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

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| In the Matter of<br>Application No. 2009-01<br><br>WHISTLING RIDGE ENERGY LLC<br><br><br>WHISTLING RIDGE ENERGY PROJECT | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | **APPLICANT'S OPENING LAND USE CONSISTENCY BRIEF** |

**TO:** The Parties Listed on the Official Service List dated 2-11-2011.

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page**

**Cases**

## TABLE OF AUTHORITIES

**Page**



**Statutes**

## TABLE OF AUTHORITIES

## I. INTRODUCTION

Whistling Ridge Energy LLC ("Whistling Ridge") has filed an Application for Site Certificate ("ASC") for the Whistling Ridge Energy Project ("Project") with Washington's Energy Facility Site Evaluation Council ("EFSEC"). Skamania County ("County") has certified that the Project is consistent and in compliance with the County's comprehensive plan and zoning ordinances. Under EFSEC's administrative rules, this certification constitutes *prima facie* proof of consistency creating a rebuttable presumption of consistency. No evidence or meritorious argument has been made before EFSEC that the Project is anything but consistent with the County's comprehensive plan and zoning ordinances. Even if there was a minor inconsistency, EFSEC can and should resolve such an inconsistency through its statutory preemption authority.

## II. SUMMARY OF MATERIAL FACTS

Whistling Ridge filed its ASC for the Project with EFSEC on March 10, 2009. In accordance with Whistling Ridge's proposal to minimize potential environmental effects, the Project will consist of no more than 38 2.0- to 2.5-MW wind turbines with a total capacity of 75 MW on a 1,152-acre site in unincorporated Skamania County *outside* of the Columbia River Gorge National Scenic Area ("Scenic Area"). ASC §§ I.4, 2.1.1; Transcript of EFSEC's Jan. 3, 2011 hearing at 73-76, 128, 148 (testimony of Jason Spadaro). Of these 1,152 acres, a total of approximately 54.25 acres will be used for energy generation for the life of the facility. ASC § 2.1.1. Commercial forestry operation will continue on the remaining approximately 1,100 acres of the Project site. ASC § 2.3.5.

The initial version of Whistling Ridge's ASC contained an analysis of two alternative routes to access the Project site as required by Washington law. WAC 463-60-296; ASC § 2.19.5. Both routes contemplated the minor improvement and use of existing roads in the

Scenic Area. ASC § 2.19.5. Alternative Route 2 was the preferred alternative in the initial version of Whistling Ridge's ASC. *Id.*

On May 4, 2009, the County's Community Development Department Director ("Planning Director") drafted a letter to EFSEC to accompany a "Staff Report for Land Use Consistency Review." This staff report analyzed the Project's—including the proposed use of Alternative Route 2—consistency with locally adopted land use plans and zoning ordinances. Ex. 2.02 at 1-2, 5. It noted that the Scenic Area road improvements contemplated by Alternative Route 2 would require review under the County's Scenic Area ordinance, SCC Title 22. *Id.* at 18-19. The Planning Director concluded that the contemplated road improvements for Alternative Route 2 were "consistent with SCC Title 22 with conditions of approval. I further find that similar road improvement projects (road widening, realignments, etc.) have been found consistent with SCC Title 22 in the past." May 4, 2009 letter from Karen A. Witherspoon, AICP, Planning Director, to Allen Fiksdal at 2. On May 5, 2009, the Board of County Commissioners ("Board") unanimously passed Resolution No. 2009-22, which adopted the staff report and resolved that the Project, as then proposed, was "consistent with the Skamania County land use plans and applicable zoning ordinances." Ex. 2.02 at 1.

On May 7, 2009, EFSEC conducted a land use hearing regarding Whistling Ridge's ASC at the Underwood Community Center in the County to receive public testimony regarding whether the Project was consistent with local land use regulations. Transcript of EFSEC's May 7, 2009 land use hearing at 1-2. County Commissioner Jim Richardson presented Resolution No. 2009-22, the Planning Director's letter, and the staff report, all of which were entered into evidence. *Id.* at 5, 8-9, 43-44. Legal counsel for Friends of the Columbia Gorge and Save Our Scenic Area (collectively, "Opponents") submitted oral and written comments to

EFSEC at the hearing regarding the Project's consistency with local land use regulations. *Id.* at 22-44.

Opponents then appealed Resolution No. 2009-22 to the Columbia River Gorge Commission ("Gorge Commission"). *See* Exs. 25.02c, 25.03c. Opponents argued that "[t]he problem with the County's analysis is that the County failed to review the proposed *purpose and use* of the haul route. In the National Scenic Area and in Skamania County generally, roads must be reviewed for both their construction and their intended uses." Ex. 25.02c at 13 (emphasis in original). Opponents contended that "the proposed *use*" of Alternative Route 2 constituted an "industrial use" that is not allowed in the Scenic Area under SCC Title 22, and thus, SCC Title 22 prohibits not only the Scenic Area road improvements contemplated by Alternative Route 2 but also the transportation of Project components over public and private roads in the Scenic Area. *Id.* at 14 (emphasis in original), 17; Ex. 25.03c at 2 n.2.

