

1 EXPEDITE
2 No hearing set
3 Hearing is set
4 Date:
5 Time:

6 The Honorable Judge James J. Dixon

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

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

Petitioners,

vs.

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.

No. 12-2-00692-7

PETITIONERS' OBJECTION TO THE
ADMINISTRATIVE RECORD AND
MOTION TO CORRECT AND ADD TO
THE RECORD

COME NOW Petitioners Friends of the Columbia Gorge, Inc. and Save Our Scenic Area
and object to the copy of the administrative record filed by Respondents (Docket #54) and move

1 to correct and add to the record as detailed below. This motion is supported by the attached
2 Declaration of Nathan J. Baker.

3 I. BACKGROUND

4 This case is an appeal of a final decision by Respondents Governor Christine O. Gregoire
5 and State Energy Facility Site Evaluation Council (“EFSEC”). The appeal is brought pursuant to
6 Chapter 80.50 RCW (“Siting Act”), and Chapter 34.05 RCW, the Washington Administrative
7 Procedure Act (“APA”). The appeal challenges Respondents’ approval of the Whistling Ridge
8 Energy Project, a wind energy project proposed to be sited in southeast Skamania County along
9 the boundary of the Columbia River Gorge National Scenic Area. The Applicant is Whistling
10 Ridge Energy, LLC (“WRE” or “Applicant”).

11 II. FACTS RELEVANT TO THE MOTION

12 On May 4, 2012, this Court issued an oral ruling requiring Respondents to file an
13 electronic copy of the administrative record in a searchable format. Petitioners and Respondents
14 subsequently filed a joint proposed Order Regarding the Filing of a Certified Electronic Copy of
15 the Administrative Record, which the court approved and entered on July 5, 2012 (Docket #52)
16 (hereinafter “Order”). Similar to the Court’s earlier, oral ruling, the written Order requires
17 Respondents to file a certified copy of the record in “electronic, searchable” format. Order at 2.

18 Respondents filed an electronic copy of the record with the court on July 31, 2012 (Docket
19 #54). Petitioners received copies of the record from Respondents on August 1, 2012.

20 The filed copy of the record consists of 2,363 individual PDF files, separated into 18
21 folders. Many of the 2,363 files have not been converted to searchable format through optical
22 character recognition (“OCR”), and even if they had been converted, there is no quick or
23 efficient manner to search for specific word or phrases in the record as a whole. *See* Baker Decl.

1 at ¶¶ 6, 7. The filed copy of the record is not Bates stamped or paginated. *Id.* at ¶ 8. Finally, the
2 filed copy of the record omits multiple documents that were either in the record or that were
3 cited, quoted, or referenced in the record. *Id.* at ¶¶ 9, 10.

4 Prior to filing this pleading, Petitioners have discussed with Respondents many of the
5 issues discussed herein. However, as of the date of this pleading, Respondents have not
6 committed to resolve any of the issues.

7 III. STATUTORY BASIS FOR THE MOTION

8 RCW 34.05.566(7) provides that once the record is filed, “[t]he court may require or
9 permit subsequent corrections or additions to the record.” Pursuant to this statutory provision, the
10 Order permits any party up to 30 days from receipt of a copy of the record “to file any requests to
11 correct or add to the record pursuant to RCW 34.05.566(7).” Order at 3.

12 IV. RELIEF SOUGHT

13 The Court should direct Respondents to correct the record by consolidating its contents
14 into one or a few PDF files, making the record fully searchable, and paginating all pages. The
15 Court should also direct Respondents to include certain documents that were omitted from the
16 record. Finally, the Court should allow the addition of certain government documents that were
17 quoted, cited, or otherwise referenced in the proceedings below.

18 V. ARGUMENT

19 A. The Court should require the record to be consolidated into one or a few PDF files, 20 Bates stamped, and made fully searchable.

