

1 EXPEDITE

2 No Hearing Set

3 Hearing is Set

4 Date: September 28, 2012

5 Time: 11:00 a m

6 The Honorable Judge James J. Dixon

7 **STATE OF WASHINGTON**
8 **THURSTON COUNTY SUPERIOR COURT**

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

12 Petitioners,

13 v.

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

18 Respondents,

19 and

20 WHISTLING RIDGE ENERGY LLC,
21 SKAMANIA COUNTY, and
22 KLICKITAT COUNTY PUBLIC
23 ECONOMIC DEVELOPMENT
24 AUTHORITY,

25 Intervenors-Respondents.

NO. 12-2-00692-7

MOTION TO CERTIFY
PETITION FOR REVIEW
TO SUPREME COURT
PURSUANT TO
RCW 80.50.140

1 COMES NOW Governor Christine O. Gregoire, Energy Facility Site
2 Evaluation Council (“EFSEC”), Whistling Ridge Energy LLC, Skamania
3 County, and the Klickitat County Public Economic Development Authority
4 (collectively, “Respondents”) by and through its legal counsel set forth below
5 and jointly move this Court for the entry of an order certifying this matter for
6 direct review by the Washington Supreme Court.

7 **I. RELIEF REQUESTED**

8 In accordance with RCW 80.50.140, Respondents request that this Court
9 immediately certify this matter to the Washington Supreme Court based upon the
10 fundamental and urgent interests at issue in these proceeding that affect the
11 public interest and the development of energy facilities and require a prompt
12 determination by the Supreme Court. In the event Petitioners oppose immediate
13 certification to the Supreme Court, Respondents request that the Court require
14 Petitioners to show cause why this matter should not be immediately certified to
15 the Supreme Court for direct review.

16 **II. STATEMENT OF FACTS**

17 This matter comes before this Court under RCW 80.50.140. Petitioners
18 have appealed Governor Gregoire’s approval, upon EFSEC’s recommendation,
19 of a Site Certification Agreement (“SCA”) for the Whistling Ridge Energy
20 Project (the “Project”). Whistling Ridge Energy LLC is the applicant of the
21 Project. As initially proposed, the Project consisted of up to 50 wind turbines
22 and a substation in Skamania County, Washington. (Rec. Doc. #3 at I-5.) In
23 order to minimize potential visual effects, Whistling Ridge Energy LLC
24 stipulated during the EFSEC review process that the Project would consist of no
25 more than 38 wind turbines. (Rec. Doc. #1625 at 73:20-74:25.) Following an

1 exhaustive review of the Project, EFSEC recommended and Governor Gregoire
2 signed a SCA that authorizes construction and operation of the substation and a
3 maximum of 35 wind turbines. (Rec. Doc. #2362 at 9.)

4 The administrative record EFSEC filed with this Court is exhaustive and
5 voluminous (over 36,500 pages). It includes public comments, oral and written
6 testimony, evidence, the Project's Final Environmental Impact Statement
7 ("FEIS"), and briefing submitted by the parties during EFSEC's review.
8 Petitioners have filed with this Court an objection to the administrative record
9 and motion to correct and "add to" the administrative record ("Objection") that
10 makes the following three requests: (1) the administrative record should be
11 combined into "one or a few," searchable, Bates stamped PDF files, (2) certain
12 inadvertently "omitted" documents should be included in the administrative
13 record, and (3) documents attached to Petitioners' Objection "that were cited,
14 quoted, or otherwise referenced during the proceedings below" should be *added*
15 to the administrative record. As noted in the answer to Petitioners' Objection
16 filed concurrently with this motion, Respondents do not dispute the first two
17 requests in the Objection, but strongly dispute the third request to *add* documents
18 to the administrative record. As described below, pending this Court's resolution
19 of that dispute, Petitioners' Petition for Review will be ready for immediate
20 certification to the Washington Supreme Court.

