☐ EXPEDITE
☐ No Hearing Set
☑ Hearing is Set
Date: October 26, 2012
Time: 11:00 a.m.
The Honorable Judge James J. Dixon

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

FRIENDS OF THE COLUMBIA GORGE, INC., and SAVE OUR SCENIC AREA, Petitioners, v. STATE ENERGY FACILITY SITE EVALUATION COUNCIL (EFSEC) and CHRISTINE O. GREGOIRE, Governor of the STATE OF WASHINGTON, Respondents, and WHISTLING RIDGE ENERGY LLC, SKAMANIA COUNTY, and KLICKITAT COUNTY PUBLIC ECONOMIC DEVELOPMENT AUTHORITY, Intervenors-Respondents.	NO. 12-2-00692-7 RESPONDENTS' RESPONSE TO PETITIONERS' MOTION TO TAKE JUDICIAL NOTICE

COMES NOW Governor Christine O. Gregoire, Energy Facility Site Evaluation Council ("EFSEC"), Whistling Ridge Energy LLC, Skamania County, and the Klickitat County Public Economic Development Authority

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(collectively, "Respondents") by and through its legal counsel set forth below and jointly respond to oppose Petitioners' motion to take judicial notice of legal authorities and facts pursuant to ER 201 and CR 9(i).

I. ARGUMENT

This Court should deny Petitioners' motion to take judicial notice of (i) certain Skamania County moratorium ordinances issued between 2007 and 2011, (ii) a typographical error in a 2007 Cowlitz County Superior Court decision, and (iii) EFSEC Order No. 828, which was issued in 2007 during EFSEC's review of the Pacific Mountain Energy Facility. Petitioners' motion is their second attempt to add information to the administrative record before this Court. This Court previously denied Petitioners' motion to add these Skamania County moratorium ordinances to the administrative record. In addition, the latter two items for which Petitioners now request judicial notice both concern a February 13, 2007 Cowlitz County land use consistency letter that this Court previously determined should not be added to the administrative record.

A. Washington Courts Have Limited Authority to Take Judicial Notice During Administrative Procedure Act ("APA") Appeals of Adjudicative Orders

Petitioners have not identified any Washington case law in which a court actually took judicial notice during an APA appeal of an adjudicative proceeding. In fact, in *Bowers v. Pollution Control Hearings Bd.*, 103 Wn. App. 587, 13 P.3d 1076 (2000), the Court of Appeals held that courts have limited authority to take judicial notice during APA appeals of adjudicative orders. *Bowers* concerned a Pollution Control Hearings Board ("PCHB") order made following an adjudicative hearing. *Id.* at 594. The petitioner asked the court to take judicial notice of a report released after the PCHB's order. *Id.* at 611. The Court of

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Appeals held that

> [*j*]*udicial review of agency action is confined to the agency record, with certain exceptions inapplicable here.* RCW 34.05.558, .562. Because none of the provisions allows us to consider the evidence submitted by Bowers on appeal, we will limit our review to the evidence presented to the PCHB.

Id. (Emphasis added; footnotes omitted.) RCW 34.05.562(1) provides that courts "may receive additional evidence" in certain narrow situations. *Id.* at 611 n.32.

Petitioners attempt to distinguish *Bowers* by claiming that the items for which they seek judicial notice are not "evidence" under *Bowers*, but instead are "judicially noticed fact[s]" under ER 201. (Petitioners' Motion at 6.) Nothing could be further from the truth. ER 201 concerns "adjudicative facts." ER 201(a). Adjudicative facts are typically "those facts that are in issue in a particular case." *State v. Grayson*, 154 Wn.2d 333, 340, 111 P.3d 1183 (2005) (quoting *Korematsu v. United States*, 584 F. Supp. 1406, 1414 (N.D. Cal. 1984).) Consequently, "adjudicative facts" in the context of an APA appeal of an adjudicative decision are "evidence" and are subject to *Bowers*.

