

1 EXPEDITE

2 No Hearing Set

3 Hearing is Set

4 Date: September 28, 2012

5 Time: 11:00 a m

6 The Honorable Judge James J. Dixon

7 **STATE OF WASHINGTON**
8 **THURSTON COUNTY SUPERIOR COURT**

9 FRIENDS OF THE COLUMBIA
10 GORGE, INC., and SAVE OUR SCENIC
11 AREA,

12 Petitioners,

13 v.

14 STATE ENERGY FACILITY SITE
15 EVALUATION COUNCIL (EFSEC) and
16 CHRISTINE O. GREGOIRE, Governor
17 of the STATE OF WASHINGTON,

18 Respondents,

19 and

20 WHISTLING RIDGE ENERGY LLC,
21 SKAMANIA COUNTY, and
22 KLUCKITAT COUNTY PUBLIC
23 ECONOMIC DEVELOPMENT
24 AUTHORITY,

25 Intervenors-Respondents.

NO. 12-2-00692-7

ANSWER TO
PETITIONERS'
OBJECTION TO THE
ADMINISTRATIVE
RECORD AND MOTION
TO CORRECT AND
ADD TO THE RECORD

1 COMES NOW Governor Christine O. Gregoire, Energy Facility Site
2 Evaluation Council (“EFSEC”), Whistling Ridge Energy LLC, Skamania
3 County, and the Klickitat County Public Economic Development Authority
4 (collectively, “Respondents”) by and through its legal counsel set forth below
5 and jointly submit this answer to Friends of the Columbia Gorge, Inc. (“FOCG”)
6 and Save Our Scenic Area’s (“SOSA”) (collectively, “Petitioners”) objection to
7 the administrative record filed by EFSEC and motion to correct and “add to” the
8 administrative record (“Objection”).

9 **I. ARGUMENT**

10 Petitioners’ Objection makes the following three requests: (1) the
11 administrative record should be combined into “one or a few,” searchable, Bates
12 stamped PDF files, (2) certain inadvertently “omitted” documents should be
13 included in the administrative record, and (3) documents attached to Petitioners’
14 Objection “that were cited, quoted, or otherwise referenced during the
15 proceedings below” should be *added* to the administrative record. As briefly
16 noted at the end of this answer, Respondents do not dispute Petitioners’ first two
17 requests. However, Respondents strongly dispute Petitioners’ third request and
18 begin by responding to that request.

19 **A. This Court lacks authority to *add* the documents attached to**
20 **Petitioners’ Objection to the administrative record, and even if such**
21 **authority existed, this Court should decline to *add* documents that**
22 **were outside the administrative record reviewed by EFSEC and**
23 **Governor Gregoire.**

24 Now, long after EFSEC and Governor Gregoire have completed their
25 review, Petitioners ask this Court to *add* additional documents to the record
because Petitioners “cited, quoted, or otherwise referenced” these documents

1 during EFSEC's review process. (Objection at 7.) The vast majority of these
2 new documents were never presented to EFSEC during its review process, even
3 though they were created well before EFSEC's adjudicative process began. Parts
4 or all of some of these documents were first attached to FOCG's petition for
5 reconsideration in clear violation of EFSEC's rules that petitions for
6 reconsideration be based on evidence in the record. *See* WAC 463-30-335(2).
7 Two other documents attached to Petitioners' Objection were created *after*
8 Governor Gregoire made her decision.

9 Petitioners missed multiple opportunities to properly include documents
10 created before EFSEC's adjudicative hearing began in the administrative record.
11 Documents created after EFSEC's adjudicative hearing are clearly outside the
12 record EFSEC and Governor Gregoire reviewed. Most importantly, Petitioners'
13 request clearly ignores the legal limits on this Court's authority to add documents
14 to the record.

