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 (EFSEC), and CHRISTINE O. GREGOIRE, Governor of the STATE OF WASHINGTON,

Respondents,

and

WHISTLING RIDGE ENERGY LLC, SKAMANIA COUNTY, and KLICKITAT COUNTY PUBLIC ECONOMIC DEVELOPMENT AUTHORITY,

Intervenors-Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Friends of the Columbia Gorge and Save Our Scenic Area (collectively, the "Opponents") challenge Governor Christine Gregoire's approval of the Whistling Ridge Energy Project ("the Project"). The Governor based her approval on a unanimous recommendation from the Energy Facility Site Evaluation Council ("EFSEC") based on a substantial record developed through almost three years of proceedings.

According to EFSEC's unchallenged Final Environmental Impact Statement, the Project site has been actively managed for commercial timber production for a century. On and near the site are clear-cuts, logging roads, four high voltage transmission lines, a natural gas pipeline, a compressor station, cellular towers, communications facilities, and resource mining rock pits. The Department of Fish and Wildlife analyzed the Project and concluded that it conforms to statewide guidance on minimizing and mitigating wildlife habitat impacts.

The Opponents' challenge misrepresents the record and the applicable law. Because they have failed to sustain their burden of proof, the Governor and EFSEC respectfully request that this Court affirm the Governor's decision.

II. COUNTER-STATEMENT OF THE ISSUES

1. Whether this Court should affirm the Governor's decision as properly protective of wildlife, when that decision was based on a substantial record, including the Department of Fish and Wildlife's determination that the Project complies with statewide guidance on the avoidance, minimization, and mitigation of wind energy facility wildlife impacts.

2. Whether this Court should affirm the Governor's decision as properly compliant with the Legislature's policy statements concerning the employment of "available and reasonable methods" to minimize environmental impacts, when the record does not contain evidence that the additional methods proposed by the Opponents are either available or reasonable.

3. Whether this Court should affirm the Governor's decision as properly compliant with requirements regarding the Project's consistency with Skamania County's comprehensive land use plan and zoning ordinances, when the County zoning code authorizes the Project outright?

4. Whether this Court should affirm the Governor's decision with regard to the site certification agreement when that agreement:

> a. Properly restricts turbine construction to pre-approved construction corridors, within which micro-siting of individual turbines will occur,
>
> b. Properly ensures that EFSEC's analysis of Whistling Ridge's forest practices will be timed to occur within a reasonable proximity to the time those activities will occur, and
>
> c. Properly contains consistent requirements regarding Whistling Ridge's forest practices.

5. Whether this Court should deny the Opponents' request for attorneys' fees and costs when EFSEC's actions were substantially justified.

III. COUNTER-STATEMENT OF THE CASE

A. The Whistling Ridge Energy Project

Whistling Ridge Energy LLC ("Whistling Ridge") applied to build and operate up to fifty wind turbines in six pre-approved corridors on the Project site. AR 4325-6. EFSEC ultimately recommended—and the Governor ultimately approved—a smaller, thirty-five-turbine project constructed in five pre-approved corridors. AR 29323, 29329, 36688, 29274.[1]

The Project sits on 1,152 acres, of which fewer than fifty-seven acres will be required for the Project's permanent footprint. AR 28193. The site has been logged for the last hundred years and is permanently committed to commercial forestry. AR 28251-2, 20227, 15820. The area within the pre-approved turbine construction corridors will continue to be logged in the future. AR 4333-4, 28203-5. The site contains few large conifers, no late-successional stands, and no old forest habitats. AR 28252-3, 20226-7, 14825.

The site is crisscrossed with four major Bonneville Power Administration high voltage transmission lines in two clear-cut corridors

[1] The Project consists of wind turbine generators located in pre-approved corridors; meteorological towers; access roadways; electrical connection/interconnection and communication systems; and an operations and maintenance facility. AR 29274-5 (site certification agreement), 4326 (map of project elements), 4327-30 (descriptions of project elements). The Governor denied Whistling Ridge's request to construct turbine strings A-1 through A-7 and C-1 through C-8. AR 29323, 29329, 36688, 29274.

and contains a network of logging roads ranging in width from approximately eight to twenty feet. AR 28252. A natural gas pipeline is located on the north end of the site, a compressor station is located to the west, cellular towers and communications facilities are located nearby, and resource mining has left rock pits in the area. AR 28252.

The Department of Fish and Wildlife determined that the Project is consistent with the Department's 2009 *Wind Power Guidelines*, which provide statewide guidance to avoid, minimize and mitigate the wildlife habitat impacts of wind energy projects. AR 20227 (App. A)[2], 17997. According to the Department, the Project site is not a natural or native forest and has reduced suitability for wildlife habitat. AR 20222 (App. B), 20226-7 (App. A). The Department concluded that Whistling Ridge's wildlife surveys used standard nationwide protocols and best available science, and its habitat and wildlife mitigation measures fully mitigate for habitat losses for all species. AR 20222 (App. B), 20227 (App. A). The U.S. Fish and Wildlife Service determined that no Northern Spotted Owl habitat occurs on or near the site and the Project is unlikely to adversely affect the owl. AR 11519, 11522, 11508-9. The Department of Fish and Wildlife concurred. AR 20227 (App. A).

[2] The Department's December 20, 2010 letter is attached at Appendix A, the Department's September 17, 2010 letter is attached at Appendix B, the Department's September 22, 2009 letter is attached at Appendix C, and the Department's September 17, 2010 letter is attached at Appendix D.

The Project site is in the Columbia Gorge within seven miles of two incorporated cities and within three miles of approximately 400 residences and buildings. AR 28357-9. In the Gorge are large hydroelectric dams; high voltage transmission lines; heavily traveled highways; two rail lines; bridges spanning the Columbia River; commercial barge traffic; recreational users; industrial, commercial and residential development with thousands of residents; commercial timber harvesting; electric and natural gas transmission lines; the Camas Paper Mill and, in the distance, wind turbines. AR 29346-7, 16109, 16113, 16117, 18822.

B. The Energy Facility Site Locations Act

The Energy Facility Site Locations Act gives the Governor ultimate authority over approval of energy facilities. RCW 80.50.100(3). If the facility is approved, the Governor enters a site certification agreement as a contract between the applicant and the State regarding the location and operation of the facility. *Id.*, RCW 80.50.020(6). The Act preempts all contradictory laws and rules. RCW 80.50.110, .120.

The Act integrates the State's technical expertise into EFSEC as a single entity empowered to evaluate project applications, conduct hearings, and make site certification recommendations to the Governor.

RCW 80.50.030, .040, .071, .090, .100.[3] EFSEC prescribes environmental monitoring conditions, acts as the lead agency for compliance with the State Environmental Policy Act, carries out ongoing regulation of approved facilities, and, when projects require them, issues water quality and clean air permits. RCW 80.50.040, .071, .090, .100, WAC 197-11-938(1).

EFSEC's process starts upon receipt of a sufficient application. RCW 80.50.060(6), .070(1), WAC 463-60-010. During its analysis, EFSEC obtains information from a variety of sources including an administrative adjudication, public hearings, and information gathered pursuant to the State Environmental Policy Act. RCW 43.21C. RCW 80.50.090, WAC 197-11-938(1).

EFSEC's analysis is guided by RCW 80.50.010, which articulates Washington's policy to recognize the pressing need for increased energy facilities; ensure that the location and operation of such facilities produces minimal adverse environmental effects; and balance the increasing demands for energy facilities with the broad interests of the public. Such balancing is to include 1) adequate operational safeguards,

[3] When EFSEC is considering a proposed project it has six fixed members with expertise in energy facility siting and a varying number of additional members. RCW 80.50.030. For this project, EFSEC consisted of the chair appointed by the Governor and representatives of the state Departments of Fish and Wildlife, Natural Resources, Ecology, and Commerce, along with the Utilities and Transportation Commission and Skamania County. AR 29372, 29330.

2) environmental protection; 3) providing abundant energy at a reasonable cost; and 4) avoiding costly duplication and wasted time. RCW 80.50.010(1), (2), (3), (5).

C. Review of the Whistling Ridge Project

Whistling Ridge filed its application in March 2009 and an amended application in October 2009. AR 20, 4260. For almost three years, EFSEC held public information and public comment hearings, a land use consistency hearing, and an adjudicative hearing, and viewed the site and its vicinity. AR 29313-5, 29317. Pursuant to the State Environmental Policy Act, EFSEC held hearings and received comments, and in August 2010 issued a Final Environmental Impact Statement ("FEIS"). AR 29314, 28127, 23690, 24212, 24926, 25604.

Following the adjudication, EFSEC preliminarily concluded to deny Whistling Ridge's application to build turbines in corridors A-1 through A-7 and C-1 through C-8, but otherwise approved the Project subject to the conditions in the order. AR 29331, 29372 ("Adjudication Order") (attached as Appendix E). Based on the Adjudication Order, the FEIS and the record, in October, 2011 EFSEC unanimously recommended gubernatorial approval of a thirty-five turbine Project without corridors A-1 through A-7 and C-1 through C-8 and subject to conditions in EFSEC's orders and the draft site certification agreement. AR 29311,

29329 ("Recommendation") (attached as Appendix F). In December, 2011, EFSEC denied petitions for reconsideration ("Reconsideration Decision") (attached at Appendix G).[4] AR 36156.

EFSEC transmitted its recommendation package to the Governor. AR 29258-9. The recommendation package included EFSEC's Adjudication Order, Recommendation, Reconsideration Decision, the FEIS, and draft site certification agreement. AR 29258-9. The site certification agreement incorporates EFSEC's Adjudication Order and Recommendation. AR 29271 (The site certification agreement is attached at App. H).

On March 5, 2012, Governor Gregoire approved the Project and signed the recommended site certification agreement. AR 36687-8, 36689, 36730.

D. Proceedings in Superior Court

The Governor's decision is subject to judicial review under RCW 80.50.140(1) and RCW 34.05, the Administrative Procedure Act ("APA"). On April 4, 2012, the Opponents filed a petition for judicial

[4] Although error is not assigned to the Reconsideration Decision, the Opponents state that the order erred by discussing preemption without holding a preemption adjudication. Pet. Br. at 3 n.6. If considered, the argument should be rejected because a preemption adjudication is required only when EFSEC determines that a project site is *inconsistent* with local land use provisions. WAC 463-28-060(1). Because EFSEC determined that the site is *consistent* with local land use provisions, this requirement was not triggered. AR 36164. The Reconsideration Decision's reference to preemption was part of a hypothetical discussion of "the full range of possible outcomes" that included the result if the site were found to be inconsistent. AR 36164, 36162.

review and in October, 2012, the superior court certified the petition to this Court. CP 4, CP 861.

The Opponents ask this Court to set aside the Governor's and EFSEC's decisions to approve the Project, reverse EFSEC's orders, and remand for further review. Pet. Br. at 3. However, in the superior court, they conceded they do not seek a "reversal of EFSEC's ultimate conclusion that the project is allowed and authorized under EFSEC statutes" and are "not asking for a declaration that this [P]roject is blatantly illegal as a whole project." RP (10/26/12) at 60-61.

IV. ARGUMENT

In this Section IV, the Governor and EFSEC present their arguments in the following order: In Section A, they describe the applicable scope and standards of review. In Sections B through F, they address the Opponents' arguments in the same sequence followed by the Opponents in their Opening Brief.

A. Scope and Standards of Review

The final reviewable decision on an application for site certification is made by the Governor exercising discretion to approve or deny the application. RCW 80.50.140(1), .100(3). The Governor's decision here was based on EFSEC's recommendation package, including the Recommendation, the FEIS, and the Adjudication Order. AR 36687-8,

28258-9. This Court considers the Governor's decision as an adjudicative proceeding under the APA. *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Coun.* ("*ROKT"),* 165 Wn.2d 275, 304, 197 P.3d 1153 (2008); *see* RCW 80.50.140(1).

The APA establishes the scope of judicial review for adjudicative proceedings in RCW 34.05.570(3). The Opponents challenge the Governor's decision here under the following statutory provisions of RCW 34.05.570(3):

> (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure; (d) The agency has erroneously interpreted or applied the law; (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, . . . ; (f) The agency has not decided all issues requiring resolution by the agency; . . . (h) The order is inconsistent with a rule of the agency, unless the agency explains the inconsistency . . . ; or (i) The order is arbitrary or capricious.

RCW 34.05.570(3)(c), (d), (e), (f), (h), (i). These standards are well established in case law.[5]

[5] Courts review *de novo* whether an agency has **followed a prescribed procedure**. *Kittitas Cnty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 155, 256 P.3d 1193 (2011). Courts review alleged **errors of law** *de novo*. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000), giving substantial weight to the decision maker's interpretation of ambiguous statutes administered by that decision maker. *Pub. Util. Dist. No. 1 of Pend Oreille Cnty. v. Dep't of Ecology*, 146 Wn.2d 778, 790, 51 P.3d 744 (2002). Courts are especially deferential when the decision maker has subject matter expertise. *Port of Seattle v. Pollution Control Hearings Bd*., 151 Wn.2d 568, 591-95, 90 P.3d 659 (2004). Courts review findings of fact for **evidence that is substantial** when viewed in light of the whole record before the court. RCW 34.05.570(3)(e). Substantial evidence is "a

To prevail, the Opponents must prove two things: 1) under one of these statutory grounds, the Governor's action was invalid at the time it was taken, *and* 2) they have been substantially prejudiced by that action. RCW 34.05.570(1)(a), (d).