The "adjudicative facts" in this proceeding were developed during EFSEC's review process. During the adjudicative proceeding Petitioners offered, and EFSEC accepted, one of the Skamania County moratorium ordinances for which they now seek judicial notice—Skamania County Ordinance No. 2010-10—as evidentiary Exhibit 1.15c. (AR 21935.) EFSEC also took official notice of another of the Skamania County moratorium ordinances for which Petitioners now seek judicial notice—Skamania County Ordinance No. 2010-06. (AR 16410, 16413-14.) As Petitioners and EFSEC considered those moratorium

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ordinances to be evidence, the other Skamania County moratorium ordinances for which Petitioners now seek judicial notice must also be considered evidence. Under *Bowers*, judicial notice should not be taken of these moratorium ordinances because none of the APA exceptions apply.[1]

Petitioners' request for judicial notice also apparently seeks to fortify their claim that EFSEC "misconstrued and misinterpreted the facts and holding" of the 2007 Cowlitz County Superior Court order. (Petition for Review ¶ 7.1.1.) EFSEC reviewed the 2007 Cowlitz County Superior Court decision and concluded that,

> given *the lack of context (e.g., neither the "opinion letter" to which the brief order refers*, nor the "defendants' motions to dismiss" are included), and *references to statutes that do not exist* (i.e., RCW 30.70C.020 and .040), it is not possible to divine any meaning at all from the face of the court's order.

(AR 29215 n.20 (emphases added).) Through this motion for judicial notice, Petitioners again seek to plug the evidentiary holes and issues that EFSEC identified as the basis for its conclusion concerning the 2007 Cowlitz County Superior Court decision. First, Petitioners seek judicial notice of a typographical

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[1] Petitioners' motion to take judicial notice of the Skamania County moratorium ordinances is also based on CR 9(i). CR 9(i) concerns pleading an ordinance as a means of proving its existence. *See Foisy v. Wyman*, 83 Wn.2d 22, 36-37, 515 P.2d 160 (1973) ("In his answer, affirmative defense and counterclaim, the defendant alleged violations of the provisions of the housing, building, fire, health and sanitation codes of the City of Seattle. Such shotgun pleading is a clear violation of CR 9(i). At the time of trial, absolutely no proof of the housing code was provided, except to offer an unauthenticated, unidentified booklet entitled 'Housing Code, City of Seattle.' The trial court, on that ground alone, correctly rejected testimony about violations of a city ordinance which had not been properly pleaded, properly authenticated or properly identified"). Petitioners' motion is not a pleading under CR 7(a) nor were any documents filed with EFSEC a pleading under CR 7(a), such that CR 9(i) is not relevant here.

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error in the 2007 Cowlitz County Superior Court decision, namely that "it cites two provisions of the Land Use Petition Act ("LUPA"), RCW 36.70.C.020 and 36.40C.040, but mistakenly cites these code sections as RCW '30.70C.020' and '30.70C.040.'" (Petitioners' Motion at 11.) This clearly implicates EFSEC's rationale that the 2007 Cowlitz County Superior Court decision "references . . . statutes that do not exist (i.e., RCW 30.70C.020 and .040)." (AR 29215 n.20.)

Second, having been unsuccessful in their attempt to convince this Court to add the February 13, 2007 Cowlitz County land use consistency "opinion letter" to the administrative record, Petitioners are pursuing an "end run" around this Court's order by seeking judicial notice of EFSEC Order No. 828, which found that the Pacific Mountain Energy Facility applicant "provided certificates affirming compliance with land use plans and zoning ordinances for . . . Cowlitz County (Exs. 2 and 11)." (Petitioners' Motion, Ex. C at 4.) Exhibit 11 was the February 13, 2007 Cowlitz County land use consistency "opinion letter" referenced in the 2007 Cowlitz County Superior Court decision. (*See* Petitioners' Motion, Ex. C at 3, 6.) If this Court takes judicial notice of Order No. 828, Petitioners will then have some context with which to challenge the "lack of context" rationale underpinning EFSEC's conclusion concerning the 2007 Cowlitz County Superior Court decision.