21 The Petition for Review contains characterizations of the facts in the
22 proceedings below and takes issue with the factual findings made by EFSEC and
23 Governor Gregoire. Respondents strongly disagree with Petitioners'
24 characterizations of the findings of fact and conclusions of law made by the
25 EFSEC and the Governor and anticipate that the Supreme Court will adjudicate

1 these matters under the appropriate standard of review. Respondents provide
2 only a brief response below in order to demonstrate how this matter satisfies
3 RCW 80.50.140's four criteria for immediate certification to the Supreme Court.

4 **III. STATEMENT OF THE ISSUES**

5 Whether the Court should immediately certify this matter to the Supreme
6 Court for direct review in accordance with RCW 80.50.140?

7 **IV. EVIDENCE RELIED UPON**

8 This motion is based upon the following evidence and information: (1) the
9 Petition for Review filed with this Court; (2) the administrative record EFSEC
10 filed with this Court on July 30, 2012; (3) Petitioners' Objection to the
11 administrative record filed by EFSEC and motion to correct and "add to" the
12 administrative record; and (4) Respondents' answer to Petitioners' Objection
13 filed concurrently with this motion.

14 **V. LEGAL AUTHORITY AND ARGUMENT**

15 Pursuant to RCW 80.50.140, the Thurston County Superior Court is
16 required to conduct its review of the matter "at the earliest possible date and shall
17 expedite such petition in every way possible." This Court's responsibility is set
18 forth as follows:

19 (1) . . . The Thurston county superior court shall certify
20 the petition for review to the supreme court upon the
following conditions:

21 (a) Review can be made on the administrative
22 record;

23 (b) Fundamental and urgent interests affecting the
24 public interest and development of energy facilities are
involved which require a prompt determination;

1 (c) Review by the supreme court would likely be
2 sought regardless of the determination of the Thurston
3 county superior court; and

4 (d) The record is complete for review.

5 RCW 80.50.140 fundamentally contemplates certification to the Supreme Court
6 without review and hearing by the Thurston County Superior Court regarding the
7 substantive merits of the Petition for Review. *Residents Opposed to Kittitas*
8 *Turbines v. EFSEC*, 165 Wn.2d 275, 286, 197 P.3d 1153 (2008) (“That [superior]
9 court *will certify* the petition to this court if it determines that” the criteria in
10 RCW 80.50.140(1) are satisfied [Emphasis added.]). The Supreme Court then
11 has discretion whether to accept or decline this Court’s certification. *Id.* at 300.
12 Thus, this Court’s role to certify the sufficiency of the record for review and
13 make a determination that the matter involves “fundamental and urgent interests”
14 and that Supreme Court review would be sought “regardless of the
15 determination” of the Superior Court. This case meets all four required criteria.

16 **A. Review can be made on the administrative record in this case.**

17 Review of the issues raised in Petitioners’ Petition for Review can be made
18 on the administrative record. The record is extensive consisting of over 36,500
19 pages and reflects the comprehensive administrative process conducted by
20 EFSEC. EFSEC conducted informational public hearings on the Project on
21 May 6-7, 2009, in Stevenson and Underwood, Washington. (Rec. Doc. #193,
22 #194.) EFSEC conducted a land use consistency hearing on the Project on
23 May 7, 2009, in Underwood near the Project site and an adjudicative hearing on
24 the Project on January 3-7, 10-11, and 20, 2011 in Stevenson, Underwood, and
25 Olympia, Washington. (Rec. Doc. #2280 at 6, 8.) Both sides presented expert
testimony during those hearings. As part of the adjudicative hearing, EFSEC

1 held sessions on January 5 and 6, 2011 in Underwood and Stevenson, at which
2 members of the public could testify. (*Id.* at 6.) EFSEC also received 396
3 comments letters and evidentiary submissions regarding land use consistency and
4 399 written submissions regarding the application adjudication. (*Id.* at 7.)

