

**SITE CERTIFICATION AGREEMENT BETWEEN  
THE STATE OF WASHINGTON AND  
DESERT CLAIM WIND POWER LLC**



**For the  
DESERT CLAIM WIND POWER PROJECT  
KITITAS COUNTY, WASHINGTON  
ENERGY FACILITY SITE EVALUATION COUNCIL  
OLYMPIA, WASHINGTON**

**EXECUTED November 15, 2023**

**Amendment No. 2: Resolution No. 353  
Date October 18, 2023**

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## **Attachments**

1. Project Legal Description
2. Council Order No. 843, Order Recommending Approval of Site Certification on Condition entered November 16, 2009.
3. Stipulation between Counsel for the Environment and Desert Claim Wind Power LLC, Exhibit 30 in the adjudicative proceeding.
4. Agreement between Washington Department of Fish and Wildlife (WDFW) and Desert Claim Wind Power LLC, Exhibit 20 in the adjudicative proceeding.
5. Council Resolution No. 343, approval of the February 26, 2018 SCA Amendment Request.
6. Council Resolution No. 353, approval of the May 5, 2023 SCA Amendment Request.

**SITE CERTIFICATION AGREEMENT**  
**FOR THE DESERT CLAIM WIND POWER PROJECT**  
**between**  
**THE STATE OF WASHINGTON**  
**and**  
**DESERT CLAIM WIND POWER LLC.**

This Site Certification Agreement (Agreement) is made pursuant to Revised Code of Washington (RCW) 80.50, by and between the State of Washington, acting by and through the Governor of Washington State, and Desert Claim Wind Power LLC, (Desert Claim or Certificate Holder).

Desert Claim filed, as permitted by law, an application with the Energy Facility Site Evaluation Council (EFSEC or Council) for site certification for the construction and operation of a wind powered generation facility to be located in Kittitas County, Washington. The Council reviewed Application 2006-02, conducted public meetings and adjudicative hearings, and by order recommended approval of the application by the Governor. On February 2, 2010, the Governor approved the Site Certification Agreement (SCA) authorizing Desert Claim to construct and operate the Desert Claim Wind Power Project (Project). A request for Amendment to the SCA was submitted to EFSEC on February 26, 2018 (Amendment Request).<sup>1</sup> On November 13, 2018, the Council approved Amendment No. 1 by resolution No. 343 (Attachment 5). On October 18, 2023, the Council approved Amendment No. 2 by resolution 353.

The parties hereby now desire to set forth all terms, conditions, and covenants in relation to such site certification in this Agreement pursuant to RCW 80.50.100(1).

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<sup>1</sup> The original Desert Claim proposal was first reviewed by Kittitas County (the County) in 2005, prior to Desert Claim's application to EFSEC. At that time, the County conducted an environmental review that resulted in preparation of a Final Environmental Impact Statement (FEIS). In April 2005, the County denied the project as it had been proposed. In January 2009, the project was reconfigured and Desert Claim submitted a revised application (Revised Application) for Site Certification to EFSEC. On February 2, 2010 the Revised Project was approved. An SCA Amendment request was submitted to EFSEC on February 26, 2018 to further revise the project.

## **ARTICLE I: SITE CERTIFICATION**

### **A. Site Description**

The site on which the Desert Claim Wind Power Project (Project) is to be constructed and operated is located in unincorporated Kittitas County, and is described more particularly in Attachment 1 to this Agreement.

### **B. Site Certification**

The State of Washington hereby authorizes Desert Claim Wind Power LLC (Desert Claim or Certificate Holder), any and all parent companies, and any and all assignees or successors approved by the Council to construct and/or operate the Project, as described in Article I.A. of this Agreement, subject to the terms and conditions set forth in Council Order No. 843, Council Order Recommending Site Certification on Condition (Attachment 2 to this Agreement), Council Resolution No. 353, and this Site Certification Agreement.

The construction and operation authorized in this Agreement shall be located within the areas designated herein and in the Amendment Request.

This Site Certification Agreement authorizes the Certificate Holder to construct the Project such that Substantial Completion is achieved no later than November 13, 2028; provided, however, that such construction is not delayed by a force majeure event, and that the construction schedule that the Certificate Holder submits pursuant to Article IV.K of this Agreement demonstrates its intention and good faith basis to believe that construction shall be completed within eighteen (18) months of beginning Construction.

The Certificate Holder may begin Commercial Operation of some wind turbine generators prior to completing construction of all wind turbine generators and other Project components, provided all necessary Project elements are in place for safe operation of the completed wind turbine generators and their operation will not adversely affect any obligations under this Agreement.

### **C. Project Description**

The Desert Claim Wind Power Project will consist of: wind turbine generators (WTGs); permanent meteorological towers; access roadways; electrical collection/interconnection and communication systems and their respective corridors and rights of way; electrical step-up and interconnection substations; an operations and maintenance (O&M) facility; temporary construction-related facilities; other related Project facilities as described in the Amendment Request.

The location of Project facilities including, but not limited to, the turbines, roadways, electrical collection and distribution system, operations and maintenance facility, electrical substations, electrical feeder lines and other related Project facilities, is generally described in the Amendment Request. The final location of the WTGs and other project facilities within the Project Area may vary from the locations shown on the conceptual drawings in the Amendment

Request, but shall be consistent with the conditions of this Agreement and in accordance with the final construction plans approved by EFSEC pursuant to Article IV. L.

1. Wind Turbine Generators (WTGs). The Project shall consist of a maximum of thirty-one (31), 3-bladed wind turbines on tubular steel towers, not to exceed a maximum height (hub height plus blade tip height) of 150 meters (492 feet), with a capacity ranging from 2.0 to 4.2 megawatts (MW). The total capacity for the project will not exceed 100 MW. The WTGs will be equipped with turbine control, safety and braking systems, and will be interconnected to a central Supervisory Control and Data Acquisition (SCADA) system.
2. Meteorological Towers. The Project will include up to four (4) free-standing (non-guyed) permanent meteorological towers. The height of the meteorological towers shall not exceed the hub height of the WTGs selected.
3. Internal Access Roads. The Project will include approximately twenty (20) miles of internal roads for access to the WTGs and other Project facilities.
4. Electrical Collection/Interconnection and Communication Systems.
  - a) Collector System. The electrical output of the WTGs will be collected and transmitted to the Project Substation via a system of underground and overhead electric cables. Fiber optic or copper communication wires will also link the individual WTGs to a central computer monitoring system.
  - b) Project Step-Up Substation(s). Power from the Project will be collected and fed to the Puget Sound Energy (PSE) or the Bonneville Power Administration (BPA) high voltage transmission lines through a Project step-up substation. The step-up substation would connect to the respective PSE or BPA interconnect.
  - c) Interconnecting Transmission Systems. The Project will interconnect with the BPA and/or PSE transmission systems on or adjacent to the Project site.
5. Operations and Maintenance Facility.
  - a) The Operations and Maintenance (O&M) facility will include a main building with offices, restrooms, reception area, outdoor parking facilities, turn-around area, laydown area, outdoor lighting and gated access. The O&M facility building will have a foundation footprint of approximately 5,000 sq. ft. and will be placed on a site of approximately four (4) acres.
  - b) The O&M facility will include a permit-exempt well (withdrawing less than 5,000 gallons of water per day) for water supply. Sanitary wastewater from the maintenance facility will be discharged to an on-site septic system.
6. Turbine Setbacks.

Turbines shall meet the following setback requirements:

- Setback from occupied residences = 2,500 feet
- Setback from external Project Area boundaries = 1.25 x tip height
- Setback from road and transmission line rights of way = 1.25 x tip height
- Setback from barns and buildings = tip height

For purposes of this Article, “residence” means the primary physical structure on a residential lot utilized as a single family home; the term includes the entire structure within the main walls and the eaves of the roof, but does not include uncovered decks, uncovered patios, or outbuildings.

Distance shall be measured horizontally from the centerline of the turbine tower to the outermost envelope of the residence considered, or to the outermost edge of the road or other feature considered.

## **ARTICLE II: DEFINITIONS**

Where used in this Site Certification Agreement, the following terms shall have the meaning set forth below:

1. “Amendment Request” means the request for amendment submitted by Desert Claim Wind Power on February 26, 2018.
2. “Amendment No. 1” means this formal written agreement, as amended and approved by Council Resolution No. 343.
3. “Application” means the *Application for Site Certification: Desert Claim Wind Power Project*, designated No. 2006-02, submitted November 6, 2006, as supplemented in the Revised Application filed in February 2009.
4. “Approval” (by EFSEC) means an affirmative action by EFSEC or its authorized agents regarding documents, plans, designs, programs, or other similar requirements submitted pursuant to this Agreement.
5. “Begin Commercial Operation” or “Beginning of Commercial Operation” means the time when the Project begins generating and delivering electricity to the electric power grid, other than electricity that may delivered as a part of testing and startup of the Project.
6. “BMPs” means Best Management Practices.
7. “Bonneville” or “BPA” means Bonneville Power Administration.
8. “Certificate Holder” means Desert Claim Wind Power LLC, any and all parent company(ies), or an assignee or successor in interest authorized by the Council.
9. “CFE” means the Counsel for the Environment serving by appointment pursuant to RCW 80.50.080.

10. “Construction” means any of the following activities: any foundation construction including hole excavation, form work, rebar, excavation and pouring of concrete for the WTGs, the operations and maintenance facility building, or the substations and erection of any permanent, above-ground structures including any transmission line poles, substation poles, meteorological towers, or turbine towers.
11. “County” means Kittitas County, Washington.
12. “DAHP” means the Washington State Department of Archeology and Historic Preservation.
13. “Desert Claim Wind Power Project” or “Project” means: wind turbine generators (WTGs) and their construction areas; permanent meteorological towers; access roadways; electrical collection/interconnection and communication systems and their respective corridors and rights-of-way; electrical step-up and interconnection substations; an operations and maintenance facility; temporary construction-related facilities; other related Project facilities as described in the Revised Application. The specific components of the Project are identified in Article I.0.
14. “DNR” means the Washington State Department of Natural Resources.
15. “Ecology” means the Washington State Department of Ecology.
16. “EFSEC” or “Council” means the State of Washington Energy Facility Site Evaluation Council, or such other agency or agencies of the State of Washington as may hereafter succeed to the powers of EFSEC for the purposes of this Agreement.
17. “EFSEC Costs” means any and all reasonable costs, both direct and indirect, associated with EFSEC activities with respect to this Site Certification Agreement (SCA), including but not limited to monitoring, staffing and SCA maintenance.
18. “EIS” or “Final EIS” means the Desert Claim Wind Power Project Final Environmental Impact Statement (August 2004) issued by Kittitas County pursuant to the requirements of the State Environmental Policy Act, and adopted by EFSEC.
19. “End of Construction” means the time when all Project facilities have been substantially constructed and are in operation.
20. “FAA” means the Federal Aviation Administration.
21. “Force Majeure Event” means any event beyond the control of the Party affected that directly prevents or delays the performance by that Party of any obligation arising under this Agreement, including an event that is within one or more of the following categories: condemnation; expropriation; invasion; plague; drought; landslide; tornado; hurricane; tsunami; flood; lightning; earthquake; fire; explosion; epidemic; quarantine; war (declared or undeclared), terrorism or other armed conflict; material physical damage to the Project caused by third parties; riot or similar civil disturbance or commotion; other

acts of God; acts of the public enemy; blockade; insurrection, riot or revolution; sabotage or vandalism; embargoes; and, actions of a governmental authority other than EFSEC.

22. “IBC” means the International Building Code.
23. “Micro-siting” means the final technical and engineering process by which the Certificate Holder shall determine the final location of each wind turbine generator.
24. “NPDES permit” means National Pollutant Discharge Elimination System permit.
25. “PSE” means Puget Sound Energy.
26. “RCW” means the Revised Code of Washington.
27. “Revised Application” means the Desert Claim Wind Power Revised Application for Site Certification submitted on February 6, 2009.
28. “SEIS” or “FSEIS” (also “Supplemental EIS or “Final Supplemental EIS”) means the Desert Claim Wind Power Project Final Supplemental Environmental Impact Statement issued on November 6, 2009 by EFSEC pursuant to the requirements of the State Environmental Policy Act.
29. “SEPA Addendum” Means the Final Addendum to the Final Supplemental EIS issued on November 1, 2018 by EFSEC, pursuant to the requirements of the State Environmental Policy Act (SEPA).
30. “Site,” “Project Site” or “Project Area” means the approximately 4,400 acre property identified in Attachment 1, located in Kittitas County, on which the Project is to be constructed and operated.
31. “Site Certification Agreement,” “SCA” or “Agreement” means this formal written agreement between the Certificate Holder and the State of Washington, including all attachments hereto and exhibits, modifications, amendments, and documents incorporated herein.
32. “Site Preparation” means any of the following activities: Project Site clearing, grading, earth moving, cutting or filling, excavation, and preparation of roads and/or laydown areas.
33. “State” or “state” means the state of Washington.
34. “Substantial Completion” means the Project is generating and delivering energy to the electric power grid.
35. “TAC” means Technical Advisory Committee as described in Article IV.E.8.
36. “UBC” means the Uniform Building Code of 2015.
37. “WAC” means the Washington Administrative Code.



38. “WDFW” means the Washington Department of Fish and Wildlife.
39. “WSDOT” means the Washington State Department of Transportation.
40. “WTG” means wind turbine generator.

### **ARTICLE III: GENERAL CONDITIONS**

#### **A. Legal Relationship**

1. This Agreement shall bind the Certificate Holder, and its successors in interest, and the State and any of its departments, agencies, divisions, bureaus, commissions, boards, and its political subdivisions, subject to all the terms and conditions set forth herein, as to the approval of, and all activities undertaken with respect to, the Project or the Site. The Certificate Holder shall ensure that any activities undertaken with respect to the Project or the Site by its agents (including affiliates), contractors, and subcontractors comply with this Agreement. The term “affiliates” includes any other person or entity controlling, controlled by, or under common control of or with the Certificate Holder.
2. This Agreement, which includes those commitments made by the Certificate Holder in the Revised Application, the Amendment Request, and in the testimony and exhibits in the Applicant’s direct case, the Certificate Holder’s Stipulation with Counsel for the Environment and its Agreement with the Washington Department of Fish and Wildlife (the Revised Application, the Stipulation and the Agreement are hereby incorporated by reference), constitutes the whole and complete agreement between the State of Washington and the Certificate Holder, and supersedes any other negotiations, representations, or agreements, either written or oral.

#### **B. Enforcement**

1. This Agreement may be enforced by resort to all remedies available at law or in equity.
2. This Agreement may be suspended or revoked by EFSEC pursuant to RCW 34.05 and RCW 80.50, for failure by the Certificate Holder to comply with the terms and conditions of this Agreement, for violations of RCW 80.50 and the rules promulgated thereunder or for violation of any applicable resolutions or orders of EFSEC.
3. When any action of the Council is required by or authorized in this Site Certification Agreement, the Council may, but shall not be legally obligated to, conduct a hearing pursuant to RCW 34.05.

#### **C. Notices and Filings**

Filing of any documents or notices required by this Agreement with EFSEC shall be deemed to have been duly made when delivery is made to EFSEC’s offices in Thurston County, by hand-delivery, first class mail, or by e-mail.

Notices to be served by EFSEC on the Certificate Holder shall be deemed to have been duly made when deposited in first class mail, postage prepaid, addressed to the Certificate Holder at General Counsel, 15445 Innovation Drive, San Diego, California 92128, with a copy to Perkins Coie LLP, Attention: Karen McGaffey, 1201 Third Avenue, Suite 4800, Seattle, Washington 98101.

**D. Rights of Inspection**

Throughout the duration of this Agreement, the Certificate Holder shall provide access to the Site, the Project structures, buildings and facilities, underground and overhead electrical collector lines, and all records relating to the construction and operation of the Project to designated representatives of EFSEC in the performance of their official duties. Such duties include, but are not limited to, environmental monitoring as provided in this Agreement and monitoring and inspections to verify the Certificate Holder's compliance with this Agreement. EFSEC personnel or any designated representatives of EFSEC shall follow all worker safety requirements observed and enforced on the Project site by the Site Certificate Holder and its contractors.

**E. Retention of Records**

The Certificate Holder shall retain such records as are necessary to demonstrate the Certificate Holder's compliance with this Agreement.

**F. Consolidation of Plans and Submittal to EFSEC**

Any plans required by this Agreement may be consolidated with other such plans, if such consolidation is approved in advance by EFSEC. This Site Certification Agreement includes time periods for the Certificate Holder to provide certain plans and other information to EFSEC or its designees. The intent of these time periods is to provide sufficient time for EFSEC or its designees to review submittals without delay to the Project construction schedule, provided submittals made to EFSEC and/or its designees are complete.

**G. Site Certification Agreement Compliance Monitoring and Costs**

The Certificate Holder shall pay to the Council such reasonable monitoring costs as are actually and necessarily incurred during the construction and operation of the Project to assure compliance with the conditions of this Agreement as required by RCW 80.50. The amount and manner of payment shall be prescribed by EFSEC pursuant to applicable rules and procedures.

The Certificate Holder shall deposit or otherwise guarantee payment of all EFSEC Costs as defined in Article II.15, for the period commensurate with the activities of this Agreement. EFSEC shall provide the Certificate Holder an annual estimate of such costs. Any instrument guaranteeing payment of EFSEC's costs shall be structured in such a manner as to allow EFSEC to collect from a third party and without approval of the Certificate Holder any such costs which the Certificate Holder fails to pay to EFSEC during any preceding billing period.

## **H. Site Restoration**

The Certificate Holder is responsible for site restoration pursuant to the Council's rules, WAC 463-72 in effect at the time of submittal of the Application.

The Certificate Holder shall develop an Initial Site Restoration Plan in accordance with the requirements set out in Article IV.D of this Agreement and in consultation with WDFW, and submit it to EFSEC for approval. The Certificate Holder may not begin Site Preparation or Construction until the Council has approved the Initial Site Restoration Plan, including the posting of all necessary guarantees, securities or funds associated therewith.

The Certificate Holder shall submit a detailed site restoration plan to EFSEC for approval in accordance with the requirements of Article VIII.A. of this Agreement.

## **I. EFSEC Liaison**

No later than thirty (30) days from the effective date of this Agreement, the Certificate Holder shall designate a person to act as a liaison between EFSEC and the Certificate Holder.

## **J. Changes in Project Management Personnel**

The Certificate Holder shall notify EFSEC of any change in the primary management personnel, or scope of responsibilities of such personnel, for the Project.

## **K. Amendment of Site Certification Agreement**

1. This Agreement may be amended pursuant to EFSEC rules and procedures applicable at the time of the request for amendment. Any requests by the Certificate Holder for amendments to this Agreement shall be made in writing.
2. No change in ownership or control of the Project shall be effective without prior Council approval pursuant to EFSEC rules and procedures.
3. Unless otherwise required by EFSEC, any change in the terms or conditions of the following Sections or Attachments to this Agreement shall not require amendment of this Site Certification Agreement in the manner prescribed in Section K.1 above: Attachment 1, Project legal description, provided the change does not result in a material alteration of the size or location of the Project.
4. Repair, maintenance and replacement of Project Facilities
  - a) The Certificate Holder is permitted, without any further amendment to this agreement, to repair and maintain Project Facilities described in Article I.C, including the WTGs, consistent with the terms of this Agreement.
  - b) The Certificate Holder is permitted to replace the WTGs without amendment to this Agreement provided the replacement meets the following conditions:

- (i) the WTG is being replaced with the same make and model WTG originally used in the Project (“Replacement Turbine”); or the WTG is being replaced with a wind turbine that is within the size limits and general configuration defined in Article I.C, Project Description (“Comparable Turbine”);
    - (ii) the Replacement Turbine or Comparable Turbine is located in the same location as the WTG being replaced; and
    - (iii) the Replacement Turbine or Comparable Turbine meets all other conditions set out in this Agreement.
  - c) The Certificate Holder shall notify EFSEC of the replacement of a WTG no later than thirty (30) days prior to the replacement occurring.
5. In circumstances where the Project causes a significant adverse impact on the environment not previously analyzed or anticipated by this Agreement, including wildlife impacts that significantly exceed projections anticipated in the Amendment Request, the Final EIS or Final SEIS, or where such impacts are imminent, EFSEC shall take all steps it deems reasonably necessary, including imposition of specific conditions or requirements on the Certificate Holder as a consequence of such a situation in addition to the terms and conditions of this Agreement. Such additional conditions or requirements initially shall be effective for not more than ninety (90) days, and may be extended once for an additional ninety (90) day period if deemed necessary by EFSEC to pursue ongoing, or continuing temporary, arrangements under other authority, including but not limited to RCW 34.05, RCW 80.50 RCW or Title 463 WAC.

#### **L. Order of Precedence**

In the event of an inconsistency or apparent ambiguity in this Agreement, the inconsistency or ambiguity shall be resolved by giving precedence in the following order:

- 1. Applicable federal and State of Washington statutes and regulations;
- 2. The body of this Site Certification Agreement, including any other provision, term or material incorporated herein by reference or otherwise attached to, or incorporated in, this Site Certification Agreement;
- 3. Representations in Applicant’s testimony and exhibits in the adjudicative proceeding in this matter;
- 4. The application of common sense to effect a result consistent with law and the principles effected in this document.

#### **M. Review and Approval Process; Exceptions**

- 1. Except for the Initial & Final Site Restoration Plans, prior to any site work, the Council may delegate to the EFSEC Manager authority to approve or deny the construction and

operational plans required by this Agreement. The EFSEC Manager shall ensure the construction and operational plans have been sufficiently reviewed prior to approval.

2. The Council Manager may allow temporary exceptions from plan requirements or provisions of the SCA when such exceptions are not contrary to the purposes of the SCA, provided that a record is kept and Council members are immediately notified. Any Council member may within seven days of the notice put the item on a Council meeting agenda for review.

#### **ARTICLE IV: PLANS, APPROVALS AND ACTIONS REQUIRED PRIOR TO CONSTRUCTION**

##### **A. Notice of Federal Permit Approvals**

No later than thirty (30) days after the effective date of this Agreement, the Certificate Holder shall notify the Council of all Federal permits, not delegated to EFSEC, that are required for construction and operation of the Project, if any, and the anticipated date of permit issuance to the Certificate Holder. The Certificate Holder shall notify the Council when all required federal permits have been obtained, no later than ten (10) business days after the last permit has been issued.

##### **B. Mitigation Measures**

During construction, operation, decommissioning, and site restoration of this Project, the Certificate Holder shall implement the mitigation measures set forth in this Agreement, including those presented in the Revised Application, the Amendment Request or identified in the final SEIS and SEPA Addendum as commitments made by Desert Claim.

No later than sixty (60) days prior to the beginning of Site Preparation, the Certificate Holder shall file with EFSEC a comprehensive list of these mitigation measures. For each of these mitigation measures, the Certificate Holder shall in the same filing further identify the construction plan and/or operation plan addressing the methodology for its achievement.

The specific plans and submittals listed in the remainder of this Article IV, and Articles V, VI, VII and VIII, shall incorporate these mitigation measures as applicable.

##### **C. Construction Stormwater Plans**

1. Notice of Intent. No later than sixty (60) days prior to the beginning of Site Preparation the Certificate Holder shall file with EFSEC a Notice of Intent to be covered by a General National Pollutant Discharge Elimination System (NPDES) Permit for Stormwater Discharges Associated with Construction Activities.
2. Construction Stormwater Pollution Prevention Plan. No later than sixty (60) days prior to the beginning of Site Preparation, the Certificate Holder shall submit to EFSEC a Construction Stormwater Pollution Prevention Plan (Construction SWPPP), and provide a copy to WDFW for comment. The Construction SWPPP shall meet the requirements of the Ecology stormwater pollution prevention program (WAC 173- 230), and the

objectives and requirements in Special Condition S.9. of the *National Pollutant Discharge Elimination System and State Waste Discharge General Permit for Stormwater Discharges Associated with Construction Activities* issued by the Department of Ecology on November 16, 2005 or as revised. The Certificate Holder shall not begin Site Preparation prior to obtaining Council approval of the Construction SWPPP.