With the exception of the two Skamania County moratorium ordinances adopted after EFSEC's adjudicative record closed, Petitioners could have properly submitted all this evidence to EFSEC during the adjudicative proceeding. For example, through their unsuccessful interlocutory appeal in 2010 of Skamania County's certificate of land use consistency to the Columbia River Gorge Commission, Petitioners were aware of the confusion attending the

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typographical error in the 2007 Cowlitz County Superior Court decision. (*See* Petitioners' Motion, Ex. B.) However, during EFSEC's subsequent adjudicative proceeding Petitioners did not provide EFSEC or the Governor with any information to address this confusion. Had Petitioners properly submitted all this evidence to EFSEC during the adjudicative proceeding, Respondents would not have taken issue with this information being part of the record. Indeed, Intervenor-Respondents did not object to FOCG seeking official notice for a Skamania County moratorium ordinance after the adjudicative record had closed. (AR 29089, 29134.) However, this evidence was *not* part of the record upon which EFSEC made its recommendation and the Governor made her decision. As the Court of Appeals has stated in the context of judicial review under the APA,

> [i]f the admission of new evidence at the superior court level was not highly limited, the superior court would become a tribunal of original, rather than appellate, jurisdiction and the purpose behind the administrative hearing would be squandered.

Motley-Motley, Inc. v. Pollution Control Hearings Bd., 127 Wn. App. 62, 76, 110 P.3d 812 (2005). This Court should deny Petitioners' motion to take judicial notice.

B. None of the Washington Case Law Petitioners Cite in Support of Their Motion for Judicial Notice Addressed Whether Washington Courts Have Authority to Take Judicial Notice During APA Appeals of Adjudicative Decisions

Petitioners have not cited a single Washington opinion in which a court considered and decided it had authority to take judicial notice during an APA appeal of an adjudicative decision. Instead, Petitioners' motion depends upon two footnotes that they argue implicate judicial notice. Petitioners declare that

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the Washington Supreme Court's recognition in a footnote that a petitioner had appealed a National Pollutant Discharge Elimination System ("NPDES") permit "appears to be the same as taking judicial notice of that fact." (Petitioners' Motion at 4 (citing *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 605 n.13, 90 P.3d 659 (2004)).) However, the Washington Supreme Court was not asked to take judicial notice of anything in *Port of Seattle*, nor did the Washington Supreme Court state that it was taking judicial notice. Unlike *Bowers*, where the court's authority to take judicial notice was squarely raised and addressed, that question was neither raised nor addressed in *Port of Seattle*.

Similarly, Petitioners claim that the Court of Appeals "impliedly" took judicial notice in a footnote of a U.S. Department of the Interior decision. (Petitioners' Motion at 4 (citing *Clark Cnty. v. W. WA Growth Mgmt. Hearings Review Bd.*, 161 Wn. App. 204, 244 n.28, 254 P.3d 862 (2011)).) Although that opinion's footnote certainly references a motion to take judicial notice, the opinion does not state that the motion was granted nor does it address the issue of whether courts have authority to take judicial notice during APA appeals of adjudicative decisions. In fact, the footnote describes how the court "must consider the evidence and circumstances of the land at the time of the County's [appealed] decision." *Id.* This admonition is consistent with both *Bowers* and *Motley-Motley*'s direction that judicial review is to be based on the administrative record unless one of the APA's exceptions applies.

As for the other four Washington opinions cited in support of their motion for judicial notice, Petitioners themselves admit that those opinions do not "reach

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the issue" of whether Washington courts have authority to take judicial notice during APA appeals of adjudicative decisions. (Petitioners' Motion at 5.)