5 In full compliance with the State Environmental Policy Act (“SEPA”),
6 EFSEC also conducted a scoping hearing on May 6, 2009, in Stevenson and
7 Underwood, Washington, issued a Draft Environmental Impact Statement
8 (“DEIS”) for public comment on May 24, 2010, conducted public hearings on the
9 DEIS on June 16-17, 2010, in Underwood and Stevenson, and accepted written
10 comments on the DEIS until August 27, 2010 (extended from the original July 19
11 deadline). (Rec. Doc. #2279 at 4.) On August 12, 2011, EFSEC’s responsible
12 official under SEPA issued the Project’s FEIS, which contains responses to the
13 public comments. (*Id.* at 4.) The FEIS is a joint environmental impact statement,
14 produced cooperatively by the State of Washington and the United States
15 Department of Energy, Bonneville Power Administration (“BPA”) as joint lead
16 agencies, to meet both SEPA and National Environmental Policy Act (NEPA)
17 standards and requirements. (Rec. Doc. #45; Rec. Doc. #2255 at 2.)

18 Petitioners’ issues were briefed and argued extensively during the EFSEC
19 adjudicative proceeding, they were addressed in various EFSEC orders, and they
20 have been fully adjudicated in EFSEC Orders Nos. 868 and 869, filed with this
21 Court as Rec. Doc. #2280 and Rec. Doc. #2279, respectively. This information is
22 in the record before this Court and review can be made on this record.

23 RCW 80.50.140(1)(a)’s requirement that “[r]eview can be made on the
24 administrative record” is not an invitation for a party to present substantive
25 evidence about the Project, such as testimony by an additional expert. Rather,

1 this criterion implicates the situation where the superior court confronts a claim
2 that “there are alleged irregularities in the procedure before the council not found
3 in the record,” in which case the superior court, “shall proceed to take testimony
4 and determine such factual issues raised by the alleged irregularities and certify
5 the petition and its determination of such factual issues to the supreme court.”
6 RCW 80.50.140(1). For example, the petitioners in *Residents Opposed to*
7 *Kittitas Turbines* alleged that EFSEC’s chairman engaged in a conflict of interest
8 and improper ex parte communications and exhibited bias. *Residents Opposed to*
9 *Kittitas Turbines*, 165 Wn.2d at 301. The superior court properly allowed those
10 petitioners to supplement the administrative record with testimony to support the
11 alleged procedural irregularities not found in the record. *Id.*

12 Here, Petitioners’ Petition for Review does not allege any irregularities in
13 EFSEC procedure not found in the record. Instead, it simply requests that this
14 Court “allow the administrative record to be supplemented in order to allow
15 meaningful review of Petitioners’ claims.” (Pet. for Rev. at 26 ¶ 8.2.) According
16 to Petitioners’ Objection, they desire to supplement the record with certain
17 documents “that were cited, quoted, or otherwise referenced during the
18 proceedings below.” Consequently, unlike the situation the superior court faced
19 in *Residents Opposed to Kittitas Turbines*, there is no need to take additional
20 evidence, and this criterion is satisfied.

21 Respondents do not dispute the first two requests in Petitioners’ Objection
22 that certain inadvertently “omitted” documents should be included in the
23 administrative record and that the administrative record should be combined into
24 “one or a few,” searchable, Bates stamped PDF files. Consequently, the only
25 issue facing this Court vis-à-vis the contents of the administrative record is

1 whether to *add* documents attached to Petitioners' Objection "that were cited,
2 quoted, or otherwise referenced during the proceedings below." Regardless of
3 how this Court rules on that request, review of the issues raised in Petitioners'
4 Petition for Review can be made from the resulting record, and this criterion is
5 satisfied.

6 **B. This case involves numerous "fundamental and urgent interests
7 affecting the public interest and development of energy facilities are
8 involved which require a prompt determination."**

9 This case involves fundamental and urgent interests because it involves a
10 key energy project, it implicates I-937's (Energy Independence Act) mandate that
11 renewable energy be developed in Washington, its substation would address
12 reliability concerns in Skamania County (*See* Rec. Doc. #2255 at 3-91), it would
13 provide desperately needed tax revenues for Skamania County (Rec. Doc. #1887
14 at 1335:17-1336:3, 1356:13-1357:22), and it is in the public's interest to avoid
15 unnecessary duplication, cost, and delay in the siting process. The Governor's
16 approval of an SCA is "in lieu of any permit, certificate or similar document
17 required by any department, agency, division, bureau, commission, board, or
18 political subdivision of this state." RCW 80.50.120(3). "[E]nergy facility
19 certification decisions by other governmental entities" are preempted. *Residents*
20 *Opposed to Kittitas Turbines*, 165 Wn. 2d at 285. The Supreme Court explained
21 this second of RCW 80.50.140's four certification criteria in *Residents Opposed*
22 *to Kittitas Turbines*. According to the Supreme Court in that case, the:

