BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of Application No. 2009-01 of WHISTLING RIDGE ENERGY, L.L.C. for WHISTLING RIDGE ENERGY PROJECT	FRIENDS OF THE COLUMBIA GORGE'S OPENING BRIEF ON LAND USE CONSISTENCY ORAL ARGUMENT REQUESTED

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I. Introduction

As will be explained below and in the incorporated materials, the proposed Whistling Ridge Energy Project ("WREP" or "the Project") is not consistent with the applicable land use plans and rules. The Council should recommend denial of the Project.

II. Incorporation by Reference

Friends of the Columbia Gorge ("Friends") hereby incorporates the arguments and facts set forth in the following three documents:

- the initial land use brief of Save Our Scenic Area ("SOSA"),
- the May 7, 2009 land use comments filed by J. Richard Aramburu, and
- the May 7, 2009 land use comments filed by Rick Till.

III. The Council must determine whether or not the Project is consistent with the applicable land use plans and rules.

The Council must determine whether or not the Project is consistent and in compliance with the applicable land use plans and rules. RCW 80.50.090(2); WAC 463-26-110.

If the Council determines that the Project is inconsistent, then the Council must hold an adjudicative hearing to consider whether the relevant land use plans and rules should be preempted. WAC 463-28-060. Following such a hearing, the Council has two options for its recommendation to the Governor. The first option is to recommend denial of the Project. The second option is to recommend that the State of Washington should preempt the relevant land use plans and rules. WAC 463-28-060(3).

If the second option is chosen, the Council must also "include conditions in the draft certification agreement which consider state or local governmental or community interests affected by the construction or operation of the energy facility or alternative energy resource and the purposes of" the preempted plans and rules. WAC 463-28-070.

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IV. The Applicant has the burden of proof to establish that the Project is consistent with the applicable plans and rules.

The Applicant has the burden of proof to establish that the Project is consistent with the applicable plans and rules. This burden may be flipped, to create a rebuttable presumption that the project is consistent, but only if the local county or city adopts a certificate attesting that the project is consistent and in compliance with the applicable plans and rules. WAC 463-26-090.

Skamania County has reviewed this Project twice. The first time, the County attempted to issue a certificate of consistency for the Project. The second time, the County chose *not* to issue a certificate of consistency, but rather adopted a "staff report to EFSEC" on land use issues. As will be explained below, the latter sequence of events controls. The County has chosen not to issue a certificate of consistency, and instead is participating with a "staff report" to the Council and as a party in the adjudication.

At the land use consistency hearing, Skamania County presented five documents[1]:

- A statement by the Skamania County Commissioners, with an accompanying list of dates;
- A certificate of land use consistency, issued by the County Planning Director;
- A resolution of the County Commissioners (Resolution No. 2009-22);
- A staff report for land use consistency review; and
- A site-specific zoning map.

The County Commissioners' resolution explicitly "adopt[ed] the Certificate of Land Use Consistency" written by the Planning Director. Resolution No. 2009-22 at 1.

[1] All five of these documents were adopted and/or issued by the County three days or less before the hearing. The County provided no notice or meaningful opportunity to comment on several of these documents. The County Commissioners listed the resolution on the agenda for a May 5, 2009 meeting, but when members of the public attended this meeting and asked to review the documents under consideration at the meeting, they were told that copies were not available for the public. The Commissioners stated that they themselves received the documents less than 24 hours before the meeting.

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Later, the Applicant modified the Project proposal and amended the Application, and Skamania County went back to the drawing board in reviewing the project for land use consistency. This time, the Planning Director issued a new "Staff Report for Land Use Consistency Review," but chose *not* to issue a certificate of consistency. The County Commissioners then issued a new resolution (County Resolution No. 2009-54). Both the new resolution and new staff report are included in Exhibit 2.03. The new resolution expressly repealed the earlier resolution "in its entirety," including the County's prior adoption of the Certificate of Consistency. Ex. 2.03 at 1.