Although Whistling Ridge and the County vigorously contested Opponents' claims before the Gorge Commission, Whistling Ridge also sought to resolve the appeal and eliminate road improvements in the Scenic Area by finding another access route. On October 12, 2009, Whistling Ridge filed amendments to its ASC with EFSEC that eliminated the initially preferred Alternative Route 2 because it "would require construction within the" Scenic Area. ASC § 2.19.5. Instead, Whistling Ridge proposed Alternative Route 3 as its preferred alternative. *Id.* Alternative Route 3 would still use public roads in the Scenic Area, but road construction would only occur *outside* the Scenic Area. *See, e.g.*, ASC §§ 2.1.1, 2.3.3.7, 2.19.5, 4.3.2.1; Ex. 2.03 at 3. The County Engineer testified that the Project's use of Alternative Route 3 will not require any road improvements in the Scenic Area. Ex. 12.00 at 5-6 (testimony of County Engineer Timothy C. Homann).

While the appeal of Resolution No. 2009-22 was pending before the Gorge Commission, the County reviewed the amended ASC and prepared a revised "Staff Report for Land Use Consistency Review." *See* Ex. 2.03. County staff again analyzed the Project's—now with the proposed use of Alternative Route 3—consistency with local land use plans and zoning ordinances. *Id.* at 1-2. The staff report advised that if Whistling Ridge had submitted a development review application for the Project to the County, because the Project does not propose "any ground disturbance or reviewable activities" within the Scenic Area, "no National Scenic Area review would be completed and is not required." *Id.* at 2, 21. On December 22, 2009, the Board unanimously passed Resolution No. 2009-54, described as a "Certification of Land Use Consistency Review" (hereinafter "Land Use Consistency Certificate"). *Id.* at 1. In this Land Use Consistency Certificate, the Board resolved that the Project "is consistent with the Skamania County land use plans and applicable zoning ordinances."[1] *Id.* at 2.

The Land Use Consistency Certificate was filed with EFSEC and circulated to Opponents, who appealed the County's second determination that the Project was consistent with its land use regulations to the Gorge Commission. *See* Ex. 25.04c. The Gorge Commission ultimately decided to "not disturb" the Land Use Consistency Certificate and dismissed Opponents' appeal. Ex. 25.04c at 2. The Gorge Commission then withdrew from the EFSEC proceeding finding no Scenic Area issues raised by the ASC. Gorge Commission Withdrawal of Intervention (Nov. 15, 2010).

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[1] The Land Use Consistency Certificate also repealed Resolution No. 2009-22. Ex. 2.03 at 1. On February 5, 2010, the Gorge Commission dismissed Opponents' appeal of Resolution No. 2009-22.

## III. ARGUMENT

### A. The Project Is Consistent with the County's Land Use Plan and Zoning Ordinances

The Project is consistent with the County's 2007 Comprehensive Plan and the County's zoning ordinances. That is the County's determination. *See* Ex. 2.03. This determination constitutes *prima facie* proof of land use consistency. WAC 463-26-090. Even though the Project is allowed by the applicable zoning code (which has the force of law), Opponents have contended that the Project is "inconsistent" with the County's land use plans and ordinances. Opponents argue against the weight of longstanding Washington law that under their strained construction of 1977 and 2007 County Comprehensive Plans, these self-described "guidance documents" have the force of law and trump the County's adopted land use regulations. None of Opponents' arguments have any merit, much less enough merit to overcome the *prima facie* proof of consistency that is the County's Land Use Consistency Certificate.

#### 1. Applicable EFSEC Standards and Requirements

> **RCW 80.50.090(2). Public hearings.**
> "[T]he council shall conduct a public hearing to determine whether or not the proposed site is consistent and in compliance with city, county, or regional land use plans or zoning ordinances."
>
> **WAC 463-26-090. Procedure where certificates affirming compliance with land use plans and zoning ordinances are presented.**
> "This rule contemplates that applicants will enter as exhibits, at the land use hearing, certificates from local authorities attesting to the fact that the proposal is consistent and in compliance with land use plans and zoning ordinances. In cases where this is done, such certificates will be regarded as prima facie proof of consistency and compliance with such land use plans and zoning ordinances absent contrary demonstration by anyone present at the hearing."
>
> **WAC 463-26-110. Determination regarding land use plans and zoning ordinances.**
> "The council shall make a determination as to whether the proposed site is consistent and in compliance with land use plans and zoning ordinances pursuant to RCW 80.50.090(2)."