15 **1. Neither RCW 80.50.140 nor Washington's Administrative**
16 **Procedure Act ("APA") authorizes this Court to add the documents**
17 **attached to Petitioners' Objection to the administrative record.**

18 This matter comes before this Court under RCW 80.50.140.
19 RCW 80.50.140(1) authorizes this Court to supplement the record if "there are
20 alleged irregularities in the procedure before the council not found in the record."
21 *See Residents Opposed to Kittitas Turbines, v. EFSEC*, 165 Wn.2d 275, 301,
22 197 P.3d 1153 (2008) (superior court properly supplemented the administrative
23 record when petitioners alleged EFSEC's chairman engaged in a conflict of
24 interest and improper ex parte communications and exhibited bias). Here,
25 Petitioners have not alleged any irregularities in EFSEC procedure not found in
the record. Instead, Petitioners' request is based solely on the claim that they

1 themselves “cited, quoted, or otherwise referenced” these documents during
2 EFSEC’s review process. Consequently, RCW 80.50.140 precludes this Court
3 from adding the documents attached to Petitioners’ Objection to the
4 administrative record.

5 Even if RCW 80.50.140 did not foreclose this Court from supplementing
6 the record as Petitioners desire, there is no authority under the APA to add the
7 documents attached to Petitioners’ Objection to the administrative record.
8 Superior courts authority under the APA to add documents to an administrative
9 record is “highly limited.” *Motley-Motley, Inc. v. Pollution Control Hearings*
10 *Bd.*, 127 Wn. App. 62, 76, 110 P.3d 812 (2005).

11 If the admission of new evidence at the superior court
12 level was not highly limited, the superior court would
13 become a tribunal of original, rather than appellate,
14 jurisdiction and the purpose behind the administrative
15 hearing would be squandered.

16 Under RCW 34.05.562(1), new evidence is admissible
17 only under highly limited circumstances. . . . Generally,
18 however, new evidence is inadmissible. When it is
19 admissible, it is admissible because it falls squarely
20 within the statutory exceptions listed in
21 RCW 34.05.562(1).

22 *Id.* RCW 34.05.562(1) provides that:

23 [t]he court may receive evidence in addition to that
24 contained in the agency record for judicial review, *only if*
25 *it* relates to the validity of the agency action at the time it
was taken and *is needed to decide disputed issues*
regarding:

1 (a) Improper constitution as a decision-making body or
2 grounds for disqualification of those taking the agency
3 action;

4 (b) Unlawfulness of procedure or of decision-making
5 process; or

6 (c) Material facts in rule making, brief adjudications, or
7 other proceedings not required to be determined on
8 the agency record.

9 [Emphasis added.]

10 Petitioners' Petition for Review does not implicate any of these three
11 enumerated issues. It does not allege that EFSEC was improperly constituted or
12 that any of its members should be disqualified. It does not allege an unlawful
13 procedure or decision-making process. As EFSEC's recommendation and the
14 Governor's decision were both based on the record, the third issue enumerated in
15 RCW 34.05.562(1) is not applicable. Petitioners attempted justification for
16 adding these documents—*i.e.*, "cited, quoted, or otherwise referenced during the
17 proceedings below"—is not listed in RCW 34.05.562(1). Consequently, this
18 Court lacks authority to add the documents attached to Petitioners' Objection to
19 the administrative record, and this Court should deny Petitioners' request.

20 **2. Even if the law gave this Court discretion to consider adding the**
21 **documents attached to Petitioners' Objection to the administrative**
22 **record, this Court should not indulge Petitioners' attempt to rectify**
23 **their own evidentiary shortcomings.**

24 As described below, Petitioners added documents to the administrative
25 record at each and every stage of EFSEC's review process. Indeed,
Order No. 868 recognized that "this aggressively litigated proceeding appear[s]
to have set a record for length, volume, and number of issues addressed for a

1 facility of this type.” (Rec. Doc. #2280 at 16.) After the adjudicative record
2 closed, Petitioners tried to rely on documents outside the record in direct
3 violation of EFSEC’s administrative rules. See WAC 463-30-230(2), 463-30-
4 310(2)(a), 463-30-335(2). Petitioners now ask this Court to *add* some of these
5 same extra-record documents and entirely new extra-record documents to the
6 administrative record. This Court should deny Petitioners’ request.