B. The Governor and EFSEC Properly Protected Wildlife

1. The Opponents incorrectly describe the law pertaining to wildlife impacts, and their description of the evidence is incomplete

In their introduction to the issue of wildlife impacts, the Opponents contend that the Governor and EFSEC failed to comply with what they

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sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." *ROKT*, 165 Wn.2d at 317. The substantial evidence standard is highly deferential to the administrative fact finder, *ARCO Prods. Co. v. Wash. Utils. & Transp. Comm'n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995), and evidence is reviewed in the light most favorable to the party who prevailed before the highest administrative fact-finder, *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001). The court will accept the fact-finder's determinations of witness credibility and the weight to be given to reasonable but competing inferences. *Id.* In reviewing mixed questions of law and fact the court applies the substantial evidence test to findings of fact and reviews questions of law *de novo*. *Tapper v. State Empl. Sec. Dep't,* 122 Wn.2d 397, 403, 858 P.2d 494 (1993). **Failure to decide all issues requiring resolution** occurs when findings are not made on matters which establish the existence or nonexistence of determinative factual matters. *Weyerhaeuser v. Pierce Cnty.*, 124 Wn.2d 26, 36, 873 P.2d 498 (1994). If an **order is inconsistent with an agency rule,** a court may grant relief if the agency has failed to explain the inconsistency by stating facts and reasons to demonstrate a rational basis for the inconsistency. *Port of Seattle*, 151 Wn.2d at 634. **Arbitrary and capricious action** is willful and unreasoning action, without consideration and in disregard of facts and circumstances. *Pierce Cnty. Sheriff v. Civil Serv. Comm'n of Pierce Cnty*., 98 Wn.2d 690, 695, 658 P.2d 648 (1983) (decided under former APA which contained the same standard). The test is very narrow and those who allege arbitrary and capricious action "must carry a heavy burden." *Id*. at 695. "Where there is room for two opinions, action is not arbitrary and capricious . . . even though one may believe the conclusion was erroneous." *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 609, 903 P.2d 433 (1995) (citations omitted). Under this test, a court "will not set aside a discretionary decision of an agency absent a clear showing of abuse" *ARCO Prods. Co.*, 125 Wn.2d at 812, and to be overturned, a discretionary decision must be manifestly unreasonable, *Hadley v. Dep't of Labor & Indus*, 116 Wn.2d 897, 906, 810 P.2d 500 (1991).

characterize as mandatory wildlife protection requirements in EFSEC's application rules. Pet. Br. at 16.

They assert that EFSEC's regulations require a "two-tiered process" comprised solely of an application that strictly conforms with WAC 463-60 and an adjudication. *Id.* In reality, EFSEC's process is far more comprehensive. In addition to the application and adjudication, EFSEC is statutorily *required* to obtain information from a variety of other sources. RCW 80.50.090(1) (informational public hearing), RCW 80.50.090(2) (land use consistency hearing), RCW 80.50.040(9), (12) (water and air permitting processes), RCW 43.21C and WAC 197-11-938(1) (State Environmental Policy Act).[6]

EFSEC's rules concerning the contents of applications must be read in the context of these statutes. WAC 463-60-010 defines the application rules in WAC 463-60 as setting forth "*guidelines* for preparation of applications." (Emphasis added). *See also* WAC 463-60-012, -065, -105, -115. EFSEC has the discretion to determine during its deliberations whether an application contains sufficient information *for EFSEC's purposes*. RCW 80.50.060(6) (applications need only contain "such information and technical studies as [EFSEC] may require"), WAC 463-60-010 ("[t]his information shall be in such detail as

[6] EFSEC has also been granted the discretion to acquire information through its own studies and by holding additional public hearings. RCW 80.50.040(6), .090(4).

determined by [EFSEC] to enable [EFSEC] to go forward with its application review"), WAC 463-14-080 (during its deliberations EFSEC will, whenever applicable, "[e]valuate an application to determine compliance with chapter 80.50 RCW and chapter 463-60 WAC").

In their introduction to the issue of wildlife impacts, the Opponents also omit important information about the record. In its application, Whistling Ridge provided extensive information about wildlife and habitat. AR 4271-73, 4307-09, 4442-75, 608-939. After working with the Department of Fish and Wildlife, Whistling Ridge proffered to the Department a habitat and wildlife mitigation proposal consisting of baseline monitoring, minimization of wildlife impacts, operational monitoring, and preservation of 100 acres of Oregon White Oak woodland and coniferous forest habitat. AR 4280, 16189-95, 15791-818. The Department emphasized that, in comparison to the habitat mitigation parcel, the Project site is not a natural or native forest, contains no old growth timber or spotted owls, and has a reduced suitability as wildlife habitat. AR 20222 (App. B), 20226-7 (App. A).

The Department concluded that the Project is consistent with statewide habitat protection guidance in the Department's 2009 *Wind Power Guidelines.* AR 20227 (App. A), 17957. The Department also reached four additional conclusions. First, the Department concluded that

Whistling Ridge's pre-project assessment and avian use surveys were consistent with the *Guidelines* and used "standard protocols utilized throughout the U.S." AR 20222 (App. B), 15820 (App. D).

Second, the Department concluded that Whistling Ridge's data "represent the best available science for predicting avian impacts." AR 20222 (App. B), 20224 (App. C), 15820 (App. D).

Third, the Department evaluated predicted wildlife impacts and concluded that it is "likely that the relationship between avian use and mortality would be similar to that evaluated in other projects" and that the Project would provide an opportunity to "better understand the relationship between wind energy development in western coniferous forests and wildlife response." AR 20222 (App. B), 15820 (App. D).

Fourth, the Department concluded that Whistling Ridge's proposed mitigation measures "fully mitigate for habitat losses for all species." AR 20227 (App. A). The Department stated that Whistling Ridge's proposed 100-acre mitigation parcel is consistent with the *Guidelines*; was developed to mitigate impacts at a 2:1 replacement ratio; contains high priority habitat qualities and wildlife species; and, unlike the Project site, is not subject to the impacts of ongoing commercial logging or wind energy operations. AR 15825, 20227 (App. A), 20223 (App. B), 15820-1 (App. D).

The United States Fish and Wildlife Service analyzed the potential impact of the Project on the Northern Spotted Owl and concluded that adverse impacts are unlikely because "[n]o designated spotted owl critical habitat occurs on or near the Project; therefore, no critical habitat will be affected." AR 11519, 11522.[7]

EFSEC's FEIS also analyzed the Project's potential habitat and wildlife impacts. Significantly, the Opponents do not challenge the adequacy of the FEIS or the conclusions it reached. Pet. Br. at 3-8. The undisputed FEIS supports the conclusions reached by the Department of Fish and Wildlife and the United States Fish and Wildlife Service. Habitat on the site is "greatly compromised," and will continue to be compromised in the future. AR 33121, 28252-3, 33171. There are no sensitive habitat features in or near the Project site and the site is not located within any known wildlife corridor, flyway, wildlife foraging area, or migratory route. AR 28255.

The FEIS also concluded that Whistling Ridge's avian surveys used the best available standard methods. AR 33141-2. While seven federal and state species of concern were identified in the vicinity of the Project site, and two more may be present, the Project's habitat impacts

[7] The Department of Fish and Wildlife agreed. AR 20227 (App. A). While the Opponents comment that the Project site is within the White Salmon North Spotted Owl Emphasis Area, they fail to explain how this matters in light of the site-specific analysis and conclusions of the Fish and Wildlife Service and the Department. Pet. Br. at 9.

will not differ substantially from the commercial logging already occurring on the site. AR 28263, 28302, 33173. The Project is unlikely to kill threatened or endangered species, and is unlikely to produce population impacts to birds from turbine collisions. AR 28302, 33113 ("the National Academy of Sciences . . . committee sees no evidence that fatalities caused by wind turbines result in measureable demographic changes to bird populations in the United States, with the possible exception of raptor fatalities in the Altamont Pass area[8] [of California]").

During the adjudication, EFSEC received additional evidence supporting the conclusions of the Department of Fish and Wildlife, the United States Fish and Wildlife Service, and the FEIS.[9] EFSEC received evidence that the Project site is currently in a degraded condition that is particularly suitable for wind energy development. AR 11483, 18184, 15981. Whistling Ridge's wildlife biologist, Greg Johnson, testified that Whistling Ridge's pre-project surveys used standard protocols and best available science. AR 11483, 15957, 15959, 15963, 15985, 15987, 15992 ("[t]he methods currently in use at Pacific Northwest wind projects apply methodologies that enjoy broad acceptance among the wind industry's

[8] Altamont Pass "is unique for its very high mortality of birds, especially Golden Eagles." AR 33191.

[9] The transcript of the adjudication is in the record at AR 16826-44, 16660-825, 17313-523, 17714-949, 18070-383, 18426-586, 18670-784, 18839-19056, 20265-364. The final witness and exhibit list is in the record at AR 21935-43.

diverse stakeholders with the exception of [Opponents' witness]"), 18075, 18077-8, 18091-2, 18132. EFSEC heard evidence that the predicted impacts of the Project would be similar to other projects even though the Project is the first project proposed in a coniferous forest habitat. AR 11483, 15957.

Based on this record, EFSEC concluded that 1) Whistling Ridge's wildlife biologists were more credible than the Opponents' witness, 2) the Project complies with the *Wind Power Guidelines*, 3) Whistling Ridge's pre-project studies are consistent with nationwide standards, present data that represent best available science, and comply with the *Guidelines*, and 4) the studies and mitigation measures required in the site certification agreement comply with the *Guidelines*. AR 29355, 36167, 36168, 29368, 29324. EFSEC's vote on these findings and conclusions was unanimous, including the Department of Fish and Wildlife's designated member.[10] AR 29372, 29330, 36170.[11]

In light of this substantial and compelling background, and as explained in more detail below, the Opponents have not proven any of

[10] The EFSEC member designated by the Department of Fish and Wildlife was not involved in the Department's review of the Project. RCW 34.05.458.

[11] EFSEC also unanimously reaffirmed in its Reconsideration Decision that the Project and Whistling Ridge's pre-project studies comply with the *Guidelines*. AR 36167-8. EFSEC emphasized that "while it may not call out for discussion in this Order every specific issue and argument raised by the petitions for reconsideration and answers, this does not mean the issue or argument was not considered by [EFSEC]. Limited or no discussion of a specific issue or argument simply means [EFSEC] finds it to be without sufficient merit to warrant discussion." AR 36158.

their specific allegations about wildlife impacts.

2. EFSEC properly considered avian surveys performed during all seasons of the year, in compliance with the avian survey rule, WAC 463-62-040(2)(f)

The Opponents contend that EFSEC violated WAC 463-62-040(2)(f) ("the avian survey rule") because Whistling Ridge did not perform avian surveys during the mid-August to mid-September[12] time period.[13] Pet. Br. at 17. The avian survey rule is one of the rules in

[12] The Opponents appear to focus on this particular sub-season of the year based on one internal email by a single Department of Fish and Wildlife employee named James Watson. Pet. Br. at 17 (citing AR 17996). The Opponents do not explain why Mr. Watson's email should be read to supersede the ultimate Department conclusion expressed by Renewable Energy Section Manager Travis Nelson that the Project's avian surveys used nationwide protocols, represented best available science, and were consistent with the *Wind Power Guidelines*. AR 20222-3 (App. B). They also appear to focus on this sub-season because the Olive-Sided Flycatcher migrates in August. Pet. Br. at 17-18 (citing AR 28273-4). However, they fail to disclose the unchallenged FEIS's conclusion that the Project site is "not very conducive for this species," AR 28273 and that "the data do not suggest that the site is in an area where [Olive-Sided Flycatchers] are concentrated [and t]herefore, no population impacts would be expected." AR 33202.

[13] The Opponents make two additional arguments about the avian survey rule that are both meritless and improperly before this Court. Pet. Br. at 19. First, the Opponents allege that EFSEC issued no findings or conclusions about Whistling Ridge's compliance with the avian survey rule, in violation of RCW 34.05.580(3)(f) (evidently referring to RCW 34.05.570(3)(f)), which authorizes judicial review when an agency has not decided all issues requiring resolution. This allegation is meritless because the unchallenged FEIS (which is part of EFSEC's recommendation package, AR 29259) specifically found that Whistling Ridge performed avian surveys during "all seasons" of the year, which is what the avian survey rule requires. AR 28277. The APA does not require extensive analysis. *US W. Commc'ns, Inc. v. Wash. Util. & Transp. Comm'n*, 86 Wn. App. 719, 731, 937 P.2d 1326 (1997); *accord, Nationscapital Mortgage Corp. v. State Dep't of Fin. Insts.*, 133 Wn. App. 723, 751-52, 137 P.3d 78 (2006). Explicit reconciliation of every conflicting shred of testimony is not required. *Miles v. Harris*, 645 F.2d 122, 124 (2d Cir. 1981); *accord, Graham v. Heckler*, 580 F. Supp. 1238, 1242 (S.D.N.Y. 1984).

Second, the Opponents contend that EFSEC's "failure" to make findings on Whistling Ridge's compliance with the avian survey rule means that it failed to "resolve all issues before making its recommendation" as required by WAC 463-30-320(6) ("the

WAC 463-62, which applies to the ongoing construction and operations of energy facilities. WAC 463-62-010. The avian survey rule requires wildlife surveys "during all seasons of the year."

EFSEC's unchallenged FEIS stated that Whistling Ridge performed avian surveys during "all seasons" of the year, i.e., "fall of 2004, summer of 2006, winter 2008-09 and spring of 2009." AR 28277. While the Opponents read the avian survey rule to require *particular sorts of surveys* during *particular sub-seasons* of the year, that is not what the rule says—the phrase used in the rule is "all seasons," not "all sub-seasons." As the Department of Fish and Wildlife concluded, Whistling Ridge's pre-project assessment and avian surveys represent the best available science, use nationally accepted standard protocols, and are consistent with the *Wind Power Guidelines*. AR 20222 (App. B).

In addition, WAC 463-62 (including the avian survey rule) establishes performance standards applicable to site certification

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recommendation rule." Pet. Br. at 19. The recommendation rule actually requires something slightly different, i.e., that every recommendation dispose of all contested issues. EFSEC's recommendation package did dispose of the avian survey rule issue when its unchallenged FEIS stated that Whistling Ridge's avian surveys were performed during "all seasons of the year." AR 28277. As described above, the APA does not require extensive analysis and reconciliation of all conflicting testimony is not required.