### 2. The County's Land Use Consistency Certificate Constitutes *Prima Facie* Proof of Land Use Consistency Creating a *Prima Facie* Presumption of Consistency

By adopting the Land Use Consistency Certificate, the County has certified that the Project "is consistent with the Skamania County land use plans and applicable zoning ordinances." Ex. 2.03. This determination of consistency filed with EFSEC constitutes "*prima facie* proof of consistency and compliance with such land use plans and zoning ordinances." WAC 463-26-090. *Prima facie* evidence is evidence that "will establish a fact or sustain a judgment unless contradictory evidence is produced." *Black's Law Dictionary* 598 (2004). The submission of such evidence creates a *prima facie* presumption of consistency "absent contrary demonstration by anyone present at the hearing." WAC 463-26-090; *see Black's Law Dictionary* 1224 (2004) (defining a *prima facie* or rebuttable presumption as "an inference drawn from certain facts that establish a *prima facie* case, which may be overcome by the introduction of contrary evidence").[2] To overcome a *prima facie* presumption, the Washington Supreme Court has required a demonstration that "actually, factually and substantially preponderate[s] against" the evidence upon which the presumption rests. *Gogerty v. Dep't of Insts.*, 71 Wn.2d 1, 8, 426 P.2d 476 (1967) (describing the import of the presumption in the context of judicial review of a State Personnel Board decision).

> "In other words, it is our view that before the superior court could upset the board's findings it would have to demonstrably appear, from the record as a whole, that the quantum of competent and supportive evidence upon which the personnel board predicated a

[2] For example, in the area of employment discrimination, the employee bears the initial burden of setting forth all the elements of a "prima facie case" of unlawful discrimination. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 181, 23 P.3d 440 (2001). Once those elements have been established, a "'legally mandatory, rebuttable presumption' of discrimination takes hold and the evidentiary burden shifts to the defendant." *Id.* (citation omitted). In this situation, the only element necessary to create the rebuttable presumption is the submission of a certificate of land use consistency from the local government. *See* WAC 463-26-090.

> challenged finding or findings of fact was so meager and lacking in probative worth, and the opposing evidence so overwhelming, as to dictate the conclusion that the pertinent finding or findings did not rest upon any sound or significant evidentiary basis."

*Id.*

Here, WAC 463-26-090 evinces a clear intent that EFSEC is to accord great weight to a local government's determination that a project is consistent with local land use plans and zoning ordinances. The mere fact that the County has certified land use consistency for the Project constitutes a *prima facie* case that a project is consistent with local land use plans and zoning ordinances. At that point, a mandatory, rebuttable presumption takes hold, and the evidentiary burden shifts to Opponents to produce convincing, admissible evidence of "inconsistency" with local land use plans and zoning ordinances. This means that the burden is on Opponents to disprove the County's determination.

### 3. Opponents' Arguments for "Inconsistency" Misrepresent the Law That Governs the County's Land Use Planning and Zoning

Opponents' entire case of land use "inconsistency" rests on a specious application of Washington law that misrepresents the underlying statutes and authorities governing the County's land use planning and zoning. Opponents' case further exaggerates purported "inconsistencies," and selectively quotes and misuses applicable comprehensive plan provisions.

#### a. Under Washington Law, the County's Zoning Codes Contain the Applicable Regulatory Requirements; the County's 2007 Comprehensive Plan Has No Regulatory Effect

Washington county land use planning occurs under either the Planning Enabling Act, RCW chapter 36.70, or the Growth Management Act, RCW chapter 36.70A. Skamania County plans under the Planning Enabling Act. *See* Ex. 2.03 at 4. Under the Planning Enabling Act a comprehensive plan "serve[s] as a policy guide" only. RCW 36.70.020(6). More significantly,

the Planning Enabling Act includes the following explicit, unambiguous requirement concerning the role of the comprehensive plan in the County:

> "In no case shall the comprehensive plan, whether in its entirety or area by area or subject by subject[,] be considered to be *other than in such form as to serve as a guide to the later development and adoption of official controls.*"

RCW 36.70.340 (emphasis added). The County's comprehensive plan is a "blueprint" and is considered no more than a "guide" to the later development and adoption of official controls (*e.g.*, the zoning code). The meaning of RCW 36.70.340 could not be any clearer; it expressly prohibits the use of a comprehensive plan to trump county zoning.

Contrary to Opponents' assertions, Washington courts have consistently interpreted comprehensive plans in Planning Enabling Act counties to have no regulatory effect at the project permitting level. As the Washington Supreme Court wrote, the Planning Enabling Act

> "directs the county planning agency (commission) to prepare a comprehensive plan. That plan is defined as a source of reference and policy guide for official regulations and controls. 'Official controls,' including zoning ordinances, are 'the means of translating into regulations and ordinances . . . the general objectives of the comprehensive plan.' RCW 36.70.340 states the comprehensive plan shall not 'be considered to be other than . . . a guide to the later development and adoption of official controls.'"