23 legislature has recognized public interests in providing
24 energy at a reasonable cost, RCW 80.50.010(3), and
25 avoiding costly duplication in the siting process and
ensuring that decisions are

1 made timely and without unnecessary delay,
2 RCW 80.50.010(5). Such public interests are present in
3 this case, requiring prompt review.

4 *Residents Opposed to Kittitas Turbines*, 165 Wn.2d at 302.

5 In this case, Petitioners urge this Court to hear the case rather than
6 certifying it to the Supreme Court. (Pet. for Rev. at 25 ¶ 8.1.) The only reason
7 for this request is to cause further delays and increase Respondents' expenses in
8 connection with the Project. The record before this Court and the Supreme Court
9 will be the same, and the Supreme Court "sits in the same place as the superior
10 court when reviewing a superior court's direct review of an administrative
11 decision." *Residents Opposed to Kittitas Turbines*, 165 Wn.2d at 295. Delay is a
12 key tool for any party opposing an energy project. However, in enacting
13 RCW 80.50.140, the Legislature removed that tool from the opponents' arsenal.

14 Although this case, by its very nature, involves fundamental and urgent
15 interests, the Petition for Review raises at least six legal issues that threaten the
16 EFSEC siting process and require prompt resolution by the Supreme Court,
17 before other energy facilities can be reviewed and permitted by EFSEC and the
18 Governor. First, Petitioners challenge EFSEC's determination of land use
19 consistency. (Pet. for Rev. at 6-9 ¶¶ 7.1.1-7.1.5.) Petitioners argue that EFSEC
20 erred in finding that Skamania County had in fact adopted a certificate of land
21 use consistency, and Petitioners argue that a certificate of land use consistency is
22 a "land use decision." These arguments present the legal issues of what
23 constitutes a certificate of land use consistency under WAC 463-26-090, by what
24 means may local authorities issue such certificates, and whether such certificates
25 are separately appealable outside of the EFSEC proceedings under the Land Use
Petition Act ("LUPA"). See RCW 36.70C.010 (LUPA establishes the process for

1 appeal of “land use decisions”). These are important legal issues because
2 Petitioners’ arguments, if successful, would control EFSEC’s process for
3 determining “whether or not the proposed site is consistent and in compliance
4 with city, county, or regional land use plans or zoning ordinances” as required by
5 RCW 80.50.090(1), circumscribe the deference EFSEC affords local
6 governments under WAC 463-26-090 in interpreting their own land use
7 regulations, and open the door for interlocutory LUPA appeals of local
8 government actions taken in the EFSEC process, thereby duplicating the
9 fundamental “one stop” permitting process ensconced in RCW Ch. 80.50. If
10 successful, Petitioners’ arguments would undermine the authority of EFSEC and
11 the Governor to implement the legislative scheme for siting jurisdictional energy
12 facilities. In enacting RCW Ch. 80.50, the Legislature recognized the
13 fundamental public interest in providing reliable energy resources
14 (RCW 80.50.010) and established a process that is unique to any other land use
15 in the State of Washington, Petitioners seek to destroy the foundation of that
16 process. It is in the utmost interest to the citizens of Washington that the
17 Supreme Court promptly reviews these issues in order to provide certainty to
18 energy facility siting and to ensure the continuation of a stable process for the
19 development, construction, and operation of energy generation and transmission
20 facilities.

