

- 1 EXPEDITE
2 No hearing set
3 Hearing is set

4 Date: October 26, 2012

5 Time: 11:00 a.m.

6 The Honorable Judge James J. Dixon

7 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
8 IN AND FOR THE COUNTY OF THURSTON

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

12 Petitioners,

13 vs.

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

19 Respondents,

20 and

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

Intervenors-Respondents.

No. 12-2-00692-7

PETITIONERS' RESPONSE TO
MOTION TO CERTIFY PETITION
FOR REVIEW TO SUPREME COURT
PURSUANT TO RCW 80.50.140

1 COME NOW Petitioners Friends of the Columbia Gorge, Inc. (“Friends”) and
2 Save Our Scenic Area (“SOSA”) and respond to Respondents’ motion for direct
3 review by the Washington Supreme Court (“Respondents’ Motion”).¹

4 I. INTRODUCTION

5 As the moving parties, Respondents bear the burden of demonstrating that all
6 four statutory factors under RCW 80.50.140(1) are met.² Respondents have not
7 met their burden. The Court should deny Respondents’ motion, and should adjudge
8 Petitioners’ claims rather than certifying the matter for direct review by the
9 Supreme Court.

10 II. STATUTORY AUTHORITY

11 In order for this case to be certified to the Washington Supreme Court for
12 direct review, Respondents must demonstrate that *all four* of the following
13 conditions are met:

- 14 (1) The Thurston county superior court shall certify the petition for review
15 to the supreme court upon the following conditions:
- 16 (a) Review can be made on the administrative record;
 - 17 (b) Fundamental and urgent interests affecting the public interest and
18 development of energy facilities are involved which require a
19 prompt determination;
 - 20 (c) Review by the supreme court would likely be sought regardless of
21 the determination of the Thurston county superior court; *and*

22 ¹ The moving parties are Respondents Governor Christine O. Gregoire and Energy
23 Facility Site Evaluation Council (“EFSEC”), as well as Intervenor-Respondents Whistling
Ridge Energy LLC, Skamania County, and the Klickitat County Public Economic Development
Authority. This response brief will refer to the moving parties collectively as “Respondents.”

² The Court should reject Respondents’ attempts to shift their burden to Petitioners. *See*
Resps.’ Mot. at 2. (“Respondents request that the Court require Petitioners to show cause why
this matter should not be immediately certified to the Supreme Court for direct review.”).

1 (d) The record is complete for review.

2 RCW 80.50.140 (emphasis added).

3 During this appeal, Respondents have repeatedly stated or implied that the
4 Superior Court's only role in hearing appeals of Siting Act decisions is to send the
5 appeals up to the Supreme Court.³ This is a gross mischaracterization of both the
6 applicable statutory framework and the history of actual practice in the Thurston
7 County Superior Court. In the forty-three years since EFSEC was created,⁴
8 approximately ten of its decisions have been appealed to the Thurston County
9 Superior Court. Only one of those appeals ever reached the Washington Supreme
10 Court. *Residents Opposed to Kittitas Turbines ("ROKT") v. EFSEC*, 165 Wn. 275,
11 197 P3d 1153 (2008). In the *ROKT* case, the petitioners did not oppose the
12 respondents' arguments that the majority of the issues raised in the case involved
13 fundamental and urgent issues of statewide importance that required a prompt
14 determination. Rather, the petitioners in the *ROKT* case only temporarily opposed
15 certification until depositions could be taken and other information gathered.⁵

16 ³ See Resps.' Mot. at 5 ("RCW 80.50.140 fundamentally contemplates certification to the
17 Supreme Court without review and hearing by the Thurston County Superior Court regarding the
18 substantive merits of the Petition for Review."); Declaration of Timothy L. McMahan (May 2,
19 2012) (Docket # 26) ("Pursuant to RCW 80.50.140, the role of the Thurston County Superior
20 Court is quite limited to verifying the sufficiency of the Record, and to certify the record to the
21 Supreme Cort. . . . This Court is not charged with adjudication of the issues on appeal, and
22 notwithstanding the 'relief' requested by Petitioners in their Petition, *this court is not authorized*
23 to reverse or remand this matter to Governor Gregoire or EFSEC.") (emphasis added).

⁴ EFSEC, originally named the Thermal Power Plant Siting Council, was created on July
24, 1969 by Executive Order 69-05 of Governor Dan Evans.

