

- 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 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' REPLY IN SUPPORT
OF OBJECTION TO THE
ADMINISTRATIVE RECORD AND
MOTION TO CORRECT AND ADD
TO THE RECORD

1 COME NOW Petitioners Friends of the Columbia Gorge, Inc. and Save Our
2 Scenic Area and reply in support of their August 31, 2012 Objection to the
3 Administrative Record and Motion to Correct and Add to the Record (Docket #58)
4 (hereinafter “Objection and Motion”).

5 I. INTRODUCTION

6 It appears that the parties are largely in agreement regarding Petitioners’
7 Objection and Motion. All parties agree that the record should be corrected to (1)
8 add page numbers to the individual pages in the record, (2) consolidate the
9 hundreds of documents in the record into one or a few searchable PDF files, and
10 (3) include certain inadvertently omitted documents.

11 Two areas of disagreement remain. First, pursuant to RCW 34.05.566(7)¹ and
12 this Court’s July 5, 2012 Order,² Petitioners have asked the Court to allow the
13 addition of certain government documents that were cited, quoted, or otherwise
14 referenced in the proceedings below, but in many cases not physically included in
15 the filed copy of the record. Respondents have responded that they “strongly
16 dispute” Petitioners’ request,³ but they do not dispute the salient facts: all these
17 documents are publicly available government documents, and the vast majority of
18 them were cited, quoted, or otherwise relied upon during the proceedings below.
19 Nor do Respondents demonstrate that any prejudice would result from allowing
20 these documents to be included in the record.

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22 ¹ “The court may require or permit subsequent corrections or additions to the record.” RCW
23 34.05.566(7).

² “Upon receipt of an electronic copy of the filed record, each party shall have up to 30 days to
file any requests to correct or add to the record pursuant to RCW 34.05.566(7).” Order Regarding the
Filing of a Certified Electronic Copy of the Administrative Record (Docket #52) at 3, ¶ 4.

³ Respondents’ Answer to Petitioners’ Objection to the Administrative Record and Motion to
Correct and Add to the Record (Docket #64) (hereinafter “Respondents’ Answer”) at 2.

1 The majority of these documents are technically already part of the record,
2 because they were involved in the proceedings below. Moreover, in several
3 instances, Intervenor-Respondents moved or otherwise requested EFSEC to strike
4 references to, copies of, and/or excerpts of these documents during the proceedings
5 below. However, their motions and requests were not granted, and therefore the
6 documents or references thereto were not stricken. The Court has authority under
7 RCW 34.05.566(7) to permit the inclusion of documents that were relied on below
8 as “corrections” to the record.

9 Even if these documents are *not* already part of the record by virtue of being
10 cited, quoted, or included below, RCW 34.05.566(7) also gives the Court express
11 authority to permit the inclusion of these documents as “additions” to the record.
12 The Court should do so. Ensuring that full copies of these documents are
13 physically included in the filed copy of the record will facilitate judicial review
14 without unduly prejudicing the parties.⁴

15 The second remaining dispute involves costs. Petitioners are not responsible
16 for any costs associated with fixing the record to make it searchable, add
17 pagination, and include inadvertently omitted documents. Those tasks are covered
18 by the agreed-upon \$8,000.00 total cap on reasonable costs, per a settlement
19 agreement between Petitioners and EFSEC, as well as this Court’s July 5, 2012
20 Order. However, it would be reasonable for Petitioners to reimburse EFSEC for the
21 reasonable costs of “adding” any documents to the record that were not physically
22 included in the record below.

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⁴ If copies of any of the disputed documents are *not* added to the filed copy of the record, Petitioners reserve the right to request judicial notice of the documents in the future. *See* ER 201 (Judicial Notice of Adjudicative Facts).

1 **II. ARGUMENT**

2 **1. The Court has authority under RCW 34.05.566(7) to allow corrections**
3 **and additions to the record.**

4 Respondents argue that this Court “lacks authority” to approve Petitioners’
5 request to allow certain documents to be included in the record as corrections
6 and/or additions. Resps.’ Answer at 2–5. Respondents are wrong. RCW
7 34.05.566(7) expressly allows the Court to “permit . . . corrections or additions to
8 the record.”