In addition, neither of these issues is properly before the Court. With regard to both issues, the Opponents failed to 1) exhaust their administrative remedies under RCW 34.05.534, AR 22202, 22288, 23197, 23242, 28768, 28808, 29092, 29180, and 2) assign error under RAP 10.3(a)(4). Pet. Br. at 4-8. In addition, their second argument is additionally flawed because they also failed to include the issue in their Petition for Judicial Review, CP 15 (§ 7.2.3), as required by RCW 34.05.546.

agreements and the ongoing construction and operation of energy facilities. WAC 463-62-010(1), (2). As a result, the avian survey rule continues to apply to the Project during its construction and operation[14] and will be considered when Whistling Ridge works with the Department of Fish and Wildlife to develop its habitat mitigation plan for EFSEC's approval and when the Project's Technical Advisory Committee does its work. AR 29285, 29288.

Based on this record, the Opponents have not demonstrated that EFSEC violated the avian survey rule, that it failed to decide issues requiring resolution, or that its recommendation failed to dispose of all contested issues.

3. EFSEC properly considered the potential for nighttime collision risk to songbirds, in compliance with the collision risk assessment application rule, WAC 463-60-332(2)(g)

The Opponents contend that EFSEC violated WAC 463-60-332(2)(g) ("the collision risk assessment application rule") because Whistling Ridge's application lacked an assessment of the nighttime collision risks for songbirds (passerines). Pet. Br. at 20-21. The collision risk assessment application rule refers to "[a]n assessment of risk of

[14] Although the site certification agreement supersedes other "negotiations, representations, or agreements," it specifically states that EFSEC may suspend or revoke the agreement if Whistling Ridge fails to comply with *EFSEC's rules*. AR 26279.

collision of avian species with any project structures, during day and night."

The Opponents' contention is meritless for three reasons. First, Whistling Ridge did assess the risk of collision of avian species during day and night, which is what the rule requires. While their *surveys* were done during the daytime, they *assessed the risk of collisions—both day and night*—by reference to existing data on the relationship between daytime survey information and subsequent post-construction mortality data, and using this relationship calculated a total (day *and night*) range of avian mortality. AR 857, 859, 861-2, 872-4, 4466, 4471-2.

Second, as discussed above at pages 12-13, EFSEC's application rules are not rigid, self-effectuating requirements, and EFSEC has multiple sources of information upon which to base its recommendation. The unchallenged FEIS concluded that no large-scale mortality of night migrating songbirds has been documented at wind energy facilities similar to what has occurred at communication towers. AR 33176, *see also* 15971. Most nocturnal songbird mortality occurs at lighted communication towers over 500 feet tall with supporting guy wires. AR 33176. The Project's turbines, in contrast, are substantially lower and have no guy wires, and turbine lighting has not been shown to increase songbird fatality. AR 29274, 33176, *see also* 15971.

The Counsel for the Environment's wildlife biologist, Don McIvor, confirmed that the Project site lacks geographic features warranting nocturnal avian migrant data collection. He stated that "there are not any obvious features which would funnel songbirds to concentrate in [the Project] area." AR 18283.[15] While noting that extenuating circumstances such as inclement weather might force songbirds to migrate at abnormally low elevations, he conceded that such events are difficult to sample and "very unlikely" to occur. AR14829, 18283. Mr. McIvor recommended post-project monitoring and adaptive management by a Technical Advisory Committee. AR 18283-4. This is what the site certification agreement requires. AR 29288, 29300.

The Department of Fish and Wildlife confirmed these conclusions when it found that Whistling Ridge's pre-project assessment and avian use surveys utilize standard nationwide protocols, represent the best available science for predicting avian impacts, and are consistent with the *Wind Power Guidelines*. AR 20222 (App. B). Don McIvor confirmed that "the fact that [Whistling Ridge's wildlife biologist] did not [conduct surveys for nighttime migration] is actually pretty consistent with the wind energy *[G]uidelines* . . . ." AR 18282-3 (italics added).

[15] When EFSEC receives an application, the Attorney General appoints a Counsel for the Environment to represent the public interest in environmental protection. RCW 80.50.080.

Based on this record, EFSEC had ample reason to conclude that Whistling Ridge's wildlife studies complied with WAC 463-60-332, which includes the collision risk assessment application rule, and that "additional measures . . . add little additional protection." AR 29368.[16] EFSEC explained its decision, specifically referring to the FEIS, and to the studies' compliance with the *Wind Power Guidelines*, AR 29355-6, 29320, 29368.[17]

Based on this record, although WAC 463-60 does not rigidly mandate the contents of Whistling Ridge's application, EFSEC properly found that Whistling Ridge's studies had complied with the collision risk assessment application rule. EFSEC's conclusions thus both complied with the rule and were supported by substantial evidence.[18]

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[16] As the Opponents recognize, EFSEC's reference to WAC 463-60-362, rather than to WAC 363-60-332, was a typographical error. Pet. Br. at 21 n.54.

[17] While the Opponents complain that EFSEC made no specific findings or conclusions on the collision risk assessment application rule (WAC 463-60-332(2)(g)), they concede that EFSEC found that Whistling Ridge complied with WAC 463-30-332 and acknowledge that this finding could have been intended to include the collision risk assessment application rule. Pet. Br. at 21. EFSEC's finding indeed encompasses the rule. The APA does not require extensive analysis. *US W. Commc'ns, Inc.,* 86 Wn. App. at 731, *accord*, *Nationscapital*, 133 Wn. App. at 751-52. In addition, this question is not properly before this Court because the Opponents failed to 1) exhaust their administrative remedies as required by RCW 34.05.534 (AR 22202, 22288, 23197, 23242, 28768, 28808, 29092, 29180); 2) include this issue in their Petition for Judicial Review, CP 14 (§ 7.2.2), as required by RCW 34.05.546; or 3) properly assign error under RAP 10.3(a)(4). Pet. Br. at 4-8.

[18] In footnote 55, the Opponents challenge Finding 27 in the Adjudication Order as impermissibly stating a general principle that "post-construction remedial measures would 'provide greater wildlife preservation' benefit than … pre-application studies." Pet. Br. at 22, n.55. Finding 27 did not address the general topic of "post-construction remedial measures" versus "pre-application studies." Finding 27 narrowly stated that "post construction *mortality studies* will provide a greater benefit than *preconstruction*

4. EFSEC properly determined that the Project complies with the *Guidelines* application rule, WAC 463-60-332(4)

The Opponents contend that EFSEC violated WAC 463-60-332(4) ("the *Guidelines* application rule") because Whistling Ridge's application did not include what the Opponents describe as mandatory information required by the *Wind Power Guidelines*. Pet. Br. at 22-23.

This contention is without merit because, as described above at pages 12-13, EFSEC's application rules, including the *Guidelines* application rule, do not establish self-effectuating mandatory requirements. Moreover, the *Guidelines* rule itself does not state that applications "must comply with" the *Wind Power Guidelines*, but instead states that applications shall give "due consideration to" and "shall consider" them. WAC 463-60-332(4). Thus, the *Guidelines* application

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studies" when evaluating injuries from physical risks such as turbine blade strikes. AR 29368 (emphasis added). The Counsel for the Environment's wildlife biologist, Don McIvor, stated that the Project site lacks features warranting pre-construction nocturnal avian migrant studies because the circumstances that might force abnormally low elevation songbird migration are unpredictable and rare. AR 14829. He therefore recommended a combination of post-construction studies and adaptive management. AR 18283-4. In other words, the best time to study the impact of actual physical hazards is when actual physical structures are in place. Based on the record, EFSEC correctly concluded that post-construction mortality studies, combined with adaptive management, will provide more benefit than pre-construction studies performed in a vacuum. As result, the Opponents have not demonstrated that Finding 27 is unsupported by substantial evidence or that it violates a rule. In addition, this issue is not properly before the Court because the Opponents failed to 1) exhaust their administrative remedies under RCW 34.05.534, AR 22202, 22288, 23197, 23242, 28768, 28808, 29092, 29180, 2) include the issue in their Petition for Judicial Review, CP 15 (§ 7.2.2), as required by RCW 34.05.546, or 3) assign error under RAP 10.3(a)(4). Pet. Br. at 4-8.

rule, by its own terms, requires consideration of, not strict compliance with, the *Wind Power Guidelines*.

Moreover, the *Wind Power Guidelines* are themselves not written in mandatory terms. They have no regulatory effect, but instead provide an "overview of . . . considerations" and "guidance." AR 17998, 18003. They state that the goal of pre-project assessments is to collect "suitable" information, that such assessments "may" use relevant information from projects in comparable habitat types, and that the site-specific components and duration of such assessments will vary depending on a variety of factors, including the availability of "applicable" information. AR 18005. Existing information on species and potential habitats in the vicinity of the project area "should" (not "must") be reviewed, and one or two years of avian use studies is "recommended" (not "required"). AR 18005, 18006.

The Department of Fish and Wildlife—the author of the *Wind Power Guidelines*—concluded that Whistling Ridge's pre-project assessment and avian studies complied with the *Wind Power Guidelines* and that, because no data exists from constructed wind projects in other industrial forests, represent the best available science for predicting impacts. AR 20222 (App. B).

Although the Opponents complain that the Department did not explain how such compliance could have occurred without analysis of

"existing sources of data, and . . . less than one full year of avian surveys," Pet. Br. at 27, they fail to understand that the *Wind Power Guidelines* do not contain mandatory requirements. The *Wind Power Guidelines* do not constrain the Department's ability to analyze this Project at this location and to conclude—as it did—that Whistling Ridge's pre-project assessment and avian surveys were "consistent with standard protocols utilized throughout the U.S.," that Whistling Ridge's "data represent best available science," and that "no similar data exist[s] for constructed wind energy projects in managed coniferous forest habitats that might help inform impact predictions." AR 20222 (App. B).

The Opponents challenge the Department's conclusion that the Project's avian use and mortality would be similar to other projects because that use/mortality relationship has been reasonably consistent across habitat types, and assert that it is impossible to predict mortality without knowing the level of avian use at the Project site. Pet. Br. at 27-28. The Opponents fail to disclose, however, that the Department *did* specifically address the level of avian use at the Project site, concluding that Whistling Ridge's pre-project assessment and *avian use surveys* are consistent with standard nationwide protocols, represent best available science, and are consistent with the *Wind Power Guidelines*. AR 20222

(App. B). EFSEC's unchallenged FEIS confirmed this conclusion. AR 33141, 33142, 33167.

The Opponents point to Whistling Ridge's wildlife biologist, Greg Johnson's, statement that he did not collect existing avian use data at other commercial forestlands, including commercial forestlands managed by the Department of Natural Resources and the United States Forest Service. Pet. Br. at 24-25, AR 18156. They fail to disclose that Whistling Ridge did obtain Northern Spotted Owl survey data from the Department of Natural Resources and avian survey data from the Klickitat County Energy Overlay Draft and Final EIS. AR 11507, 4456-7, 4272. They also fail to disclose the balance of Mr. Johnson's testimony that "data collected on site is always going to be the best predictor of risk," AR 18157, and that any off-site data would "have little value," AR 18156, due to methodological differences between wind farm surveys and commercial forestland surveys. AR 18155. Not only have the Opponents not demonstrated that useful commercial forestland data actually exist, but they undercut their own argument by paradoxically contending that Whistling Ridge should have performed two years of avian surveys due to the "*dearth* of existing information." Pet. Br. at 27 (emphasis added).

The Opponents criticize Whistling Ridge for not including data from other wind energy facilities proposed in the Pacific Northwest,

Pet. Br. at 26, but fail to show that such data exists or that the sites for such proposed facilities bear any scientifically valid similarity to the Project site.

The Opponents complain that Whistling Ridge failed to perform avian use surveys for a consecutive twelve-month period. *Id*. They have not demonstrated that the Department interprets the *Wind Power Guidelines* in this fashion. To the contrary, Whistling Ridge's biologist, Greg Johnson, stated that the *Wind Power Guidelines* are referring to surveys performed in four *seasons*. AR 15968. The unchallenged FEIS concurs. AR 33182, 33195.

The Opponents contend that Whistling Ridge should have collected Partners in Flight breeding data for two bird species (the Olive-Sided Flycatcher and the Vaux's Swift) but fail to explain how this data would have added anything of merit to the other information that Whistling Ridge provided about these species. Pet. Br. at 24, AR 15985-6, 868, 875, 884.

Based on this record, EFSEC did not violate the *Guidelines* application rule, and EFSEC's conclusion that the Project complied with the *Wind Power Guidelines* was not arbitrary and capricious or

unsupported by substantial evidence. [19]

5. EFSEC properly addressed habitat mitigation through ongoing regulation in response to current site conditions and scientific analysis, in compliance with the mitigation planning application rule, WAC 463-60-332(3)

The Opponents contend that EFSEC violated WAC 463-60-332(3) ("the mitigation planning application rule") because Whistling Ridge's application at AR 4474-75 lacked a detailed habitat mitigation plan. Pet. Br. at 29.[20] The mitigation planning application rule asks applicants

[19] As a result, contrary to the assertion at Pet. Br. at 29 n.68, there was no "inconsistency" with the *Guidelines* rule necessitating an explanation by EFSEC pursuant to RCW 34.05.570(3)(h).

[20] The Opponents complain that EFSEC failed during its deliberations to evaluate Whistling Ridge's application for compliance with the mitigation planning application rule under WAC 463-14-080(1) ("the deliberations rule"). Pet. Br. at 30, 32. The Court should reject their complaint for three reasons. First, the deliberations rule is part of a chapter intended "to publicize significant policy determinations and interpretations by which [EFSEC] is guided." WAC 463-14-010. The deliberations rule, by its own terms, publicizes certain components of EFSEC's *internal analytic process* during its *deliberations*, stating that "whenever applicable" EFSEC will "[e]valuate an application to determine compliance with chapter 80.50 RCW and chapter 463-60." (Emphasis added.) Nothing in the rule expresses an intent to create enforceable rights or legal liabilities or to otherwise expose EFSEC's internal deliberations to public scrutiny. Second, the Opponents have not demonstrated how the presence or absence of an internal EFSEC evaluation about the application would be material to the ultimate question of Project approval based on the entire record before the Governor. Findings are not required on issues that are immaterial to the outcome of a dispute. *See In re Welfare of A.B.*, 168 Wn.2d 908, 924-25, 232 P.3d 1104 (2010); *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 707, 592 P.2d 631 (1979). Third, EFSEC's compliance with the deliberations rule is not properly before this Court because the Opponents failed to 1) exhaust their administrative remedies under RCW 34.05.534 (AR 22202, 22288, 23197, 23242, 28768, 28808, 29092, 29180); 2) include this issue in their Petition for Judicial Review, CP 16-17 (§ 7.2.6), as required by RCW 34.05.546; or 3) properly assign error under RAP 10.3(a)(4). Pet. Br. at 4-8.

