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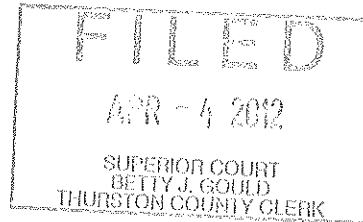
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ENERGY FACILITY SITE
EVALUATION COUNCIL

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

FRIENDS OF THE COLUMBIA
GORGE, INC., and SAVE OUR
SCENIC AREA,

Petitioners,

vs.

STATE ENERGY FACILITY SITE
EVALUATION COUNCIL and
CHRISTINE O. GREGOIRE, Governor
of the STATE OF WASHINGTON,

Respondents.

No. 12 2 00692 7

PETITION FOR JUDICIAL REVIEW
PURSUANT TO RCW 80.50.140 AND
CHAPTER 34.05 RCW

COME NOW Petitioners Friends of the Columbia Gorge, Inc. ("Friends") and Save Our Scenic Area ("SOSA") and, pursuant to RCW 80.50.140 and Chapter 34.05 RCW, petition this Court for review of the Governor's approval of the Whistling Ridge Wind Energy Project ("WREP" or "Project") and execution of the Site Certification Agreement, as well as several Orders of the Energy Facility Site Evaluation Council ("EFSEC" or "the Council") in the same matter.

1. Name and Mailing Address of Petitioners:

Friends of the Columbia Gorge
522 SW 5th Ave., Suite 720
Portland, OR 97204-2100

Save Our Scenic Area
P.O. Box 41
Underwood, WA 98651

2. Names and Mailing Addresses of Petitioners' Attorneys:

Gary K. Kahn
Reeves, Kahn, Hennessy & Elkins
4035 SE 52nd Ave.
P.O. Box 86100
Portland, OR 97286-0100
Attorney for Petitioner Friends of the Columbia Gorge

Nathan J. Baker, Staff Attorney
Friends of the Columbia Gorge
522 SW 5th Ave., Suite 720
Portland, OR 97204-2100
Attorney for Petitioner Friends of the Columbia Gorge

J. Richard Aramburu
Aramburu & Eustis, LLP
720 Third Avenue, Suite 2112
Pacific Building
Seattle, WA 98104-1860
Attorney for Petitioner Save Our Scenic Area

3. Names and Mailing Addresses of Agencies Whose Actions are at Issue:

Energy Facility Site Evaluation Council (EFSEC)
1300 S Evergreen Park Dr. SW
P.O. Box 43172
Olympia, WA 98504-3172

The Honorable Christine O. Gregoire
Governor of the State of Washington
416 Sid Snyder Ave. SW, Suite 200
P.O. Box 40002
Olympia, WA 98504-0002

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1 4. Identification of the Agency Actions at Issue:

2 4.1. The Governor's execution of the Site Certification Agreement dated March 5,
3 2012. A copy of the signed Site Certification Agreement is attached hereto as Exhibit A.

4 4.2. The Governor's approval of the Whistling Ridge Wind Energy Project. A copy of
5 the Governor's letter approving the WREP, dated March 5, 2012, is attached hereto as Exhibit B.

6 4.3. EFSEC Order No. 871, dated January 6, 2012, denying a motion to take official
7 notice of certain documents. A copy of Order No. 871 is attached hereto as Exhibit C.

8 4.4. EFSEC Order No. 870, dated December 27, 2011, denying petitions for
9 reconsideration. A copy of Order No. 870 is attached hereto as Exhibit D.

10 4.5. EFSEC Order No. 869, dated October 6, 2011, entitled "Order and Report to the
11 Governor Recommending Approval of Site Certification in Part, on Condition." A copy of Order
12 No. 869 is attached hereto as Exhibit E.

13 4.6. EFSEC Order No. 868, dated October 6, 2011, entitled "Adjudicative Order
14 Resolving Contested Issues." A copy of Order No. 868 is attached hereto as Exhibit F.

15 5. Identification of Parties in the Adjudicative Proceedings that Led to the Agency Action:

16 Counsel for the Environment
17 Gordon Karg
18 Office of the Attorney General
19 P.O. Box 40100
20 Olympia, WA 98504-0100

21 Whistling Ridge Energy LLC
22 P.O. Box 266
23 Bingen, WA 98605

21 Friends of the Columbia Gorge
22 522 SW 5th Ave., Suite 720
23 Portland, OR 97204-2100

23 ///

1 Save Our Scenic Area
2 P.O. Box 41
Underwood, WA 98651

3 Department of Commerce
4 Attention: Tony Usibelli, Assistant Director, Energy Policy Division
P.O. Box 43173
5 Olympia, WA 98504-3173

6 Skamania County
c/o Board of County Commissioners
P.O. Box 790
7 Stevenson, WA 98648

8 Skamania County Public Utility District No. 1
1492 Wind River Highway
9 Carson, WA 98610

10 Skamania County Economic Development Council
267 NW 2nd
11 P.O. Box 436
Stevenson, WA 98648

12 Skamania County Agri-Tourism Association
13 P.O. Box 100
Underwood, WA 98651

14 Association of Washington Business
15 Attention: Kristopher I. Tefft, General Counsel
1414 Cherry St. SE
16 P.O. Box 658
Olympia, WA 98501

