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 RESPONSE BRIEF ON LAND USE CONSISTENCY ORAL ARGUMENT REQUESTED

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I. Introduction

The Applicant has failed to meet its burden of demonstrating that the Whistling Ridge Energy Project ("Project") is consistent with the applicable land use laws and rules. In fact, the Project is inconsistent. The Council should uphold the applicable laws and rules and find the Project inconsistent.

II. Incorporation by Reference

Friends of the Columbia Gorge ("Friends") hereby incorporates the arguments and facts set forth in the Response Brief of Save Our Scenic Area ("SOSA") on Land Use Consistency.

III. The Applicant and County mistakenly argue that the County has issued a certificate of land use consistency.

The Applicant and County mistakenly argue that the County has issued a certificate of land use consistency in this matter. Applicant's Land Use Consistency Opening Brief ("App. Br.") at 4; Skamania County and Klickitat County Public Economic Development Authority's Land Use Brief ("County Br.") at 3. But as explained in Friends' Land Use Consistency Opening Brief ("Friends Op. Br."), there is no longer a certificate of land use consistency. Friends Op. Br. at 2–3. There was at one time a County certificate, but the County later repealed its adoption of that certificate and replaced it with a "staff report to EFSEC." Ex. 2.03 (cited in Friends Op. Br. at 2–3).

In their briefs, the County and Applicant assert there is a certificate of consistency, but gloss over exactly what document they believe the certificate is, and even appear to differ on this point. The County's brief appears to deem the Planning Director's staff report as a certificate. County Br. at 2 n. 7, 3. This is contrary to the statements of the Planning Director herself, who has clarified there is no certificate of consistency—there is only a staff report. Ex.

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1.14C. The County's brief also ignores the fact that the Planning Director previously issued a certificate of consistency, which has since been expressly repealed. *See* Friends Op. Br. at 2–3.

In contrast with the County's brief, the Applicant's brief refers to County Resolution No. 2009-54 as a certificate of consistency. App. Br. at 4. The Applicant twists the facts, saying that Resolution No. 2009-54 describes itself "as a 'Certification of Land Use Consistency Review.'" *Id.* (citing Ex. 2.03). It does not. Nowhere does Resolution No. 2009-54 say that the resolution itself, nor any document incorporated or adopted by the resolution, is a certificate of consistency. While the resolution contains a subject heading and whereas clause that in part refer to "Certification of Land Use Consistency," the Planning Director has clarified that there is no certificate, and that this reference should have been to a "Staff Report." Ex. 1.14C. And even if the Planning Director is wrong and there was no typographical error, the subject heading of the resolution at most relates to the *subject* of possible *certification*, not an actual *certificate*. The County engaged in that process and ultimately repealed its certificate of consistency and instead adopted a "staff report to EFSEC, not a decision." Ex. 2.03 (Resolution No. 2009-54) at 2.

The County's choice to "not [adopt] a decision," *id.*, is important in determining whether there is a certificate. Certificates of consistency in EFSEC matters *are* land use decisions. Local governments have previously argued otherwise, but have lost those arguments. *See* Order, *Columbia Riverkeeper v. Cowlitz County*, Cowlitz County Superior Ct. No. 07-2-00400-0 (May 2, 2007) (hereinafter "Cowlitz Order") ("The opinion letter of Mike Wojtowicz dated February 13, 2007 is an interpretive decision which *is a final decision* under RCW [36.70C.020[1]].")

[1] The citation included in the court's order, RCW 30.70C.020, is a typographical error.

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(emphasis added), *appeal dismissed by stipulated motion*, Wash. Ct. App. No. 36393-3-II (Dec. 12, 2007).[2] In the *Columbia Riverkeeper* case, the opinion letter of the Cowlitz County Planning Director expressly stated "[t]his letter is intended to serve as a certificate of land use consistency in conformance with WAC 463-62." On review, the Cowlitz County Superior Court held that the County's certificate was a land use decision. Cowlitz Order at 1.

In contrast, in the instant matter, the County expressly adopted "a staff report to EFSEC, not a decision." Ex. 2.03 at 2. This is also in direct contrast with the County's prior resolution in this matter (now repealed), where the County expressly adopted a "certificate of consistency." *See* Friends Br. at 2–3 (citing Resolution No. 2009-22).

Furthermore, for whatever reason (presumably because the County wanted to avoid appellate review by the Gorge Commission[3]), the County did not process this matter as a land use decision. For example, the County did not provide notice by mail to adjacent landowners and known interested parties. Nor did the County provide any opportunity to review and comment on the Staff Report prior to its adoption. If the County had processed the matter as a land use decision, notice and an opportunity to comment would have been required. *See generally* SCC §§ 21.16.080, 22.06.110, 23.04.030(B)(4); 2007 Comprehensive Plan at 30 (Goal LU.6).