Based on their mistaken assumption that the application rules are rigid requirements, and that EFSEC failed to force Whistling Ridge's application to include an elaborate (and speculative) habitat mitigation plan in its application, the Opponents also argue that EFSEC therefore failed to "decide issues requiring resolution" citing

to discuss habitat and species measures such as avoiding, minimizing, and mitigating impacts. WAC 463-60-332(3). Whistling Ridge's application contained such information. AR 4453-4, 4456, 4470-1, 4474-5. The FEIS also described the design, construction, and operation activities that would mitigate impacts to biological resources. AR 28172-83.

In addition, like EFSEC's other application rules, the mitigation planning application rule imposes no inflexible mandates and EFSEC treated it accordingly. Instead of requiring Whistling Ridge to speculate in its application about what comprehensive, ongoing habitat mitigation actions might ultimately satisfy EFSEC and the Governor, EFSEC approached habitat mitigation planning as it has at the other wind energy facilities it regulates, by adopting an adaptive management approach.

WAC 463-30-320(6) ("the recommendation rule"). Pet. Br. at 32. As described above in footnote 13, the recommendation rule actually requires that recommendations dispose of all *contested* issues. EFSEC's recommendation package disposed of compliance with the habitat mitigation planning application rule, and all other habitat related issues, for the reasons described in the text of this brief. Moreover, EFSEC's compliance with the recommendation rule is not properly before this Court because the Opponents failed to exhaust their administrative remedies under RCW 34.05.534 (AR 22202, 22288, 23197, 23242, 28768, 28808, 29092, 29180).

On the same basis, the Opponents contend that EFSEC should have issued findings and conclusions about whether Whistling Ridge's application complied with the mitigation planning application rule, citing RCW 34.05.580(3)(f). Pet. Br. at 32. They again evidently intend to refer to RCW 34.05.570(3)(f), which authorizes judicial review when an agency has not decided all issues requiring resolution. However, the application rules are not mandatory, so they have not demonstrated that any findings on this question were required. They have also not demonstrated how the presence or absence of such a decision is material in light of all of the multiple sources of information available to EFSEC. As described above in footnote 20, findings are not required on issues that are immaterial to the outcome of a dispute. In addition, EFSEC's compliance with RCW 34.05.570(3)(f) is not properly before this Court because the Opponents failed to exhaust their administrative remedies under RCW 34.05.534 (AR 22202, 22288, 23197, 23242, 28768, 28808, 29092, 29180).

AR 36158. EFSEC regulates such facilities on an on-going basis by requiring and responding to pre- and post-construction studies and by consulting with subject matter experts such as the Departments of Fish and Wildlife, Ecology, Natural Resources, affected tribes, and the United States Fish and Wildlife Service. AR 29283, 29285-86, 29284, 29299, 29300, 29301, 29287, 29294, 29291, 29300. This use of post-approval plans and programs is "consistent with [EFSEC's] long established and successful procedures . . . requir[ing] development of specific compliance provisions during the final design stages of project development, and during and after project construction, with prescribed [EFSEC] oversight." AR 36158.[21]

The Department of Fish and Wildlife recommended this regulatory approach to ensure that "pre-construction predictions of wildlife impacts are, in fact, monitored over time and evaluated in order to manage adaptively in response to the facts as they are borne out" by the Project. AR 15961-2, accord AR 37038-9. The United States Fish and Wildlife Service and the Counsel for the Environment's wildlife biologist similarly

[21] See also AR 29354, 29368 ("[a]daptive management utilized through a Technical Advisory Committee will provide benefit by bringing appropriate interests and skills to studies and development of remedial measures"); AR 29356 (EFSEC "provides mitigation measures through . . . ongoing study aimed at providing continuing improvement."); AR 29357 (the site certification agreement will include "post-construction . . . studies to increase understanding . . . and to pursue and recommend suggestions to reduce . . . mortality" and "adaptive management strategies to optimize the balance between measures that work and effective operation of the facility" and EFSEC "support[s] performance analysis . . . in forest environments. . . .").

endorsed adaptive management strategies. AR 29356-7, 14838. Intervenor below, Seattle Audubon Society, "strongly agrees with having [EFSEC] including this type of adaptive management requirement in its site certification." AR 22362-3.[22]

To implement this regulatory choice, the site certification agreement requires Whistling Ridge to undertake four major habitat mitigation activities: 1) coordinate with the Department of Fish and Wildlife to develop for EFSEC approval a habitat mitigation plan that satisfies the *Guidelines*, AR 28285-6; 2) monitor post-construction avian impacts, AR 29300; 3) create a Technical Advisory Committee to evaluate avian and other monitoring data and make recommendations to EFSEC about additional studies or mitigation, AR 28288; and 4) supply supplemental compensatory mitigation if actual impacts exceed predicted

[22] The record illustrates the wisdom of this approach. Upon the realignment of transmission feeder lines at the already-constructed, EFSEC-regulated, Wild Horse Power Project, the Department of Fish and Wildlife recommended raptor perch guards to avoid sage grouse predation. AR 37036. At the time installation was to occur, emerging scientific information called into question the effectiveness of this approach. *Id*. The Technical Advisory Committee thereupon required studies that ultimately suggested that perch guards could exacerbate predation. *Id*. Based on the study results, the Department of Fish and Wildlife and the United States Fish and Wildlife Service recommended that EFSEC implement alternative protective measures. AR 37037-8. The Department's biologist specifically recommended such a "function based outcome rather than to be fixated on a potential option that doesn't seem to have support of the science on the ground today. . . ." AR 37038. The Department's designated EFSEC member stated, "I appreciate the ability for the experts to get out there on the ground and try to not be stuck with decisions that we made several years ago on a new industry that's just now really coming on in the shrub steppe [habitat] but be able to adapt over time and maneuver the mitigation in the best way possible." AR 37038-9.

impacts. AR 29286.[23]

While the Opponents complain that this approach defers regulatory decisions to the future, they do not offer a legally valid justification for their contention that doing so is impermissible. Pet. Br. at 31. They point to the habitat mitigation planning application rule but, as described above, this rule does not impose mandatory requirements on Whistling Ridge's application. They point to the requirement that EFSEC hold one adjudicative hearing, but RCW 80.50 and the APA do not require—and logic would not allow—EFSEC to accelerate to the adjudication all regulatory decisions that could occur over the thirty-year life span of the Project. AR 4333.[24] The Governor and EFSEC manage on-going

[23] The site certification agreement also requires Whistling Ridge to take a host of additional steps to protect wildlife and habitat: protect wetlands, AR 29287; develop in consultation with the Department of Fish and Wildlife a habitat restoration plan for temporarily disturbed areas, AR 29288; comply with the Forest Practices Act, AR 29294, 29302; pay for a full-time, on-site environmental monitor, AR 29295-6; develop an environmental compliance program including habitat restoration and other mitigation measures, AR 29295; provide weekly environmental monitoring reports to EFSEC that include habitat mitigation, AR 29295; implement best management practices to minimize impacts to habitat and wildlife, AR 29296-7, 29301-2; implement post-construction avian monitoring in consultation with the Department of Fish and Wildlife to quantify and address impacts to avian species and assess the adequacy of mitigation measures, AR 29300; implement compliance with the Bald and Golden Eagle Protection Act in consultation with the Department of Fish and Wildlife and the United States Fish and Wildlife Service, AR 29300; implement pre- and post-construction bat monitoring and mitigation activities, AR 29301; develop and implement post-Project site restoration plans, AR 29284-5, 29304; comply with the Wind Power Guidelines, AR 29356; use low-impact lighting to reduce the attraction of insect-feeding species, AR 29357; mitigate impacts through micro-siting, AR 29357; and avoid turbine locations that separate nesting areas from food gathering areas, AR 29357, 29368.

[24] RCW 80.50.090(3) requires EFSEC to hold one adjudicative proceeding so that "any person shall be entitled to be heard in support of or in opposition to the application" but RCW 80.50 contains no requirements regarding the substantive contents

mitigation needs at the other EFSEC-regulated wind energy facilities by adaptive management, and the Legislature has not restricted the Governor and EFSEC's authority to do so. RCW 80.50.010; RCW 80.50.040.[25]

Although the Opponents contend that an adaptive management approach to regulation "preclude[es] meaningful participation in a public review of a proper mitigation plan, Pet. Br. at 31, 32, the Opponents have had—and will continue to have—ample opportunity for input on habitat mitigation activities at the Project site. If the site certification agreement is amended, EFSEC will hold at least one public hearing. WAC 463-66-030. If an EFSEC decision triggers review under the State Environmental Policy Act, the Opponents will have opportunities to comment. WAC 463-47-020 (citing WAC 197-11-502, -510, -535). EFSEC also provides additional public comment opportunities. RCW 80.50.090, WAC 463-06-050, AR 37119, 37206, 37261. Legal mechanisms also exist for seeking judicial review of EFSEC's decisions. *ROKT*, 165 Wn.2d at 295.

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of such an application. RCW 80.50.020(3) simply defines "application" as "any request for approval of a particular site or sites filed in accordance with the *procedures* established pursuant to this chapter." (Emphasis added.) The Opponents do not challenge EFSEC's interpretation or application of these statutes on constitutional due process grounds, nor do they contend that these statutes dictate the contents of Whistling Ridge's application.

[25] The APA specifies that judicial review of such a discretionary choice is limited to assuring that the choice has been made in accordance with the law, with the reviewing court declining to itself undertake the exercise the discretion placed by the legislature on the executive branch. RCW 34.05.574.

EFSEC fully complied with the habitat mitigation planning application rule. The legislature did not restrict the Governor's discretion to approve an adaptive management approach to project regulation, and the Opponents have not demonstrated that they lack meaningful opportunities for input into future regulatory decisions.

6. EFSEC complied with the project impact application rule, WAC 463-60-332(3)(e), by properly identifying the amount of potentially impacted habitat

The Opponents contend that EFSEC violated WAC 463-60-332(3)(e) ("the project impact application rule") by making allegedly inconsistent findings about the amount of potentially impacted habitat. Pet. Br. at 32.[26] The project impact rule refers to the identification and

[26] The Opponents also contend that EFSEC failed to determine "whether the calculations in the application are correct," as allegedly required by WAC 463-14-080(1) ("the deliberations rule"), and that EFSEC therefore violated RCW 34.05.570(3)(f), which authorizes judicial review when an agency has not decided all issues requiring resolution. Pet. Br. at 32, 34. The Opponents have not identified which calculations in the application they think EFSEC failed to double-check. Moreover, as described above in footnote 20, the deliberations rule publicizes EFSEC's internal analytic process during its deliberations but does not open those deliberations to attack. Even if it did, the rule refers to evaluating the application to determine compliance with EFSEC's statutes and rules. It does not state that EFSEC must double-check all of the many scientific and mathematical calculations in large energy facility siting applications. As a result, EFSEC "failure" to double-check the calculations in the application could not have violated the deliberations rule. The Opponents have also failed to draw any logical connection between alleged unchecked calculations in Whistling Ridge's application and their claim that EFSEC made inconsistent findings about the amount of impacted habitat. They therefore failed to demonstrate how any lack of findings under the deliberations rule could be material. *See In re Welfare of A.B.*, 168 Wn.2d at 924-25 (findings are not required on issues that are immaterial to the outcome of the dispute); *Daughtry*, 91 Wn.2d at 707. EFSEC did not violate either the deliberations rule or RCW 34.05.570(3)(f). In addition, EFSEC's compliance with these provisions of law is not properly before this Court because the Opponents failed to 1) exhaust their administrative remedies under RCW 34.05.534 (AR 22202, 22288, 23197, 23242, 28768,

quantification of compensation for impacts or losses to existing species due to project impacts and mitigation measures. WAC 463-60-332(3)(e).

The Opponents' attempt to cherry-pick portions of the record to support their argument should be rejected. As with decisions of the courts,[27] administrative decision should be read as a whole.[28] This table illustrates that EFSEC's findings about potentially impacted habitat were consistent with each other and with the unchallenged FEIS:

Project Element	FEIS	Adjudication Order	Recommendation
Project Area[29]	1,152 acres (AR 28193)	"approximately 1152 acres" (AR 29335)	"about 115 acres"[30] (AR 29311) "approximately 1000 acres" (AR 29313)

28808, 29092, 29180); 2) include this issue in their Petition for Judicial Review, CP 18-19 (§ 7.2.8), as required by RCW 34.05.546; or 3) properly assign error under RAP 10.3(a)(4). Pet. Br. at 4-8.

[27] *See Bennett Veneer Factors, Inc. v. Brewer*, 73 Wn.2d 849, 853, 441 P.2d 128 (1968) (appellate court will read ambiguous finding of trial court "in context with the court's other findings"); *In re Marriage of Smith*, 158 Wn. App. 248, 256, 241 P.3d 449 (2010) (appellate court reads divorce decree "in its entirety and construe it as a whole"); *Callan v. Callan*, 2 Wn. App. 446, 449, 468 P.2d 456 (1970) ("judgment must be read in its entirety").

[28] *See Office of Pub. Util. Counsel v. Texas-New Mexico Power Co.*, 344 S.W.3d 446, 450-51 (Tex. App. 2011) ("In construing orders of an administrative agency, we apply the same rules as when we interpret statutes . . . ."); *Philip Morris USA Inc. v. Tolson*, 176 N.C. App. 509, 515, 626 S.E.2d 853, 858 (2006) ("In interpreting an agency order, the order 'should be read as a whole.'"); *Cedar Rapids Steel Transp., Inc. v. Iowa State Commerce Comm'n*, 160 N.W.2d 825, 838 (Iowa 1968) ("in the interpretation of an adjudicatory order the entire instrument must be considered . . . in order to determine its intent and purpose").