17 Seattle Audubon Society
18 8050 35th Ave NE
Seattle, WA 98115

19 Port of Skamania County
20 P.O. Box 1099
Stevenson, WA 98648

21 City of White Salmon
22 P.O. Box 2139
White Salmon, WA 98672

23 ///

1 Klickitat County Public Economic Development Authority
MS-CH-26
2 127 West Court
Goldendale, WA 98620

3 Wilbur Slockish, Jr.
4 Johnny Jackson
c/o Jason Spadaro, Whistling Ridge Energy LLC
5 P.O. Box 266
Bingen, WA 98605

6 Yakama Nation Tribal Council
7 P.O. Box 151
Toppenish, WA 98948

8 Cultural Resources Program
9 Confederated Tribes and Bands of the Yakama Nation
P.O. Box 151
10 Toppenish, WA 98948

11 6. Facts Demonstrating Petitioners are Entitled to Obtain Judicial Review:

12 Pursuant to RCW 34.05.530, Petitioners have standing to obtain judicial review.

13 Petitioners are nonprofit conservation advocacy organizations dedicated to the protection and
14 enhancement of resources of the Columbia River Gorge region. Petitioners' members live in the
15 communities, and use and enjoy the resources likely to be affected by, the proposed Whistling
16 Ridge Energy Project. Petitioners were granted Intervenor status in and participated fully in
17 EFSEC's proceedings, including its adjudication, land use consistency proceedings, and
18 proceedings under the State Environmental Policy Act ("SEPA"), Chapter 43.21C RCW.
19 Petitioners' interests are among those that were required to be considered by the Respondents in
20 making their decisions. Petitioners are adversely affected and aggrieved by the actions taken by
21 Respondents in adjudicating, approving, and executing an agreement for the site certification
22 application for the Whistling Ridge Energy Project. Pursuant to RCW 80.50.140(1), final
23 decisions on applications for energy facilities may be appealed to the Thurston County Superior

1 Court. A judgment by this Court in favor of Petitioners would substantially eliminate or redress
2 the prejudice to Petitioners caused or likely to be caused by Respondents' actions.

3 7. Petitioners' Reasons for Believing that Relief Should be Granted:

4 7.1. Land Use Consistency

5 7.1.1. EFSEC erroneously concluded that Skamania County adopted a certificate
6 of land use consistency in this matter. Skamania County reviewed the Whistling Ridge Wind
7 Energy Project twice. The first time, the County issued a certificate of land use consistency
8 pursuant to WAC 463-26-090. The second time, the County took a different approach, replacing
9 its certificate with a "staff report to EFSEC" and plainly stating that the new staff report was "not
10 a [land use] decision." EFSEC erred in deeming the County's staff report a certificate of land use
11 consistency, and as a result, improperly shifted the burden to other parties to demonstrate that the
12 project is inconsistent with applicable land use authorities. EFSEC also misconstrued and
13 misinterpreted the facts and holding in *Columbia Riverkeeper v. Cowlitz County*, Cowlitz County
14 Superior Court No. 07-2-00400-0 (May 2, 2007), *appeal dismissed by stipulated motion*, Wash.
15 Ct. App. No. 36393-3-II (Dec. 12, 2007), which held that a certificate of land use consistency
16 submitted by a County to ESFEC is a land use decision.

17 7.1.2. EFSEC erroneously concluded that siting privately owned and operated
18 large-scale wind energy turbines is consistent and in compliance with the Conservancy
19 designation of the Skamania County Comprehensive Plan. The Governor allowed up to 35 wind
20 turbines on lands designated "Conservancy" in the County's Comprehensive Plan. However, the
21 Comprehensive Plan does not allow privately owned and operated large-scale wind energy
22 facilities on Conservancy lands. Instead, the Comprehensive Plan states that if a type of use is
23 not listed as allowed in the Plan itself and in future zoning ordinances, that type of use is

1 “prohibited.” 2007 Comp. Plan at 30, 31. Here, private large-scale wind energy projects are not
2 listed as allowed, and are thus prohibited. EFSEC erred in concluding otherwise.

3 In addition, large-scale wind energy projects are inconsistent with the stated purpose of the
4 Conservancy designation, which is to “conserve and manage existing natural resources in order
5 to maintain a sustained resource and/or utilization.” EFSEC misconstrued the term “natural
6 resource,” in part because EFSEC erred in looking to *Wikipedia*, rather than applicable state law
7 and relevant provisions of the Comprehensive Plan, to interpret this term.

8 7.1.3. Respondents erred by failing to evaluate and ensure the Project’s
9 consistency with the goals and policies of the Skamania County Comprehensive Plan. EFSEC
10 was required to determine consistency with the Comprehensive Plan. RCW 80.50.090(2). The
11 Comprehensive Plan further provides that the goals and policies of the Plan must be consulted,
12 and that individual projects must be consistent with the policies:

13 Each of the chapters . . . includes goals and policies that are the essence of
14 the Plan and are intended to be consulted to guide decisions on a wide range of
15 issues, including permitting and resource allocation. It is important to remember
16 that the goals and policies in this Comprehensive Plan are just as important as the
17 maps in making land use and development decisions. To be consistent with the
18 Comprehensive Plan, a project must also meet the intent of the Comprehensive
19 Plan’s policies, not just the land use designation and zoning classification.

20 * * *

21 . . . Policies are decision-oriented statements that guide the legislative or
22 administrative body while evaluat[ing] a new project or proposed changes in the
23 County ordinances.

20 2007 Comp. Plan at 14. Despite these requirements, EFSEC failed to adopt findings or
21 conclusions evaluating the project under most of the Comprehensive Plan’s goals and policies,
22 even though consistency with many applicable goals and policies was disputed in EFSEC’s land
23 ///

1 use proceedings. Respondents failed to follow prescribed procedures and failed to decide issues
2 requiring resolution.

