NO. 88089-1

SUPREME COURT OF THE STATE OF WASHINGTON

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.

OPENING BRIEF OF PETITIONERS

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GLOSSARY OF NAMES

Name	Position
Dean Apostol	Expert witness called by Petitioners on scenic issues
John Crumpacker	President, Skamania County Agri-Tourism Association
Jurgen Hess	Former USFS landscape architect
Greg Johnson	Expert witness called by Applicant on wildlife issues
James Luce	Chair, EFSEC
H. Bruce Marvin	Counsel for the Environment
Don McIvor	Expert witness called by CFE on wildlife issues
Jeff Reams	Expert witness called by Applicant on wildlife issues
Dr. K. Shawn Smallwood	Expert witness called by Petitioners on wildlife issues
Jason Spadaro	President, Whistling Ridge Energy LLC President, S.D.S. Co., LLC President, SDS Lumber Company Manager, Broughton Lumber Company
Chris Watson	Expert witness called by Applicant on scenic issues
Al Wright	Manager, EFSEC

GLOSSARY OF ACRONYMS

APA	Administrative Procedure Act
AR	Administrative Record
CFE	Counsel for the Environment
CL	Conclusions of Law
DNR	Washington Department of Natural Resources
EAJA	Equal Access to Justice Act
EFSLA	Energy Facilities Site Locations Act
FAA	Federal Aviation Administration
FFCL	Findings of Fact and Conclusions of Law
GMA	Growth Management Act
MW	Megawatts
NAS	National Academy of Sciences
NPS	National Park Service
PEA	Planning Enabling Act
RP	Verbatim Report of Proceedings for October 26, 2012
SAS	Seattle Audubon Society
SCA	Site Certification Agreement
SCC	Skamania County Code
SEPA	State Environmental Policy Act
SOSA	Petitioner Save Our Scenic Area
SOSEA	Northern Spotted Owl Special Emphasis Area
USFS	United States Forest Service
WDFW	Washington Department of Fish and Wildlife
WREP	Whistling Ridge Energy Project
WTG	Wind Turbine Generators

I. INTRODUCTION

This appeal challenges decisions made by the State Energy Facility Site Evaluation Council ("EFSEC" or "Council") and former Governor Christine O. Gregoire in approving the Whistling Ridge Energy Project ("Project" or "WREP"), a wind energy project proposed to be sited in southeastern Skamania County in the Columbia River Gorge. The appeal is brought pursuant to the Energy Facilities Site Locations Act ("EFSLA"), chapter 80.50 RCW, and the Administrative Procedure Act ("APA"), chapter 34.05 RCW.

Despite its relatively small proposed energy output,[1] the Project poses more resource impacts and conflicts—and is more controversial—than any other wind energy project ever proposed in the State of Washington.[2] The Project's significant problems largely stem from its unique siting—at a scenic, forested location where the Cascade Mountain

[1] The Project's proposed nameplate (maximum) capacity of 75 MW would make it the second-smallest capacity wind project in the State of Washington. AR 16732 (testimony of the Applicant's president, Jason Spadaro). 75 MW equals only about 1% of the total capacity for wind energy projects "online, under construction, or with transmission access rights" in the state as of 2011. *See* CP 163 n.xvii. Further, according to Applicant Whistling Ridge Energy LLC ("Applicant"), the true maximum capacity of this Project would likely be less 75 MW, and will remain unknown until the Applicant proposes a final Project layout. AR 28889.

[2] Of the written public comments that EFSEC received during the proceedings below, 1,299 were unique comments that stated a position on the Project. Of these 1,299 comments, 86% expressed concern regarding, or opposition to, the Project. AR 28772 n.1; CP 97, 119. In addition, EFSEC noted that the number of issues adjudicated and the length of its adjudicative hearings for this matter "appear to have set a record . . . for a [wind energy] facility." CP 128.

Range meets the Columbia River Gorge, and along the boundary of the federally protected Columbia River Gorge National Scenic Area.[3] As EFSEC Chair James Luce concluded in his concurring opinion,

> tens of thousands visit the Gorge yearly to recreate and enjoy the beauty of a natural landscape, a landscape also treasured by many who live in the area and oppose this project. . . . [T]here is no question that there will be a significant impact in this environmentally sensitive area, especially to its unparalleled viewscapes and possibly to its avian and other wildlife populations.

CP 158; *see also* CP 161 n.iii (further describing the Columbia Gorge).

In reviewing and approving the Project, Respondents[4] made many errors. First, Respondents failed to comply with applicable laws requiring the protection of wildlife and wildlife habitat. Second, Respondents did not meet their duty to ensure minimal impacts to aesthetic, heritage,[5] and recreational resources. Third, EFSEC erred in finding the Project

[3] The Scenic Area was designated by Congress in 1986 via the Columbia River Gorge National Scenic Area Act. 16 U.S.C. §§ 544–544p. A map from the Application showing the vicinity of the proposed Project site is attached to this Brief as Appendix A (and found at AR 4317). Another map from the Application showing the Project's proximity to the Scenic Area is attached as Appendix B (and found at AR 4326).

[4] In this brief, "Respondents" refers to EFSEC and the Governor collectively. Generally, Respondents had shared obligations to ensure consistency with EFSLA and its implementing rules. Where only one Respondent is relevant, the Brief will refer to that Respondent by name (*i.e.*, EFSEC or the Governor).

[5] Respondents must "[p]reserve important historic, cultural, and natural aspects of our national heritage." WAC 463-47-110(1)(b)(iv). EFSEC properly concluded that "[a]part from the existence of the National Scenic Area, the Columbia Gorge in the region of the proposed Project has a unique spot in the history, heritage, and culture of indigenous inhabitants, American national exploration and development, and current citizens of Washington, Oregon, and the entire United States." CP 105 (FFCL 13).

consistent with Skamania County's Comprehensive Plan and land use ordinances. Fourth, Respondents either failed to resolve, or improperly deferred, review of important aspects of the Project (including the final project layout and its impacts, as well as the forest practices component of the Project) and failed to ensure the rights of the public to participate in future review of the unresolved aspects. Finally, the approved permit is internally inconsistent in its treatment of forest practices.

This Court should enter an order (1) voiding and setting aside Respondents' decisions to approve the Project, (2) reversing EFSEC's orders, and (3) remanding for further review. Further, the Court should award Petitioners their attorneys fees and expenses as allowed by law.

II. ASSIGNMENTS OF ERROR

A. Challenged Decisions

This appeal challenges the following administrative orders by EFSEC,[6] as well as the Governor's final approval of the Project and execution of the EFSEC-drafted permit for the Project:

[6] EFSEC also made errors in its Order No. 870, entitled "Order Denying Petitions for Reconsideration of Order 868 and Order 869"—particularly its findings as to whether local land use authorities should be preempted, *see* CP 83–86, without ever scheduling a preemption hearing as required by WAC 463-28-060(1). However, the APA states that "[a]n [agency] order denying reconsideration . . . is not subject to judicial review." RCW 34.05.470(5); *see also KS Tacoma Holdings, LLC v. Shoreline Hearings Bd.*, 166 Wn. 117, 125 n.5, 272 P.3d 876, *rev. den.*, 174 Wn. 2d 1007, 278 P.3d 1112 (2012). Petitioners are thus precluded from assigning error to Order No. 870 in this Brief.

- EFSEC Order No. 868, dated October 6, 2011, entitled "Adjudicative Order Resolving Contested Issues" (hereinafter "Adjudicative Order") (CP 113–64).

- EFSEC Order No. 869, dated October 6, 2011, entitled "Order and Report to the Governor Recommending Approval of Site Certification in Part, on Condition" (hereinafter "Recommendation Order") (CP 93–112).

- The Governor's decision to adopt EFSEC's recommendation *in toto* and approve the Project, announced in a letter to EFSEC dated March 5, 2012 (CP 76).

- EFSEC's preparation of, and the Governor's execution of, a permit for the Project, called a Site Certification Agreement ("SCA"), executed by the Governor on March 5, 2012 (CP 30–74).[7]

B. Assignments of Error and Issues Pertaining Thereto

In making the decisions listed above, Respondents made the following errors:

1. Respondents failed to comply with applicable laws requiring the protection of wildlife and wildlife habitat. *Issues*: (a) Did Respondents err by failing to evaluate and ensure consistency with EFSEC's wildlife survey requirements, and did EFSEC err by finding that the Applicant's wildlife assessments and surveys conformed with the 2009 Washington Department of Fish and Wildlife ("WDFW") Wind Power Guidelines? (b) Did Respondents err by failing to require the Applicant to

[7] The Applicant has, so far, declined to execute the SCA. CP 71; RP 37, 48–49.

assess the risk of nighttime collision impacts to avian species? (c) Did Respondents err by failing to require the Applicant to submit a wildlife mitigation plan in the Application that conforms to EFSEC's rules? (d) Did Respondents err by failing to evaluate and ensure consistency with EFSEC's "no net loss" standard of performance for wildlife impacts? (e) Did Respondents err by failing to determine the amount of disturbed or impacted wildlife habitat, and did Respondents err by approving the Project without first ensuring that the ratio of replacement habitat to impacted habitat would be greater than 1:1? (f) Did EFSEC err by approving and/or favorably considering a wildlife habitat mitigation parcel belatedly proposed by the Applicant, without requiring the Applicant to make this proposal in the form of a revision to the Application, and without allowing the parties to present evidence and testimony on the adequacy of the proposed parcel? (g) Did Respondents fail to ensure minimal adverse impacts to wildlife resources through direct bird and bat collisions by failing to consider and require the available and reasonable measure of reducing the amount of time wind turbine blades would spin?

2. Respondents erred in failing to ensure minimal impacts to aesthetic, heritage, and recreational resources. ***Issues***: (a) Did Respondents fail to ensure minimal impacts to aesthetic, heritage, and recreational

resources by failing to consider and require the available and reasonable measures of employing radar-activated aviation safety lighting and reducing the amount of time the turbine blades would spin?

3. EFSEC erred in finding the project consistent with Skamania County's Comprehensive Plan and land use ordinances. *Issues*: (a) Did EFSEC err in concluding that siting privately owned and operated large-scale wind energy turbines is consistent and in compliance with the Conservancy designation of the Skamania County Comprehensive Plan ("Plan"), which authorizes only the uses "specifically listed" in the Plan or in the County's land use ordinances? (b) Did EFSEC err in concluding that Skamania County's moratorium ordinances prohibiting conversions of unzoned forest land to non-forest use are not land use ordinances and were "irrelevant" to EFSEC's land use consistency review process?

4. Respondents erred in failing to resolve and/or improperly deferring review of, important aspects of the Project. Further, in deferring review of unresolved aspects of the Project, Respondents erred in failing to ensure public participation in these future reviews. *Issues*: (a) Did Respondents fail to resolve, or improperly defer review of, important aspects of the Project, including the final project layout and its impacts, as well as the forest practices components of the Project? (b) In deferring

review of any unresolved aspects of the Project, did Respondents fail to ensure the rights of the public to participate in these future reviews?

5. Respondents erred in preparing, approving, and executing a Project permit that contains internal inconsistencies regarding compliance and enforcement for the forest practices components of the Project. *Issues*: (a) Is the permit internally inconsistent regarding compliance and enforcement for forest practices? (b) If so, should Respondents be required to reconcile the inconsistencies?

6. Respondents erred in adopting the findings of fact and conclusions of law ("FFCL") contained within the decisions identified in section II.A of this Brief and related to the prior Assignments of Error, including in the following numbered sections of EFSEC's decisions:

Adjudicative Order[8]: Overview Conclusions[9] 1, 3, 4; §§ I.B, II.B, III.D.1. III.D.2, III.D.7, III.E; FFCL IV.11, IV.14, IV.15, IV.16, IV.20, IV.22, IV.24, IV.26, IV.27, IV.28, IV.29, IV.30, IV.41, IV.42, IV.43.

Recommendation Order[10]: FFCL 6, 8, 9, 13, 14, 15, 16, 17, 18, 19, 20, 21, 32, 42; Conclusions of Law ("CL")[11] 4, 6.

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[8] CP 113–64 (Order No. 868).
[9] CP 113–14.
[10] CP 93–112 (Order No. 869).
[11] CP 110–111.

Issues: (a) Are these findings of fact and conclusions of law supported by substantial evidence? (b) Are they arbitrary or capricious? (c) Are they inconsistent with EFSEC's rules? (d) Did Respondents fail to follow any prescribed procedure(s) in making them? (e) Did Respondents erroneously interpret or apply the law in making them? (f) Did Respondents decide all issues requiring resolution?

