BEFORE THE STATE OF WASHINGTON

ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of Application No. 2009-01 WHISTLING RIDGE ENERGY PROJECT LLC WHISTLING RIDGE ENERGY PROJECT	**APPLICANT'S LAND USE CONSISTENCY RESPONSE BRIEF**

To The Parties of Record (See Attached Service List)

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I. INTRODUCTION

Whistling Ridge Energy LLC ("Whistling Ridge") submits this brief in response to Friends of the Columbia Gorge ("FOCG") and Save Our Scenic Area's ("SOSA") (collectively, "Opponents") opening land use consistency briefs. As explained below, the issues FOCG and SOSA raised in these briefs are divorced from the facts, rely on information outside the record, lack legal merit, and are insufficient to overcome WAC 463-26-090's *prima facie* presumption of land use consistency. As explained below, the Energy Facility Site Evaluation Council ("EFSEC") should pay Opponents' arguments no heed, and oral argument on these issues would only affect unnecessary expenses and delays. Contrary to Opponents' contentions, the Whistling Ridge Energy Project ("Project") is consistent with applicable Skamania County ("County") land use plans and rules, as the County has certified.

II. RESPONSE TO FOCG'S OPENING LAND USE CONSISTENCY BRIEF

A. Resolution No. 2009-54 Is a Certificate of Land Use Consistency Under WAC 463-26-090 That Creates a *Prima Facie* Presumption of Consistency and Compliance with County Land Use Plans and Zoning

FOCG argues that the May 4, 2009 letter from the County Planning Director to EFSEC was the "certificate of land use consistency" and that the County Board of Commissioners ("Board") repealed this letter when it adopted Resolution No. 2009-54 on December 22, 2009, such that "there is no county certificate of consistency for this Project." FOCG Brief at 2-3. This argument blatantly mischaracterizes the Planning Director's May 4, 2009 letter, Resolution No. 2009-22 (*i.e.*, the original land use consistency certificate), and Resolution No. 2009-54 (*i.e.*, the current land use consistency certificate).

First, Resolution No. 2009-22 is clearly titled "Certification of Land Use Consistency Review for Whistling Ridge Energy Project" and states that "more detailed findings of consistency are included in the Community Development Director's Certificate of Land Use Consistency, which is attached hereto and is incorporated herein by reference as if set forth in full." Ex. 2.02. Resolution No. 2009-22 was admitted into evidence without objection by

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Opponents or the County. Tr. at 195:13-21. The May 4, 2009 letter is not attached to Resolution No. 2009-22, as Mr. Kahn himself noted. Tr. at 212:3-4. Instead, the staff report is attached to Resolution No. 2009-22. In her prefiled testimony, Katy Chaney recognized the distinction between the May 4, 2009 letter and Resolution No. 2009-22 by testifying that the letter was just an "*initial determination*" of consistency, whereas "[t]he staff report was adopted by the Skamania County Board of County Commissioners as Resolution 2009-22." Ex. 2.00 at 8:6-10 (emphasis added). Contrary to FOCG's insinuation, the Board did not adopt the May 4, 2009 letter when it approved Resolution No. 2009-22. Resolution No. 2009-22 was the County's original certificate of land use consistency, not the May 4, 2009 letter.

Second, the Board's intent in approving Resolution No. 2009-54 is self-evident from the resolution's very title: "Certification of Land Use Consistency Review for the amended application for the Whistling Ridge Energy Project."[1] Ex. 2.03. Resolution No. 2009-54 provides that "more detailed findings of consistency are included in the Community Development Director's Certificate of Land Use Consistency, which is attached hereto and is incorporated herein by reference as if set forth in full." Ex. 2.03. Attached was a revised staff report. *Id.*; Ex. 2.00 at 8:15-17 (prefiled testimony of Ms. Chaney). In other words, Resolution No. 2009-54 refers to the staff report as a "Certificate of Land Use Consistency." Most importantly, the Board unequivocally stated that "after due deliberation, [the Board] adopts the Certificate of Land Use Consistency as a staff report to EFSEC, not a decision, and *resolves that the Whistling Ridge Energy Project is consistent with the Skamania County land use plans and*

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[1] Judge Wallis himself described Resolution No. 2009-54 as a "Certificate of Land Use Consistency." Tr. at 194:17-18. In his cross-examination of Ms. Chaney, Mr. Kahn characterized Resolution No. 2009-54 as a "certificate." Tr. at 211:3. In contrast, at the land use hearing, Mr. Aramburu described the document from the Planning Director not as a "certificate" but rather as "the letter that you received tonight from the planning director of Skamania County." May 4, 2009 Tr. at 41:1-2. The disingenuous nature of FOCG's argument is betrayed by Opponents' lawyers own words.