3 7.1.4. EFSEC misinterpreted the County's proposed energy development zoning
4 amendments and the Skamania County Hearing Examiner's 2009 SEPA appeal decision
5 regarding these proposed amendments. EFSEC erred by construing the County's proposed (now
6 abandoned) energy development zoning amendments, erroneously deeming them an effort by the
7 County to "*update* the zoning ordinances to *better mesh* with the comprehensive plan." Order
8 No. 868 at 13 (emphasis added). In fact, the County proposed to amend its zoning ordinances to
9 authorize large-scale energy development—including privately operated wind energy facilities—
10 in locations (including the Project site) where such uses are not currently allowed. The Hearing
11 Examiner held that the development of large-scale wind energy facilities, and the significant
12 environmental impacts caused by such facilities, would be probable with the adoption of the
13 proposed zoning amendments, and therefore an environmental impact statement was required
14 before the County could adopt these amendments. If the County had been merely "updating" its
15 zoning code to "better mesh" with its Comprehensive Plan, or to adopt standards for uses that
16 were already allowed (as the County unsuccessfully argued to the Hearing Examiner), the scope
17 of allowed uses under the ordinance would not have increased, and an EIS would not have been
18 required. EFSEC erred by misconstruing the Hearing Examiner's decision.

19 EFSEC also erred in concluding that the Hearing Examiner "rejected" the proposed zoning
20 amendments. Order No. 868 at 13. The Hearing Examiner rejected the County's determination of
21 non-significance under SEPA, *not* the proposed zoning amendments. The County voluntarily
22 "shelved" the energy zoning amendments after the Hearing Examiner's decision, thus causing

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1 Applicant Whistling Ridge Energy to seek approval from EFSEC and the Governor rather than
2 from the County, given the Governor's preemption authority.

3 7.1.5. EFSEC misinterpreted the County's moratoria prohibiting conversions from
4 forest use to non-forest use on the Unmapped lands. The challenged actions allow up to 35 large-
5 scale wind energy turbines on lands designated as "Unmapped" by the Skamania County Code.
6 Such development is prohibited under an ongoing series of moratoria enacted by Skamania
7 County since 2007 that prohibit conversions of commercial forest lands to non-forest uses on
8 Unmapped lands. The County's moratoria are required by RCW 36.70A.060, which requires
9 local governments to adopt protections for commercial forest lands. EFSEC erroneously
10 interpreted the law by concluding that Skamania County's moratoria are not zoning ordinances
11 and are "irrelevant" to EFSEC's land use consistency review process. Order No. 868 at 11. As a
12 result of these errors, Respondents further erred by failing to evaluate and find the Project
13 inconsistent with the County's moratoria and with RCW 36.70A.060, and thus failed to decide
14 issues requiring resolution.

15 7.1.6. EFSEC misinterpreted the applicable law on preemption of local land use
16 authorities, and adopted erroneous findings and conclusions regarding preemption that
17 prejudiced Petitioners' substantial rights. EFSEC misinterpreted the applicable law by
18 concluding that "[i]f . . . the Council determines that [a proposed project] is inconsistent [with
19 local land use requirements], the local land use requirements are preempted by operation of law."
20 Order No. 868 at 9. To the extent that EFSEC's conclusion was intended to mean that the local
21 land use requirements are *automatically* preempted by operation of law, then the conclusion is in
22 error. If a project is inconsistent with applicable land use requirements, then those land use
23 requirements can be preempted *only if* (1) EFSEC holds a hearing to consider preemption and (2)

1 the Governor affirmatively decides to preempt. *See* WAC 463-28-010, -060, -070, -080. To the
2 extent that EFSEC concluded otherwise, EFSEC's interpretation of the applicable law was in
3 error.

4 In addition, in its Order on Reconsideration, EFSEC arbitrarily and capriciously adopted
5 findings and conclusions suggesting that EFSEC engaged in a preemption inquiry, even though
6 EFSEC never held the preemption hearing required by WAC 463-28-060. *See* Order No. 870 at 3
7 & n. 4, 6-9. First, the Order on Reconsideration inaccurately implies that EFSEC's adjudicative
8 hearing included a hearing on preemption. *See id.* at 6. This is not correct. In order for EFSEC to
9 have held a preemption hearing, it would have first needed to find the project inconsistent with
10 the local land use authorities, and it would have then needed to issue a public notice that EFSEC
11 was holding a public hearing to take evidence and argument as to whether EFSEC should
12 preempt the local land use authorities and what types of conditions might mitigate the project's
13 inconsistencies with these authorities, all of which is required by WAC 463-28-010, -060 and -
14 070, and RCW 80.50.100(2). Contrary to the statements in the Order on Reconsideration, neither
15 event ever occurred. EFSEC thus failed to follow prescribed procedures, and its findings and
16 conclusions implying that it held a preemption hearing are arbitrary and capricious.

17 EFSEC's Order on Reconsideration then goes on to conclude that "[e]ven had the Council
18 [found the project inconsistent with local land use authorities], it would have determined that
19 preemption under RCW 80.50.110(2) is appropriate and required, subject to the imposition of
20 appropriate conditions." Order No. 870 at 9. By reaching this and similar findings and
21 conclusions in its Order on Reconsideration, EFSEC skipped the public process required by law,
22 concluding that Skamania County's land use authorities should be preempted without first
23 holding required hearings to hear from the citizens of Skamania County and other affected

1 persons about whether preemption would be a prudent course of action, and if so, what types of
2 mitigating conditions might be appropriate under RCW 80.50.100(2) and WAC 463-28-070. By
3 deliberating and adopting findings and conclusions on preemption without following the
4 procedures prescribed by law, EFSEC prejudiced the substantial rights of the public, including
5 those of the Petitioners, to participate in a properly scheduled and conducted preemption hearing.