The Construction SWPPP shall identify a regular inspection and maintenance schedule for all erosion control structures. The schedule shall include inspections after significant rainfall events. Any damaged structures shall be addressed immediately. Inspections, and subsequent erosion control structure corrections, shall be documented in writing and available for EFSEC's review on request.

3. Temporary Erosion and Sediment Control Plan. The Certificate Holder shall develop a Temporary Erosion and Sediment Control (TESC) Plan. No later than sixty (60) days prior to the beginning of Site Preparation, the Certificate Holder shall submit the TESC Plan to the Council for approval and provide a copy to WDFW for comment. The Certificate Holder shall not begin Site Preparation prior to obtaining Council approval of the TESC Plan. As an alternative to submitting a separate TESC Plan, the Certificate Holder may include measures for temporary erosion and sedimentation control in the Construction SWPPP required in Article IV, Section C.2, above.
4. Construction Spill Prevention, Control and Countermeasures Plan. The Certificate Holder shall develop a Construction Spill Prevention, Control, and Countermeasures Plan (Construction SPCCP), consistent with the requirements of 40 CFR Part 112. The Construction SPCCP shall include the Site, feeder line corridors, and all access roads. The Certificate Holder shall require all contractors working on the facility to have a spill prevention and countermeasure program consistent with 40 CFR Part 112. No later than sixty (60) days prior to the beginning of Site Preparation, the Certificate Holder shall submit the Construction SPCCP to the Council for approval and provide a copy to WDFW and Ecology for comment. The Certificate Holder shall not begin Site Preparation prior to obtaining Council approval of the Construction SPCCP. All applicable elements of the Construction SPCCP shall be implemented prior to the beginning of Site Preparation.

#### **D. Initial Site Restoration Plan**

The Certificate Holder is responsible for Project decommissioning and site restoration pursuant to Council rules. The Certificate Holder shall develop an Initial Site Restoration Plan, pursuant to the requirements of WAC 463-72-040 in effect on the date of Application, in consultation with WDFW. The Certificate Holder shall submit the Initial Site Restoration Plan to the Council for review at least sixty (90) days prior to the beginning of Site Preparation. The Certificate Holder shall not begin Site Preparation prior to obtaining approval of the Initial Site Restoration Plan from the Council.

The Initial Site Restoration Plan shall be prepared in sufficient detail to identify, evaluate, and resolve all major environmental and public health and safety issues reasonably anticipated by the Certificate Holder on the date the Plan is submitted to EFSEC. The Initial Site Restoration Plan

shall describe the process used to evaluate the options and select the measures that will be taken to restore or preserve the Project site or otherwise protect the public against risks or danger resulting from the Project. The Initial Site Restoration Plan shall include a discussion of economic factors regarding the costs and benefits of various restoration options versus the relative public risk, and shall address provisions for funding or bonding arrangements to meet the Project site restoration or management costs. The Initial Site Restoration Plan shall be prepared in detail commensurate with the time until site restoration is to begin. The scope of proposed monitoring shall be addressed in the Initial Site Restoration Plan.

The objective of the Plan shall be to restore the site to approximate pre-Project condition or better. The Plan shall require removal of the wind turbine nacelles, blades, towers, foundations, cables and other facilities to a depth of four feet below grade, regrading of areas around the Project facilities and final restoration of disturbed land. Among other things, the Plan will address timing and intensity of grazing to ensure successful revegetation.

The Plan shall include the following elements:

1. Decommissioning Timing and Scope, as required by Article VIII.C. of this Agreement.
2. Decommissioning Funding and Surety, as required by Article VIII.D. of this Agreement.
3. Mitigation measures described in the Revised Application, the Amendment Request, Final EIS, Final SEIS, and SEPA Addendum that will be implemented for decommissioning of the Project.
4. An Initial Site Restoration Plan, which shall address both the possibility that site restoration will occur prior to, or at the end of, the useful life of the Project and also the possibility of the Project being suspended or terminated during construction.
5. A description of the assumptions underlying the plan. For example, the plan should explain the anticipated useful life of the Project, the anticipated time frame of site restoration, and the anticipated future use of the site.
6. An initial plan for demolishing facilities, salvaging equipment, and disposing of waste materials.
7. Performing an on-site audit, and preparing an initial plan for disposing of hazardous materials (if any) present on the site and remediation of hazardous contamination (if any) at the site.
8. An initial plan for restoring the site, including the removal of structures and foundations to four feet below grade and the regrading of the site.
9. Provisions for preservation or removal of Project facilities if the Project is suspended or terminated during construction.

**E. Habitat, Vegetation, and Fish and Wildlife Mitigation**

1. Habitat Mitigation Plan. Prior to the beginning of Site Preparation, the Certificate Holder shall develop a Habitat Mitigation Plan in consultation with WDFW, based upon the compensatory mitigation ratios outlined in the 2009 WDFW Wind Power Guidelines. The Certificate Holder shall submit the Habitat Mitigation Plan to EFSEC for approval at least 60 days prior to the beginning of Site Preparation.
  - a) The Certificate Holder and WDFW will agree upon a map of habitat types found within the Project Area ("Habitat Map"). This Habitat Map will be based upon the Natural Resources Conservation Service (NRCS) maps of soils and ecological sites, and field investigations of the Project Area.
  - b) The Habitat Mitigation Plan will specify the Certificate Holder's Mitigation Obligation. The Certificate Holder's Mitigation Obligation will be calculated using the mitigation ratios specified in the 2009 WDFW Wind Power Guidelines. For purposes of calculating the Mitigation Obligation, expected habitat impacts will be determined based upon the pre-construction Project Layout drawings and the habitat types shown on the Habitat Map. Pre-construction Project Layout drawings will show expected permanent and temporary land disturbances.
  - c) The Certificate Holder may satisfy its Mitigation Obligation either by purchasing a mutually acceptable mitigation parcel and deeding it to WDFW or a mutually acceptable third party, by contributing money to a mutually acceptable third-party that owns or will purchase a mitigation parcel, or by paying WDFW a fee of one thousand seven hundred fifty dollars (\$1,750.00) per acre in lieu of mitigation. If the Certificate Holder has not satisfied its Mitigation Obligation prior to commencing Site Preparation, the Certificate Holder will provide a letter of credit to EFSEC in an amount sufficient to provide financial security for the Mitigation Obligation. The Certificate Holder will be required to satisfy its Mitigation Obligation prior to commencing commercial operation of the Project.
  - d) The Habitat Mitigation Plan will include a process to determine the actual impacts to habitat following the completion of construction. In the event that actual impacts to habitat exceed the expected impacts determined prior to construction, the Habitat Mitigation Plan will include a mechanism for the Certificate Holder to provide supplemental compensatory mitigation (Supplemental Mitigation). Supplemental Mitigation, if any, may take the form of an additional mitigation parcel, the contribution of additional funds to a third-party who owns or will purchase an additional mitigation parcel, or the payment of an additional fee of one thousand seven hundred fifty dollars (\$1,750.00) per acre to WDFW lieu of mitigation.
2. Rare Plants. The Certificate Holder shall complete a rare plant survey of the Project Area. If plants of concern are identified on the Project site and significant adverse impacts to such plants are anticipated, then the Certificate Holder shall develop a Plant Conservation



Plan in consultation with the Washington Natural Heritage Program and submit it to EFSEC for approval no later than 60 days prior to the beginning of Site Preparation.

3. Wetlands, Streams and Riparian Areas.

- a) Except as authorized by a Clean Water Act section 404 permit, construction of the Project shall not result in any temporary or permanent disturbance of wetlands or other surface waters considered to be Waters of the United States by the Department of the Army, Corps of Engineers for purposes of the Clean Water Act, 33 U.S.C. § 1301 et seq.
- b) Prior to construction of the site, a final set of wetland buffers, setbacks, and mitigation standards for permanent and temporary impacts shall be determined by EFSEC in consultation with Ecology. Wetland buffers shall be determined in accordance with applicable provisions of the Kittitas County Code for Critical Areas in KCC 17A. Where supported by the following Ecology guidance documents, EFSEC may require buffers of greater width than would be required under KCC 17A: Wetland Mitigation in Washington State - Part 1: Agency Policies and Guidance, Ecology Publication #06-06-011a (March 2006); Wetland Mitigation in Washington State - Part 2: Developing Mitigation Plans, Ecology Publication #06-06-011b (March 2006); Update on Wetland Buffers: The State of the Science, Final Report, Ecology Publication #13-06-11 (October 2013). Based on the final wetlands mitigation requirements from EFSEC, the Certificate Holder shall submit a Wetlands Mitigation Plan to EFSEC for approval at least sixty (60) days prior to the beginning of Site Preparation, which shall summarize how the Site is in compliance with those wetland buffers, setbacks and mitigation standards.

The Certificate Holder will be required to conduct wetland mitigation monitoring for a period of 10 years.

- c) When finalizing construction plans, the Certificate Holder will coordinate with WDFW and Ecology regarding finalizing construction and operating plans, in relation to micro-siting of project facilities and roads, in order to avoid or minimize the facility elements' temporary and permanent impacts on streams and wetlands.
- d) If any unanticipated disturbance of wetlands occurs, the Certificate Holder shall prepare a Wetlands Restoration Plan in consultation with WDFW and submit it to EFSEC for approval.
- e) Prior to any construction work affecting the bed or flow of in waters of the State (including seasonally dry channels), the Certificate Holder will consult with and obtain approval from WDFW, and provide documentation of such approval to EFSEC. At least sixty (60) days prior to beginning any such channel work, the Certificate Holder shall submit construction drawings to EFSEC for review and approval. The drawings shall specify the exact locations of work to be conducted,

buffers that are required, and best management practices and mitigation measures that will be implemented as required by this article.

4. Construction Soil Management and Vegetation Plan. In consultation with WDFW, the Certificate Holder shall develop a Construction Soil Management and Vegetation Plan. No later than sixty (60) days prior to the beginning of Site Preparation, the Construction Soil Management and Vegetation Plan shall be submitted to the Council for review and approval. The Certificate Holder shall not begin Site Preparation prior to obtaining EFSEC approval of the Soil Management and Vegetation Plan.
5. Wet Season Construction. Construction activities are not restricted to particular seasons however the Certificate Holder shall attempt to sequence construction activities in order to minimize temporary earth disturbances during the wet season where practical. In particular, the Certificate Holder shall avoid earth-disturbing activities that result in distinct areas of temporary habitat disturbance (e.g. cross- county trenching to install electric collector system lines) in shrub-steppe areas when soils are saturated (which commonly occurs from mid-November through April) to the greatest extent possible. If such activities are to take place during periods of soil saturation, the Certificate Holder shall consult with WDFW to develop a specific plan incorporating strategies and best management practices to minimize the environmental impacts of the activities and additional restoration measures to ensure successful restoration of the disturbed habitat.
6. Habitat Restoration Plan. In consultation with WDFW, the Certificate Holder shall develop a Habitat Restoration Plan for temporarily disturbed areas.

The Habitat Restoration Plan shall require that all temporarily disturbed areas be reseeded with an appropriate mix of native, locally-adapted plant species in a manner and sequence that will maximize the likelihood of successful restoration of the area and prevent the spread of noxious weeds. Among other things, the Plan shall address the timing and intensity of grazing during revegetation. The Plan shall include a pre-identified reference site or sites that the Certificate Holder, the TAC and WDFW can use to gauge the success of the habitat restoration and revegetation efforts. The Habitat Restoration Plan shall include a restoration schedule that identifies timing windows during which restoration should take place, and an overall timeline for when all restoration activities will be completed. WDFW and the TAC may suggest modifications to the initial Habitat Restoration Plan as new information becomes available.

No later than sixty (60) days prior to the beginning of Site Preparation, the Habitat Restoration Plan shall be submitted to the Council for review and approval. The Certificate Holder shall not begin Site Preparation prior to obtaining EFSEC approval of the Habitat Restoration Plan.

7. Noxious Weed Control Plan. In consultation with WDFW, the Certificate Holder shall develop a Noxious Weed Control Plan. No later than sixty (60) days prior to the beginning of Site Preparation, the Noxious Weed Control Plan shall be submitted to the Council for review and approval.

8. Technical Advisory Committee. The purpose of the Technical Advisory Committee (TAC) is to ensure that monitoring data collected pursuant to the required Avian Monitoring Plan (see Article VI.C), the Bat Monitoring Plan (see Article VI.E.) and other related monitoring data are considered in a forum in which independent and informed parties can collaborate with the Certificate Holder. The TAC will make recommendations to EFSEC if it deems additional studies or mitigation are warranted to address impacts that were either not foreseen in the Revised Application, the Amendment Request, the Final EIS, the Final SEIS and SEPA Addendum, or significantly exceed impacts that were projected. In order to make advisory recommendations to EFSEC, the TAC will review and consider results of Project monitoring studies, including post-construction avian and bat mortality surveys, and new scientific findings made at wind generation facilities with respect to the impacts on habitat and wildlife, as they may relate to the Desert Claim Wind Power Project. The TAC will assess whether the post-construction restoration and mitigation and monitoring programs for wildlife that have been identified and implemented merit further studies or additional mitigation, taking into consideration factors such as the species involved, the nature of the impact, monitoring trends, and new scientific findings.

The TAC, or individual members thereof, will be authorized to consult, exchange information, and collaborate with TACs from other wind turbine projects, including the Kittitas Valley Wind Power Project and the Wild Horse Wind Power Project, for purposes of identifying and monitoring cumulative environmental impacts, and, if necessary, developing mitigation recommendations addressing known or newly identified cumulative impacts related to the construction and operation of wind power projects.

The TAC may include, but need not be limited to, representatives from WDFW, U.S. Fish and Wildlife Service, Audubon Washington or its member chapters, EFSEC, Kittitas County, DNR, and the Certificate Holder. EFSEC, at its discretion, may add additional representatives to the TAC from local interest groups as well as state, local, federal and tribal governments. All TAC members must be approved by EFSEC.

With the exception of DNR, no representative to the TAC may be party to a turbine lease agreement, or any other contractual obligation with the Certificate Holder.

No later than sixty (60) days prior to the beginning of Site Preparation, the Certificate Holder shall contact the agencies and organizations listed above requesting that they designate a representative to the TAC, and that the agencies or organizations notify EFSEC in writing of their TAC representative and of their member's term of representation. No later than sixty (60) days prior to the beginning of Commercial Operation, the Certificate Holder shall convene the first meeting of the TAC.

No later than sixty (60) days after the beginning of Construction, the Certificate Holder shall submit to EFSEC proposed Rules of Procedure describing how the TAC shall operate, including but not limited to a schedule for meetings, a meeting procedure, a process for recording meeting discussions, a process for making and presenting timely TAC recommendations to the Council, and other procedures that will assist the TAC to function properly and efficiently. The Certificate Holder will provide a copy of the

proposed Rules of Procedure at the first TAC meeting for review and comment. The TAC may suggest modifications of the plan; any such modifications must be approved by EFSEC.

The TAC will be convened for the life of the Project, except that EFSEC may terminate the TAC if: the TAC has ceased to meet due to member attrition; or, the TAC determines that all of the pre-permitting, operational and post-operational monitoring has been completed and further monitoring is not necessary; or the TAC members recommend that it be terminated. If the TAC is terminated or dissolved, EFSEC may reconvene and reconstitute the TAC at its discretion.

The ultimate authority to require implementation of additional mitigation measures, including any recommended by the TAC, shall reside with EFSEC.

9. Pre-Construction Raptor Nest Survey. During the nesting season immediately prior to beginning Site Preparation, the Certificate Holder shall conduct a raptor nest survey. The results of the survey shall be submitted to EFSEC and will be used to determine timing restrictions and/or buffer distances to active raptor nests.
10. Pre-Construction Townsends Ground Squirrel Survey. Prior to commencing Site Preparation, the Certificate Holder shall survey the Project site for Townsends Ground Squirrels and/or their burrows, using a protocol developed in consultation with the WDFW. If Townsends Ground Squirrels are found to exist on the Project site, the Certificate Holder shall consult with WDFW to determine whether proposed construction activities are likely to have significant adverse impacts on the Townsends Ground Squirrel population, taking into account the habitat mitigation being provided by the Certificate Holder. If the Certificate Holder and WDFW conclude that significant impacts are likely, the Certificate Holder, in consultation with WDFW, shall develop a plan to implement reasonable and practical mitigation measures during construction. This plan shall be submitted to EFSEC for approval thirty (30) days prior to Site Preparation.

#### **F. Construction Traffic Development Standards**

Development Standards: The Certificate Holder shall incorporate the following development standards into the design and construction of the Project.

1. Project Access Roads. Access to the turbines will be achieved via graveled roads branching from Smithson Road.  
  
Access from County roads shall be constructed with the appropriate slopes and culverts in accordance with Kittitas County standards in effect on the date of the Application in this matter. All roads within the site shall be designed in consultation with the fire services provider, pertinent state agencies and emergency suppliers to ensure that fire vehicles can gain safe access to the site as necessary to provide emergency services.
2. Video Monitoring. County roads, including shoulder pavement, shall be video monitored before and after construction of the Project. The Certificate Holder shall repair any damage to County roads, such that the roads meet or exceed Kittitas County standards.

3. Project Site Access. Project roads run across both private and public (DNR) lands. In order to coordinate access to public lands in accordance with DNR land management practices, the Certificate Holder will implement an adaptive management approach in coordination with DNR on the portion of the Project site owned by DNR. Adaptive management allows for changes over time to the level of control and types of activities on DNR lands, as needed. In general, the Certificate Holder will permit controlled access on the DNR lands, as long as it does not interfere with or introduce adverse impacts to Project operations or personnel. The Certificate Holder will have no obligation to provide access on or across private lands.
4. Construction Traffic Management Plan. At least sixty (60) days prior to the beginning of Site Preparation, the Certificate Holder shall submit to EFSEC for review a Construction Traffic Management Plan. The Construction Traffic Management Plan should address increased construction traffic on Smithson Road to limit construction delivery vehicles during peak travel times and to accommodate agricultural road use on Smithson Road. The Certificate Holder shall not begin Site Preparation prior to obtaining Council approval of the Construction Traffic Management Plan. This plan will incorporate those items outlined in Article IV.F.1 through 3, above.
5. Oversize or Overweight Hauls. The Certificate Holder shall notify EFSEC, at the earliest time possible, of any permits or approvals required to conduct oversize or overweight hauls.

**G. Federal Aviation Administration Review**

1. No later than thirty (30) days prior to the beginning of Construction, the Certificate Holder shall provide to EFSEC copies of the Determination of Non-Hazard certificates issued by the Federal Aviation Administration (FAA).
2. In accordance with RCW 70A.550.020, Laws of 2023, ch. 334, § 2, the project shall apply to the Federal Aviation Administration (FAA) for approval to install an aircraft detection lighting system (ADLS). There is the potential for additional impacts or permitting considerations associated with this installation. If approved by the FAA, EFSEC shall review the proposed ADLS system prior to installation to determine whether any additional permits and conditions are required. Any identified additional permits and conditions would be subject to review and approval by the Council.

**H. Cultural and Archeological Resources Plan**

With the assistance of an experienced archeologist, and in consultation with the Yakama Nation and the Department of Archeology and Historic Preservation (DAHP), the Certificate Holder shall develop a Cultural Resources Monitoring and Mitigation Plan for monitoring construction activities and responding to the discovery of archeological resources or buried human remains. The development of the Cultural Resources Monitoring and Mitigation Plan must be done in coordination with DAHP and the Yakama Nation and approved by EFSEC. The following must be considered during the plan development:

- Avoidance of the concentrated-resource areas.

- Habitat rehabilitation of impacted-resource areas as a means of mitigation for impacts to the diffuse-resource areas.
- Archaeological sites be provided a minimum 30 meter/100 foot buffer.
- Archaeological isolates should be further studied and be provided a minimum 15 meter/50 foot buffer.
- 51 rock features should be re-evaluated and recorded as archaeological sites.
- Archaeological monitoring during construction when ground-disturbing activity is involved.

The Certificate Holder shall provide copies of the draft Plan for comment to potentially affected tribes, prior to submitting the plan for EFSEC approval. The Certificate Holder shall submit the Plan to EFSEC for review and approval no later than sixty (60) days prior to the start of Site Preparation. The Certificate Holder shall not begin Site Preparation prior to obtaining approval of the Plan from the Council. All applicable elements of the Plan shall be implemented prior to the start of Site Preparation. The Plan shall include, but not be limited to, the following:

1. The Plan shall provide for the avoidance of significant archeological sites where practical. For sites to be avoided, the boundaries of identified cultural resources and buffer zones shall be staked in the field and flagged as no-disturbance areas to avoid inadvertent disturbance during construction. These site markings will be removed following construction. The Plan shall address alternative mitigation measures to be implemented if it is not practical to avoid archeological sites or isolates.
2. The Plan shall address the possibility of the unanticipated discovery of archeological artifacts during construction. If any archaeological artifacts, including but not limited to human remains, are observed during construction, disturbance and/or excavation in that area will cease, and the Certificate Holder shall notify the DAHP, EFSEC, and the affected tribes and in the case of human remains the County Coroner or Medical Examiner. At that time, appropriate treatment and mitigation measures shall be developed in coordination with the agencies and tribes cited above, and implemented following approval by EFSEC. If Project facilities cannot be moved or re-routed to avoid the resources, the Certificate Holder shall contact EFSEC and DAHP for further guidance which may require the implementation of a treatment plan. If a treatment plan is required, it shall be developed in consultation with DAHP and any affected tribes.
3. If a tribe requests to have its representatives present during earth-disturbing construction activities, the Certificate Holder shall accommodate reasonable requests. In all cases the Certificate Holder shall inform EFSEC of each such tribal request.

## **I. Construction Emergency Plan**

1. Construction Emergency Plan. The Certificate Holder shall retain qualified contractors familiar with the general construction techniques and practices to be used for the Project and its related support facilities. The construction specifications shall require contractors to implement a safety program that includes an emergency plan. The Certificate Holder shall prepare and submit a Construction Emergency Plan to EFSEC for review at least sixty (60) days prior to the beginning of Site Preparation. The Certificate Holder shall

coordinate development and implementation of the Plan with applicable local and state emergency services providers. The Certificate Holder shall not begin Site Preparation or Construction prior to obtaining EFSEC approval of the Construction Emergency Plan. The Construction Emergency Plan shall include consideration of:

- a) Medical emergencies;
  - b) Construction emergencies;
  - c) Project Area evacuation;
  - d) Fire protection and prevention;
  - e) Flooding;
  - f) Extreme weather abnormalities;
  - g) Earthquake;
  - h) Volcanic Eruption;
  - i) Facility blackout;
  - j) Hazardous materials spills;
  - k) Blade or tower failure;
  - l) Aircraft impact;
  - m) Terrorism, sabotage, or vandalism;
  - n) Bomb threat.
2. Fire Protection Services. Prior to commencing Site Preparation, the Certificate Holder shall verify continuing protection through DNR for Desert Claim facilities on land leased from that agency and shall execute a fire protection services agreement with a fire services provider such as Kittitas Valley Fire and Rescue for the Project site to ensure that adequate fire protection services are in place during the construction and operations of the Project.
3. Fire Control Plan. The Certificate Holder shall develop and implement a Fire Control Plan in coordination with state and local agencies to minimize risk of accidental fire during construction and to ensure effective response to any fire that does occur on the Project Site at any time. The Certificate Holder shall submit the Fire Control Plan to EFSEC for review and approval at least sixty (60) days prior to Site Preparation and provide a copy to WDFW, DNR and Ecology for comment. The Certificate Holder shall not begin Site Preparation prior to obtaining Council approval of the Fire Control Plan.

## **J. Construction Management Plan**

The Certificate Holder shall with the assistance of Council Staff develop a detailed Construction Management Plan in consultation with WDFW and other affected State and local agencies. The Plan shall address the primary Site Preparation and Construction phases for the Project, and shall be generally based on the mitigation measures contained in this Agreement and the Revised Application. At least sixty (60) days prior to the start of Site Preparation, the Certificate Holder shall submit the Construction Management Plan to the Council for review and approval. The Certificate Holder shall not begin Site Preparation prior to obtaining Council approval of the Construction Management Plan.