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applicable zoning ordinance."[2] Ex. 2.03 at 2 (emphasis added). The County's consistency determination could not be any clearer.

FOCG's specious use and mischaracterization of a County staff communication in a futile attempt to muddy the Board's clear action was exposed in FOCG's own cross-examination of Ms. Chaney.[3] Mr. Kahn posited that "Ms. Chaney testified that there was a certificate of land use consistency. This [Ex. 1.14c] is an email that say [*sic*] there isn't [a certificate of land use consistency]. It's from an official of Skamania County." Tr. at 216:18-20. Ms. Chaney responded:

> The way I read this e-mail -- again I didn't see what the beginning correspondence was -- asked the question of Karen Witherspoon that the certificate of land use consistency referred to in Resolution 2009-54 was in fact an additional certificate of land use or there was a staff report. If you look at my attachment to Exhibit 2.03 to my testimony, there's Resolution 2009-54 which is entitled certification of land use consistency review for the amended application for the Whistling Ridge Energy Project. This resolution repeals Resolution 2009-22 in its entirety. So the resolution is a certificate of land use and attached to that is the staff report, and I think that's all that Jessica Davenport was trying to clarify in her e-mail to Nathan Baker.

Tr. at 217:18 -218:6. Ms. Chaney's reading of Ex. 1.14c is entirely consistent with the wording of Resolution No. 2009-54, because it incorporated an attached "Certificate of Land Use Consistency," and the only attached document was the staff report. It is also consistent with the very content of Ex. 1.14c, which simply provided that the reference in Resolution No. 2009-54 to a "Certificate of Land Use Consistency" should have been to the staff report that was attached to Resolution No. 2009-54. There is no question that Resolution No. 2009-54 constitutes the County's certification of land use consistency for the Project.

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[2] The County has engaged in this process in the utmost good faith, and the Board's characterization of Resolution No. 2009-54 as a "staff report to EFSEC, not a decision" recognizes and respects the preemptive legal role and responsibility of EFSEC and the Governor.

[3] Mr. Kahn's use of Ex. 1.14c typifies Opponents' repeated and calculated misuse of agency emails that were offered throughout the proceedings without context and without disclosure of the actual, complete email colloquies—a tactic to which Whistling Ridge repeatedly objected. *See, e.g.*, Tr. at 216:10-17, 738:5-20.

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B. FOCG Inappropriately Demands That the County Should Have Conducted SEPA Review as Part of Its Consistency Determination

First, Whistling Ridge strongly objects to FOCG's attempt to incorporate by reference attorney Rick Till's comment letter submitted to EFSEC at the land use hearing on May 7, 2009. FOCG Brief at 1:11, 4:3-8. If FOCG intended to bring forward factual arguments concerning land use consistency in the adjudicative proceedings, it should have offered its own witness or, at a minimum, questioned the witnesses present on these issues. FOCG did not do that. This is particularly relevant given that attorney Till's comments concerned an ASC that has since been amended and Resolution No. 2009-22, which has since been repealed. These distinctions are material, because the Till letter was aimed at a Project design that contemplated improvements to access roads in the National Scenic Area and the potential use of Department of Natural Resources ("DNR") lands. Attorney Till's comment letter, therefore, is rendered entirely moot by the amended ASC and the adoption of Resolution No. 2009-54. EFSEC should strike FOCG's attempted incorporation of attorney Till's comment letter, which is clearly calculated to circumvent EFSEC's adjudicative process, not to mention EFSEC's clear limitation on the number of pages in parties' opening land use consistency briefs.[4]

FOCG's current arguments are entirely aimed at whether the County, acting in its role in certifying land use consistency pursuant to WAC 463-26-090, adequately considered the purported (and vigorously disputed) scenic effects of the Project prior to adopting Resolution No. 2009-54. FOCG Brief at 4:17-6:16. FOCG's criticism of the County's conclusions in Resolution No. 2009-54 contradicts FOCG's argument, made in the same brief, that Resolution No. 2009-54 is not, in fact, a "land use consistency certification." The County certainly would not need to undertake what effectively amounts to a full SEPA review of visual effects if the County was issuing nothing more than an "opinion" to EFSEC. Moreover, and more

[4] *See* FOCG Brief at 4:5-8 ("Given space constraints, Friends will not repeat the discussions here, and instead we incorporate those documents by reference.")