21 Second, Petitioners challenge EFSEC’s authority to manage the Project
22 after it has been approved. For example, Petitioners claim EFSEC’s
23 recommendation erred by allowing the applicant to wait until after Project
24 approval to resolve forest practice issues. (Pet. for Rev. at 21 ¶ 7.7.1.)
25 Petitioners also claim that EFSEC erred by failing to state the process for

1 interested persons to participate in EFSEC's future review and management of
2 the Project. (Pet. for Rev. at 22 ¶ 7.8.1.) These claims raise the important legal
3 issue of whether and by what means EFSEC can regulate and manage this Project
4 and any other EFSEC-jurisdictional energy facilities following the Governor's
5 approval.

6 Third, Petitioners make a number of claims that EFSEC failed to make
7 findings or impose requirements necessary to protect the environment. For
8 example, Petitioners claim that EFSEC "failed to consider and require available
9 and reasonable methods to avoid, minimize, and mitigate these [aesthetic heritage
10 and recreational resource] impacts." (Pet. for Rev. at 18 ¶ 7.3.2.) However,
11 EFSEC's recommendation to the Governor also considered the joint EFSEC/BPA
12 FEIS for the Project. (Rec. Doc. #2279 at 14.) The basic purpose for requiring a
13 FEIS is "to require local governments to consider total environmental and
14 ecological factors to the fullest extent when taking major actions significantly
15 affecting the quality of the environment." *Residents Opposed to Kittitas*
16 *Turbines*, 165 Wn.2d at 311. Although Petitioners complain about EFSEC's
17 environmental findings, their Petition for Review does not challenge the FEIS,
18 which includes extensive analysis of environmental impacts and identifies
19 measures to avoid, minimize, and mitigate these very impacts. (Rec. Doc. #2255
20 at 1-22 to 1-34.) Petitioners' claims effectively constitute an end around attack
21 on the SEPA process followed by EFSEC and evidenced in the issuance of the
22 FEIS by EFSEC's SEPA responsible official. Petitioners' arguments raise the
23 legal issue of whether a petition for review can challenge EFSEC's conclusions
24 regarding the environment without assigning error to, and irrespective of, the
25

1 extensive environmental analysis and mitigation measures imposed through the
2 FEIS.

3 Petitioners also claim that SCA is arbitrary and capricious because of
4 ambiguity about its expiration date. (Pet. for Rev. at 23 ¶ 7.9.1.) This claim
5 raises a fourth and fifth legal issue to be resolved by the Supreme Court: (4)
6 Whether the SCA expires 10 years after the Governor signs it or 10 years after
7 the SCA has been executed by both parties, and (5) Does the Governor act
8 within her fundamental discretion under the statute and have the authority to
9 agree that the expiration of the SCA may be stayed while the applicant obtains all
10 necessary state and federal permits and during the period needed to finally
11 resolve all appeals related to those permits. These arguments seek an
12 interpretation of EFSEC's rules and RCW Ch. 80.50 and would allow opponent
13 to effectively "run the clock" on the SCA for this Project and any future EFSEC
14 energy facilities by endless appeals, thereby undermining the statutory scheme.
15 If successful, Petitioners' arguments would have a large impact on statewide
16 energy planning and investment and impede the State's interest in, and regulation
17 of, the construction and operation of energy facilities to supply abundant power
18 within the scheme and timeframe enacted by the Legislature. Again, these are
19 legal issues that require prompt resolution by the Supreme Court.

20 Sixth, Petitioners challenge the SCA's "Order of Precedence" claiming
21 that it puts higher precedence on state law than federal law. (Pet. for Rev. at 25 ¶
22 7.10.2.) This raises the legal issue of whether the state is required to look to
23 federal law first in resolving any legal question involving the Project, without
24 regard to well established and extensive state and federal jurisprudence
25

1 concerning how federal and state law must coincide in the regulation of state-
2 licensed and regulated land development.