9 Respondents cite two statutory provisions that authorize the Court to take or
10 receive new “evidence” or “testimony” and add it to the record. Resps.’ Answer at
11 3–5 (citing RCW 80.50.140(1), 34.05.562(1)). For example, Respondents cite
12 RCW 80.50.140(1), a provision of the Energy Facilities Site Location Act (“Siting
13 Act”) that involves “alleged irregularities in the procedure before the council not
14 found in the record” and that authorizes the court to “take testimony and determine
15 such factual issues raised by the alleged irregularities.” Respondents also cite
16 RCW 34.05.562(1), a provision of the Administrative Procedure Act (“APA”) that
17 authorizes the court to “receive evidence” in order to “decide disputed issues
18 regarding” procedural irregularities such as “[i]mproper constitution as a decision-
19 making body,” “grounds for disqualification of those taking the agency action,”
20 “[u]nlawfulness of procedure or decision-making process,” and “[m]aterial facts in
21 rule making, brief adjudication, or other proceedings not required to be determined
22 on the agency record.” Petitioners are not alleging any such irregularities in this
23 appeal, and therefore the provisions cited by Respondents are not implicated here.⁵

⁵ Respondents also cite *Motley-Motley v. Pollution Control Hearings Board*, 127 Wn. App. 62, 76, 110 P.3d 812 (2005). Because *Motley-Motley* interprets RCW 34.05.562(1), which does not apply in the instant case, the *Motley-Motley* case does not apply, either.

1 Moreover, Respondents fail to acknowledge the differences between two
2 provisions of the APA, RCW 34.05.566(6) and 34.05.566(7):

- 3 (6) Additions to the record pursuant to RCW 34.05.562 must be
4 made as ordered by the court.
- 5 (7) The court may require or permit subsequent corrections or
6 additions to the record.

7 Subsection (6) cross-references RCW 34.05.562, which, as discussed above,
8 involves generating new evidence before the court in order to address alleged
9 irregularities in the procedures below. Again, Petitioners are not making arguments
10 about alleged procedural irregularities below, and are not asking to take new
11 testimony or generate new evidence that was not considered below. Neither RCW
12 34.05.566(6) nor RCW 34.05.562 apply here.

13 Subsection (7), on the other hand, authorizes a reviewing court to require or
14 permit *other types* of corrections or additions to the record—in other words,
15 corrections and additions to the record that do *not* involve alleged irregularities in
16 procedure. RCW 34.05.566(7) thus gives the court authority to approve
17 Petitioners’ request.

18 The provision of the Siting Act cited by Respondents, 80.50.140(1), also
19 involves allegations of procedural irregularities, and therefore is also not applicable
20 here. Importantly, this section does not say (as Respondents imply) that alleged
21 irregularities in procedure are the *only* basis for adding to the record in a Siting Act
22 proceeding. *See* 80.50.140(1). To the contrary, the Siting Act expressly
23 incorporates all provisions of the APA, including 34.05.566(7), the provision relied
on here. *See* RCW 80.50.140(1) (“A final decision pursuant to [the Siting Act]
shall be subject to judicial review pursuant to provisions of chapter 34.05 RCW
[*i.e.*, the APA] and this section [*i.e.*, the Siting Act].”). By incorporating the APA,

1 the Siting Act gives this Court the authority to permit corrections and additions to
2 the administrative record.

3 The Court should reject Respondents' argument that the Court "lacks
4 authority" to approve Petitioners' request. RCW 34.05.566(7) expressly gives the
5 Court authority to approve corrections and additions to the record, even if the
6 corrections and additions do not involve the generation of new testimony or other
7 new evidence to address alleged irregularities in the procedures below.