Petitioners then cite five federal opinions, which Petitioners believe demonstrate that "[f]ederal courts frequently take judicial notice in cases involving the federal APA and other federal statutes that limit judicial review to the agency record." (Petitioners' Motion at 6.) However, *Copar Pumice Co. v. Tidwell*, 603 F.3d 780, 791 n.3 (10th Cir. 2010), does not stand for Petitioners' proposition that "a court may take judicial notice of background information." (Petitioners' Motion at 7.) The cited footnote does not even reference judicial notice; instead, it concerns a motion to supplement the administrative record. Furthermore, the evidence for which Petitioners now seek judicial notice cannot be characterized as "background information," because it goes to the correctness of EFSEC and the Governor's decisions.[2] In *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 702 n.22 (10th Cir. 2009), the court took judicial notice of physical changes (*i.e.*, the reintroduction a falcon population) that rendered an issue in the appeal moot. That situation is clearly not analogous to Petitioners' motion, which seeks judicial notice for evidence that concerns the substantive merits of their appeal. *OR Natural Desert Ass'n v. Bureau of Land Mgmt.*, 531 F.3d 1114, 1134 n.14 (9th Cir. 2008), did not involve judicial review of an adjudicative proceeding, but rather was an appeal of an Environmental Impact Statement, and here, Petitioners claim to be "not challenging the

[2] *Copar Pumice Co.*, 603 F.3d at 791 n.3, cited *Asarco, Inc. v. U.S. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980), which states that "[i]f the reviewing court finds it necessary to go outside the administrative record, it should consider evidence relevant to the substantive merits of the agency action only for background information . . .. *Consideration of the [extra-record] evidence to determine the correctness or wisdom of the agency's decision is not permitted.*" (Emphasis added).

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adequacy of the FEIS." (Petitioners' Response to Motion to Certify Petition for Review to Supreme Court Pursuant to RCW 80.50.140 (Docket #92) at 13.) *Singh v. Ashcroft*, 393 F.3d 903 (9th Cir. 2004), was an immigration case that did not involve the federal APA, and hence has no relevance here. (*See* Petitioners' Motion at 6 n.1 ("Washington courts frequently look to *federal APA cases* for guidance in interpreting the Washington APA").) (Emphasis added.) In *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 558 n.6 (9th Cir. 1989), the court took judicial notice in the context of fashioning its directive on remand; the judicially noticed fact was not used in deciding the merits in that appeal. In contrast, here Petitioners request judicial notice of evidence "important for resolving two claims in the Petition for Review." (Petitioners' Response to Motion to Certify Petition for Review to Supreme Court Pursuant to RCW 80.50.140 at 6-7.) *Thompson* provides no support for taking judicial notice of evidence that goes to the substantive merits of Petitioners' claims. Simply put, Petitioners have not identified any case law indicating that this Court should take judicial notice of Petitioners' proffered evidence.

II. CONCLUSION

As previously described in Respondents' response to Petitioners' motion to add documents to the administrative record (Docket #64), Petitioners had ample opportunity to place evidence before EFSEC and the Governor. They did not properly place before EFSEC the evidence for which they now seek judicial notice (with the exception of the Skamania County moratorium ordinances already in the adjudicative record). The other parties, including Intervenor-Respondents, did not have an opportunity to review and respond to this evidence, and neither EFSEC nor Governor Gregoire reviewed this evidence before making

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their respective decisions. For all the reasons set forth above, Governor Gregoire, EFSEC, Whistling Ridge Energy LLC, Skamania County and the Klickitat County Public Economic Development Authority jointly request that this Court deny Petitioners' motion to take judicial notice.

DATED this 22nd day of October, 2012, at Olympia, WA.

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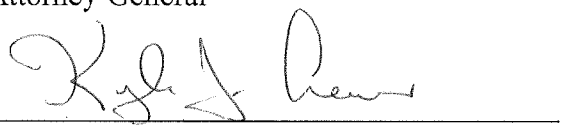

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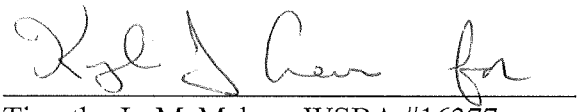

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I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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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.

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