III. STATEMENT OF THE CASE

The Whistling Ridge Energy Project is proposed to be sited along the boundary of the Columbia River Gorge National Scenic Area ("National Scenic Area"), adjacent to the rural community of Underwood, and near the communities of Mill A and Willard. App. A-1; App. B-1. The Project site is visible from a number of cities and rural communities,[12] nationally designated travel corridors,[13] and scenic and recreational vantage points on nearby state and federal public lands.[14]

The Project site and the surrounding Columbia River Gorge are truly a special place. In 2009 the Gorge was ranked sixth internationally

[12] In addition to the rural communities discussed above, these include the cities of White Salmon, Washington and Hood River, Oregon. *See* App. A-1; AR 4544.

[13] These include the Lewis and Clark National Historic Trail, the Oregon Pioneer National Historic Trail, the Historic Columbia River Highway, and the Ice Age Floods National Geological Trail. CP 128; AR 14810, AR 26600.

[14] These include numerous hiking trails and peaks within the Gifford Pinchot National Forest and on Washington Department of Natural Resources ("DNR") lands. AR 4583–84, 10228.

and second in North America among sustainable destinations by the National Geographic Society's Center for Sustainable Destinations, which called the Gorge "the U.S.A.'s Rhineland." CP 161 n.iii. In a recent letter commemorating the twenty-fifth anniversary of the creation of the National Scenic Area, Governor Gregoire referred to the Columbia River Gorge as "a spectacular river canyon slicing through the Cascades Mountains" and called the Gorge a "wild and beautiful place," "like no place on Earth," and an "international treasure." AR 28800; *see also Skamania County v. Columbia River Gorge Comm'n*, 144 Wn. 2d 30, 59, 62, 26 P.3d 241 (2001) (Ireland, J., concurring) (referring to the Columbia River Gorge as "a pristine national treasure" and a "unique and irreplaceable landscape"); CP 161 n.iii (Adjudicative Order, Concurrence of Chair Luce) (referring to the Gorge as "a natural wonder" and "an environmental treasure" with "majestic boundaries.").

The Project site is also located within a designated Northern Spotted Owl Special Emphasis Area ("SOSEA")[15] and is highly diverse in wildlife. The site provides habitat for more than ninety species of birds,[16] and as many as fifteen species of bats may occupy the site.[17] Most of these

[15] AR16542; WAC 222-16-086(10) (White Salmon SOSEA).
[16] CP 150 (FFCL IV.25); AR 15399.
[17] *See* AR 28284; CP 150 (FFCL IV.25).

species are associated with forested habitat,[18] and many are of special federal and state concern.[19] The mountain ridges running through the Project site, as well as the nearby Columbia River, are important migration routes for raptors and other birds.[20] Because the WREP would be the first large-scale, commercial wind energy project built in a Pacific Northwest coniferous forest, it would be the first time many of these species would be exposed to such a project.[21]

On March 10, 2009, the Applicant submitted to ESFEC an application,[22] and on October 12, 2009 submitted a revised application,[23] proposing to site a wind energy facility at the 1,152-acre Project site in southeastern Skamania County. The Applicant proposed to construct 50 wind turbines along several forested peaks within the Cascade Mountain Range, including Chemawa Hill, Underwood Mountain, and Saddleback Mountain.[24] The site is currently used for commercial forestry.[25]

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[18] AR 14829–33 (testimony of Don McIvor, wildlife expert witness called by the Counsel for the Environment); AR 18284–85 (cross-examination of Don McIvor).

[19] AR 28263, 28284.

[20] AR 14825 (testimony of Don McIvor).

[21] *See* AR 14825–26 (testimony of Don McIvor); *see also* AR 22270 (Counsel for the Environment's closing brief).

[22] AR 20.

[23] AR 4260. This Brief will discuss only the revised Application, hereinafter referred to as "the Application."

[24] AR 4325; App. A-1; App. B-1; *see also* 14825 (testimony of Don McIvor noting that the Project site is "at the southern end of the Monte Cristo Range" and "on the eastern flank of the Cascade Range.").

[25] AR 4333.

EFSEC's review of the Project included several public hearings, an adjudication, a determination of land use consistency, and review under the State Environmental Policy Act ("SEPA"), chapter 43.21C RCW. EFSEC issued a number of orders during its review, and ultimately recommended approval of the Project in part, and denial in part. CP 111. On March 5, 2012, Governor Gregoire adopted EFSEC's recommendation *in toto* and executed the EFSEC-drafted Site Certification Agreement.[26]

In their decisions, Respondents acknowledged and partially addressed some of the Project's problems—particularly its significant adverse impacts to aesthetic, heritage, and recreational resources—by denying wind turbines at specified locations within the Project site.[27] However, Respondents did approve the construction of 35 wind turbines at yet-to-be-determined locations within the remainder of the Project site.[28] The permit allows the turbines to be 430 feet tall and equipped with constantly flashing lights for aviation safety.[29]

This appeal followed. Petitioners[30] filed a timely Petition for Judicial Review in Thurston County Superior Court on April 4, 2012. CP

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[26] CP 71, 75–76.
[27] CP 72–73 (SCA attach. I), 75–76, 105–06 (FFCL 13, 15).
[28] CP 38 (SCA § I.C), 75.
[29] CP 38 (SCA § I.C.1), 62 (SCA § V.J).
[30] Petitioner Friends of the Columbia Gorge, Inc. ("Friends"), founded in 1980,

4. The Superior Court issued several procedural orders, culminating in an October 26, 2012 order certifying the appeal for direct review by the Washington Supreme Court. RP 63–66.[31]

IV. ARGUMENT

A. Standards of Review

The APA provides the standards of review for judicial review of agency orders in an adjudicative proceeding. RCW 34.05.570(3). The following standards apply in this appeal:

- Whether "[t]he agency . . . has failed to follow a prescribed procedure." RCW 34.05.570(3)(c).[32]

- Whether "[t]he agency has erroneously interpreted or applied the law." RCW 34.05.570(3)(d).[33]

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is a non-profit organization with approximately 5,000 members dedicated to protecting and enhancing the scenic, natural, cultural, and recreational resources of the Columbia River Gorge and surrounding lands. AR 4003–04. Petitioner Save Our Scenic Area ("SOSA"), founded in 2007, is a nonprofit organization consisting of Columbia River Gorge residents dedicated to protecting and enhancing the Gorge's environmental and scenic resources. AR 3974. Petitioners were granted intervenor status by EFSEC early on in its adjudication, AR 3860–61, and participated fully in all proceedings.

[31] All references to "RP" in this Brief are to the Verbatim Report of Proceedings for the October 26, 2012 proceedings before the Thurston County Superior Court.

[32] Review under this standard is de novo. *Kittitas County v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wn. 2d 144, 155, 256 P.3d 1193 (2011) (citing *Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn. 2d 329, 341, 190 P.3d 38 (2008)). "The burden of demonstrating that the [agency] failed to follow prescribed procedure is on the party asserting error." *Lewis County v. W. Wash. Growth Mgmt. Hearings Bd.*, 139 P.3d 1096, 1097, 157 Wn.2d 488 (2006) (citing *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn. 2d 543, 553, 14 P.3d 133 (2000)).

[33] "Relief from an administrative decision will be granted when the law is erroneously interpreted or applied by the agency." *Mader v. Health Care Auth.*, 70 P.3d 931, 936, 149 Wn. 2d 458 (2003). Courts reviewing agency decisions under this standard "engage in de novo review, but should accord substantial weight to the agency interpretation." *Everett Concrete Prods., Inc. v. Dept. of Labor & Indus.*, 748 P.2d 1112,

- Whether "[t]he 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." RCW 34.05.570(3)(e).[34]

- Whether "[t]he agency has not decided all issues requiring resolution by the agency." RCW 34.05.570(3)(f).[35]

- Whether "[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." RCW 34.05.570(3)(h).[36]

1114, 109 Wn. 2d 819 (1988) (citing *Franklin County Sheriff's Office v. Sellers*, 97 Wn. 2d 317, 325, 646 P.2d 113 (1982)). "While an agency's findings of fact are granted deference, applying the law to the facts is a question of law which [the Court] review[s] de novo." *Mader*, 70 P.3d at 931 (citing *Tapper v. Emp't Sec. Dep't*, 122 Wn. 2d 397, 402, 858 P.2d 494 (1993)).

[34] "Courts review challenges under RCW 34.05.570(3)(e) that an order is not supported by substantial evidence by determining whether there is 'a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.'" *Kittitas County*, 172 Wn. 2d at 155 (quoting *Thurston County*, 164 Wn. 2d at 341).

[35] *See Suquamish Tribe v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 156 Wn. App. 743, 778, 235 P.3d 812 (2010), *rev. den.*, 170 Wn. 2d 1019, 245 P.3d 773 (2011) ("When an agency fails to address an issue or supplies no reason for a decision, based on an erroneous legal conclusion that leads an agency to either not decide or to inadequately decide an issue, a legal ground for remand . . . and further proceedings before the agency arise."); *see also Low Income Hous. Inst. v. City of Lakewood*, 119 Wn. App. 110, 118–19, 77 P.3d 653 (2003) (When an agency "presents no basis for its decision," the reviewing court "cannot review its analysis" and remands "for more thorough findings and articulation of the basis for the ruling.").

[36] Courts "interpret agency regulations as if they were statutes" and "review is, therefore, de novo, but [courts] give substantial weight to an agency's interpretation of statutes and regulations within its area of expertise." *Wash. Cedar & Supply Co. v. State*, 137 Wn. App. 592, 598. 154 P.3d 287 (2007) (citing *Roller v. Dep't of Labor & Indus.*, 128 Wn. App. 922, 926–27, 117 P.3d 385 (2005)). Here, EFSEC "has no rules [specifically designed] for siting renewable resources" and therefore the agency "looks to [its] previous decisions, organic statutes and regulations developed primarily for thermal projects" and "proceeds on a case-by-case basis[,] . . . inevitably leav[ing] room for questioning whether the correct result was reached." CP 157 (Adjudicative Order, Concurrence of Chair Luce).

- Whether "[t]he order is arbitrary or capricious." RCW 34.05.570(3)(i).[37]

B. Respondents erred by failing to ensure that the Project will comply with mandatory requirements for wildlife protection.

Wildlife impacts are among the most serious potential side-effects of a poorly sited wind energy facility. Spinning turbine blades can result in avian collisions and death.[38] Bats often forage and chase insects around the spinning turbines, resulting in death from "barotrauma," a type of internal hemorrhaging caused by a sudden drop in air pressure.[39] Wind facilities can result in permanent habitat fragmentation and cause species to avoid otherwise suitable habitat, which may impact both flight and nesting behaviors.[40] At other wind facilities, this displacement effect has been documented up to 660 feet from any given turbine.[41]

In the case of the WREP, several key facts indicate that wildlife impacts could be quite high, and therefore must be properly studied,

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[37] "Courts review challenges that an order is arbitrary and capricious under RCW 34.05.570(3)(i) by determining whether the order represents 'willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action.'" *Kittitas County*, 172 Wn. 2d at 155 (quoting *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn. 2d 38, 46–47, 959 P.2d 1091 (1998)).

[38] CP 150 (FFCL IV.27); AR 16881 (findings of the Skamania County Hearing Examiner).

[39] AR 15401 (testimony of Dr. K. Shawn Smallwood, expert wildlife witness called by Petitioners); AR 14833 (testimony of Don McIvor).

[40] *See* AR 15401–02 (testimony of Shawn Smallwood); AR 16881 (findings of the Skamania County Hearing Examiner).

[41] AR 15984 (testimony of Greg Johnson, expert wildlife witness called by the Applicant).

disclosed, and mitigated prior to project approval. If built, the WREP would be the first commercial wind facility of its kind sited within a Pacific Northwest forest, where impacts are potentially much higher than in other ecosystems.[42] The Project site is located within the White Salmon SOSEA, and the northern spotted owl[43] has been documented "in close proximity to the [Project] site."[44] Several special-status species have been documented at or near the Project site.[45] In fact, far more avian species have been identified at the Project site than at the Altamont Pass wind energy facility in California, where bird fatalities are "notoriously high."[46]

Not surprisingly, numerous concerns were expressed about the Project's potentially significant impacts to wildlife, not only by Petitioners and their wildlife expert Dr. K. Shawn Smallwood,[47] but also by several

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[42] *See* AR 14825–26, 14833 (testimony of Don McIvor); AR 15406 (testimony of Shawn Smallwood); AR 2270 (CFE's closing Brief).

[43] The northern spotted owl is currently listed as "threatened" under the federal Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544, as well as under Washington law, WAC 232-12-297. AR 4457.

[44] AR 14829 (testimony of Don McIvor). In the spring and summer of 2010, the Applicant's wildlife witness Jeff Reams documented a northern spotted owl near the Project site. AR 11506–07 (testimony of Jeff Reams); AR 19963 (sealed document #2095) (map showing sites where spotted owl was detected).

[45] These include the northern goshawk (*Accipiter gentilis*), Vaux's swift (*Chaetura vauxi*), pileated woodpecker (*Dryocopus pileatus*), golden eagle (*Aquila chrysaetos canadensis*), and olive-sided flycatcher (*Contopus cooperi*). AR 28263–74.