8 **2. Pursuant to RCW 34.05.566(7), the Court should permit the requested
9 documents to be included as corrections and/or additions to the record.**

10 **A. Skamania County land use moratorium ordinances**

11 Petitioners request that the Court permit copies of a series of Skamania
12 County land use moratorium ordinances to be included in the record. Pets.' Obj.
13 and Mot. at 7 & Ex. A. The filed copy of the record already contains copies of four
14 of these ordinances,⁶ but EFSEC issued an order denying the inclusion of one of
15 the four because the record was closed before that ordinance came into existence.⁷

16 The moratorium ordinances relate to the issue of land use consistency. One of
17 EFSEC's statutory responsibilities is to determine whether applications for siting
18 energy facilities are consistent with local governments' land use ordinances. RCW
19 80.50.090(2); WAC 463-26-110. Accordingly, EFSEC must hold a "public land
20 use hearing" to take comments from the public on land use consistency. WAC 463-
21 26-010, -050, -060. EFSEC's standards for submitting documents into the record at
22 a public land use hearing are more informal and lenient than for its adjudications.⁸

23 ⁶ Ordinance No. 2010-06 (Rec. Doc. #1443), No. 2010-10 (Rec. Doc. #1631), No. 2011-03 (Rec.
Doc. #2294 at Ex. B), and Ordinance No. 2011-08 (Rec. Doc. #2331 at Ex. A).

⁷ See Rec. Doc. #2354 (Council Order No. 871) (involving Ordinance 2011-08).

⁸ Compare WAC 463-26-060 (At the land use public hearing, an "*opportunity for testimony by
anyone shall be allowed* relative to the consistency and compliance with land use plans and zoning

1 EFSEC held a public land use hearing, but it did so very early in the process,
2 on May 7, 2009. Rec. Doc. #243 (Transcript of Public Land Use Hearing).⁹

3 Written and oral comments at the land use hearing addressed Skamania County's
4 series of land use moratorium ordinances.¹⁰

5 By the time the land use consistency issues were briefed (nearly two years
6 after the land use hearing), the process for submitting relevant land use documents
7 into the record was, at best, unclear.¹¹ Petitioners again addressed the land use
8 moratoria in their briefing, providing a list of all the relevant moratoria ordinances
9 (several of which had been adopted in the intervening two years) and a link to the
10 specific page on Skamania County's website where copies of the ordinances were
11 posted. Rec. Doc. #2134 (Friends' Land Use Opening Brief) at 10 & n.8.

12 Petitioners provided this information in order to provide a complete chronology of
13 the ordinances and access to the ordinances for EFSEC's review.

14 In this appeal, the Court will be asked to review EFSEC's legal conclusion
15 that Skamania's moratorium ordinances are not "zoning ordinances . . . within the
16 meaning of RCW 80.50."¹² To facilitate review of this legal conclusion, the Court
17 should allow copies of the moratorium ordinances to be included in the record.

18 Allowing the ordinances to be included does not result in any prejudice to the
19 parties. Indeed, during the proceedings below, Intervenor-Respondents did not

20 ordinances.") (emphasis added) *with* WAC 436-30 (formal rules for adjudicative proceedings that address
21 intervention, appearance, practice, evidence, and other topics).

22 ⁹ The final decision in this matter did not occur until nearly three years later, on March 5, 2012.
23 Rec. Doc. #2361.

¹⁰ *See, e.g.*, Rec. Doc. #243 (Transcript of Public Land Use Hearing) at 30–31; Rec. Doc. #244
(Friends' Land Use Consistency Comments) at 12; Rec. Doc. #254 (Skamania County Hearing Examiner
Decision) at 4, Finding #10.

¹¹ After the May 2009 hearing, EFSEC never provided a further opportunity to submit documents
into the record under its more relaxed standards for public land use hearings, and instead rejected several
land use-related documents that Petitioner Friends attempted to submit during the adjudication. *See* Rec.
Doc. #1598 (Transcript of Dec. 21, 2010 Prehearing Conference) at 63–68.

¹² Rec. Doc. #2280 (Council Order No. 868) at 11.

1 oppose copies of the moratorium ordinances being included in the record. *See, e.g.*,
2 Rec. Doc. #2315 (Applicant’s Resp. to Requests for Consideration) at 4
3 (“[Applicant] does not oppose consideration of [Ordinance No. 2011-03], because
4 a prior version appears [in the record].”).