⁵ See County's Response to Mot. to Certify (Docket #26) (Dec. 4, 2007), *ROKT v.*
21 *EFSEC*, Thurston County Superior Court No. 07-2-02080-0), at 3 (requesting "[t]hat the Court
22 deny the Governor's motion to certify the matter to the Washington Supreme Court *at this time*
23 because the record is not yet complete") (emphasis added); *ROKT's* Response to Mot. to Certify
(Docket #25) (Dec. 4, 2007), *ROKT v. EFSEC*, at 7 ("ROKT and Lathrop propose that the Court
defer decision on the Motion to Certify to the Supreme Court until the parties and the Court have
an adequate opportunity to review the record, supplement or strike portions as appropriate,

1 Accordingly, after the petitioners were allowed to take the depositions of Council
2 members and gather other evidentiary information, the case was certified for direct
3 review by the Supreme Court.⁶

4 Other appeals of EFSEC decisions have met a different fate in the Thurston
5 County Superior Court. For example, in *Cascade Columbia Alliance v. EFSEC*,
6 Judge Hicks adjudicated the merits of the Petition for Judicial Review, which
7 included constitutional claims,⁷ and remanded the case to EFSEC.⁸ And in *Wildlife*
8 *Forever of Grays Harbor v. EFSEC*, Judge McPhee adjudicated the merits of the
9 case and upheld the Site Certification Agreement.⁹ *Cascade Columbia Alliance*
10 and *Wildlife Forever* show that the Thurston County Superior Court not only has
11 the authority to adjudicate appeals of Siting Act decisions, it has previously
12 exercised that authority.

13 III. FACTUAL BACKGROUND

14 Respondents characterize EFSEC's review of the Project as "exhaustive."
15 Resps.' Mot. at 2-3. While Petitioners do not doubt that EFSEC intended to
16 conduct an exhaustive review, the end result fell far short of that goal. EFSEC's
17 failure to resolve all issues is attested to by the fact that it received approximately

18 conduct discovery and fact-finding hearings and then sign the certification Order which is
19 submitted concurrently with this Response.").

20 ⁶ Order Certifying Petitions for Review to Supreme Court for Direct Review (Docket
21 #87), *ROKT v. EFSEC* (Feb. 29, 2008).

22 ⁷ "EFSEC's Orders violate the state and federal constitutional due process, equal
23 protection, and freedom of association rights of CCA and its members." Pet. for Jud. Rev.
(Docket #2), *Cascade Columbia Alliance v. EFSEC*, Thurston County Superior Court No. 96-2-
04073-5 (Nov. 13, 1996) at 9, ¶ VII.3.

⁸ Order & Judgm., *Cascade Columbia Alliance v. EFSEC*, Thurston County Superior
Court No. 96-2-04073-5 (July 10, 1998) (Docket #86).

⁹ Order Affirming Site Certification Agreement Amendment No. 3 for the Satsop Power
Plant Site, *Wildlife Forever of Grays Harbor v. EFSEC*, Thurston County No. 99-2-01150-1
(June 7, 2000) (Docket #41).

1 two hundred pages of briefing from seven parties involving reconsideration of its
2 adjudicative order, recommendation order, and draft Site Certification Agreement
3 (“SCA”).¹⁰ Unfortunately, after hearing the many issues and arguments raised on
4 reconsideration, EFSEC declined to change a single word in any of its decisional
5 documents or the draft SCA, and the Governor likewise signed the SCA without
6 making or asking for any changes.¹¹ At that point, Petitioners’ only recourse was to
7 seek relief in this Court.

8 Respondents neglect to mention the important fact that the Applicant has
9 placed the Project indefinitely on hold, for reasons that have nothing to do with this
10 appeal and instead involve the Project’s lack of economic viability in today’s
11 energy market. Despite receiving the Governor’s signature on the SCA, the
12 Applicant has taken absolutely no steps to pursue development of the Project, such
13 as signing the SCA, submitting to EFSEC any of the plans and other
14 documentation required by the conditions of approval, or notifying EFSEC that it
15 intends to move forward with any aspects of the Project. The Applicant is free to
16 take any of these actions while the decision is under appeal (unless injunctive relief
17 is sought and granted), but has so far declined to do so. The fact that the Project is
18 on hold seriously undermines Respondents’ arguments that this appeal urgently
19 requires a prompt determination in the Supreme Court.

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¹⁰ AR 28762–29047, 36509–36664.

¹¹ See EFSEC’s Order Denying Petitions for Reconsideration of Order 868 and Order 869 (Rec. Doc. #2344, beginning at AR 36487).

