

BEFORE THE STATE OF WASHINGTON  
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of  
Application No. 2009-01

of

WHISTLING RIDGE ENERGY PROJECT LLC  
for

WHISTLING RIDGE ENERGY PROJECT

PREHEARING ORDER NO. 20  
COUNCIL ORDER NO. 865

Council Order Affirming Restriction  
against Incorporations by reference into  
Briefs

After the adjudicative hearing in this case, the Council directed Administrative Law Judge Wallis to establish maximum briefing page lengths for land use and adjudicative hearing issues. This was done by Judge Wallis after discussion with and among parties at a post-hearing conference January 20, 2011. No party objected to the established page limitation, and the limitation was incorporated in Council Order 863 on March 4, 2011.

Friends of the Columbia Gorge (Friends) and Save Our Scenic Area (SOSA) sought to incorporate by reference the contents of each others' briefs as well as other documents.

Judge Wallis entered an order on March 4, 2011 ruling, among other things, that the incorporation was improper and would not be received. Friends objects to the ruling, "to preserve its rights on appeal," but citing no authority in support of its position. Applicant responds, citing numerous authorities that incorporations by reference are improper.

The Council sustains the order which clearly states that attempted incorporations by reference violate the page limitations. They would have resulted in briefs the equivalent of nearly 100 double-spaced pages in length. Particularly troubling is Friends' acknowledgment that its incorporations by reference are made expressly to avoid the Council's briefing limitations, to which it had agreed at the January 20 post-hearing conference.

The "incorporation by reference" device also puts an unfair, unanticipated burden on other parties, particularly the County, who may feel obligated to respond to the "incorporated" material within the established page limitations.

To be clear: (1) It is reasonable to set out passages from exhibits or laws or other citable material, and to refer to exhibits and other appropriate documents as authority or as the source of cited material but (2) unreasonable to hamper Council efforts to provide procedural fairness by

seeking to circumvent the Council's procedural order limiting briefing page limitations in the manner sought by Friends and SOSA.

For the reasons stated herein, the Council affirms the procedural order of March 4, 2011 and strikes the "incorporated by reference" material from SOSA's and Friends' briefs.

For the Council,



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James O. Luce, Chairman

Olympia, Washington

March 21, 2011