6 7.2. Wildlife Resources

7 7.2.1. Respondents erred by failing to evaluate and ensure consistency with the
8 no-net-loss standard of performance for wildlife habitat in EFSEC's rules. Under WAC 463-62-
9 040(2)(a), an applicant for site certification of an energy project "must demonstrate no net loss of
10 fish and wildlife habitat function and value." Despite the fact that the WREP would impact
11 habitat used by more than 90 species of birds and two species of bats, EFSEC failed to adopt any
12 findings and conclusions regarding this rule, and thus failed to ensure consistency with the no-
13 net-loss standard of performance. EFSEC has therefore not decided all issues requiring
14 resolution by the agency, and its orders are inconsistent with its rules. In addition, the Governor's
15 decision to approve the Project in the absence of a demonstration of consistency with the no-net-
16 loss standard was arbitrary and capricious.

17 7.2.2. EFSEC erred by failing to require the Applicant to assess the risk of
18 nighttime collision by avian species. WAC 463-62-332(2)(g) requires every application for site
19 certification to include "[a]n assessment of risk of collision of avian species with any project
20 structures, during day and night, migration periods, and inclement weather." The Applicant
21 failed to assess the risk of nighttime collision for most avian species. As a result, EFSEC's
22 decisions are arbitrary and capricious, not supported by substantial evidence, and inconsistent
23 with the agency's rules.

1 7.2.3. EFSEC erred by failing to evaluate and ensure consistency with EFSEC's
2 wildlife survey requirements. Under WAC 463-62-040(2)(f), an applicant for site certification
3 must conduct wildlife surveys during all seasons of the year "to determine breeding, summer,
4 winter, migratory usage, and habitat condition of the site." The Applicant failed to survey and
5 determine avian usage during key migration periods. Moreover, EFSEC made no findings or
6 conclusions regarding compliance with WAC 463-62-040(2)(f). EFSEC has therefore not
7 decided all issues requiring resolution by the Agency, its orders are inconsistent with its rules,
8 and its decisions are arbitrary and capricious.

9 7.2.4. EFSEC erred by finding that the Applicant's pre-project wildlife
10 assessments and surveys conform with the 2009 WDFW Wind Power Guidelines. An applicant
11 for site certification of an energy project must describe how the Washington State Department of
12 Fish and Wildlife ("WDFW") Wind Power Guidelines are satisfied. WAC 463-60-332(4). The
13 2009 WDFW Wind Power Guidelines provide that prior to site certification, "[e]xisting
14 information on species and potential habitats in the vicinity of the project area should be
15 reviewed and if appropriate, mapped." Sources for this information include resource agencies,
16 local experts, recognized databases, data systems, and data at other nearby wind facilities or
17 other types of projects. The 2009 Guidelines also require (1) a minimum of one full year of
18 baseline avian use surveys, and (2) two full years of studies if there is limited or no relevant data
19 regarding seasonal use of the project site, or if the site is significantly diverse in habitat and
20 species. For several reasons, the Applicant did not meet these requirements: the Applicant failed
21 to collect existing information on species use and abundance; the Applicant performed less than
22 one full year of avian baseline studies; and the Applicant performed less than two full years of
23 avian baseline studies, despite a lack of preexisting information on seasonal use of the Project

1 site. EFSEC's approval was therefore contrary to the 2009 Wind Power Guidelines as well as
2 EFSEC's rules, and EFSEC's findings of consistency with the 2009 Wind Power Guidelines (*see*
3 Order No. 868 at 25, 38) are not supported by substantial evidence.

4 7.2.5. EFSEC erred in finding that post-construction remedial measures will
5 provide greater protection for wildlife than would the required pre-project wildlife surveys.

6 EFSEC determined in pertinent part that the Applicant need not complete the surveys required by
7 EFSEC's rules and the WDFW Wind Power Guidelines—including surveys during nighttime
8 and migratory periods—because post-construction information and remedial mitigation are more
9 beneficial to wildlife than avoiding impacts in the first place. *See* Order No. 868 at 38. This
10 finding/conclusion is arbitrary and capricious, not supported by substantial evidence in the
11 record, and inconsistent with EFSEC's rules requiring the Application to contain sufficient
12 information to evaluate the Project's impacts before those impacts occur. *See* WAC 463-60-
13 332(2) and 463-62-040(2).

14 7.2.6. EFSEC erred by failing to require the Applicant to prepare and submit a
15 wildlife mitigation plan that conforms with EFSEC's rules, and the Governor erred by approving
16 the Project in the absence of an adequate mitigation plan. Under WAC 463-60-332(3), an
17 application for site certification must include a mitigation plan that discusses measures to avoid,
18 minimize, and compensate for impacts to wildlife and wildlife habitat. Among other
19 requirements, the mitigation plan must "[a]ddress all best management practices to be
20 employed," "[a]ddress how cumulative impacts associated with the energy facility will be
21 avoided or minimized," "[d]emonstrate how the mitigation measures will achieve equivalent or
22 greater habitat quality, value and function for those habitats being impacted," "[i]dentify and
23 quantify level of compensation for impacts to, or losses of, existing species due to project

1 impacts,” and “[a]ddress how mitigation measures considered have taken into consideration the
2 probability of success of full and adequate implementation of the mitigation plan.” *Id.* The
3 mitigation plan contained in the Application fails to meet these requirements. As a result,
4 EFSEC’s decision was not supported by substantial evidence and was inconsistent with its rules.
5 In addition, Respondents failed to decide issues requiring resolution and acted arbitrarily and
6 capriciously by approving the Project in the absence of a sufficient mitigation plan.