[29] Defined in the FEIS, AR 28193 n."a," as the area shown in Figure 2-1, AR 28192, which delineates a very large overall project site boundary, the majority of which will undergo no Project-related development.

[30] Defined in the Recommendation as "a site" of about 115 acres. AR 29311. The omission of a "2" as the last digit is an obvious typographical error, as confirmed by the later reference in the Recommendation to "approximately 1000" acres. AR 29313.

Wind Facility Footprint [31]	384 acres (AR 28193)	384 acres (AR 28335)[32]	N/A
Total Area to be Developed Within Project Area	56.15 acres (permanent impact) and 52.1 acres (temporary impact) (AR 28193)	N/A	"[a]bout 50 acres…for… the permanent footprint [and] "about 50 additional acres temporarily affected" (AR 29313) "[a]bout 100 acres would be affected in all, with about half…temporarily (AR 29320) "About 100 acres will be impacted by temporary construction activities;[33] the permanent…footprint will be about 50 acres" (AR 29323)

According to the unchallenged FEIS, the overall "project area" is 1,152 acres, with the actual "wind facility footprint" restricted to 384 of those 1,152 acres. AR 28193 ("Area Proposed for EFSEC Certification and Micrositing"). In other words, 1,152 acres are subject to EFSEC regulation as the Project "area" but only 384 acres of the larger project area is subject to *potential* on-the-ground development. Of those 384

[31] Defined in the FEIS as "the total area of all corridors and development study areas in the Project boundary with overlapping areas removed, in which development potentially could take place." AR 28193, n."b."

[32] Defined in the Adjudication Order as "permanently developed for placement of the turbine towers, access roads, substations, underground and overhead transmission lines, and an operations and maintenance facility." AR 28335.

[33] Because temporary construction activities will also occur in the permanently impacted areas, about 100 acres will be impacted be temporary construction activities.

acres, *actual* on-the-ground development is restricted to less than fifty-seven acres of permanent impacts and less than fifty-three acres of temporary impacts, AR 28193 ("Impacts" and "Total Area to be Developed within Project Area").

The Opponents express confusion about whether these numbers reflect Whistling Ridge's original fifty-turbine application or the smaller thirty-five-turbine project ultimately approved by the Governor. Pet. Br. at 33. The unchallenged FEIS expressly states that it analyzed the original project conformation of up to fifty turbines. AR 28191.

The Opponents also allege in passing that EFSEC failed to determine which portions of the Project site require mitigation. Pet. Br. at 32.[34] This assertion is contradicted by the portion of the table above labeled "Total Area to be Developed Within Project Area," which shows that fewer than fifty-seven acres will be permanently impacted and

[34] The Opponents' related contention that Whistling Ridge proposes height restrictions on "hundreds of acres of forestland to provide wind clearance" and that such height limitations might be maintained by "frequent clear-cuts or by replacing forested habitat with grass or shrubs" Pet. Br. at 34, is inaccurate. AR 4333-6, 11331. As both the application and the unchallenged FEIS stated, many of the remaining stands of trees in the turbine corridors are near maturity and already subject to existing harvest plans. AR 4333-4, 28204-6. A cleared area will be maintained approximately fifty feet in all directions from each turbine and planted with native grasses and low-growing shrubs. AR 4333, 28204. Trees will be planted between fifty and 500 feet around each turbine. *Id.* From fifty to 150 feet from each turbine tree heights will be restricted to fifty feet above the base of the turbine; between 150 and 500 feet from the turbine tree heights will be restricted to approximately fifty feet above the turbine base within an area formed by a ninety-degree angle centered on the prevailing wind. AR 28204, 28206. However, it is expected that many of the replanted trees will grow at a rate that will not require any artificial limits. *Id.*, AR 11331.

fewer than fifty-three acres will be temporary impacted. The *exact* size and locations of such impacts within the 384-acre Project footprint will be determined through micro-siting as final construction plans are developed and the on-the-ground habitat mitigation planning is completed. AR 4316, 36700, 29313.

Based on this record, EFSEC complied with the project impact rule, made consistent findings, was not arbitrary and capricious, and decided all issues requiring resolution.

7. EFSEC complied with the no-net-loss rule, WAC 463-62-040(2)(a)

The Opponents contend that EFSEC violated WAC 463-62-040(2)(a) ("the no-net-loss rule"), which requires no-net-loss of fish and wildlife habitat function and value. Pet. Br. at 34.[35] The no-net-loss rule is part of the chapter that sets ongoing performance standards for the construction and operation of energy facilities. WAC 463-62-010.

[35] The Opponents' assignments of error and specification of related issues pertaining to the amount of impacted habitat also recite the following issue: 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. Pet. Br. at 5. Although the Opponents make a passing reference to the rule that refers to the 1:1 mitigation ratio (WAC 463-62-040(2)(d)), the Opponents provide no argument or citation to authority in support of their contention. Pet. Br. at 32-34, 36-40. Courts generally do not consider such arguments that violate RAP 10.3(a)(5). *Hollis v. Garwell, Inc.*, 137 Wn.2d 683, 689 n.4, 974 P.2d 836 (1999). If the Court nonetheless considers this issue, the Court should reject the Opponents' contention because, as described above at pages 19-20, rules in WAC 463-62 (such as the 1:1 mitigation ratio rule) have ongoing force and will be considered during the preparation and implementation of a habitat mitigation plan. AR 29285-6. The Opponents have therefore not demonstrated that EFSEC violated the 1:1 mitigation ratio rule.

The Opponents have failed to demonstrate that EFSEC violated the no-net-loss rule.[36] The Department of Fish and Wildlife deemed the Project to "*fully* mitigate for habitat losses for *all species,*" noting that the 100-acre habitat mitigation parcel proposed by Whistling Ridge is calculated at a 2:1 replacement ratio.[37] AR 20227 (emphasis added), 20223.[38] In its recommendation package, EFSEC's specifically stated that this parcel complies with the no-net-loss rule. AR 31259.[39]

Moreover, even if this showing was inadequate (which it is not), as described above at pages 19-20, rules such as no-net-loss rule continue to

[36] The Opponents also misrepresent the record by stating that "the facility itself may be more than 1,100 acres in size, resulting in a virtual wall of turbines stretching across multiple forested ridgelines." Pet. Br. at 35. As described in the preceding subsection of this brief, the overall Project *area* is 1,152 acres but the portion of that area within which proposed development may potentially occur is 384 acres, of which fewer than fifty-seven acres will be permanently impacted by no more than thirty-five turbines built on land already logged for a century.

[37] The Opponents describe WAC 463-62-010(1) as stating that "the agency 'shall apply' this standard during its administrative adjudications." Pet. Br. 34. To the contrary, WAC 463-62-010(1) simply states that it "sets . . . performance standards and mitigations requirements . . . associated with site certification for construction and operation of energy facilities" and that EFSEC "shall apply these rules to site certification agreements. . . ." WAC 463-62-010(2) states that the chapter "shall apply to the construction and operation of energy facilities."

[38] At the time the Department made this statement, Whistling Ridge was still proposing a fifty-turbine project. During the adjudication, Whistling Ridge committed to reduce the number of turbines to thirty-eight. AR 16732-3. In its Recommendation, EFSEC recognized that this reduction mitigates the effect of the Project. AR 29313 n.2. EFSEC and the Governor ultimately further reduced the allowable number of turbines to no more than thirty-five. AR 29274. Presumably, a thirty-five-turbine project could have fewer impacts than a fifty turbine project and produce a ratio even higher than 2:1.

[39] The Opponents have pointed to no requirement in the Energy Facility Site Locations Act that would restrict the location of findings to only one portion of EFSEC's recommendation package. To the contrary, EFSEC's recommendation package included the FEIS and its Recommendation specifically stated that, except with respect to aesthetics and heritage, it considered the FEIS as "proper basis for [EFSEC's] Recommendation." AR 29259, 29314.

apply to the Whistling Ridge's preparation of habitat mitigation plan and the Project's Technical Advisory Committee. AR 29285-6, 29288-9.

Thus, EFSEC's recommendation package complied with the no-net-loss rule.[40]

8. EFSEC provided the Opponents with an opportunity to evaluate and provide evidence about the proposed habitat mitigation parcel

The Opponents contend that by allowing Whistling Ridge to offer its proposed 100 acre habitat mitigation parcel in pre-filed rebuttal testimony EFSEC violated RCW 34.05.449(2), RCW 80.50.090(3), and WAC 463-30-020, which accord to parties in adjudications certain rights to be heard. Pet. Br. at 36-38.[41]

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[40] The Opponents make two additional contentions that are neither correct nor properly before this Court. First, they allege that by failing to make findings about the no-net-loss rule, EFSEC failed to "dispose of contested issues" (citing WAC 463-30-320(6) ("the recommendation rule")) and its orders are inconsistent with an agency rule (citing RCW 34.05.580(3)(h)). Pet. Br. at 35-6 (presumably they intended to cite to RCW 34.05.570(3)(h)). As discussed in the text of this subsection of this brief, EFSEC's recommendation package specifically cited the no-net-loss rule and stated that the mitigation parcel complied with it. As a result, EFSEC did not violate the recommendation rule or RCW 34.05.570(3)(h).

Second, the Opponents contend that EFSEC failed to decide all issues requiring resolution, citing RCW 34.05.580(3)(f) (evidently intending to cite to RCW 34.05.570(3)(f)). Pet. Br. at 35. RCW 34.05.570(3)(f) authorizes judicial review when agencies do not decide all issues requiring resolution. For the same reasons that EFSEC complied with the recommendation rule and RCW 34.05.570(3)(h)), it also complied with RCW 34.05.570(3)(f).

In addition, EFSEC's compliance with these provisions of law is not properly before this Court because the Opponents failed to 1) exhaust their administrative remedies under RCW 34.05.534 (AR 22202, 22288, 23197, 23242, 28768, 28808, 29092, 29180); or 2) properly assign error under RAP 10.3(a)(4). Pet. Br. at 4-8.

[41] The Opponents also comment that EFSEC should have required Whistling Ridge to include the 100 acre habitat mitigation parcel in its application, and that by not doing so EFSEC violated the mitigation planning application rule (WAC 463-60-332(3))

The Opponents' argument is meritless. Whistling Ridge submitted its pre-filed rebuttal testimony about the mitigation parcel on December 16, 2010. AR 11301, 16188-16195, 15791-818, 15825, 15823. The adjudication did not begin until January 3, 2011. AR 16662.[42] EFSEC specifically provided the Opponents with an opportunity to object to pre-filed rebuttal testimony, but they elected not to do so with regard to the habitat mitigation parcel.[43] AR 11875, 14580-1, 15868-70, 16358-410. In now contending that they asked to present evidence or testimony on the adequacy of the parcel, Pet. Br. at 37 (citing AR 22263), the Opponents oddly cite to the Opponent Friends of the Columbia Gorge's *post-adjudication* brief, filed almost two months after the adjudication ended. AR 22267, 20359. Moreover, at the time of the adjudication,

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and EFSEC's "procedures." Pet. Br. at 40. The Court should reject this passing comment because it violates RAP 10.3(a)(6). Courts will not consider alleged errors when the party fails to provide argument and citation to authority. *Hollis*, 137 Wn.2d at 689 n.4. If the Court considers the Opponents' comment, it should be rejected because, as described above at pages 12-13, EFSEC's application rules such as the habitat mitigation planning rule are not inflexible self-effectuating requirements. EFSEC regulates through adaptive management, in concert with subject matter experts such as the Department of Fish and Wildlife, and the site certification agreement specifically requires Whistling Ridge to propose habitat mitigation measures such as the mitigation parcel and does not require the entire process start over with the inclusion of mitigation measures in the application. AR 29286, 29288.

[42] The record shows that Whistling Ridge first proposed the mitigation parcel to the Department five months prior to the adjudication. AR 15792-5. EFSEC authorized the parties to engage in discovery "at any time in the process." AR 08630, 08628. The Opponents evidently chose not to ask Whistling Ridge about the existence of a mitigation parcel.

[43] The Opponents comment in passing that Whistling Ridge offered the pre-filed mitigation parcel testimony through Jason Spadaro but do not allege that this constituted reversible error. Pet. Br. at 37.

Opponent Friends of the Columbia Gorge addressed Whistling Ridge's pre-filed testimony about the parcel with its own pre-filed cross-examination exhibits, AR 16846-8, 16849-51, and with extensive briefing. AR 22261-66. In addition, along with intervenor Seattle Audubon Society, Opponent Friends of the Columbia Gorge extensively cross-examined multiple witnesses about the mitigation parcel. AR 18179-81, 18273-5, 18445-52.

The Opponents are equally incorrect that EFSEC made inconsistent statements about the suitability of the parcel and the degree to which the parcel affected its recommendation.[44] Pet. Br. at 39. EFSEC stated that Whistling Ridge did not formally offer the parcel to EFSEC as mitigation. AR 29331-2, AR 29357. EFSEC stated that it would therefore not "address" the parcel in its findings. AR 29331-2, AR 29357. While in its findings, EFSEC commented in the context of discussing establishment of the Technical Advisory Committee that the parcel was "appropriate," EFSEC repeatedly emphasized here and elsewhere that the parcel "may" satisfy Whistling Ridge's mitigation obligation. AR 29368,[45] 29331,

[44] This issue is not properly before this Court because the Opponents failed to 1) exhaust their administrative remedies under RCW 34.05.534 (AR 22202, 22288, 23197, 23242, 28768, 28808, 29092, 29180); 2) include this issue in their Petition for Judicial Review, CP 17-18 (§ 7.2.7), as required by RCW 34.05.546; or 3) properly assign error under RAP 10.3(a)(4). Pet. Br. at 4-8.