[46] AR 15399 (testimony of Shawn Smallwood).

[47] *See, e.g.*, AR 15377–15419 (testimony of Shawn Smallwood).

chapters of the Audubon Society,[48] the Counsel for the Environment[49] ("CFE"), the CFE's wildlife expert Don McIvor,[50] and others.

To protect wildlife, EFSEC's regulations require a two-tiered process. First, applicants must comply with WAC 463-60-332, which, *inter alia*, requires an applicant to perform wildlife surveys, propose mitigation measures, and include this information in the application. Second, EFSEC is required to conduct an adjudication "for the presentation of evidence on the application." WAC 463-14-080(4); *see also* RCW 80.50.090(3). EFSEC's rules outline the standards it must use to adjudicate the adequacy of the application for the protection of fish and wildlife. These rules are found at WAC 463-62-040, and require the applicant to demonstrate, *inter alia*, "no net loss of fish and wildlife habitat function and value." WAC 463-62-040(2)(a).

Here, fundamental requirements for guarding against wildlife impacts were not followed. For the reasons set forth below, this matter

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[48] These included the Seattle Audubon Society ("SAS"), Columbia Gorge Audubon Society, Vancouver Audubon Society, and Kittitas Audubon Society. *See, e.g.*, CP 136; AR 2277, 4013, 8433, 10357, 22353.

[49] For all applications received by EFSEC, the Attorney General is required to appoint an assistant attorney general as Counsel for the Environment who "shall represent the public and its interest in protecting the quality of the environment." RCW 80.50.080. During EFSEC's review of the Application, the appointed CFE was H. Bruce Marvin. Examples of the CFE's concerns pertaining to wildlife impacts can be found in his Closing Brief at AR 22268–82.

[50] *See, e.g.*, AR 14824–35 (testimony of Don McIvor).

should be reversed and remanded for further review and findings consistent with the agency's rules.

1. EFSEC erred by failing to evaluate and ensure consistency with EFSEC's wildlife survey and assessment requirements.

To ensure that potential wildlife impacts are fully studied and disclosed prior to project approval, EFSEC's rules require every applicant to conduct pre-application wildlife surveys. These surveys must be performed "during all seasons of the year to determine breeding, summer, winter, migratory usage, and habitat condition of the site." WAC 463-62-040(2)(f).

Here, evidence in the record indicates that late summer (August through September) is a key migration period for avian species using the Project site. For example, WDFW employees noted during their review of the Applicant's avian use surveys that "the period from mid-August to mid-September will have the greatest numbers of birds in passage, primarily juvenile accipiters. . . . Adult birds, obviously fewer in number, will dominate counts after mid-September including eagles and buteos." AR 17996. In addition, the migration period for the olive-sided flycatcher, one of the "species of federal concern" documented at the Project site, occurs only during the month of August, when the flycatcher migrates

through Washington to South America. AR 28273–74. To understand potential wildlife impacts before the WREP is approved, it is critical—as well as legally required—to perform avian use surveys during all seasons, including this key migration period.

The Applicant did not do so. Instead, the Applicant performed avian use surveys between September 11 and November 4, 2004, between May 15 and July 14, 2006, and between December 4, 2008 and May 29, 2009. AR 24321. At no point, however, did the Applicant perform any surveys between July 15 and September 10. As a consequence, avian use of the Project site during the mid-August to mid-September migration period remains a virtual mystery.

For example, the Applicant completely failed to conduct any surveys during the entire migration period of the olive-sided flycatcher.[51] It is possible that many olive-sided flycatchers pass through the Project site each August, when every member of that species migrates to South

[51] It is unclear why the Applicant did not perform surveys during the migration period for the olive-sided flycatcher. However, it is possible that the Applicant's failure to do so resulted from its wildlife expert Greg Johnson being unaware of the species' habitat preferences. At the adjudicative hearing, Mr. Johnson incorrectly stated that olive-sided flycatchers are most often associated with riparian corridors. AR 18106 (cross-examination of Greg Johnson). However, olive-sided flycatchers prefer "forest habitat and adjacent cleared areas such as burned areas or clear cuts," AR 28273, which is the exact type of habitat found at the Project site, *see* AR 4333–36. *See also* AR 22357 (SAS's Closing Arguments) (olive-sided flycatchers "utilize edge habitat").

America. But because the Applicant failed to conduct any surveys during this period, the flycatcher's migratory use of the Project site is unknown.[52]

The Applicant failed to satisfy the requirements of WAC 463-62-040(2)(f), which requires the Applicant to perform avian use surveys "during all seasons of the year to determine . . . migratory usage. . . of the site." In addition, EFSEC completely failed to make any findings of fact or conclusions of law regarding the Applicant's compliance with WAC 463-62-040(2)(f). In so doing, EFSEC failed to decide "all issues requiring resolution by the agency." RCW 34.05.580(3)(f). Finally, EFSEC violated its own rule requiring it to resolve all contested issues before making its recommendation to the Governor. *See* WAC 463-30-320(6) ("Every recommendation to the governor shall . . . [c]ontain a recommendation disposing of all contested issues."). The matter should be reversed and remanded for review under EFSEC's standards.

2. EFSEC erred by failing to require the Applicant to assess the risk of nighttime collision impacts to avian species.

In addition to requiring pre-project wildlife surveys, EFSEC's rules require every application to include a "detailed discussion of

[52] The Applicant's failure to survey during the flycatcher's migration period may have especially grave consequences. In 2006, every olive-sided flycatcher observed at the Project site was flying within the rotor-swept height for wind turbines, indicating a high risk of collision if turbines had been present. AR 14831 (testimony of Don McIvor).

temporary, permanent, and direct and indirect impacts on habitat, species present and their use of the habitat during construction, operation and decommissioning of the energy facility." WAC 463-60-332(2). This detailed discussion "shall" include "[a]n assessment of risk of collision of avian species with any project structures, during day and night." WAC 463-60-332(2)(g).

According to the Applicant, the risk of nighttime collision may be especially high in light of lessons learned at other wind energy facilities in Washington and Oregon:

> Based on abundance, passerines [*i.e.*, songbirds] are expected to make up the largest proportion of fatalities at the Whistling Ridge Energy Project. Post-construction mortality data collected at other windfarms in Washington and Oregon indicate that less correlation between pre-construction surveys and turbine-related mortality is observed in non-raptor species. *The lack of correlation may be because most fatalities are among nocturnal migrants that are not accounted for during surveys.*

AR 4472 (emphasis added).

Despite the Applicant's admission that "most fatalities" may occur at nighttime, the Application does not contain an assessment of the risk of nighttime collision as required by EFSEC's rules. *See* WAC 463-60-332(2)(g). The Applicant admitted this in the Application. *See* AR 4472

(explaining that the Applicant's risk assessments "do not take into consideration flight behavior or abundance of nocturnal migrants.").[53]

EFSEC made no findings or conclusions regarding the Applicant's omission, nor regarding the requirement to assess nighttime collision risks. Instead, EFSEC determined generally, without any scientific basis, that the Applicant satisfied the requirements at WAC 463-60-332[54] because "additional" studies would "add little additional protection." CP 150 (FFCL IV.26).

To the extent this general finding was intended to address the need to assess the risk of nighttime collisions, it violates the Agency's rules and is not supported by substantial evidence. *See* RCW 34.05.570(3)(e), (h). As the Applicant effectively admitted in the Application, the Application does not provide an assessment of the risk of nighttime collision. As such, EFSEC could not have determined, based on substantial evidence, that WAC 463-60-332(2)(g) was satisfied.

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[53] *See also* AR 14829 (testimony of Don McIvor) ("The record does not show that any effort was made to assess night migration of songbirds through the area. In fact, the [Application] mentions that night migration activity at the site is unknown."); AR 15410 (testimony of Shawn Smallwood) ("The utilization surveys were diurnal, so were not designed to detect species active in the early morning, evening, or at night.").

[54] EFSEC found that the Applicant's wildlife studies complied with "WAC 463-60-362." CP 150 (FFCL IV.25). WAC 463-60-362 does not address wildlife studies. Petitioners assume that EFSEC intended to cite WAC 463-60-332.

Moreover, EFSEC failed to state any facts or reasons justifying its departure from the requirement to assess nighttime collision risks. EFSEC provided no citation to the record for its contention that, despite its mandatory rules to the contrary, such an analysis would "add little additional protection."[55] EFSEC's vague, unsupported, and conclusory finding warrants a remand.[56]

For the reasons stated above, this Court should vacate Respondents' actions approving the Project and should remand this matter for an assessment of the risk of nighttime impacts to avian species.

3. EFSEC erred by finding that the Applicant's wildlife assessments and surveys conform with the WDFW Wind Power Guidelines.

EFSEC also erred when it determined that the Applicant satisfied the requirements of the WDFW's Wind Power Guidelines ("WDFW Guidelines"). *See* CP 150 (FFCL IV.26).[57] The WDFW Guidelines provide instruction on how to avoid and mitigate wildlife impacts when

[55] Similarly, EFSEC's finding that post-construction remedial measures would "provide greater benefit to wildlife preservation" than would mandatory pre-application studies, CP 150 (FFCL IV.27), is not supported by substantial evidence and is inconsistent with EFSEC's rules. The mandatory pre-application surveys, required to satisfy both EFSEC's own rules and the WDFW Guidelines, have not yet been performed, and the data generated by them does not yet exist. As a result, EFSEC's conclusion that such studies would provide less protection for wildlife than would post-construction remedial measures cannot be based on substantial evidence.

[56] EFSEC's departure from its rules and failure to adopt sufficient findings are especially problematic in light of the Applicant's admission that "most fatalities" may occur at nighttime. AR 4472.

[57] A copy of the WDFW Guidelines is in the record at AR 17997.

siting wind energy facilities. EFSEC's rules incorporate the WDFW Guidelines and mandate compliance with them as a requirement for site certification. WAC 463-60-332(4) (Applications "shall describe" how the WDFW Guidelines "are satisfied.").

Under the WDFW Guidelines, the first step in avoiding significant wildlife impacts is to document patterns of wildlife usage at the proposed project site. *See* AR 18005. This is known as the "pre-project assessment," under which applicants must engage in two levels of gathering data about wildlife use at a proposed project site. *Id*. First, applicants must survey existing data sources relevant to species use and distribution:

> 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 database, Wildlife Program Wildlife Resources Data System), 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 WDFW.

AR 18005–06.

Second, the WDFW guidelines require applicants to perform on-the-ground wildlife surveys, including "a minimum of one full year of [general] avian use surveys." AR 18006. The full year of avian use surveys is required even when data already exists concerning avian use of

the project site. *See id.* "Two or more years of relevant data are recommended," however, when "there is limited or no relevant data regarding seasonal use of the project site (e.g., data from nearby areas of similar habitat type)." *Id*. The purpose of requiring two or more full years of avian use surveys is to account for inter-annual variation, because a species' use of a site can vary greatly from year to year. *See* AR 18004 ("[S]ome 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.").[58]

Here, the Applicant failed to satisfy any of the requirements above. Greg Johnson, wildlife expert for the Applicant, admitted that in preparing the Application, his firm neither collected nor analyzed existing data on avian use data at other commercial forestlands,[59] nor breeding data for two sensitive bird species found at the Project site, even though he knew that the latter data was "readily available."[60] The Applicant thus failed to

[58] *See also* AR 15382 (testimony of Shawn Smallwood) (discussing "inter-annual variation in both fatality rates and utilization rates").

[59] *See* AR 18155–56 (cross-examination of Greg Johnson).

[60] *See* AR 18166 (cross-examination of Greg Johnson) (Q: "[A]re you familiar with the Partners in Flight breeding bird data regarding the Olive-sided Flycatcher or Vaux's Swift?" A: "I haven't looked at those species specifically."); *see also* AR 15986 (testimony of Greg Johnson) (admitting that data from the Partners in Flight North American Landbird Conservation Plan includes "relative abundance counts from the North American Breeding Bird Survey" and is "readily available for the bulk of North American land birds").

gather "[s]ources of existing information" and consult "recognized databases" prior to developing field and analysis protocols for pre-project surveys, as required by the WDFW Guidelines. AR 18005. Because the Applicant's experts failed to gather such data, they had no understanding of the relative abundance of multiple species at the Project site.[61]

Mr. Johnson also admitted that in preparing the Application, his firm had not requested data on the local abundance of species from resource agencies that own adjacent and nearby lands, including the DNR (the landowner immediately to the north of the Project site) and the U.S. Forest Service. Instead, he merely "assum[ed]" no such data was available.[62] This failure to even ask for information violated the requirement to gather and review "[e]xisting information on species and potential habitats in the vicinity of the project" from "resource agencies," AR 18005, and also disregarded the very purpose of the WDFW

[61] *See* AR 22272 (CFE's Closing Brief) ("During the hearing, it became apparent that Applicant's experts did not gather relative abundance data regarding sensitive wildlife species found at the site.") (citing AR 18288 (testimony of Don McIvor) ("Those data were not presented, either weren't available or weren't collected, weren't presented. We don't have them.")); AR 22356 (SAS's Closing Arguments) ("As the applicant's avian expert witness Mr. Johnson admitted under cross examination, he does not know if the project site has relatively high or low abundance of specific bird species. The information review and the survey data collection conducted on behalf of the applicant can shed no light on this central issue.") (citation omitted) (citing AR 18164) (cross-examination of Greg Johnson)).