7 **a. Statement of Material Facts Concerning EFSEC’s Review**
8 **Process**

9 Petitioners have appealed Governor Gregoire’s approval, upon EFSEC’s
10 recommendation, of a Site Certification Agreement for the Whistling Ridge
11 Energy Project (the “Project”) in Skamania County, Washington. EFSEC’s
12 review consists of “[t]wo legally separate processes”: an adjudicative proceeding
13 and the environmental review required by the State Environmental Policy Act
14 (“SEPA”). (Rec. Doc. #1394 at 2.) In Order No. 854, EFSEC advised the parties
15 that:

16 [t]he purpose of the adjudicative record is not to provide
17 casual reading, where references to outside sources may
18 be common and appropriate. Instead, directly relevant
19 documents may be the subject of questions during the
20 adjudicative hearing and may be used and referenced in
21 drafting of briefs, orders and recommendations. Parties,
22 Council members and the Governor need to have them in
23 hand for reference as questions are asked and answered
24 and to understand the complete story of the witnesses.
25 The assumption [by FOCG and SOSA] that a complete
and organized record is unnecessary for complex
litigation is incorrect.

1 (Rec. Doc. #1417 at 2.) EFSEC also has administrative rules governing the
2 admission of documentary evidence and the taking of official notice. *See, e.g.*,
3 WAC 463-30-310(2)(a) (documentary evidence shall be submitted to the other
4 parties “sufficiently in advance [of the adjudicative hearing] to permit study and
5 preparation of cross-examination and rebuttal evidence”), WAC 463-30-230(2)
6 (requiring that parties be notified “before or during [the adjudicative] hearing” of
7 material sought to be officially noticed and “afforded an opportunity to contest
8 the facts and material so noticed”).

9 As part of the adjudicative process, EFSEC conducted a land use
10 consistency hearing on May 7, 2009, and an adjudicative hearing on January 3-7,
11 10-11, and 20, 2011. (Rec. Doc. #2280 at 6, 8.) Both sides presented testimony
12 and other evidence during those hearings. At the conclusion of EFSEC’s
13 adjudicative hearing on January 20, 2011, Administrative Law Judge Wallis led
14 the parties through a detailed discussion of which documents were in and which
15 documents were out of the adjudicative record. (*See* Rec. Doc. #2110 at
16 1488:19-1516:19.) At the end of this discussion, Judge Wallis asked “Is there
17 anything further?” (*Id.* at 1516:14-15.) Hearing no response, he closed the
18 adjudicative hearing. (*Id.* at 1516:16-19.)

19 EFSEC subsequently issued Order No. 864, which addressed “the final
20 exhibit list” for the adjudicative proceeding that “governs the status of exhibits
21 from this point forward.” (Rec. Doc. #2163 at 1.) This final exhibit list appears
22 in the administrative record as Rec. Doc. #2166. The copy that was sent to
23 Governor Gregoire appears in the record at Rec. Doc. #2352. Petitioners did not
24 object to the final exhibit list. (*See* Rec. Doc. #2170 at 1.)
25

1 On May 20, 2011, the Council reopened the adjudicative record to receive
2 copies of visual simulations of the Project that EFSEC staff had made for
3 EFSEC's May 2-3, 2011 site visit. (Rec. Doc. #2201.) EFSEC then "recloses the
4 [adjudicative] record." *Id.*

5 In full compliance with SEPA and in cooperation with the United States
6 Department of Energy, Bonneville Power Administration under the National
7 Environmental Policy Act, EFSEC also issued a Draft Environmental Impact
8 Statement ("DEIS") for public comment on May 24, 2010, conducted public
9 hearings on the DEIS June 16-17, 2010, and accepted written comments on the
10 DEIS until August 27, 2010 (extended from the original July 19 deadline). (Rec.
11 Doc. #2255 at 2; Rec. Doc. #2279 at 4.) FOCG and SOSA each submitted
12 comments on the DEIS. (Rec. Doc. #2252 at 634-638, 643-648, 765-862, 914-
13 1192, 1201-1202.) EFSEC's responsible official under SEPA issued the Project's
14 Final Environmental Impact Statement ("FEIS"), which contains responses to the
15 public comments, on August 12, 2011. (*See* Rec. Doc. #2251.)

16 On October 6, 2011, EFSEC issued Order No. 868 resolving contested
17 issues in the adjudicative proceeding. (Rec. Doc. #2280.) EFSEC then issued
18 Order No. 869, which considered "both Order No. 868 resolving adjudicative
19 issues and the FEIS" for the Project and recommended that Governor Gregoire
20 approve the Project, subject to certain conditions. (Rec. Doc. #2279.)