1 **IV. ARGUMENT**

2 **A. Other than the issues raised in Petitioners’ previous motions regarding**
3 **completion of the administrative record and judicial notice, the record is**
4 **complete for review and review can be made on the administrative**
5 **record.**

6 The first statutory factor for certification to the Supreme Court is whether
7 “[r]eview can be made on the administrative record.” RCW 80.50.140(1)(a). The
8 fourth factor is whether “[t]he record is complete for review.” RCW
9 80.50.140(1)(d).

10 Petitioners previously filed an Objection to the Administrative Record and
11 Motion to Correct and Add to the Record (“Objection and Motion”),¹² which the
12 Court granted in part and denied in part.¹³ In the Objection and Motion, Petitioners
13 requested that the administrative record should be completed by including copies
14 of certain documents that were cited, quoted, or otherwise relied on during the
15 proceedings below, and argued that many of these documents were already part of
16 the record by virtue of being considered below, and that in any event the
17 documents should be “added” to the record. The Court denied this portion of the
18 Objection and Motion, determining in an oral ruling that it did not have authority
19 to “supplement” the record.¹⁴

20 Second, on October 15, 2012, Petitioners filed a motion asking this Court to
21 take judicial notice of certain legal authorities and facts, which motion is currently
22 pending. The materials covered by this motion are important for resolving two

23 ¹² Docket #58 (filed Aug. 31, 2012)

¹³ Docket #76 (Order dated Sept. 28, 2012).

¹⁴ Petitioners reserve the right to assign error to this ruling in the event of an appeal.

1 claims in the Petition for Review involving land use consistency.¹⁵ The Court
2 should grant the motion and take judicial notice of the requested materials.

3 Other than the issues raised in these two motions, the record is complete for
4 review, and review can be made on the administrative record.

5 **B. Respondents have not shown that any fundamental or urgent interests**
6 **affecting the public interest and development of energy facilities are**
7 **involved that require a prompt determination.**

8 The second statutory factor for certification to the Supreme Court is whether
9 “[f]undamental and urgent interests affecting the public interest and development
10 of energy facilities are involved which require a prompt determination.” RCW
11 80.50.140(1)(b). With this Project and this Applicant, there is no urgency and no
12 need for a prompt determination. Furthermore, Respondents fail to demonstrate
13 any fundamental interests affecting the public interest and the development of
14 energy facilities.

15 The statements and actions of the Applicant in this matter underscore the fact
16 that there is no urgency. First and perhaps most importantly, the Applicant has not
17 yet even signed the Site Certification Agreement (“SCA”), which is the first
18 necessary step for acting on the state’s approval of the Project. The Governor
19 adopted EFSEC’s recommendation and signed the SCA on March 5, 2012. Despite
20 the passage of more than seven months, the Applicant still has not executed the
21 SCA, submitted to EFSEC any of the plans and other documentation required by
22 the conditions of approval, or taken any other action in furtherance of the Project.

23 Further, the Applicant has made many public statements that the Project is not
financially feasible as approved by the Governor. In its Petition for
Reconsideration, the Applicant stated that the decision by EFSEC and the

¹⁵ Pet. for Jud. Rev. (Docket #4) at ¶¶ 7.1.1, 7.1.5.

1 Governor to deny 15 of the proposed 50 turbines “kills the project.”¹⁶ The
2 Applicant has also repeatedly stated that the project has been placed indefinitely on
3 hold, given the denial of 15 of the turbines and the realities of today’s energy
4 markets. Kahn Decl., Exs. 1–5. No doubt the Applicant is waiting to see if the
5 energy markets change, given that the Applicant has until March 5, 2022 to begin
6 construction. *See* WAC 463-68-030, -080. But given that there are more than nine
7 years remaining in that time period, plus the possibility of extensions, *see* WAC
8 463-68-080, it is clear that the the Applicant is not in any hurry to begin
9 constructing a project that is currently not financially feasible. In short, there is no
urgency whatsoever.

10 Furthermore, there is no urgency for any other EFSEC applicants. According
11 to EFSEC’s website, as of March 17, 2012, the only application currently “under
12 review” by EFSEC is the project in the instant case, Whistling Ridge. Kahn Decl.,
13 Ex. 9. Nor have Respondents shown that that any other potential applicants are
waiting in the wings to submit new applications.

14 The EFSEC application process typically takes several years from start to
15 finish.¹⁷ Even if a new application were submitted today, the legal issues in the
16 instant case will be resolved in sufficient time to guide any future applications.

17 Finally, there is no urgency in general for wind energy. Because it is highly
18 uncertain whether the federal wind energy production tax credit will be renewed at

19 ¹⁶ AR 28907; *see also* Kahn Decl., Ex. 5. Curiously, despite this pronouncement, the
20 Applicant chose not to appeal the denial of the 15 turbines.