[62] AR 18158 (cross-examination of Greg Johnson); *see also* AR 18167 ("I'm not sure there was any data available.").

Guidelines: to provide the "best possible information" for "project proponents, permitting authorities and other stakeholders," AR 18004.

Nor did the Applicant seek out data from any other wind energy facilities proposed for Pacific Northwest forests (*e.g.*, Radar Ridge and Coyote Crest in Washington, and Middle Mountain in Oregon) in preparing the Application,[63] even though such data may have helped determine the relative abundance of special-status and sensitive species present at the Whistling Ridge site. The Applicant's failure to gather this data in preparing the Application violated the requirements to "review[] data gathered at other nearby wind facilities or other types of projects" as part of the assessment process and to use that data "to develop field and analysis protocols" for surveys at the Project site. AR 18005–06.

The Applicant also failed to perform avian use surveys for "a minimum of one full year," AR 18006,[64] choosing instead to perform a cumulative nine months of surveys, conducted in bits and pieces and scattered over the course of several years. AR 24321.[65] Similarly, the

[63] *See* AR 18129 (cross-examination of Greg Johnson).

[64] *See generally* 15381–82 (testimony of Shawn Smallwood) (Performing surveys for "less than one full year" is "inconsistent with current protocols and best scientific practices.") (citing WDFW Guidelines and recommendations of the U.S. Fish & Wildlife Service Wind Turbine Guidelines Advisory Committee).

[65] As discussed *supra* Part IV.B.1, one of the consequences of the Applicant's failure to survey for at least one full year was that the key mid-August to mid-September migration period for several avian species was completely ignored.

Applicant failed to perform surveys for "[t]wo or more years," AR 18006, despite the dearth of existing information concerning seasonal avian use of the Project site and the possibility of large variations in use from one year to the next.[66] The Applicant's surveys were thus inconsistent with the WDFW Guidelines.

In its Adjudicative Order, EFSEC determined that the Applicant had complied with the 2009 WDFW Guidelines, citing a two-page letter from WDFW to the Applicant. CP 137 (citing letter at AR 20222–23). The letter fails to explain, however, how the Applicant complied with the WDFW Guidelines while failing to gather and analyze existing sources of data, and while performing less than one full year of avian use surveys. Instead, the WDFW letter states only that

> [b]ecause 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 [at the Project site] would be similar to that evaluated in other projects.

AR 20222.

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[66] AR 15383 (testimony of Shawn Smallwood) (citing WDFW Guidelines) (noting that two or more years of surveys should be conducted "when avian groups of concern are at risk, *where data on seasonal use are lacking, or where species diversity is high*.") (emphasis added); *see also* AR 22268 (CFE's Closing Brief) (Because the Project would "be the first of its kind constructed [at a forested site] it is imperative that these impacts be fully understood.").

The WDFW's statement about the *relationship between* avian use and mortality misses the point, because it omits half of the equation. One must still know the level of avian use at the Project site before one can accurately predict the level of mortality, which is the whole point of a pre-project assessment. This is why the WDFW Guidelines underscore the importance of completing the required pre-project surveys. AR 18005 (statement in the WDFW Guidelines that one of the "primary purposes" of pre-project avian use surveys is to "collect information suitable for predicting the potential impacts of the project on wildlife.").[67]

To understand the impacts of this Project on avian species, it is crucial to comply with the requirements for pre-project surveys and data collection *before* making a decision on the Project. EFSEC's conclusion that the Applicant complied with the WDFW Guidelines is not based on substantial evidence and is arbitrary and capricious. Further, because the Applicant failed to comply with the survey and data requirements,

[67] In addition, the WDFW's statement, which speculates that the relationship between avian use and mortality may be the same at the Project site as at existing wind projects at "other [non-forested] habitat types and locations," AR 20222, was contradicted by the wildlife experts of the CFE and Petitioners. *See* AR 14833 (testimony of Don McIvor) ("Other wind power projects in Washington are located in significantly different types of habitat and data gathered from these sites cannot be used to extrapolate potential impacts of the proposed project site. This is especially a concern in light of the disproportionate impact wind energy facilities are believed to have on forest bats."); AR 15406 (testimony of Shawn Smallwood) ("While developing a screening tool for siting wind energy facilities in California, I concluded that forested sites pose greater hazards to more bird species, including special status species.").

Respondents' approval of the Project was inconsistent with EFSEC's rules.[68]

4. EFSEC erred by failing to require the Applicant to submit a wildlife mitigation plan in the Application that conforms with EFSEC's rules, and Respondents erred by approving the Project in the absence of an adequate mitigation plan.

Under WAC 463-60-332(3), every application for site certification must include a detailed mitigation plan. Among other requirements, the plan must "[a]ddress all best management practices to be employed," "[a]ddress how cumulative impact associated with the energy facility will be avoided or minimized," "[d]emonstrate how the mitigation measures will achieve equivalent or greater habitat quality, value and function for those habitats being impacted," and "[a]ddress how mitigation measures considered have taken into consideration the probability of success of full and adequate implementation of the mitigation plan." *Id*. at (a)–(j).

Here, the Applicant all but ignored these requirements. The entire wildlife mitigation plan in the Application is one page long. AR 4474–75. Moreover, the Application fails to include a single word addressing the

[68] Nor did EFSEC explain the inconsistency with its rules, nor state facts and reasons to demonstrate a rational basis for the inconsistency. *See* RCW 34.05.570(3)(h). To the contrary, EFSEC recognized the "possible additional value of . . . increas[ing] available information" per the WDFW Guidelines, and concluded that supplying this required information "may have been helpful." CP 137.

mitigation standards identified in WAC 463-60-332(3), much less provide the "detailed discussion" required by the rule. Among other problems, the Application fails to "demonstrate" how the cursory mitigation measures would "achieve equivalent or greater habitat quality" than the habitat being impacted, as expressly required by WAC 463-60-332(3)(d).

Nor did EFSEC adequately evaluate the wildlife mitigation plan. As part of its mandatory "deliberative process," EFSEC's rules require it to "[e]valuate [the] application to determine compliance with . . . chapter 463-60 WAC." WAC 463-14-080(1). This rule required EFSEC to evaluate the mitigation plan in the Application and determine whether it complies with the requirements of WAC 463-60-332(3). EFSEC's decisions contain no such findings and conclusions. The closest EFSEC came to adopting such findings and conclusions was its broad, one-sentence conclusion that the "Applicant's wildlife *studies* comply with the requirements of the WDFW Guidelines and WAC 463-60-[332]." CP 150 (FFCL IV.26) (emphasis added). This broad statement does not constitute an evaluation of whether the wildlife mitigation plan complies with the detailed requirements of WAC 463-60-332(3), and is insufficient for this

Court to determine that EFSEC found the Application in compliance with WAC 463-60-332(3).[69]

Finally, Respondents included conditions of approval in the SCA that would apparently require future submission of a wildlife mitigation plan. CP 49–50 (SCA § IV.E.1). Respondents' approach of deferring submission and review of a wildlife mitigation plan to a future date, *after* their approval of the Project, is inconsistent with EFSEC's rules, which require the wildlife mitigation plan to be submitted "in the application," WAC 463-60-332, so that its adequacy can be reviewed and adjudicated by EFSEC (with participation by interested parties) *prior* to a decision. *See* RCW 80.50.090(3); WAC 463-14-030(3), 463-14-080.

In conclusion, EFSEC violated its own rules, without explanation, by failing to require that the Applicant demonstrate "*in the application*" how the proposal will meet the express requirements for wildlife mitigation plans. WAC 463-60-332(3) (emphasis added). EFSEC also failed to evaluate the Application to determine compliance with the wildlife mitigation plan requirements of WAC 463-60-332(3), thus

[69] *See Weyerhaeuser v. Pierce County*, 124 Wn. 2d 26, 35, 873 P.2d 498 (1994) ("The purpose of findings of fact is to ensure that the decisionmaker 'has dealt fully and properly with all the issues in the case before he or she decides it and so that the parties involved' and the appellate court 'may be fully informed as to the basis of his or her decision when it is made.'") (quoting *In re LaBelle*, 107 Wn. 2d 196, 219, 728 P.2d 138 (1986)) (internal brackets omitted).

violating its deliberative procedures prescribed by WAC 463-14-080(1). Finally, EFSEC failed to dispose of contested issues and decide issues requiring resolution, in violation of RCW 34.05.580(3)(f) and WAC 463-30-320(6), respectively. EFSEC's errors substantially prejudiced Petitioners' rights by precluding meaningful participation in a public review of a proper mitigation plan. This matter should be remanded for proper review of a wildlife mitigation plan under EFSEC's rules.

5. EFSEC erred by failing to determine the amount of disturbed or impacted wildlife habitat requiring mitigation.

Concerning mitigation of wildlife impacts, EFSEC failed to resolve the threshold step of determining the amount of disturbed or impacted wildlife habitat that would require mitigation. Under WAC 463-60-332(3)(e), an application must "[i]dentify and quantify the level of compensation for impacts to, or losses of, existing species due to project impacts." EFSEC must in turn determine whether the calculations in the application are correct. *See* WAC 463-14-080(1). As discussed below, however, EFSEC failed to make consistent findings of fact regarding the quantity of habitat that would be disturbed, impacted, or eliminated.

For example, the Adjudicative Order states that the Project would cover 1,152 acres of land, with 384 acres "permanently developed for

placement of turbine towers, access roads, substations, underground and overhead transmission lines, and an operations and maintenance facility." CP 117 (FFCL I.B). Yet, the Recommendation Order describes the entire project as only 115 acres in size. CP 93. Inconsistent with both of these prior calculations, the Recommendation Order also states that "50 acres are needed for the permanent footprint of the proposed turbines and support facilities, with about 50 additional acres temporarily affected." CP 95. And at another point the Recommendation Order states that "[a]bout 100 acres" would be temporarily affected, plus a "permanent facility footprint" of "about 50 acres." CP 105 (FFCL 9).

These inconsistent findings would put the total size of the Project—let alone the amount of affected habitat—anywhere from 115 acres to 1,152 acres, and fail to "[i]dentify and quantify the level of compensation for impacts to" wildlife habitat. WAC 463-60-332(3)(e).

The inconsistencies may be in part due to EFSEC's failure to state whether it was calculating the affected acreage based on the Applicant's proposal to install 50 wind turbines, or the approved project of 35 turbines in yet-to-be-determined locations. They may also be due to EFSEC's failure to determine which portions of the Project require mitigation. For example, in addition to the areas that would be permanently cleared for the

turbine footprints, the Applicant also proposes to place height restrictions on hundreds of acres of forestland to provide wind clearance. AR 4333–36. According to the Applicant, these height limitations might be maintained through frequent clear-cuts or by replacing forested habitat with grass or shrubs. AR 11331 (testimony of Jason Spadaro).

EFSEC did not resolve these issues. By failing to make consistent findings regarding the actual acreage of affected habitat that would require mitigation, and by failing to clarify which portions of the Project require mitigation, EFSEC acted arbitrarily and capriciously and inconsistent with its rules, and failed to decide issues requiring resolution. This matter should be remanded pursuant to RCW 34.05.570(3)(f), (h), and (i) for correction of EFSEC's errors.

6. Respondents erred by failing to evaluate and ensure consistency with the no-net-loss standard of performance for wildlife habitat in EFSEC's rules.

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).

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As proposed in the Application, this Project would result in a net loss of valuable wildlife habitat. For example, the facility itself may be more than 1,100 acres in size, resulting in a virtual wall of turbines stretching across multiple forested ridgelines. *See* AR 4316 (discussing Project size); App. B-1 (depicting turbine locations). The Project would cause avian collision and death, and may cause wildlife to avoid otherwise suitable habitat, for the duration of the Project's life.[70] The Project would also result in the permanent "conversion" of forested habitat to non-forest use. AR 11335 (testimony of Jason Spadaro). The lands to be converted include, at the very least, any areas cleared for turbines and other permanent structures and roads.[71]

Despite the Project's impacts to wildlife habitat, EFSEC failed to make any findings of fact or conclusions of law regarding the no-net-loss standard. EFSEC's orders do not even cite the regulation containing the standard, nor mention the concept of "no net loss." *See* CP 93–164.

By failing to make findings of fact or conclusions of law regarding the no-net-loss standard, EFSEC failed to decide "all issues requiring resolution by the agency," RCW 34.05.580(3)(f), and failed to dispose of

[70] AR 15401–02 (testimony of Shawn Smallwood).