*Barrie v. Kitsap Cnty.*, 93 Wn.2d 843, 848, 613 P.2d 1148 (1980) (citations omitted); *see also Cougar Mountain Assocs. v. King Cnty.*, 111 Wn.2d 742, 757, 765 P.2d 264 (1988); *Cathcart-Maltby-Clearview Cmty. Council v. Snohomish Cnty.*, 96 Wn.2d 201, 212, 634 P.2d 853 (1981); *Lutz v. City of Longview*, 83 Wn.2d 566, 574, 520 P.2d 1374 (1974) (recognizing that a comprehensive plan is a "blueprint"). Just one year after its holding in *Barrie*, the Washington Supreme Court further refined its holding, stating:

> "[A] comprehensive plan is advisory rather than regulatory. . . . Such a plan suggests regulatory measures but does not impose them and, thus, does not itself deprive the landowner of its

> property. *The zoning ordinance is the regulatory measure under this state's scheme.*"

*Westside Hilltop v. King Cnty.*, 96 Wn.2d 171, 176, 634 P.2d 862 (1981) (citations omitted; emphasis added).[3] No appellate decision has ever sanctioned the denial of permits or other development approvals for failure to conform to a comprehensive plan adopted under the Planning Enabling Act.[4]

The County's 2007 Comprehensive Plan's clear role as a policy document having no regulatory effect under the Planning Enabling Act is made plain by the 2007 Comprehensive Plan's own terms.

> "**CHAPTER 1: INTRODUCTION**
>
> **Purpose of the Comprehensive Plan**
>
> **What is a Comprehensive Plan?**
>
> A Comprehensive Plan is an official public document that *guides policy decisions* related to the physical, social and economic growth of a county. It provides a framework for future growth, development, and public decision-making. . . . *A Comprehensive Plan is not a regulatory document. Rather, it is a guiding document which includes goals and policies that are implemented through development regulations and other official controls.*"

2007 Comprehensive Plan at 6 (emphases added).[5]

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[3] As recently as 2008, the Court of Appeals reconfirmed the *Barrie* holding and recognized that under the Planning Enabling Act comprehensive plans are "admittedly only in the nature of a 'guide' or 'blueprint' and have little force or effect. The zoning codes were the primary source of regulating property use." *Coffey v. City of Walla Walla*, 145 Wn. App. 435, 439 n.1, 187 P.3d 272 (2008).

[4] Zoning ordinances govern the issuance of permits and trump conflicting provisions of a comprehensive plan. *See Cougar Mountain*, 111 Wn.2d at 757; *Nagatani Bros. v. Skagit Cnty. Bd. of Comm'rs*, 108 Wn.2d 477, 480, 739 P.2d 696 (1987). The Washington Supreme Court has even affirmed these basic principles—that comprehensive plans are guides and that development regulations control permitting—for Growth Management Act counties. *See Weyerhaeuser v. Pierce Cnty.*, 124 Wn.2d 26, 43, 873 P.2d 498 (1994); *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 873-74, 947 P.2d 1208 (1997).

[5] Judicial notice of the County's 2007 Comprehensive Plan was taken at EFSEC's May 7, 2009 land use hearing. *See* Transcript of EFSEC's May 7, 2009 land use hearing at 32.

"**CHAPTER 2: LAND USE ELEMENT**

**Introduction**

The Land Use Element of the Skamania County 2007 Comprehensive Plan *provides policy guidance* for the uses of land throughout the entire unincorporated county, which range from residential, commercial and industrial structures to farm and forestry activities, to open spaces and undeveloped environmentally sensitive areas. The goals and policies contained in the Land use Element provide the guidance as to how and where these uses should be located, and what type of overall land use pattern should evolve as Skamania County develops over the next 20 years. . . .

The Comprehensive Plan provides the overall community vision, goals, and general policies for future development in Skamania County. It does not, however, provide all the details. *Precise standards, such as building setbacks, permitted uses within a particular zoning district or appropriate types of stormwater management systems are included in the various implementing ordinances (official controls).*"

*Id.* at 22 (emphases added). The County's 2007 Comprehensive Plan further provides that

"[t]he following uses, *depending upon on adopted zoning classifications*, are appropriate within the **Conservancy designation:**

. . . .

6. *Public facilities and utilities, such as* parks, public water access, libraries, schools, utility substations, and telecommunication facilities"

*Id.* at 25-26 (emphases added).

"**Land use Element Goals and Policies**

. . . .