21 On October 27, 2011, Petitioners filed their petitions for reconsideration.
22 (*See* Rec. Doc. #2293, #2294.) To support an alleged error in Order No. 868,
23 FOCG's petition for reconsideration cited the FEIS for another EFSEC-permitted
24 wind energy facilities (*i.e.*, Kittitas Valley) and wildlife studies for two other
25 proposed wind energy facilities (*i.e.*, Coyote Crest and Radar Ridge). (Rec. Doc.

1 #2294 at 26-27 fn. 67, 69, 70.) However, these documents were not part of the
2 adjudicative record upon which Order No. 868 was based. (See Rec. Doc.
3 #2163.) FOCG also attached the following documents to its petition for
4 reconsideration: (1) a Cowlitz-County Superior Court order (*Id.*, Ex. A); (2)
5 Skamania County Ordinance No. 2011-03 and a corresponding staff “Agenda
6 Item Commentary” (*Id.*, Ex. B); and (3) five pages excerpted from a Wyoming
7 permit for a wind energy facility (*Id.*, Ex. C). None of these documents were part
8 of the administrative record.

9 Intervenor-Respondents Whistling Ridge Energy LLC, Skamania County,
10 and the Klickitat County Public Economic Development Authority timely
11 objected to Petitioners’ attempted reliance on these documents. (Rec. Doc.
12 #2315 at 3-5, Rec. Doc. #2310 at 12.)

13 On December 27, 2011, EFSEC issued Order No. 870 denying the
14 petitions for reconsideration. (Rec. Doc. #2321.) The only extra-record
15 document addressed in this order was the Cowlitz-County Superior Court order.
16 (*See id.* at 8 fn. 20.)

17 On December 29, 2011, Petitioners moved EFSEC to take official notice of
18 Skamania County Ordinance No. 2011-08 and the corresponding staff “Agenda
19 Item Commentary.” (Rec. Doc. #2331.) On January 6, 2012, EFSEC issued
20 Order No. 871 denying “the motion as being untimely. The [adjudicative] record
21 in this matter has been closed since May, 2011.” (Rec. Doc. #2353.)

22 On March 5, 2011, Governor Gregoire approved the Project, as
23 recommended and conditioned by EFSEC. (Rec. Doc. #2361.)
24
25

1 **b. Skamania County moratorium ordinances and corresponding**
2 **staff commentaries should not be added to the administrative**
3 **record.**

4 Petitioners request that seven Skamania County moratorium ordinances
5 adopted before EFSEC's adjudicative hearing, two Skamania County moratorium
6 ordinances adopted after the adjudicative hearing, and one Skamania County
7 moratorium ordinance adopted after Governor Gregoire approved the Project be
8 added to the administrative record. Petitioners' Objection does not even inform
9 this Court that the Objection's exhibit containing these ten moratorium
10 ordinances also contains the corresponding staff "Agenda Item Commentary" for
11 each ordinance nor does the Objection attempt to justify why these commentaries
12 should be added to the record.

13 Of the seven Skamania County moratorium ordinances adopted before
14 EFSEC's adjudicative hearing began on January 3, 2011, two are already part of
15 the administrative record, which is why the parties' briefing repeatedly addressed
16 the moratorium ordinances.¹ Petitioners never requested that EFSEC include the
17 staff commentaries for these two pre-hearing moratorium ordinances in the
18 record. Petitioners squandered their opportunities to include the other five pre-
19 hearing moratorium ordinances and seven staff commentaries attached to
20 Petitioners' Objection, and this Court should decline Petitioners' request that
21 these documents be added to the record.

22 Petitioners unsuccessfully tried to get the two moratorium ordinances
23 adopted after the adjudicative hearing into the record. FOCG attached Skamania

24 ¹ During the adjudicating hearing, Petitioners offered and EFSEC admitted Skamania County Ordinance
25 2010-10. (See Rec. Doc. #2166 at 1.) EFSEC also took official notice of Skamania County Ordinance 2010-06.
(Rec. Doc. #1598 at 64:17-21, 67:9-12, 68:1-10.) Skamania County Ordinance 2010-06 and Skamania County
Ordinance 2010-10 appear as Rec. Doc. #1443 and Rec. Doc. #1631, respectively.