21 ¹⁷ EFSEC and Governor Gregoire have approved four wind energy projects to date. For
22 the Wild Horse Wind Project, the application was filed on March 9, 2004, and the Governor
23 approved the project on July 26, 2005. For the Kittitas Valley Wind Project, the application was
submitted in January 2003, and Governor Gregoire approved the project on September 18, 2007.
For the Desert Claim Wind Power Project, the application was submitted on November 6, 2006,
and the Governor approved the project on February 1, 2010. For the Whistling Ridge Energy
Project, the application was submitted on March 10, 2009, and the Governor approved the
project on March 5, 2012. Kahn Decl., Exs. 10–12.

1 the end of 2012, new wind energy construction throughout the country, and
2 particularly throughout the Northwest, has come to a screeching halt. Kahn Decl.,
3 Ex. 6. Even projects already approved are on hold, including at least one project
4 approved by Governor Gregoire.¹⁸ Simply put, there is no rush for building or
5 applying for wind energy projects at the present time, and thus no urgency or need
6 to bypass the Superior Court in this appeal.

7 Respondents raise several issues that they argue constitute fundamental and
8 urgent interests affecting the public interest and development of energy facilities.
9 For example, they cite state laws that encourage the development of renewable
10 energy facilities in Washington, the provision of energy at a reasonable cost, and
11 the avoidance of duplication and delay in the siting process; and they mention the
12 property tax revenues that could accrue from this Project. Resps.’ Mot. at 8–9.¹⁹
13 But these arguments would apply equally to any other wind energy application
14 filed with EFSEC. Respondents fail to show that there is anything unique or urgent
15 about this Project that warrants special consideration. Respondents’ arguments
16 render RCW 80.50.140(1)(c) meaningless because they result in the second
17 statutory factor always being met for every application.

18 Respondents next contend that Petitioners’ motivation in opposing the
19 certification is “to cause further delays and increase respondent’s expenses.”
20 Resps.’ Mot. at 9. This is simply not true. In fact, Petitioners believe that litigating

21 ¹⁸ Of the three wind energy projects that the Governor approved prior to Whistling Ridge,
22 construction has not yet begun on one of them (the Desert Wind project, approved by Governor
23 Gregoire on February 2, 2010). Kahn Decl., Ex. 7. Another wind project (the Kittitas Valley
project, approved by Governor Gregoire on September 18, 2007) has encountered difficulties
selling its power. Kahn Decl., Ex. 8.

¹⁹ Respondents also argue that the Project’s “substation would address reliability
concerns in Skamania County.” Resps.’ Mot. at 8. However, this was proven during EFSEC’s
allegation to be a completely hollow claim. AR 22316–20 (the Skamania County PUD has no
intentions to purchase energy from the Project, not even for backup power; instead, all energy
from the Project would most likely be distributed outside the State of Washington).

1 the matter in Superior Court may very well resolve things *more quickly*, rather than
2 cause delay. The majority of Petitioners’ claims are procedural issues that are
3 unique to this Project and that will have no applicability to other projects.
4 Depending on the outcome, Petitioners may not appeal a Superior Court decision.
5 *See* Brown Decl. at ¶¶ 4, 5; Drach Decl. at ¶¶ 4, 5. Further, Petitioners believe that
6 it could very well prove more judicially efficient for one Superior Court judge to
7 review the record and render a decision, as opposed to nine Supreme Court
8 justices. Respondents have simply not shown that the Supreme Court would be
9 able to render a decision more quickly than this Court.

10 Respondents identify six legal issues in the Petition for Review that they
11 claim “threaten the EFSEC siting process and require prompt resolution by the
12 Supreme Court, before other energy facilities can be reviewed and permitted by
13 EFSEC and the Governor.” Resps.’ Mot. at 9. As an initial matter, Respondents
14 fail to show that there are any “other energy facilities” waiting to be reviewed and
15 permitted by EFSEC. And even if an application for a new project were submitted
16 today, a decision by the Superior Court (and, if applicable, any appellate court(s)
17 on review) in the instant matter would be resolved long before the Governor would
18 issue a decision on any new application.

19 As for the merits of the six allegedly important issues raised by Respondents,
20 several of these are attempts to create issues that are simply not present in this
21 case. For the other issues, the complete lack of urgency greatly outweighs any
22 perceived threats to EFSEC’s process.