Policy LU.1.2: The plan is created on the premise that the land use areas designated are each best suited for the uses proposed therein. However, *it is not the intention of this plan to foreclose on future opportunities that may be made possible by technical innovations, new ideas and changing attitudes.* Therefore, other *uses that are similar to the uses listed here should be allowable uses, review*

> *uses or conditional uses, only if the use is specifically listed in the official controls of Skamania County for that particular land use designation.*"

*Id.* at 26 (emphases added).

As the County determined in its Land Use Consistency Certificate, the Project is within the areas designated "Conservancy" and "Rural Lands II" in the 2007 Comprehensive Plan. Ex. 2.03 at 7. Public utilities and facilities and utility substations are allowed uses in the Conservancy and Rural Lands II areas. *Id.* The County found that the Project is consistent with these designations. *Id.*

Considerable deference should be accorded to the findings and decisions by the County's Planning Department and the Board.[6]

> "Courts give considerable deference to the construction of ordinances and other legislation by those officials charged with their enforcement. The expertise of administrative agencies is often a valuable aid in interpreting and applying ambiguous legislation in harmony with legislative policies and goals. Administrative officials may appropriately 'fill the gaps' where necessary to effectuate a statutory scheme, as long as the official does not purport to *amend* the statute."

*Balser Invs. v. Snohomish Cnty.*, 59 Wn. App. 29, 37, 795 P.2d 753 (1990) (emphasis in original; citations omitted). The same rules of construction apply to municipal ordinances as applied to

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[6] "Considerable judicial deference should be given to the construction of an ordinance by the agency charged with its enforcement." *Hoberg v. City of Bellevue*, 76 Wn. App. 357, 359-60, 884 P.2d 1339 (1994); *see also City of Pasco v. PERC*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992) ("[W]here an agency is charged with administration and enforcement of a statute, the agency's interpretation of the statute is accorded great weight in determining legislative intent when a statute is ambiguous."); *Neighbors of Black Nugget Road v. King Cnty.*, 88 Wn. App. 773, 778, 946 P.2d 1188 (1997) ("We give considerable deference to the enforcing agency's interpretation of an ambiguous ordinance."). In the context of reviewing orders under the Administrative Procedures Act, courts

> "'accord substantial weight to the agency's view of the law it administers.' When the agency has expertise in a specialized field of law and has quasi-judicial functions in that field, we accord substantial weight to its construction of statutory words, phrases and legislative intent. The party asserting that an agency's order is invalid has the burden of demonstrating its invalidity."

*Peacock v. Pub. Disclosure Comm'n*, 84 Wn. App. 282, 286, 928 P.2d 427 (1996) (citation and footnotes omitted).

statutes. *Mt. Spokane Skiing Corp. v. Spokane Cnty.*, 86 Wn. App. 165, 172, 936 P.2d 1148 (1997). Here, the County's interpretation of the 2007 Comprehensive Plan and its findings of Project consistency therewith should be given considerable deference.

**b. The Project Is Consistent with the Applicable County Zoning Ordinances; Because Most of the Project Site Is Not Zoned, the Project Is an Outright Permitted Land Use Within Most of the Project Site**

Contrary to Opponents' contentions that the County zoning code is "ineffective,"[7] it is in fact presumed valid. *Cathcart*, 96 Wn.2d at 211 ("Comprehensive land use plans and promulgatory zoning regulations are presumed valid and are invalid only for manifest abuse of discretion."). By the County's computation, approximately 1,036 acres of the Project site are within the "unmapped" area of the County (zoning designation "unmapped classification" or "UNM"). Ex. 2.03 at 3, 11. As described in the Land Use Consistency Certificate, in the UNM area,

> "all uses which have not been declared a nuisance by statute, resolution, ordinance or court of jurisdiction are allowable. The standards, provisions, and conditions of this title shall not apply to unmapped areas."

Ex. 2.03 at 10 (*quoting* SCC 21.64.020). Wind farms are not listed as a nuisance by any County resolution or ordinance. *See id.* at 11. Wind farms have not been declared a nuisance by Washington statute or courts. *See id.* The Project does not and will not constitute a "nuisance" under Washington law. Therefore, the Project is an outright permitted use in the UNM area, and is consistent with and in compliance with the County zoning code. *Id.*

Approximately 127 acres of the Project site are zoned "For/Ag-20." *Id.* at 3, 11. "Semi-public facilities and utilities" are a conditional use in the For/Ag-20 zone. *Id.* at 11, 12. The

[7] *See* May 6, 2009 letter from J. Richard Aramburu to Allen Fiksdal ("SOSA Letter") at 9.