1 County Ordinance No. 2011-03 and the corresponding staff commentary to its
2 petition for reconsideration and asked that EFSEC take official notice of it (Rec.
3 Doc. #2294 at 9 fn. 21, Ex. B), even though WAC 463-30-335(2) requires that
4 petitions for reconsideration be based on “the evidence of record.” Petitioners
5 subsequently moved EFSEC to take official notice of Skamania County
6 Ordinance No. 2011-08 and the corresponding staff commentary. (Rec. Doc.
7 #2331.) EFSEC denied that “motion as being untimely. The record in this
8 matter has been closed since May, 2011.”² (Rec. Doc. #2353.) Indeed, EFSEC’s
9 administrative rule regarding official notice provides that:

10 Parties shall be notified *either before or during hearing*,
11 or by reference in preliminary reports or otherwise, of the
12 material so noticed and the sources thereof, including any
13 staff memoranda and data, and *they shall be afforded an*
opportunity to contest the facts and material so noticed.
[Emphases added.]

14 WAC 463-30-230(2). EFSEC properly did not grant Petitioners’ request that it
15 take official notice of these two post-hearing moratorium ordinances and
16 corresponding staff commentaries, and this Court should decline Petitioners’
17 request that these documents be added to the record.

18 The final moratorium ordinance attached to Petitioners’ Objection—
19 Skamania County Ordinance No. 2012-04—was adopted on May 22, 2012. This
20 is over two months *after* Governor Gregoire made her decision in this
21 administrative record. There is no basis for adding an ordinance adopted, and
22

23 _____
24 ² Petitioners attempt to explain away this denial by noting that EFSEC “did not determine that the
25 document was irrelevant or inherently improper for inclusion in the record.” (Objection at 8 fn. 10.) This
rationale ignores that the adjudicative record was closed and that EFSEC had already denied the petitions for
reconsideration.

1 corresponding staff commentary prepared, over two months after Governor
2 Gregoire approved the Project. This Court should deny Petitioners' request to
3 add this moratorium ordinance and staff commentary to the administrative
4 record.

5 **c. The Feb. 13, 2007 Cowlitz County letter concerning an entirely**
6 **different energy project should not be added to the**
7 **administrative record.**

8 Petitioners next desire to add a Feb. 13, 2007 Cowlitz County letter
9 concerning an entirely different energy project to this Project's administrative
10 record. There is simply no basis for this request given that Petitioners again
11 missed their opportunities to present this letter to EFSEC during the proceedings
12 below.

13 After the adjudicative hearing was complete, FOCG's response brief on
14 land use consistency quoted a Cowlitz County Superior Court order and
15 requested that EFSEC take official notice of this order. (Rec. Doc. #2155 at 2-3.)
16 Order No. 868 rejected FOCG's argument that relied on this order "as being
17 unsupported. The [Cowlitz County Superior Court] decision was not offered into
18 evidence during the hearing and no copies were provided to the Council or to
19 other parties." (Rec. Dec. 2280 at 10 (citing RCW 34.05.461, section (4) of
20 which requires that APA orders "be based exclusively on the evidence of record
21 in the adjudicative proceeding and on matters officially noticed in that
22 proceeding.")).

23 FOCG then attached the Cowlitz County Superior Court order to its
24 petition for reconsideration (Rec. Doc. #2294, Ex. A), even though WAC 463-
25 30-335(2) requires that petitions for reconsideration be based on "the evidence of
record." In denying the petitions for reconsideration in Order No. 870, the only

1 extra-record document EFSEC addressed was this Cowlitz County Superior
2 Court order:

3 Friends also argues that a certification of consistency is a
4 decision requiring SEPA review under RCW 43.20C.030,
5 citing a superior court order in another proceeding.
6 Order 868 rejects this challenge as being unsupported.
7 The decision was not offered into evidence during the
8 hearing and no copies were provided to the Council or to
9 other parties. The Council nevertheless examined the
10 order and found it does not support Friends' argument.
11 Indeed, given the lack of context (*e.g., neither the*
12 *"opinion letter" to which the brief order refers, nor the*
13 *"defendants' motions to dismiss" are included*), and
14 references to statutes that do not exist (i.e., RCW
15 30.70C.020 and .040), it is not possible to divine any
16 meaning at all from the face of the court's order. The
17 order makes no reference at all to RCW 41.21C.030.

18 (Rec. Doc. #2321 at 8 fn. 20 [Emphases added].) Petitioners now seek to rectify
19 the "lack of context" EFSEC identified in Order No. 870 by asking that this
20 Court add the "opinion letter" to the administrative record.