## **K. Construction Schedule**

No later than thirty (30) days prior to the beginning of Site Preparation, the Certificate Holder shall submit to EFSEC an overall construction schedule. Thereafter, the Certificate Holder shall notify EFSEC of any significant changes in the construction schedule.

## **L. Construction Plans and Specifications**

1. At least sixty (60) days prior to the beginning of Construction, the Certificate Holder shall submit to EFSEC or its designated representative for approval those construction plans, specifications, drawings and design documents that demonstrate the Project design will be in compliance with the conditions of this Agreement. The Certificate Holder shall also provide copies to WDFW, DNR, Ecology and other agencies as EFSEC may direct, for comment. The plans shall include overall Project site plans, foundation drawings, equipment and material specifications, and vendor guarantees for equipment performance as appropriate. The Certificate Holder shall not begin Construction prior to obtaining Council approval of the construction plans and specifications.

The certificate holder shall also submit, for the Council's review and approval prior to micro-siting, an analysis of the feasibility of placing all turbines more than 0.5 miles from non-participating residences to avoid dominating views from these sensitive viewing locations.

2. The Certificate Holder shall consult with WDFW on ways to minimize road construction and other habitat impacts prior to preparing final construction plans. The Certificate Holder shall also consult with emergency services suppliers prior to preparing final road construction plans, to ensure that interior Project roads are sufficient to provide reliable access by emergency vehicles, in its final design for construction, the Certificate Holder, shall maximize the use of existing roads and pathways, and minimize the construction of new roads as much as reasonable and practical, and without disrupting wetlands or other sensitive habitat. The final design shall be subject to approval by EFSEC.
3. The Certificate Holder shall provide a final project layout plan to demonstrate that project structures comply with the setback conditions of Article I.C.6.
4. Project buildings, structures, and associated systems shall be designed and constructed consistent with code requirements, including the seismic standards, of the Uniform



Building Code (UBC) or the International Building Code (IBC), but no less stringent than those found in the UBC 2015.

5. The Certificate Holder shall design, install, operate and maintain the domestic on-site septic system in accordance with Kittitas County requirements.
6. The Certificate Holder shall purchase water only from sources that have been certificated or otherwise authorized by the Department of Ecology. At least thirty (30) days prior to the beginning of Site Preparation, the Certificate Holder shall provide to EFSEC proof of contract for the water supply source it intends to use during Site Preparation, Construction and Operation. The Certificate Holder shall notify EFSEC of any changes in the source of supply no later than fifteen (15) days before the change.
7. Prior to the beginning of Site Preparation, the Certificate Holder shall present to EFSEC copies of the signed and executed lease(s) with DNR.

## **ARTICLE V: PROJECT CONSTRUCTION**

### **A. Environmental Monitoring During Construction**

1. Environmental Monitor (EM). EFSEC will provide full-time on-site environmental monitoring for the construction phase of the Project, at the Certificate Holder's cost. The EM shall be an independent, qualified engineering firm (or a person associated with such firm) selected by EFSEC, and shall report directly to EFSEC.
2. Environmental Compliance Program for Construction Activities. The Certificate Holder shall identify and develop environmental monitoring and "stop-work" criteria in consultation with the EM and other EFSEC designees prior to beginning Site Preparation. EFSEC will review and approve the final stop-work criteria to be implemented for the Project. The Environmental Compliance Program will cover avoidance of sensitive areas during construction, waste handling and storage, stormwater management, spill prevention and control, habitat restoration efforts begun during the construction phase of the project and other mitigation measures required by this Agreement. The Certificate Holder shall implement the program to ensure that construction activities meet the conditions, limits and specifications set out in the Site Certification Agreement, all Attachments thereto, and all other applicable state and federal environmental regulations.
3. Preconstruction Meeting. A preconstruction meeting shall be held between the Environmental Monitor and the construction team to review and clarify construction related plans, special concerns, and construction techniques prior to beginning work.
4. Copies of Plans and Permits Kept On Site. A copy of the Site Certification Agreement, Plans approved by the Council or its designees, and all applicable construction permits will be kept at the Project Site. The lead Project construction personnel and construction project managers will be required to read, follow, and be responsible for all required compliance activities. The EM will be responsible for monitoring that all construction permit requirements are adhered to, and that any deficiencies are promptly reported and that corrective measures are initiated.

5. Environmental Monitor Weekly Reports. The EM will provide weekly reports to EFSEC regarding adherence to BMPs, the implementation of environmental mitigation plans, and environmental problems reported or discovered as well as corrective actions taken by the Certificate Holder to resolve these problems. The EM will provide copies to the Certificate Holder of reports submitted to EFSEC.
6. Environmental Violations and Stop-Work Orders. Upon identification of an environmental noncompliance issue, the EM will work with the responsible subcontractor or direct-hire workers to correct the violation; if non-compliance is not corrected in a reasonable period of time the EM shall request that EFSEC issue a “stop work” order for that portion of the work not in compliance with Project environmental requirements. EFSEC will promptly notify The EM of any “stop work” orders that have been issued.
7. Environmental Monitor Availability. No excavation, filling or re-grading work shall be performed at any time unless the EM is available for full, concurrent and independent environmental monitoring on-site.

#### **B. Quarterly Construction Reports**

The Certificate Holder shall submit quarterly construction progress reports to EFSEC no later than thirty (30) days after the end of each calendar quarter. Such reports shall describe the status of construction and identify any changes in the construction schedule.

#### **C. Construction Inspection**

EFSEC shall provide plan review and inspection of construction for all Project buildings, structures, underground and overhead electrical lines, sanitary waste water discharge systems, and other Project facilities to ensure compliance with this Agreement. Construction shall be in accordance with the approved design and construction plans, the IBC or UBC and other relevant regulations. EFSEC may contract with Kittitas County, another appropriate agency or an independent firm to provide these services.

#### **D. As-Built Drawings**

The Certificate Holder shall maintain a complete set of as-built drawings on file for the life of the Project, and shall allow the Council or its designated representative access to the drawings on request following reasonable notice.

#### **E. Habitat, Vegetation, Fish and Wildlife**

1. The Certificate Holder shall use construction techniques and Best Management Practices (BMPs) to minimize potential impacts to habitat and wildlife;
2. The Certificate Holder shall ensure that the construction team includes a qualified staff person or persons with experience in construction in sensitive arid environments similar to that found in the Project Area.

3. Construction teams shall stake work and clearing limits prior to construction and ground clearing.
4. The Certificate Holder shall avoid the installation of above-ground collector lines where practical. To the extent practical, collector lines shall be installed in or alongside roadways, in areas currently disturbed, in other areas that will be permanently disturbed by Project construction, or by directionally drilling under surface waters. When it is not practical to avoid the installation of above-ground collector lines, the Certificate Holder shall consult with WDFW to determine the most practical alternative with the least adverse environmental impacts. Any above-ground collector lines will be designed to comply with the current Avian Power Line Interaction Committee Guidelines.
5. The Certificate Holder shall post, maintain and enforce driving speed limits of 25 miles per hour within the Project Area to minimize potential collisions with wildlife during construction
6. All permanent meteorological towers shall be free-standing monopoles without guy wires. The Certificate Holder shall use bird markers on all temporary meteorological towers with guy wires.
7. The Certificate Holder, in consultation with its wildlife consultant and WDFW, shall schedule the sequence of construction activities and/or locations across the Project Area in a manner that will minimize risks to Loggerhead Shrike, Sage Thrasher and Long-billed Curlews that may nest in the Project Area during the months of April through June to the extent that it is reasonable, practical and feasible to do so. The Certificate Holder shall not be required to avoid or restrict construction activities during those months.
8. The Certificate Holder shall promptly remove carcasses and livestock afterbirths from the Project Area during construction of the Project. The Certificate Holder shall consult with WDFW in the development and implementation of this removal program.

**F. Construction Noise**

The Certificate Holder and its contractors and subcontractors shall use industry standard noise attenuation controls during construction to mitigate noise impacts and shall comply with applicable state and local noise emission regulations. The Certificate Holder shall limit blasting and loud construction activities to daytime hours (7 a.m. to 10 p.m.), and shall comply with the applicable requirements of WAC 173-60-040(2) (b) during the hours of 10:00 p.m. and 7:00 a.m.

**G. Construction Safety and Security**

1. Federal and State Safety Regulations. The Certificate Holder shall comply with applicable federal and state safety regulations (including regulations promulgated under the Federal Occupational Safety and Health Act and the Washington Industrial Safety and Health Act), as well as local and state industrial codes and standards (such as the Uniform Fire Code). The Certificate Holder, its general contractor, and all subcontractors shall make every reasonable effort to maximize safety for individuals working at the Project.

2. Construction Phase Health and Safety Plan. The Certificate Holder shall develop and implement a Construction Phase Health and Safety Plan prior to the beginning of Site Preparation. The Certificate Holder shall consult with local and state organizations providing emergency response services during the development of the plan to ensure timely response in the event of an emergency. The Certificate Holder shall submit the plan to EFSEC for review and approval no later than sixty (60) days prior to Site Preparation.
3. Construction Phase Site Security Plan. The Certificate Holder shall develop and implement a construction phase site security plan to effectively monitor the Project Site. The Certificate Holder shall consult with local and state organizations providing emergency response services during the development of the plan to ensure timely response in the event of an emergency. The Certificate Holder shall submit the plan to EFSEC for review and approval no later than sixty (60) days prior to Site Preparation.

Site access will be controlled and all on-site construction staff and visitors will be required to carry an identification pass. Temporary fencing with a locked gate may be installed at laydown areas for storage of equipment and materials.

4. Visitors Safety. Visitors shall be provided with safety equipment where and when appropriate.

## **H. Fugitive Dust**

The Certificate Holder shall implement appropriate mitigation measures to control fugitive dust from roads and construction activities. The Certificate Holder shall use water or a water-based, environmentally safe dust palliative such as lignin, for dust control on unpaved roads during Project construction. The Certificate Holder shall not use calcium chloride for dust suppression.

## **I. Contaminated Soils**

In the event that contaminated soils are encountered during construction, the Certificate Holder shall notify EFSEC and Ecology as soon as possible. The Certificate Holder shall manage, handle and dispose of contaminated soils in accordance with applicable local, state and federal requirements.

## **J. Light, Glare and Aesthetics**

The Certificate Holder shall implement mitigation measures to minimize light and glare impacts. Project buildings shall be constructed of local materials and in local building styles to maximize their fit into the local landscape, and shall be landscaped with native shrub-steppe vegetation around buildings and equipment boxes to integrate the structures into the surrounding landscape. Project structures shall be painted with neutral/low reflectivity finishes to the extent feasible. The Certificate holder shall neither place nor allow advertising, logos, cellular antennas, or other clutter on the turbines, nacelles, or buildings of the Project. The O&M facility buildings shall be painted with a low reflectivity earth tone colored finish. The only lighting on the turbines will be the aviation lighting required by FAA and other lighting required by other government agencies. Outdoor lighting at the O&M facility and substation(s) will be minimized to safety and security

requirements, motion sensors will be used to keep lighting turned off when not required, and lighting will be equipped with hoods and directed downward. If compliance with any of these requirements is not feasible, the Certificate Holder may seek a waiver from the Council.

The Certificate Holder shall investigate the application of an Aircraft Detection Lighting System (ADLS) prior to construction and report its findings to EFSEC. The report should include the benefits and feasibility of ADLS for the Desert Claim project.

#### **K. Construction Wastes and Clean-Up**

The Certificate Holder shall dispose of sanitary and other wastes generated during construction at facilities authorized to accept such wastes. The certificate holder shall include in its waste management plan a commitment to recycle project components when recycling opportunities are reasonably available for wastes generated during construction.

The Certificate Holder shall properly dispose of all temporary structures not intended for future use upon completion of construction. The Certificate Holder also shall dispose of used timber, brush, refuse or flammable materials resulting from the clearing of lands or from construction of the Project in a manner and schedule approved by EFSEC.

### **ARTICLE VI: SUBMITTALS REQUIRED PRIOR TO THE BEGINNING OF COMMERCIAL OPERATION**

#### **A. Operations Stormwater Pollution Prevention Plan**

1. Operations Stormwater Pollution Prevention Plan. The Certificate Holder shall prepare an operations stormwater pollution prevention plan (Operations SWPPP) in consultation with WDFW and submit it to EFSEC for approval at least thirty (30) days prior to the beginning of Commercial Operation. The Operations SWPPP shall include an operations manual for permanent BMPs. The Operations SWPPP shall be prepared in accordance with the guidance provided in the Ecology Stormwater Management Manual for Eastern Washington, September 2004. The Certificate Holder shall periodically review the Operations SWPPP against the guidance provided in the applicable Ecology Stormwater Management Manual, and make modifications as necessary to the Operations SWPPP to comply with current requirements for BMPs.
2. Operations Spill Prevention, Control and Countermeasure Plan. The Certificate Holder shall prepare an Operations Spill Prevention, Control and Countermeasures Plan (Operations SPCCP) in consultation with WDFW and submit it to EFSEC for review and approval at least thirty (30) days prior to the beginning of commercial operation. The Operations SPCCP shall be prepared pursuant to the requirements of 40 CFR Part 112, Sections 311 and 402 of the Clean Water Act and Section 402 (a)(1) of the Federal Water Pollution Control Act (FWPCA) and RCW 90.48.080. The Operations SPCCP shall include the Site, all Project structures and facilities on the site, substations(s), feeder line corridors, and all access roads. The Operations SPCCP shall be implemented within three (3) months of the beginning of Commercial Operation. The Operations SPCCP must be updated and submitted to the Council every two (2) years.

## **B. Emergency Plans**

1. Operations Emergency Plan. No later than sixty (60) days prior to the beginning of Commercial Operation, the Certificate Holder shall submit for the Council's approval an Operations Emergency Plan for the Project to provide for employee safety in the event of emergencies, such as those listed below. The Certificate Holder shall coordinate development of the plan with local and state agencies that provide emergency response services in the Project Area. Periodically, the Certificate Holder shall provide the Council with updated lists of emergency personnel, communication channels and procedures. The Emergency Response Plan shall address in detail the procedures to be followed in the event of emergencies listed in Article IV.I.1.
2. Fire Protection Services. The Certificate Holder shall maintain fire protection services agreement(s) pursuant to IV.I.2 of this Agreement for the entire Project, for the life of the Project or until and to the extent that the Project site is annexed into a Fire District or other municipal entity that provides fire protection services.
3. Operations Fire Control Plan. The Certificate Holder shall develop an operations phase Fire Control Plan in consultation with WDFW and WDNR and in coordination with other state and local agencies to minimize risk of accidental fire during operation and ensure effective response to any fire that does occur. No later than sixty (60) days prior to the beginning of Commercial Operation the Certificate Holder shall submit the Plan to EFSEC for review and approval.

## **C. Post-Construction Avian Monitoring Plan**

No later than one hundred twenty (120) days prior to beginning Commercial Operation, the Certificate Holder shall submit to EFSEC for review and approval a Post-Construction Avian Monitoring Plan. The Post-Construction Avian Monitoring Plan shall be developed in consultation with the WDFW. The Avian Monitoring Plan shall be based upon the 2009 WDFW Wind Power Guidelines, although the Certificate Holder and WDFW may agree to depart from the Guidelines if circumstances warrant. The purpose of the plan shall be to quantify impacts to avian species and to assess the adequacy of mitigation measures implemented. Results shall be reported to EFSEC and the TAC. The monitoring plan shall include the following components:

1. The Certificate Holder shall implement an avian casualty/fatality reporting and handling system by Project personnel (operations and maintenance staff) for the life of the Project following a detailed written protocol developed for the Project and similar to that used by other wind projects in the region.
2. The Certificate Holder shall perform a minimum of one breeding season's raptor nest survey of the Project Area, including a 1 mile buffer, to locate and monitor active raptor nests potentially affected by construction and operation of the Project.
3. The Council will commission or review for approval a two-year monitoring study by a third-party consultant to evaluate impacts to avian species. This study will include, at a minimum, standardized casualty searches, searcher efficacy trials and scavenger removal trials.

4. The Post-Construction Avian Monitoring Plan for the Project will follow a detailed written protocol that will document the monitoring measures being conducted.
5. EFSEC shall reconvene the TAC if unanticipated circumstances arise during incidental monitoring.

#### **D. Post-Construction Bald Eagle Study Plan**

In consultation with the Counsel for the Environment (CFE) and WDFW, the Certificate Holder shall develop a Bald Eagle Study Plan to study the behavior of bald eagles during calving operations in the first two years of Project operation and submit the Plan to EFSEC for approval no later than 60 days prior to commencing Commercial Operation.

The Certificate Holder shall implement the Plan and present the results of the study to the TAC. The TAC will consider the study results and determine whether the calving operations in the Project Area present an unreasonable risk to bald eagles. If so, the TAC will develop recommendations regarding possible additional mitigation measures that may further reduce the risk to bald eagles. Mitigation measures that may be considered include, but are not limited to, modifying the operation of the wind turbines, modifying or moving the calving operations within the Project Area, or removing the calving operations from the Project Area. The TAC will submit its findings and recommendations for mitigation measures, if any, to EFSEC for EFSEC's consideration. EFSEC will have final authority to decide whether to require the implementation of additional mitigation measures addressing this issue.

In the event that a bald eagle is killed by a turbine during calving operations in the Project Area, the Certificate Holder will report the fatality to EFSEC, the TAC and the United States Fish and Wildlife Service within forty-eight (48) hours. In the TAC Rules of Procedure, the Certificate Holder will propose that, within thirty (30) days, the TAC evaluate the available information and consider whether there are practical additional measures that should be implemented to reduce the risk to bald eagles and report its findings and recommendations, if any, to EFSEC.

#### **E. Pre-Operation Bat Survey and Bat Monitoring Plan**

Prior to beginning commercial operation, the Certificate Holder, in consultation with WDFW, shall conduct a bat monitoring survey during the bat migration (late summer and early fall). The survey shall utilize current technology and methodology to document bat use of the site, including which if any species are at risk from site operation. Detectors shall be placed at an appropriate elevation to monitor migrating bats within the rotor sweep zone.

The Certificate Holder shall consult with the CFE and WDFW in developing the protocol for the survey. The Certificate Holder shall present the results of the survey to the TAC. If, based on the survey results, the TAC concludes that the Project presents a significant risk to bats that is substantially greater than the risk described in the Final SEIS; the TAC may recommend to EFSEC that additional mitigation measures be required.

The Certificate Holder shall develop a post-construction Bat Monitoring Plan in consultation with WDFW and submit the plan to EFSEC for approval no later than sixty (60) days prior to commencing Commercial Operation. The plan shall include two years of bat fatality monitoring.

## **ARTICLE VII: PROJECT OPERATION**

### **A. Water Discharge**

The Certificate Holder shall ensure that all stormwater control measures and discharges are consistent with the Operations SWPPP, required by Article VI.A.1. and the Ecology *Stormwater Management Manual for Eastern Washington, September 2004*.

Domestic sewage generated at the O&M facility shall be discharged to an on-site septic system.

### **B. Noise Emissions**

The Certificate Holder shall operate the Project in compliance with applicable Washington State Environmental Noise Levels, WAC 173-60.

The Certificate Holder shall submit a Complaint-Based Noise Monitoring and Response Plan to EFSEC for review and approval prior to operation, to address low frequency noise and aeroacoustic noise.

### **C. Fugitive Dust Emissions**

The Certificate Holder shall continue to implement dust abatement measures as necessary.

### **D. Habitat, Vegetation and Wildlife BMPs**

During Project operations, the Certificate Holder shall implement appropriate operational BMPs to minimize impacts to plants and animals. In addition to those mitigation measures presented in the Revised Application, these include the following:

1. Implementation of the Operations Fire Control Plan developed pursuant to Article VI.B.3, in coordination with local fire districts, to avoid accidental wildfires and respond effectively to any fire that might occur.
2. Implementation of the Certificate Holder's agreement with a fire services provider such as Kittitas Valley Fire and Rescue to provide fire protection services during the construction and operation of the Project, and in conjunction with DNR, implement protection services on DNR land leased by the Certificate Holder.
3. Operational BMPs to minimize storm water runoff and soil erosion.
4. Implementation of the noxious weed control program, in coordination with WDFW, to control the spread and prevent the introduction of noxious weeds.
5. Cattle ranchers who have leased property for the Project may continue conducting calving operations in fenced areas within the Project Area. The Certificate Holder will not site any turbine within the fenced calving areas or within a buffer area equal to the length of a turbine blade plus one hundred feet from the fence line. The Certificate Holder shall not permit calving operations to take place on the portion of the Project Area



that will be owned by the Certificate Holder or an affiliate of the Certificate Holder. Cattle ranchers who have leased property for the Project may continue conducting calving operations in fenced areas within the Project Area. During calving operations, the Certificate Holder will not operate any turbine within the fenced calving areas or within a buffer area equal to the length of a turbine blade plus one hundred feet from the fence line of the calving operations.

6. The Certificate Holder shall promptly remove carcasses and livestock afterbirths from the Project Area during operation of the Project. The Certificate Holder shall consult with WDFW in the development and implementation of this removal program.
7. The Certificate Holder shall avoid the use of rodenticides to control rodent burrowing around wind turbine towers as much as possible. In the event that the Certificate Holder believes the use of rodenticides is necessary, the Certificate Holder shall consult with WDFW to develop a plan for appropriate application and use, and submit the plan to EFSEC for approval prior to implementation.
8. The Certificate Holder shall cooperate with WDFW in its efforts to manage deer and elk in the Project vicinity. The Certificate Holder shall not prohibit hunting in the Project Area, except when the Certificate Holder determines that hunting would place personnel, property or equipment in jeopardy.

**E. Safety and Security**

1. Personnel Safety. The safety of operating personnel is governed by regulations promulgated under the Federal Occupational Safety and Health Act and the Washington Industrial Safety and Health Act. The Certificate Holder shall comply with applicable federal and state safety laws and regulations (including regulations promulgated under the Federal Occupational Safety and Health Act and the Washington Industrial Safety and Health Act) as well as local and industrial codes and standards (such as the Uniform Fire Code).
2. Operations Phase Health and Safety Plan. No later than sixty (60) days after the beginning of Commercial Operation, the Certificate Holder shall develop and, after EFSEC approval, implement an Operations Phase Health and Safety Plan. The Certificate Holder shall consult with local and state organizations providing emergency response services during the development of the plan to ensure timely response in the event of an emergency.
3. Operations Phase Site Security Plan. The Certificate Holder shall develop and implement an Operations Phase Site Security Plan. The Certificate Holder shall submit the Plan to EFSEC for review and approval no later than sixty (60) days before the beginning of Commercial Operation. The Plan shall include, but shall not be limited to, the following elements: controlling access to the site by any visitors, contractors, vendors, or suppliers; security lighting of the operation and any visitor's center and maintenance facility buildings; fencing of the substation(s); and securing access to wind turbines, pad transformers, pad-mounted switch panels and other outdoor facilities. A copy of the final

Security Plan shall be provided to EFSEC and other agencies involved in emergency response.

4. Visitors Safety. The Certificate Holder shall require visitors to observe the safety plans and shall provide them with safety equipment where and when appropriate.

#### **F. Dangerous or Hazardous Materials and General Waste Management**

The Certificate Holder shall handle, treat, store, and dispose of all dangerous or hazardous materials in accordance with Washington state standards for hazardous and dangerous wastes, WAC 463-40 and WAC 173-303. Following any abnormal seismic activity, volcanic eruption, severe weather activity, flooding, vandalism or terrorist attacks the Certificate Holder shall inspect areas where hazardous materials are stored to verify that containment systems are operating as designed.

The certificate holder shall include in its waste management plan for general waste, a commitment to recycle project components when recycling opportunities are reasonably available for wastes generated during operations and maintenance.

#### **G. Decommissioning of Individual Wind Turbine Generators**

During the lifetime of the project, the Certificate Holder may choose, or be otherwise required to, decommission individual WTGs without the entire project being terminated pursuant to Article VIII of this agreement.