[45] In this regard, the Opponents cite to a related oral statement by EFSEC Manager Al Wright that EFSEC had "considered and favorably regarded" the parcel. Pet. Br. at 39. The Opponents omitted the rest of his statement, which is consistent with

29357. Nowhere did EFSEC state that the parcel actually *satisfied* Whistling Ridge's mitigation obligation. The site certification agreement requires that Whistling Ridge submit a habitat mitigation plan and EFSEC stated that Whistling Ridge's mitigation obligation "may" (not "must") be satisfied by the purchase of a mutually acceptable mitigation parcel or by contributing money or fees for mitigation. AR 29286, 29320, 29324, 36167-8.[46] As described above at footnotes 28 and 29, administrative decisions, like decisions of the courts, must be read as whole. Contrary to the Opponents' contention, EFSEC's statements about the mitigation parcel cannot fairly be read as inconsistent regarding EFSEC's acceptance of the parcel or as prohibiting Whistling Ridge from offering the parcel as part of its mitigation plan. EFSEC did not accept the parcel but did not prohibit Whistling Ridge from offering it in the future.

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the balance of EFSEC's treatment of the parcel. The complete sentence is: "[EFSEC] considered and favorably regarded that proposal; however, it was never really presented to [EFSEC] in the form of a stipulated agreement between the parties, and so therefore [EFSEC] simply acknowledged in the adjudicative process and its consideration but did not make a finding on that particular issue because it was never culminated into a stipulated agreement to [EFSEC]." AR 28720.

[46] The Opponents also comment in passing that the proposed mitigation parcel may not provide habitat for the same species of wildlife that would be impacted by the Project. Pet. Br. at 37 n 37. This passing comment violates RAP 10.3(a)(6) and the Court should disregard it. *Hollis,* 137 Wn.2d at 689 n.4. If the Court considers the comment, the Department of Fish and Wildlife specifically approved the parcel as appropriate mitigation and consistent with the *Wind Power Guidelines*, which do not mandate identical forest habitat. AR 15825, 20227, 18010 (the *Guidelines* "should not be viewed as preventing or discouraging . . . 'customized' or 'alternative' mitigation packages"). In addition, this issue is not properly before this Court because the Opponents failed to 1) include this issue in their Petition for Judicial Review, CP 17-18 (§ 7.2.7), as required by RCW 34.05.546; or 3) properly assign error under RAP 10.3(a)(4). Pet. Br. at 4-8.

Based on this record, EFSEC properly allowed the Opponents to be heard pursuant to RCW 34.05.449(2), RCW 80.50.090(3), and WAC 463-30-020 and did not act in an arbitrary and capricious fashion in making consistent findings about the habitat mitigation parcel.

C. The Governor and EFSEC Properly Implemented the Legislative Policy to Minimize Adverse Environmental Effects Through Available and Reasonable Methods

1. Increased cut-in speeds

The Opponents contend that EFSEC violated RCW 80.50.010 and WAC 463-14-020(1) when it did not require Whistling Ridge to implement increased turbine cut-in speeds (i.e., the speed at which turbine blades begin spinning) to protect birds and bats. Pet. Br. at 40-41.[47] RCW 80.50.010 and WAC 463-14-020(1) state the Legislature's policy that EFSEC minimize adverse environmental effects "through available and reasonable methods."

[47] The Opponents also comment in passing that Whistling Ridge "may have" underestimated the likely fatality rates for birds and bats. Pet. Br. at 41 n.77. This passing comment violates RAP 10.3(a)(6) and the Court should disregard it. *Hollis*, 137 Wn.2d at 689 n.4. In addition, this issue is not properly before the Court because the Opponents failed to 1) include it in their Petition for Judicial Review, CP 19 (§ 7.2.10), as required by RCW 34.05.546; or 2) properly assign error under RAP 10.3(a)(4). Pet. Br. at 4-8. If the Court elects to consider the comment, it should be rejected because the Opponents do not contend that EFSEC committed reversible error. EFSEC received and considered testimony regarding predicted avian, and bat fatalities from both Whistling Ridge and the Opponents. The Opponents' testimony was also submitted as a comment on the Draft Environmental Impact Statement. AR 26774-78. As the unchallenged FEIS recognized, the Opponents' testimony overestimated fatality rates and relied on a flawed assumption. AR 33174 ("[T]he inflated estimates of raptor mortality by Smallwood are flawed[.]"); AR 33180 ("Not accounting for this probability of finding carcasses during multiple searches leads to an overestimate of fatality rates in Smallwood's estimator.")

The Opponents' contention is meritless because their witness, Shawn Smallwood, admitted that increased cut-in speeds have not been adopted at *any* wind energy facility and that the only specific design he identified is "experimental." AR 15408.

Based on this record, RCW 80.50.010 and WAC 463-14-020(1) did not require EFSEC to treat increased cut-in speeds as an available and reasonable method of minimizing impacts. EFSEC also was not required to specifically address increased cut-in speeds because, for an issue to be properly raised before an agency, there must be more than a slight reference to the issue in the record. *King Cnty. v. Wash. State Boundary Review Bd. for King Cnty.*, 122 Wn.2d 648, 670, 860 P.2d 1024 (1993); *Miles v. Harris*, 645 F.2d 122, 124 (2d Cir. 1981) (agencies are not "require[d] . . . explicitly to reconcile every conflicting shred of . . . testimony").

2. Radar-activated safety lighting

The Opponents allege that when EFSEC did not require radar-activated safety lighting, it violated the requirement to use available and reasonable methods to reduce effects on the environment, including esthetic, heritage and recreational resources. Pet. Br. at 43-44.[48]

[48] EFSEC analyzed the Project area's scenic heritage, the implications of the nearby National Scenic Area (16 U.S.C. § 544o(a)(10)), the significant development that has already occurred in the Gorge, and the competing testimony on the question of visual

Although the Opponents contend that EFSEC should have required radar-activated aviation lighting to protect scenic resources, they have not demonstrated that such technology was either available or reasonable. The unchallenged FEIS described the Project's aviation safety lighting as small blinking points of red light that would not light up the sky or the surrounding landscape, and concluded that compliance with the Federal Aviation Commission's lighting requirements provided appropriate mitigation, noting that such lights are to some degree shielded from ground level view due their vertical beam. AR 28416-8. By comparison, the Columbia Gorge "already contains lighting on massive hydro-electric dams, high-voltage transmission lines, antennas, highways, [and] in cities. . . ." AR 16097.

The Opponents imply that radar-activated aviation lighting is available and reasonable but the evidence they cite contradicts their position. Pet. Br. at 47 n.89. Their witness, Dean Apostol, did not address availability and reasonableness; he merely suggested that Whistling Ridge should have analyzed radar-activated lighting technology. AR 14609. The Counsel for the Environment expressed no opinion on availability or

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impacts. AR 29346-54, 28357-9, 29317-19. After spending two days viewing the Project site, and doing a detailed viewing site analysis, EFSEC ultimately adopted the recommendation of the Counsel for the Environment to eliminate turbines corridors A-1 through A-7. AR 29336, 29352-3. EFSEC also went *beyond* that recommendation and prohibited turbine corridors C-1 through C-8. AR 29352, 29367, 29317 n.12.

reasonableness, instead suggesting only that Whistling Ridge should have investigated such technology. AR 22286. The Opponents cite to Opponent Friends of the Columbia Gorge's petition for reconsideration of EFSEC's recommendation, and excerpts attached to it from a 2011 permit for a Wyoming wind farm. AR 28831-32, 28869-73. Even assuming that information presented for the first time in a motion for reconsideration can be considered notwithstanding WAC 463-30-335(2)'s requirement that petitions for reconsideration be based on evidence in the record, the Wyoming permit required that developer to seek Federal Aviation Administration approval for radar-activated aviation lighting but did not indicate that such lighting was reasonable or available (or that it would ever receive FAA approval). AR 28871, 28872, 28873. What the record also showed—and the Opponents do not challenge—is that radar-activated lighting *may actually pose a risk to planes* due to concerns about lighting system failures. AR 16096.

The Opponents also fail to mention the testimony of Michael Lang, Opponent Friends of the Columbia Gorge's Conservation Director. AR 16009. Although he testified to his "understanding" that an unnamed project somewhere in the northeastern United States used radar-activated lighting, he did not testify that such lighting was part of the settlement

between Friends and another turbine project developer in the vicinity of the Gorge. AR 19025-6, 16014, 19035.

Based on this record, EFSEC was not required to treat radar-activated safety lighting as an available and reasonable method under RCW 80.50.010 and the Opponents have not demonstrated that EFSEC erroneously applied the law, that EFSEC's decision was unsupported by substantial evidence, or that EFSEC violated a rule.

3. Measures to reduce turbine blade spin time

The Opponents also allege that EFSEC should have required unspecified "measures to reduce the amount of time that the turbine blades spin when not generating energy." Pet. Br. at 49. They neither identify such measures nor demonstrate that they are available and reasonable. Based on this record, EFSEC was not required to treat unidentified measures to reduce blade spin time as available and reasonable methods under RCW 80.50.010 and the Opponents have not demonstrated that EFSEC failed to decide an issue that was properly raised before it or failed to dispose of a properly contested issue.

D. The Governor and EFSEC Properly Addressed Land Use Consistency

1. The Opponents have not overcome Skamania County Resolution 2009-54, which is *prima facie* proof of land use consistency

The Energy Facility Site Locations Act required EFSEC to determine whether the Project's site "is consistent and in compliance with" Skamania County's comprehensive land use plan and zoning ordinances" (collectively "land use provisions"). RCW 80.50.090(2), WAC 463-26-050, -060, -110. EFSEC's rules gave Whistling Ridge the opportunity to submit to EFSEC a certificate from Skamania County certifying consistency of the site with the County's land use provisions. WAC 463-26-090. Whistling Ridge submitted Skamania County Resolution 2009-54 which, under EFSEC's rules, constituted *prima facie* proof of consistency "absent contrary demonstration by anyone present at the hearing." AR 11596-11624, WAC 463-26-090. As the entity empowered to implement and interpret its land use provisions, Skamania County's interpretation is worthy of deference. *Ford Motor Co. v City of Seattle, Executive Servs. Dep't,* 160 Wn.2d 32, 42, 156 P.3d 185 (2007) (reviewing courts give considerable deference to a local government's construction of its zoning ordinances). As explained below, EFSEC

correctly concluded that the Opponents did not overcome this presumption. AR 29342-3, 29366, 29314.

2. Background on the legal relationship between Skamania County's Comprehensive Plan and its zoning ordinances

Skamania County developed its comprehensive plan and zoning ordinances pursuant to the Planning Enabling Act, RCW 36.70. AR 11601. That Act and decades of settled case law define the nature of—and establish a hierarchy between—those documents.

The Planning Enabling Act defines comprehensive plans as the "beginning step" in planning, as "policy guide[s]," and as a "source of reference to aid in the developing, correlating and coordinating official regulations and controls." RCW 36.70.020(6). The Act mandates that "[i]n no case shall the comprehensive plan, whether in its entirety or area by area or subject by subject[,] be considered to be other than in such form as to serve as a guide to the later development and adoption of official controls." RCW 36.70.340. Washington courts have thus consistently held that comprehensive plans have no project-specific regulatory effect. *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 873-74, 947 P.2d 1208 (1997); *Cougar Mountain Assocs. v. King Cnty.*, 111 Wn.2d 742, 757, 765 P.2d 264 (1988); *Westside Hilltop Survival Comm. v. King Cnty.*, 96 Wn.2d 171, 175-176, 634 P.2d 862 (1981);

Cathcart-Maltby-Clearview Cmty. Coun. v. Snohomish Cnty., 96 Wn.2d 201, 212, 634 P.2d 853 (1981).[49]

Zoning ordinances, in contrast, are one of the "official controls" on "the physical development of a county . . . and are the means of translating into regulations and ordinances all or any part of the general objectives of the comprehensive plan." RCW 36.70.020(11), .550, .570; *Viking Properties, Inc. v. Holm*, 115 Wn.2d 112, 126, 118 P.3d 322 (2005) (". . . it is local development regulations . . . which act as a constraint on individual landowners."). Zoning ordinances are presumed to be valid. *Cathcart-Maltby-Clearview*, 96 Wn.2d at 211.

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[49] Exceptions to this principle are when the zoning ordinance itself requires compliance with the comprehensive plan, *Weyerhaeuser v. Pierce Cnty.*, 124 Wn.2d 26, 43, 873 P.2d 498 (1994), or the legislature creates a statutory exception by giving comprehensive plans direct regulatory effect, as is the case of the State Environmental Policy Act in RCW 43.21C.060. *West Main Assocs. v. City of Bellevue*, 49 Wn. App. 513, 524-25, 742 P.2d 1266 (1987). The Opponents describe this latter exception somewhat inaccurately by stating that comprehensive plans are enforceable standards when "specifically called out" as the basis for exercising regulatory authority. Pet. Br. at 50 n.93. This is only correct if by "specifically called out" the Opponents mean "the legislature has enacted a statute, such as the one discussed in *West Main Assocs.*, which expressly mandates that comprehensive plans be given regulatory effect." RCW 80.50.090(2) is not such a statute. RCW 80.50.090(2) requires EFSEC to "determine" whether the site is "consistent and in compliance with" the comprehensive plan and zoning ordinances. In contrast to the statute addressed in *West Main Assocs.*, RCW 80.50.090(2) does *not* state that it gives direct regulatory effect to comprehensive plans. In addition, RCW 80.50.090(2) should be read in concert with the rest of RCW 80.50. *State, Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). Notwithstanding the State's power to preempt local land use provisions, RCW 80.50.100(2) states that EFSEC "shall include conditions in the draft certification agreement . . . to protect . . . local government or community interests . . . ." The Opponents' reading would disrupt the settled expectations of local governments and the public that comprehensive plans have no project-specific regulatory effect and would create a senseless dichotomy between energy facilities sited by EFSEC and energy facilities sited by local governments, with the former—but not the latter—subject to direct regulation by the comprehensive plan.