7 7.2.7. EFSEC erred by approving and/or favorably considering a proposed
8 replacement habitat parcel without allowing the parties to evaluate and present evidence on the
9 adequacy of that parcel. WAC 463-62-040(d) requires replacement habitat to be of equal or
10 greater function and value to that of the impacted habitat. Via rebuttal testimony in the
11 adjudication, the Applicant offered a parcel located in Klickitat County as a replacement habitat
12 parcel. During the announcement of its adjudicative and recommendation decisions on October
13 6, 2011, EFSEC stated it “considered and favorably regarded” the Klickitat County parcel.
14 EFSEC also concluded “that the mitigation parcel discussed in the record is appropriate and may
15 be accepted.” Order No. 868 at 38. EFSEC also appears to have concluded that the Klickitat
16 County parcel contains superior habitat to that of the Project site. *Id.* at 27.

17 Because the Applicant offered the mitigation parcel for the first time through rebuttal
18 testimony, the parties were prejudiced and were deprived of their right to evaluate and submit
19 evidence on the mitigation parcel and its compliance with EFSEC rules, in direct contravention
20 of RCW 34.05.449(2). Therefore, EFSEC’s approval and/or favorable consideration of the
21 mitigation parcel was made without following prescribed procedures and was arbitrary and
22 capricious. Further, all evidence regarding the mitigation parcel was submitted by the
23 Applicant’s company president, who was not established as an expert on wildlife issues, and

1 none of the Applicant's witnesses on wildlife issues were willing to testify regarding the
2 adequacy of the parcel in meeting EFSEC's rules and WDFW Wind Power Guidelines. EFSEC's
3 findings and/or favorable consideration of the Klickitat County parcel were therefore not
4 supported by substantial evidence and were arbitrary and capricious.

5 7.2.8. EFSEC erred by failing to determine the amount of disturbed or impacted
6 habitat, and Respondents erred by approving the Project without first ensuring that the ratio of
7 replacement habitat to impacted habitat will be greater than 1:1. The Site Certification
8 Agreement requires the Applicant to prepare and submit a final mitigation plan prior to
9 construction, including the option of purchasing a mitigation parcel to compensate for habitat
10 disturbance. SCA at 20–21. EFSEC failed, however, to adopt consistent findings and conclusions
11 regarding how many acres of habitat will be disturbed and must be compensated for. For
12 example, EFSEC's calculations of the total acreage of disturbance range from 50 acres to 384
13 acres. *See* Order No. 868 at 5; Order No. 869 at 1, 3, 10, 13. In addition, WAC 463-62-040(2)(d)
14 requires that "[t]he ratios of replacement habitat to impacted habitat shall be greater than 1:1."
15 However, it is unclear whether EFSEC's calculations include, or will include, areas other than
16 permanently cleared areas—such as habitat from which wildlife is displaced, as well as habitat
17 where the Applicant will place height restrictions on forest growth in order to provide wind
18 clearance for the Project. By deferring required analyses and determinations to a future date,
19 EFSEC failed to resolve issues requiring resolution—primarily whether replacement habitat will
20 meet the requirement to compensate for impacted habitat at a ratio greater than 1:1. Furthermore,
21 EFSEC's decisions are inconsistent with its rules and not based on substantial evidence. Finally,
22 EFSEC's conflicting calculations of the total acreage of habitat disturbance, as well as

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1 Respondents' decisions to approve the Project without first resolving all wildlife mitigation
2 issues, were arbitrary and capricious.

3 7.2.9. Respondents failed to adopt conditions of approval found necessary by
4 EFSEC to protect bird and bat flight paths and feeding and nesting areas. The Adjudicative Order
5 concludes that the Applicant will be required to design a project layout that avoids bird and bat
6 flight paths and impacts to feeding and nesting areas. *See* Order No. 868 at 27, 38. The executed
7 Site Certification Agreement, however, fails to include any such requirements. Respondents'
8 failure to adopt such conditions was arbitrary and capricious and inconsistent with the
9 Adjudicative Order.

10 7.2.10. Respondents failed to consider and require the available and reasonable
11 measure of locking turbine blades when they are not generating electricity in order to reduce the
12 Project's impacts to wildlife resources. Respondents are required to ensure through "available
13 and reasonable methods" that the location and operation of energy facilities "will produce
14 minimal adverse effects on the environment." RCW 80.50.010. In addition, the Applicant is
15 required in its Application to describe "the means to be utilized to minimize or mitigate possible
16 adverse impacts" of the Project. WAC 463-60-085(1). Unrebutted testimony showed that
17 reducing blade spin-time is one of the few proven measures to reduce avian impacts, short of
18 shutting down or relocating turbines. By failing to consider and require this measure,
19 Respondents failed to decide issues requiring resolution, violated RCW 80.50.010, and
20 erroneously applied the law.