A transparent and meaningful public process is critical to any land use consistency review process and might have provided the foundation for granting any deference to the

[2] Friends requests that the Council take official notice of documents from this prior EFSEC matter pursuant to WAC 463-30-230. Copies of documents from this matter can be circulated upon request.

[3] *See* Skamania County and Klickitat County Public Economic Development Authority's Land Use Response Brief at 3 n. 6.

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County for its interpretations. But the County conscientiously avoided adopting a certificate of consistency, developed its "staff report" behind closed doors, and expressly avoided undertaking the public processes required for government decisions. Now, the County demands deference to its staff report. County Br. at 3. Given the circumstances under which the County's staff report was prepared and adopted, the County's demand for deference should be rejected.

In addition, both the County's resolution and its Staff Report fail to review the Project under multiple applicable county plans and rules. For example, the County's documents fail to apply Skamania County Code Title 23 and the County's ongoing moratorium prohibiting forest practice conversions on unzoned lands. Because the County's documents are silent on these and other points, there is nothing that can be given deference nor treated as *prima facie* evidence of compliance.[4]

Ultimately, the County Commissioners adopted a staff report to EFSEC and resolved that the Project is consistent, but stopped short of adopting a decision in the form of a certificate of consistency. In fact, the County Commissioners expressly *repealed* the only certificate of consistency that has ever existed in this matter. Friends Op. Br. at 3–4. Thus, there is no certificate of consistency. There is only a resolution adopting a "staff report to EFSEC." The County's staff report does not constitute *prima facie* evidence of compliance with the County plans and rules under WAC 463-26-090. The Applicant retains its burden to demonstrate consistency with the plans and rules.

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[4] Any interpretations or conclusions articulated for the first time in a County legal brief should not be given deference either. At most, such material would be a post-hoc rationalization not entitled to deference.

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IV. Even the County Staff Report acknowledges that the Siting Council must determine whether the Project is consistent with the Comprehensive Plan.

The SOSA land use briefs have thoroughly addressed the requirement to review the Project under the Comprehensive Plan. Friends supports and incorporates those arguments and will not repeat them here, but does wish to highlight that even the County's Staff Report concludes that consistency with the Comprehensive Plan must be evaluated.

At page 5, the Staff Report (Exhibit 2.03) states that "The following Goals and Policies of the Skamania County Comprehensive Plan are applicable to the proposed project." The County then analyzes the proposal for consistency with specific goals and policies in the Comprehensive Plan. Staff Report at 5–9. If the Comprehensive Plan did not apply, there would have been no need for the Staff Report to evaluate consistency with the Plan.

Now, apparently out of convenience, the County is reversing its position on whether consistency with the Comprehensive Plan is necessary. *See* County Br. at 3–4. The Council should reject the County's flip-flopping and should evaluate and determine whether the Project is consistent with the Comprehensive Plan.

V. The Project is not an allowed use within the applicable zoning designations.

The County's Staff Report finds that "[t]he project is considered a semi-public utility facility[5] [*sic*]." Staff Report (Ex. 2.03) at 7. The County makes a similar argument at page 3 of its Brief, where the County argues that the portion of the Project proposed in the Resource Production Zone (FOR/AG 20) would be consistent with the applicable zoning code. Within

[5] The County Comprehensive Plan and zoning ordinance do not include a category of use called a "utility facility," but rather include "facilities *and* utilities" as two different types of uses within the same category. *See, e.g.*, 2007 Comp. Plan at 26; SCC §§ 21.08.010(69), 21.56.030(C). The County has not clarified whether it believes the Project would be a "facility" or a "utility," or both.

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Resource Production zones, semi-public (but not public) facilities and utilities are allowed. SCC § 21.56.030(C) (authorizing "[s]emi-public facilities and utilities" as conditional uses[6]).

The project is large enough, however, that it would be located in more than one zoning designation. In fact, the vast majority of the Project would be located in the unmapped (*i.e.*, unzoned) lands designated as Conservancy in the Comprehensive Plan. But in the Conservancy designation, only public, *not* semi-public, facilities and utilities are allowed. 2007 Comp. Plan at 25–26.[7]

Thus, there is literally a split within the Project site in terms of what is allowed. On one side of the line (on the zoned lands), only *semi-public* facilities and utilities are allowed. On the other side (on the unzoned lands), only *public* facilities and utilities are allowed.