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importantly, as EFSEC is well aware, RCW 80.50.180 explicitly *exempts* all county actions that are involved with EFSEC permitting from compliance with SEPA. This is an important part of the preemptive regulatory scheme, in that environmental review is solely within the authority of EFSEC and the Governor.[5] Furthermore, FOCG's visual/aesthetic arguments ignore Skamania County Code ("SCC") Title 22's clear limitation on visual regulation. *See* SCC 22.02.120 ("Nothing in this title shall: . . . (10) Establish protective perimeters or buffer zones outside of the Columbia River Gorge National Scenic Area."), 22.02.050 (providing that SCC Title 22 applies to the Scenic Area "and to no other lands within the county"). In summary, FOCG's argument is legally frivolous, relies on information that is not in the record of the adjudicative proceedings, and should be stricken and denied by EFSEC.

C. Whistling Ridge Has Not "Converted" Forest Land to Non-Forestry Use; Forest Practices Act Approval for Conversions Prior to Development Is Routine

FOCG's arguments concerning the Forest Practices Act ("FPA") rely on numerous documents that are not in the EFSEC adjudicative record, were not submitted by FOCG in a timely fashion, and cannot come into the record now through "official notice" or any other means. *See* FOCG Brief at 8:15-16, 9:1-5 (including footnotes). FOCG has known about FPA permits on the Project site for a very long time. *See, e.g.*, Ex. 1.00 at 10:18-11:24 (prefiled testimony of Jason Spadaro). If FOCG intended to raise issues with specific FPA applications and permits, FOCG should have put forward a competent witness to testify or, at a minimum, submitted evidence through cross-examination exhibits. FOCG did not do that, despite ample opportunity during the longest wind energy facility permitting hearing in the history of the state.[6]

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[5] EFSEC will recall that this very issue was addressed by EFSEC and its legal counsel in the Kittitas Valley and Wild Horse proceedings, where Kittitas County petitioned the Department of Ecology to seize the lead agency role from EFSEC and took the legal position that no land use consistency certification or any local process could proceed without completing an EIS.

[6] *See* Tr. at 739:3-7 (Mr. Kahn objecting to admission of three Washington Department of Fish and Wildlife ("WDFW") letters at the adjudicative hearing because "[w]e've had six months to comprise the record here (continued . . .)

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Instead, FOCG chose to "blindside" EFSEC and Whistling Ridge at this incredibly late stage in the proceedings. It is impossible to "untangle" the many references to documents that are not in the record, and for this reason, page 7:1 through page 9:15 of FOCG's brief should not be considered and should be stricken from the record, and the legal argument therein should be summarily denied.

Notwithstanding FOCG's reliance on documents that are not in the record, FOCG's legal argument is deeply flawed. First, the Project's compliance with Chapter 76.09 RCW is irrelevant for purposes of determining land use consistency. RCW 80.50.090(2) provides that EFSEC is to make a determination of consistency with "city, county, or regional land use plans or zoning ordinances." Chapter 76.09 RCW was enacted by the Washington legislature, and the relevant administrative rules were promulgated by the state Forest Practices Board. Simply put, they are not "city, county, or regional land use plans or zoning ordinances."[7] For this reason, FOCG's argument is not germane to the issue of land use consistency.

Second, contrary to FOCG's contentions, the mere filing of a permit application, including an ASC, does not constitute a "conversion" to a non-forestry use. The concept of "conversion" to a non-forestry use is a statutory matter that is defined as "a bona fide *conversion to an active use* which is incompatible with timber growing and as may be defined by forest practices rules." RCW 76.09.020(8) (emphasis added). No "active use" incompatible with timber growing occurs when an ASC is filed with EFSEC; nor does the routine harvesting of a

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with all the exhibits attached to declarations. If these [WDFW letters] were appropriate to be submitted by the Applicant they should have been done so in a timely basis.").