In accordance with Article III, Section K, paragraph 5, of this agreement, individual WTGs found to cause unanticipated significant adverse impact(s) on the environment may have further operating conditions imposed by EFSEC, including permanent shutdown, decommissioning, and removal from the Project Area. In addition, EFSEC retains the authority to order removal of any individual WTG that remains inoperable or is not used for more than six months.

The Certificate Holder will disassemble and remove from the Project Area the WTG being decommissioned within one year of the last date the WTG produced power for sale.

Decommissioning of the WTG does not require removal of the WTG foundation.

The Certificate Holder shall notify EFSEC of its intent to decommission the turbine, and shall provide a schedule for decommissioning activities.

#### **H. Shadow Flicker Mitigation Measures**

The Certificate Holder will attempt to avoid, minimize and mitigate shadow flicker at nearby residences. Shadow flicker can usually be addressed by planting trees, shading windows or other mitigation measures. As a last resort the control system of the wind turbine could be programmed to stop the blades during the brief periods when conditions result in perceptible shadow flicker.

The Certificate Holder shall develop a mitigation and complaint monitoring plan to respond to any residential complaints regarding shadow flicker. The mitigation plan will include avoidance, minimization, and mitigation of shadow flicker through turbine shut down, planting trees, shading windows, or other mitigation measures. The complaint monitoring plan will be reviewed and approved by EFSEC prior to operation and, at a minimum, will include:

- Notification of EFSEC within five (5) business days of receipt of any request to mitigate shadow flicker.
- Notification of EFSEC within two (2) weeks of original receipt, of the actions taken in response, and
- EFSEC shall retain authority to review and override the Certificate Holder's denial(s) of any requests or choice of mitigation in this regard.

## **ARTICLE VIII: PROJECT TERMINATION, DECOMMISSIONING AND SITE RESTORATION**

### **A. Detailed Site Restoration Plan**

The Certificate Holder shall submit a Detailed Site Restoration Plan to EFSEC for approval within ninety (90) days from the time the Council is notified of the termination of the Project. The Detailed Site Restoration Plan will provide for restoration of the Site within the timeframe specified in Article VIII.C., taking into account the Initial Site Restoration Plan and the anticipated future use of the Site. The Detailed Site Restoration Plan shall address the elements required to be addressed by WAC 463-72-050 (in effect at the date of submittal of the Application), and the requirements of the Council-approved Initial Site Restoration Plan pursuant to Article IV.D. of this Agreement. The Certificate Holder shall not begin Site Restoration activities without prior approval from the Council. The certificate holder shall include in its decommissioning plan a commitment to recycle project components when recycling opportunities are reasonably available.

### **B. Project Termination**

1. Termination of this Site Certification Agreement, except pursuant to its own terms, is an amendment of this Agreement.
2. The Certificate Holder shall notify EFSEC of its intent to terminate the Project.
3. The Certificate Holder shall terminate the Project if, at the written request of the Council, the Certificate Holder demonstrates that the energy generated by the Project for the past twelve (12) month period is less than 10% of the Historical Energy Production (as defined below) and the following exemptions do not apply: the twelve (12) month reduced energy output period described above is the result of (i) a repair, restoration or improvement to an integral part of the Project that affects the generation of electricity that is being diligently pursued by the Certificate Holder, or (ii) a force majeure event,

including, but not limited to, an extended low wind period. Historical Energy Production means the sum of all energy generated by the Project divided by the number of months since the beginning of Commercial Operation multiplied by twelve, starting twelve months after Commercial Operation commences.

4. The Council may initiate proceedings leading to SCA amendment pursuant to WAC 463-66-090.

**C. Decommissioning Timing and Scope**

1. Timing. The Certificate Holder shall commence decommissioning of the Project within twelve (12) months following the termination described in Article VIII.B. above.

The period to perform the decommissioning may be extended if there is a delay caused by conditions beyond the control of the Certificate Holder including, but not limited to, inclement weather conditions, equipment failure, wildlife considerations or the availability of cranes or equipment to support decommissioning.

2. Scope. Decommissioning the Project shall involve removal of the Turbines; removal of foundations to a depth of four (4) feet below grade; regrading the areas around the Project Facilities; removal of Project access roads and overhead cables (except for any roads and/or power cables that Project Area landowners wish to retain); and final reseedling of disturbed lands (all of which shall comprise “Decommissioning”). Decommissioning shall occur in the order of removing the Turbines as the first priority and performing the remaining elements immediately thereafter.
3. Monthly Reports. If requested by EFSEC, the Certificate Holder will provide monthly status reports until this decommissioning work is completed.

**D. Decommissioning Funding and Surety**

1. Except as provided in Art. VIII.D.3 below, the Certificate Holder or any Transferee, as the case may be, shall provide financial assurance sufficient for Decommissioning costs in the form of a performance bond, guaranty or a letter of credit to ensure the availability of funds for such costs (the “Decommissioning Security”) to EFSEC. The Certificate Holder shall include a detailed engineering estimate of the cost of decommissioning in its Initial Site Restoration Plan submitted to EFSEC.

The Initial Site Restoration Plan shall provide that the Decommissioning costs shall be reevaluated annually during construction of the Project and once every five (5) years thereafter from the date of Substantial Completion to ensure sufficient funds for Decommissioning. If deemed appropriate at that time, the amount of decommissioning funds may be adjusted by EFSEC accordingly.

2. The duty to provide such security shall commence thirty (30) days prior to the beginning of Construction of the Project, and shall be renewed on an annual basis. On or before the date on which financial security must be established, the Certificate Holder shall provide

EFSEC with one of the following security devices that is reasonably acceptable to EFSEC:

*Performance Bond.* The Certificate Holder or any Transferee, as the case may be, shall provide financial security for the performance of its decommissioning obligations through a Performance Bond issued by a surety registered with the Washington State Insurance Commissioner and which is, at the time of delivery of the bond, on the authorized insurance provider list published by the Insurance Commissioner. The Performance Bond shall be in an amount equal to the Decommissioning costs. The Performance Bond shall be for a term of one (1) year, shall be continuously renewed, extended, or replaced so that it remains in effect for the remaining term of this Agreement or until the secured decommissioning obligations are satisfied, whichever occurs sooner. In order to ensure continuous renewal of the Performance Bond with no lapse, each Performance Bond shall be required to be extended or replaced at least one month in advance of its expiration date. Failure to secure such renewal or extension shall constitute a default of the Applicant under this Agreement and under the Bond provisions; or

*Letter of Credit.* The Certificate Holder or any Transferee, as the case may be, shall provide financial security for the performance of its decommissioning obligations through a letter of credit issued by a bank whose long-term debt is rated "A" or better by a Rating Service. The letter of credit shall be in an amount equal to the Decommissioning costs. The letter of credit shall be for a term of 1 year and shall be continuously renewed, extended, or replaced so that it remains in effect for the remaining term of this Development Agreement or until the secured decommissioning obligations are satisfied, whichever occurs sooner. The State of Washington, by and through EFSEC or its successor or designees, shall be authorized under the letter of credit to make one or more sight drawings thereon upon certification to the issuing bank of the Applicant's or Transferee's (as the case may be) failure to perform its decommissioning obligations when due; or Guaranty. Applicant or any Transferee, as the case may be, shall provide financial security for the performance of its decommissioning obligations by delivering a payment guaranty guaranteeing its Decommissioning obligations hereunder from an entity (i) having, at the time of delivery of such guaranty, a senior unsecured long term debt rating ("Credit Rating") of (1) if such entity has a Credit Rating from Standard and Poor's but not from Moody's, BBB- or better from Standard and Poor's or (2) if such entity has a Credit Rating from Moody's but not from Standard and Poor's, Baa3 or better from Moody's or (3) if such entity has a Credit Rating from both Standard and Poor's and Moody's, BBB- or better from Standard and Poor's and Baa3 or better from Moody's; or (ii) having audited financial statements, prepared by a nationally-recognized firm of independent auditors and indicating a financial net worth of at least \$75,000,000.

3. If Project ownership is transferred after the effective date of this Agreement pursuant to applicable EFSEC laws and regulations, EFSEC has the right to require, consider and approve other financial instruments and/or assurances that would provide for the

Certificate Holder's performance of its Decommissioning obligations pursuant to Article VIII.C. and VIII.D. of this Amended Site Certification Agreement.

**ARTICLE IX: SITE CERTIFICATION AGREEMENT - SIGNATURES**

## **Attachment 1**

(Placeholder)

Project Legal Description Pending Survey



## **ATTACHMENT I**

### **Property 1:**

Section 16, Fractional Section 18 and the West Half of Section 22, all in Township 19 North, Range 18 East, W.M., in the County of Kittitas, State of Washington

### **Property 2:**

The Southwest Quarter of Section 9, Township 19 North, Range 18 East, W.M., in the County of Kittitas, State of Washington.

### **Property 3:**

The North Half of Section 27, Township 19 North, Range 18 East, W.M., in the County of Kittitas, State of Washington, EXCEPT (1) The Southeast Quarter of the Northeast Quarter; (2) Tracts of land conveyed to the Kittitas Reclamation District by deed dated December 16, 1927, recorded in Book 46 of Deeds, page 106, and by deed dated March 4, 1929, recorded in Book 47 of Deeds, page 255 and by deed dated March 5, 1929, and recorded in Book 47 of Deeds, page 256; (3) Parcels 1 and 2 of that certain Survey recorded August 6, 1993, in Book 19 of Surveys, pages 120 and 121, under Auditor's File No. 562115, being a portion of the Northeast Quarter of Section 27, Township 19 North, Range 18 East, W.M., in the County of Kittitas, State of Washington; (4) Right of way for Robbins Road (also shown of record as Evans Road); and (5) Right of way for Reecer Creek Road.

### **Property 4:**

The Northeast Quarter of Section 25, Township 19 North, Range 17 East, W.M., in the County of Kittitas, State of Washington, EXCEPT a strip of land 135 feet in width conveyed to the Kittitas Reclamation District by deed dated December 9, 1927, recorded December 9, 1927, in Book 46 of Deeds, Page 70, under Auditor's File No. 88576.

AND

The North Half, the North Half of the Northwest Quarter of the Southwest Quarter, and the North Half of the North Half of the South Half of the Northwest Quarter of the Southwest Quarter of Section 30 and all of Section 19, all in Township 19 North, Range 18 East, W.M., in the County of Kittitas, State of Washington.

### **Property 5:**

Section 21; the East Half of Section 20; and the Southeast Quarter of Section 17, all in Township 19 North, Range 18 East, W.M., in the County of Kittitas, State of Washington.

AND

That part of the South Half of the Northeast Quarter of Section 17, Township 19 North, Range 18 East, W.M., in the County of Kittitas, State of Washington, which is described as follows:

A tract of land bounded by a line beginning at a point on the East boundary line of the right of way of the county road 30 feet East and 16.5 feet North of the Southwest corner of said Northeast Quarter of said section and running thence North 89°15' East parallel with the South line of said quarter section 1714 feet; thence North 61°33' East 398.2 feet; thence South 84°15' East 188 feet; thence South 23°15' East 177 feet to a point on the South boundary line of said section; thence South 89°15' West along said South boundary line of said section 2329.5 feet; and thence North 16.5 feet to the point of beginning;

EXCEPT a strip of land 12 feet wide lying South of a line described as follows:

Beginning at a point 30 feet East and 16.5 feet North of the Southwest corner of said section and running thence North 89°15' East 1714 feet; thence North 61°33' East 398.2 feet; thence South 84°15' East 188 feet; and thence South 23°15' East 177 feet to a point on the South boundary line of said section.

**Property 6:**

The Southwest Quarter of Section 17, Township 19 North, Range 18 East, W.M., in the County of Kittitas, State of Washington, EXCEPT (1) the North one rod of the Northeast Quarter of the Southwest Quarter of said section; (2) the North 5 rods of the Northwest Quarter of the Southwest Quarter of said section; and (3) the right of way of Reecer Creek Road along the East line, thereof.

AND

The West Half of Section 20, Township 19 North, Range 18 East, W.M., in the County of Kittitas, State of Washington, EXCEPT right of way of Reecer Creek Road along the East boundary thereof.

AND

All of the North Half and that portion of the South Half of Section 29, Township 19 North, Range 18 East, W.M., in the County of Kittitas, State of Washington, lying North of and above the North line of the North Branch Canal of the Kittitas Reclamation District, EXCEPT the right of way of Reecer Creek Road along the North line thereof and right of way of Lower Green Canyon Road along the East line thereof.

## **Attachment 2**

Council Order No. 843, Order Recommending Approval of Site Certification on Condition  
entered November 16, 2009

BEFORE THE STATE OF WASHINGTON  
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of:

APPLICATION NO. 2006-02

DESERT CLAIM WIND POWER LLC

DESERT CLAIM WIND POWER PROJECT

**COUNCIL ORDER No. 843**

**Order Recommending Approval of Site  
Certification Agreement**

**Executive Summary**

In this Order, the Energy Facility Site Evaluation Council (EFSEC or Council) recommends that the Governor, on behalf of the State of Washington, approve a proposed site in Kittitas County near Ellensburg, Washington, for the construction and operation of the Desert Claim Wind Power Project.

EFSEC is the state agency charged with making a recommendation to the Governor as to whether a new major energy facility should be sited in the state of Washington.<sup>1</sup>

This matter involves an Application for certification of a proposed site in rural Kittitas County, approximately eight miles northwest of Ellensburg, Washington, for the construction and operation of the Desert Claim Wind Power Project (the Project), a wind-powered energy production facility consisting of a series of turbines as well as associated electric collector and transmission lines and other supporting infrastructure.

Approximately 5,200 acres of undeveloped land are proposed for use with the Project. About 86 acres would be permanently developed for placement of the turbine towers, access roads, substations, underground and overhead transmission lines, and an operations and maintenance facility, and about 317 acres would be disturbed temporarily during construction.<sup>2</sup> Desert Claim Wind Power LLC, (Desert Claim or Applicant) seeks a Site Certification Agreement (SCA) with the State of Washington to construct and operate no more than 95 wind turbines that would generate up to 190 MW of wind power. The Project would also construct and use an interconnection transmission line 100 to 200 feet in length, to allow interconnection with the Bonneville Power Administration (BPA) or Puget Sound Energy transmission systems.

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<sup>1</sup> RCW (Revised Code of Washington) 80.50

<sup>2</sup> Application, Table 3, P. 15

The Council has reviewed Desert Claim's Revised Application for Site Certification (Application), No. 2006-02; it has conducted public meetings and adjudicative hearings; and by this Order it recommends approval of the Application to the Governor of the state of Washington.

The Applicant has entered into a stipulation and settlement agreement with Counsel for the Environment, a party to the proceeding. It has also entered an agreement with the Washington Department of Fish and Wildlife, or WDFW<sup>3</sup> defining and limiting the Project's construction and operation with regard to matters of interest to that department. Applicant accepts the offset and mitigation commitments it makes in those agreements in addition to the commitments it makes in the Application, and those offset and mitigation measures provided for in the hearing evidence and in the environmental impact statement. Applicant asks that the provisions be incorporated into the SCA. The Council has reviewed, and it approves, each of these agreements and measures.

Operation of the planned Project consistent with the protections provided in the Application and the Final Supplemental Environmental Impact Statement (FSEIS), the commitments made in the Agreements and within the terms of the proposed SCA is therefore expected to produce minimal adverse impacts on the environment, the ecology of the land and its wildlife, and the ecology of the state waters and their aquatic life.

The Council has carefully considered the state's need for energy at reasonable cost<sup>4</sup> and the need to minimize environmental impacts. The Council determines that this facility will provide the region with significant energy benefits while not resulting in unmitigated, significant adverse environmental impacts. Thus, the proposed Project meets the requirements of applicable law and is consistent with the policy and intent of RCW 80.50.

The Council therefore recommends that the Governor APPROVE the siting of this Project, as set out in this Order and the accompanying draft Site Certification Agreement.

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<sup>3</sup> The WDFW is not a party to the proceeding, although it provides one member to the Council and thus is entitled to party status upon request. Washington Administrative Code (WAC) 463-30-050.

<sup>4</sup> See, RCW 80.50.010.

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## 1. INTRODUCTION

### A. Procedural Setting

1. **Application:** This is an application for a Site Certification Agreement allowing the Applicant, Desert Claim Wind Power LLC, to construct and operate a commercial wind power generation facility in Kittitas County, Washington.

2. **Hearings:** This matter was heard before the Washington State Energy Facility Site Evaluation Council in formal adjudicative sessions on July 13, 21 and 22, 2009, in Ellensburg, Seattle and Olympia, Washington, before Council Members James O. Luce, Council Chair; Richard Fryhling, Department of Commerce<sup>5</sup>; Hedia Adelsman, Department of Ecology; Mary McDonald, Department of Natural Resources; Jeff Tayer, Washington Department of Fish and Wildlife; Richard Byers, Washington Utilities and Transportation Commission; and Ian Elliot, Kittitas County. The Council retained C. Robert Wallis, Administrative Law Judge, for purposes of this proceeding.

The parties were represented as follows:

Applicant, Desert Claim Power Project LLC: Karen McGaffey and Kelley Moser, Attorneys at Law, Perkins Coie LLP, Seattle

Counsel for the Environment: Bruce Marvin, Assistant Attorney General, Office of the Attorney General, Olympia, Washington.

Kittitas County: Neil Caulkins, Deputy Prosecuting Attorney, Kittitas County Prosecuting Attorney's Office, Ellensburg, Washington.

Washington State Department of Commerce: Alice Blado, Asst. Attorney General, and Tony Usibelli, Assistant Director, Energy Policy Division, Olympia, Washington.

Economic Development Group of Kittitas County: Ron Cridlebaugh, Executive Director, Ellensburg, Washington.

3. **Decision:** In this Order, the Council recommends to the Governor of the State of Washington that the Application be approved; consistent with the terms of the Order, and that the Governor and the Applicant enter into a Site Certification Agreement as proposed in Attachment I to this Order.

### B. The Applicant and the Project

The Applicant is Desert Claim Wind Power, LLC (Desert Claim or Applicant). It is a

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<sup>5</sup> The Department of Community, Trade and Economic Development was renamed as the Department of Commerce in the 2009 legislative session.



wholly owned subsidiary of enXco, an affiliate of the French company EdF Energies Nouvelles. The Applicant is a Washington State limited liability company, created for the sole purpose of developing, permitting, financing, constructing, owning and operating the Desert Claim Wind Power Project.

The Project was initially proposed in 2001 as a 180 MW, 120-turbine project, and application was made to Kittitas County. The Kittitas County Board of County Commissioners denied the proposal. Applicant appealed the decision to Kittitas County Superior Court, which upheld the County's decision. Desert Claim filed its EFSEC application in 2006 and submitted its revised application in February, 2009. Among the modifications made to the Project proposal since it was denied by Kittitas County are the following:

- The Project area is consolidated into one parcel, rather than the four separate parcels previously proposed.
- The number of turbines is reduced from 120 to 95, and a more powerful, 2 MW generator model is proposed to generate 190 MW instead of the initially-proposed 180 MW.
- The turbine placement configuration is modified to reduce to seven the number of non-participating residences within 2,500 feet of a turbine and all are placed more than 1,640 feet<sup>6</sup> from residences owned by persons who are not participating in the Project by selling or leasing land to the Applicant.
- Shadow flicker has been reduced or avoided for adjacent, non-participating residences, and if it occurs, Applicant agrees to stop the offending turbines under flicker conditions at the request of the affected landowner.
- Daytime strobe lighting has been eliminated and nighttime red lighting reduced to fewer than half the turbines.

The Project would be constructed in central Washington's Kittitas Valley on valley land eight miles northwest of Ellensburg that is used principally for cattle grazing and feed crop production. Elements of the Project include access roads, foundations, underground and overhead electrical system collection lines, a grid interconnection substation, a step-up substation for interconnection with the power grid, meteorological stations, an operations and maintenance (O&M) facility, and associated supporting infrastructure such as safety and control systems and an internal electrical system. The entire Project area encompasses approximately 5,200 acres.

Desert Claim proposes turbines that are located on the valley floor rather than located

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<sup>6</sup> The distance 1,640 feet is four times the "tip height," i.e., the height of the turbine tower plus a blade at a vertical position.

along high ridgelines<sup>7</sup>, noting that it is thus less noticeable. The Project area is currently zoned as either Agriculture-20 or Forest and Range, and is designated as rural in the Kittitas County comprehensive plan. The majority (3,671 acres) of the Project site, and the proposed interconnection points, lie on privately owned land. The remainder of the Project site occupies 1,529 acres of land for which the Applicant has secured a long term-lease from the Washington Department of Natural Resources (DNR).

The Project will use 3-bladed wind turbines on tubular steel towers to generate electricity. Turbines will be 2 MW (generator nameplate capacity). Only one type and size of turbine will be used for the entire Project.

All construction activities will occur within the areas identified in the Application. The precise location of the facilities may change during final engineering and micro-siting to maintain adequate spacing between turbines for optimized energy efficiency and to compensate for local topographical and wind conditions and to minimize impacts on nearby nonparticipating residences. Final locations will comply with conditions set forth in this order and the Site Certification Agreement, including safety and visual setbacks, noise level limitations, and requirements related to sensitive environments and cultural resources. Final turbine construction placement will maximize turbine setback from non-participating residences.

Water required for construction of the Project will be purchased off-site from authorized sources, and transported to the Project area by truck. Sanitary waste water produced during construction will be disposed of off-site at facilities authorized to accept such wastes. Sanitary waste water produced during Project operation will be discharged to and treated in an on-site sanitary septic system constructed in accordance with Kittitas County requirements. Water needs during operation will be supplied by an on-site permit-exempt well producing less than 5,000 gallons per day, with sanitary wastes disposed of in an on-site approved septic system. The Project will not generate process wastewater during operation. Stormwater discharges generated during construction and operation of the Project will be managed in accordance with Washington State stormwater management practices and guidelines.

The Applicant agrees to mitigate all permanent and temporary negative impacts on vegetation caused by the proposed Project, in accordance with the guidelines outlined in the Washington Department of Fish and Wildlife (WDFW) Wind Power Guidelines for siting and mitigating wind power projects east of the Cascades.

Electricity generated by the Project will be transmitted to either the Puget Sound Energy (PSE) or Bonneville Power Administration (BPA) electrical transmission systems. Both transmission lines run through the Project area. A 230 kV transmission feeder line will be constructed to allow interconnection with the transmission system chosen to transport the power to its purchaser. The maximum length of the line will be 200 feet.

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<sup>7</sup> The Wild Horse and Kittitas Valley wind projects approved by the Governor are located predominately on ridge lines.

Power from the Project turbines will be fed to a step-up substation to match the voltage of the transmission lines. The step-up substation will connect to the feeder line, which will connect to the utility's interconnect substation.

### **C. The Council and the EFSEC Review Process**

EFSEC was created to advise the Governor in deciding which proposed locations are appropriate for the siting of large energy facilities.<sup>8</sup> It is the policy of the state of Washington to recognize the pressing need for energy facilities and to ensure, through available and reasonable methods, that the location and operation of such facilities will produce minimal adverse effects on the environment, ecology of the land and its wildlife, and the ecology of state waters and their aquatic life.<sup>9</sup>

The Council has a comprehensive mandate to balance the State's need for abundant energy at a reasonable cost with the broad interests of the public. The Council is also charged with protecting the health of citizens and recommending site approval for power facilities where minimal adverse effects on the environment can be achieved.<sup>10</sup>

The Council conducted its review of this Application in an adjudicative proceeding pursuant to RCW 34.05, as required by RCW 80.50.090(3) and WAC 463-30.

Desert Claim moved for a determination that it had satisfied WAC 463-28-030(1) by making reasonable efforts to cure the inconsistency with local land use requirements and, therefore, Desert Claim could proceed to submit a request for preemption. The Council heard argument on the motion on April 10, 2007, and requested supplemental briefing, which Desert Claim submitted.