Although the reasons for this split are not entirely clear, the County has stated that the purposes for the Conservancy designation are "to provide for the conservation and management of existing natural resources in order to achieve a sustained yield of these resources, and to conserve wildlife resources and habitats." 2007 Comp. Plan at 25. Presumably the County was furthering these goals by allowing only public, and not semi-public, facilities and utilities in the Conservancy designation. The ultimate effect is to restrict development of such uses in the Conservancy designation by allowing them only when owned by a public entity, in which case they would be more likely to be necessary and in the public interest.

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[6] The County Code defines a "conditional use" as "one that requires [a conditional use] permit from the BOA" (Board of Adjustment). SCC § 21.08.010(24). Although this definition remains on the books, the Skamania County Board of Adjustment has been dissolved and the authority for issuing conditional use permits is now vested in the County Hearing Examiner. *See* SCC § 21.16.060(A).

[7] "The following uses are appropriate within the Conservancy designation: . . . Public facilities and utilities, such as parks, public water access, libraries, schools, utility substations, and telecommunication facilities." 2007 Comprehensive Plan at 25–26.

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The County Staff Report and Brief decline to expressly acknowledge this split. Instead, the Staff Report and Brief obfuscate the issue, finding that the Project would be a "semi-public utility facility" while failing to acknowledge that such uses are not allowed in the Conservancy designation. Staff Report at 7; County Br. at 4. The Comprehensive Plan is very clear that "if any use is not listed as [an allowable use, review use, or conditional use], then the use is prohibited within that land use designation." 2007 Comp. Plan at 30 (Policy LU.6.1). The only potential way to allow a non-listed use is to amend the Comprehensive Plan and/or zoning ordinance. *Id.* at 31 (Policy LU.6.2).

The Applicant has stated that it "would own and operate" the Project "and would manage all of the affairs of the project." Amended Application at § 1.1.2. Unless the Applicant changes its mind on this point and decides to sell the Project to a public entity, the Project could never be regarded as a public utility or facility. The County finds that the Project is a "semi-public utility facility," while failing to acknowledge that such uses are not allowed in the Conservancy lands, which make up the vast majority of the Project site. Even under the County's own findings, the Project is inconsistent with the applicable zoning laws and rules.

Ultimately, under the structure of the land use code, the Project is not a semi-public, public, or private facility or utility. Rather, the Project is a "wind turbine" project, which the Code defines but fails to authorize in any particular zone. On October 31, 2005, the County amended the zoning code to add the following definition:

> Wind Turbine: A machine with turbine apparatus (rotor blades, nacelle and tower) capable of producing electricity by converting the kinetic energy of wind to rotational, mechanical and electrical energy; provided, the term does not include electrical distribution or transmission lines, or electrical substations.

SCC § 21.08.010(91) (adopted via Skamania County Ord. No. 2005-02).

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The wind turbines proposed for the Whistling Ridge Project easily meet the "wind turbine" definition. And this definition has been in the County Code for the past five and a half years, but nowhere in the County Code is this type of use authorized.

Because the "wind turbine" use is specifically defined, and yet not authorized as an allowed use, this Project is not allowed and is inconsistent with the County zoning ordinance.

The County argues that the Project is *allowed outright* throughout most of the Project site. County Br. at 2–3. The County's argument begs the question why the Project hasn't already gone forward at this portion of the site, with the County's blessing. The County is wrong. The current Comprehensive Plan and zoning ordinance do not authorize this type of Project. That is why in 2008, the County proposed a substantial rewriting of the Code that would have expressly authorized wind energy projects in multiple zones. However, the proposed ordinance was never adopted, has been indefinitely shelved, and cannot be applied here. *See* SOSA Principal Land Use Brief at 17–18.

VI. The Project violates Skamania County's moratorium prohibiting forest practice conversions on unzoned lands.

As discussed in Friends' Opening Brief, Skamania County has prohibited forest practice conversions on unzoned lands, including the Project site, since 2007. *See* Friends Op. Br. at 9–12. The County adopted the moratorium because it is not in compliance with its statutory mandate to designate and protect critical areas and commercial forestlands. *See* RCW 36.70A.170(1)(b), (d). To protect these lands in the absence of zoning, the County has imposed a moratorium on the acceptance of SEPA checklists for forest practice conversions, thereby effectively prohibiting conversions. *See* WAC 222-20-040(4).