5 Respondents single out Ordinance No. 2012-04, which, as they point out, was
6 adopted on May 22, 2012, two months after Governor Gregoire made her decision.
7 Resps.’ Answer at 11–12. Petitioners concede it is unnecessary to include this
8 ordinance, given the language in WAC 463-26-050 that EFSEC and the Governor
9 must determine consistency with county land use ordinances in effect “*at the time*
10 *of application*” (emphasis added). Petitioners thus hereby withdraw the request to
11 include a copy of Ordinance No. 2012-04, as long as copies of all the prior
12 moratorium ordinances are included.¹³

13 Respondents also oppose the inclusion of the “agenda item commentaries” for
14 the moratorium ordinances, which are summaries of the ordinances written by
15 Skamania County Planning Staff and presented to the Skamania County Board of
16 County Commissioners when each ordinance was adopted, and sometimes posted
17 by Skamania County on the County’s website.¹⁴ At least one of the moratorium
18 commentaries is already included in the filed copy of the record.¹⁵

19 The commentaries provide helpful background information that may help
20 review the ordinances, including lists of the ordinance numbers and dates,

21 ¹³ Because some of these ordinances were adopted prior to the Governor’s decision, but after the
22 record was closed, it would have been impossible to include them in the record before it was closed. The
23 APA provision relied upon by Petitioners is tailor-made for this type of situation, where documents come
into existence after the record was closed but prior to the agencies’ final decision. RCW 34.05.566(7)
 (“The court may require or permit subsequent corrections or additions to the record.”)

¹⁴ Copies of the commentaries are included in Exhibit A to Petitioners’ Objection and Motion.

¹⁵ Rec. Doc. #2294 (Friends’ Pet. for Recons.) at Ex. B, p. 5. Intervenors-Respondents requested
that EFSEC strike this document from the record. Rec. Doc. #2315 (Applicant’s Resp. to Requests for
Recons.) at 4; Rec. Doc. #2310 (Skamania County’s & KCPEDA’s Resp. to Obj. & Pet. for Recons.) at
12. Intervenors-Respondents’ request was not granted.

1 explanations and summaries of the ongoing moratoria, and status updates on the
2 County's efforts to amend its zoning authorities. Respondents fail to show any
3 harm or prejudice from admitting copies of the commentaries into the record. The
4 Court should allow the remaining commentaries to be admitted into the record.

5 **B. Cowlitz County certificate of land use consistency**

6 One of the land use consistency issues in this appeal involves EFSEC's
7 interpretation of the court's decision in *Columbia Riverkeeper v. Cowlitz County*,
8 Cowlitz County Superior Court No. 07-2-00400-0 (May 2, 2007), *appeal dismissed*
9 *by stipulated motion*, Wn. Ct. App. No. 36393-3-II (Dec. 12, 2007). That case
10 involved whether a county's certificate of land use consistency submitted to
11 EFSEC pursuant to WAC 463-26-090 is a land use decision. Both the Cowlitz
12 County Superior Court decision and the Cowlitz County certificate of consistency
13 were quoted and relied on in the proceedings below. The Court should allow the
14 inclusion of a copy of the Cowlitz certificate, in order to facilitate judicial review.¹⁶

15 At the time of the May 7, 2009, public land use hearing, there was no way for
16 Petitioners to know that the Cowlitz County document would later become
17 relevant. The issue presented itself later, when the Skamania County
18 Commissioners on December 22, 2009 rescinded Skamania's certificate of
19 consistency and replaced it with a "staff report to EFSEC" that Skamania declared
20 was "not a [land use] decision."¹⁷

21 When land use briefing occurred, the legal issue of whether a certificate of
22 consistency is a land use decision had by that time arisen. Petitioners thus quoted
23 the Cowlitz County certificate of consistency,¹⁸ because that exact legal issue had
24 been directly decided in the *Cowlitz County* case. EFSEC, however, concluded that

¹⁶ The Cowlitz certificate is attached to Petitioners' Objection and Motion as Exhibit B.

¹⁷ Rec. Doc. #1326 (Skamania County Resolution No. 2009-54) at 2.