In the new resolution, the County "adopt[ed] the Certificate of Land Use Consistency as a staff report to EFSEC, not a decision." Ex. 2.03 at 2. The Planning Director clarified that the reference in the new resolution to a "Certificate of Land Use Consistency" was a typographical error: there was no Certificate this time around. Rather, the County chose to issue only a staff report. Ex. 1.14C ("Resolution 2009-54 . . . should have referred to the Staff Report, there is not an additional document called the Certificate of Land Use Consistency.").

The County's actions demonstrate that it is aware of the difference between a certificate of land use consistency and a staff report. The first time, the County adopted a certificate. The second time, the County adopted only a "Staff Report to EFSEC." Ex. 2.03 at 2. Furthermore, in the second resolution, the County repealed its prior adoption of the certificate.

Thus, there is no county certificate of consistency for this Project. The Council should review the County's Staff Report, but the Staff Report does not in and of itself create a presumption of consistency. Rather, the Applicant retains the burden of demonstrating consistency.

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V. The Project is not consistent with the Skamania County Comprehensive Plan and Zoning Code.

As explained in detail in SOSA's initial land use brief and in the land use comments of J. Richard Aramburu and Rick Till, the Project is not consistent with the applicable provisions of the Skamania County Comprehensive Plan and County zoning code. Given space constraints, Friends will not repeat the discussions here, and instead we incorporate those documents by reference.

In reviewing the Application and preparing findings regarding land use consistency, the Council should review Friends' and SOSA's comments side by side with those of the County and any other commenters. Below, we will briefly highlight one point and update another point in Mr. Till's letter.

A. The Project fails to comply with the Comprehensive Plan's mandate to protect scenic resources.

As noted in Mr. Till's letter, the Skamania County Comprehensive Plan requires the protection of scenic resources. *See* Till Letter at 5, 6–7. The relevant provisions of the Comprehensive Plan are Policy LU.3.3, which requires the County to "[e]ncourage industry that would have minimal adverse environmental or aesthetic effects," and Policy LU.5.5, which requires the County to "[p]romote compatibility of industry with the surrounding area or community by fostering good quality site planning, landscaping, architectural design, and a high level of environmental standards."

The County essentially concludes that because the turbines would be painted gray and located outside the Columbia River Gorge National Scenic Area, the scenic impacts of the Project are minimized, and the Project therefore complies with the Comprehensive Plan.

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County Staff Report (Ex. 2.03) at 7–8. The County's analysis is wholly inadequate, and its conclusions are incorrect.

First, the County completely ignores the potential impacts to scenic views from multiple locations, such as the National Scenic Area, the Lewis and Clark National Historic Trail, the Oregon Pioneer National Historic Trail, the Historic Columbia River Highway, the Ice Age Floods National Geological Trail, and various hiking trails and vantage points in the Gifford Pinchot National Forest and on nearby lands owned by the Washington DNR. Two federal agencies with expertise in the affected scenic resources, the U.S. Forest Service and National Park Service, have concluded that the Project would significantly harm these resources. Exs. 21.02, 21.04, 21.05.

The County summarily dismisses the scenic impacts of the Project,[2] merely because the proposed turbines would be located outside the National Scenic Area boundary. County Staff Report (Ex. 2.03) at 7. The County's approach is in error. The proximity of the Project to the Scenic Area boundary is irrelevant to whether the Project will cause scenic impacts, and to how the impacts should be avoided or mitigated as required by the Comprehensive Plan. The County completely ignores the impacts of the proposed massive, 425-foot-tall towers and their flashing lights and spinning blades, including the fact that these towers would break skylines within scenic, forested landscapes.

And as for avoiding, minimizing, and mitigating the Project's adverse scenic impacts, the County yet again misses the mark. The *only* avoidance or mitigation measure relied upon by the

[2] The scenic impacts of the Project have been discussed at length in the adjudication and in the SEPA context. Friends will not repeat those lengthy discussions here, but we encourage the Council to concurrently address topics that interrelate between land use consistency and the environmental and community impacts, pursuant to WAC 463-28-070 and -080.

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County is an incorrect assumption that the turbines would be painted gray. County Staff Report (Ex. 2.03) at 7.