On May 8, 2007, the Council granted Desert Claim's motion and ruled that Desert Claim was not required to file another application with Kittitas County under Kittitas County Code chapter 17.61A. See Council Order No. 830 at page 7 (May 8, 2007). The Council urged the County and Desert Claim to work together to resolve their issues.<sup>11</sup>

Desert Claim acquired rights to additional property, which allowed reconfiguration of the Project and additional mitigation measures. It filed a Revised Application on February 6, 2009, which is now the basis for this proceeding.

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<sup>8</sup> RCW 80.50.

<sup>9</sup> RCW 80.50.010.

<sup>10</sup> RCW 80.50.010; WAC 463-47-110.

<sup>11</sup> At the conclusion of the adjudicative hearings, the County acknowledged that it had no remaining issues with the Applicant.

#### **D. Compliance with the State Environmental Policy Act**

The Council is charged with the responsibility to review proposed projects under the State Environmental Policy Act (SEPA), RCW 43.21C. That law provides for the consideration of probable adverse environmental impacts and possible mitigation measures. WAC 463-47-140 Pursuant to SEPA, EFSEC is the lead agency for environmental review of projects under the jurisdiction of RCW 80.50; the Council Manager is the SEPA responsible official. WAC 463-47-051

In this proceeding, the Council complied with SEPA requirements by taking several steps. It adopted the Final Environmental Impact Statements (EIS) that Kittitas County previously adopted for the Project. The Council issued a Determination of Significance and request for comment on the scope of a Supplemental EIS and it conducted a scoping hearing. The Council issued a Draft Supplemental EIS for public comment, and conducted a public hearing on the DSEIS. The Council also accepted written comments on the DSEIS documents, and adopted and issued a Final SEIS.

#### **E. Adjudicative Proceeding**

Applicant filed its Revised Application on February 6, 2009. On March 27, 2009, the Council issued its Notice of Intent to Hold Adjudicative Proceeding, Notice of Opportunity and Deadline to File Petitions for Intervention, and Notice of Prehearing Conference.

Statutory parties to the EFSEC adjudicative hearings include the Applicant and Counsel for the Environment. The Washington State Department of Community, Trade and Economic Development (CTED, now the Department of Commerce ["Commerce" in this order]) filed a Notice of Intervention. Kittitas County also timely sought party status. Commerce and Kittitas County, as Council members for this proceeding are entitled to intervene under Council rule<sup>12</sup>. The Council also granted party status to the Economic Development Group of Kittitas County (EDG).

The Council conducted a prehearing conference pursuant to proper notice on April 23, 2009. The Council entered Prehearing Orders Numbers 1 and 2 (Council Orders Nos. 838 and 840), allowing and rejecting requests to intervene and establishing a schedule for the hearings.

On June 23, 2009, the Applicant entered into a Stipulation and Settlement Agreement with Counsel for the Environment. On July 21, 2009, the Applicant entered into an Agreement with the Washington State Department of Fish and Wildlife (WDFW),<sup>13</sup> and it stipulated on the record on July 22, 2009 that it would comply with the terms of that agreement. The Council reviewed the stipulation with CFE and the agreement with WDFW at a post-hearing session on

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<sup>12</sup> WAC 463-30-050.

<sup>13</sup> The WDFW did not submit a formal notice of participation in this matter and thus is not a party, although it had the right to participate under WAC 463-30-050.

July 22, 2009, at Olympia, Washington.

The Council held an adjudicative evidentiary hearing session regarding Desert Claim's Application on July 13, 2009, in Ellensburg, Washington. On the evening of the same day, the Council held a hearing session in Ellensburg to receive comments from members of the public at which 19 members of the public testified. On July 21, the Council convened a hearing session in Seattle, Washington, to receive public testimony at which 13 members of the public testified. The Council also received 30 written comments regarding the Project from members of the public, collectively received in the record as Exhibit No. 9. On July 22, 2009, by notice to the parties, a further session was convened in Olympia, Washington for the purpose of inquiring into the Applicant's stipulation and settlement with Counsel for the Environment and its Agreement with the Department of Fish and Wildlife.<sup>14</sup> The Applicant and Counsel for the Environment appeared, and the Applicant offered the testimony of its witness, Mr. Steeb, in support of the terms of the Agreements.

After the hearings, the Applicant filed a post-hearing brief and Kittitas County filed a document expressly stating that it considered its issues with the Applicant to be resolved. Counsel for the Environment submitted comments relating to inclusion of Stipulation and Agreement provisions into Applicant's draft Site Certification Agreement. No other parties made submissions.

#### **F. Land Use Consistency**

The Council is required to hold a formal public adjudicative hearing to determine whether a proposed Project's use of a site is consistent with local or regional land use plans as well as zoning ordinances in effect at the time the Application was submitted to the Council.<sup>15</sup> A land use consistency hearing was conducted on January 30, 2007, in Ellensburg, Washington. Both Desert Claim and the County agreed that Desert Claim had not obtained the approvals required by the Kittitas County Code. On May 8, 2007, following briefing and argument, the Council granted Desert Claim's motion and determined that Applicant was not required to file another application with the County.

Desert Claim filed an application with Kittitas County in January 2003 seeking the approvals necessary under the County Code to construct and operate a 120-turbine, 180 MW wind project. Desert Claim made numerous changes to the project and incorporated mitigation measures to address concerns raised during that process. The Board of County Commissioners denied Desert Claim's application.<sup>16</sup>

The Kittitas County Superior Court rejected Desert Claim's appeal and upheld the county's decision. Desert Claim then considered additional changes to address concerns raised

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<sup>14</sup> See, WAC 463-30-253, relating to presentations of settlement agreements.

<sup>15</sup> RCW 80.50.030(2), WAC 463-14-030(2).

<sup>16</sup> Ex. 11.16.

during the County process and obtained a lease on neighboring WDNR land so that it could consolidate the turbines in a more compact area. Desert Claim submitted its Application for Site Certification to EFSEC on November 6, 2006, proposing a 95-turbine, 190 MW project to be located in the same area as the original proposal. The EFSEC proposal had fewer turbines, fewer neighboring residences, and greater setbacks than the original proposal. It also avoided impacts to wetlands, complied with state noise regulations, and included commitments to avoid shadow flicker at neighboring residences.

The Applicant reports that it made efforts to communicate with Kittitas County about the changes to the Project with a view toward achieving agreement.<sup>17</sup> The County Commissioners, however, indicated that they had "no interest" in "making a decision about the project" outside of the siting process outlined by the Kittitas County Code.<sup>18</sup>

EFSEC held a Land Use Consistency Hearing in Ellensburg on January 30, 2007. During the hearing, both Desert Claim and Kittitas County agreed that Desert Claim had not obtained the approvals required by Kittitas County Code chapter 17.61A. The Council, therefore, found that the Project was not consistent with the Kittitas County land use requirements in existence at the time Desert Claim filed its application with the Council.<sup>19</sup> Desert Claim then moved for a determination that it had satisfied the requirement of WAC 463-28-030(1) that it make reasonable efforts to cure the inconsistency and, therefore, that Desert Claim could proceed to submit a request for preemption. The Council heard argument on the motion on April 10, 2007 and received additional briefing.

The Council granted Desert Claim's motion on May 8, 2007, ruling that Desert Claim is not required to file another application with Kittitas County under Kittitas County Code chapter 17.61A.<sup>20</sup> Desert Claim's evidence indicates that it continued to make efforts to resolve differences with the County, but that the Board of County Commissioners declined to meet with Desert Claim.<sup>21</sup>

Applicant now urges us to preempt County regulations under the authority of RCW 80.50.110(2) and RCW 80.50.040(1). Desert Claim then filed a written Request for Preemption and a supporting declaration. Under rules applying to this application,<sup>22</sup> the Council must consider, in an adjudicative hearing, whether to preempt inconsistent local regulation. WAC 463-28. The Council has considered that issue in this adjudicative proceeding.

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<sup>17</sup> Ex. 11.19

<sup>18</sup> Ex. 11.17

<sup>19</sup> Council Order No. 825

<sup>20</sup> Council Order No. 830, at p. 7

<sup>21</sup> Exhibit 11, p.38. ll. 37-38.

<sup>22</sup> After this application was filed, the Council repealed and amended some of the rules relating to preemption. This application is governed by the rules in effect at the time it was filed.

At the conclusion of the proceeding, the County indicated that it no longer opposed the application.

Desert Claim has satisfied the legal requirements for preemption; therefore, we grant Desert Claim's request.

#### **G. Public Testimony and Comment**

In addition to evidentiary hearings, the Council is required to hold adjudicative hearing sessions in which any person may present information and comment about a proposed project and may be heard in support of, or in opposition to, an Application.<sup>23</sup> The Council provided an opportunity for public witnesses to testify during the hearing on the Draft EIS, the hearings on land use consistency, and the public adjudicative hearings on the proposed Project.

EFSEC provided public notices of the following events: receipt of the Application; public meetings; land use hearing; the Council's intent to hold adjudicative proceedings; the opportunity to file petitions for intervention and filing deadlines for such petitions; adjudicative hearings; Determination of Significance and request for comments on scope of the Environmental Impact Statement (EIS); Draft EIS comment period and public comment hearings; notice of availability of a Final EIS. The Council duly published all required notices of these proceedings. The Council did receive comment from members of the public at each of these procedural stages during the hearings or portions of hearings set specifically to receive public comment.

The Council received oral comments on the original application on December 13, 2006, in Ellensburg, Washington; and at a Land Use hearing on January 30, 2007. Oral comments were also received on the Draft SEIS on April 23, 2009, in Ellensburg, Washington; and at public hearings held July 13, 2009 and July 21, 2009 in Ellensburg and Seattle, Washington respectively.

The Council received 41 comment letters from members of the public regarding the Application, 40 written submissions regarding land use consistency, and 63 letters regarding the Draft SEIS.

The Council considered the oral and written comments submitted by the public as indications of topics and views significant to the public. The Council appreciates the witnesses' efforts in presenting testimony and written comments.

#### **H. Council Action on Recommendation to Governor**

In accordance with the requirements of RCW 34.05 and RCW 80.50, on November 16, 2009, at a duly noticed Special Meeting convened in Ellensburg, Washington, the Council voted

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<sup>23</sup> RCW 80.50.090; WAC 463-14-030.

unanimously to recommend approval of the Project to the Governor of Washington state. The Council memorializes its action in this Order, Council Order No. 843.

#### **4. SETTLEMENTS AND STIPULATIONS**

The Council encourages parties to application proceedings to make reasonable efforts to settle contested issues. The Applicant worked with Counsel for the Environment and the Council acknowledges the professionalism, attention to detail, and advocacy underlying the resulting stipulation and settlement, Exhibit 30 in this record. In addition, the applicant and the Department of Fish and Wildlife entered an agreement specifying actions the applicant will take to preserve habitat and reduce adverse effects on fish and wildlife. Although the WDFW is not a party to this proceeding, the Council has reviewed the document (Exhibit 20). The Council considered the agreements and explored them with the parties at a post-hearing session on July 22, 2009. The Council finds that the Applicant has appropriately accepted their terms as commitments benefiting the environment and that it accepts the agreements and the obligations set out therein.

Therefore, the Council accepts and approves the Desert Claim settlement agreement with Counsel for the Environment and Desert Claim's agreement with WDFW. The Council incorporates the two Agreements and their terms into the Site Certification Agreement. In doing so, we note that the Agreements in part independently address common matters, and the two may not be squarely comparable. Recognizing the possibility of ambiguity or conflict in this area, the Council accepts the unopposed suggestion of Counsel for the Environment that the provision most protective of the environment be adopted. In addition, the Council has added general provisions in the Site Certification Agreement to guide interpretation of the documents.

#### **5. ELEMENTS FOR CONSIDERATION**

Notwithstanding the agreements we received and accept, and the resolution of previously-contested issues through modification of the application and entry into the Agreements, the Council still must consider whether the evidence presented meets the Applicant's obligation to demonstrate that applicable environmental standards are met. The applicant has the burden of demonstrating through its evidence that the Project meets the requirements of law, consistent with the legislative policy and intent of RCW 80.50 and the Council has the obligation to review the evidence, even when uncontested, to ensure that it meets the requirements of law and rule. We have done so, and enter this Order as our acknowledgment and review of all the evidence of record.

EFSEC is also responsible for complying with the State Environmental Policy Act (SEPA), set out in RCW 43.21C. That Act requires consideration and mitigation of a project's probable significant adverse environmental impacts. WAC 463-47-140. The Council must also consider all public comment received on proposed power facilities. RCW 80.50.090; WAC 463-14-030.

#### **6. ENVIRONMENTAL DETERMINATIONS**

##### **A. Habitat and Wildlife**



## **1. Habitat**

The Project is located primarily in grassland and shrub steppe habitat types. Although there are some federal jurisdictional waters and wetlands within the Project Area, there will be no temporary or permanent impacts to these waters and wetlands. Desert Claim's agreements with CFE (Ex. 30) and WDFW (Ex. 20) include conditions intended to minimize temporary and permanent habitat impacts, and to provide compensatory mitigation for impacts that cannot be avoided. Desert Claim will develop a Habitat Restoration Plan in consultation with WDFW to ensure that areas disturbed during construction will be reseeded with native vegetation and noxious weeds will be controlled. Desert Claim will also develop a Habitat Mitigation Plan in consultation with WDFW that will provide compensatory mitigation for temporary and permanent habitat impacts consistent with the 2009 WDFW Wind Power Guidelines.

At the conclusion of the Project's life, the wind turbines, foundations and other facilities will be removed to a depth of 4 feet below grade, and areas will be revegetated and restored to their pre-project condition. Desert Claim will prepare an Initial Site Restoration Plan for Council approval, consistent with the Council's rules, and has agreed to consult with WDFW in the preparation of that Plan.<sup>24</sup>

In light of these commitments, WDFW has agreed that the Project is consistent with the WDFW Wind Power Guidelines and that "the Project will not result in significant adverse impacts to . . . habitat."<sup>25</sup> The Council finds that with the mitigation measures Applicant agreed to with WDFW and required in the Site Certification Agreement, mitigation is consistent with the WDFW Wind Power Guidelines, and as a result no significant adverse impacts to habitat are expected to occur.

## **2. Birds**

The Project's effect on birds is expected to be similar to those experienced at other wind projects in the region. Although individual birds will be killed, the Project is not expected to have a significant impact on the regional population of any species of birds.

Consistent with its agreement with WDFW, Desert Claim has incorporated features in the Project design to reduce avian impacts, including minimizing the use of overhead collector lines, using tubular towers without guy wires, and minimizing tower lighting. Desert Claim has also proposed a monitoring and adaptive management plan involving a Technical Advisory Committee ("TAC") that EFSEC has required for other wind projects.

Desert Claim, CFE and WDFW have also agreed to several specific measures to address potential risk to bald eagles during calving season. Private ranchers currently conduct calving within fenced areas in the Project Area, and they will continue to do so. Because calving can attract eagles, turbines will not be located within or inappropriately near fenced calving areas, and

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<sup>24</sup> WDFW Agreement, Ex. 20

<sup>25</sup> Ex. 20 at 12 (WDFW Agreement).

all carcasses and afterbirths will be removed promptly. Desert Claim will also conduct a bald eagle study during the calving season in the first two years of the Project's operation and present the study's results to the TAC, which can then consider whether to recommend additional mitigation measures.

WDFW has concluded that, with the agreed protections, "the Project will not result in significant adverse impacts to . . . wildlife."<sup>26</sup> CFE represents that if the stipulated measures are accepted, his issues with the Project are withdrawn.<sup>27</sup>

### **3. Bats**

Although wind power projects often result in some bat fatalities, the evidence here does not indicate that the Project will significantly impact bat populations. At the request of the CFE and WDFW, Desert Claim has agreed to conduct a pre-operation bat monitoring survey and two years of fatality monitoring once the Project is in operation. It will present the results to the TAC.

### **B. Air Quality**

One of the principal environmental advantages of wind power is that it produces electricity without the significant emission of air pollutants and greenhouse gases that are associated with traditional fossil fuel-fired electrical generation. There will be no air emissions associated with the Project, except for the relatively minor emissions associated with construction; operation and maintenance vehicles and equipment; and emissions of fugitive dust.

The Council finds that the expected construction emissions associated with the Project will have no adverse affect on the ambient air quality in the Kittitas County air shed. The Project will not emit regulated air pollutants when operating, and is therefore not subject to federal or state emissions control requirements during operations. Fugitive emissions will continue to be mitigated using the same measures implemented during construction.

### **C. Water Use and Water Quality**

Wind power will produce electricity without water use typically associated with thermal or hydro electrical generation. The Project will only use small amounts of water for dust suppression, concrete mixing, and domestic and sanitary uses. Construction of the Project is not expected to affect surface or ground water in the area adversely. The Project must develop and implement a Council-approved Construction Stormwater Pollution Prevention Plan ("SWPPP"), Temporary Erosion and Sedimentation Control ("TESC") Plan, and Spill Prevention Control and Countermeasures ("SPCC") Plan. Although public comments questioned the potential impact of construction on wells, there is no information of record that construction activities would adversely affect groundwater or wells in the vicinity.

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<sup>26</sup> Ex. 20 at 12.

<sup>27</sup> Ex. 20, p 14, line 6-7.

Once in operation, the Project will not discharge industrial waste water. It will implement a Council-approved Operational SWPPP and SPCC Plan to avoid adverse impacts to water quality, and it will construct and operate a septic system to deal with domestic-type wastes produced on-site.

#### **D. Noise**

The Council's regulations require compliance with the maximum noise limits set forth in regulations promulgated by the Department of Ecology.<sup>28</sup> The results of predictive modeling introduced into evidence indicate that the Project will comply with these noise limits. The Site Certification Agreement should require compliance with those regulatory noise limits.

#### **E. Shadow Flicker**

Shadow flicker is a term used to refer to the shadow a revolving blade casts on a stationary object. Analysis in Tab 8 of the Revised Application described and supported by Applicant's witness Julia Meier (Ex.17) indicates that the Project has a theoretical potential to result in no more than 26 hours of shadow flicker a year at nearby residences. The report also concludes that shadow flicker is not expected to be noticeable at distances of more than 1,500 feet from a turbine. With all nonparticipating residences more than 1,640 feet from turbines, therefore, no noticeable shadow flicker is anticipated. To ensure that shadow flicker is not a problem to nonparticipating residences, however, Desert Claim has proposed a condition in the Site Certification Agreement that would require turbines to be turned off during the time during the day if and when a nonparticipating residence experiences shadow flicker. The Council adopts that proposal.

#### **F. Cultural and Archeological Resources**

The Applicant will address cultural resources in the final design and micro-siting process. It will work with the Washington State Department of Archaeological and Historic Preservation and affected Native American tribal authorities to identify, preserve, and as necessary mitigate, culturally significant sites.

The Council finds that with implementation of these mitigation measures no impacts on known culturally sensitive areas will occur under any of the proposed scenarios. Operation of the Project will not impact any of the archaeological or historical sites identified during this current cultural resource survey.

#### **G. Turbine Views and Aesthetics**

The Desert Claim Project is spread out over a relatively flat valley floor. The valley is already a working agricultural landscape with barns, silos, hay storage and farm equipment, and

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<sup>28</sup> WAC 463-62-030 (referencing WAC 173-60).

views already include high voltage transmission lines. By locating the Project in the valley, turbines do not stand out on top of area ridgelines, and turbines do not break the horizon line when viewers in the Ellensburg area look north toward the Stewart Range.

Although any commercial scale wind project will have an effect on area views, Desert Claim will minimize and mitigate aesthetic impacts by painting turbines a neutral color with low-reflectivity finish, minimizing Project lighting, and promptly repairing or removing any broken or inoperable turbines.

The greatest aesthetic impacts will likely be experienced by those living closest to the Project<sup>29</sup>. The Project has been revised since its original proposal to reduce the number of turbines by 25 (about 20%) and the number of non-participating residences within 2,500 feet<sup>30</sup> of a turbine by two (about 22%), with seven remaining. At the same time, total generating capacity from the project has been increased to 190 MW through use of higher capacity turbines.

The Council recognizes, as Desert Claim asserts,<sup>31</sup> that a configuration on the valley floor minimizes visual intrusion compared with a distant view of ridgelines. However, a corollary to this is that nearby views appear more intrusive, as is apparent in the visual simulations in this record.<sup>32</sup> Not only may one or two nearby turbine towers be seen, but the relatively level ground and the number of Project turbines mean that for some nearby residences the Project visual presence may be greater and more intrusive.

Desert Claim proposes a minimum setback of four times the turbine tip height,<sup>33</sup> here 1,640 feet. Witness David Blau testified for Desert Claim on “.... visual impacts... with particular emphasis in the impacts of those residing near proposed turbines.”<sup>34</sup> His testimony

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<sup>29</sup> Applicant's brief, p. 19, citing the draft SEIS, ex. 4, at 3-58; *see also* Ex. 5 (FSEIS) at 3-63

<sup>30</sup> The Applicant acknowledged the significance of a 2,500-foot setback in the EFSEC application by identifying the nine residences within that radius of one or more turbines (Section 2.3.2) and by noting the reduction to seven residences in Section I, p. 2 and in its January 20, 2009 submission of its revised application (third unnumbered page). The FSEIS also considers distances, noting that Desert Claim proposed a minimum 4X setback based upon EFSEC's recommendation to the Governor in the Kittitas Valley application (page 3-47) and that Desert Claim reduced to seven the number of nonparticipating residences between 1,640 and 2,500 feet from turbines. The aesthetic impact of turbines with 2,500 feet is acknowledged in Application Section 1.7.6 at p. 1-11; turbines within 2,500 feet are identified in Sec. 2.2.1.3, p. 2-11. Sec. 2.2.2.2, p. 2-19, also acknowledges the seven nonparticipating residences within 2,500 feet of a turbine.

<sup>31</sup> Desert Claim Post-hearing brief, p. 18.

<sup>32</sup> Section 3.4.6 of the FSEIS (exhibit 5) observes the increased impacts on nearby views, and applicant cites and acknowledges this effect in its brief at page 19.

<sup>33</sup> Exhibit 18, Prefiled Testimony of David Blau

<sup>34</sup> Exhibit 18, p. 2

includes an evaluation of the “looming effect” of the turbines located nearest to residences. He concludes that this “4X” setback would be more than sufficient to mitigate visual impacts and “eliminate any adverse looming effect” at nearby residences.<sup>35</sup> Affected nonparticipating homeowners did not express specific concerns about the effect of nearby turbines on view or aesthetics. Setback requirements appear to be somewhat subjective and to vary markedly in other jurisdictions. Mr. Steeb submitted evidence of other jurisdictions’ setback requirements, indicating minimal setbacks (Ex. 11, pp. 41-2); the Kittitas County ordinance requires one-half mile. One of the public witnesses cited to an asserted French requirement of a one-mile setback (Ms. McCosh, TR36).

Mr. Blau’s testimony was uncontroverted by other expert testimony. It does not specifically address the effects of multiple turbines in proximity to residences. Few commenters at the public hearings mentioned visual aspects of nearby turbines and the comments were not expert. The Applicant asserts in its brief that “The evidence does demonstrate . . . , that requiring greater setbacks would significantly reduce the environmental, energy and economic benefits of the Project.”<sup>36</sup>

The Council has not adopted a setback “standard,” but has relied on the record in each proceeding.<sup>37</sup> Reviewing the evidence of record, including the simulations,<sup>38</sup> however, the Council believes that it is appropriate to maximize the distance of nearby turbines from nonparticipating residences.

This is consistent with decisions in the Kittitas Valley proceeding, EFSEC Application 2003-1. There, Governor Gregoire directed the Council reconsider setback distances from adjacent landowners’ residences,<sup>39</sup> and the KV SCA imposed the following requirement:

For each turbine located within 2,500 feet of a non-participating landowner’s existing residence, micro-siting determinations shall give highest priority to increasing the distance of the turbine from that non-participating landowner’s residence, even beyond the minimum four times height setback . . . , so as to further mitigate and minimize any

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<sup>35</sup> Exhibit 18, p. 13

<sup>36</sup> Applicant’s brief, p. 20.

<sup>37</sup> The “4X” measure was proposed and adopted in the Kittitas Valley application and was proposed in this proceeding. The Council does not establish a different requirement in this order.

<sup>38</sup> See, for example, FSEIS figures 3.4-10, 3.4-14, 3.4-16 and 3.4-18.