¹⁸ Rec. Doc. #2155 (Friends' Land Use Resp. Brief) at 3.

1 it did not understand the “context” of Petitioners’ arguments, in part because the
2 Cowlitz County certificate of consistency was not “included” in the record.¹⁹ But
3 the Cowlitz County certificate was originally submitted to EFSEC, *which therefore*
4 *already had a copy.*

5 Respondents now claim that Petitioners were attempting to “force EFSEC . . .
6 to review all of EFSEC’s files for documents that might pertain to parties’
7 arguments.” Resps.’ Answer at 13. This claim could not be any further from the
8 truth. Petitioners’ request involves a specific two-page public document that
9 Petitioners identified, cited, and quoted during the proceedings below—*not* an
10 open-ended request for EFSEC to search all of its files to find relevant documents.
11 EFSEC’s decision below seems to imply that EFSEC had never seen the Cowlitz
12 document, even though it was originally submitted to EFSEC, and even though
13 EFSEC had jurisdiction over the Cowlitz project. To facilitate judicial review of
14 the parties’ legal arguments pertaining to the Cowlitz certificate, Petitioners ask
15 that a copy be included in the record.

16 Respondents also question whether the Governor should be required to
17 “review all of EFSEC’s files.” Resps.’ Answer at 13–14. This is also a straw-man
18 argument. Petitioners have never requested that anyone conduct an open-ended
19 search of EFSEC’s files. Instead, during the proceedings below, Petitioners
20 identified a specific document that is already in EFSEC’s possession and that is
21 relevant to land use consistency. After seeing Petitioners’ identification of this
22 document, the Governor could at any time have requested a copy from EFSEC.

23 Moreover, the Governor did not even make an independent determination of
land use consistency in this matter; rather, EFSEC made the land use rulings that
are challenged here. EFSEC’s knowledge of and possession of a document that

¹⁹ Rec. Doc. #2321 (Order No. 870) at 8 n.20.

1 was identified and quoted in the proceedings below is certainly relevant to whether
2 a copy of that document should be included in the record for judicial review. *See*
3 *Envtl. Defense Fund, Inc. v. Blum*, 458 F. Supp. 650, 661 (D.D.C. 1978 (“The
4 agency may not . . . skew the ‘record’ for review in its favor by excluding from
5 that ‘record’ information in its own files which has great pertinence to the
6 proceeding in question.”); *Nat’l Wildlife Fed’n v. Burford*, 677 F. Supp. 1445,
7 1457 (D. Mont. 1985) (“An agency may not submit an administrative record to the
8 court which contains only documents favoring the agency’s decision and omits
9 documents present in the agency’s file which bear upon matters before the Court.”)
(citing *Envtl. Defense Fund*, 458 F. Supp. at 661).²⁰

10 Finally, Respondents raise the fact that Intervenor-Respondent Klickitat
11 County Public Economic Development Authority (“KCPEDA”) has not had a copy
12 of the Cowlitz County document since 2010, like several of the other parties.
13 While this is technically accurate, KCPEDA could easily have requested a copy
14 from Petitioners, EFSEC, or Skamania County once the document was identified
15 and quoted in the proceedings below. Indeed, KCPEDA and Skamania County are
16 represented by the same counsel.

17 In conclusion, Petitioners merely ask that a copy of this public document,
18 which was identified and quoted in the proceedings below, which was already in

19 ²⁰ Federal cases that apply the federal APA are instructive in reviewing Petitioners’ Objection and
20 Motion, given the identical requirements in both the federal APA and the Washington APA for reviewing
21 courts to consider agency actions in light of the “whole record.” 5 U.S.C. § 706; RCW 34.05.570(3); *see*
22 *also* RCW 34.05.001 (“The legislature intends, by enacting this 1988 Administrative Procedure Act . . . to
23 achieve greater consistency with other states and the federal government in administrative procedure[.] . .
24 . . . The legislature also intends that the courts should interpret provisions of this chapter consistently with
25 decisions of other courts interpreting similar provisions of other states, the federal government, and model
26 acts.”). Washington courts frequently look to federal APA cases for guidance in interpreting the
27 Washington APA. *See, e.g., Seattle Bldg. & Const. Trades Council v. Wash. State Apprenticeship &*
28 *Training Council*, 129 Wn. 2d 787, 793–94; 920 P.2d 581, 583–84 (1996); *Nw. Ecosystem Alliance v.*
29 *Wash. Forest Practices Bd.*, 149 Wn. 2d 67, 79–80, 66 P.3d 614, 619–20 (2003); *Allan v. Univ. of Wash.*,
30 140 Wn. 2d 323, 342, 997 P.2d 360, 370 (2000).