21 The Court’s Order expressly required Respondent to file an electronic, searchable copy of
22 the record. Order at 2. Respondent, however, has not filed a record that is fully searchable. Many
23 of the individual documents in the record are not searchable, and even if they were, there is no

1 quick or efficient manner to search through the 2,363 individual PDF files to find specific
2 content in the record. The filed record does not comply with the Court's order.

3 The Court should require the Respondents to ensure that the record is fully searchable.
4 The quickest and easiest way of doing this would most likely be to consolidate the 2,363 PDF
5 files into one or a few PDF files and then render them searchable via Adobe Acrobat.

6 In addition, Respondents failed to Bates stamp or otherwise number the individual pages
7 of the record. This will make it extremely difficult for the parties and the Court to find and cite
8 material in the record. The Court should require Bates stamping or pagination of the record to
9 allow for uniform, efficient, and practical use of the record.

10 All three of these tasks (consolidating PDF files, rendering them searchable, and
11 pagination) can be accomplished quickly, on a batch basis, via Adobe Acrobat and/or scripts that
12 can be added to Adobe. Petitioners have previously provided Respondent EFSEC with technical
13 advice on how to accomplish these tasks, and Petitioners remain available to assist EFSEC to
14 ensure that the Court has an adequate record for review. *See* Baker Decl. at ¶¶ 3, 4.

15 **B. The Court should require the record to include certain omitted documents.**

16 Petitioners request correction of the administrative record to include several documents
17 that were omitted in the copy filed with the court.¹

18 First, as alluded to in the record index, Record Document #2095² contains a
19 "confidential" and "protected" map pertaining to northern spotted owl³ sightings and designated
20 owl management "circles" in the project vicinity. This map was omitted from the filed copy of
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22 ¹ Petitioners have identified many other omitted documents; however, because those other
documents are not relevant or not essential to the appeal, Petitioners are not requesting their inclusion.

23 ² This map was designated as Exhibit 5.07 in the proceedings below.

³ The northern spotted owl is listed as a threatened species pursuant to the federal Endangered
Species Act, 16 U.S.C. §§ 1531-1544.

1 the record. The map contains sensitive wildlife information that should not be made available to
2 the public. However, the map is an indisputable part of the record and should be provided to the
3 Court. Petitioners request that the Court require the map to be filed with the Court under separate
4 cover and that the map be treated as a sealed record.

5 Second, the filed copies of the record omit two maps depicting estimated wind speeds for
6 the project site, prepared with data generated by the National Renewable Energy Laboratory. The
7 two maps are part of document #2105 in the record and are included in the online version of that
8 document posted on EFSEC's website,⁴ but are not included in the electronic copy of the record
9 filed with this Court. This oversight can be easily corrected by revising the record to include the
10 two maps.

11 Third, the filed copy of the record omits all transcripts and minutes of the regular EFSEC
12 meetings at which the Whistling Ridge Energy Project was addressed. At multiple meetings
13 between the filing of WRE's application and the ultimate decision by Governor Gregoire, the
14 EFSEC Council members and staff addressed the Whistling Ridge project. Topics at these
15 meetings included updates from staff on the proceedings now challenged in this appeal, feedback
16 and policy direction from the Council members on the progress of the Whistling Ridge site-
17 certification process, and prepared public statements read by Council members regarding the
18 Whistling Ridge process. The Whistling Ridge project was addressed on the following dates:

19 ///

22 ⁴ The two maps are part of Public Comment #345 and are found on EFSEC's website at pages 87
23 and 88 of the PDF available at the following link:
<http://www.efsec.wa.gov/Whistling%20Ridge/Comments/Adjudication%20Comments/Comment%20291%20-%20349%20Re.pdf>.