23 The first item raised by Respondents involves paragraph 7.1.1 in Petitioners’
Petition for Judicial Review, which involves whether Skamania County adopted a

1 certificate of land use consistency in this matter. Resps.’ Mot. at 9.²⁰ Respondents
2 greatly overstate the precedential value of this legal issue for other EFSEC
3 projects, and also raise phantom legal issues that are not presented in this appeal
4 and that have already been decided by the courts. Respondents correctly note that
5 this claim involves “the legal issues of what constitutes a certificate of land use
6 consistency under WAC 463-26-090 [and] by what means may local authorities
7 issue such certificates.” Resps.’ Mot. at 9. However, Petitioners are not aware of
8 any other EFSEC proceeding in which a local government submitted a “staff report
9 to EFSEC” that is “not a decision,” as Skamania County did here.²¹ Further, to
10 avoid this issue, local governments merely need to adopt “certificates of
11 consistency” rather than make comments or “staff reports to EFSEC.” Thus, this
12 situation is unlikely to arise in the future, there is no threat to ESFEC’s process for
13 future matters, and there is no need for immediate resolution by the Supreme
14 Court.

15 Further, Respondents also raise an issue that is not even presented in this
16 appeal: “whether [local governments’] certificates [of land use consistency] are
17 separately appealable outside of the EFSEC proceedings under the Land Use
18 Petition Act (‘LUPA’).” Resps.’ Pet. at 9. Petitioners are not sure why
19 Respondents even raise this issue; Petitioners will join Respondents in stipulating
20 that certificates of land use consistency are *not* separately appealable under LUPA.
21 Indeed, that was the holding of the Cowlitz County Superior Court in *Columbia
22 Riverkeeper v. Cowlitz County*, Cowlitz County Superior Court No. 07-2-00400-0
23 (May 2, 2007), *appeal dismissed by stipulated motion*, Wn. Ct. App. No. 36393-3-
II (Dec. 12, 2007) (a certificate of land use consistency is a “land use decision”

²⁰ Respondents also cite paragraphs 7.1.2 through 7.1.5, but present no arguments involving the claims in these paragraphs.

²¹ AR 11377–78.

1 under LUPA, but appeals under LUPA are nevertheless preempted by the appellate
2 process under the Siting Act).²² Other courts have likewise held that jurisdiction
3 over land use consistency appeals involving EFSEC projects lies exclusively in the
4 Thurston County Superior Court. *See, e.g., Lathrop v. EFSEC*, 130 Wn. App. 147,
5 121 P.3d 774 (2005). Petitioners have no desire in this appeal to disturb these
6 judicial rulings. This issue is simply not before this Court. The Court should reject
7 Respondents’ attempts to fabricate an issue out of whole cloth.

8 The next item cited by Respondents as requiring a prompt resolution is
9 Petitioners’ claims that EFSEC erred by allowing the Applicant to wait until after
10 project approval to resolve forest practice issues and by failing to outline the
11 processes by which interested persons will be allowed to participate in EFSEC’s
12 future reviews and decisions on the Project. Resps.’ Mot. at 10–11. Respondents
13 claim that these claims raise “the important legal issue whether and by what means
14 EFSEC can regulate and manage this project.” *Id.* at 11. As noted above, Whistling
15 Ridge is the only project currently under review by EFSEC. In addition, the only
16 two approved but not-yet-built EFSEC projects (Desert Claim Wind Power Project
17 and BP Cherry Point Cogeneration) are currently on hold. Kahn Decl., Exs. 7, 9,
18 12. There are no other new applications before EFSEC, and this Court will likely
19 render a decision before EFSEC reaches any decision-making point on any future
20 applications. Thus, Respondents cannot legitimately claim an urgent need to have
21 this issue decided. It should also be noted that the Whistling Ridge application is
22 one of the only applications in the Western United States for a wind energy project
23 in forested habitat, and no other EFSEC application has ever involved forest

²² A copy of the *Cowlitz County* decision is in the administrative record at AR 28862.

1 practices issues.²³ Thus, it is highly unlikely that forest practice issues will arise
2 with other EFSEC applications in the foreseeable future.