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Without citation to authority, Skamania County argues that "[t]he moratorium is not directed at the Project, . . . is not directed at . . . EFSEC," and "does not apply to . . . permits not listed [in the moratorium], including EFSEC review and approval of a wind project." County Br. at 5. Although the County concedes that the moratorium applies to "SEPA Checklists related to forest conversions" to non-forestry uses (*id.*), the County absolutely fails to explain why the moratorium does not apply to the forest conversion that is acknowledged to be part of this Project. Because the Project would convert forest lands to industrial use, the moratorium does in fact apply, and it renders this Project inconsistent with Skamania County laws and rules.

The County further argues that the moratorium "does not apply to the development of environmental impact statements." County Br. at 5. This assertion is plainly erroneous. The moratorium prohibits the County from accepting SEPA checklists for forest practice conversions. A SEPA checklist is used by the decision-making agency to make a threshold determination on whether a proposed action will likely cause a significant adverse impact to the environment. WAC 197-11-310, 315, 330. If a proposal will likely lead to significant adverse impacts, an environmental impact statement is required. WAC 197-11-340. Thus, a SEPA checklist is a necessary prerequisite to developing an environmental impact statement. By prohibiting the processing of SEPA checklists for conversions, the moratorium prohibits the processing of environmental impact statements for conversions.

The moratorium was a conscious and deliberate—and indeed, necessary—act by Skamania County to protect critical areas and commercial forestlands until zoning ordinances are adopted to comply with state law. Until zoning controls have been adopted for the unzoned

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lands, the moratorium must be maintained and enforced. The Project is inconsistent with County laws and rules, and the Council should reach that conclusion.

VII. The County ignores Skamania County Code Title 23's prohibition against issuing land use approvals and building permits for unauthorized forest conversions.

The County concedes that "[t]he Project does have to comply with the County's critical areas ordinance, building codes, and the State Environmental Policy Act." County Br. at 2–3. However, the County completely ignores Skamania County Code Title 23, which prohibits the County from issuing building permits or local land use approvals for unauthorized forest conversions. SCC § 23.03.010. This is different from the moratorium on unzoned lands discussed above, but it is equally applicable to this Project.

Over the past several years, the Applicant has clearcut hundreds of acres within the 1,152-acre Project site, without ever disclosing its intentions to convert from forestry uses to non-forestry uses, and without obtaining the requisite approvals prior to harvest. *See* Friends Op. Br. at 8–9. The Applicant's actions have triggered a six-year moratorium against conversions, as well as a finding that the Project violates applicable land use laws. *Id.* at 9.

Skamania County Code Title 23 implements the Forest Practices Act's requirement that landowners must obtain approval from local jurisdictions prior to converting forest land to non-forestry uses. SCC §§ 23.01.020, 23.03.010; *see also* Friends Op. Br. at 7–9. Specifically, Title 23 includes the following provisions:

> Skamania County shall deny any applications to the county for development permits or approvals on lands that are subject to the six-year moratorium prescribed in RCW 76.09.
>
> Lands on which the owner or operator failed to obtain an approved forest practice application from DNR and the DNR has determined that such an application was required, shall be subject to a moratorium as provided in this

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> chapter for six years from the date of the discovery by the DNR or by the county . . .

SCC §§ 23.03.010(A), (B). The County can waive the six-year moratorium, but only for a single-family residence and accessory uses, and not for other types of uses such as industrial energy facilities. SCC §§ 23.03.010(B), 23.03.030(B), 23.04.010, 23.04.040.

In blind support of a single landowner's development project, the County ignores its obligations under state and county laws to protect forest land from unauthorized conversions. The Council, standing in the shoes of the County, must recognize and apply Title 23 and prohibit the issuance of any land use approval for all forested lands that were harvested without obtaining the required approvals for the intended conversions. *See* SCC § 23.03.010. State and county law assign a special value to commercial forest lands, and impose rigorous protections for these lands. The Council should not allow these protections to be ignored or violated.

VIII. The Applicant has failed to demonstrate that the proposed haul route complies with the applicable authorities.

In its opening land use brief, the Applicant spends several pages discussing the proposed "haul route" for hauling the turbine components to the Project site. App. Br. at 1–4. The Applicant correctly notes that Friends, SOSA and other parties filed administrative appeals with the Columbia River Gorge Commission arguing, in part, that construction of the haul route within the Columbia River Gorge National Scenic Area would require National Scenic Area review and approval. In response to those appeals, the Applicant changed the proposed haul route and argued that no construction within the National Scenic Area would be necessary. Based upon that representation, the Gorge Commission determined it had no jurisdiction. Ex. 25.04c at 6.

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As part of this Council's adjudicative hearing, the Applicant submitted testimony that it would not be necessary to construct any improvements along the haul route within the National Scenic Area for trucks as long as 150 feet. *See, e.g.*, Ex. 12 at 5.