County zoning code does not define "semi-public facilities and utilities."[8] The County determined in its Land Use Consistency Certificate that the Project constitutes a "semi-public utility facility." *Id.* at 3, 7. "Semi-public utility facility" is not defined in the County's zoning code. Within the County's considerable discretion as the administrator of its own zoning code, the County has determined that the Project is allowed by conditional use permit for the 127-acre area that is zoned For/Ag-20. If permitted locally, this part of the Project would be subject to the local conditional use provisions outlined in SCC 21.16.070. *Id.* at 11. The zoning code would require a determination of whether the proposed use is compatible with existing or permitted uses in the specific area using six criteria. As confirmed by the County's Land Use Consistency Certificate, the Project complies with the applicable criteria. *Id.* at 11-14. Under the same criteria, the operation and maintenance building is allowed as a conditional use within the County's Residential-5 (R-5) zone. *Id.*

In consideration of the presumptive validity of local zoning, considerable deference should be accorded to the County's findings of land use consistency. Even if there is an "inconsistency" with the applicable local land use plan, the County has found the Project to be consistent with its land use planning and zoning. The fundamental statutory framework under which EFSEC operates is to respect local land use decisions, to determine consistency if possible, and, in the event of a finding of inconsistency, to include conditions in the draft certification agreement that "consider[] state or local governmental community interests affected by the construction or operation of the energy facility or alternative energy resource and the

[8] The County zoning code defines "semi-public facilities" as "facilities intended for public use which may be owned and operated by a private entity," whereas "public facilities and utilities" is defined in the County's zoning code as "facilities which are owned, operated, and maintained by public entities which provide a public service required by local governing bodies and state laws." SCC 21.08.010.

purposes of laws, ordinances, or rules or regulations promulgated thereunder that are preempted pursuant to RCW 80.50.110(2)." RCW 80.50.100(1).

Here, the County's Planning Director, who administers the zoning code, and the elected County Board of Commissioners have unanimously resolved that the Project is consistent with applicable County land use laws and unanimously support the Project. Exs. 2.03, 51.00r. Fundamentally, EFSEC's interest and mandate is to seek a determination of consistency, either by respecting and deferring to the County's Planning Director and elected officials, or, in the event of an inconsistency, to exercise its preemption authority and to recommend conditions that best address the underlying reason a proposed energy facility is not "consistent" with local land use plans and zoning ordinances.[9]

In this case, the County's elected officials have certified consistency, they support the Project, and there is no rational reason for EFSEC to find inconsistency in light of Opponents' specious legal argument. Even if an inconsistency is found, there is no rationale for refusing to exercise inherent, statutory, preemptive authority, which was unanimously confirmed by the Washington Supreme Court in *Residents Opposed to Kittitas Turbines v. EFSEC*, 165 Wn.2d 275, 197 P.3d 1153 (2008). *See, e.g.*, Transcript of EFSEC's Jan. 11, 2011 hearing at 1359 (testimony of Commissioner Paul Pearce indicating that the Board would ask EFSEC to preempt if an inconsistency was found).

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[9] The County's zoning code includes SCC Title 22, which imposes standards to regulate development within the Scenic Area, such as the "visually subordinate" standard. SCC 22.02.050 expressly states that SCC Title 22's requirements apply to the Scenic Area "*and to no other lands within the county*" (emphasis added). *See also* Ex. 51.00r at 4, lines 16-21 (testimony of Commissioner Paul Pearce); Transcript of EFSEC's Jan. 11, 2011 hearing at 1368-69 (testimony of Michael Lang that Scenic Area land use guidelines do not apply outside the Scenic Area); *id.* at 1383-84 (testimony of Michael Lang that SCC Title 22 only applies to the Scenic Area). The regulation of land uses within the context of the Columbia River Gorge National Scenic Area Act is a matter of great importance to the County. Ex. 51.00r at 3, line 1, through 5, line 24 (testimony of County Commissioner Paul Pearce). Unless EFSEC intends to preempt SCC 22.02.050, EFSEC cannot disregard this explicit prohibition within the County's zoning code.

### c. The Hearing Examiner's 2009 Finding Has No Bearing on the County's Authority to Continue to Permit Projects Under the Existing Zoning Code and Is Not *Res Judicata* in This Proceeding

Opponents' key argument for "inconsistency" relates to a finding, taken grossly out of context, by the Hearing Examiner in reviewing the County's 2008 attempt to enact new zoning.[10] Opponents argue that the Hearing Examiner's finding related to whether wind energy facilities are anticipated in the 2007 Comprehensive Plan constitutes binding *res judicata* and must govern EFSEC's decision in this proceeding. First, as discussed above, the 2007 Comprehensive Plan has no regulatory effect and has absolutely no bearing on the County's authority to continue to permit projects under the existing zoning. *See supra* footnote 4 and accompanying text. The County's permitting authority is a matter of well-settled Washington law, and the existing zoning code is not rendered "ineffective" merely because the County has adopted a new comprehensive plan but thereafter has been obstructed from amending its zoning code.[11] The County is fully within its authority to conduct its fundamental governmental business of considering land development proposals under existing, applicable law. EFSEC should respect this authority and do nothing to disrupt its well-established legal effect.

