

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

**In the Matter of
Application No. 2006-02**

Desert Claim Wind Power L.L.C.

Desert Claim Wind Power Project

COUNCIL ORDER NO. 830

**ORDER ON DETERMINATION THAT
DESERT CLAIM WIND POWER HAS
SATISFIED WAC 463-28-030(1)**

Nature of the Proceeding:

This matter involves a motion filed by Desert Claim Wind Power L.L.C., a wholly owned subsidiary of enXco Inc., (Desert Claim or the Applicant) on March 5, 2007, for a formal determination that the Applicant has made “all reasonable efforts to resolve the noncompliance with the local land use requirements of Kittitas County (County) pursuant to WAC 462-28-030(1), and therefore be allowed to file a formal written request for preemption under WAC 463-28-040.

Background and Procedural Matters:

On November 3, 2006, Desert Claim, submitted application No. 2006-02 to the Energy Facility Site Evaluation Council (EFSEC or Council) to construct and operate the Desert Claim Wind Power Project (Project)¹. On January 12, 2007, the Council issued a *Notice of Public Informational Meeting, Land-Use Hearing, and Scoping Meeting Under the State Environmental Policy Act*. On January 30, 2007, at 7:00 p.m., pursuant to RCW 80.50.090 and Chapter 463-26 WAC, the Council convened a land-use hearing at the Kittitas County Event Center (Fairgrounds), Ellensburg Washington, to determine if the proposed Project site was consistent with the Kittitas County land use plans and zoning ordinances. The Council by Order No. 825, dated March 7, 2007, found the Applicant’s proposal to be inconsistent with the County’s land use plans and zoning ordinances and ordered the Applicant to:

1. Make all reasonable efforts to resolve the existing land use inconsistencies in the Project application as a condition of the Council continuing to process the application.

¹ The Project is a renewable wind energy generation facility that will consist of up to 90 wind turbines and have a nameplate capacity of up to 180 megawatts (MW). The proposed Project is located in the Kittitas County approximately 8 miles northwest of Ellensburg, Washington

2. Make monthly reports to the Council at its monthly meetings regarding the status of its efforts and negotiations with the County on land use issues until at least April 30, 2007.

In addition, the Applicant was authorized to request a stay of Council proceedings during the period when the request for resolution of noncompliance was being processed by the County.

On March 5, 2007, the Applicant filed a motion requesting that the Council find that it had made “all reasonable efforts to resolve the noncompliance” for the purposes of satisfying WAC 463-28-030(1). At its March 10th meeting, the Council discussed the motion and decided to take public comment through March 30, 2007, and schedule the matter for discussion and possible action at its scheduled April 10, 2007 meeting.

April 10, 2007 Meeting:

The following EFSEC members were present: Chair Jim Luce, Judy Wilson (Department of Natural Resources), Hedia Adelman (Department of Ecology), Jeff Tayer (Department of Fish & Wildlife), Richard Fryhling (Department of Community, Trade, and Economic Development), Tim Sweeney (Utilities and Transportation Commission), and Patti Johnson (Kittitas County).

Participants:

Representing the Applicant: Karen M. McGaffey, Attorney at Law

Representing Kittitas County: James Hurson, Deputy Prosecutor
Darryl Piercy, Dept. of Community Development Services

Counsel for the Environment: Michael Tribble, Assistant Attorney General

The Council requested supplemental briefing on the motion and continued a decision on the matter to a date to be determined².

May 8, 2007 Meeting:

The following EFSEC members were present at the Council’s May 8, 2007 meeting: Chair Jim Luce, Judy Wilson (Department of Natural Resources), Jeff Tayer (Department of Fish & Wildlife), Richard Fryling (Department of Community, Trade, and Economic Development), Tim Sweeney (Utilities and Transportation Commission), and Patti Johnson (Kittitas County). After discussion, the Council approved by a vote of 5 to 1³ to grant the Applicant’s motion subject to conditions discussed below.

² The Council scheduled May 8, 2007 as the date to discuss make a determination on the March 5, 2007 motion.

Governing Statute and Regulations:

RCW 80.50.090 provides that the Council conduct a public hearing to determine whether or not the proposed site is consistent and in compliance with local and regional land use plans or zoning ordinances.

Chapter 463-26 WAC generally provides that the hearing shall be adversarial in nature and be held to determine whether the proposed facility is consistent and in compliance with local and regional land use plans or zoning ordinances.

Chapter 463-28 WAC provides for a process for resolving land use inconsistencies; applications for state preemption of land use plans and zoning ordinances; and Council determination of whether the state should preempt local and regional land use plans or zoning ordinances when an application is not consistent with such plans or ordinances in effect on the date of application. Chapter 463-28-030 sets out procedures for an applicant to follow if the Council determines that the site of a proposed energy facility is not consistent and in compliance with local land use plans or zoning ordinances. Chapter 463-28-040 specifically requires that an applicant "...demonstrate a good faith effort to resolve...noncompliance issues."