<sup>39</sup> “I am directing EFSEC to reconsider Article I (C) (7) of the proposed Site Certification Agreement (“Agreement”) pertaining to turbine setbacks from adjacent land owners’ residences without signed agreements with Sagebrush Power Partners, LLC., my directive . . . is solely focused on the need to determine on this particular project whether additional setbacks beyond the four times height (4xh) requirement for non-participating landowners are achievable...”

visual impacts on that non-participating landowner.<sup>40</sup>

WAC 463-28-070 requires the Council to consider local government or community interests in deciding matters subject to preemption. Kittitas County has adopted an ordinance<sup>41</sup> that requires one-half mile setbacks from residences, or 2,640 feet.<sup>42</sup> It is not by its terms applicable to the land on which the Project will be built, and it would be inappropriate for the Council to consider mandating compliance with the ordinance. But the ordinance reflects the interests of the County and the community, and the regulatory mandate of our rule requires a close review of setback requirements for the Project.

The Council therefore believes that steps must be taken in this proceeding similar to those in the Kittitas Valley matter cited above. Given the need in any event to perform engineering and micro-siting analyses, there is little additional burden on the Applicant in that process to include concerted efforts to increase the setbacks of turbines located within 2,500 feet of a nonparticipating residence. In addition, based on our review of simulations that illustrate visual effects of turbines when viewed from nearby locations and our view of the site, Applicant must take similar efforts to limit to one the number of turbines located within 2,500 feet of any nonparticipating residence. The Council recognizes the desirability of increased distance based on record references, on the simulations of record, the Council's expertise and its view of the site. It recognizes also that the 2,500-foot distance is not a generally applicable standard, but selects it because of its use a benchmark for analysis in the evidence of record.

Prior to commencement of construction, the Applicant shall provide EFSEC with documentation demonstrating its efforts to site the applicable turbine locations in the manner set out in this section, identifying specific reasons if Applicant considers this not to be feasible.

#### **H. Glare and Aesthetics**

The Application discusses glare and aesthetics, making commitments to ensure that the project minimizes light and glare impacts. The Council, based on the Applicant's commitments, requires the applicant to comply with the following provisions: Project buildings will be constructed of local materials and in local building styles to maximize their fit into the local landscape, and be landscaped with native shrub-steppe vegetation around buildings and equipment boxes to integrate the structures into the surrounding landscape. Project structures shall be painted with neutral/low reflectivity finishes. The Certificate Holder shall neither place nor allow advertising, logos, cellular antennas, or other clutter on the turbines, nacelles, or buildings of the Project. The O&M facility buildings shall be painted with a low reflectivity

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<sup>40</sup> Site Certification Agreement between State of Washington and Sagebrush Power Partners LLC, p. 11.

<sup>41</sup> Kittitas County Code, Chapter 17.61A, the Wind Farm Resource Overlay Zone.

<sup>42</sup> Section 17.61A.035, adopted in 2007, applies to certain eastern and southern portions of the county, and does not apply to the Project area. The section states that if the half-mile setback "is not attainable, additional analysis shall be included to support the application."

earth tone colored finish. The only lighting on the turbines will be the aviation lighting required by Federal Aviation Administration. Outdoor lighting at the O&M facility and substation(s) will be minimized to safety and security requirements, motion sensors will be used to keep lighting turned off when not required, and lighting will be equipped with hoods and directed downward.

We include these requirements in the Site Certification Agreement. We do not believe it likely that compliance with these requirements will be difficult, but require the Certificate Holder to seek a waiver from the Council if it believes that compliance is not feasible.

## **I. Health and Safety**

### **1. Safety setback**

Desert Claim has designed the Project to include a minimum 625-foot safety setback between turbines and all occupied structures, public roads and public rights of way. This distance is based upon engineering calculations of the maximum potential distance of safety hazards such as tower collapse, blade throw and ice throw, plus an additional 25% margin of safety. The Council finds this adequate for public safety protection.

However, we note that it is the 625-foot setback, and not the 1,640-foot setback, that applies to occupied residences owned by project participants, that is, persons who have a financial interest through lease of land or otherwise, in the Project. We anticipate that in a future application or rulemaking proceeding we will receive information about health or safety effects related to setback that will provide us with greater information. This issue is related to, but different from, the setback for aesthetic reasons.

### **2. Fire Hazards**

Members of the public raised concerns and Council members asked questions about fire hazards and the resources for adequate fire protection. Although evidence in the record appears to indicate that wind turbines rarely cause fires and would be unlikely to affect a fire started by some other cause, it is not denied that fires could be started by turbine or other activities on the site, nor that fires originating off-site could spread onto the site. In either event, emergency response would be required on-site.

Desert Claim must therefore prepare a Fire Control Plan in coordination with pertinent local and state agencies and response organizations. Desert Claim has reached agreement with the Department of Natural Resources, which has fire protection jurisdiction over its lands under lease to Desert Claim. Desert Claim must also enter into one or more additional fire services agreements to cover the entire Project Area before beginning construction. Desert Claim must also maintain agreement(s) covering the entire Project, for the life of the Project. In addition, it must design the internal project roads to accommodate fire fighting and other emergency response equipment.

### **3. Health and Safety Plans**

The Applicant must prepare Health and safety and emergency plans for both the construction and operation phases to protect public health, safety and the environment on and off

the site, to anticipate a comprehensive list of major natural disasters or industrial accidents that could relate to or affect the proposed Project. The Applicant will be responsible for implementing the plans in coordination with the local emergency response organizations. The Project operating and maintenance group and all contractors must receive emergency response training as part of the regular safety-training program to ensure that effective and safe response actions would be taken to reduce and limit the impact of emergencies at the Project site.

## **J. Roads and Transportation**

### **1. Public Roads**

At the County's request, Desert Claim has agreed to use video to document before and after conditions of roads being used for construction access. After construction, Desert Claim will make any repairs necessary to ensure that these roads are returned to Kittitas County standards.<sup>43</sup> Desert Claim also agreed to prepare a Road Signage Plan prior to construction, consistent with the Manual on Uniform Traffic Control Devices.

### **2. Internal Access Roads**

The Project expects to have approximately 27 miles of internal access roads, allowing construction and maintenance vehicles to travel to each Project turbine. Desert Claim has agreed with the CFE and WDFW to minimize new road construction to avoid unnecessary impacts to habitat and soil disturbance.<sup>44</sup> The Revised Application describes the Project's internal roads as single-lane gravel roads, generally having 15-20 foot surface widths. Desert Claim proposes to make these roads no wider than necessary for their intended purpose. However, Desert Claim commits to ensure that the points of ingress and egress from these internal Project roads to public roads be constructed according to County standards. Ex. 1 Tab 1 at 11 (Revised Application).

Desert Claim agreed on brief to construct the internal access roads according to whatever requirements the Council imposes, but Desert Claim does not propose to construct all internal roads according to County private road standards. The County's private road standards appear to be intended to apply to privately owned roads that will allow two-way traffic within low- and high-density residential developments that serve from three to forty or more lots.<sup>45</sup> For low density developments, the County requires a minimum gravel surface of 20 feet. Desert Claim argues that the Project's access roads are not intended to serve two-way traffic to members of the public, and might be considered more akin to private driveways, which the County Code only requires to be 8 feet wide for single use, or 12 feet wide for joint use. Desert Claim argues that its proposal to construct narrow one-lane internal access roads appropriately balances the need for safe and effective access for construction and maintenance with the interest in minimizing

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<sup>43</sup> Testimony of Mr. Steeb, TR 11.

<sup>44</sup> Ex. 20 at 3 (WDFW Agreement); Ex. 30 at § II.G.2. (CFE Stipulation).

<sup>45</sup> See Kittitas County Code § 12.12.020, Table 12-1.



impacts to habitat in the Project Area.

The Council agrees with WDFW and the CFE that habitat must not be disturbed unnecessarily. However, the Council has concerns here, as noted in the section addressing fire protection, that emergency service vehicles must have adequate access to the site in the event of fire, accident or other emergency. The Council directs that the Applicant consult with emergency service suppliers, including fire departments or districts, police or sheriff departments, and any other emergency service responders that may be called to the site, regarding required weight capacity, turning radius, accommodation as necessary for the passage of two or more vehicles, and other requirements for safe and prompt emergency access at any time of the year, and submit a proposal to the Council for approval before finalizing plans for roadway construction.

### **3. Socioeconomics**

The Project will result in increased employment in Kittitas County, both during construction and during operation. The Project's economic impacts are not expected to be limited to jobs and the salaries of employees. The Project will purchase goods and services, and it will make lease payments to landowners for use of the property for the Project. The Project will increase the total valuation of real property in Kittitas County. It and its lessors will pay increased taxes as a result. The resulting revenues will be available for schools and local public services in the area, including county roads and county government. Tax revenues resulting from the Project could result in reduced property tax levy rates for local taxpayers.

### **4. Site Restoration**

WAC 463-42-655 requires an Applicant to provide a plan for site restoration in sufficient detail to identify, evaluate, and resolve all anticipated major environmental, public health, and safety issues. The rule requires that this plan address provisions for funding or bonding arrangements to meet the site restoration and management costs.

In its Application, Desert Claim outlines the scope of activities that would be undertaken at the end of the Project's useful life. These activities included removal of Project structures, removal of foundations to four feet below grade, and restoration of soil surfaces as close as reasonably possible to their original condition. Through its Stipulation and Settlement Agreement with WDFW, the Applicant has further defined the site restoration activities.

The Applicant has committed to posting funds or guarantees sufficient for decommissioning, to ensure the availability of decommissioning funds when needed.

The Council has considered the Applicant's commitments and finds them to be appropriate. Desert Claim will provide an initial site restoration plan to the Council prior to construction of the Project, and a detailed site restoration plan must be approved by the Council prior to decommissioning at the end of the useful life of the Project.

### **5. Cumulative Impacts**

Potential impacts of the proposed Project were considered cumulatively with other potential development in the surrounding areas. On balance, the impacts are adequately mitigated.

#### **K. Exceptions to specific requirements**

The Council recognizes that during the construction and operation of a complex project such as the one proposed, circumstances may rarely arise where literal adherence to SCA requirements would operate to raise costs unnecessarily or could actually produce a result counter to the interests of the public or the environment. An example might be taking advantage of weather conditions to do minor preparation work that, if delayed, could be more difficult *and* that, if performed early, would not run counter to the intent of regulation or of the SCA.

The Council authorizes the Council Manager to allow such exceptions, provided that a record is kept; that Council members are immediately notified and any Council member may within seven days of the notice put the item on the next Council open meeting agenda for review.

#### **L. Project Construction**

The Council finds that there is a benefit to the public to have permitted facilities ready to be constructed whenever it becomes known that more generation capacity is needed. As noted above, it is in the state's declared interest to secure abundant energy at reasonable cost. Nonetheless, the Council recognizes that an unlimited "build window" for a proposed project is not appropriate as, over time, technology or mitigation measures presented in an application may no longer be protective of environmental standards and conditions at the time the facility is constructed.

The Applicant proposes to construct the Project in the manner set out in the Application and the Agreements. It has proposed a five-year build window for the Project after obtaining needed permits. The Applicant expects to complete construction in approximately nine months, but commits to making its best efforts to complete construction within 18 months. The Applicant is not restricted from operating and generating power from individual strings of turbines that are completed prior to others, so long as all needed infrastructure, safety and mitigation measures are in place.

These measures provide flexibility for construction but also address needs to complete the project in a timely manner.

#### **M. Conformity with Law**

It is the policy of the state of Washington to recognize the pressing need for increased energy facilities, and to ensure through available and reasonable methods that the location and operation of such facilities will produce minimal adverse effects on the environment, the ecology of the land and its wildlife, and the ecology of state waters and their aquatic life. It is the intent of the law to seek courses of action that will balance the increasing demands for energy facility location and operation in conjunction with the broad interests of the public. RCW 80.50.010.

Consistent with legislative intent, the Council must consider whether an energy facility at a particular site will produce a net benefit after balancing the legislative directive to provide for abundant energy at a reasonable cost with the impact to the environment and the broad interests of the public. Here, the Council finds that the Project conforms to the legislative intent expressed in RCW 80.50.010.

The Applicant proposes to construct the Project in accordance with applicable national and international building codes. Electrical and mechanical project components would comply with international design and construction standards. The Applicant proposes to implement a comprehensive employee safety plan during construction and operation of the Project. The Council therefore finds that operational safeguards will be technically sufficient to protect the public and the public welfare. RCW 80.50.010 (1).

The Applicant has agreed to appropriate environmental mitigation requirements as indicated in the sections discussed above. As a whole, the mitigation package preserves and protects the quality of the environment. This Project will produce electrical energy without generating greenhouse gas emissions. As a renewable energy resource and one that does not produce carbon dioxide with the production of energy, the Project will enhance the public's opportunity to enjoy the esthetic and recreational benefits of the air, water and land resources; to promote air cleanliness; and to pursue beneficial changes in the environment. RCW 80.50.010(2).

Finally, the evidence in the record supports the conclusion that the region needs to continue to add electrical generation capacity. As a renewable energy source using wind power for generation, the Project will contribute to the diversification and reliability of the state's electrical generation capacity, and will therefore support the legislative intent to provide abundant energy at a reasonable cost.

#### **N. Project Benefits**

The Council noted above that the Project will benefit Washington State stemming both from the nature of a wind power generation project, and from certain economic benefits.

The environmental benefits include the energy generated, from a generation source that does not require the creation of carbon dioxide, and economics, as the Project will provide construction jobs, employment during operation, tax revenues to local governments, and payments to landowners and service providers. And of course, the available generation will have considerable economic value.

### **5. CONCLUSION**

The Council has carefully considered its statutory duties, applicable administrative rules, and all of the evidence in the record in exercising its duty to balance the state's need for energy at a reasonable cost with the need to protect the environment and the health and safety of the residents of the local area.

One of the Council's principal duties is to ensure that the location of energy facilities will produce minimal adverse effects on the environment. We have considered the testimony of expert witnesses and members of the public, the settlement agreements, as well as the Draft and Final EIS and Draft and Final Supplemental EIS in determining whether this Project, with its proposed mitigation measures and the requirements of the settlement agreements, is appropriate for this location.

We understand the concerns of members of the public. The technology is still relatively

new to this region, new facilities may seem out of place in today's landscapes, and fear of possible consequences of industrial development is natural and understandable. However, based on the record before us, we conclude that the mitigations and protective measures that the Applicant commits to are adequate to protect the public, including members of the public who reside in and use the areas near the Project.

As currently proposed, and with mitigation for a number of impacts and the conditions of the Site Certification Agreement, the Project will have a minimal impact on the environment.

One of the Council's additional duties is to ensure that the supply of energy, at a reasonable cost, is sufficient to ensure people's health and economic welfare. The record shows that this Project would serve those goals. The Council considered whether the total package of mitigation measures offset the environmental impacts of the Project. Viewed on balance, with respect to this Project, and in the context of mitigation proposed, the package for the Desert Claim Project satisfies the legislative policy of RCW 80.50.

For all of the reasons discussed in the body of this Order, and the Council recommends to the Governor that this Project be APPROVED, subject to agreement to the attached Site Certification Agreement.

## **6. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having found above the detailed facts relating to all material matters, the Council now makes the following summary Findings of Facts and Conclusions of Law. For readers' convenience, relevant preliminary conclusions of law are stated with the supporting findings of fact.

### **A. Nature of the Proceeding**

This matter involves Application No. 2006-02 to the Washington State Energy Facility Site Evaluation Council (EFSEC or Council) for certification to construct and operate the Desert Claim Wind Power Project (Project), a wind powered energy generation facility with a maximum of 95 wind turbines and a maximum installed nameplate capacity of 190 MW. The Project is to be located in the central portion of Kittitas County, Washington.

### **B. The Applicant and the Application**

1. The Applicant, Desert Claim Power Project LLC, is a Washington Limited Liability Company (LLC) formed to develop, permit, finance, construct, own and operate the Project. Desert Claim Power Project LLC is owned by enXco, which is considered to be a Site Certificate Holder, as defined in the Site Certification Agreement, and thus bound by obligations defined therein.

2. Kittitas County rejected Desert Claim's application for Project approval by a decision affirmed in Kittitas County Superior Court. Despite later negotiations, the Applicant and the County failed to reach agreement. The County indicated in its final briefing presentation in this matter that it now does not dispute any aspect of the application.

3. The Council concludes that the Project is inconsistent with local land use plans and zoning ordinances. On November 3, 2006 the Applicant submitted an Application for Site Certification to the Council seeking certification, pursuant to the RCW 80.50.060, of a site on which to construct and operate the Desert Claim Power Project in Kittitas County, Washington. As initially proposed, the Project was to be a wind powered electrical generation facility, with a generation capacity not to exceed 180 MW produced by no more than 120 turbines.

4. On February 6, 2009, the Applicant submitted a Revised Application for Site Certification. As revised, the Project is to be a wind powered electrical generation facility, with a generation capacity of up to 95 turbines, not to exceed a total of 190 MW.

#### **C. Compliance with the State Environmental Policy Act (SEPA)**

5. EFSEC is the lead agency for environmental review of project proposals within its jurisdiction under terms of the State Environmental Policy Act, RCW 43.21C. The Council Manager is the SEPA responsible official. WAC 463-47-051.

6. On December 15, 2003 Kittitas County issued a DEIS and August 16, 2004 the County issued an FEIS regarding Desert Claim's application to the County.

7. On March 19, 2007 the Council adopted the FEIS issued by the County and issued a notice of determination that an SEIS would be required. On April 6, 2009 the Council issued a notice that a draft SEIS was issued on April 2, 2009. The notice stated that public comments on the DSEIS would be received through May 5, 2009 and that a public meeting to receive comments would be held in Ellensburg on April 23, 2009. On April 23, 2009 the Council held a public meeting in Ellensburg to receive public comments on the DSEIS.

8. On November 6, 2009, the Council issued the Final SEIS for the Project.

#### **D. The Adjudicative Proceeding**

9. The Council duly published and, when required, served, notices of receipt of the Application, public meetings, commencement of the Adjudicative Proceeding and opportunity to file petitions for intervention, prehearing conferences, land use hearings, and the adjudicative hearings regarding Application No. 2006-02.

10. The Council duly noticed and conducted prehearing conferences on April 23, 2009 and July 8, 2009. The Council issued Prehearing Orders Numbers 1 through 3 (Council Orders Nos. 838, 840 and 841).

11. Counsel for the Environment (CFE) Bruce Marvin and the Applicant are parties to the proceeding pursuant to RCW 80.50.080. The Council received a notice of intervention and granted party status to the Washington State Department of Community, Trade and Economic Development (CTED, now the Department of Commerce), and Kittitas County, which are both entitled to participate pursuant to WAC 463-30-050. The Council also granted party status to the Economic Development Group of Kittitas County (EDG). The Council denied intervenor status to Roger Overbeck, who appeared on his own behalf, for failure to comply with basic procedural requirements.

12. On July 23, 2009, Desert Claim and Counsel for the Environment filed a Stipulation and Settlement Agreement with the Council addressing environmental issues.

13. On July 21, 2009, Desert Claim and WDFW filed an Agreement with the Council addressing issues of wildlife and habitat protection and preservation.

14. The Council held a formal adjudicative hearing regarding Application 2006-02 on July 13, 2009, in Ellensburg, Washington.

15. The Council held adjudicative hearings to receive testimony and opinion from members of the public about Application 2006-02 in Ellensburg and in Seattle Washington. Nineteen persons testified at the Ellensburg hearing on July 13, 2009, and 13 members of the public offered comments at the Seattle hearing session on July 21, 2009.

16. At a post-hearing conference on July 22, 2009, the Council considered the Stipulation and Settlement Agreement between Desert Claim and Counsel for the Environment, as well as the Agreement between Desert Claim and WDFW. Counsel for the Environment, counsel for the Applicant and a witness, Mr. Steeb, described the agreements and responded to Council questions about them

17. The Applicant and other parties to the proceeding were given an opportunity to submit simultaneous briefs and a Proposed Site Certification Agreement. The Applicant made the submission, but other parties waived presentation of simultaneous opening briefs and were allowed the opportunity to submit responding briefs, instead. The Applicant made its filing on July 21, 2009. In filings on August 17, 2009, Counsel for the Environment submitted responding comments that clarified but did not dispute the applicant's submission, and Kittitas County stated formally that it had no remaining issues involving the Project.

18. On November 16, 2009, the Council voted unanimously to recommend approval of the Project to the Governor of the state of Washington.

#### **E. Project Description and Configuration**

19. The Desert Claim Power Project is a wind powered electrical generation facility in Kittitas County, Washington. The Project will consist of 95 wind turbine generators with a total nameplate capacity of 190 MW.

20. The Project will include access roads, turbine foundations, underground and overhead collection system electrical lines, a grid interconnection substation, step-up substation(s), a feeder line running from the on-site step-up substation(s) to the interconnection substation, meteorological stations, an operations and maintenance (O&M) center and associated supporting infrastructure and facilities

21. The Project is to be constructed in accordance with the Application and the analysis performed in the Environmental Impact Statement and Supplements, within five years from obtaining all necessary state and federal permits. Applicant will make its best efforts to complete construction within 18 months of beginning construction. The Applicant may operate and generate power from individual strings of turbines as they are completed, while the remaining strings of turbines remain under construction, so long as necessary infrastructure, safety and

mitigation measures are in place.

#### **F. Site Characteristics**

22. The Project will be located approximately eight miles northwest of Ellensburg, in Kittitas County.

23. The Project will be constructed across a land area of approximately 5,200 acres.

24. The majority of the Desert Claim Power Project site and the proposed electric transmission interconnect points lie on privately owned lands. The Applicant has secured a long term lease on the remaining portion of the Project site from the Washington Department of Natural Resources.

25. The proposed site is located within Forest and Range and Agriculture 20 land use zoning designations in Kittitas County. The site has historically been used for grazing.

#### **G. Air Quality**

26. During construction, the types of direct impacts to air quality would be typical of those associated with any large construction project. The primary types of air pollution generated during Project construction will be emissions from vehicle and equipment exhaust, along with fugitive dust particles from travel on paved and unpaved surfaces.

27. Exhaust emissions and fugitive air emissions from construction sites are exempt from air emission permitting requirements. Exhaust emissions and fugitive air emissions resulting from travel on Project roads during operation of the Project are also exempt from air permitting requirements.

28. Operation of the Project will not result in any direct air emissions.

29. The Council finds that the Applicant's proposed mitigation measures, as set out in the Site Certification Agreement, are adequate to minimize fugitive dust impacts during construction and operation of the Project.

#### **H. Water Resources**

30. Water for construction will be purchased off-site from an authorized source, and then delivered by truck to the Project site.

31. During construction, sanitary waste water will be collected in portable tanks, and disposed of off-site at locations permitted to accept such waste. During Project operation, a septic system will be installed at the operations and maintenance facility site in compliance with Kittitas County septic system requirements to treat the domestic-type sanitary waste water from the facility.

32. Wind energy facilities do not use water in the electrical generation process. There will be no operational use or discharge of water from the Project.

33. Precipitation could result in surface runoff from Project facilities during Project construction and operation. However, the Project site grading plan and roadway design will incorporate measures in compliance with the Storm Water Pollution Prevention Plan (SWPPP) and Best Management Practices (BMPs) to ensure that surface runoff will infiltrate directly into the surface soils surrounding Project facilities.

34. The Council finds there will not be significant adverse impacts to water quality from construction or operation of the Project.

#### **I. Habitat, Vegetation and Wetlands**

35. The Project primarily contains grassland habitat.

36. The Applicant has proposed to mitigate all permanent and temporary impacts on vegetation and habitat in accordance with the WDFW Wind Project Habitat Mitigation Guidance Document (WDFW Wind Power Guidelines).

37. The Applicant will also implement Best Management Practices to minimize introduction of weeds, will implement a noxious weed control program, and will develop and implement a comprehensive post-construction restoration plan, including habitat reseeding programs, for temporarily disturbed areas, in consultation with WDFW.

38. The Applicant will implement mitigation measures to prevent the spread of noxious weeds in the Project area during construction.