As to Opponents' *res judicata* argument, the Hearing Examiner's decision is not *res judicata* and has absolutely no force or effect in this proceeding. *Res judicata* can apply to administrative decisions, but its application is extremely limited:

> "Res judicata will bar a claim when a prior final resolution has a concurrence of identity in four respects with a subsequent proceeding: 'There must be an identity of (1) subject matter;

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[10] *See* SOSA Letter at 14 (*quoting* Hearing Examiner's 2009 finding that "[t]he 2007 Comprehensive Plan does not contemplate the type of energy facilities described in the Planning Commission Recommended Draft" zoning ordinance); Transcript of EFSEC's May 7, 2009 land use hearing at 29 (argument of Nathan Baker).

[11] *See* Ex. 101 at 2 (summarizing Opponents' prior litigation with the County that resulted in the Hearing Examiner's 2009 decision); Transcript of EFSEC's Jan. 3, 2011 hearing at 88, 91 (testimony of Jason Spadaro concerning Opponents' prior litigation with the County).

(2) cause of action; (3) persons and parties; and (4) the quality of persons for or against whom the claim is made.'"

*Davidson v. Kitsap Cnty.*, 86 Wn. App. 673, 681, 937 P.2d 1309 (1997) (*quoting Hilltop Terrace Homeowners Ass'n v. Island Cnty.*, 126 Wn.2d 22, 32, 891 P.2d 29 (1995)). "[S]ubject matters are not identical if they differ substantially." *Hilltop Terrace*, 126 Wn.2d at 32 (holding that *res judicata* did not apply to a second application for an antenna tower because the project design had substantially changed). Four criteria are to be considered in determining whether the causes of action are the same: (i) whether the second action would destroy or impair rights or interests established in the first action, (ii) whether substantially the same evidence is presented in both, (iii) whether both actions involve infringement of the same right, and (iv) whether they both arise out of the same transactional nucleus of facts. *Rains v. State*, 100 Wn.2d 660, 664, 674 P.2d 165 (1983). The parties must be the same, have the same legal interests, or be in privity. *In re Recall of Pearsall-Stipek*, 136 Wn.2d 255, 261, 961 P.2d 343 (1998); *Loveridge v. Fred Meyer*, 125 Wn.2d 759, 764, 887 P.2d 898 (1995) ("Mere awareness of proceedings is not sufficient to place a person in privity with a party to the prior proceeding."). Without identity of the parties, there can be no identity of quality. *Burke Motor Co. v. Lillie*, 39 Wn.2d 918, 922, 239 P.2d 854 (1952).

None of the four requirements for *res judicata* set forth by Washington appellate courts are met in this situation. The subject matters are entirely different (*i.e.*, general legislative rezoning vs. project permitting). The "cause of action" is entirely different (*i.e.*, alleged SEPA violation vs. alleged inconsistency with local land use regulations), and none of the four criteria identified in *Rains* for assessing identify of the cause of action is satisfied. Whistling Ridge was not a party to the Hearing Examiner's decision and has very different legal interests than the County, so the parties are not the same and thus there is neither identity of the parties nor quality.

In other words, the Hearing Examiner's decision fails to meet any of the four requirements for *res judicata*. The Hearing Examiner's decision may be meaningful to the County as it continues to consider future zoning code amendments, but it is completely irrelevant to the consideration and issuance of land use permits under the existing zoning code. It is utterly immaterial to this EFSEC proceeding.

**d. RCW 36.70.545 Does Not Render the County's Zoning Code Void**

Opponents have argued that RCW 36.70.545 renders the County's pre-2007 zoning code invalid because it is not consistent with the County's 2007 Comprehensive Plan. SOSA Letter at 9. This contention misrepresents what RCW 36.70.545 requires and deliberately obscures the controlling authority of RCW 36.70.340. RCW 36.70.545 states that "[b]eginning July 1, 1992, the development regulations of each county that does not plan under [the Growth Management Act] shall not be inconsistent with the county's comprehensive plan." Statutes must be read in their entirety, not in a piecemeal fashion that is not faithful to the statute's language and underlying policy. *Vaughn v. Chung*, 119 Wn.2d 273, 282, 830 P.2d 668 (1992). Statutes are to "be construed to effect their purpose and unlikely, absurd or strained consequences should be avoided." *Kadoranian v. Bellingham Police Dep't*, 119 Wn.2d 178, 189, 829 P.2d 1061 (1992).