3 These are not the only legal issues involved in this case. However, they
4 demonstrate that the case involves significant legal issues that require prompt
5 resolution by the Supreme Court because they go to the heart of the State's
6 energy facility siting process and cast a cloud over the State's ability to
7 implement the Legislature's direction in accordance with RCW Ch. 80.50. Just
8 as in *Residents Opposed to Kittitas Turbines*, delay in resolving these issues "will
9 result in uncertainty for all existing and pending siting projects. Such uncertainty
10 could lead to delay in the construction and operation of energy facilities and
11 ultimately restrict the availability of energy at reasonable costs in the state."
12 *Residents Opposed to Kittitas Turbines*, 165 Wn.2d at 302-3. The certification
13 procedure in RCW 80.50.140 was designed to resolve such questions and avoid
14 additional duplication, cost, and delay, in order to ensure the energy generation
15 and transmission is provided to serve the public without interruption or
16 unreasonable delay. For these reasons, the second of RCW 80.50.140's four
17 certification criteria is satisfied.

18 **C. Review by the Supreme Court would likely be sought regardless of
19 this Court's determination.**

20 Petitioners and Respondents are equally likely to seek Supreme Court
21 review if this Court declined to follow RCW 80.50.140 by not certifying this
22 matter and instead resolving it on the merits. Petitioners have been involved in
23 stopping wind energy development in Skamania County for years. They
24 successfully appealed Skamania County's 2008 zoning amendments that
25 implicated wind energy development in certain parts of the County (Rec. Doc.

1 #1633), they unsuccessfully appealed Skamania County's two certificates of land
2 use consistency for the Project to the Columbia River Gorge Commission (Rec.
3 Doc. #683 at 2, #1879), and they have now appealed EFSEC's recommendation
4 and the Governor's approval of the SCA for the Project. Indeed, Order No. 868
5 states that "this aggressively litigated proceeding appear[s] to have set a record
6 for length, volume, and number of issues addressed for a facility of this type."
7 (Rec. Doc. #2280 at 16.) Considering the aggressive nature of this litigation and
8 that delay favors these Petitioners (and is a key tool they have deliberately
9 deployed throughout the process), it is difficult to believe that the Petitioners
10 would not seek Supreme Court review if they were unsuccessful on the merits
11 before this Court.

12 Governor Gregoire and EFSEC would appeal an adverse decision on the
13 important legal issues in this case, because these issues have importance not only
14 for this Project but also future energy facilities. Furthermore, all Respondents
15 would likely appeal an adverse decision, because Petitioners seek a remand of the
16 matter to EFSEC. (Pet. for Rev. at 26 ¶ 8.3.) Again, delay is Petitioners' main
17 weapon in opposing this Project. Respondents would seek Supreme Court
18 review to prevent this delay. For these reasons, this criterion is satisfied.

19 **D. The record is complete for review.**

20 After this Court rules on Petitioners' request that documents attached to
21 Petitioners' Objection "that were cited, quoted, or otherwise referenced during
22 the proceedings below" be *added* to the administrative record, the record will be
23 settled and complete. *See Residents Opposed to Kittitas Turbines*, 165 Wn.2d at
24 302 ("Upon supplementing the record [under RCW 80.50.140(1)(a) with
25 testimony to support allegations of irregularities in EFSEC procedure not found

1 in the record], the court determined that the record was complete for review in
2 satisfaction of RCW 80.50.140(1)(d).”). The record will be ready for review and
3 the fourth of RCW 80.50.140’s four certification criteria will be satisfied, once
4 EFSEC files a record combined into “one or a few,” searchable, Bates stamped
5 PDF files that includes (i) the inadvertently “omitted” documents and (ii) if this
6 Court so rules, documents attached to Petitioners’ Objection.


7 In summary, this Court should certify this matter to the Supreme Court as
8 provided in RCW 80.50.140.

9 **VI. CONCLUSION**

10 For all the reasons set forth above, Governor Gregoire, the Energy Facility
11 Site Evaluation Council, Whistling Ridge Energy LLC, Skamania County and the
12 Klickitat County Public Economic Development Authority jointly request that
13 this Court make findings in accordance with RCW 80.50.140 and certify the
14 Petition for Review for direct review by the Washington Supreme Court.

15 DATED this 20th day of September, 2012, at Olympia, WA.

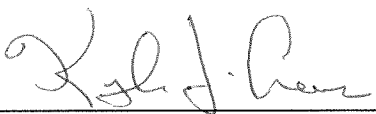
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