1	Mar. 10, 2009	Jan. 12, 2010	Feb. 15, 2011	Jan. 24, 2012
	Apr. 14, 2009	Feb. 9, 2010	Mar. 15, 2011	Feb. 21, 2012
2	May 12, 2009	Mar. 9, 2010	Apr. 19, 2011	Mar. 21, 2012
	June 9, 2009	Apr. 13, 2010	May 17, 2011	
3	Aug. 11, 2009	May 11, 2010	July 19, 2011	
	Sept. 8, 2009	June 8, 2010	Aug. 16, 2011	
4	Oct. 13, 2009	July 13, 2010	Nov. 15, 2011	
	Nov. 10, 2009	Aug. 10, 2010	Dec. 20, 2011	
5	Dec. 8, 2009	Oct. 19, 2010		
		Nov. 9, 2010		
6		Dec. 14, 2010		

7 Transcripts and/or minutes of all of these meetings have already been produced, are publicly
8 available,⁵ and are part of the proceedings underlying the actions challenged in this appeal. The
9 transcripts and minutes of these public meetings should be included in the record.

10 Fourth, the filed copy of the record omits the transcript of an important special meeting
11 from the proceedings below. On December 27, 2011, the EFSEC Council held a special meeting
12 where the Council members discussed and adopted Council Order No. 870 (Record Document
13 #2,344), which denied petitions for reconsideration of the Council’s adjudicative and
14 recommendation orders (Record Doc. #2,280 and #2,279). Petitioners are challenging Council
15 Order No. 870 in this appeal. Moreover, the public notice for the December 27, 2011 special
16 meeting, as well as the accompanying certificate of service, are included in the filed copy of the
17 record as Documents #2,327 and 2,328. However, the filed copy of the record does not include
18 the transcript of the special meeting.⁶ The transcript should have been included.

19 Fifth, the filed copy of the record appears to omit two EFSEC-prepared summaries of the
20 petitions for reconsideration filed below. The filed copy of the record includes three documents
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22 ⁵ The transcripts and minutes of EFSEC’s regular meetings may be found on the EFSEC website:
<http://www.efsec.wa.gov/meet.shtml>.

23 ⁶ A transcript of the December 27, 2011 special meeting may be found on the EFSEC website:
<http://www.efsec.wa.gov/FILES/minutes/2011/12-27-11%20WR%20Special%20Meeting%20Minutes%20Corrected%20Version.pdf>.

1 summarizing the “key points” made by the Applicant, Skamania County, the Klickitat County
2 Economic Development Authority, and the Seattle Audubon Society in their petitions for
3 reconsideration of the Council’s adjudicative and recommendation orders. *See* Documents
4 #2,307, 2,308, 2,309. These summaries appear to have been prepared by EFSEC staff for the
5 Council’s review. The filed copy of the record inadvertently omits, however, the summaries of
6 the petitions for reconsideration filed by Petitioners Friends of the Columbia Gorge, Inc. and
7 Save Our Scenic Area. These summaries should be included in the record.

8 **C. The Court should allow copies of certain documents that were cited, quoted, or**
9 **otherwise referenced during the proceedings below to be included in the record.**

10 Pursuant to RCW 34.05.566(7), the Court may “require or permit subsequent corrections
11 or additions to the record” once it is filed. Pursuant to this statutory provision and the Court’s
12 Order, Petitioners request that the Court allow copies of certain documents that were cited,
13 quoted, or otherwise referenced during the proceedings below to be included in the record, in
14 order to facilitate judicial review. None of these documents are new to EFSEC or the other
15 parties, all of them were cited or quoted below, and all of them are publicly available
16 government documents that are relevant to Petitioners’ claims.

17 First, Petitioners request the inclusion of a series of Skamania County land use
18 ordinances involving, in pertinent part, the conversion of forest lands to non-forestry uses.
19 Approximately every six months since 2007,⁷ Skamania County has passed these ordinances in
20 order to renew a County-established moratorium that, in pertinent part, prohibits the conversion
21 of forest lands to non-forestry uses on unzoned lands within the County, including portions of the
22 project site in the instant appeal. These ordinances were cited and discussed extensively in the

23 ⁷ The relevant ordinances are Skamania County ordinances number 2007-10, 2008-01, 2008-08,
2008-13, 2009-03, 2010-06, 2010-10, 2011-03, 2011-08, and 2012-04.