[7] The County has adopted local code provisions—SCC Title 23—addressing FPA conversions, but FOCG does not rely on the County code or even cite to it. *See* FOCG Brief at 7:1-9:15. Even if FOCG had relied on SCC Title 23, a "zoning ordinance" is defined, as applicable here, as a County ordinance adopted pursuant to the Planning Enabling Act or Article XI of the state Constitution, or as designated by enacted Substitute House Bill 1037 (2007). *See* RCW 80.50.020(22). However, SCC Title 23 was adopted pursuant to RCW ch. 76.09. *See* SCC 23.01.020, 23.01.030. Thus, SCC Title 23 is not a zoning ordinance with which EFSEC must make a land use consistency determination.

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commercial/industrial forest that has been in forestry use for more than a century constitute a "conversion." The Project site remains in commercial forest use today, and the entire site will continue to be managed for that purpose until construction commences following the issuance of a Site Certificate. If Whistling Ridge had already *constructed* the Project and had harvested timber for that purpose, an unlawful "conversion" on small part of the Project site may have occurred. But that is not the factual setting pending before EFSEC. Again, filing an ASC with EFSEC and seeking comprehensive federal and state environmental review does not constitute a "conversion" under the FPA. Contrary to FOCG's fantastic assertions, no "misrepresentation" has occurred.

In addition, FOCG fundamentally misunderstands (or purposefully mischaracterizes) how conversions are addressed under the FPA. The FPA provides two different schemes for the conversion of forestland. The scheme that FOCG cites provides that if forestland is converted to a non-forestry use without advance disclosure, a moratorium is imposed that lasts for six years or until the county takes the actions described below in this paragraph, whichever is shorter. RCW 76.09.460; FOCG Brief at 7:23. In contrast, the scheme that FOCG utterly ignores (but that is applicable here) provides that if a landowner decides to initiate an actual conversion within six years of receiving an FPA approval for which an intent to convert was not stated, the landowner must stop all forest practice activities on the site; contact the Department of Ecology, the county, and the DNR; and withdraw any pending FPA applications. RCW 76.09.470(1). Conversions can be authorized under both schemes once (i) the landowner complies with SEPA, (ii) the county receives notification that any outstanding DNR final orders or decisions have been resolved, and (iii) the county either determines that the land in question fully complies with local ordinances and regulations or requires the implementation of a mitigation plan to address violations of local ordinances and regulations.[8] RCW 76.09.460(2), 76.09.470(2)(b).

[8] The County has adopted a local process for addressing FPA conversions. *See* SCC ch. 23.05. The process is straightforward and reflects the statutory language, focused most particularly on requiring a "completed (continued . . .)

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The latter FPA scheme is applicable here—not the former scheme that FOCG strongly alleges has been violated—because *no conversion has occurred.* As EFSEC's members are well aware, approval of conversions under the latter FPA scheme routinely occurs.[9] The Project site is a long-standing commercial forest with harvest schedules and rotations disclosed and discussed in ASC § 2.3.6. Whistling Ridge has comprehensively described the entire Project in a lengthy ASC that explicitly disclosed and discussed the needed "conversion" approval in ASC §§ 2.3.6 and 2.20.3.3. The government action necessary to approve the conversion for the Project is already well under way in these proceedings: (i) SEPA compliance is under way;[10] (ii) there are no outstanding DNR final orders or decisions to resolve; and (iii) the County has already determined that the Project fully complies with local ordinances and regulations. *See* RCW 76.09.470(2). All applicable agencies are participating, commenting, and involved in the EFSEC process. Whistling Ridge is in full compliance with the FPA, and there is no impediment to the approval of the conversion necessary to use a small part of the Project site for wind energy generation.[11]

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SEPA environmental checklist." SCC 23.05.030. Once that process has been completed, "any development permit or approval may be issued by the county according to the relevant Skamania County Code, ordinances or regulations." SCC 23.05.040. Given EFSEC's preemptive authority, it would "step into the shoes" of the County and DNR in administering FPA conversion approvals.

[9] In fact, the County's Certificate of Land Use Consistency noted that the alternative location for the operations and maintenance facility, on a parcel at the junction of West Pit Road and Williard Road—far to the west of the Project site—would require a "moratorium lift" under the County code. *See* Ex. 2.03; ASC § 2.3.3.6. Again, such a "moratorium lift" is a routine practice, as evidenced by the fact that the County did not state or even insinuate that this would prevent the operations and maintenance facility from being sited at that location.

[10] *See* Tr. at 139:4-6 (testimony of Mr. Spadaro that "[w]e are now going through the SEPA process for the evaluation of the impacts that would occur as a result of the conversion").