21 7.2.11. The deadlines for submitting certain wildlife plans and specifications set
22 forth in the Site Certification Agreement are inconsistent with EFSEC's rules. EFSEC's rules
23 require that "[a]t least ninety days prior to start of construction . . . a certificate holder shall

1 provide the plans and specifications required by the site certification agreement to the council for
2 approval.” WAC 463-68-050 (emphasis added). Two conditions of approval in the executed
3 SCA are inconsistent with EFSEC’s rules because they fail to require the Applicant to submit
4 required plans and specifications at least ninety days prior to the start of construction. First, the
5 SCA requires the Applicant to submit its proposed Rules of Procedure for the wildlife Technical
6 Advisory Committee “[n]o later than *sixty (60) days after* the beginning of Construction.” SCA
7 at 24 (emphasis added). Second, although the SCA requires the Applicant to conduct a bat
8 monitoring survey during the bat migration period, the SCA also states that this survey need not
9 occur until “[p]rior to beginning *commercial operation*.” SCA at 36. Both of these time periods
10 in the SCA are inconsistent with WAC 463-68-050.

11 7.3. Aesthetic, Heritage, and Recreational Resources

12 7.3.1. EFSEC’s Adjudicative Order arbitrarily and capriciously states that the
13 turbine corridors approved by the Governor “must be allowed.” EFSEC’s Recommendation
14 Order states that the turbine corridors it recommended for approval “may be permitted” by the
15 Governor. Order No. 869 at 7. EFSEC’s Adjudicative Order, however, conflicts with this finding
16 by stating that the same corridors “must be allowed.” Order No. 868 at 24. EFSEC’s use of the
17 phrase “must be allowed” could imply that EFSEC would not have the authority to deny these
18 turbine locations in the event that unanticipated or unacceptable impacts of these turbines are
19 identified. EFSEC’s use of this phrase conflicts with the remainder of its findings and
20 conclusions and with the applicable law, and is therefore arbitrary and capricious. On remand,
21 the phrase “must be allowed” should be stricken or modified.

22 ///

23 ///

1 7.3.2. Respondents erred by failing to consider and require available and
2 reasonable measures to reduce the Project's impacts to the aesthetic, heritage, and recreational
3 resources of the Columbia River Gorge. Respondents are required to ensure through "available
4 and reasonable methods" that the location and operation of energy facilities "will produce
5 minimal adverse effects on the environment." RCW 80.50.010. In addition, the Applicant is
6 required in its Application to describe "the means to be utilized to minimize or mitigate possible
7 adverse impacts" of the Project. WAC 463-60-085(1). While the Governor's decision to
8 eliminate certain turbine corridors avoids some of the Project's adverse impacts to aesthetic,
9 heritage, and recreational resources, the remaining approved turbines will still cause adverse
10 impacts, and Respondents failed to consider and require available and reasonable methods to
11 avoid, minimize, and mitigate these impacts. Such methods include radar-triggered aviation
12 lighting (as distinguished from standard aviation lighting); locking turbine blades so they do not
13 spin when they are not generating electricity; and preserving, enhancing, and/or restoring
14 existing aesthetic, heritage, and recreational resources to compensate for the Project's impacts.
15 By failing to consider and require these measures, Respondents violated RCW 80.50.010, failed
16 to decide issues requiring resolution, and erroneously applied the law.

17 7.3.3. The executed Site Certification Agreement fails to include key measures to
18 avoid and mitigate impacts to aesthetic and heritage resources that were identified as necessary
19 in EFSEC's Orders. First, EFSEC's Orders concluded that a portion of the "A" turbine corridor
20 and the entire "C" corridor cannot be developed. Order No. 868 at 22, 24; Order No. 869 at 7,
21 13. Accordingly, EFSEC's Recommendation Order required the Applicant to file, by October 27,
22 2011, legal descriptions identifying the areas where wind turbines will be prohibited. Order No.
23 869 at 13 n. 23. This deadline has long since passed, yet the Applicant still has not complied with

1 EFSEC's requirement. Moreover, Respondents failed to require, in the executed Site
2 Certification Agreement, a means of prohibiting wind energy development in the locations of the
3 denied corridors, despite Respondents' findings and conclusions that such development must be
4 prohibited in exchange for approval of the approved corridors. Although Attachment 1 to the
5 SCA includes a partial legal description of locations where wind turbines are "eliminated," the
6 legal description is incomplete, and Respondents failed to require any legal description or
7 prohibitions of these turbines to be attached to the property deeds as a condition of approval.

8 Second, EFSEC's Adjudicative Order includes a requirement that the Applicant use
9 "micrositing" to reduce expected adverse impacts to scenic and heritage resources caused by
10 wind turbines in the approved corridors. Order No. 868 at 24. The Order specifically states that
11 "[t]he Site Certification Agreement will require Applicant to prepare [for] approval a micrositing
12 plan that minimizes visual impacts from the Project on sensitive resources." *Id.* Despite EFSEC's
13 findings and conclusions, no such condition appears within the executed SCA. In the absence of
14 an actual micrositing plan—or even a requirement for the Applicant to submit one for public
15 review at a later date—there is insufficient evidence in the record to demonstrate that the adverse
16 visual impacts of the approved turbines, including any changed turbine sizes or locations, will in
17 fact be minimized. Further, the SCA does not comply with the Adjudicative Order.