1 EFSEC's possession, and which is relevant to Petitioners' claims on appeal, be
2 included in the record to evaluate the parties' arguments regarding land use
3 consistency. This is not a situation where Petitioners wish to generate new
4 evidence or rely on a document that was not relied on below. The Court should
5 allow the inclusion of the document.

6 **C. Wyoming permit requiring radar-activated aviation safety lighting**

7 The filed copy of the record contains excerpts from a 2011 permit for a wind
8 energy project in Wyoming.²¹ Intervenors-Respondents moved to strike this
9 document from the record during the proceedings below,²² but their motion was
10 not granted. The portions of the Wyoming permit that are relevant to the issue of
11 aviation safety lighting are already included in the record.²³ However, to avoid any
12 confusion or criticism about whether the permit was properly excerpted,²⁴ the full,
unexcerpted permit should be included in the record.²⁵

13 If requested by EFSEC or the Governor, Petitioners would have filed a full
14 copy of the Wyoming permit during the proceedings below, but no request was
15 made. In addition, the Wyoming permit is a government document that was
16 publicly available on the Internet, thus providing an opportunity to review the full

17 ²¹ Rec. Doc. #2294 (Friends' Pet. for Recons.) at Ex. C.

18 ²² Rec. Doc. #2315 (Applicant's Resp. to Requests for Recons.) at 4-5; Rec. Doc. #2310
(Skamania County's & KCPEDA's Resp. to Obj. & Pet. for Recons.) at 12.

19 ²³ Respondents argue that the excerpts of the Wyoming permit are not already in the record (even
20 though the excerpts are included on the flash drive filed with the Court), because the Wyoming permit is
21 dated July 18, 2011, while the record was closed in May 2011. Resps.' Answer at 14-15. Assuming for
the sake of argument that Respondent's contention is accurate and the Wyoming permit is not in the
record, the fact that the permit did not exist until after the record was closed is exactly the type of
situation for which RCW 34.05.566 allows "subsequent . . . additions to the record" to be permitted by the
court.

22 ²⁴ The Applicant argued below that it "has been provided with less than 10% of the document"
and that "the five pages [Friends] has attached have also been selectively highlighted, which suggests that
23 [Friends] attached altered excerpts rather than true copies." Rec. Doc. #2315 (Applicant's Resp. to
Requests for Recons.) at 4-5.

²⁵ A full copy of the Wyoming permit is attached to Petitioners' Objection and Motion as Ex. C.

1 document, as EFSEC did with numerous other documents.²⁶ Petitioners took the
2 extra step here of attaching the relevant excerpts from the Wyoming permit
3 (instead of merely citing the document’s location on the Internet), but were still
4 criticized by the Applicant because Petitioners did not attach the full document.
5 The Applicant’s criticism should be resolved by including the full document in the
6 record for judicial review.

7 **D. Three documents pertaining to wildlife impacts from publicly**
8 **available environmental impact statements**

9 Petitioners have requested the inclusion in the record of three documents
10 pertaining to wildlife impacts.²⁷ As explained in Petitioners’ Objection and
11 Motion, each of the three documents is part of a publicly available environmental
12 impact statement (“EIS”), and Petitioners cited and relied on all three documents
13 during the proceedings below.²⁸ Furthermore, EFSEC reviewed and considered
14 Petitioners’ discussions of these documents, and did not grant the Applicant’s
15 requests to strike the references to these documents. *See generally* Pets.’ Obj. &
16 Mot. at 11–12 & nn.18, 19.