For starters, even the County's assumption that the turbines would be painted gray is wrong. The Application states that the turbines would be painted "gray *or white*." Amended Application at § 2.3.3.2 (emphasis added). And the Application repeatedly states that the turbines would be painted a "light color," even though the surrounding natural setting is not light in color. *See, e.g.*, Amended Application at 4.2-5, 4.2-72. Ultimately, whether the turbines are painted light gray, white, or some other light color, they will not blend in with the green and brown forests and blue skies surrounding the Project area.

But more importantly, the County completely ignores potential measures such as alternative siting, alternative turbine layouts, radar-triggered lighting, and scenic easements within the affected viewsheds. The County's approach directly violates the Comprehensive Plan, which requires scenic impacts to be avoided, minimized, and mitigated.

B. The "Phase 2" (DNR) portion of the Project has been removed from consideration.

Mr. Till's letter states that the proposed "Phase 2" expansion of this Project onto adjacent DNR lands must be reviewed concurrently with the Application presently before EFSEC (i.e., "Phase 1"). *See* Till Letter at 6. However, subsequent to Mr. Till's letter, the DNR indefinitely abandoned consideration of the Phase 2 proposal because of significant potential harm to public resources, including federally protected wildlife species. Because the Phase 2 proposal is now off the table, there is no longer any need to review the two phases concurrently.

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VI. The Project is in violation of state and county laws regulating conversions of forest land to non-forestry uses.

The Project would permanently convert at least 55 acres of forest land to non-forestry (industrial) uses. Not only has the Applicant failed to seek approval by the DNR and County for these conversions, the Applicant failed to even *disclose* the conversions in its applications for forest practices at the Project site. Both the failure to disclose, and the conversions themselves, violate the applicable law.

A. Conversions from forest to non-forest use require notification to and approval by DNR and the County.

Forest practices in the State of Washington require a DNR permit. RCW 76.09.060(3); WAC 222-20-010(1); *see also* DEIS at 4-3. If the forest practices involve a conversion of forest land to a non-forest use, the landowner must notify the DNR of the conversion in advance within the forest practice application. RCW 76.09.020(8), 76.09.060(3); *see also* 76.09.070(1), 76.09.070(5). The DNR may not approve a conversion until the local government is notified of the conversion and the government completes SEPA review of the conversion. WAC 222-16-050(2), 222-20-040(4).

The consequences for converting forest land without notice are severe. The conversion is deemed a violation of local land use regulations. RCW 76.09.060(3)(d). The underlying land is subject to a six-year moratorium prohibiting conversion activities, and no building permits or development approvals may be issued on the land. RCW 76.09.060(3)(e), 76.09.460; WAC 222-20-050(3).[3] Undisclosed and unauthorized conversions are also subject to monetary penalties, loss of forest land tax designations, property tax penalties, and penalties for violating

[3] WAC 222-20-050(3) states that the six-year moratorium is provided in RCW 76.09.060(3)(b)(i). This appears be in error. The moratorium requirement is located in RCW 76.09.060(3)(e).

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the fee requirements for forest practice applications. RCW 76.09.170, 76.09.060(3)(c), 76.09.065(2).

A moratorium can be lifted in less than six years only if the landowner complies with all requirements in RCW 76.09.460(2), including obtaining a formal determination that the conversion complies with local land use regulations. RCW 76.09.460(2).

B. The Applicant unlawfully failed to disclose and seek approval for its conversions, thereby triggering several penalties.

In the current case, there is no question that a sizable amount of forest land would be converted to non-forestry uses. The Applicant concedes that at least 55 acres of land would be converted. Transcript ("Tr.") 140 (Jan. 3, 2011); Ex. 1.00 at 7; Amended Application at 4.2-14. The Applicant also concedes that "cleared areas would be considered 'forest conversion' under the Washington Forest Practices Act." Amended Application at 3.4-10.

The problem is that the Applicant[4] has applied for numerous forest practice applications within the Project area in recent years,[5] but *never* disclosed its intent to convert forestland. The DNR acknowledged this issue in a recent letter to EFSEC. Ex. 1.16C at 5.