Discussion:

The Applicant has asked the Council to make a formal determination regarding the Applicant's satisfaction of the requirements of WAC 463-28-030(1), "As a condition necessary to continue processing the application, it shall be the responsibility of the applicant to make the necessary application for change in, or permission under, such land use plans or zoning ordinances, and make all reasonable efforts to resolve the noncompliance." (Emphasis added)

The request is based in part on the fact that Desert Claim already applied for and was denied a January 2003 application for a similar wind farm project by the Board of Kittitas County Commissioners (BOCC) under the current land use regulations pertaining to wind farms under the Kittitas County Code (KCC) Chapter 17.61A.⁴

Previously, Council Order No. 825 found that the Project is inconsistent with the county's land use laws. With a Council determination of Desert Claim's satisfaction of WAC 462-28-030(1), the applicant could file a direct request for preemption.

The Applicant argues among other points that:

³ The representative from Kittitas County voted against granting the applicant's motion.

⁴ Desert Claim appealed the BOCC decision to Kittitas County Superior Court, but the decision to deny the project was upheld and there was no further appeal.

1. Factually the proposed facility is substantially similar to the original request and that a new application would be futile.
2. Read as a whole, EFSEC's statutory and regulatory authority only requires "reasonable" and "good faith" efforts to cure inconsistencies, and that the applicant has already made such efforts.
3. EFSEC's statutory emphasis is to "...avoid[ing] costly duplication in the siting process and ensure[ing] that decisions are made timely and without unnecessary delay." RCW 80.50.010(5).

Kittitas County argues to the contrary that:

1. The project proposed to EFSEC has substantially changed from the January 2003 application to the County, and as such is a new application which the County must review notwithstanding (1) EFSEC's March 27, 2007 Order 826 finding that the County's Wind Farm Overlay Ordinance and other County requirements irreconcilably conflict with EFSEC's own statutory authorities.
2. That a reapplication is not a futile act.
3. EFSEC cannot waive the Chapter 463-28 rules regarding preemption.

Council Precedent:

On March 27, 2007, the Council issued Order No. 826, recommending to the Governor the approval of the Kittitas Valley Wind Power Project (KVVPP) in Kittitas County. Specifically, based on that applicant's request for preemption, the Council, under the authority of RCW 80.50.110, recommended preemption of the County's FR 20 zone limits of non-agricultural structures to 35 feet in height and the requirements of KCC chapter 17.61A, the county's Wind Farm Resource Overlay Zone. At page 14 of the order, the Council noted that the BOCC denied the overall proposal and individually denied each of the four elements required by the KCC 17.61A. Further, on page 16 of the order, the Council found that the Project only conflicted with the 35 feet requirement and the Wind Farm Overlay Ordinance.

The Council noted, that with respect to the Wind Farm Overlay Ordinance, that:

“EFSEC's preemption statutory power to certify and regulate the location construction and operation of energy facilities such as the proposed KVVPP, simply cannot be usurped by local governments seeking to impose their own imprimatur on the siting process.”

Further, at page 26 of Order No. 826, the Council found that the statutory mandate to avoid costly duplication of the siting process supported its recommendation of preemption of the County's Wind Farm Overlay Ordinance. This of course, is the same ordinance which served as the basis of the Desert Claim's 2003 application denial by the BOCC.

The Council further found that the Wind Farm Overlay Ordinance usurped EFSEC's role of site-specific project evaluation. The Council stated:

“Under the county's Overlay Ordinance process, the Applicant had to obtain its site-specific permits from Kittitas County, then return to the EFSEC process and obtain those same permits a second time. The Council finds this to be exactly the type of “costly duplication in the siting process” that EFSEC was created to avoid.”

Finally, Order No. 826 states that the site-specific process demanded by Kittitas County circumvents EFSEC's ability to achieve its statutory mandate and seeks to preserve a local veto power over energy facility projects proposed for EFSEC approval. Conclusion 4 of Order No. 826, briefly summarizes the above findings and again concludes that the 35 feet height restriction as well as the county's Wind Farm Overlay Ordinance be preempted as a matter of state law.

Council Action Upon Motion:

Based on the pleadings and testimony provided, and all other evidence produced at the hearing, or timely submitted to EFSEC offices, the Council, having fully considered all such matters, adopts the following Findings of Fact, Conclusions of Law, Determination, and Order:

A. Findings of Fact:

1. EFSEC is required by RCW 80.50.090(2), WAC 463-143-030 and WAC 463-26-110 to consider whether the Project complies with local land use plans and zoning ordinances, and EFSEC has preemptive authority to determine those matters. See WAC 463-28-020.
2. The Council conducted land use hearings on the matter of consistency pursuant to RCW 80.50.090(2).
3. The Council in Order No. 825, dated March 7, 2007, found that the Project was not consistent with the County's land use plans or zoning ordinances.
4. On March 5, 2007, the Applicant submitted a motion to the Council for a determination that it had met the requirements of WAC 463-28-030 and therefore could proceed with its request for preemption under WAC 463-28-040.
5. The Council discussed the motion at its March 10, 2007 meeting and heard argument by the parties and further discussed the motion at its April 10, 2007 meeting and invited the parties to submit supplemental briefing on the motion, and on May 8, 2007 determined to issue this order.