16 ²⁶ For example, EFSEC’s Council Chairman, Jim Luce, adopted a concurrence order in this
17 matter that cites numerous public materials available on the Internet, even though copies of these
18 documents were not inserted into the record. Rec. Doc. #2280 (Council Order No. 868, Concurring
19 Opinion of Chairman Jim Luce) at 44–52 (citing and providing Internet links to *National Geographic*
20 *Traveler* article, Bonneville Power Administration pricing policy, EFSEC notice of proposed rulemaking,
21 American Wind Energy Association factsheet, and Northwest Power Planning Council work plan).
22 Chairman Luce’s concurrence shows that EFSEC can consider publicly available documents that are
23 relevant to the issues under review, even if they are not physically inserted into the record.

²⁷ The three documents are attached as Exhibits D, E, and F to Petitioners’ Objection and Motion.

²⁸ Respondents argue that it is “simply not true” that Petitioners provided the website addresses
for these three documents during the proceedings below. Resps.’ Answer at 16 n.3. In an attempt to prove
their argument, Respondents attach a *paper* copy of Petitioners’ Petition for Reconsideration. If the Court
reviews the *electronic* copy of this document submitted on flash drive as part of the administrative record,
it will see that Petitioners provided clickable hyperlinks for all three documents. Rec. Doc. #2294 at 26,
nn.67 & 69. Petitioners’ Adjudication Response Brief also cites the Coyote Crest document and provides
a hyperlink to the document. Rec. Doc. #2189 at 21 n.22. Finally, the Coyote Crest document, entitled
“2007–2008 Avian Baseline Study: Draft Report,” was originally part of the *Draft* Coyote Crest EIS but
was also incorporated unchanged into the *Final* Coyote Crest EIS.

1 Moreover, all three of these documents were expressly considered by EFSEC
2 as part of its EIS.²⁹ Thus, there should be no question that these documents are part
3 of the record, because RCW 34.05.476(2)(d) provides that the “agency record shall
4 include . . . [e]vidence received *or considered*” by the agency (emphasis added);
5 *see also Thompson v. U.S. Dept. of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (“The
6 whole administrative record . . . ‘is not necessarily those documents that the
7 agency has compiled and submitted as ‘the’ administrative record.’ The ‘whole’
8 administrative record, therefore, consists of all documents and materials directly or
9 indirectly considered by agency decision-makers and includes evidence contrary to
10 the agency’s position.”) (emphasis in original) (quoting *Exxon Corp. v. Dept. of*
11 *Energy*, 91 F.R.D. 26, 32, 33 (N.D.Tex. 1981)) (internal citations omitted); *see*
12 *also Ad Hoc Metals Coalition v. Whitman*, 227 F.Supp.2d 134, 139 (D.D.C. 2002)
13 (“The Experts Workshop transcript, having been *referred to, considered by, or*
14 *used by* EPA before it issued its final rule must be included in the administrative
15 record, particularly given the adverse nature of its contents.”) (emphasis added).

16 Respondents now make confusing arguments that the three wildlife
17 documents should somehow be excluded from the record because “Petitioners have
18 not challenged the FEIS in this appeal.” Resps.’ Answer at 18. This argument is an
19 irrelevant tangent. Potential arguments, defenses, and rebuttals in the appeal do not
20 change the fact that the documents are part of the record. It is undisputed that the
21 Whistling Ridge FEIS (Rec. Doc. #2255) considers and relies on the documents.
22 Thus, pursuant to RCW 34.05.476(2)(d) and 34.05.566(7), the documents are also
23 part of the record and are proper to “add” to the filed copy of the record.

²⁹ Petitioners previously noted that the Whistling Ridge FEIS expressly considers the Coyote Crest and Radar Ridge EIS documents. Pets.’ Obj. & Mot. at 10–11 (citing Rec. Doc. #2255 (Whistling Ridge FEIS) at 3-287 (Table 3.14-1), 3-299). Petitioners have since discovered that the Whistling Ridge FEIS *also* expressly considers and relies on the Kittitas Valley FEIS as well. *See* Rec. Dec. #2255 (Whistling Ridge FEIS) at 3-114.