The Applicant's nondisclosure is not excusable error, because the Applicant has for many years pursued an industrial energy facility at the site. *See, e.g.*, Ex. 1.17C (Hearing Examiner

[4] This Brief refers to Whistling Ridge Energy, LLC ("WRE") and the landowners collectively as the "Applicant." The landowners are S.D.S. Co., LLC; Stevenson Land Company; and the Broughton Lumber Company. These entities and WRE have overlapping controlling ownership interests and are operated by the same staff. *See* Amended Application at §§ 1.12, 1.13, 1.14.

[5] Figure 2.3-3 in the Amended Application shows that between 2003 and 2008, roughly ten tracts within the Project site were harvested. In addition, Intervenor requests that the Council take official notice, pursuant to WAC 463-30-230, of relevant DNR applications and decisions for the subject land. Several potentially relevant forest practice application numbers are 2702622, 2702784, 2702862, 2703252, and 2704504. This is not intended to be an exhaustive list; it is the Applicant's burden to demonstrate that it has met all conversion requirements, and EFSEC's responsibility to confirm compliance. Forest practice applications and decisions are available on DNR's website at https://fortress.wa.gov/dnr/fpars/login.aspx?RedirectURL=FPASearch.aspx.

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Decision) at 13–14, Findings No. 37 & 38. Indeed, the Applicant filed at least one of its forest practice applications *after* filing the WREP application.[6] And yet, the Applicant did not disclose in its FPA its intent to convert. In fact, the Applicant said quite the opposite, declaring an intent to keep the land in forestry use.[7]

Because of the Applicant's material misrepresentations, the DNR did not initiate the conversion review process, and the intended permanent conversions of forest land have never been reviewed nor approved pursuant to the applicable state and local laws. The Council must recognize the Applicant's failure to disclose and obtain approval for the conversions, and must enforce the applicable penalties, including the prohibition on the issuance of building permits and land use approvals required by RCW 76.09.060(3)(e) and WAC 222-20-050(3). Further, the Council must also find that the Project does not comply with local land use regulations, as required by RCW 76.09.060(3)(d).

C. The Project violates Skamania County's moratorium against forest practice conversions.

In addition to the six-year moratorium against conversions triggered by the Applicant's failure to disclose (discussed in the previous section), there is another moratorium at play here. In 2007, Skamania County prohibited forest practice conversions on unzoned lands, including

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[6] FPA 2704504 was received by the DNR on November 2, 2009. This was eight months after the Applicant filed the WREP Application. The clearcut proposed in FPA 2704504 was approved by the DNR and has now been completed. It appears that this clearcut included the "older stand of trees" that provides the "best habitat" referred to by Mr. Cantrell during his cross-examination of Mr. Spadaro. Tr. 156–57 (Jan. 3, 2011). Mr. Spadaro confirmed that this area was clearcut after the Application was filed and the DEIS issued. Tr. 157 (Jan. 3, 2011). The DNR's SEPA decision on this FPA notes that "[t]he FPA was classed as a Class 4 Special due to potential impacts to Spotted Owl habitat." DNR, Notice of Final Determination, SEPA File No. 09-0110902 (Dec. 1, 2009).

[7] "This FPA and SEPA review pertains *only to forestry activities*. *The landowner's intent of this proposal is to keep this site in forest management.*" DNR, Notice of Final Determination, SEPA File No. 09-0110902 (Dec. 1, 2009) (emphasis added).

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the Project site. Although this prohibition is apparently intended to be temporary, it was in place when WRE filed the Application, and it remains in place today. The countywide moratorium prohibits the Applicant's proposed conversions, and makes the Project inconsistent with local land use regulations.

Skamania County first imposed its moratorium on July, 10, 2007, and has renewed the moratorium in six-month intervals since then.[8] The most recent renewal was Ordinance 2010-10, adopted on December 28, 2010, and found in the record as Exhibit 1.15C.

The County's moratorium prohibits the processing of SEPA checklists for forest practice conversions in most unincorporated, unzoned lands in Skamania County,[9] including the majority of the Project area. By prohibiting the processing of environmental checklists, the moratorium effectively prohibits the conversions themselves. *See* WAC 222-20-040(4).