1 proceedings below,⁸ and EFSEC's interpretations of the ordinances are challenged in the instant
2 appeal.⁹ Petitioners request that the Court allow the attached copies of these ordinances to be
3 added to the record. This will not result in any prejudice or surprise to the other parties; the
4 documents are, after all, public documents prepared and adopted by Intervenor-Respondent
5 Skamania County, and the other parties are well familiar with the documents, given their central
6 role in the proceedings below.¹⁰ Including these documents will ensure that the Court has
7 complete and up-to-date information regarding the County ordinances, the interpretation of
8 which will be a fundamental issue on appeal.

9 Second, the Court should allow a copy of a local government land use certificate of
10 consistency from a prior EFSEC matter to be added to the record. In the instant appeal,
11 Petitioners are challenging EFSEC's determination that Skamania County adopted a certificate
12 of consistency finding that the Whistling Ridge Energy Project would be consistent with local
13 land use authorities. *See* Petition for Judicial Review (Docket #4) at ¶ 7.1.1. This claim includes
14 a challenge to EFSEC's interpretation of the court's decision in *Columbia Riverkeeper v. Cowlitz*
15 *County*, Cowlitz County Superior Court No. 07-2-00400-0 (May 2, 2007), *appeal dismissed by*

17 ⁸ *See, e.g.*, May 7, 2009 Tr. (Record Document #493) at 30–31; Jan. 3, 2011 Tr. (record
18 Document #1,626) at 20, 30–31, 141–45; Amended Application (Record Document #628) at 4.2-14; Ex.
19 1.15C (Record Document #1,631); Ex. 1.17C (Record Document #1,633) at 4; Friends' Land Use Op Br.
20 at 9–12 (Record Document # 2,134); County Land Use Op. Br. at 5 (Record Document #2,135); SOSA
21 Land Use Resp. Br. at 1–2 (Record Document #2,131); Seattle Audubon Society Land Use Resp. Br.
(Record Document # 2,156) at 1; Applicant Land Use Resp. Br. (Record Document #2,152) at 9–10;
22 County Land Use Resp. Br. at 5–6 (Record Document #2,157); Friends Pet. for Recons. (Record
23 Document #2,294) at 9–12 & Ex. B; SOSA Pet. for Recons. (Record Document #2,293) at 27–32; County
Resp. to Pets. for Recons. (Record Document #2,310) at 11; Applicant Resp. to Pets. for Recons. (Record
Document #2,315) at 4, 16.

⁹ *See* Petition for Judicial Review (Docket #4) at ¶ 7.1.5.

¹⁰ During the proceedings below, Petitioners moved to reopen the record to include Ordinance
No. 2011-08, which was the current moratorium ordinance in effect at that time. Record Document
#2,331. The EFSEC Council denied the motion, but the only stated reason for the denial was that the
record had already been closed. Record Document #2,353 (EFSEC Order #871) at 1. The Council did *not*
determine that the document was irrelevant or inherently improper for inclusion in the record. *See id.*

1 *stipulated motion*, Wash. Ct. App. No. 36393-3-II (Dec. 12, 2007). In the *Columbia Riverkeeper*
2 matter, the Cowlitz County Superior Court held that a county's certificate of land use
3 consistency submitted to EFSEC was a land use decision. Record Document #2294 (Friends'
4 Petition for Reconsideration), at Exhibit A. In the proceedings below in the instant matter,
5 Petitioners quoted from Cowlitz County's certificate of consistency,¹¹ and EFSEC issued an
6 order interpreting the Superior Court's decision.¹² To avoid any dispute about the accuracy of
7 Petitioners' quotes, and to facilitate judicial review of EFSEC's decision, Petitioners request that
8 the Court allow a copy of the certificate of land use consistency to be included in the record. This
9 results in no prejudice to Respondents and the other parties, given that the document was cited
10 and quoted below; the document was originally submitted to EFSEC, which is therefore charged
11 with knowledge of its contents; and the other parties have had copies of this document since
12 2010.¹³ The Court should allow a copy of the Cowlitz County certificate of consistency to be
13 added to the record.