18 7.4. Columbia River Gorge National Scenic Area

19 7.4.1. Respondents failed to ensure that all portions of the Project's turbine
20 corridors will be sited outside the Columbia River Gorge National Scenic Area. The Applicant
21 has depicted at least one wind turbine for this Project (turbine "F1") as sited immediately
22 adjacent to the boundary of the Columbia River Gorge National Scenic Area ("NSA"), and it is
23 at best unclear whether portions of the turbine blades, cleared areas, and forest practices for some

1 of the turbines would extend into the NSA. Federal and county laws prohibit the siting of new
2 commercial energy facilities within the NSA. *See* 16 U.S.C. § 544d(d)(6); Skamania County
3 Code §§ 22.04.010(88)(d), 22.10.020(A). The Governor approved the Application despite the
4 possibility that it may result in components of the Project being located inside the Scenic Area,
5 and yet failed to resolve this issue or even to include a condition of approval in the SCA ensuring
6 that all portions of the Project, including turbine blades, forest practices, and cleared areas, will
7 be located outside the boundary of the NSA. By failing to ensure that all Project components will
8 be located outside the NSA boundary, Respondents failed to decide all issues requiring
9 resolution, issued arbitrary and capricious decisions not based on substantial evidence, and
10 violated the applicable law.

11 7.5. Noise Impacts

12 7.5.1. Respondents erred in failing to require review of the noise impacts of the
13 final layout of the Project, including the final model, size, and siting of individual turbines. The
14 Applicant has not yet selected or identified final details for the Project. If the final siting and size
15 of the turbines would differ from what the Applicant modeled and proposed in the Application
16 and adjudication, the Applicant should be required to model the final layout, just as EFSEC
17 previously required for the Kittitas Valley Wind Project. By authorizing the Applicant to change
18 the Project at some unknown future date, but without requiring modeling of the noise impacts of
19 any changed details, Respondents have issued arbitrary and capricious decisions. Moreover,
20 Respondents' decisions are not based on substantial evidence, because the evidence for the noise
21 impacts of the final Project layout does not yet exist—and will *never* exist—under Respondents'
22 approach.

23 .///

1 7.6. Transportation Impacts

2 7.6.1. The Site Certification Agreement omits multiple road and transportation
3 requirements found necessary in EFSEC's Adjudicative Order. EFSEC stated multiple road and
4 transportation requirements in its Adjudicative Order, but failed to include these requirements in
5 the Site Certification Agreement. *See* Order No. 868 at 29, 39. These include requirements to
6 prepare and submit for approval transportation blockage contingency plans; requirements to
7 consult with schools, emergency services, and others regarding public road access; standards for
8 private roads; a requirement to verify carriers possession of appropriate permits; and a
9 requirement to avoid road construction and improvements within the National Scenic Area. *See*
10 *id.* When Petitioners noted these discrepancies and asked EFSEC to clarify by expressly stating
11 these requirements within the conditions of approval in the SCA, EFSEC's only response was to
12 note that the Applicant must comply with the SCA and with local and state regulations. Order
13 No. 870 at 14. EFSEC's response only casts further confusion on whether the Applicant is bound
14 by all road and transportation requirements stated in the Adjudicative Order. Respondents'
15 actions in failing to expressly require compliance with road and transportation requirements
16 found necessary in the Adjudicative order were arbitrary and capricious.

17 7.7. Forest Practices

18 7.7.1. Respondents failed to resolve forest practices issues prior to the Governor's
19 approval of the Project. The Project must comply with the Washington Forest Practices Act
20 ("FPA"), RCW Chapter 76.09; the Forest Practices Rules, WAC Title 22; and Skamania
21 County's Forest Practices Moratorium Ordinance, SCC Title 23. EFSEC erroneously concluded
22 that Respondents may wait until *after* Project approval to address and resolve forest practices
23 compliance, which was a contested issue in the adjudication. By carving out and deferring

1 review of this portion of the Project until a later date, Respondents failed to decide all issues
2 requiring resolution, failed to dispose of all contested issues, and issued decisions that are not
3 based on substantial evidence.

4 7.7.2. The executed Site Certification Agreement is internally inconsistent
5 regarding forest practice compliance and enforcement. The SCA contains two sections regarding
6 forest practices issues: sections IV.M (p. 29) and VII.E (p. 37). These two sections differ in
7 multiple respects. For instance, section VII.E discusses agency enforcement, while section IV.M
8 does not. Section VII.E requires a forest practices application ("FPA") at least sixty days prior to
9 forest practice activities, while section IV.M only requires an FPA at least sixty days prior to
10 *ground disturbance* activities. Section IV.M expressly discusses road
11 construction/reconstruction, reforestation, gravel and rock removal, and slash disposal, while
12 section VII.E is silent on these activities. Both sections are silent on compliance with SCC Title
13 23. Respondents' internally inconsistent conditions of approval regarding forest practices are
14 arbitrary and capricious and an erroneous application of the law.

15 7.8. Future Review of Project Components

16 7.8.1. Respondents erred in failing to state the processes for interested persons to
17 participate in EFSEC's future reviews of the Project and its components. Respondents deferred
18 submission and analysis of multiple Project components until unknown future dates. These
19 deferrals include, but are not limited to, forest practices compliance, wildlife assessment and
20 mitigation plans, and turbine "micrositing" plans. Other future agency reviews required by
21 EFSEC's rules include authorization and approval of whether conditions remain unchanged
22 should the Applicant fail to begin construction within five years of the Governor's execution of
23 the Site Certification Agreement. *See* SCA at 8; WAC 463-68-070. By failing to specify the

1 processes for interested persons to participate in these future agency reviews, Respondents have
2 engaged in unlawful procedure or decision-making process and rendered arbitrary and capricious
3 decisions.

4 7.8.2. Respondents erred in failing to address Project repowering. The Applicant
5 indicated that at the end of the Project's expected 30-year lifetime, the Applicant may wish to
6 "repower" the Project "by upgrading equipment with more efficient turbines." Amended
7 Application at 2.3-3, 2.3-12. Because Respondents failed to adopt findings, conclusions, and
8 conditions addressing the expected lifetime of the Project and the procedures for future
9 replacement of turbines, Respondents failed to resolve issues requiring resolution and acted
10 arbitrarily and capriciously.