Here, Opponents' interpretation of RCW 36.70.545 ignores RCW 36.70.340, which was enacted approximately 30 years prior to RCW 36.70.545 and which the legislature did not change when it enacted RCW 36.70.545. In other words, the legislature's clear statement in RCW 36.70.340 that comprehensive plans under the Planning Enabling Act are not to be considered anything other than a "guide to the later development and adoption of official controls" remains true. Furthermore, Opponents' interpretation of RCW 36.70.545 leads to the "absurd or strained consequence[]" that the County voided its entire existing zoning code and voided the County's power to regulate land development under its duly enacted zoning code by

adopting the 2007 Comprehensive Plan. If the legislature intended that the adoption of a new comprehensive plan would have such a harsh effect (tantamount to a complete moratorium on all forms of land development and building construction), the legislature would have so provided expressly in the statute.

The only plausible interpretation of RCW 36.70.545, which harmonizes with RCW 36.70.340, is that RCW 36.70.545 does not invalidate the County's zoning code. Instead, it merely directs all Planning Enabling Act counties to undertake the legislative work to ensure that zoning ordinances "shall not be inconsistent with the county's comprehensive plan." This is a legal requirement to consider zoning ordinances guided by comprehensive plans, not a law that invalidates existing zoning codes and thereby denies all land development and building permits sought under existing zoning codes. Opponents' interpretation of RCW 36.70.545 lacks merit and should be disregarded.

## B. EFSEC and the Governor Should Resolve Any "Inconsistency" with the County's Comprehensive Plan and Zoning Ordinances Through Statutory Preemption Authority

### 1. Applicable EFSEC Standards and Requirements

> **RCW 80.50.110. Chapter governs and supersedes other law or regulation – Preemption of regulation and certification by state.**
> "(1) If any provision of this chapter is in conflict with any other provision, limitation, or restriction which is now in effect under any other law of this state, or any rule or regulation promulgated thereunder, this chapter shall govern and control and such other law or rule or regulation promulgated thereunder shall be deemed superseded for the purposes of this chapter. (2) The state hereby preempts the regulation and certification of the location, construction, and operational conditions of certification of the energy facilities included under RCW 80.50.060 as now or hereafter amended."

> **WAC 463-28-060. Adjudicative proceeding.**
> "(1) Should the council determine under WAC 463-26-110 a site or any portions of a site is inconsistent it will schedule an adjudicative proceeding under chapter 463-30 WAC to consider

preemption. (2) The proceeding for preemption may be combined or scheduled concurrent with the adjudicative proceeding held under RCW 80.50.090(3). (3) The council shall determine whether to recommend to the governor that the state preempt the land use plans, zoning ordinances, or other development regulations for a site or portions of a site for the energy facility or alternative energy resource proposed by the applicant."

**WAC 463-28-080. Preemption – Recommendation.**
"The council's determination on a request for preemption shall be part of its recommendation to the governor pursuant to RCW 80.50.100."

**RCW 80.50.100(1). Recommendations to governor – Approval or rejections of certification – Reconsideration.**
"The council shall include conditions in the draft certification agreement to implement the provisions of this chapter, including, but not limited to, conditions to protect state or local governmental or community interests affected by the construction or operation of the energy facility, and conditions designed to recognize the purpose of laws or ordinances, or rules or regulations promulgated thereunder, that are preempted or superseded pursuant to RCW 80.50.110 as now or hereafter amended." *See also* WAC 463-28-070 (providing the same).

**2. Preemption Is Appropriate Here to the Extent EFSEC Finds Any Inconsistency with the County's 2007 Comprehensive Plan and Zoning Ordinances**

By confidently demanding that EFSEC and the Governor decline to exercise statutory preemption authority Opponents have created an untenable scenario that demands EFSEC intervention. They argue against the weight of Washington law that the County cannot apply its zoning code. They have sued the County repeatedly, and they contend that EFSEC can do nothing to resolve the false case of "inconsistency" that Opponents have built.

EFSEC was established for the fundamental purpose of cutting through local efforts to obstruct the permitting of energy facilities. *Residents Opposed to Kittitas Turbines*, 165 Wn.2d at 316 ("RCW 80.50.010(5) specifically instructs EFSEC to avoid costly duplication in the siting process, presumably through its preemption power."). While Whistling Ridge believes that

(i) the Project is entirely consistent with local land use plans and zoning ordinances and (ii) Opponents have entirely failed to overcome the *prima facie* proof of consistency, EFSEC and the Governor can and should resolve any minor inconsistency or ambiguities with the County's 2007 Comprehensive Plan and existing zoning ordinances through its statutory preemption authority. RCW chapter 80.50 anticipates that the imposition of appropriate conditions is the principal tool to resolve any inconsistency. Opponents present absolutely nothing that would disrupt this explicit statutory scheme.

## IV. CONCLUSION

For the reasons set forth above, EFSEC should determine that the Project is consistent and in compliance with County land use plans and zoning ordinances. If EFSEC finds any minor inconsistencies, EFSEC should exercise its statutory preemption authority and impose appropriate conditions to implement the purpose of any preempted local land use regulations.

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