39. The Council finds that with the implementation of all mitigation measures proposed by the Applicant, the Project is not expected to result in significant adverse impacts on wetlands, vegetation, and habitat.

#### **J. Fisheries and Wildlife**

40. Given the lack of potential fish habitat for fish species with federal or state protected status within the Project area, no significant impacts on fisheries are anticipated to occur with the implementation of Best Management Practices (BMPs) and applicable stormwater permits that would control runoff, erosion and sedimentation into water bodies.

41. The Council finds that with the mitigation measures proposed, no significant adverse impacts on fish resources are expected to occur.

42. The Council finds that mitigation measures implemented by the Applicant to protect habitat, wetlands and vegetation, as described previously, will compensate for disturbance impacts to wildlife, including avian species, during construction and operation of the Project.

43. Total avian mortality is expected to be 171-608 birds per year if 95 turbines are constructed; this equals 0.9 to 3.2 birds/MW/year. Raptor mortality is expected to be 23 per year, which equals 0.12 raptors/MW/year. Passerine (songbird) mortality is expected to be 280 birds per year, which equal 1.47 birds per/MW/year. Bat mortality is expected to be 76-475 bats per year, which equals 0.4-2.5 bats/MW/year.



44. The proposed design of the Project incorporates features to avoid or minimize impacts to plants and wildlife, including avoidance of construction in sensitive areas; choice of underground electrical collection lines wherever feasible to minimize perching locations and electrocution hazards to birds; choice of turbines with low rotation speed, and use of tubular towers to minimize risk of bird collision with turbine blades and towers.

45. The Applicant will conduct baseline monitoring and avian mortality analyses in conformance with WDFW's wind power guidelines. The Applicant has addressed all of WDFW concerns, according to the Settlement with WDFW.

46. The Applicant will develop a post-construction monitoring plan for the Project to quantify impacts to avian species and to assess the adequacy of mitigation measures implemented.

47. The Applicant has proposed, and will be required to convene, a Technical Advisory Committee (TAC) to review pertinent monitoring and scientific data and to develop appropriate responses to impacts that exceed avian mortality projections made in the Application and EIS. The TAC will monitor all mitigation measures and efforts and examine information relevant to assessing Project impacts to habitat, avian and bat species, and other wildlife. The TAC will determine whether further mitigation measures would be appropriate, considering factors such as the species involved, the nature of the impact, monitoring trends, and new scientific findings regionally or at a nearby wind power facility. The TAC shall recommend mitigation measures to the Council; the ultimate authority to implement additional mitigation measures, including any recommended by the TAC, will reside with EFSEC.

48. The bald eagle has the potential to occur within the Project site, based on the use of site property for cattle calving, which creates potential food for the eagles.

49. During calving, the Applicant will cease operations of any turbines within blade distance plus 100 feet of fences within which calving occurs. Doing so is adequate to protect eagles attracted to the activity. Studies to be conducted during operations will provide further information about the effect of operations on the eagles and will provide support for any necessary additional protections.

50. The Council finds that, with appropriate mitigations, the Project will result in no significant unavoidable adverse impacts to wildlife.

#### **K. Noise**

51. The Project shall be designed to comply with applicable Washington State Environmental Noise Levels of WAC 173-60.

52. The Council finds no significant noise impacts from construction or operation of the Project.

#### **L. Geological Hazards**

53. There are no significant impacts on soil, topography, or geology resulting from construction of the Project. Risks associated with ground movements due to landslides,

subsidence, expansive soils or similar geological phenomena are minimal; no special design or construction considerations are recommended or required.

54. Historically, the region has a low level of seismicity. Project buildings, structures, and associated systems will be designed and constructed consistent with pertinent requirements, including seismic standards, of the Uniform Building Code (UBC) or the International Building Code (IBC), but no less stringent than those found in the Uniform Building Code of 1997.

#### **M. Traffic and Transportation**

55. Construction of the Project will result in a short-term increase of traffic in the local area through truck deliveries of equipment and materials and worker commutes. Operation of the Project will have no significant impact on local traffic patterns.

56. The Applicant's Traffic Mitigation Plan will adequately mitigate all adverse impacts identified in the FEIS. The Plan will include documentation of pavement conditions before construction begins, allowing Kittitas County to monitor any road deterioration associated with the Project. The Applicant will repair any such road damage

#### **N. Cultural and Archeological Resources**

57. The Applicant, in consultation with the Office of Archeology and Historic Preservation (OAHP) and affected tribes, will develop a cultural resources monitoring plan for monitoring construction activities and responding to the discovery of archeological artifacts or buried human remains.

58. The Council finds that with implementation of these mitigation measures no impacts on known culturally sensitive areas will occur. Operation of the Project will not impact any of the archaeological or historical sites identified during this current cultural resource survey.

#### **O. Visual Resources/Light and Glare**

59. The Applicant's visual simulations of the Project demonstrated existing conditions together with the expected post-construction images from a variety of viewpoints, allowing the Council to view a computer model of the completed wind farm.

60. The Council recognizes, as demonstrated in public testimony, that evaluation of visual impacts of wind farms is potentially controversial. Because simulated images are reduced in size from eyewitness views, they must be evaluated accordingly. Objective visual impact assessments based on recognition of the changes to the existing visual resources that would result from construction, operation, and decommissioning of the Project can be conducted scientifically.

The Applicant will use landscaping and paint so as to minimize the visual impact of project structures and will forbid the use of advertising or decorations on its structures. The Project is sited on the valley floor, rather than on ridges, which will lessen its visibility.

61. After all mitigation measures are implemented, despite the nature of contrasts between mechanical structures and elements of a natural environment, this Project will have no

significant adverse impacts on the existing visual environment.

**P. Health and Safety**

62. The Project site is generally arid rangeland. The risk of fire during the summer dry season is a significant health and safety concern associated with the proposed Project.

63. To mitigate the fire risk the Applicant will comply with electrical design that complies with the National Electric Code (NEC). The Applicant will enter into a fire protection contract with one or more existing fire protection agencies. The Applicant will also prepare a fire control plan and an emergency plan, coordinated with local and state agencies to ensure efficient response to emergency situations and will construct roads adequate to allow access to emergency vehicles.

64. Construction and operation of the Project will require the use of hazardous materials such as diesel and gasoline fuels for operating construction equipment and vehicles; lubricating oils; transformer mineral oils; and cooling, lubricating and hydraulic fluids used in the turbines. The Applicant has proposed various supply and storage mechanisms depending on the type of fluid being handled.

65. The Applicant will be required to develop Spill Prevention Control and Countermeasures Plans for both construction and operation phases of the Project.

66. Construction and operation of the Project will not result in the generation of any hazardous wastes in quantities regulated by state or federal law.

67. Tower collapse is extremely rare and highly unlikely. Minimum setbacks incorporated into the proposed Project layout will reduce the safety risks associated with ice throw, tower collapse and other safety or nuisance issues.

68. The Project is not likely to produce shadow-flicker effects on any existing, nonparticipating residences in the area because the residences are farther from the turbines than flicker effects can customarily be noticed. However, the Applicant will stop turbines producing a flicker effect on nonparticipating residences existing when the application was filed, during times when flicker may be observed, upon request from the landowner of the residence.

69. With the mitigation measures provided, the Council finds that the Project will not cause a significant adverse health and safety impact.

**Q. Socioeconomics**

70. Project construction and operation will result in increased employment in Kittitas County.

71. Project-related spending will generate direct and indirect income during construction.

72. Adequate local housing supplies exist to accommodate the Project's demand for temporary rental housing.

73. Construction of the Project will increase the total valuation of real property in Kittitas County. Based on the assessed value of its real property, the Project will become a significant taxpayer in Kittitas County. The new tax revenues will benefit local and state schools, county government, county roads, and other local services.

74. The rural location of the Project site greatly diminishes the potential for negative impacts to residential property values. Several public witnesses voiced concerns that the values of some nearby homes could be adversely affected, which the Council believes to be likely. Based upon a review of all evidence contained in the record, however, the Council finds that construction and operation of the Desert Claim Wind Power Project will not have any significant negative impact on overall property values in Kittitas County.

#### **R. Public Services**

75. The Project is not anticipated to have a significant adverse effect on any public services, including law enforcement, fire, water, medical, recreational, or schools.

76. The Project will not have any significant adverse impact on communication facilities or services in the area.

#### **S. Site Restoration**

77. In accordance with WAC 463-42-655 the Applicant entered into an Agreement with WDFW that addresses site restoration. At the end of the useful life of the facility, the equipment will be removed and the entire area returned to as near its original condition as reasonably possible.

78. Prior to starting construction activities, the Applicant must post sufficient security to ensure complete decommissioning of the Project and restoration of the site.

#### **T. Cumulative Impacts**

79. Potential cumulative impacts of the development of the Desert Claim and other wind power projects, as well as other economic and residential growth in Kittitas County, were considered. The construction of the Project, in conjunction with other development actions, is not expected to result in significant adverse cumulative impacts, because such impacts are either not expected to occur, or mitigation measures shall be employed to reduce the impacts of individual development.

80. A single cumulative impact involving development of all existing and proposed wind power projects was identified with respect to visual resources: the impact of repetitive views of turbines in the County for residents and visitors to the Valley could result in the impression of change in the overall visual character of the Kittitas Valley landscape.

#### **U. Term of the Site Certification Agreement**

81. The Site Certification Agreement will authorize the Certificate Holder to construct the Project such that substantial completion is achieved no later than five (5) years from the date

that all state and federal permits necessary to construct the Project are obtained. Applicant may seek an extension of time through an SCA amendment if it believes it is unable to complete the Project on that schedule.

82. Construction of the entire Project shall be completed within approximately eighteen (18) months of beginning construction.

83. The Site Certification Agreement will continue in effect for the life of the Project and until the completion of site restoration unless terminated earlier by agreement between the Certificate Holder and the State.

## **V. Conformance with Law**

84. The Applicant proposes to construct the Project in accordance with applicable national and international building codes, in compliance with international design and construction standards, and to implement a comprehensive employee safety plan. The Council finds that operational safeguards will be at least as stringent as the criteria established by the federal government and will be technically sufficient for welfare and protection of the public. RCW 80.50.010 (1).

85. The Applicant has agreed to appropriate environmental mitigation requirements. The mitigation package preserves and protects the quality of the environment. As a renewable energy resource, the Project will enhance the public's opportunity to enjoy the aesthetic and recreational benefits of the air, water and land resources; to promote air cleanliness; and to pursue beneficial changes in the environment. RCW 80.50.010(2).

86. As a renewable energy source wind power generation facility, the Project will contribute to the diversification and reliability of the state's electrical generation capacity, and will therefore support legislative intent to provide abundant energy at a reasonable cost. RCW 80.50.010(3)

87. The Council finds that approving the Application as provided herein and entering the Site Certification Agreement will balance the increasing demands for energy facility location and operation in conjunction with the broad interests of the public.

## **7. CONCLUSIONS OF LAW**

Based on the foregoing findings of fact, the testimony received, and evidence admitted during the adjudicative and land use hearings, the environmental documents and environmental determinations made by the Council, the settlement agreements presented to and approved by the Council, and the entire record in this matter, the Council makes the following ultimate Conclusions of Law:

1. The Washington State Energy Facility Site Evaluation Council has jurisdiction over the Applicant and entities with ownership interests in the Applicant, and the Council has jurisdiction over the subject matter of Application No. 2006-02, pursuant to RCW 80.50 and RCW 34.05.

2. The Council conducted its review of the Desert Claim's Application 2006-02 as an Council Order No. 843

adjudicative proceeding pursuant to RCW 34.05, as required by RCW 80.50.090(3) and WAC 463-30.

3. EFSEC is the lead agency for environmental review of Desert Claim's Application pursuant to the requirements of RCW 43.21C. Because the SEPA responsible official determined that the proposed action could have one or more significant adverse environmental impacts, an Environmental Impact Statement (EIS) was required. The Council complied with RCW 43.21C, WAC 197-11, and WAC 463-47, by adopting the Final EIS adopted by Kittitas County and by issuing a Determination of Significance and Scoping Notice, conducting a scoping hearing, issuing a Draft Supplemental EIS (SEIS) for public comment, conducting a public hearing and accepting written comments on the Draft SEIS, and adopting a Final SEIS.

4. The Council is required to determine whether a proposed Project site is consistent with county or regional land use plans or zoning ordinances. RCW 80.50.090; WAC 463-14-030. The Council concludes that the proposed use of the site is not consistent and not in compliance with all applicable Kittitas County land use plans and zoning laws, based on the prior application to the County, the rejection of Applicant's judicial appeal, the failure to reach a settlement with the County, and Kittitas County's acquiescence in Desert Claim's legal positions set out in its post-hearing brief. The Council has considered County interests affected by the application, particularly the setback issue, and the County has withdrawn its opposition to the application. Preemption of County regulation is therefore appropriate. WAC 463-28-030, -070.

5. The legislature has recognized that the selection of sites for new large energy facilities will have a significant impact upon the welfare of the population, the location and growth of industry, and the use of the natural resources of the state. It is the policy of the state of Washington to recognize the pressing need for increased energy facilities and to ensure through available and reasonable methods that the location and operation of such facilities will produce minimal adverse effects on the environment, ecology of the land and its wildlife, and the ecology of state waters and their aquatic life. RCW 80.50.010.

6. The certification of the Desert Claim Wind Power Project, as described in Application 2006-02, as amended, and with the inclusion of the requirements of the settlement agreements and the terms of this Order, will further the legislative intent to provide abundant energy at reasonable cost. At the same time, the mitigation measures and the conditions of the proposed Site Certification Agreement ensure that through available and reasonable methods, the construction and operation of the Project will produce minimal adverse effects to the environment, the ecology of the land and its wildlife, and the ecology of state waters and their aquatic life.

7. The Application should be granted, as provided in this Order, and the Council should recommend approval of the attached Site Certification Agreement.

## **8. RECOMMENDATION AND ORDER**

Based on the Findings of Fact, Conclusions of Law, the Draft and Final EIS and the draft and final supplemental EIS, and the full adjudicative record in this matter, the Council makes and enters the following Order:

1. The Council recommends that the Governor of the state of Washington APPROVE certification for the construction and operation of the Desert Claim Power Project located in Kittitas County, Washington.

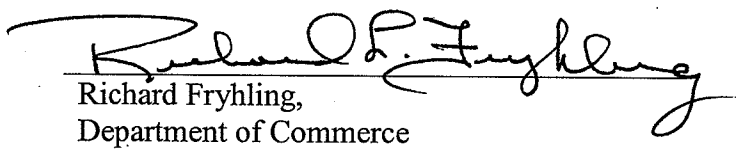
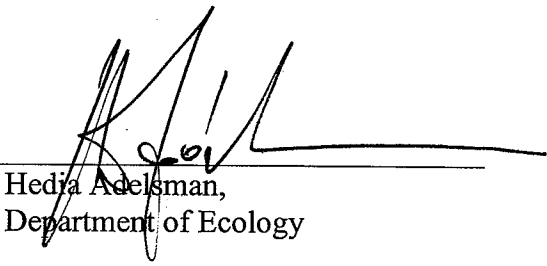

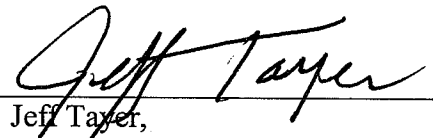
2. The Council orders that its recommendations as set out in this Order, together with the proposed Site Certification Agreement appended hereto, be reported and forwarded to the Governor of the State of Washington for consideration and action.

## 9. SIGNATURES

DATED and effective at Olympia, Washington, this 16th day of November, 2009.

  
James Oliver Luce, Chair

James O. Luce,  
Council Chair

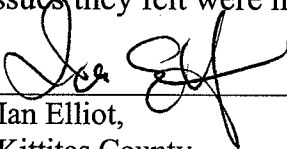
  
Richard Fryhling,  
Department of Commerce  
Hedra Adelman,  
Department of Ecology  
Richard Byers,  
Utilities and Transportation Commission  
Mary McDonald,  
Department of Natural Resources  
Jeff Tayer,  
Department of Fish and Wildlife

Ian Elliot, Concurring in the result – As a newcomer to the EFSEC process I have had to spend significant time understanding the law and convention as it pertains to EFSEC. I believe the process is flawed because the rights of the local citizens and the obligations of EFSEC do not align. As a result, once a project has been accepted by EFSEC and local permitting has been preempted, the issues of law take precedence over the issues of the project and how those issues affect the local citizen or land owner. An issue might be significant but if it is not of record in the hearing it is not to be considered. I believe the project has too high a turbine density (units per acre) and that we have not adequately dealt with the visual effect of multiple turbines on relatively flat terrain as it pertains to local residents.

Another issue is the cumulative effect of multiple proceedings on local citizens. Kittitas County has gone through three applications and two preemptions. The vast

majority of the local populace has taken the attitude, "what difference does it make? They are going to approve the project anyway, why bother to get involved?" This is evidenced by the great volume of public involvement and testimony in the first project and dearth of similar input in Desert Claim. Local news stories and letters to editor also point to this conclusion. Adequate safeguards and flexibility are required to protect the local interests after preemption. In addition, I believe that the State of Washington has done a poor job of informing the citizens of their rights under preemption and how their input can affect the outcome.

I concur with the outcome of the process, given the parameters we were required to work within and applaud the hard work of the council in trying to deal with some issues they felt were needed to be addressed but were limited by the evidence of record.



---

Ian Elliot,  
Kittitas County

#### **10. NOTICE TO PARTIES:**

Administrative relief may be available through a petition for reconsideration, filed no later than 2:00 p.m. on November 30, 2009 with the Council Manager pursuant to WAC 463-30-335(1). Answers, if any, must be filed no later than the close of business on December 11, 2009, pursuant to WAC 463-30-335(3).



### **Attachment 3**

Stipulation between Counsel for the Environment and Desert Claim Wind Power LLC, Exhibit 30 in the adjudicative proceeding.

November 13, 2018 letter from Bill Sherman, Counsel for the Environment

November 12, 2018 letter from Karen McGaffey, Perkins Coie

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BEFORE THE STATE OF WASHINGTON  
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of Application No. 2006-02  
Desert Claim Wind Power Project

STIPULATION BETWEEN  
COUNSEL FOR ENVIRONMENT AND  
DESERT CLAIM WIND POWER LLC

I. Introduction

A. **Parties**

Desert Claim Wind Power LLC ("Desert Claim") has filed an Application for Site Certification with the Energy Facility Site Evaluation Council ("EFSEC" or the "Council") seeking a Site Certification Agreement ("SCA") authorizing it to construct and operate a wind power project (the "Project") on approximately 5,200 acres (the "Project Area") located northwest of Ellensburg in unincorporated Kittitas County. The Project will consist of up to 95 2-megawatt ("MW") wind turbines and associated facilities. Desert Claim filed its Application with the Council on November 6, 2006, and filed a Revised Application on February 6, 2009.

The Counsel for the Environment ("CFE") is a statutory party to the proceedings before EFSEC and is charged with representing the public and its interest in protecting the quality of the environment. RCW 80.50.080.

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**B. Identification, Evaluation and Resolution of Issues**

Desert Claim and its consultants have undertaken impact assessments to identify actual and potential impacts to the environment expected from the construction and operation of the Project. In addition, EFSEC has adopted a Final Environmental Impact Statement ("FEIS") published by Kittitas County in 2004 addressing an earlier version of the project proposal, and EFSEC has published a Draft Supplemental Environmental Impact Statement ("SEIS") providing further information and analysis concerning the Project's potential environmental impacts.

The CFE and its consultants have evaluated the information presented in the Revised Application, the FEIS and the Draft SEIS, as well as undertaking their own investigation of the Project Area and other available information. By letter dated May 4, 2009, the CFE submitted comments concerning the Draft SEIS to EFSEC. On May 16, 2009, the CFE circulated a *Preliminary Statement of Issues*, which identified twenty-one possible issues that the CFE might wish to raise during the adjudicative proceeding.

The CFE and Desert Claim (collectively "the Parties") have discussed the issues identified by the CFE, exchanged additional information concerning those issues and agreed upon ways to resolve them. The commitments set forth in this stipulation ("Stipulation") fully resolve the issues identified by the CFE in its *Preliminary Statement of Issues*.

**C. Purpose and Intent**

The Parties agree that this Stipulation is intended to fully resolve all issues identified by the CFE in its *Preliminary Statement of Issues*, dated June 16, 2009. Through this Stipulation, the Parties set forth the obligations, commitments, and restrictions that the Parties intend to have incorporated into the SCA as conditions. These conditions would be

1 in addition to any mitigation measures identified in the Revised Application, the FEIS and  
2  
3 Final SEIS that EFSEC may impose through the SCA. The obligations and conditions set  
4  
5 forth in the Stipulation relate to the construction and operation of the Project as described in  
6  
7 the Revised Application. So long as the obligations and conditions outlined in this  
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9 Stipulation, are included in the SCA, the CFE fully supports the issuance of an SCA for the  
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11 Project, and the CFE agrees not to recommend or request that EFSEC require any additional  
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13 mitigation or conditions in the SCA. Neither the CFE nor Desert Claim will advocate any  
14  
15 mitigation measures or permit conditions that are inconsistent with those found in this  
16  
17 Stipulation in any proceedings concerning the Project.  
18

## 19 **II. Resolution of Issues**

### 20 **A. Environmental Benefits**

21  
22 The Parties recognize that operation of the Project will have environmental benefits.  
23  
24 The Project will generate electricity without the emission of air pollutants and greenhouse  
25  
26 gases that result from the generation of electricity at fossil fuel-fired facilities. The Project  
27  
28 will generate electricity without the use of significant water resources that are typically  
29  
30 associated with thermal generation facilities. The Project will also help to preserve open  
31  
32 space and keep rangeland in agricultural use.  
33

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35 The Parties acknowledge that the Project is consistent with Washington State's  
36  
37 Energy Policy, which among other things encourages the development of renewable energy  
38  
39 resources. RCW 43.21F.015. Increasing generation of electricity from renewable sources,  
40  
41 such as wind power, is also an important part of Washington's plan for reducing greenhouse  
42  
43 gas emissions. See Washington Departments of Ecology and Community Trade, and  
44  
45 Economic Development, *Growing Washington's Economy in a Carbon-Constrained World*:  
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2 *A Comprehensive Plan to Address the Challenges and Opportunities of Climate Change* 23  
3  
4 (Dec. 2008). The Project is consistent with the recommendation of Washington's Climate  
5  
6 Advisory Team to "increase the level of renewable and alternative energy that can be  
7  
8 delivered to the electric grid." *Leading the Way: A Comprehensive Approach to Reducing*  
9  
10 *Greenhouse Gases in Washington State* 55 (Feb. 1, 2008).

11  
12 **B. Technical Advisory Committee**

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14 Desert Claim agrees to form a Technical Advisory Committee ("TAC") as outlined  
15  
16 in the Washington Department of Fish and Wildlife Wind Power Guidelines (April  
17  
18 2009) ("2009 WDFW Guidelines").

- 19  
20 1. The purpose of the TAC will be to ensure that monitoring data collected  
21  
22 pursuant to the Avian Monitoring Plan and the Bat Monitoring Plan and other  
23  
24 related monitoring data are considered in a forum in which independent and  
25  
26 informed parties can collaborate with Desert Claim. The TAC will make  
27  
28 recommendations to EFSEC if it deems additional studies or mitigation are  
29  
30 warranted to address impacts that were either not foreseen in the Revised  
31  
32 Application, the FEIS or the Final SEIS, or significantly exceed the impacts  
33  
34 that were projected in those documents. In order to make advisory  
35  
36 recommendations to EFSEC, the TAC will review and consider the results of  
37  
38 Project monitoring studies, as well as new scientific findings made at wind  
39  
40 generation facilities with respect to the impacts on habitat and wildlife, as they  
41  
42 may relate to the Project. The TAC will assess whether the post-construction  
43  
44 restoration and mitigation and monitoring programs for wildlife that have been  
45  
46 identified and implemented merit further studies or additional mitigation, taking  
47

1  
2 into consideration factors such as the species involved, the nature of the impact,  
3  
4 monitoring trends, and new scientific findings.