3 Next, Respondents point to Petitioners' claims that the SCA fails to include
4 key measures to avoid and mitigate impacts to resources as required by RCW
5 80.50.010 and WAC 463-60-085(1). Resps.' Mot. at 11 (citing Pet. for Jud. Rev. at
6 ¶ 7.3.2). Respondents contend that Petitioners raise the legal issue of whether a
7 petition for review can challenge EFSEC's conclusions regarding the environment
8 without assigning error to the Final Environmental Impact Statement ("FEIS") that
9 was prepared in conjunction with the project. Respondents apparently
10 misunderstand the nature of Petitioners' claim. Petitioners are not challenging the
11 adequacy of the FEIS.²⁴ Rather, Petitioners are challenging the adequacy of the
12 Application, as well as the decisions of EFSEC and the Governor under the Siting
13 Act and rules. Simply put, Respondents' arguments regarding SEPA and the EIS
14 are a red herring and should be rejected.

15 For its next two purported important legal issues, Respondents point to
16 paragraph 7.9.1 in the Petition for Review, which involves whether the SCA
17 expires ten years after the Governor signs it, ten years after it has been executed by
18 both parties, or ten years after all appeals of any state and federal permits for the
19 project have been exhausted. Resps.' Mot. at 12. Respondents argue that this is an
20 important issue for other energy facilities, but they fail to mention the fact that
21 there are no other energy projects in the EFSEC queue that require a prompt

22 ²³ See EFSEC Order No. 868 at 24, 38 (AR 28675, 28689) (“[Counsel for the
23 Environment] observes that this is the first wind project in a conifer forest in the western United
States on land currently managed as commercial forest. . . . The project is among the first four
wind energy generation projects to be seriously proposed in a northwest forest habitat.”).

²⁴ In fact, EFSEC made it abundantly clear in a series of adjudicative orders that the EIS
and the related State Environmental Policy Act (“SEPA”) process was separate from the
adjudication. See Rec. Docs. #944 (Order No. 4, June 29, 2010), 1099 (Order No. 6, Aug. 11,
2010), 1394 (Order No. 9, Oct. 8, 2010), 1417 (Order No. 10, Oct. 15, 2010).

1 resolution of the issue. As to the Whistling Ridge Project itself, this is likely to be a
2 non-issue for all practical purposes. If this appeal results in a remand on one or
3 more issues, it is likely that EFSEC and the Governor will have to amend or
4 reissue a new SCA, which may restart the ten-year clock at that time. In addition,
5 WAC 463-68-080 provides the opportunity for an extension of the ten-year period
6 if certain conditions are met. Respondents fail to show that the Applicant is
7 prejudiced by having this issue resolved by the Superior Court rather than the
8 Supreme Court.

9 Respondents' final stated legal issue is Petitioners' challenge to the priority of
10 different laws as addressed within the SCA. Resps.' Mot. at 12 (citing Pet. for Jud.
11 Rev. at ¶ 7.10.2). The SCA improperly gives a higher priority to state law than to
12 federal law. However, because there does not appear to be any current identified
13 conflict between federal and state law, the resolution of this issue is not urgent and,
14 as exhaustively noted above, there are no other applications pending that would
15 require a prompt answer to this issue.

16 While Petitioners can envision situations where issues raised in a challenge to
17 a Siting Act decision may involve fundamental issues and urgent issues that
18 require prompt resolution,²⁵ this is simply not one of those cases. To justify
19 certification to the Supreme Court, Respondents cannot merely cite to the statutory

20 ²⁵ The *ROKT* case is a perfect example of such a case. The *ROKT* case involved several
21 fundamental and urgent issues of statewide importance, including alleged unconstitutional
22 regulatory takings; an attack on EFSEC's authority to approve wind energy facilities; challenges
23 to EFSEC's preemption authority and decision; alleged violations of the appearance of fairness
doctrine; alleged conflicts of interest on the part of EFSEC decision-makers; alleged bad faith
actions by EFSEC; alleged endangerment of the public's health, safety, and welfare; an alleged
failure to consider the potential economic viability of the wind project; alleged failure to ensure
that the energy from the project would be used in the State of Washington; alleged conflicts
between the Siting Act and the Growth Management Act; and alleged violations of the State
Environmental Policy Act. *See generally* Pet. for Jud. Rev. (Docket #4), *ROKT v. EFSEC*,
Thurston County Superior Court No. 07-2-02080-0; Pet. for Jud. Rev. (Docket #4), *Kittitas*
County v. Gregoire, Thurston County Superior Court No. 07-2-02099-1.

1 factors. They must show how all of the factors are met. Given the factual scenario
2 as set forth above, there is no urgency here. In fact, as discussed in the next
3 section, depending on the outcome in Superior Court, the case might very well end
4 there. It is not at all clear that keeping the case in Superior Court would result in
5 undue delay.