[11] FOCG is simply inventing things when it states that Whistling Ridge "concedes that *at least* 55 acres of land would be converted." FOCG Brief at 8:10-11 (emphasis added). The ASC and testimony before EFSEC could not be more clear. The Project will have a permanent impact of *no more* than 54.25 acres. ASC Table 2.1-1; Ex. 1.00 at 7:7-10; Land Use Hearing Tr. at 12:3-9 (sworn testimony of Mr. Spadaro that immediately around the bases of the turbines slightly less than 10 acres would be converted to non-forestry use).

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D. The Project Does Not Violate the County's Moratorium Ordinance Against Accepting and Processing SEPA Checklists for Forest Practice Conversions

FOCG contends that the current County moratorium ordinance (Ordinance No. 2010-10, Ex. 1.15c) prohibits the development of the Project. FOCG Brief at 9:16-12:19. In yet another example of its repeated mischaracterizations of the law and the facts in these proceedings, FOCG misstates the purpose of this moratorium and disregards its explicit limitations.

First, the Board, in its sole discretion as the local governmental authority regulating County land use, adopted the current moratorium ordinance. *See* Ex. 1.15c at 3 (referencing the County's broad authority to adopt the ordinance). The state did not order the County to adopt this moratorium ordinance; nor was the moratorium ordinance's adoption required because the County is "out of compliance with State law on its zoning efforts." FOCG Brief at 10:15-17, 11:7-8. These allegations are pure fabrications. Instead, the Board adopted the moratorium ordinance due to a concern about residential development in unzoned parts of the County.[12] Unlike the Project, residential conversions eliminate the ability to manage forests for commercial forestry purposes.

As the County explained in its opening land use consistency brief, the moratorium ordinance is not applicable to the Project. County Brief at 5:3-12. The moratorium ordinance only applies to the acceptance and processing of the following three things: (i) various permits for 20+ acre parcels created by deed after January 1, 2006; (ii) subdivisions and short subdivisions; and (iii) SEPA checklists related to FPA conversions within unincorporated and unzoned parts of the County. Ex. 1.15c. Neither of the first two categories applies to the Project. ASC at 4.2-14. As for the third category, it does not apply to the Project, because the

[12] *See, e.g.*, Ex. 1.15c at 2 ("[T]he County Commissioners are determining which areas will be designated as commercial forest land and protected from the encroachment of residential uses . . . ; and . . . allowing new construction on these parcels created through an unregulated exempt process prior to the County Commissioners completing the zoning classification process essentially is circumventing the legislative process and could endanger the public's safety, health and general welfare.").

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County does not require a SEPA checklist for the Project. SCC 16.04.070(A) expressly provides that a SEPA checklist "is not needed if SEPA compliance has been completed, or *SEPA compliance has been initiated by another agency.*"[13] (Emphasis added.) *See also* RCW 80.50.180 (explicitly exempting all county actions involved with EFSEC permitting from compliance with SEPA). EFSEC had assumed lead agency status for SEPA purposes and had issued its scoping notice before the County reviewed the ASC for land use consistency. *See* Ex. 2.03 at 1, 4.[14]

Resolution No. 2009-54 did not address the moratorium ordinance for two reasons. First, as described above, the moratorium ordinance does not apply to the Project because EFSEC—not the County—is responsible for SEPA compliance. *See* Ex. 2.03 at 2 (certifying consistency with "County land use plans and *applicable* zoning ordinances" (emphasis added)). Second, Resolution No. 2009-54 only assessed the County's substantive land use requirements and policies. County Brief at 5:7-8. Consequently, Resolution No. 2009-54 did not address compliance with SCC Title 16, which contains the County's SEPA rules. For these reasons, the Project does not violate the County moratorium ordinance against accepting and processing SEPA checklists for FPA conversions.[15]

III. RESPONSE TO SOSA'S OPENING LAND USE CONSISTENCY BRIEF

Whistling Ridge's opening land use consistency brief already addressed most of the contentions raised by SOSA. *See* WREP Brief at 5-18. Whistling Ridge notes that SOSA's

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[13] In addition, SCC Title 16, which contains the County's SEPA rules, was adopted "under SEPA Chapter 43.21C RCW and SEPA Rules, Chapter 197-11 WAC." SCC 16.04.010. Thus, SCC Title 16 is not a zoning ordinance with which EFSEC must make a consistency determination. *See supra* footnote 7 (discussing the scope of the term "zoning ordinance").