[71] *See* App. B-1 (map of project elements); AR 18435–36 (cross-examination of Jason Spadaro).

contested issues, *see* WAC 463-30-320(6). And by failing to address the mandatory no-net-loss standard, EFSEC's orders are also "inconsistent with a rule of the agency." RCW 34.05.580(3)(h). Consequently, this matter should be remanded to the Agency to determine whether the Project would result in a net loss of wildlife habitat.

7. EFSEC erred by approving and/or favorably considering a proposed replacement habitat parcel without allowing the parties to evaluate and present evidence on the adequacy of that parcel.

Likely because it realized that the Project could not meet the no-net-loss standard, the Applicant belatedly proposed during the adjudication to dedicate an off-site "mitigation parcel" in an attempt to offset negative wildlife impacts. AR 11336. The proposed mitigation parcel is located in neighboring Klickitat County, twelve miles east of the Project site. AR 11336, 18473. The Applicant proposed to dedicate the parcel to the Klickitat County government. AR 11336.

EFSEC's rules require that "[t]he ratios of [any] replacement habitat to impacted habitat shall be greater than 1:1 to compensate for temporal losses, uncertainty of performance, and differences in functions and value." WAC 463-62-040(2)(d). In addition, "[m]itigation credits and debits shall be based on a scientifically valid measure of habitat function, value, and area." WAC 463-62-040(2)(c).

According to the Applicant, the parcel contains oak woodlands, rather than the coniferous forest that would be lost at the Project site. AR 11336. There was no documentation that the proposed mitigation parcel provides habitat for the same species of birds and animals as would be impacted by the Project,[72] or that the parcel's habitat function and value would be equivalent to the habitat it would be replacing.

EFSEC made two errors concerning its treatment of the mitigation parcel. First, because the Applicant waited until its *rebuttal* testimony to offer the mitigation parcel, Petitioners were not afforded the opportunity to present evidence or testimony on the adequacy of the parcel, despite requesting the opportunity to do so. *See* AR 22263. The Applicant introduced the mitigation parcel for the first time through the rebuttal testimony of Jason Spadaro, president of the Applicant. AR 11334–39.[73] Mr. Spadaro is not a wildlife expert,[74] and neither of the Applicant's wildlife experts had any first-hand knowledge of the mitigation parcel and thus were unable to answer questions about it during cross-examination.[75]

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[72] Because the proposed mitigation parcel contains a different habitat type than found at the Project site, it is unlikely that both sites support the same species of wildlife.

[73] The Applicant filed Mr. Spadaro's rebuttal testimony on December 16, 2010. AR 16188; AR Index. The Applicant had formulated its plans for the mitigation parcel at least five months prior. AR 15791–95 (July 14, 2010 letter from Mr. Spadaro to the WDFW discussing the proposed mitigation parcel).

[74] AR 18455, 18469 (cross-examination of Jason Spadaro).

[75] AR 18150 (cross-examination of Greg Johnson), 18229 (cross-examination of

The APA provides that "[t]o the extent necessary for full disclosure of all relevant facts and issues, the presiding officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence." RCW 34.05.449(2). This rule applies to EFSEC adjudications. WAC 463-30-020. In addition, RCW 80.50.090(3) provides that "any person shall be entitled to be heard in support of or in opposition to the application for site certification."

Here, the Applicant's delay in proposing the mitigation parcel until rebuttal testimony—rather than proposing it in the Application as required by EFSEC's rules—prevented Petitioners from offering *any* evidence or testimony evaluating the parcel. The Applicant's approach also prevented Petitioners from eliciting competent testimony from the Applicant's witnesses regarding the adequacy of the parcel. This matter should be remanded to allow Petitioners an opportunity to provide evidence and expert testimony on the adequacy of the proposed mitigation parcel under the applicable standards. *See* RCW 34.05.449(2).

Jeff Reams); *see also* AR 2279 (CFE's Closing Brief) ("CFE is also concerned that none of the wildlife experts who appeared at the hearing had visited the [proposed mitigation] site or developed an opinion regarding whether its conservancy would serve as comprehensive mitigation for the loss of habitat resulting from the project.").

Second, EFSEC made inconsistent statements about whether the mitigation parcel affected its decision to recommend approval of the Project, and made contradictory findings about the suitability of the mitigation parcel to offset the Project's impacts.

For example, in its Adjudicative Order, EFSEC stated that it did not make any findings on the adequacy of the mitigation parcel. *See* CP 114 n.2 ("[T]his Order does not address the mitigation parcel in the findings of Fact & Law."); CP 139 (FFCL III.D.2(d)) (same). Yet, elsewhere in the same decision, EFSEC stated that it *did* consider the mitigation parcel. CP 150 (FFCL IV.29) ("*The council concludes* . . . that the mitigation parcel discussed in the record is appropriate and may be accepted.") (emphasis in original). In addition, when EFSEC announced its decision to recommend approval of the WREP at an October 6, 2011 public meeting, EFSEC Manager Al Wright stated orally that EFSEC had "considered and favorably regarded" the mitigation parcel. AR 28720.

EFSEC also made findings within the SCA where it seemingly reached the opposite conclusion—that the Applicant may *not* use the mitigation parcel to satisfy its mitigation obligations. Instead, the SCA requires the Applicant to either "purchase" a mitigation parcel or donate money or fees for mitigation—apparently precluding the Applicant from

using the proposed mitigation parcel, which the Applicant already owns. CP 50 (SCA § IV.E.1(c)).

In conclusion, by making inconsistent findings and statements regarding the suitability of the proposed mitigation parcel and whether it affected EFSEC's decision to recommend approval of the Project, EFSEC acted arbitrarily and capriciously within the meaning of RCW 34.05.570(3)(i). Further, EFSEC failed to follow the procedures prescribed by its rules by failing to require inclusion of the off-site mitigation parcel within the Application, per WAC 463-60-332(3), and by failing to allow Petitioners to submit evidence and expert testimony relating to the parcel, *see* WAC 463-14-080(4). The Court should remand for correction of these errors.

8. Respondents failed to consider and require the available and reasonable measure of reducing the amount of time the Project's wind turbine blades would spin in order to ensure minimal adverse effects to birds and bats from direct collisions.

Respondents are required to ensure through "available and reasonable methods" that the operation of energy facilities "will produce *minimal* adverse effects on the environment, ecology of the land and its wildlife." RCW 80.50.010 (emphasis added); *see also* WAC 463-14-

020(1) (same).[76] In addition, the Application must describe "the means to be utilized to *minimize* or mitigate possible adverse impacts" of the Project. WAC 463-60-085(1) (emphasis added). Finally, EFSEC's rules state that the agency has an "overriding policy . . . to avoid or mitigate adverse environmental impacts which may result from the council's decisions." WAC 463-47-110(1)(a).

Here, because Respondents failed to consider or require measures that would reduce the amount of time the Project's wind turbine blades would spin, Respondents failed to ensure minimal adverse effects to wildlife caused by collisions with turbine blades, and thus violated EFSLA and EFSEC's rules. *See* RCW 80.50.010; WAC 463-14-020(1).

There is no question that the Project would kill birds and bats. EFSEC determined as much. CP 106 (FFCL 17) ("Bird mortality will result from operation of the Project.").[77] Under EFSLA and EFSEC's

[76] The words "minimal" and "minimize" are not defined in EFSLA or EFSEC's rules. The dictionary definition of "minimal" is "of, being, or having the character of a minimum," "constituting the least possible in size, number, or degree," or "extremely minute." *Webster's Third New Int'l Dictionary* 1438 (unabridged ed. 2002). Similarly, the dictionary definition of "minimize" is "to reduce to the smallest possible number, degree, or extent." *Id.*

[77] In addition to the Applicant's failure to comply with the survey and data requirements discussed earlier in this Brief, *supra* Parts IV.B.1, .2, & .3, the Applicant may have substantially underestimated the likely fatality rates for birds and bats. *See, e.g.*, AR 15394–99 (testimony of Shawn Smallwood) (discussing modeling errors in the Applicant's studies that underestimate likely avian and bat mortality rates); AR 14827–28 (testimony of Don McIvor) (describing errors in Applicant's models that underestimate likelihood of birds or bats crossing the "rotor swept zone.").

rules, Respondents are required to ensure *minimal* harm to wildlife. Respondents failed to do so.

According to the Application, the Project would not generate energy when wind speeds are less than 9 mph. AR 4327.[78] In addition, the turbines would have "braking systems, pitch controls and other speed controls" that could be used to reduce or control turbine rotor speed. AR 4503; *see also* AR 4327 ("At speeds exceeding 56 mph, the blades feather on their axis and the rotor stops turning.").

Petitioners' expert witness Dr. Shawn Smallwood testified that a proven measure to reduce impacts is to "increase[] turbine cut-in speed (i.e., the wind speed at which wind turbine blades begin spinning)," and that when this measure was tested at an existing wind energy facility by increasing cut-in speed to approximately 11 mph, it reduced "bat fatalities 53% to 87% with a projected annual power loss of 0.3%." AR 15408.

Dr. Smallwood's testimony shows that by selecting an appropriately higher cut-in speed and precluding the turbine blades from spinning until that wind speed occurs, unnecessary blade movement could be reduced and fewer birds and bats would be struck by spinning blades, thus minimizing collision fatalities and resulting in very little energy loss.

[78] The Application does not explain, however, whether the Project's turbine blades would continue to spin at wind speeds less than 9 mph.

This available and reasonable measure, however, was neither considered in any of Respondents' decisions, nor required in the SCA. By failing to consider or require this measure, Respondents failed to comply with their responsibilities to ensure minimal impacts to wildlife, erroneously applied the law, and failed to decide all issues requiring resolution. The Court should remand the decision with directions for Respondents to consider measures that would ensure minimal impacts to wildlife by reducing turbine blade spin-time.[79]

C. Respondents erred by failing to require available and reasonable measures to ensure minimal impacts to aesthetic, heritage, and recreational resources.

As discussed earlier, *see supra* Part IV.B.8, EFSLA requires Respondents to ensure through "available and reasonable methods . . . that the location and operation of [energy] facilities will produce *minimal* adverse effects on the environment." RCW 80.50.010 (emphasis added). The scope of impacts that must be minimized includes impacts to aesthetic, heritage, and recreational resources. *See* RCW 80.50.010(2) WAC 463-47-110(1)(b); CP 149 (FFCL IV.23). Here, Respondents' duty was not met for these resources.

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[79] As discussed in the next section of this Brief, *infra* Part IV.C, this measure would also help ensure minimal impacts to aesthetic, heritage, and recreational resources.

By denying turbines in certain areas, Respondents avoided some of the Project's adverse impacts to aesthetic, heritage, and recreational resources. *See* CP 72–73, 76, 99, 106, 133–36. However, the Project as approved by Respondents would still cause adverse impacts to these resources, because a substantial number of turbines would remain "significantly visible" from significant viewing sites. CP 149 (FFCL IV.24); *see also* AR 28828–29; CP 74.[80] The Governor noted in her decision that "[e]ven with a reduction to 35 turbines, there would be unavoidable impacts on the unique visual resources of the Columbia River Gorge." CP 76.

Although Respondents were able to *avoid* some of the Project's impacts by denying turbines in certain areas, Respondents failed to require available and reasonable measures that would *minimize* the impacts of the *approved* turbines.[81] Two specific measures were overlooked: (1) minimizing the amount of time the Project's aviation safety lighting would flash by requiring this lighting to be radar-activated, and (2) minimizing

[80] Affected viewing sites include hundreds of residences, multiple federal and state highways within the Columbia River Gorge National Scenic Area, numerous recreational sites, local rural communities such as Willard, and urban areas such as White Salmon. *See* CP 74 (SCA attach. 2); AR 4544, 4584, 16238–59; App. A-1.

[81] Because the final Project layout has not yet been determined, the exact impacts to aesthetic, heritage, and recreational resources are at this time unknown. *See infra* Part IV.E. However, regardless of where the approved turbines are sited, their flashing lights and spinning blades will cause adverse impacts that must be minimized.

the scenic impacts of spinning turbine blades by reducing the amount of time they would spin.

The record contains substantial evidence that the Project, as approved, would cause adverse impacts to aesthetic, heritage, and recreational resources, due in part to the high visibility of aviation safety lighting and the increased scenic impacts caused by spinning turbine blades. This evidence includes formal comments from federal agencies with expertise in the affected scenic resources (the U.S. Forest Service ("USFS") and National Park Service ("NPS")),[82] leading experts in the scenic resources of the Columbia River Gorge,[83] admissions from the Applicant's witnesses,[84] and other evidence.[85]

The impacts of aviation lighting and moving turbine blades were also some of the most common concerns expressed during public comment by numerous affected residents and recreation users of the Columbia River Gorge.[86] These comments demonstrate harm to the

[82] *See* AR 14807–08 (USFS comments), 14811–12 (NPS comments).