14 Third, the Court should allow a full copy of a 2011 permit for a wind energy project in
15 Wyoming, the relevant portions of which are already in the record, to be added to the record.
16 During the proceedings below, Petitioners requested that EFSEC adopt conditions of approval to
17 reduce the likely significant adverse scenic impacts of the project caused by its constantly
18 flashing lighting for aviation safety. Record Document #2294 (Friends' Petition for
19 Reconsideration) at 20–21. Specifically, Petitioners requested that EFSEC require the Applicant
20 to use radar-activated lighting (*i.e.*, lighting activated only when planes are actually nearby) in
21 order to reduce the amount of time that the lighting would be flashing and visible from important
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23 ¹¹ Record Doc. #2155 (Land Use Response Brief) at 3.

¹² Record Doc. #2280 (Council Order No. 868) at 10.

¹³ *See* Record Doc. #2294 (Friends' Petition for Reconsideration) at 3, n. 5.

1 viewing locations. To support the request, Petitioners cited a recent wind facility siting decision
2 from the State of Wyoming requiring radar-activated aviation safety lighting, and attached
3 relevant excerpts from the Wyoming permit. *Id.* at Ex. C. In response, the Applicant implied that
4 Petitioners had tampered with the Wyoming permit. *See* Record Document #2,315 (Applicant's
5 Response to Requests for Reconsideration) at 5. To avoid any confusion about the contents of the
6 Wyoming permit, Petitioners request that a complete copy be added to the record. This should
7 resolve any disputes regarding the authenticity of the material.

8 Finally, Petitioners request that copies of three government documents related to wildlife
9 impacts be added to the record. Petitioner Friends cited to all three of these documents during the
10 proceedings below, and EFSEC reviewed and considered all references to these documents:

- 11 • Appendix C to the Coyote Crest Final Environmental Impact Statement (Jan. 2009).¹⁴
12 This document consists of a document entitled "Avian Baseline Study Draft Report,
13 Coyote Crest Wind Resource Area, Pacific and Lewis Counties, Washington." Friends
14 cited to this document at page 21 of its adjudication response brief (Record Document
15 #2,189) and at page 26, note 67 of its petition for reconsideration (Record Document
16 #2,294). In both instances, Friends provided the website address where the document
17 could be found.¹⁵ Moreover, EFSEC itself also cited and relied on this document in its
18 Final Environmental Impact Statement for the Whistling Ridge Project. Record
19 Document #2,255 at 3-287 (Table 3.14-1), 3-299.

20 ¹⁴ During the proceedings below, the Applicant expressed some confusion about this document,
21 believing it to be a final report and not the draft report that is cited in the Final Environmental Impact
22 Statement for the Whistling Ridge Project. *See* Record Doc #2,315 (Applicant's Response to Requests for
23 Reconsideration) at 5 n. 4. The EFSEC Council did not respond to the Applicant's challenge. Admitting
this document would help resolve the document's identity, should the issue come into dispute later in this
appeal.

¹⁵ Appendix C to the Coyote Crest FEIS may be found at the following address:
<http://lewiscountywa.gov/attachment/3118/DEISVolume2AppendixC.pdf>.

