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6 **BEFORE THE STATE OF WASHINGTON**  
7 **ENERGY FACILITY SITE EVALUATION COUNCIL**

8 In the Matter of Application No. 2009-01

PREHEARING ORDER NO. 16  
COUNCIL ORDER NO. 861

9 WHISTLING RIDGE ENERGY LLC

DECISION OF THE ENERGY  
FACILITY SITE EVALUATION  
COUNCIL IN RESPONSE TO

10  
11 WHISTLING RIDGE ENERGY  
PROJECT

INTERVENORS' MOTION TO  
DISQUALIFY DOUG SUTHERLAND

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14 **I. INTRODUCTION**

15 Intervenor Save Our Scenic Area (SOSA), Friends of the Columbia Gorge (Friends),  
16 and the Seattle Audubon Society (Audubon) (the moving parties) seek to disqualify Energy  
17 Facility Site Evaluation Councilmember Doug Sutherland appointed to represent Skamania  
18 County from participation in this matter. The Energy Facility Site Evaluation Council (the  
19 Council) issues this decision in response to the motion seeking to disqualify Doug Sutherland.

20 **II. FINDINGS OF FACT**

21 **A. The Energy Facility Site Evaluation Council**

22 **1. Creation and Purpose**

23 The Council was created in 1970 to provide "one stop" service in the siting of power  
24 plants, rather than having the various pieces of a siting decision spread among a multiplicity of  
25 state agencies and local governments. 1970 Wash. Laws 1<sup>st</sup> ex. sess. § 45. The Legislature  
26 intended to integrate the administrative and technical resources of state government for the

review, certification, and monitoring of the siting, construction, and operation of power plants. The powers and authority of EFSEC is governed by RCW 80.50.

## **2. Membership**

The Council consists of representatives from a variety of state agencies and local governments. There are six fixed members and a varying number of additional members appointed when their appointing entities' interests are affected by a proposed project.

The six fixed members are a chair appointed by the Governor, and representatives of the Departments of Commerce, Ecology, Fish and Wildlife, Natural Resources, and the Utilities and Transportation Commission. RCW 80.50.030(2)(b) and (3)(a).

Additional members appointed on a case-by-case basis include representatives of local governments and, possibly, four state agencies. In particular, for the purposes of this motion, RCW 80.50.030(4) states:

The appropriate county legislative authority of every county wherein an application for a proposed site is filed shall appoint a member or designee as a voting member to the council. The member or designee so appointed shall sit with the council only at such times as the council considers the proposed site for the county which he or she represents, and such member or designee shall serve until there has been a final acceptance or rejection of the proposed site.

## **3. Selection of Doug Sutherland as Skamania County's Designee**

On October 26, 2010, Skamania County, through an action by its Board of County Commissioners, selected Doug Sutherland, former Washington State Commissioner of Public Lands, as the County's new designee to replace former designee Judy Wilson.

## **B. The Disqualification Requests and Motions**

The moving parties seek to disqualify Doug Sutherland on the grounds that his sitting as a councilmember creates a conflict of interest and demonstrates prejudgment or bias in violation of the appearance of fairness doctrine. The moving parties have submitted declarations, exhibits (*see* Declaration of J. Richard Aramburu in Support of Request/Motion for Recusal of Doug Sutherland and Declaration of Nathan J. Baker in Support of Intervenor

Friends of the Columbia Gorge's and Seattle Audubon Society's Response to Save Our Scenic Area's Request for Recusal or Disqualification of Doug Sutherland), and legal memoranda attempting to demonstrate that Doug Sutherland's past statements in favor of wind power energy and his affiliations with groups associated with the promotion of wind power constitute a basis for his own recusal or, in the alternative, a basis for the Council's disqualification of Councilmember Sutherland.

### III. CONCLUSIONS OF LAW

#### A. The Council's Authority to Decide the Motion Is Restricted Under the RCW 34.05

1. The Council's power to address motions concerning the Council's composition is restricted by the plain words of the statute. RCW 80.50.030. Pursuant to RCW 80.50.030(4), Skamania County appointed Doug Sutherland to the Council as its designee.

2. The conduct of the adjudicative proceeding to arrive at a recommendation to the Governor under RCW 80.50.100 is held pursuant to RCW 34.05. See RCW 80.50.090(3) and WAC 463-18-090.

3. The Council is the presiding officer at adjudicative proceedings pursuant to RCW 34.05 and RCW 80.50. WAC 463-30-020.

4. Individuals on the Council are subject to disqualification for bias, prejudice, interest, or any other cause provided in RCW 34.05 or for which a judge is disqualified. RCW 34.05.425(3).

5. Any party may petition for the disqualification of an individual. RCW 34.05.425(4).

6. The *individual* whose disqualification is requested shall determine whether to grant the petition stating facts and reasons for the determination. RCW 34.05.425(5) (emphasis added).

7. Pursuant to RCW 34.05, Councilmember Sutherland has the individual responsibility to address the parties' motion for his recusal; the Council does not.

#### IV. DECISION

Based on the foregoing conclusions of law, the Council denies the motion of Intervenors Save Our Scenic Area, Friends of the Columbia Gorge, and the Seattle Audubon Society to disqualify Skamania County's chosen representative Doug Sutherland from membership on the Energy Facility Site Evaluation Council.

DATED this \_\_\_\_\_ day of December, 2010.

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Jim Luce, Chair

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Hedia Adelsman  
Department of Ecology

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Dennis Moss  
Utilities and Transportation Commission

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Richard Fryhling  
Department of Commerce

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Andrew Hayes  
Department of Natural Resources

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Jeff Tayer  
Department of Fish and Wildlife

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Doug Sutherland  
for Skamania County