[83] *See, e.g.*, AR 14587–89 (testimony of Dean Apostol, Petitioners' expert witness on scenic issues), 17963–65 (written comments of Jurgen Hess, former USFS landscape architect); AR 17903 (oral testimony of Jurgen Hess).

[84] *See, e.g.*, AR 21552, 21556 (testimony of Applicant's witness Chris Watson).

[85] *See, e.g.*, AR 19314 (National Academy of Science report: "A Visual Impact Assessment Process for Evaluating Wind-Energy Projects") (discussing impacts of wind turbine lighting), 19515 (comments of Will Bloch) (analyzing scenic impacts of spinning turbine blades).

[86] For oral testimony regarding the adverse impacts of nighttime lighting, *see,*

public. As Governor Gregoire noted, "[v]isual impacts and esthetics are not solely the province of experts; they are within the knowledge and general experience of all who enjoy the natural beauty of our region." CP 76.

1. Radar-activated aviation safety lighting

The Applicant proposes constantly flashing aviation safety lighting. AR 4534. As explained in the testimony and comments cited above, the nighttime impacts of this lighting would be significant. These impacts were expressly acknowledged by the Applicant in the Application[87] and by EFSEC Chair Luce in his concurring opinion.[88]

To address lighting impacts, radar-activated lighting is a reasonable and available technology that triggers safety lighting only when aircraft are in the vicinity, leaving skies unlit the majority of the

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e.g., AR 3004, 9074 (Peter Cornelison), 3014 (Kate McCarthy), 3062 (Steve Andruss), 3067 (Sally Newell), 3070 (Scott Hulbert); 3119 (Chris Lloyd), 3120 (James Buckland), 3130 (Rebecca Stonestreet), 3146 (Sally Newell), 3172 (Rob Bell), 3182 (Scott Cook), 3189 (David Neikirk), 3673 (Stephen Bronsveld), 9061 (Mike Eastwick), 9095 (Herb Hardin), 9102 (Brian Shortt), 9112 (Paul Smith), 9114 (Sally Newell), 8487–88 (Jill Barker); 17868 (Tom Rousseau), 17895 (Mark King), 17900 (Marlene Woodward), 17941 (Simon Sampson), 18346 (Ole Helgerson). For oral testimony on the impacts of moving turbine blades, *see, e.g.*, AR 3052 (John Crumpacker for the Skamania County Agri-Tourism Association), 3004, 8487, 9074, 18374 (Peter Cornelison), 3182 (Scott Cook), 3189 (David Neikirk), 8487–88 (Jill Barker), 17896 (Mark Schmidt), 17900 (Marlene Woodward).

[87] "The flashing of FAA aviation lights on the tops of turbines at night would similarly be considered a negative impact." AR 4574.

[88] CP 158 (The "landscape will now be altered . . . by night with warning lights required by the Federal Aviation Administration.").

time. The CFE specifically recommended the measure of radar-activated lighting "as a means of minimizing adverse visual impacts on the night sky." AR 22286. Petitioners and their expert scenic witness, Dean Apostol, also recommended radar-activated lighting and provided an example of another wind energy project where this technology was required as a condition of approval.[89]

Respondents included a condition of approval in the SCA requiring lighting impacts to be minimized: "The Certificate Holder shall implement mitigation measures to minimize light and glare impacts." CP 62 (SCA § V.J). Respondents relied on this condition in concluding that the FAA lighting "will not add significant light or glare to the immediate surroundings or unduly detract from scenic values." CP 106 (FFCL 16[90]). Respondents may have intended for the condition in the SCA to require radar-activated lighting. However, it is impossible to know for sure, because neither the SCA nor any of Respondents' decisions specifically address this measure (despite it being specifically raised by the parties)—even while the SCA *does* provide details for *other* lighting measures.[91]

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[89] AR 14609, 22286, 28831–32, 28869–73.

[90] In this FFCL, the citation to SCA § IV.J was ostensibly a typographical error; Petitioners assume the citation was intended to be SCA § V.J, which discusses lighting.

[91] For instance, the SCA requires that for any outdoor lighting installed at the Project's operations and management facility, "motion sensors will be used to keep

To the extent that Respondents deferred the issue of radar-activated lighting for later resolution, Respondents failed to dispose of all contested issues and failed to decide issues requiring resolution. *See* WAC 463-30-320(6); RCW 34.05.570(3)(f).To the extent that Respondents *did* consider radar-activated lighting and rejected it, Respondents adopted findings and conclusions not based on substantial evidence and erroneously interpreted or applied their duty to ensure minimal scenic impacts under EFSLA and EFSEC's rules. RCW 34.05.570(3)(d), (e), (h). In either event, the matter should be remanded for express consideration of radar-activated lighting as a means of ensuring minimal impacts.

2. Reducing the amount of time turbine blades would spin

Modern wind turbines have a blade sweep the size of a Boeing 747 Jumbo Jet; a constantly moving object of such an immense size can dramatically alter a landscape.[92] As explained by the National Park Service in its comments to EFSEC on this Project, the visual impacts of the Project on the scenic and historic qualities of the Gorge, "*especially*

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lighting turned off when not required." CP 62 (§ V.J).

[92] *See generally* AR 16879 (findings of the Skamania County Hearing Examiner) ("Wind turbines . . . have the potential to dramatically alter the landscape. To put the massive scale in perspective, the tallest building in Portland is 546 feet tall. Even a turbine that is only 300 feet tall could have a blade sweep diameter comparable to the length of a Boeing 747 Jumbo Jet."); AR 14588 (testimony of Petitioners' scenic witness Dean Apostol) ("The rotating blades of wind turbines are a unique feature that attracts additional attention. The human eye is naturally drawn towards movement. This movement draws more attention and increases visual contrast and thus impacts.").

when movement of a structure acts as an additional point of focus, depreciate the scenic and historical qualities that originally warranted national protection." AR 14811 (emphasis added).

Respondents failed to require measures to reduce the amount of time that the turbine blades would spin when not generating energy. In addition to the benefits for wildlife as discussed above, *see supra* Part IV.B.8, such measures would reduce the effect that moving wind turbine blades have in attracting viewers' attention away from the important heritage landscapes surrounding the Project. Yet there is no apparent requirement in the SCA for such measures to be employed.

As with the issue of radar-activated lighting, Respondents failed to decide issues requiring resolution and failed to dispose of all contested issues. To the extent that Respondents considered and rejected a requirement to reduce blade spin-time, Respondents erroneously interpreted or applied their duties to minimize adverse impacts to aesthetic, heritage, and recreational resources. The Court should remand with directions to evaluate and, where appropriate, require these measures.

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D. Respondents erred in finding the Project consistent with Skamania County's Comprehensive Plan and land use ordinances.

1. Legal Background: The land use consistency review process under EFSLA

In reviewing any proposed application for an energy facility, EFSEC must "conduct a public hearing to determine whether or not the proposed site is consistent and in compliance with city, county, or regional land use plans[93] or zoning ordinances."[94] RCW 80.50.090(2); *see also* WAC 463-26-050, -060. After holding this hearing, EFSEC must "make a determination as to whether the proposed site is consistent and in compliance with land use plans and zoning ordinances." WAC 463-26-100.

In the instant case, EFSEC held a land use consistency hearing on May 7, 2009. CP 120. In its Adjudicative and Recommendation Orders, EFSEC found the Project consistent with Skamania County's land use

[93] "Land use plan" is defined as "a comprehensive plan or land use element thereof adopted by a unit of local government pursuant to chapter 35.63, 35A.63, 36.70, or 36.70A RCW, or as otherwise designated by chapter 325, Laws of 2007." RCW 80.50.020(14); *see also* WAC 463-26-050. In other situations outside the realm of EFSLA, a land use application might not need to be reviewed against the Comprehensive Plan. Here, however, such review is expressly required. Washington courts have approved use of the comprehensive plan as an enforceable standard when such plans are specifically called out as the basis for exercising regulatory authority. *See, e.g., West Main Assocs. v. City of Bellevue*, 49 Wn. App 513, 525, 742 P.2d 1266 (1987).

[94] "Zoning ordinance" is defined as "an ordinance of a unit of local government regulating the use of land and adopted pursuant to chapter 35.63, 35A.63, 36.70, or 36.70A RCW or Article XI of the state Constitution, or as otherwise designated by chapter 325, Laws of 2007." RCW 80.50.020(22); *see also* WAC 463-26-050.

authorities.[95] The Governor's decision approving the Project does not expressly address land use consistency issues. CP 75–76.

Interpretation of Skamania County's Comprehensive Plan and land use ordinances is de novo. *See Whatcom County Fire Dist. No. 21 v. Whatcom County*, 171 Wn. 2d 421, 427, 256 P.3d 295 (2011) ("Interpretation of statutes and ordinances is a question of law reviewed de novo.") (citing *In re Pers. Restraint of Cruze*, 169 Wn. 2d 422, 426, 237 P.3d 274 (2010); *Griffin v. Thurston County Bd. Of Health*, 165 Wn. 2d 50, 55, 196 P.3d 141 (2008)). Unambiguous ordinances are applied according to their plain meaning, while ambiguous ordinances are construed. *Sleasman v. City of Lacey*, 159 Wn. 2d 639, 643, 151 P.3d 990 (2007). A reviewing court's "goal in construing zoning ordinances is to determine legislative purpose and intent." *Milestone Homes, Inc. v. City of Bonney Lake*, 145 Wn. App. 118, 126, 186 P.3d 357 (2008) (citing 8 E. McQuillin, *The Law of Municipal Corporations*, § 25.71 at 224 (3d ed. 2000); *HJS Dev., Inc. v. Pierce County*, 148 Wn. 2d 451, 472, 61 P.3d 1141 (2003)).

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[95] CP 96, 111 (CL 4), 120–25, 147–48 (FFCL IV.12–16).

2. EFSEC erroneously concluded that siting privately owned and operated large-scale wind energy turbines is consistent and in compliance with the Conservancy designation of the Skamania County Comprehensive Plan.

The majority of the Project site, including the portions where Respondents approved 35 wind turbines, is designated "Conservancy" under Skamania County's Comprehensive Plan ("Comprehensive Plan" or "Plan"). AR 4513–14.[96] Thus, EFSEC was required to determine whether the proposed Project is "consistent and in compliance with" the Conservancy designation under the Plan. WAC 463-26-100.

EFSEC erred in concluding that privately owned and operated large-scale wind energy turbines are consistent and in compliance with the Conservancy designation. *See* CP 124–25. The Comprehensive Plan authorizes three types of uses that may be allowed (uses allowed outright, review uses, and conditional uses). App. C-8–C-9. It then provides that any use not listed as one those three types is prohibited:

> Three types of uses 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 one of the following types of developments, then the use is prohibited within that land use designation.*

App. C-8–C-9 (emphasis added).

[96] App. C-1. Copies of all Comprehensive Plan pages cited in this Brief are included in Appendix C. The full Plan is in the record starting at AR 21988.

The Plan lists twelve categories of allowed uses for the Conservancy designation. App. C-3–C-4. The only category that is even remotely similar to a privately owned and operated large-scale wind energy facility is the sixth category, "*[p]ublic facilities and utilities*, such as parks, public water access, libraries, schools, utility substations, and telecommunication facilities." App. C-4 (emphasis added). To fit within this category, however, a use must be "*public*." *Id.* (emphasis added).[97]

The WREP would *not* be a public facility. Rather, it would be owned and operated by the Applicant, a private company, thus making the Project a private facility. *See* AR 4265, 4282. EFSEC erred in failing to conclude that a privately owned and operated wind energy facility is neither consistent nor in compliance with the Comprehensive Plan.

EFSEC also misinterpreted Comprehensive Plan Policy L.U.1.2, which reads as follows:

> 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

[97] The Skamania County zoning ordinance further defines "[p]ublic facilities and utilities" as "facilities which are *owned, operated, and maintained by public entities* which provide a public service required by local governing bodies and state laws." SCC § 21.08.010 (emphasis added). The zoning ordinance is in the record starting at AR 22061.

> or conditional uses, *only if the use is specifically listed in the official controls*[98] *of Skamania County for that particular land use designation.*

App. C-4 (emphasis added). EFSEC focused on the background language in the first half of this Policy, noting that the Plan "by its own terms does not foreclose unmentioned uses." CP 124–25. EFSEC disregarded, however, the operative, regulatory language in the second half of the Policy, which allows uses unmentioned in the Plan only if they are "specifically listed" in an official County zoning control "for that particular land use designation." App. C-4.

In this case, there was no showing that privately operated wind energy facilities are "specifically listed" in any of Skamania County's official controls for the Conservancy designation.[99] Thus, the Project cannot be deemed consistent with the plain language of Policy L.U.1.2 unless and until the County adopts an ordinance specifically listing and

[98] The Comprehensive Plan defines "official controls" as "legislatively defined and enacted policies, standards, detailed maps and other data, all of which control the physical development of a county or any part thereof or any detail thereof, and are a means of translating into regulations and ordinances all or any part of the general objectives of the comprehensive plan. Such official controls may include, but are not limited to ordinances establishing zoning, subdivision control, critical areas, shorelines, and any adoption of detailed maps. (RCW 36.70.020)." App. C-2.