In the event of a conflict between a zoning ordinance and a comprehensive plan, the specific zoning ordinance prevails. *Citizens for Mount Vernon*, 133 Wn.2d at 874 (citing *Cougar Mountain*, 111 Wn.2d at 757); *Nagatani Bros., Inc. v. Skagit Cnty. Bd. of Comm'rs*, 108 Wn.2d 477, 480, 739 P.2d 696 (1987). If a comprehensive plan prohibits a particular use but the zoning code permits it, the use is permitted. *Citizens for Mount Vernon*, 133 Wn.2d at 874. These principles have been enforced by courts both prior to and following the enactment of the Growth Management Act ("GMA") in 1991.[50]

The Project is located within the Skamania County comprehensive plan's Conservancy land use designation.[51] AR 11604. The designation 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." AR 22012. Within the Conservancy designation "[l]ogging, timber management, agricultural and

[50] *Citizens for Mount Vernon*, 133 Wn.2d at 873-74 (post-GMA); *Cougar Mountain*, 111 Wn.2d at 757 (pre-GMA); *Nagatani Bros.*, 108 Wn.2d at 480 (pre-GMA); *Timberlake Christian Fellowship v. King Cnty.*, 114 Wn. App. 174, 183, 61 P.3d 332 (2002), *review denied sub nom., Citizens for a Responsible Rural Area Dev. v. King Cnty.*, 149 Wn.2d. 1013, (post-GMA); *Lakeside Indus. v. Thurston Cnty.*, 119 Wn. App. 886, 894-5, 83 P.3d 433, *review denied*, 152 Wn.2d 1015 (2004) (post-GMA).

[51] Skamania County approved its first comprehensive plan in 1977, AR 21994, and adopted zoning ordinances between 1989 and 1991. AR 21996. In 2007, the County adopted a new comprehensive plan. AR 16866. In 2008, the County prepared new zoning ordinances, but they cannot go into effect until the County prepares an Environmental Impact Statement. AR 16864, 16892. As a result, the County's current zoning ordinances predate its 2007 comprehensive plan.

mineral extraction" are the "main use activities" and the plan enumerates particular uses that are appropriate "depending upon . . . adopted zoning classifications." AR 22012-3.

Consistent with the Planning Enabling Act, the comprehensive plan defines itself as a policy guide implemented through development regulations and not as a self-effectuating regulatory enactment. AR 21993, 22009 (Land Use Element "provides policy guidance" for uses of land with "[p]recise standards, such as . . . permitted uses . . . included in the various implementing ordinances. . . .").

Policy LU.1.2 in the plan provides that the comprehensive plan is not intended "to foreclose on future opportunities that may be made possible by technical innovations, new ideas and changing attitudes [so] other uses that are *similar to* the uses listed here should be allowable uses, review uses or conditional uses, only if the use is specifically listed in the official controls of Skamania County for that particular land use designation." AR 22013 (emphasis added). One of the uses enumerated as appropriate within the Conservancy designation is "[p]ublic facilities and utilities, such as . . . utility substations . . . ." *Id.* In accordance with Policy LU.1.2, the County considered the Project to be a semi-public utility facility that is similar to such public facilities and utilities. AR 11603-4.

Consistent with the comprehensive plan's statement that appropriate uses within the Conservancy designation depend upon adopted zoning classifications, the Project is within the County's unmapped ("UNM") zoning classification. AR 22012, 11608.[52] In the UNM zoning classification, "all uses which have not been declared a nuisance by statute, resolution or court of jurisdiction are allowable." Skamania County Code 21.64.020, AR 22127. The County's list of public nuisances does not include wind energy projects. Skamania County Code 8.30.010, AR 11608.

3. The Opponents have not overcome the presumption of land use consistency created by Resolution 2009-54

The Opponents contend that the Project is inconsistent with the comprehensive plan's Conservancy designation because wind projects are not specifically enumerated as allowed uses and because the Project is inconsistent with the purpose of the Conservancy designation. Pet. Br. at 52. Their argument fails to overcome the presumption of consistency attached to Skamania County Resolution 2009-54. AR 11596-11624, WAC 463-26-090.

First, as discussed above, it is settled law that Skamania County's comprehensive plan is not a self-effectuating regulatory document that can

[52] The only exception is a five-acre parcel in the R-5 zone devoted to an alternative location for the operations and maintenance facility. AR 28365. This parcel plays no role in the Opponents' appeal.

directly "allow" or "prohibit" the Project. As a result, it is irrelevant whether or not the plan enumerates wind projects as an allowed use.

Second, even if the comprehensive plan has direct regulatory effect (which it does not), the Project complies with the plan. The Opponents base their argument to the contrary on the plan's Policy LU.6.1. Pet. Br. at 52-53. By its own term, Policy LU.6.1 does not invalidate previously enacted zoning ordinances such as Skamania County Code 21.64.020, which allows within the UNM zoning classification any use that is not a nuisance. Consistent with the status of the comprehensive plan as a *plan*, based upon which *future* zoning ordinances will be developed, Policy LU.6.1 addresses *future* zoning ordinances: "[t]hree types of uses *should be* established for each land use designation under this plan and for any zone established to implement this plan." AR 22017 (emphasis added), RCW 36.70.340.[53]

Policy LU.6.1 must also be read in the context of the goal that it supports: the public participation Goal, LU.6, is "[t]o provide opportunities for citizen participation in the government decision process and in planning activities regarding land development." AR 22017. Reading the policy to invalidate automatically Skamania County

[53] As discussed above at footnote 51, Skamania County's 2007 comprehensive plan post-dates its zoning ordinances, so its implementing ordinances have yet to be enacted.

Code 21.64.020 violates not only this public participation goal but also the Planning Enabling Act's public notice and comment requirements for zoning ordinance amendments. RCW 36.70.580, .630.

Moreover, a separate policy, Policy LU.1.2, allows uses *similar to* those enumerated in the Conservancy designation, so by its own terms the plan does not require all allowed uses to be expressly enumerated.[54] AR 22013. The County considered the Project to be a semi-public facility contemplated by Policy LU.1.2 as a use that is similar to the public facilities and utilities specifically enumerated as allowed uses. AR 11604, 22013.[55] While the Opponents contend that this reading of Policy LU.1.2 is incorrect because it also contains "operative, regulatory language"

[54] The Opponents may argue in reply that RCW 36.70.545 invalidates zoning ordinances that are inconsistent with a comprehensive plan. RCW 36.70.545 provides that "development regulations of each county that does not plan under RCW 36.70A.040 [the GMA] shall not be inconsistent with the county's comprehensive plan." RCW 36.70.545 does not invalidate inconsistent zoning ordinances. The Court should construe RCW 36.70.545 together with the related statutes in the Planning Enabling Act. *Tracfone Wireless, Inc. v. Wash. Dep't of Rev.*, 170 Wn.2d 273, 281, 242 P.3d 810 (2010). The Opponents' reading of RCW 36.70.545 would contradict RCW 36.70.340, which defines comprehensive plans as guides to later development of zoning ordinances, and RCW 36.70.580 and .630, which require public notice and comment before zoning ordinances are amended. Automatic invalidation of existing zoning ordinances upon adoption of a new and allegedly inconsistent comprehensive plan would disrupt the settled expectations of local governments, landowners, and the public, and (depending on the scope and content of an amended comprehensive plan) could leave some local governments and landowners unexpectedly lacking zoning ordinances. The Court should avoid such an unlikely, absurd and strained construction. *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002).

[55] Skamania County Code 21.08.010 defines "semi-public facilities" as "facilities intended for public use which may be owned and operated by a private entity." The record reflects that Whistling Ridge has requested connection to the Bonneville Power Administration's transmission lines for use by public utilities. AR 25181, 15933, 16819.

mandating that similar uses are only allowed if specifically listed in a zoning ordinance, comprehensive plans by definition do not contain "operative, regulatory language." Moreover, Policy LU.1.2, like Policy LU.6.1, is contemplating *future* zoning ordinances.

The Opponents are equally incorrect that the Project is inconsistent with the purpose of the Conservancy designation, which is 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." Pet. Br. at 55-6, AR 22012. The Opponents assert that by referring to *Wikipedia* rather than looking at RCW 36.70A.060(1)(a) in the Growth Management Act, EFSEC misconstrued the term "natural resource" as including wind power. Their contention is meritless for three reasons.

First, the Growth Management Act provision cited by the Opponents, RCW 36.70A.060(1)(a), requires counties planning under the Growth Management Act to adopt regulations to conserve agricultural, forest, and mineral resource lands.[56] But since Skamania County does not plan under the Growth Management Act, the statute is inapplicable to the County. AR 11601.

[56] RCW 36.70A.060(1)(a) refers to RCW 36.70A.170, which requires all counties to designate agricultural, forest, and mineral resources lands.

Second, even if RCW 36.70A.060(1)(a) applied to the County, the Opponents have not demonstrated that the legislature intended in the Growth Management Act to prevent local governments and EFSEC from considering wind to be a natural resource.[57] To the contrary, state law specifically defines wind as a natural resource. RCW 19.29A.090(3) ("qualified alternative energy resources means . . . [w]ind"); RCW 19.285.030(20) ("[r]enewable resource . . . means . . . wind").[58]

Third, given that state law defines wind as a natural resource, the Opponents cannot credibly argue that EFSEC committed reversible error when it stated that "[a]ir and the force of wind are identified as natural resources. *See, e.g., Wikipedia.*" AR 29343 n.23 (emphasis in original). *Webster's Third New Int'l Dictionary* defines "natural resources" as "materials (as mineral deposits or waterpower) supplied by nature." *Webster's Third New Int'l Dictionary,* 1507 (2002). Wind power meets

[57] Based on their arguments before EFSEC, the Opponents may argue in their reply that RCW 36.70A.020(8) and RCW 36.70A.170 in the Growth Management Act restrict consideration of wind as a natural resource. AR 28793-4. Neither statute pertains to the definition of "natural resource" in the Conservancy designation's purpose statement. RCW 36.70A.020 describes goals that are to be used exclusively by counties planning under the Act but, as already explained, Skamania County does not plan under the Act. Moreover, RCW 36.70A.020(8) encourages counties to maintain and enhance "natural resource industries," not "natural resources." RCW 36.70A.170 requires all counties to designate "resource lands," including "[f]orest lands that are not already characterized by urban growth and that have long-term significance for the commercial production of timber." However, nowhere does RCW 36.70A.020(8) or RCW 36.70A.170 prohibit wind from being identified as a natural resource for other purposes.

[58] The Director of Washington's State Energy Office, Tony Usibelli, testified that "[e]nergy policy and law in Washington have been evolving to strengthen . . . support for renewable resources, including wind." AR 15346, 15345.

this definition.

For all of these reasons, the Opponents did not overcome the presumption of land use consistency created by Skamania County Resolution 2009-74. They therefore have not demonstrated to this Court that EFSEC's finding of land use consistency was reversible error.

4. EFSEC properly construed Skamania County's moratorium

The Opponents contend that EFSEC misinterpreted the County's moratorium by concluding that it is not a zoning ordinance. Pet. Br. at 58. The Opponents are incorrect for three reasons.

First, the Opponents misrepresent the moratorium as directly "prohibiting" forest practices conversions. Insofar as it is applicable to this case, the moratorium applies, not directly to forest practice conversions, but to the County's acceptance and processing of State Environmental Policy Act ("SEPA") checklists related to certain forest practices conversions.[59] AR 16856.

Second, under the Skamania County Code, a SEPA checklist is "not needed if . . . SEPA compliance has been initiated by another agency." Skamania County Code 16.04.070(A). EFSEC initiated SEPA

[59] The moratorium also applies to the County's acceptance and processing of certain permits for larger parcels created by deed after January 2006 and for subdivisions and short subdivisions, but these portions of the moratorium play no role in this case. AR 16856.

compliance for the Project, so the County's moratorium on its own acceptance and processing of a SEPA checklist is facially inapplicable to the Project.[60] AR 1015.

Third, even if the moratorium had any bearing on the Project's SEPA checklist (which it did not), the moratorium is not a zoning ordinance as defined in the Energy Facility Site Locations Act. The Act defines "zoning ordinance" as a local government ordinance "regulating the use of land." RCW 80.50.020(22). The moratorium does not regulate land use because to "regulate" means to "govern or direct according to rule," and Skamania County's acceptance and processing—or moratorium on acceptance and processing—of SEPA checklists does not govern or direct land use. *Webster's Third New Int'l Dictionary*, 1913 (2002). SEPA checklists provide information that governments use to determine whether a proposal's environmental impact requires preparation of an Environmental Impact Statement. WAC 197-11-315, -960. Such environmental information assists governments make decisions about

[60] This result with regard to EFSEC projects is consistent with the purpose of the County's moratorium, which the County enacted in response to encroaching *residential* development. AR 16854 ("most of the area . . . not . . . covered by a zoning classification is . . . used as commercial forest land . . . and . . . the Growth Management Act requires counties to protect commercial forest land from *encroaching residential use*"), AR 16855 ("[t]he County Commissioners are determining which areas will be designated as commercial forest land and protected from the encroachment of *residential uses*"; "uncontrolled *residential growth* in the areas of commercial forest lands . . . could . . . increase the risk of forest fires; and "information was gathered to help determine . . . the best locations . . . for future *residential development*") (emphasis added).

proposals. WAC 197-11-055(2), *Norway Hill Pres. & Prot. Ass'n v. King Cnty.*, 87 Wn.2d 267, 277-78, 552 P.2d 674 (1976). The environmental information does not, however, itself impose any self-effectuating regulatory controls, i.e., it does not "regulate" land use within the meaning of Energy Facility Site Locations Act.[61]

Based on this record, the Opponents have not demonstrated that EFSEC improperly interpreted the County's moratorium.

E. The Site Certification Agreement Does Not Allow the Project Layout to Be Impermissibly Undetermined, Properly Addresses Forest Practices Decision Making, and Contains Consistent Forest Practices Provisions

1. The site certification agreement does not allow the final Project layout to be impermissibly undetermined

The Opponents contend that the Project's layout and impacts are impermissibly undetermined because individual turbines may be located "almost anywhere within the 1,150-acre Project site." Pet. Br. at 65. In reality, the site certification agreement requires that construction and operation "shall be located within the areas designated herein and in the modifications to revised Application for Site Certification." AR 29273.