[14] *See also* ASC at 4.2-14 ("Because of EFSEC's well-established preemptive role in permitting wind energy facilities, *including acting as Lead Agency for associated SEPA review*, the County's moratorium on acceptance of SEPA checklists for forest practices conversions does not affect the project." (emphasis added)).

[15] Even if the current County moratorium ordinance did apply to the Project, EFSEC retains virtually plenary preemptive authority and can certainly preempt this moratorium, assuming it has a legal effect on the Project.

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interpretation of the 2007 Comprehensive Plan places the County in an impossible situation. SOSA argues the County's adoption of the 2007 Comprehensive Plan voided the County's existing zoning code. SOSA Brief at 12:12-13. Consequently, new zoning (and according to SOSA, a new comprehensive plan) is needed before wind energy development can be permitted. SOSA Brief at 10:10-12. But budget issues prevent the County from adopting new zoning. Tr. at 1342:13-20 (testimony of Commissioner Paul Pearce). Renewable energy development, such as the Project, would help address the County's budget issues. *See* Ex. 51.00 at 7:7-25 (prefiled testimony of Commissioner Pearce). However, SOSA reasons that this economic development is precluded until new zoning (and a new comprehensive plan) is adopted, which can only occur after the County completes a costly programmatic Environmental Impact Statement. SOSA Brief at 10:10-12. Consequently, the effect of SOSA's interpretation of the 2007 Comprehensive Plan is that the adoption of new zoning must precede economic development, but the County cannot afford to adopt new zoning in the absence of economic development. Courts are to avoid interpretations that lead to "unlikely, absurd or strained consequences." *State v. Stannard*, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987).

A. SOSA's "Background" Information Is Not Legislative History and Is Irrelevant to the Interpretation of the County's 2007 Comprehensive Plan

Legislative history can certainly have a role in construing legislative actions. *See, e.g.*, *Brown v. State*, 155 Wn.2d 254, 265, 119 P.3d 341 (2005) ("If a statute is not plain on its face, this court will turn to legislative history."). However, SOSA's construction of the County's 2007 Comprehensive Plan is not based on legislative history but rather on various miscellaneous information unconnected to the Board's adoption of the 2007 Comprehensive Plan. *See Black's Law Dictionary* 919 (2004) (defining legislative history as the "background and events leading to the enactment of a statute, including hearings, committee reports, and floor debates"). There is no evidence that any of SOSA's cited information led to or was involved in the adoption of the 2007 Comprehensive Plan. For example, SOSA directs EFSEC's attention to the Hearing

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Examiner's findings that wind energy development had been occurring in Klickitat County and that Klickitat County's EIS included a portion of eastern Skamania County. SOSA Brief at 6:21-7:7. However, there is no evidence that the Board was aware of this activity in Klickitat County or that it played any role in the Board's adoption of the 2007 Comprehensive Plan. SOSA also focuses on a Bonneville Power Administration ("BPA") map in the Hearing Examiner's record. SOSA Brief at 7:18-22. Again, there is no evidence that the Board was aware of this BPA map or that it played any role in the Board's adoption of the 2007 Comprehensive Plan. Next, SOSA directs EFSEC's attention to County planning staff's alleged conversations with SDS Lumber and its consultant concerning wind energy development. SOSA Brief at 7:8-18, 7:23-8:5. However, as Mr. Aramburu successfully argued in connection with the admissibility of Joe Mentor's prefiled rebuttal testimony concerning the Scenic Act's legislative history, using staff "to establish legislative history is entirely inappropriate." Dec. 21, 2010 Tr. at 60:21-22. In addition, there is no evidence that these conversations played any role in the Board's adoption of the 2007 Comprehensive Plan. Finally, SOSA argues that the fact that certain "definitions from the 2005 proposed zoning ordinance were not incorporated into the 2007 Plan is indicative of the intent of the legislative body not to allow such uses." SOSA Brief at 6:16-18. Again, there is no evidence that the proposed definitions SOSA cites played any role in the Board's adoption of the 2007 Comprehensive Plan. For these reasons, all of SOSA's "background" information is irrelevant to a proper interpretation of the County's 2007 Comprehensive Plan.