6 **C. There is not a sufficient basis to conclude that review by the Supreme
7 Court would likely be sought regardless of the determination of the
8 Superior Court.**

9 The third factor for certification to the Supreme Court is whether “[r]eview by
10 the supreme court would *likely* be sought *regardless* of the determination of the
11 Thurston county superior court.” RCW 80.50.140(1)(c) (emphasis added). This
12 factor requires a showing that if the Thurston County Superior Court denies the
13 motion for certification and adjudges the case, then *no matter what the Superior
14 Court decides*, one or more of the parties will *likely* seek further review in the
15 Supreme Court.²⁶ As will be explained below, there is not a sufficient basis to
16 conclude that such an outcome is *likely*.

17 Respondents make the bold but incorrect assertion that “Petitioners and
18 Respondents are *equally likely* to seek Supreme Court review” if the Superior
19 Court denies certification and adjudges the case. Resps.’ Mot. at 13 (emphasis
20 added). Respondents’ attempts to speak for Petitioners as to whether Petitioners
21 would seek further review are inappropriate and invalid. The Court should allow
22 each party to speak for itself as to the likelihood of seeking review by the Supreme
23 Court.

///

²⁶ If the Superior Court denies Respondents’ motion and adjudicates the merits of the case, then future review by the Washington Supreme Court would be discretionary. *See* RCW 2.06.030; 80.50.140(1)(c); RAP 4.2.

1 Filed concurrently with this response brief are the Declarations of Keith
2 Brown and Tom Drach, members of the Boards of Directors of Petitioners Friends
3 and SOSA, respectively. In the declarations, Mr. Brown and Mr. Drach explain
4 that Petitioners have not made any advance plans to appeal an adverse decision of
5 this Court, and that instead, Petitioners evaluate each legal judgment and decision
6 on a case by case basis when it is issued. Brown Decl. at ¶ 4; Drach Decl. at ¶ 4. It
7 certainly cannot be said that Petitioners are likely to seek review by the Supreme
8 Court no matter what happens in the Superior Court.

9 In addition, Mr. Brown and Mr. Drach explain that the majority of the 32
10 claims in this appeal are unique to this project, rather than involving issues of
11 statewide importance. Brown Decl. at ¶ 5; Drach Decl. at ¶ 5. Given the nature and
12 sheer number of claims, Petitioners believe it will be a more appropriate and
13 efficient use of judicial resources for the Superior Court to refine and adjudicate
14 the 32 claims, rather than sending the case directly to the Supreme Court. For the
15 same reason, in the event of a Superior Court decision ruling against Petitioners on
16 all 32 claims, Petitioners would be more likely to appeal to the Court of Appeals
17 than to seek direct review by the Supreme Court.

18 Moreover, Mr. Brown and Mr. Drach also explain if Petitioners prevail before
19 this Court on *some* of the 32 claims listed in the Petition for Judicial Review but
20 not others, they believe that Petitioners would be *less likely* to seek review by a
21 higher court than if Petitioners lose on all claims. Given these statements, it would
22 be incorrect to conclude that Petitioners would seek review “*regardless of the*
23 *determination of the Thurston County superior court,*” RCW 80.50.140(1)(c)
(emphasis added).

Respondents attempt to portray Petitioners as litigious organizations who
would be likely to seek review all the way to the Washington Supreme Court under

1 any circumstance, simply because they oppose this Project. Resps.’ Mot. at 13–14.
2 Petitioners are not nearly as litigious as Respondents would have this Court
3 believe. In the thirty-two years since Friends of the Columbia Gorge was
4 incorporated, Friends has *never* sought review of a case in the Washington
5 Supreme Court.²⁷ Similarly, SOSA has never been a party to an appellate case in
6 the Washington courts, let alone sought review in the Washington Supreme Court.

7 Respondents EFSEC and Governor Gregoire announce that they would appeal
8 an adverse decision by this Court “on the important legal issues in this case.”
9 Resps.’ Mot. at 14. At pages 9 through 13 of their Motion, Respondents identify
10 what they believe are the “important legal issues.” According to Respondents, the
11 “important” and “significant” issues involve six of Petitioners’ 32 claims,²⁸ and
12 EFSEC and the Governor will appeal any adverse ruling on these six claims. This
13 begs the question as to what would happen if EFSEC and the Governor prevail on
14 the six claims they have identified, but lose on all or some of the remaining 26
15 claims. Respondents make no showing that they would seek review by the
16 Supreme Court in such an event, except to make an ironic argument that they
17 “would seek Supreme Court review to prevent . . . delay.” Resps.’ Mot. at 14.
18 Respondents’ argument that they would expend the time and resources to seek
19 review of a ruling on issues that they have not even identified in their Motion as