The moratorium was enacted primarily because the County is not in compliance with its statutory mandate to designate critical areas and commercial forest lands, and thereby protect these areas from the encroachment of urban growth. *See* RCW 36.70A.170(1)(b), (d); Ex. 1.15C.[10]

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[8] Intervenor requests that the Council take official notice of the County's prior moratorium ordinances pursuant to WAC 463-30-230. All ordinances can be retrieved from Skamania County's web site at http://www.skamaniacounty.org/commissioners/homepage/ordinances-2/.

The prior moratorium ordinances were Ordinance Nos. 2007-10 (July 10, 2007), 2008-01 (Jan. 8, 2008), 2008-08 (July 3, 2008), 2008-13 (Dec. 30, 2008), 2009-03 (July 28, 2009), and 2010-06 (June 15, 2010). The moratorium was allowed to lapse for a period of approximately one month when Ordinance 2008-13 expired, but was reestablished with the adoption of Ordinance 2009-03.

[9] The only exception is the Swift Sub-Area. Ex. 1.15C at 3. The Project site is nowhere near the Swift Sub-Area. *See* Amended Application at fig. 4.2-2.

[10] The County concedes this mandate at page 9 of its 2007 Comprehensive Plan.

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The County amended its Comprehensive Plan in 2007, but has not yet updated its zoning code to comply with state law nor to achieve consistency with the 2007 Comprehensive Plan.[11] The County has stated in its moratorium ordinances that it "is in the process of updating zoning classification[s] for all land within unincorporated Skamania County to be consistent with the adopted [2007] Comprehensive Plan." *See, e.g.*, Ex. 1.15C at 1.

As long as the County is out of compliance with state law on its zoning efforts, the moratorium is necessary to protect critical areas and commercial forest lands. The moratorium was imposed in pertinent part to protect unzoned commercial forest land from conversion to non-forestry uses and to prevent unchecked development during the legislative process.

The moratorium was also imposed because "many areas within the County are prime habitat area for many Federal and State listed endangered, threatened, sensitive, candidate and priority species of fish and wildlife." Ord. 2008-01[12]; *see also* Ex. 1.17C (Hearing Examiner Decision) at 5, Finding No. 10.

There is no dispute that the vast majority of the Project site is subject to Skamania County's moratorium. Ex. 2.00 at 7; Amended Application at fig. 4.2-2 & p. 3.4-10; Tr. 144 (Jan. 3, 2011). In fact, the Applicant essentially concedes that the moratorium applies to this Project, but argues that EFSEC should exercise its preemptive authority rather than applying the moratorium. The Applicant argues that

> [b]ecause of EFSEC's well-established preemptive role in permitting wind energy facilities, including acting as Lead Agency for associated SEPA review,

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[11] *See* RCW 36.70A.130(1)(d) and RCW 36.70A.130(4)(b) (requiring zoning ordinances to be consistent with comprehensive plans and to be periodically updated to maintain consistency with comprehensive plans).

[12] Curiously, the County has deleted this reference to imperiled species in its more recent extensions of the moratorium.

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> the County's moratorium on acceptance of SEPA checklists for forest practices conversions does not affect the project.

Amended Application at 4.2-14.

By citing "EFSEC's well-established preemptive role," the applicant is essentially admitting that the Project is inconsistent with the land use laws. The question before the Council at this time is not whether to preempt land use laws, but whether the Project is consistent with these laws. On that point, the Applicant is wrong in stating that the moratorium does not affect the Project. The Council must determine whether the Project would comply with applicable land use laws, and cannot simply disregard the laws.

The County's moratorium is unambiguous and applies directly to this Project, prohibiting the intended conversion from forest use to industrial use. Furthermore, in the County's own words, allowing this Project to proceed in the absence of zoning controls "essentially is circumventing the legislative process and could endanger the public's safety, health and general welfare." Ex. 1.15C (Ord. No. 2010-10) at 2. The Council should hold the County to its word and recommend denial of the Project until the subject property is appropriately zoned as required by state law and the moratorium is lifted.

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VII. Conclusion

For the reasons stated above, the Council should find the Project inconsistent with the applicable land use plans and rules, and should recommend denial of the Project.

Dated this 11th day of February, 2011.

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