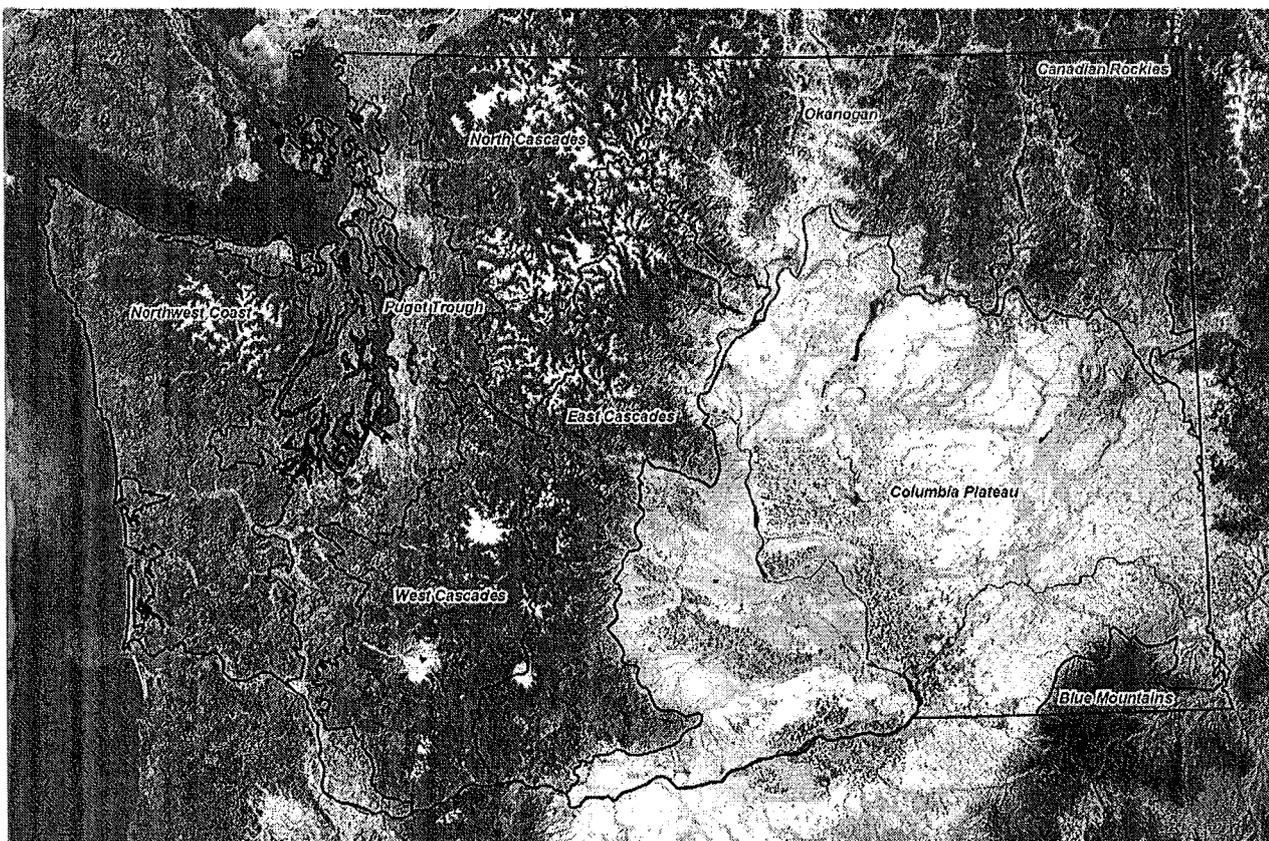
WDFW Western Gray Squirrel Recovery Plan (2005)

WDFW Western Pond Turtle Recovery Plan (1999)

## 8.7 Washington Ecoregion Map

Map showing the nine ecoregions in Washington State. Each ecoregion exhibits special physical and environmental characteristics, including unique combinations of soils, geology and climate, that give rise to a distinctive composition and distribution of plant communities and associated wildlife. The ecoregional boundaries are derived from boundaries originally developed by the U.S. Environmental Protection Agency and USDA Forest Service, and were used by the Washington Department of Natural Resources in their Washington Natural Heritage Plan adopted in 2003. These boundaries are also used by The Nature Conservancy and its partners for developing ecoregional assessments and plans across North America.

### *Ecoregions within Washington State*



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Good Afternoon:

Please find attached the *Response Brief of Intervenor-Respondent Whistling Ridge Energy LLC and Appendices*.

Case Name: Friends of the Columbia Gorge, Inc., et al v. State Energy Facility Evaluation Council, et al.

Case No.: Supreme Court No. 88089-1

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*Copies are being served on the parties via first class mail along with a courtesy copy via cc of this email. Thank you.*

**PLEASE NOTE: Per my discussion today with Ms. Amy Bailey of the Clerk's office, I am sending nine (9) color copies of our Appendices for distribution. These will be sent via UPS overnight delivery.**

Thank you.

**Kali Turner** | Legal Practice Assistant  
to Timothy L. McMahan, Eric L. Martin and William B. Collins  
Gold Certified Member, **Stoel Rives "Go Green" P<sup>2</sup> Sustainability Program**  
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