11 7.9. Time Periods and Deadlines Set Forth in Conditions of Approval

12 7.9.1. The conditions of approval regarding the expiration of the Site Certification
13 Agreement are internally inconsistent and in violation of EFSEC's rules. EFSEC's rules provide
14 that a Site Certification Agreement expires if the Applicant fails to begin construction within ten
15 years of the Governor's execution of the Agreement. WAC 463-68-030, -080. In some locations,
16 the SCA accurately states this ten-year period. SCA at 8 ("If the Certificate Holder does not
17 begin construction of the Project within ten (10) years of the execution of the SCA, all rights
18 under this SCA will cease."). The SCA errs, however, in stating a *different* deadline at another
19 location: "no later than ten (10) years from the date that all final state and federal permits
20 necessary to construct and operate the Project are obtained and associated appeals have been
21 exhausted." SCA at 8. The latter deadline violates EFSEC's rules. In addition, Respondents'
22 adoption of conflicting deadlines within the same permit is arbitrary and capricious.

1 7.9.2. The conditions in the Site Certification Agreement regarding the time period
2 to complete Project construction violate and conflict with EFSEC's Recommendation Order.
3 EFSEC's Recommendation Order succinctly states that "[c]onstruction of the entire Project shall
4 be completed within eighteen (18) months after beginning construction." Order No. 869 at 18
5 (Finding/Conclusion No. 40). The executed SCA, however, fails to expressly make this eighteen-
6 month period binding, instead referring to the Certificate Holder's "intention" regarding the
7 construction time period. SCA at 8. This language conflicts with and violates EFSEC's Order,
8 and is therefore arbitrary and capricious.

9 7.9.3. The conditions in the Site Certification Agreement regarding EFSEC's
10 ability to address unexpected impacts from individual turbines are internally inconsistent.
11 Condition of approval VII.H expressly gives EFSEC full authority to address unanticipated harm
12 to the environment, including permanent additional conditions such as the removal of specific
13 turbines. SCA at 38. Condition III.K.5, however, appears to conflict with EFSEC's ability to
14 impose permanent conditions or requirements by limiting the duration of such conditions or
15 requirements to no more than 180 days. *See* SCA at 17. To the extent that the 180-day time
16 period limits EFSEC's ability to impose permanent measures, its adoption was arbitrary and
17 capricious.

18 7.10. Order of Precedence

19 7.10.1. The executed Site Certification Agreement fails to indicate the order of
20 precedence as between the Council's Recommendation and Adjudicative Orders and the Site
21 Certification Agreement in the event of a conflict or ambiguity. The executed SCA states that
22 the Project is "subject to the terms and conditions set forth in Council Order No. 869, Council
23 Order Recommending Site Certification on Condition (Attachment 4 to this Agreement), and this

1 Site Certification Agreement.” SCA at 8, Art. I.B. The SCA also purports to attach EFSEC’s
2 Adjudicative Order (No. 868) and Recommendation Order (No. 869) as Attachments 3 and 4,
3 respectively. *See* SCA at 6. The SCA, however, does not explain what happens in the event of a
4 conflict between the SCA and these two orders. Compounding this problem, the “Order of
5 Precedence” in the SCA omits any mention of the Adjudicative and Recommendation Orders,
6 again making it unclear which document(s) govern in the event of an inconsistency. *See* SCA at
7 17. During EFSEC’s process, Petitioners raised multiple inconsistencies between these
8 documents (involving turbine siting, transportation, construction duration, and other issues),
9 none of which have been resolved. Respondents’ failure to address the order of precedence
10 between these documents, especially when specific inconsistencies between them have already
11 been identified, was arbitrary and capricious.

12 7.10.2. The “Order of Precedence” set forth in the Site Certification Agreement
13 improperly places state statutes and regulations higher in precedence than federal statutes and
14 regulations. *See* SCA at 17. Federal statutes and regulations are higher in precedence than state
15 statutes and regulations. *See Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000)
16 (“A fundamental principle of the Constitution is that Congress has the power to preempt state
17 law. . . . And even if Congress has not occupied the field, state law is naturally preempted to the
18 extent of any conflict with a federal statute.”) (citations omitted). Respondents’ placement of
19 state law higher in precedence than federal law is unconstitutional on the face of the SCA.

20 8. Requested Relief:

21 8.1. Pursuant to RCW 80.50.140(1), the Court should adjudge Petitioners’ claims rather
22 than certifying the matter for direct review by the Washington Supreme Court.

23 ///

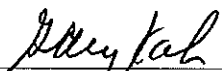
1 8.2. The Court should allow the administrative record to be supplemented in order to
2 allow for meaningful review of Petitioner's claims.

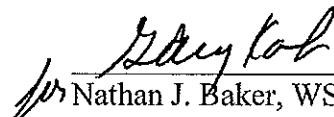
3 8.3. The Court should enter an order setting aside the Governor's decision to approve
4 the Whistling Ridge Energy Project, voiding the execution of the Site Certification Agreement,
5 reversing EFSEC's orders, and remanding to EFSEC for further review.

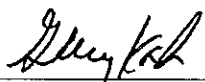
6 8.4. The Court should award Petitioners their costs and attorneys fees as allowed by
7 law, including RCW 4.84.350.

8 8.5. The Court should grant Petitioners any additional relief that the Court deems just,
9 proper, and equitable.

10 Dated this 3rd day of April, 2012

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