However, it became clear during the hearing that the trucks may need to be longer than 150 feet. Nathan Larson, a senior transportation engineer with URS Corporation, the Applicant's consultant, testified that based on a 150-foot long truck, there would need to be a 155-foot turning radius. Tr. at 488 (Jan. 5, 2011). Furthermore, at page 2.3-3, the Amended Application notes that the turbine blades would be approximately 129 to 164 feet long, depending on which type of turbine is selected.

Relying on the length of the vehicle as 150 feet, Timothy Homann, the Skamania County Engineer, testified that no improvements to the haul route would be necessary. Tr. at 501 (Jan. 5, 2011). However, when questioned about the turning radius necessary for a 164-foot blade, Mr. Larson testified that the additional length of the truck would increase the turning radius by approximately ten percent. Tr. at 498 (Jan. 5, 2011). Mr. Larson acknowledged that he had no analysis as to whether the additional turning radius would require additional improvements on the haul route. *Id*. Mr. Homann, the County Engineer, also testified that he had not conducted any analysis as to whether road improvements would be necessary if the load were 164 feet as opposed to 150 feet. *Id*.

It remains unclear whether the portion of the proposed haul route within the National Scenic Area would entail new construction triggering review under National Scenic Area regulations. The Appellant has not met its burden of demonstrating consistency with the County zoning authorities.

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The Applicant states that County staff has reviewed the proposed haul route each time it has been modified, and each time found it consistent. App.'s Br. at 4. The County staff's review under the transportation element of the Comprehensive Plan, however, is incomplete and inadequate. The Comprehensive Plan notes that eleven bridges in Skamania County have structural deficiencies that need to be corrected. 2007 Comp. Plan at 51. Although the new proposed haul route includes at least one older bridge (across the Little White Salmon River), the record is silent on whether this bridge is among these structurally deficient bridges. The Staff Report simply states that some improvement would be needed, without addressing the adequacy of bridges along the haul route. Staff Report (Ex. 2.03) at 9. Similarly, the Application merely notes the need to use the bridge across the Little White Salmon River, while failing to evaluate the bridge's age, load capacity, and ability to sustain the oversized and heavy loads necessary for this Project.

As part of its determination on land use consistency, the Council must resolve whether the proposed haul route would use any bridges that are structurally deficient and/or cause those bridges to need additional repairs or to be replaced.

Finally, the Comprehensive Plan incorporates the February 2006 Skamania County Regional Transportation Plan ("SCRTP") by reference. 2007 Comp. Plan at 49. "This plan identifies future regional transportation system needs and outlines the transportation plans and improvements necessary to maintain adequate mobility within and throughout the Skamania County region." *Id.* Neither the County nor the Applicant explain whether the Project's necessary improvements or congestion impacts would be consistent with the SCRTP. The Council should evaluate consistency with the SCRTP in its land use determination.

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IX. The Council should disregard the County's arguments about the County's economic wishes and "guiding vision."

Having failed to demonstrate that an industrial wind energy facility would be consistent with the applicable land use laws and rules, the County goes on to argue that the Whistling Ridge Energy Project is critical to achieving the County's "guiding vision." County Br. at 5–6. The County then lists off a handful of quotes from a County Commissioner regarding economics in Skamania County. *Id.* at 6–7. Meanwhile, the County ignores the likely adverse economic impacts of the Project, such as impacts to tourism and the decline of property values and, by extension, property tax revenues in the vicinity of the Project.

The County's one-sided discussion of economic factors is irrelevant to the Council's mandate to evaluate the Project under the applicable land use laws and rules. The County acknowledges that this information is irrelevant, but argues that it did not have the resources to include this information in its Comprehensive Plan or in a land use ordinance. County Br. at 6–7. Despite the County's claims that the Project is "critical" and "central" to achieving the vision for the Comprehensive Plan, there is no evidence that the County designed the current Comprehensive Plan or zoning ordinances to authorize large-scale energy facilities, let alone identify such developments as critical or central to a County "vision."

The County is essentially arguing that the Project is consistent with what it *wishes* it had written in the Comprehensive Plan and what it *would like* to adopt in a zoning ordinance. The County's approach is plainly insufficient. The Council cannot issue its land use determination based on what Skamania County wishes it had done. The Council must apply the laws and rules that were duly adopted.

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X. Conclusion

For the reasons stated in Friends and SOSA's land use briefs and in the material incorporated therein, the Council should find the Project inconsistent with the applicable land use plans and rules, and should recommend denial of the Project.

Dated this 25th day of February, 2011.

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