- 1 • Wildlife Baseline Studies for the Radar Ridge Wind Resource Area, Pacific County,
2 Washington: Final Report, April 15, 2008 – June 18, 2009 (2009). Friends cited to this
3 document at page 26, note 67 of its petition for reconsideration (Record Document
4 #2,294) and provided the address of a website where the document could be found.¹⁶
5 As with the previous document, EFSEC also cited and relied upon this document.
6 Record Document #2,255 (Whistling Ridge Final Environmental Impact Statement) at
7 3-287 (Table 3.14-1), 3-299.
- 8 • Kittitas Valley Wind Power Project Final Environmental Impact Statement, Appendix
9 A (Feb. 1, 2007). Friends cited this document at page 26, notes 69 and 70 of its petition
10 for reconsideration (Record Doc #2,294) and provided the address where the document
11 may be found on EFSEC’s website.¹⁷ Because this document is an EFSEC document,
12 EFSEC is charged with knowledge of its contents.

13 These documents are relevant to this appeal because they allow for an evaluation of the
14 relative abundance of sensitive wildlife species at the Whistling Ridge project site in comparison
15 to other proposed sites for wind energy projects in the Pacific Northwest, and thus will help to
16 inform the Court on the merits of Petitioners’ arguments regarding EFSEC’s review of the
17 proposed project’s potential impacts to wildlife resources. All three documents are government
18 documents that were cited and relied upon in the proceedings below. Further, in its
19 recommendation order, the Council found that the Applicant’s request to strike the references to
20 these documents was without merit. *See* Record Document #2,342 at 3 n. 5.¹⁸ Finally, EFSEC

21 ¹⁶ This document has since been removed from the website, apparently because the Radar Ridge
22 project has been cancelled.

23 ¹⁷ Appendix A to the Kittitas Valley FEIS may be found at the following address:
<http://www.efsec.wa.gov/kittitaswind/FEIS/Vol%201%20Appendices/App.%20A%20text.pdf>.

¹⁸ In its response to the petition for reconsideration filed by Petitioner Friends, the Applicant
requested that the Council strike the wildlife documents listed above. Record Document #2,315 at 5. The

1 concluded that the references to these documents in Friends' Petition for Reconsideration
2 presented no new issues not already considered by EFSEC, thus implying that the agency had
3 thoroughly reviewed the documents when they were previously cited.¹⁹ Documents such as these
4 that were considered by the agency below are deemed part of the record. *See* RCW
5 34.05.476(2)(d) (The administrative record consists of evidence that is either "received or
6 considered.") Because these three documents were discussed during the proceedings below, were
7 given substantive consideration by EFSEC, and the discussions of the documents were not
8 stricken from the record, the documents should be included in the final record on review.

9 VI. CONCLUSION

10 The Court should adopt the attached proposed order or a similar order consistent with this
11 Objection and Motion.

12 Dated this 31st day of August, 2012

13 /s/ Gary K. Kahn
14 Gary K. Kahn, WSBA No. 17928
15 Reeves, Kahn, Hennessy & Elkins
Attorney for Petitioner Friends

/s/ Nathan J. Baker
Nathan J. Baker, WSBA No. 35195
Friends of the Columbia Gorge
Staff Attorney for Petitioner Friends

16 /s/ J. Richard Aramburu
17 J. Richard Aramburu, WSBA No. 466
18 Aramburu & Eustis, LLP
Attorney for Petitioner SOSA

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20 Council did not respond directly to the Applicant's arguments, but stated that any argument not
21 specifically addressed were found to be "without sufficient merit to warrant discussion." Record
22 Document #2,342 (Council Order No. 870) at 3 n. 5.

23 ¹⁹ See Transcript of December 27, 2011 Special Meeting at 10:12-17 ("EFSEC finds and
concludes that none of the petitions raises any factual or legal arguments that EFSEC has not already
heard during the adjudication and in post-hearing briefs, deliberated upon, and discussed in Orders 868
and 869 and in the draft Site Certification Agreement.") (statement of Council Chair Jim Luce), *available*
at <http://www.efsec.wa.gov/FILES/minutes/2011/12-27-11%20WR%20Special%20Meeting%20Minutes%20Corrected%20Version.pdf>.