1 **3. Petitioners should not be required to pay additional costs to EFSEC for**
2 **production of the record, except for the costs of adding pages to the**
3 **record that were not included below.**

4 Respondents ask the Court to require Petitioners to pay additional,
5 unspecified costs to Respondent EFSEC for correcting the record. Resps.’ Answer
6 at 19. Petitioners disagree with this request. Before the record was filed, Petitioners
7 and EFSEC reached a settlement agreement that capped Petitioners’ liability to
8 EFSEC for the reasonable costs of preparing the record at \$8,000.00.³⁰ This Court
9 ratified that agreement in its July 5, 2012 Order (Docket #52). That Order provides
10 that the requirement for Friends to pay \$8,000.00 to EFSEC “will fully satisfy
11 Petitioners’ obligations under RCW 34.05.566(3) to Respondents in this Action.”
12 July 5, 2012 Order (Docket #52) at 2–3. The same Order also requires EFSEC to
13 file the record in a “searchable format,” *id.* at 2, which has not yet happened.
14 Respondents’ new request for costs is contrary to the Court’s Order.

15 Although the costs to correct the record should be relatively minimal,³¹
16 Petitioners should not be required to make additional payments just because
17 EFSEC has so far failed to file a paginated, searchable copy of the record, or
18 because EFSEC inadvertently omitted documents that all parties agree should have
19 been included. Because EFSEC was supposed to have completed these tasks the
20 first time, any costs for completing them should be borne by EFSEC.

21 Petitioners acknowledge they are requesting the “addition” of certain pages to
22 the record, which will slightly increase the agreed-upon costs. Petitioners are
23 willing to pay the reasonable costs of adding these pages. An appropriate per-page
measure of reasonable costs is 21.4 cents per page. This figure is calculated by

³⁰ Second Declaration of Nathan J. Baker in Support of Petitioners’ Objection to the Record (“2nd Baker Decl.”) at ¶¶ 3, 4.

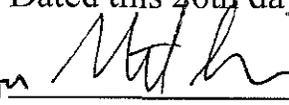
³¹ See Declaration of Nathan J. Baker in Support of Petitioners’ Objection to the Record (“1st Baker Decl.”) (Docket #55) at ¶¶ 4, 5; 2nd Baker Decl. at ¶¶ 7, 11.

1 dividing the agreed-upon total reasonable costs for the record (\$8,000.00) by the
2 total number of pages in the record before the requested pages are added (37,364
3 pages³²). Thus, it would be appropriate for this Court to require Petitioners to
4 reimburse EFSEC up to 21.4 cents per page for the costs of including in the record
5 any document listed in Part IV.C of Petitioners' Objection and Motion.

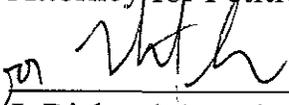
6 III. CONCLUSION

7 The Court should adopt the attached proposed order or a similar order
8 consistent with this Reply.

9 Dated this 26th day of September, 2012

10 
11 _____
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13 Reeves, Kahn, Hennessy & Elkins
14 Attorney for Petitioner Friends

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17 Attorney for Petitioner SOSA

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19
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23 _____
³² The filed copy of the record contains 36,704 pages. In addition, the inadvertently omitted documents that will now be included in the record when it is corrected are estimated to total 660 pages. See 2nd Baker Decl. at ¶¶ 6, 7, 8.

CERTIFICATE OF SERVICE

I certify that I have this day caused to be served the PETITIONERS' REPLY IN SUPPORT OF OBJECTION TO THE ADMINISTRATIVE RECORD AND MOTION TO CORRECT AND ADD TO THE RECORD in the above-entitled action and this Certificate of Service by electronic mail and first-class United States mail, postage prepaid, to the following persons at the specified addresses:

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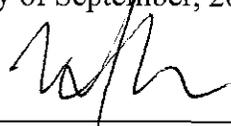
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I certify, or declare, under penalty of perjury under the laws of the State of Washington that the foregoing statements are true and correct.

Signed at Portland, Oregon this 26th day of September, 2012.



Nathan J. Baker, WSBA No 35195
Staff Attorney for Petitioner Friends