21 Petitioners claim that adding this Feb. 13, 2007 Cowlitz County letter to
22 this Project's administrative record will not prejudice the parties because "the
23 document was originally submitted to EFSEC, which is therefore charged with
24 knowledge of its contents; and the other parties have had copies of this document
25 since 2010." (Objection at 9.) Apparently, Petitioners believe that they can force
EFSEC and the Governor to review all of EFSEC's files for documents that
might pertain to parties' arguments. This belief is presented without legal
authority, and runs directly contrary to EFSEC's direction in a pre-hearing order
that "Parties, Council members and the Governor need to have [directly relevant
documents] in hand for reference" during the review process. (Rec. Doc. #1417

1 at 2.) Moreover, contrary to Petitioners' assertion, Respondent Governor
2 Gregoire and Intervenor-Respondent Klickitat County Public Economic
3 Development Authority were not parties in the *Drach v. Skamania County* appeal
4 to the Columbia River Gorge Commission (*See* Rec. Doc. #1877 at 1, #1878 at 1,
5 #1879 at 1), and therefore never received a copy of this Feb. 13, 2007 Cowlitz
6 County letter in that proceeding. Finally, Petitioners had ample opportunity
7 during the adjudicative proceeding to properly include this letter in the
8 administrative record if they had so desired. As Petitioners squandered their
9 opportunities to present this letter to EFSEC during the proceedings below, this
10 Court should deny Petitioners' request to now add this letter to the administrative
11 record.

12 **d. The full Wyoming wind energy permit should not be added to**
13 **the administrative record.**

14 There is no basis for this Court to add a 56-page Wyoming wind energy
15 permit to the record when this document was never presented to EFSEC or given
16 to the parties. Contrary to Petitioners' assertion, "relevant portions" of this
17 document are not part of the adjudicative record. (Objection at 9.) This permit is
18 not identified on EFSEC final exhibit list. (*See* Rec. Doc. #2166). Furthermore,
19 it is dated July 18, 2011 (Objection, Ex. C at 54) but Order No. 871 stated that
20 EFSEC's record closed in May 2011. (Rec. Doc. #2353.) FOCG simply
21 attached five pages excerpted from this Wyoming permit to its petition for
22 reconsideration and asked EFSEC to take official notice of those five pages.
23 (Rec. Doc. #2294 at 20, Ex. C.)

24 WAC 463-30-335(2) requires that petitions for reconsideration be based on
25 "the evidence of record." WAC 463-30-230(2) requires that parties be notified

1 “before or during [the adjudicative] hearing” of material sought to be officially
2 noticed and “afforded an opportunity to contest the facts and material so
3 noticed.” FOCG did not comply with either of these administrative rules when it
4 attached the five excerpted pages of the Wyoming permit to its petition for
5 reconsideration and EFSEC never took official notice of them. Petitioners seek
6 to add the full 56-page permit to the record in order “[t]o avoid any confusion
7 about the contents of the Wyoming permit” in this appeal. While this intent may
8 be laudable, Petitioners did not afford EFSEC or the Governor the opportunity to
9 review the entire 56-page permit. *See Motley-Motley*, 127 Wn. App. at 76 (“If
10 the admission of new evidence at the superior court level was not highly limited,
11 the superior court would become a tribunal of original, rather than appellate,
12 jurisdiction and the purpose behind the administrative hearing would be
13 squandered.”). This Court should deny Petitioners’ request.

14 **e. The Kittitas Valley FEIS and wildlife studies for Coyote Crest**
15 **and Radar Ridge wind energy facilities should not be added to**
16 **the administrative record.**

17 There is no basis for this Court to add the Kittitas Valley FEIS and wildlife
18 studies for Coyote Crest and Radar Ridge wind energy facilities to the
19 administrative record. FOCG’s petition for reconsideration alleged, among other
20 things, that Order No. 868 (termed the “Adjudicative Order” in FOCG’s petition
21 as opposed to Order No. 869, which FOCG’s petition termed the
22 “Recommendation Order”) erred in applying the Washington Department of Fish
23 and Wildlife’s *Wind Power Guidelines*. (See Rec. Doc. #2294 at 24-27, which
24 are attached to this answer as Exhibit 1.) To support this alleged error in Order
25