6. The Council received and considered the following pleadings concerning the Applicant's motion:
 - a. Motion for Determination That Desert Claim Has Satisfied WAC 463-28-030(1) dated March 5, 2007.
 - b. Declaration of David Steeb In Support of WAC463-28-030(1) Determination dated March 5, 2007.
 - c. Kittitas County Response To Motion For Determination Re WAC 463-28-030(1) dated March 30,2007.
 - d. Kittitas County Crankovich Affidavit Re WAC Motion dated March 30, 2007.
 - e. Kittitas County Piercy Affidavit Re WAC Motion dated March 30,2007.
 - f. Desert Claim's Supplemental Briefing Re WAC 463-28-030(1) dated April 17, 2007.
 - g. Notice of Abstention from Argument Regarding Applicant's March 6, 2007 Motion for Determination of WAC 463-28-030(1) Satisfaction dated March 21, 2007. (Counsel for the Environment)

B. Conclusions of Law:

1. The Council has the authority under chapter 80.50 RCW and WAC Chapter 463-28 to make a determination under WAC 463-28-030.
2. EFSEC, pursuant to its authority under RCW 80.50.010, has previously preempted the Wind Farm Overlay Ordinance (KCC Chapter 17.61A) and the height restrictions of the FR 20 zone.
3. Wind farms in Kittitas County are neither a permitted nor a prohibited use, nor is a conditional use permit required under the County's current ordinance.
4. The Applicant had applied in 2003 to the County for a wind power project permit and was rejected by the BOCC on the same basis upon which the Kittitas Valley Wind Project was denied.
5. Requiring the Applicant to file a new application with the County under WAC 463-60 would be contrary to the statutory authority under RCW 80.50.010 "to avoid costly

duplication in the siting process and ensure that decisions are made timely and without unnecessary delay.”

6. WAC 463-28-030(1) requires only that an applicant make the “necessary application” for approval under the county’s land use regulations and only make “reasonable” efforts to solve noncompliance.

C. Determination and Order:

These findings bear directly upon the Desert Claim application, and but for the Council existing administrative procedures contained in Chapter 463-28, might well support a finding that the Applicant need not work further with the County. On the other hand, even the Applicant does not go so far and offers a thirty-day period within which it commits to work with the County in good faith to resolve such differences as may be capable of being resolved. (Desert Claim’s Supplemental Brief, pp 7-9)

The Council believes that the Applicant’s offer is consistent with the Council’s existing administrative procedures which remain, notwithstanding the Council’s decision in the Kittitas Valley Wind Power Project. WAC 43-28-040 (1) requires that an applicant requesting preemption demonstrate to the Council’s satisfaction that it “has demonstrated a good faith effort to resolve non-compliance issues.”⁵

The “good faith” question is different from the question of whether the Applicant must file a new application with the County under WAC 463-28-030 (1). The Council’s legal determination in the Kittitas Valley case is dispositive on this issue. By this Order, the Council finds that based upon its findings in the Kittitas Valley Wind Power Project, the filing of such an application in conformity with the County’s Wind Farm Overlay Ordinance, KCC Chapter 17.61A, and the height restrictions of the FR 20 zone is not required.

The Applicant’s motion shall be granted. The Council will not specify what actions it believes may constitute a demonstration of “good faith” other than to observe that the proposed Project’s turbines likely will exceed the height restrictions in the County’s zoning regulations and may be visible to property owners and the public in the project area. The Council also recognizes that

⁵ EFSEC’s regulations contain no express definition of “good faith” and the Council recognizes the abstract and intangible quality associated with this term. However, the Council believes this requirement to mean that an applicant must demonstrate to the Council during the adjudicative process that it has used best efforts to work through local government to resolve inconsistencies to the extent practicable.

The Council recognizes that this will be furthered by the cooperation of Kittitas County. EFSEC encourages the County and the applicant to cooperate to the fullest extent possible to address and resolve issues likely to be presented to the Council in an adjudicative proceeding. These issues are found in the Environmental Impact Statement and include but are not limited to viewscape, set backs, tower height, and avian/wildlife impacts.

“good faith” requires a willingness on the part of both the Applicant and the County to work together to attempt to resolve issues outside the scope of the legal issues regarding conformity with the County’s Wind Farm Overlay Ordinance, KCC Chapter 17.61A, and the height restrictions of the FR 20 zone.

The Applicant shall proceed in accordance with this order for a period not to exceed the time allowed for extension pursuant to Order No. 829, after which time it may file a request for preemption pursuant to WAC 463-28-040.

Therefore, it is hereby **ORDERED** that the in accordance with WAC Chapter 463-28, the Applicant’s motion for a determination regarding satisfaction of the requirements of WAC 463-28-030(1) is granted in accordance with the conditions set forth above.

DATED and effective at Olympia, Washington, the 8th day of May, 2007.

WASHINGTON STATE
ENERGY FACILITY SITE EVALUATION COUNCIL

James O. Luce, Chair