20 ²⁷ Friends has been a party to only two Washington Court of Appeals cases, and did not
21 seek review by the Washington Supreme Court in either case, despite losing both cases in the
22 Court of Appeals. *Friends of the Columbia Gorge, Inc. v. Wash. State Forest Practices Appeals*
23 *Bd.*, 129 Wn. App. 35, 118 P.3d 354 (Div. II 2005); *Friends of the Columbia Gorge, Inc. v.*
Columbia River Gorge Comm’n, 126 Wn. App. 363, 108 P.3d 134 (Div. III 2005). Friends has
been a party to one case in the Washington Supreme Court, but in that case, Friends did not seek
review by the Washington Supreme Court. *Skamania County v. Columbia River Gorge Comm’n*,
144 Wn.2d 30, 41–42, 26 P.3d 241 (2001).

²⁸ Respondents cite the claims found in paragraphs 7.1.1, 7.7.1, 7.8.1, 7.3.2, 7.9.1, 7.10.2
of the Petition for Judicial Review as involving “important legal issues.” Resps.’ Mot. at 9–13.
Respondents also cite paragraphs 7.1.2 through 7.1.5, but present no legal argument as to
whether those paragraphs involve “important” issues. *See id.* at 9.

1 “important”—all in order to “prevent . . . delay”—is baffling, given that the
2 Supreme Court would not even be required to accept review.²⁹ The Court should
3 review with circumspection Respondents’ arguments that they would attempt to
4 save time by pursuing a discretionary appeal that might only serve to delay
5 implementation of a Superior Court ruling.³⁰

6 In conclusion, there is not a sufficient basis to conclude that every possible
7 outcome in the Thurston County Superior Court would be *likely* to result in a
8 request for review by the Washington Supreme Court. In fact, the declarations filed
9 by Petitioners’ representatives demonstrate the opposite: certain potential
10 outcomes—such as a mixed result whereby Petitioners prevail on some claims and
11 lose on others—are *less likely* to result in a request for review filed with the
12 Supreme Court. And although Respondents claim that they would seek review by
13 the Supreme Court if they lose in this Court, they have identified only six issues
14 that they believe are “important” enough to seek review for any reason other than
15 to “prevent . . . delay.” This is not a credible claim, given that pursuing a
16 discretionary appeal at that point would likely only *create delay*. This Court should
17 reject Respondents’ arguments and find that there is not a sufficient basis to
18 conclude under RCW 80.50.140(1)(c) that review by the Supreme Court would
19 likely be sought regardless of this Court’s determination.

20 ///

21 ///

22 ²⁹ In order to obtain Supreme Court review, Respondents would be required to
23 demonstrate to the Supreme Court that the case involves “a fundamental and urgent issue of
broad public import which requires prompt and ultimate determination.” RAP 4.2. The Supreme
Court’s decision whether to accept review of a Superior Court decision is discretionary. *See id.*

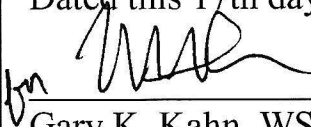
³⁰ Petitioners also note that the Applicant chose not to appeal the Governor’s decision,
even after proclaiming that the Governor’s denial of 15 of the proposed 50 wind turbines “kills
the project.” AR 28907. The fact that the Applicant did not appeal such a purportedly important
issue undermines its vow to file a future appeal of a decision of the Superior Court.

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V. CONCLUSION

The Court should adopt the attached proposed order or a similar order consistent with this Motion.

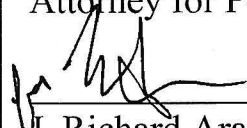
Dated this 17th day of October, 2012



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1 **CERTIFICATE OF SERVICE**

2 I certify that I have this day caused to be served PETITIONERS' RESPONSE
3 TO MOTION TO CERTIFY PETITION FOR REVIEW TO SUPREME COURT
4 PURSUANT TO RCW 80.50.140 in the above-entitled action by electronic mail and
5 first-class United States mail, postage prepaid, to the following persons at the specified
6 addresses:

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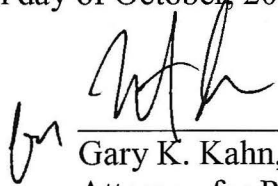
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19 I certify, or declare, under penalty of perjury under the laws of the State of
20 Washington that the foregoing statements are true and correct.

21 Signed at Portland, Oregon this 17th day of October, 2012.

22 
23 _____
Gary K. Kahn, WSBA No. 17928
Attorney for Petitioner Friends