[99] In fact, as EFSEC acknowledged, at one time Skamania County proposed a "zoning code amendment that would have allowed wind powered generation facilities in certain county areas, including the site of the proposed Project," but that code amendment is currently on hold because the County has not yet prepared an environmental impact statement analyzing its impacts. CP 146 (FFCL IV.3).

allowing privately operated energy facilities in the Conservancy designation. EFSEC erred in concluding otherwise.

In addition, large-scale wind energy facilities are inconsistent with the stated purpose of the Conservancy designation, which is as follows:

> The Conservancy land use area 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.
>
> Much of the Conservancy land use area is characterized by rugged terrain, steep in slope, and unsuitable for development of any kind. *Logging, timber management, agricultural and mineral extraction* are main use activities that take place in this area. Recreational activities of an informal nature such as fishing, hunting, and hiking occur in this area, although formal recreational developments may occur from time to time. *Conservancy areas are intended to conserve and manage existing natural resources* in order to maintain a sustained resource yield and/or utilization.

App. C-3 (emphasis added).

According to its stated purpose, the Conservancy designation is "intended to provide for the conservation and management of existing natural resources," which are explained to be "logging, timber management, agricultural and mineral extraction." *Id.* This purpose in the Plan is fully consistent with the Growth Management Act ("GMA"), chapter 36.70A RCW, which describes "natural resource lands" as

"agricultural, forest, and mineral resource lands" and calls for the conservation of these lands for agricultural, forest, and mineral resource production. RCW 36.70A.060(1)(a). Allowing forest lands to be converted to non-forest uses like industrial wind energy facilities conflicts with these purposes and requirements.

In interpreting the meaning of "natural resources," rather than examining and applying the plain language of the Comprehensive Plan and the GMA discussed above, EFSEC looked to an outside source, "*Wikipedia, the Free Encyclopedia*." CP 125 n.21, CP 148 (FFCL IV.16). EFSEC concluded that because "air" and "the force of wind" were "identified as natural resources" on the *Wikipedia* website, these terms should be deemed natural resources under the Plan. CP 125 n.21.[100] EFSEC erred by reaching beyond the plain language of the applicable Plan and statute, relying instead on *Wikipedia,* an outside source that has no legal bearing on land use planning in Washington or Skamania County.

Moreover, assuming arguendo that EFSEC may interpret the County's Plan by using an outside source that the County had not considered when adopting the Plan, *Wikipedia* was not an appropriate

[100] EFSEC did not explain whether it evaluated the definition of "natural resources" that appeared on *Wikipedia* circa July 10, 2007 (the date the Skamania County Comprehensive Plan was adopted), or some other date. *See* CP 125, n.21.

source. Given the inherent impermanence and high potential for unreliability of information found at *Wikipedia*, legal scholars caution against citing it in adjudicative decisions:

> The impermanence of Wikipedia content, which can be edited by anyone at any time, and the dubious quality of the information found on Wikipedia raise[] a number of unique concerns.
> . . .
> . . . Wikipedia should not be cited in place of a more authoritative source for facts or references that are significant to the court's opinion. Choosing a more authoritative source avoids concerns over the quality and permanence of the information on Wikipedia.

Lee F. Peoples, *The Citation of Wikipedia in Judicial Opinions*, 12 Yale J.L. & Tech. 1, 3, 30 (2009–2010).

As a result of EFSEC's decision to rely on *Wikipedia* to interpret the Comprehensive Plan, rather than using the plain language of the Plan and the GMA, EFSEC misconstrued the term "natural resources" and erroneously concluded that a privately owned, large-scale wind energy facility is consistent with the Conservancy designation.

In conclusion, a private large-scale wind energy facility is inconsistent with the purposes and standards of the Conservancy designation in the Comprehensive Plan, is not specifically listed in any official zoning control, and is thus prohibited. Further, EFSEC erred by

failing to examine the applicable provisions of the Plan and the GMA to interpret the term "natural resources," and by instead relying on *Wikipedia*. EFSEC's erroneous interpretations and conclusions should be reversed and remanded for further consideration.

3. EFSEC misinterpreted the County's moratorium ordinances prohibiting conversions from forest use to non-forest use on the Unmapped lands.

The challenged decisions allow 35 industrial wind energy turbines on lands used and maintained for commercial timber production and designated as "Unmapped" or "unzoned" by the Skamania County land use ordinance. CP 75, 121. EFSEC disregarded, however, a series of local land use moratorium ordinances adopted by Skamania County to prohibit conversions of forest lands to non-forest uses on Unmapped lands until appropriate zoning could be adopted. EFSEC erroneously interpreted these ordinances by concluding they were not zoning ordinances and were "irrelevant" to ESFEC's land use consistency review process. CP 123. As a result of these errors, Respondents further erred by failing to evaluate and find the Project inconsistent with the moratoria, and thus failed to decide an issue requiring resolution.

On July 10, 2007, Skamania County adopted its current Comprehensive Plan. App. C-1. The same day, in conjunction with the

adoption of the Plan, the County also adopted an ordinance establishing a moratorium prohibiting various types of development on the Unzoned lands, until zoning could be adopted for these lands consistent with the Plan. App. D-1. Approximately every six months for the next several years, including for the duration of the proceedings below, the County adopted new ordinances renewing the moratorium. AR 21206 n.8.[101]

The County described the purposes of the moratorium ordinances in the text of the ordinances, stating that the County "is in the process of updating zoning classification[s] for all land within unincorporated Skamania County to be consistent with the adopted Comprehensive Plan," that "there are over 15,000 acres of private land within unincorporated Skamania County that do not have zoning classifications," that most of this private land is "currently used as commercial forest land," that "the County Commissioners are determining which areas will be designated as commercial forest land and protected from the encroachment of residential uses as required by the Growth Management Act," that to allow unregulated development on these lands before zoning could be adopted would "essentially . . . circumvent[] the legislative process and could

[101] For purposes of this appeal, all ordinances involved were functionally identical to Ordinance No. 2010-10, the particular ordinance that EFSEC focused on for its Adjudicative Order. A copy of this ordinance is attached to this Brief as Appendix D. Lists of the series of ordinances can be found at AR 21206 n.8 and CP 172 n.8.

endanger the public's safety, health and general welfare," and that "continued unplanned and uncontrolled residential growth in the areas of commercial forest lands . . . could potentially increase the risk of forest fires and other emergency events." App. D-1–D-2.

Accordingly, the County prohibited various types of development activities on the unzoned lands, including one type relevant to this appeal: the conversion of forest land to nonforest use. App. D-3.[102]

The following facts are undisputed. First, the Application proposes siting wind energy turbines on "Unmapped," *i.e.*, unzoned, lands. AR 4403; CP 105 (FFCL 10). Second, the Unmapped lands where turbines are proposed are used and maintained for commercial forestry. AR 4333; CP 105 (FFCL 10). And third, the Application proposes the conversion of Unmapped commercial forest lands to nonforest (industrial) uses.[103]

Because the Project would convert Unmapped commercial forest lands to non-forest uses, it was prohibited by—and should have been deemed inconsistent and not in compliance with—the County's moratoria.

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[102] The ordinances accomplished this prohibition by barring 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." App. D-3. SEPA checklists are a prerequisite for all conversions of forest land to nonforest uses. WAC 222-16-050(2), 222-20-010(7)(b).

[103] *See* AR 4333–36 (portion of Application proposing forest harvest, including conversions to non-forest use), 11330–31 (testimony of Jason Spadaro), 22552 (same).

Instead, EFSEC's Adjudicative Order spends only two sentences addressing the moratoria, summarily dismissing them as "relating to forest practices," being neither zoning ordinances nor land use plans under chapter 80.50 RCW, and "irrelevant" to EFSEC's duty to determine land use consistency:

> [T]he project's opponents challenge[104] various . . . local provisions relating to forest practices, which are . . . irrelevant here as being neither zoning ordinances nor land use plans within the meaning of RCW 80.50. These include a moratorium (Ex. 1.15C[105]) on certain types of development of forest areas.

CP 123.

Although EFSEC accurately determined that the County's ordinances involve a "moratorium . . . on certain types of development of forest areas," EFSEC nevertheless erred in concluding that the ordinances are not zoning ordinances and were "irrelevant" to land use consistency. *Id.* Contrary to EFSEC's conclusion, the County's moratoria against development on unzoned forested lands are "zoning ordinances" under EFSLA, which defines a "zoning ordinance" as

> an ordinance of a unit of local government regulating the use of land and adopted pursuant to chapter 35.63, 35A.63,

[104] Petitioners did not *challenge* the cited authorities; rather, Petitioners asked the Council to apply them. *See* AR 21203–08, 21867–70.

[105] Exhibit 1.15C was a copy of Skamania Ordinance No. 2010-10, attached as Appendix D to this Brief.

> 36.70, or 36.70A RCW or Article XI of the state Constitution, or as otherwise designated by chapter 325, Laws of 2007.

RCW 80.50.020(22).

Here, the County's moratoria fit all of the criteria under the definition of "zoning ordinance." First, the moratoria are ordinances. Second, they regulate the use of land by prohibiting certain uses (including the conversion of commercial forest lands to non-forest uses). And third, as expressly stated within the moratorium ordinances themselves, they were adopted pursuant to the Growth Management Act, chapter 36.70A RCW, and the Planning Enabling Act ("PEA"), chapter 36.70 RCW:

- "Whereas, the *Growth Management Act* requires all counties in the State of Washington to provide protections for commercial forest land from the encroachment of residential uses." App. D-1.

- "[T]he County Commissioners are determining which areas will be designated as commercial forest land and protected from the encroachment of residential uses *as required by the Growth Management Act*." App. D-2.

- "Whereas, the Board of County Commissioners *has the authority pursuant to RCW 36.70.795*[106] to adopt a moratorium . . . . A moratorium may be renewed for one or more six-month period(s) if a subsequent public hearing is held and finding[s] of fact are made prior to each renewal." App. D-3 (emphasis added).

[106] RCW 36.70.795 is a provision of the Planning Enabling Act (PEA) that authorizes local governments to adopt and renew moratoria and interim zoning controls.

Thus, according to the plain language of the moratorium ordinances themselves, the ordinances were passed pursuant to the GMA and PEA, and were intended to regulate development activities in the County. EFSEC erred in concluding that the moratorium ordinances are not "zoning ordinances" within the meaning of RCW 80.50.020(22). As a result of this error, EFSEC failed to evaluate the Project for consistency with the ordinances, thus failing to decide all issues requiring resolution. Pursuant to RCW 34.05.570(3)(d) and (f), the Court should reverse EFSEC's determination of consistency and remand for further review, including consideration of the Project's consistency with the moratoria.

E. Respondents erred by failing to resolve, or improperly deferring review of, important aspects of the Project, and by failing to ensure the rights of the public to participate in future review of these aspects.

Many of the final details of the proposed Project are unknown and unresolved. This is primarily because Respondents approved the Project on the condition that the Applicant submit a revised proposed turbine layout and other Project plans at a future, unspecified date. The procedures and substantive standards that Respondents might use in reviewing final Project plans and details once they are submitted—including whether and how the public may participate in such reviews—are unknown. In

addition, Respondents completely deferred any consideration of the forest practices component of the Project to a later date (and without explaining the future procedures that will apply), even though forest practices are an integral part of the Project proposal and were a contested issue.

In approving the Project in this manner, Respondents made several errors. First, by failing to resolve and/or deferring review of unresolved aspects of the Project, Respondents have not decided all issues requiring resolution nor disposed of all contested issues, thus violating RCW 34.05.570(3)(f) and WAC 463-30-320(6).

Second, because the actual project layout and plans do not yet exist, the Project was approved in the absence of substantial evidence in violation of RCW 34.05.570(3)(e), and the decisions to approve the Project were arbitrary and capricious, violating RCW 34.05.570(3)(i).

Third, to the extent that it was proper for Respondents to defer review of unresolved aspects of the Project to a future, post-approval date, Respondents failed to ensure that Petitioners and other interested parties would have an opportunity to be heard, thus violating EFSEC's prescribed procedures for reviewing a siting application and prejudicing Petitioners' rights to participate in the review process.

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The decisions should be remanded for review and resolution of the unresolved aspects of the Project.

1. The final Project layout and its resulting impacts have not been determined.

The approved SCA describes the Project in pertinent part as "a maximum of 35, 3-bladed, X-megawatt [*sic*] (MW) nameplate-rated wind turbines on tubular steel towers." CP 38. There is, however, no final site plan depicting the locations where these 35 turbines would be placed.