[61] The meaning of the zoning ordinance definition in RCW 80.50.020(22) is plain on its face. However, if the statute were deemed ambiguous, application of the canons of construction would still result in the exclusion of SEPA activities from the ambit of the statute. Expressing one thing in a statute implies the exclusion of the other and statutory omissions are deemed to be exclusions. *In re Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002). If the legislature intended to include SEPA activities in the definition of "zoning ordinance" it would have included a reference to RCW 43.21C in RCW 80.50.020(22). The lack of such a reference indicates legislative intent to exclude such activities from the definition.

EFSEC's Recommendation, as incorporated into the site certification agreement, specifically states that "[w]ind turbine towers would be distributed among five turbine corridors, identified as Corridors A through E on Application Revised Fig. 2.3-1" (and excluding construction of turbine corridors A-1 through A-7 and the C-1 through C-8). AR 29271, 29323-4 (turbine corridor map), 29319, 29317 n.12.[62] Thus, the scope of the Project is not impermissibly undetermined.

The Opponents now point to language in the agreement stating that the turbines' final locations may vary from the locations shown on the conceptual drawings in the application. Pet. Br. at 65, n.108. This does not support their argument that turbines may therefore be located anywhere within the 1,152-acre site. The Opponents have selectively omitted the balance of the sentence, which states "but [the turbine locations] shall be consistent with the conditions of this Agreement and . . . the final . . . plans approved by EFSEC." AR 29274. Read in the context of the provisions described above, this language allows turbines to be located within the five corridors, but does not allow the corridors to change location or allow turbine construction outside the corridors.

[62] *See also* AR 29350 (tower placement in the corridors is subject to micro-siting), AR 4316 (application sought approval for construction within corridors, AR 25325 (FEIS analyzed turbines in corridors), AR 16818 (Whistling Ridge testimony regarding turbine corridors).

The Opponents also argue that by deferring final approval of specific turbine locations to a future date, the Governor has violated public participation requirements. As described above, this contention is meritless because the Opponents have multiple meaningful opportunities for future participation, including the option of seeking judicial review.

Based on this record, the Governor's decision was supported by substantial evidence, complied with all rules and procedures, and the Opponents have not demonstrated substantial prejudice.

2. The site certification agreement properly addresses forest practices decision making

The Opponents contend that EFSEC erred by deferring regulatory decision making under the Forest Practices Act.[63] Pet. Br. at 67-68.

The Opponents are incorrect. The Energy Facility Site Locations Act supersedes the Forest Practices Act for EFSEC-regulated projects but the Governor and EFSEC have elected to regulate the Project's forest practices by applying the latter Act. RCW 80.50.110, AR 29294, 29302. The site certification agreement states that Whistling Ridge's forest practices activities must be permitted by a forest practices application and

[63] The Forest Practices Act regulates the growing, harvesting, or processing of timber on forest land. RCW 76.09.010; RCW 76.09.020(15), (17). Landowners must submit forest practices notifications or application prior to beginning most forest practices. RCW 76.09.050(2); WAC 222-20-010(1). Depending on the classification of the forest practice, the landowner must either obtain regulatory approval of a forest practices application or wait for the expiration of a specified number of days after filing a notification. *Id.;* WAC 222-20-020.

that this obligation applies "to activities during the construction phase of the project and to subsequent activities on land remaining in forestry for the duration of the project." AR 29294. As discussed in more detail in the succeeding section of this brief, the site certification agreement requires Whistling Ridge to submit forest practices applications sixty days prior to beginning forest practices associated with construction, and again sixty days prior to beginning any forest practices on land remaining on forestry for the duration of the Project. AR 29294, 29283, 29276, 29302.

This structure ensures that EFSEC's analysis of Whistling Ridge's forest practices will occur within a reasonable proximity to the time of the activities, rather than months or years previously, and that EFSEC's analysis is based on the most precise and current information about on-the-ground conditions. This approach is consistent with the relatively short timeframes applicable to forest landowners who are not regulated by EFSEC[64] and with the adaptive management approach to Project regulation discussed in detail above.

The Opponents are equally incorrect that by deferring forest practices decisions to the future, EFSEC has deprived them of public participation opportunities. As described above, the law accords the

[64] Under the Forest Practices Act, the timeframe between filing a forest practices application and the time landowners may begin operations is generally short. WAC 222-20-010(1), -020(1) (generally fourteen to sixty days).

Opponents multiple meaningful opportunities for public participation in future decision making and the Opponents have pointed to no requirement that the site certification agreement recite those provisions.

Based on this record, the Governor's decision properly decided all issues, complied with EFSEC's rules, was based on substantial evidence, and is not arbitrary and capricious, and the Opponents have not demonstrated substantial prejudice.

3. The site certification agreement contains consistent forest practices provisions

The Opponents contend that site certification agreement Articles IV(M) and VII(E) are inconsistent. Pet. Br. at 69.[65] The Opponents are incorrect because Articles IV(M) and VII(E) are consistent where consistency is required.

Both articles require Whistling Ridge to comply with the Forest Practices Act throughout the life of the Project. AR 29294, 29302. Article IV(M) applies to the construction phase of the Project and therefore requires compliance "during the construction phase of the project and to subsequent activities on land remaining in forestry for the duration of the [P]roject." AR 29283, 29294. Article VII(E) applies to Project operations and therefore requires compliance only for "activities

[65] This issue is not properly before this Court because the Opponents failed to exhaust their administrative remedies as required by RCW 34.05.534. AR 22202, 22288, 28768, 28808, 29092, 29180.

on land remaining in forestry for the duration of the [P]roject." AR 29301, 29302.

Both articles contain a sixty-day deadline for submitting forest practices applications but, because the articles come into play at different points during the Project's lifespan, each contains a different trigger for the start of the sixty-day clock. Article IV(M) applies to the construction phase, so it requires submission of a forest practices application sixty days prior to "initiating ground disturbance activities."[66] AR 29294. Article VII(E), in contrast, requires submission of the application 60 days prior to actually "initiating forest practices" on "land remaining in forestry for the duration of the [P]roject." AR 29302.

While Section VII(E) states that the Department of Natural Resources will conduct forest practices compliance and enforcement on EFSEC's behalf, and Section IV(M) does not, the Adjudication Order (which is part of the site certification agreement, AR 29271) explicitly

[66] This is consistent with the agreement's definition of "construction" as "any foundation construction including hole excavation, form work, rebar, excavation and pouring of concrete for the [turbines and other structures] and erection of any permanent, above-ground structures" and with the incorporated Recommendation's requirement that Whistling Ridge submit a forest practices application sixty days prior to construction. AR 29276, 29327. The Opponents' comment that the definition of "construction" does not include activities governed by the Forest Practices Act misses the point. Pet. Br. at 70. It is true that regulation under the Forest Practices Act concerns forest practices as defined in RCW 76.09.020(17) and does not regulate activities such as hole excavation and pouring of concrete. However, forest practices *associated with* these types of construction activities are regulated, usually as conversion-related forest practices defined as Class IV-Generals. *See* RCW 76.09.050(1)(Class IV(a)); WAC 222-16-050(2)(Class IV-Generals described).

stated that EFSEC "retains the Department of Natural Resources . . . as a subcontractor to assist [EFSEC] in ensuring that a Project meets all applicable requirements of the [Forest Practices Act]." AR 29360, 29370. As a result, there can be no legitimate doubt about forest practices enforcement under both articles.

Contrary to the Opponents' reading, Article IV(M) does *not* enumerate as requiring a forest practices application "road construction and reconstruction, reforestation, gravel and rock removal, and slash disposal." Pet. Br. at 70. Article IV(M) requires a forest practices application for "all forest practices, including, but not limited to, timber harvest, road construction/reconstruction and reforestation activities," with the full scope of such coverage determined by the overarching citation to the Forest Practices Act and rules, which regulate forest practices associated with such activities. AR 29294. The references to "gravel and rock removal, and slash disposal" cited by the Opponents are in the *next* portion of Article IV(M), which specifies that "*other activities* . . . may require *additional permits*" such as a surface mining reclamation permit or a burn permit. AR 29294-5 (emphasis added). While the Opponents complain that Article VII(E) does not contain these requirements, Article

VII(E) specifically requires Forest Practices Act compliance for "all" forest practices.[67]

Based on this record, the Opponents have not demonstrated that the site certification agreement contained inconsistent references to forest practices, that EFSEC failed to decide all issues, or that the Governor's decision was arbitrary and capricious.

F. The Opponents Are Not Entitled to Attorneys' Fees and Costs

The Opponents seek attorneys' fees and other expenses against EFSEC under RCW 4.84.350, the Equal Access to Justice Act ("EAJA").[68] Pet. Br. at 71-72. This Court should deny the Opponents' request. Even if Opponents were to prevail on one or more issues, EFSEC's actions were "substantially justified," prohibiting any EAJA award against it.[69]

To be awarded EAJA fees and expenses, a party must first be a "prevailing party" because it "obtained relief on a significant issue that achieves some benefit that the qualified party sought."

[67] The omission of a reference in Article VII(E) to additional permits such as surface mining reclamation or burn permits is reasonable because these permits are most likely to be needed during Project construction, not Project operations.

[68] RCW 4.84.350(1) states in pertinent part that "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."

[69] Any award under the EAJA would be against EFSEC, not the Governor. The Governor is not an agency for purposes of either the EAJA or the APA. RCW 4.84.340(1), RCW 34.05.010(2).

RCW 4.84.340(5).[70] *See Kettle Range Conserv. Group v. Wash. Dep't of Natural Res.*, 120 Wn. App. 434, 468-69, 85 P.3d 894 (2003), *review denied*, 152 Wn.2d 1026 (2004); *Citizens for Fair Share v. State Dep't of Corr.*, 117 Wn. App. 411, 436, 72 P.3d 206 (2003), *review denied*, 150 Wn.2d 1037 (2004) (fees denied where party "prevailed on only one relatively minor P[ublic] D[isclosure] A[ct] violation"). EFSEC's position is that the Court should rule in favor of EFSEC on all issues. Thus the Opponents would not be a prevailing party at all. As the statute and cases make clear, however, winning on one or even more minor issues would not make the Opponents a prevailing party.

In addition, the Opponents cannot qualify as a prevailing party, even if they win on one or more significant issues, because they are asking the Court to remand the Project application for additional proceedings by EFSEC. Pet. Br. at 3, 75. Even if the Court does so, this does not mean they will have obtained any relief on the merits of any of their claims. At least one Washington case and several federal cases have held that a party is not a "prevailing party" where the only relief it obtains is a remand.[71] *See Ryan v. State Dep't of Soc. & Health Servs.*, 171 Wn. App. 454, 476,

[70] The State does not dispute that the Opponents meet the requirements for being a "qualified party" as defined in RCW 4.84.340(5).

[71] Washington's EAJA is modeled after the federal act, and the definitions of the federal act are generally applicable to the Washington act. *See Plum Creek Timber Co. v. Wash. State Forest Practices Bd.*, 99 Wn. App. 579, 595, 993 P.2d 287 (2000).

287 P.3d 629 (2012) ("A party must prevail on the merits before being considered a prevailing party."); *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990); 32 Am. Jur. 2d *Federal Courts* §§ 245-248 (2012); *but see Alpine Lakes Prot. Soc'y v. Dep't of Natural Res.*, 102 Wn. App. 1, 19, 979 P.2d 929 (1999); *Seattle Area Plumbers v. Wash. State Apprenticeship & Training Coun.*, 131 Wn. App. 862, 882, 129 P.3d 838 (2006).

Assuming the Opponents could surmount these threshold obstacles, the Court should not award fees and costs if "the agency action was substantially justified or . . . circumstances make an award unjust." RCW 4.84.350(1). A party does not obtain an award under the EAJA simply because it is a "prevailing party." *Kettle Range Conser. Group*, 120 Wn. App. at 469. Rather, the burden shifts to the agency to show that its position was substantially justified.

Substantially justified means justified to a degree that would satisfy a reasonable person that the agency's position has a reasonable basis in law and fact. *Silverstreak, Inc. v. Wash. State Dep't of Labor & Indus.*, 159 Wn.2d 868, 892, 154 P.3d 891 (2007). Here, even if the Court concludes that one or more of the Opponents' challenges are well taken, the Court should find that EFSEC was substantially justified. As the Court of Appeals has recognized, an agency may be substantially justified

where it makes a decision, even if overturned, in a matter that "required consideration of a complicated regulatory scheme as well as the subjective issue of esthetics." *Plum Creek Timber Co. v. Wash. State Forest Practices Appeals Bd.*, 99 Wn. App. 579, 595, 596, 993 P.2d 287 (2000). Likewise, an agency can be found to have been substantially justified where there are no state appellate decisions addressing the issue. *Id.*

With respect to technical matters such as wildlife, EFSEC heard conflicting testimony from the Opponents' and Whistling Ridge's expert witnesses and outside agencies supported Whistling Ridge's view, and the Opponents have not challenged the FEIS. With respect to land use issues, Skamania County Resolution 2009-54 constituted *prima facie* proof of consistency. EFSEC considered the Opponents' attempts to overcome this presumption but ultimately was shown no controlling precedent requiring it to disregard the County's stated position.

With regard to the Opponents' challenge to the adaptive management approach of reserving some of the details of the project until the implementation phase, no Washington case law prohibits this, and this approach has been used at other wind projects and recommended by other agencies. Under these circumstances, the Court should find that EFSEC was substantially justified and the Court should deny the Opponents' request for attorneys' fees and expenses under the EAJA.

V. CONCLUSION

For the reasons set forth above, the Governor and EFSEC ask the Court to affirm the Governor's decision.

RESPECTFULLY SUBMITTED this 12th day of April, 2013.

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PROOF OF SERVICE

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 12th day of April, 2013, at Olympia, Washington.

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