B. SOSA's Alleged Comprehensive Plan Inconsistencies Are Based on Faulty Reasoning and Are Insufficient to Overcome the Project's *Prima Facie* Presumption of Consistency Under WAC 463-26-090

As detailed in Whistling Ridge's opening land use consistency brief, Planning Enabling Act counties' comprehensive plans have no regulatory effect. For EFSEC, a determination of comprehensive plan consistency in Planning Enabling Act counties should closely follow the legal framework that defines the relationship between "guidance" plans and regulatory zoning. Without this framework, much mischief can be made in selecting and applying visionary or

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aspirational plan elements to stop development projects. By its own clear terms, the County's 2007 Comprehensive Plan is just that—a non-regulatory visionary and aspirational guidance document. Elevating this guidance document to have regulatory effect in an EFSEC proceeding conflicts with the Planning Enabling Act's legal framework, undermines fundamental local government authority, and destroys regulatory certainty, contrary to longstanding Washington law

Contrary to SOSA's argument that the Project is inconsistent with the 2007 Comprehensive Plan, there is nothing in the 2007 Comprehensive Plan that prohibits wind energy development in the County. SOSA's assertions that the Project is inconsistent with two goals and three associated policies in the 2007 Comprehensive Plan are based on its unfounded contentions (i) that the current zoning code is void and (ii) that SOSA's background information is relevant to interpreting the 2007 Comprehensive Plan. SOSA Brief at 9-10. However, the Washington Supreme Court has held that "[c]omprehensive land use plans and promulgatory zoning regulations are presumed valid and are invalid only for manifest abuse of discretion." *Cathcart-Maltby-Clearview Cmty. Council v. Snohomish Cnty.*, 96 Wn.2d 201, 211, 634 P.2d 853 (1981). In light of the fact that no abuse of discretion has manifested (much less even been alleged by Opponents), SOSA's first rationale lacks merit. As to its second rationale, Part III.A of this brief already details how SOSA's background information has no role in interpreting the 2007 Comprehensive Plan. For these reasons, SOSA's assertions of inconsistency must fail.

More importantly, SOSA's assertions utterly fail to overcome the *prima facie* presumption of consistency that arose under WAC 463-26-090 when the County certified the Project's consistency with local land use plans and zoning ordinances. As explained in more detail in Whistling Ridge's opening land use consistency brief, overcoming this presumption requires "opposing evidence so overwhelming, as to dictate the conclusion that the pertinent finding or findings [by the County] did not rest upon any sound or significant evidentiary basis." WREP Brief at 7 (*quoting Gogerty v. Dep't of Insts.*, 71 Wn.2d 1, 8, 426 P.2d 476 (1967)).

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SOSA has failed to even approach this standard. Thus, EFSEC should find that the Project is consistent with the 2007 Comprehensive Plan.

C. SOSA's Alleged Zoning Code Inconsistencies Are Deficient and Insufficient to Overcome the *Prima Facie* Presumption

SOSA's assertions of inconsistency with the County zoning code are so poor that they scarcely merit a response.[16] SOSA emphasizes that wind farms are "not listed" as allowable uses in the County zoning code. SOSA Brief at 12:16-13:3. This ignores "*all uses* which have not been declared a nuisance . . . are allowable" on most of the Project site. Ex. 2.03 at 10 (emphasis added) (*quoting* SCC 21.64.020). For the remainder of the Project site, the County has certified that the Project would be allowed as a "semi-public utility facility" conditional use. *Id.* at 11. Finally, Washington law is quite clear that in Planning Enabling Act counties, "a comprehensive plan is advisory rather than regulatory. . . . 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). Thus, SOSA's arguments that the 2007 Comprehensive Plan's provisions trump the zoning code lack any basis in the law. SOSA Brief at 14:5-16:22. Moreover, none of SOSA's assertions are sufficient to overcome the *prima facie* presumption of consistency.

IV. CONCLUSION

For the reasons set forth above, the land use consistency issues Opponents have raised are divorced from the facts, rely on information outside the record, lack legal merit, and are insufficient to overcome WAC 463-26-090's *prima facie* presumption of consistency. EFSEC

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[16] SOSA's critique of the ASC's informational discussion of Table 2-1 is irrelevant to the question of land use consistency. SOSA Brief at 13:4-14:4. The County's Certificate of Land Use Consistency—Resolution No. 2009-54—was not based on Table 2-1, nor did Whistling Ridge rely on Table 2-1 in its opening land use consistency brief.

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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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