Instead, the SCA requires the Certificate Holder to "provide a final project layout plan" at a future, unspecified date. CP 57 (Condition No. IV.L.3). Similarly, EFSEC's Adjudicative Order requires future submission and review of a "micrositing plan that minimizes visual impacts from the Project on sensitive resources" and that avoids bird and bat flight paths and impacts to feeding and nesting areas. CP 136, 139, 150.[107] Moreover, the SCA allows the final layout to relocate individual turbines almost anywhere within the 1,150-acre Project site,[108] except for specified areas where turbines are prohibited.[109]

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[107] These requirements of the Adjudicative Order are incorporated into the SCA. *See* CP 35, 37 (§ I.B), 46 (§ III.L), 96.

[108] CP 38 (§ I.C) ("The final location[s] of the [turbines] and other project facilities within the Project Area may vary from the locations shown on the conceptual drawings in the Revised Application . . . ."); *see also* App. B-1 (map of Project area).

[109] CP 42 (§ II.25) (definition of "Project Site"), CP 72–73 (SCA attach. I) (legal description of Project area, which prohibits turbines in certain locations).

Relocating turbines outside of the "corridors" where they were proposed might increase or decrease the Project's resource impacts, or shift them to a new location. Under any of these scenarios, the Project would be different from what was proposed in the Application.

The final Project layout is undetermined. Thus, Respondents have approved the Project in the absence of substantial evidence that the Project complies with the applicable law, because the evidence (the actual layout plan for the Project) *does not yet exist*. Pursuant to RCW 34.05.570(3)(e), the approval of the Application should be vacated and the matter should be remanded for submission and review of the final Project layout and its impacts, *prior* to a decision approving or rejecting the Project.

In addition, Respondents have adopted a course of action that allows future changes to the Project layout without guaranteeing a public hearing.[110] Respondents have thus violated the requirements of EFSLA and EFSEC's rules affording the public the right to participate in project review.[111] Because Respondents' decisions are inconsistent with EFSEC's

[110] EFSEC's rules for "amendments" to SCAs offer guidance here. They require a public hearing for any amendment. WAC 463-66-030. They also require a formal decision by either EFSEC or the Governor, depending on the nature of the proposed amendment. WAC 463-66-060, -070, -080. But under Respondents' adopted approach, resolution of the deferred issues (*e.g.*, the turbine layout) would not require an "amendment" of the SCA and, thus, are not subject to the substantive and procedural requirements for amendments.

[111] *See* RCW 80.50.090(3) (requiring an adjudicative proceeding and requiring

rules and fail to follow prescribed procedures, the appeal should be remanded for Respondents to specify the processes that will occur if and when the Applicant submits future site plans.[112]

2. Respondents failed to evaluate and resolve the forest practices aspects of the proposal, and also failed to specify the public processes for future evaluation and resolution of these aspects.

According to the Application, the Project involves forest practices, including the permanent clearing of forests for turbine corridors and roads, as well as limiting vegetation heights outside the permanently cleared areas in order to provide wind clearance. AR 4333–36. EFSEC correctly noted that it had authority to ensure compliance with forest practices requirements under the Forest Practices Act, chapter 76.09 RCW, and the Forest Practices Rules, Title 222 WAC. CP 142, 152 (FFCL IV.41). EFSEC also correctly noted that forest practices compliance and enforcement was a contested issue. *See* CP 123, 142.

EFSEC erred, however, by deferring *any* review or analysis of the

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that "any person shall be entitled to be heard in support of or in opposition to the application"); WAC 463-14-030(3) (EFSEC "shall allow any person desiring to be heard to speak in favor of or in opposition to the proposed site."), 463-14-080 (requiring an adjudicative proceeding and allowing public testimony and comments concerning any proposed project).

[112] *See* RCW 34.05.570(3)(c) (requiring judicial relief if agency failed to follow a prescribed procedure), 34.05.570(3)(h) (requiring judicial relief if decision is inconsistent with agency rule), 34.05.570(1)(d) (requiring relief if petitioner is substantially prejudiced), 34.05.574(1) (court may remand for further proceedings).

Project's forest practices and their compliance with applicable law until some unknown point in the future,[113] *after* the Governor approved the Project. EFSEC cannot wait until a later date to resolve this important issue. "Every recommendation to the governor [on an application for site certification] shall . . . [c]ontain a recommendation *disposing of all contested issues*." WAC 463-30-320(6) (emphasis added). Yet EFSEC did not even attempt to resolve this issue before making a recommendation to the Governor. EFSEC's decision did not decide all issues requiring resolution by the agency and is inconsistent with EFSEC's rules, is not based on substantial evidence, and is arbitrary and capricious.

Further, assuming arguendo that Respondents have the authority to approve an energy project even while carving out and deferring review and resolution of important aspects of the Project, Respondents failed to guarantee the protection of the rights of the public to participate in Respondents' deferred review and decisions. The Siting Act, EFSEC's rules, the APA, and the Forest Practices Act all require opportunities for public participation. *See generally* RCW 80.50.090; WAC 463-14-030; RCW 34.05.434; RCW 76.09.205. The approved SCA, however, does not

[113] As discussed in the next section of this Brief, the SCA is internally inconsistent regarding the timing for the submission of any forest practices applications for the Project. *See infra* Part IV.F.

set forth any provisions requiring notice to interested parties of any forest practices applications or decisions for the Project, opportunities for public involvement, or appeal rights. It is undecided and unclear what processes will occur.[114] Respondents' decisions to approve the SCA were arbitrary and capricious, inconsistent with EFSEC's rules, and prejudicial to Petitioners' rights to participate in review of the forest practices aspects of the Project. The decision should be remanded.

F. The Site Certification Agreement is internally inconsistent regarding forest practices compliance and enforcement.

The Site Certification Agreement contains two sections addressing forest practices. *See* CP 58–59 (§ IV.M), 66 (§ VII.E). The language of these two sections is similar, and both sections appear to have originated from the same draft language. Respondents failed to reconcile important differences between these two sections.

For instance, section IV.M requires applications for forest practices activities to be submitted "at least 60 days prior to initiating *ground disturbance activities*." CP 58 (emphasis added). In contrast, section VII.E requires such applications to be submitted "at least 60 days prior to

[114] For example, will review of the forest practices aspects of the Project follow the public process requirements of the Forest Practices Act, EFSEC's rules, both, or neither? Will EFSEC's review of the forest practices culminate in another recommendation to the Governor, a formal decision by EFSEC, or neither? Respondents' decisions provide no answers to these questions.

initiating *forest practices*." CP 66 (emphasis added). Adding further confusion, EFSEC's Recommendation Order states that "[t]he Applicant must prepare a Forest Practices Application Notification . . . sixty days prior to *construction*." CP 108 (emphasis added). Neither "ground disturbing activities" nor "forest practices" are defined in the SCA. "Construction" is defined,[115] but the definition does not include activities governed by the Forest Practices Act. *See* RCW 76.09.020(17) (definition of "forest practice"), 76.09.060 (forest practice application procedures). It is unclear which of these conflicting provisions governs, and therefore unclear when review of forest practice activities is required.

Section IV.M of the SCA expressly requires the submission of a forest practices application for road construction and reconstruction, reforestation, gravel and rock removal, and slash disposal, while section VII.E is silent on these activities. Section VII.E discusses agency enforcement, while section IV.M does not. Section IV.M expressly requires an application for forest practices during the "construction phase of the project," while section VII.E does not. *See* CP 58–59, 66.

[115] "Construction" is defined in the SCA as "any of the following activities: any foundation construction including hole excavation, form work, rebar, excavation and pouring of concrete for the WTGs [wind turbine generators], the operations and maintenance facility building, or the substations and erection of any permanent, above-ground structures including any transmission line poles, substation poles, meteorological towers, or turbine towers." CP 40 (§ II.8) (definition of "construction").

The adoption of these internally inconsistent conditions of approval was arbitrary and capricious. Furthermore, by failing to reconcile the differences between these two sections, Respondents failed to decide issues requiring resolution. The matter should be remanded pursuant to RCW 34.05.570(3)(f) and (i) so that Respondents may reconcile the differences between these two sections of the SCA.

G. The Court should award attorneys fees and costs to Petitioners.

RAP 18.1(a) and (b) provide that if applicable law grants a party the right to recover reasonable attorney's fees or expenses on review, the party must request an award in its opening brief. Petitioners hereby request an award of fees and costs as discussed below.

First, Petitioners request an award of attorneys fees, not to exceed $25,000, as allowed by Washington's Equal Access to Justice Act ("EAJA"), RCW 4.84.340–.360. EAJA allows for recovery of attorneys fees and costs on appeal of an agency action as follows:

> Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. A qualified party[116]

[116] Both Petitioners are qualified parties: Friends is a 501(c)(3) tax-exempt organization, and SOSA is a 501(c)(4) organization with a net worth less than five million dollars. *See* RCW 4.84.340(4) (definition of "qualified party").

> shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.

RCW 4.84.350(1). Awards under EAJA are capped at $25,000. RCW 4.84.350(2).

This case involves numerous important issues regarding the review of proposed energy facilities under EFSLA and the APA. The nature of this case caused the Thurston County Superior Court to conclude that "there is a significant precedential value to this case," that the case is "of fundamental interest," it "affects the public interest," and "it is of interest to other developers who might be interested in energy facilities in the future." CP 64–65. If Petitioners obtain relief on one or more important issues, the Court should award Petitioners their reasonable attorneys' fees up to $25,000, to be paid by Respondents.[117]

Second, in accordance with RAP 14.2, Petitioners request an award of their costs on appeal.

Third, as allowed by RCW 34.05.566(5) and regardless of whether Petitioners are a prevailing or substantially prevailing party,[118] Petitioners

[117] Because Respondents are the agencies whose decisions are under review, any award under EAJA should be made only against Respondents, and not against Respondents-Intervenors.

[118] The statute focuses on whether a party "unreasonably refuses to stipulate to shorten . . . the record," not on which party prevails or substantially prevails. RCW

request an award of one-half of their actual costs[119] for the preparation and transmittal of the agency record, to be taxed against the Applicant.

Although Petitioners are obligated to pay for the reasonable costs of preparing and transmitting the agency record, RCW 34.05.566(3), the record may be shortened by stipulation of all parties, RCW 34.05.566(4), and "[t]he court may tax the cost of preparing . . . copies of the record . . . [a]gainst a party who unreasonably refuses to stipulate to shorten . . . the record," RCW 34.05.566(5).

Here, the agency record exceeds 37,000 pages and includes considerable material not relevant to the issues on appeal.[120] Petitioners attempted on several occasions to stipulate to shorten the record. CP 285–86. The Applicant, however, steadfastly refused to even entertain discussion of shortening the record, giving little reason other than that the record should "completely capture[] all elements of the proceedings, including the depth and character of the opposition" to the Project. CP 269.[121] The Applicant's position was unreasonable.

34.05.554(5)(a).

[119] Petitioners' actual costs are $8,000.

[120] Examples of the many issues and documents not relevant on appeal include energy need and production, wind speed ratings, geology, fire hazards, cultural resources and other tribal issues, health and safety, socioeconomics, orders on procedural issues and related pleadings, notices of appearance, personal service contracts, certificates of service, and numerous filings by persons and entities not parties to this appeal.

[121] The Applicant also argued that shortening the record would be "bound to"

Moreover, the Applicant's unreasonable refusal to shorten the record substantially increased the costs for Petitioners. As EFSEC explained, the agency undertook a "lengthy and time-consuming process" to prepare the record. CP 276. Each of the 2,396 documents in the record were organized in chronological order by date received; itemized by document number, internal folder, internal file, date of document, sender, recipient, and description; paginated; and electronically linked to via the record index. AR Index; CP 276. If the Applicant had cooperated to allow shortening of the record, much of the time and costs incurred for these tasks could have been avoided, because far fewer documents would have been involved. The Court should tax one-half of Petitioners' actual costs for the preparation and transmittal of the record against the Applicant.

V. CONCLUSION

The Whistling Ridge Energy Project would be sited on forest land on the rim of the Columbia River Gorge, one of Washington's premier heritage landscapes. The Project site and vicinity are rich with sensitive wildlife habitat, historic scenic views, and communities of people drawn to the natural splendor and recreational opportunities of the area.

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cost more in attorneys' fees than it would save in costs. CP 269. This was mere speculation, however, because unlike all other parties, the Applicant was completely unwilling, as a threshold matter, to even entertain discussion of shortening the record. *See* CP 268–70, 286.

The Project would result in a myriad of adverse impacts to these resources, and yet would produce only a relatively small amount of energy. The significance and sensitivity of the affected resources underscore the importance of protecting the public interest and ensuring complete and proper implementation of all regulatory requirements.

As explained in this Brief, Respondents have not complied with the applicable law, thus unnecessarily imperiling significant resources. The APA, EFSLA, and EFSEC's rules have all been violated. The Court should reverse and remand for further review.

RESPECTFULLY SUBMITTED this 25th day of February, 2013.

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