- 5  
6 2. The TAC may include, but need not be limited to, representatives from the  
7  
8 Washington Department of Fish and Wildlife ("WDFW"), U.S. Fish and  
9  
10 Wildlife Service, Audubon Washington or its member chapters, EFSEC,  
11  
12 Kittitas County, Washington Department of Natural Resources ("WDNR"),  
13  
14 and Desert Claim. EFSEC, at its discretion, may add representatives to the  
15  
16 TAC from local interest groups as well as state, local, federal and tribal  
17  
18 governments. All TAC members shall be approved by EFSEC.  
19  
20 3. With the exception of WDNR, no representative to the TAC may be party to  
21  
22 a turbine lease agreement or any other contractual obligation with Desert  
23  
24 Claim.  
25  
26 4. Prior to the beginning of the Site Preparation, Desert Claim shall contact the  
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28 agencies and organizations listed above in paragraph 2 requesting that they  
29  
30 designate a representative to the TAC, and that the agencies or organizations  
31  
32 notify EFSEC in writing of their TAC representative and of their member's  
33  
34 terms of representation. No later than 60 days prior to the beginning of  
35  
36 Commercial Operation, Desert Claim shall convene the first meeting of the  
37  
38 TAC.  
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40 5. No later than 60 days after the beginning of construction, Desert Claim will  
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42 submit to EFSEC proposed Rules of Procedure describing how the TAC shall  
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44 operate, including but not limited to a schedule for meetings, a meeting  
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46 procedure, a process for recording meeting discussions, a process for making  
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1 and presenting timely TAC recommendations to the Council, and other  
2 procedures that will assist the TAC to function properly and efficiently.  
3  
4 Desert Claim will provide a copy of the proposed Rules of Procedure at the  
5 first TAC meeting for review and comment. The TAC may suggest  
6 modifications of the Rules of Procedure; any such modifications must be  
7 approved by EFSEC.  
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13 6. The TAC will be convened for the life of the Project, except that EFSEC may  
14 terminate the TAC if: the TAC has ceased to meet due to member attrition;  
15 the TAC determines that all of the pre-permitting, operational and post-  
16 operational monitoring has been completed and further monitoring is not  
17 necessary; or the TAC members recommend that it be terminated. If the  
18 TAC is terminated or dissolved, EFSEC may reconvene and reconstitute the  
19 TAC at its discretion.  
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21 7. The ultimate authority to require implementation of additional mitigation  
22 measures, including any recommended by the TAC, will reside with EFSEC.  
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31 **C. Townsends Ground Squirrel**

32 The Townsends Ground Squirrel is a WDFW candidate species. Prior to  
33 commencing construction, Desert Claim agrees to survey the Project site for Townsends  
34 Ground Squirrels and/or their burrows, using a protocol developed in consultation with the  
35 WDFW. If Townsends Grounds Squirrels are found to exist on the Project site, Desert  
36 Claim will consult with WDFW to determine whether proposed construction activities are  
37 likely to have significant adverse impacts on the Townsends Ground Squirrel population,  
38 taking into account the habitat mitigation being provided by Desert Claim. If Desert Claim  
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1 and WDFW conclude that significant impacts are likely, Desert Claim, in consultation with  
2 the WDFW, will develop a plan to implement reasonable and practical mitigation measures  
3 during construction. This Plan shall be subject to approval by EFSEC.  
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7 **D. Birds, Including Eagles**  
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- 9  
10 1. The Parties recognize that construction of the Project has the potential to  
11 adversely affect Loggerhead Shrike, Sage Thrasher, and Long-billed Curlews  
12 that may nest in the Project Area during the months of April through June.  
13 Desert Claim does not agree to avoid or restrict construction activities during  
14 those months. However, Desert Claim, in consultation with its wildlife  
15 consultant and WDFW will schedule the sequence of construction activities  
16 and/or locations across the Project Area in a manner that will minimize risks  
17 to these birds during those months to the extent that it is reasonable, practical  
18 and feasible to do so.  
19  
20 2. Prior to commencing commercial operation, Desert Claim will develop an  
21 Avian Monitoring Plan in consultation with WDFW and submit the plan to  
22 EFSEC for approval. Desert Claim and WDFW will consider the 2009  
23 WDFW Wind Power Guidelines in developing the Avian Monitoring Plan,  
24 which will include two years of fatality monitoring involving standardized  
25 carcass searches, scavenger removal trials, searcher efficiency trials, and  
26 reporting of incidental fatalities.  
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3. The Parties acknowledge that livestock calving has the potential to attract bald eagles to the Project Area. The Parties also acknowledge that the private ranchers who have leased their property for the Project may have no practical location outside the Project Area to conduct calving operations. To address the potential risk this may present to bald eagles, Desert Claim agrees to implement the following mitigation measures:

- a. Desert Claim agrees that no calving operations will take place on the portion of the Project that will be owned by Desert Claim or an affiliate. Cattle ranchers who have leased property for the Project may continue conducting calving operations in fenced areas. The approximate location of those areas is shown on the attached figure. Desert Claim will not locate any turbine within the fenced calving areas or within a buffer area equal to the length of a turbine blade plus one hundred feet from the fence line.
- b. Desert Claim will promptly remove carcasses and livestock afterbirths from the Project Area during construction and operation of the Project. Development and implementation of this program shall be done in consultation with WDFW.
- c. In consultation with the CFE and WDFW, Desert Claim will develop a plan to study the behavior of bald eagles during calving operations in the first two years of Project operation. Desert Claim will implement the study plan and present the results of the study to the TAC and EFSEC. The TAC will consider the study results and

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determine whether the calving operations in the Project Area present an unreasonable risk to bald eagles. If so, the TAC will develop recommendations regarding possible additional mitigation measures that may further reduce the risk to bald eagles. Mitigation measures that may be considered include, but are not limited to, modifying the operation of the wind turbines, modifying or moving the calving operations within the Project Area, or removing the calving operations from the Project Area. The TAC will submit its findings and recommendations for mitigation measures, if any, to EFSEC for EFSEC's consideration. EFSEC will have final authority to decide whether to require the implementation of additional mitigation measures addressing this issue.

- d. In the event that a bald eagle is killed by a turbine, Desert Claim will report the fatality to EFSEC and the TAC within 48 hours. In the TAC Rules of Procedure, Desert Claim will propose that, within 30 days, the TAC evaluate the available information and consider whether there are additional mitigation measures that should be implemented to reduce the risks to bald eagles and report its findings and mitigation recommendations, if any, to EFSEC.

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**E. Bats**

1. Prior to beginning commercial operation, Desert Claim in consultation with the WDFW will conduct a bat monitoring survey during the bat migration (late summer and early fall). The survey will utilize current technology and methodology to document bat use of the site, including which if any species are at risk from site operation. Desert Claim will consult with the CFE and WDFW in developing the protocol for the survey. Desert Claim will present the results of the survey to the TAC. If, based on the survey results, the TAC concludes that the Project presents a significant risk to bats that is substantially greater than the risk described in the Final SEIS, the TAC may recommend to EFSEC that additional mitigation measures be required.
2. Prior to commencing commercial operation, Desert Claim will develop a post-construction Bat Monitoring Plan in consultation with WDFW and submit the plan to EFSEC for approval. The plan will include two years of bat fatality monitoring.

**F. Plants**

Desert Claim will complete a rare plant survey prior to issuance of the Final SEIS. If plants of concern are identified on the Project site and significant adverse impacts to such plants are anticipated, Desert Claim will develop and adopt a Plant Conservation Plan in consultation with the Washington Natural Heritage Program and subject to approval by EFSEC prior to commencement of construction. The CFE reserves the right to submit comments to EFSEC regarding the survey results and any Plant Conservation Plan that may be prepared.

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**G. Habitat Impacts**

1. Prior to starting construction, Desert Claim will develop a Habitat Restoration and Revegetation Plan in consultation with WDFW and submit it to EFSEC for approval. The Plan will require that all temporarily disturbed areas be reseeded with an appropriate mix of native, locally adapted plant species in a manner and sequence that will maximize the likelihood of successful restoration of the area and prevent the spread of noxious weeds. The Plan will include a pre-identified reference site or sites that Desert Claim, the TAC, and WDFW can use to gauge the success of the habitat restoration and revegetation efforts. WDFW and the TAC may suggest modifications to the initial Plan as new information becomes available.
2. The Parties recognize that newly constructed roads may fragment the existing habitat and increase corridors for predators. In its final design for construction, Desert Claim, in consultation with WDFW, agrees to maximize the use of existing roads and pathways and minimize the construction of new roads as much as reasonable and practical and without disrupting wetlands and other sensitive habitat. This final design shall be subject to approval by EFSEC.
3. Prior to starting construction, Desert Claim will develop a Habitat Mitigation Plan in consultation with WDFW, and subject to approval by EFSEC, based upon the compensatory mitigation ratios outlined in 2009 WDFW Wind Power Guidelines. This plan will include a map identifying habitat types based upon USGS soils maps. The Parties recognize that the final design of

1 the Project will vary from the schematic design set forth in the Revised SCA  
2 Application. Desert Claim agrees that any compensatory mitigation will be  
3 based upon the permanent and temporary habitat disruptions identified in the  
4 Final Construction plans. Desert Claim further agrees to increase the  
5 compensatory mitigation to reflect actual conditions after construction is  
6 completed should the as-built project result in greater temporary or  
7 permanent impacts than those shown in the Final Construction plans.  
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15 **H. Best Management Practices (BMPs)**  
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17 Prior to starting construction, Desert Claim will prepare the following plans and  
18 submit them for EFSEC's review and approval:  
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- 20 1. Construction Site Management Plan
- 21 2. Temporary Erosion and Sediment Control Plan
- 22 3. Construction Stormwater Pollution Prevention Plan
- 23 4. Construction Spill Prevention, Control and Countermeasures Plan
- 24 5. Construction Soil Management and Vegetation Plan
- 25 6. Noxious Weed Control Plan
- 26 7. Construction Emergency Plan
- 27 8. Construction Fire Control and Protection Plan
- 28 9. Construction Traffic Management Plan
- 29 10. Cultural and Archeological Resources Plan

30 These plans will include measures, such as best management practices designed to  
31 avoid or minimize potential environmental impacts. Any blasting during  
32 construction will comply with state regulations.  
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**I. Dust Control**

During construction and operation of the Project, Desert Claim will use water or a water-based, environmentally safe dust palliative such as lignin, for dust control on unpaved roads during Project construction. Desert Claim agrees not use calcium chloride for dust suppression.

**J. Independent Environmental Monitor**

Desert Claim agrees to retain a full-time, on-site independent environmental monitor to ensure compliance with the wetland set back requirements, BMPs, and other construction related mitigation measures imposed by this Stipulation and the SCA. During the course of construction, the independent environmental monitor will be responsible for preparing and submitting monthly progress reports to EFSEC regarding adherence to BMPs and the implementation of environmental mitigation plans.

**K. Cumulative Impacts**

The TAC, or individual members thereof, will be authorized to consult, exchange information, and collaborate with TACs from other wind turbine projects, including the Kittitas Valley Wind Power Project and the Wild Horse Wind Power Project, for purposes of identifying and monitoring cumulative environmental impacts, and, if necessary, developing mitigation recommendations addressing known or newly identified cumulative impacts related to the construction and operation of wind power projects.

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### **III. Withdrawal of Issues and General Terms**

#### **A. Withdrawals of Issues**

Upon approval of this Stipulation, the CFE withdraws its issues from the adjudicative hearing, but reserves its right to otherwise participate in the adjudicative hearing process pursuant to the terms herein.

#### **B. Support of Stipulation**

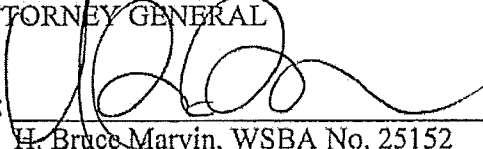
The Parties support this Stipulation and fully support the issuance of an SCA for the Project, subject to the conditions set forth in this Stipulation. The Parties understand that this Stipulation is subject to review and approval by EFSEC. The Parties will cooperate in submitting this Stipulation to EFSEC for acceptance, and will support adoption of this Stipulation in proceedings before EFSEC. The CFE reserves the right to attend the hearing and participate in the support and defense of this Stipulation. The CFE also reserves the right to be heard on any issue raised by any other party or any member of EFSEC in the matter that affects the statutory duties of the CFE. The CFE will support certification of the Project and will not advocate any conditions or mitigation requirements in addition to those outlined in this Stipulation. The Parties reserve the right to advocate additional conditions or changes to these conditions during the adjudicative proceedings, if substantial changes are made to the Project or if there is a significant unanticipated change of circumstances.

#### **C. Termination**

If EFSEC rejects or modifies this Stipulation, the Parties reserve their individual and collective rights to terminate this Stipulation. Before a party exercises its right to terminate this Stipulation, both parties shall use their best efforts to take reasonable actions necessary to re-negotiate this Stipulation in a mutually satisfactory manner.

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2 Dated June 23, 2009.  
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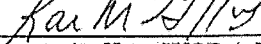
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6 ROBERT M. MCKENNA  
7 ATTORNEY GENERAL  
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10 By:   
11 H. Bruce Marvin, WSBA No. 25152  
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13  
14 1125 Washington St. S.E.  
15 P.O. Box 40100  
16 Olympia, WA 98504-0100  
17 Telephone: 360.586.2438  
18 Email: [BruceM1@atg.wa.gov](mailto:BruceM1@atg.wa.gov)  
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20 Counsel for the Environment  
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PERKINS COIE LLP

By:   
Karen McGaffey, WSBA No. 20535  
Kelly Moser, WSBA No. 36474

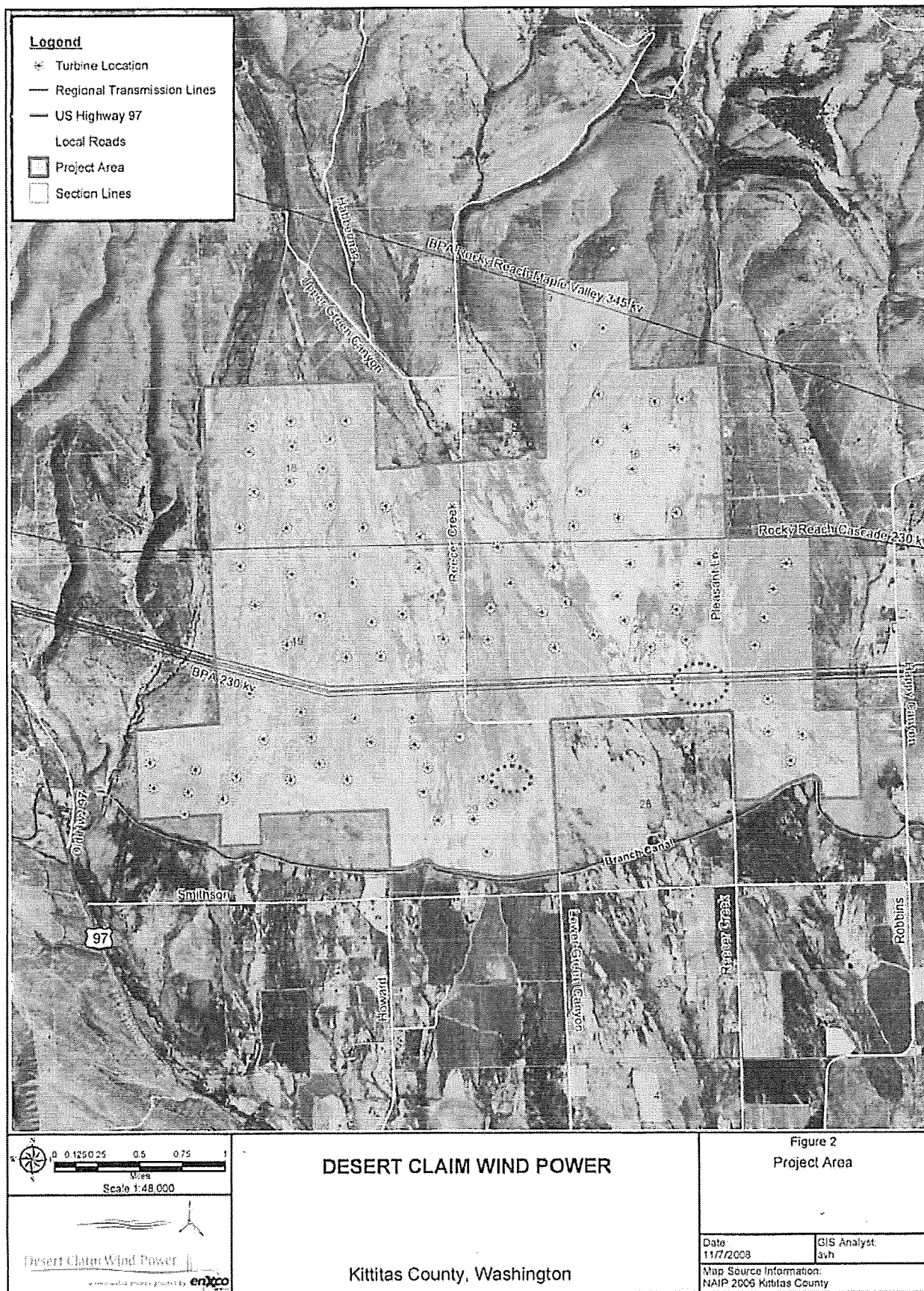
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Attorneys for Applicant  
Desert Claim Wind Power

STIPULATION BETWEEN COUNSEL FOR  
ENVIRONMENT AND DESERT CLAIM  
WIND POWER LLC - 15  
58415-0001/LEGAL16423925.1

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# **APPENDIX B**



**Bob Ferguson**  
**ATTORNEY GENERAL OF WASHINGTON**

Counsel for Environmental Protection  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104

November 13, 2018

Kathleen Drew, Chair  
Washington State Energy Facility Site Evaluation Council  
1300 S Evergreen Park Dr.  
PO Box 47250  
Olympia, WA 98504-7250

To the Council:

**RE: Desert Claim Wind Power LLC application for amended SCA**

I write in my capacity as Counsel for the Environment on the Desert Claim Wind Power LLC project.

On June 23, 2009, Counsel for the Environment and Desert Claim signed a Stipulation by which my office agreed to "fully support the issuance of the [Site Certification Agreement] for the Project, subject to the conditions set forth in th[e] Stipulation." Although the proposed project has changed in certain ways from the original certified proposal, my office stands by its agreement to fully support issuance of an amended SCA, in light of that Stipulation and the commitments that Desert Claim Wind Power LLC made in the attached letter of November 12, 2018. For your convenience, I attach the 2009 Stipulation and 2018 Letter as Appendices.

Sincerely,

William R. Sherman  
Counsel for the Environment

Attachments

cc: Karen M. McGaffey, Counsel for Desert Claim Wind Power LLC  
Ann Essko, Senior Counsel, Attorney General's Office  
Jonathan Thompson, Assistant Attorney General, Attorney General's Office

Karen M. McGaffey  
KMcGaffey@perkinscoie.com  
D. +1.206.359.6368  
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November 12, 2018

**VIA E-MAIL**

Bill Sherman  
Counsel for the Environment  
Washington Attorney General's Office  
800 5th Avenue, Suite 2000, TB-14  
Seattle, WA 98104

**Re: Desert Claim - SCA Amendment Request**

Dear Bill:

On February 26, 2018, the Certificate Holder Desert Claim Wind Power LLC (Desert Claim) filed a request to amend the Site Certification Agreement (SCA) authorizing the construction and operation of the Desert Claim Wind Power Project. The Amendment Request seeks to modify the SCA to authorize construction and operation of a smaller project, using different turbines in a different layout. The SCA originally authorized a 95-turbine, 180-megawatt project, and the Amendment Request contemplates a project with no more than 31 turbines and a total capacity of no more than 100 megawatts.

On September 25, 2018, EFSEC issued a SEPA Addendum and a staff memorandum concerning the Amendment Request. EFSEC has scheduled the matter for action at its November 13, 2018 Council Meeting.

We are writing on behalf of Desert Claim to outline additional mitigation commitments Desert Claim is prepared to make in connection with the Amendment Request. The original SCA was approved by EFSEC after careful examination by the Council. On June 23, 2009, after careful consideration, the Counsel for the Environment joined a Stipulation by which it "fully support[ed] the issuance of an SCA for the Project, subject to the conditions set forth in this stipulation." Based on our discussions, we understand that the Counsel for the Environment stands by its support as stated in the 2009 Stipulation, in light of the commitments discussed below:

**(1) Birds Nesting in the Project Area.**

Based on a stipulation filed by Desert Claim and the Counsel for the Environment during the 2009 adjudicatory proceedings, Article V.E.7. of the SCA provides as follows:

The Certificate Holder, in consultation with its wildlife consultant and WDFW, shall schedule the sequence of construction activities and/or locations across the Project Area in a manner that will minimize risks to Loggerhead Shrike, Sage Thrasher and Longbilled Curlews that may nest in the Project Area during the months of April through June to the extent that it is reasonable, practical and feasible to do so. The Certificate Holder shall not be required to avoid or restrict construction activities during those months.

Desert Claim agrees that it will also schedule the sequence of construction activities and/or locations across the Project Area in a manner that will minimize risks to Sagebrush Sparrow that may nest in Project Area during the months of April through June to the extent that is reasonable, practicable and feasible to do so.

**(2) Eagles**

Based on the stipulation filed by Desert Claim and the Counsel for the Environment, Article VI.D. of the SCA provides in part as follows:

In the event that a bald eagle is killed by a turbine during calving operations in the Project Area, the Certificate Holder will report the fatality to EFSEC, the TAC and the United States Fish and Wildlife Service within forty-eight (48) hours.

Desert Claim also agrees that in the event that a golden eagle is killed by a turbine during calving operations in the Project Area, the Certificate Holder will report the fatality to EFSEC, the TAC and the United States Fish and Wildlife Service within forty-eight hours.

**(3) Bats**

Based on the stipulation filed by Desert Claim and the Counsel for the Environment, Article VI.D. of the SCA provides as follows:

Prior to beginning commercial operation, the Certificate Holder, in consultation with WDFW, shall conduct a bat monitoring survey during the bat migration (late summer and early fall). The survey shall utilize current technology and methodology to document bat use of the site, including which if any species are at risk from site operation. Detectors shall be placed at an appropriate elevation to monitor migrating bats within the rotor sweep zone. The Certificate Holder shall consult with the CFE and WDFW in developing the protocol for the survey. The Certificate Holder shall present the results of

Bill Sherman  
November 12, 2018  
Page 3

the survey to the TAC. If, based on the survey results, the TAC concludes that the Project presents a significant risk to bats that is substantially greater than the risk described in the Final SEIS; the TAC may recommend to EFSEC that additional mitigation measures be required.

The Certificate Holder shall develop a post-construction Bat Monitoring Plan in consultation with WDFW and submit the plan to EFSEC for approval no later than sixty (60) days prior to commencing Commercial Operation. The plan shall include two years of bat fatality monitoring.

Desert Claim agrees that the bat monitoring survey conducted during the bat migration will include reasonable efforts to determine whether Townsend's Big-Eared bats are likely to be present within the Project's rotor sweep zone.

Thank you for working with us to resolve your concerns. We appreciate your support of the Desert Claim Wind Project.

Very truly yours,



Karen M. McGaffey

## **Attachment 4**

Agreement between Washington Department of Fish and Wildlife (WDFW) and Desert Claim Wind Power LLC, Exhibit 20 in the adjudicative proceeding.

**AGREEMENT BETWEEN DESERT CLAIM WIND POWER LLC AND  
WASHINGTON DEPARTMENT OF FISH AND WILDLIFE CONCERNING  
THE DESERT CLAIM WIND POWER PROJECT**

**Preamble**

In November 2006, Desert Claim Wind Power LLC ("Desert Claim") filed an Application for Site Certification with the Washington Energy Facility Site Evaluation Council ("EFSEC") requesting certification for the Desert Claim Wind Power Project (the "Project"). In February 2009, Desert Claim filed a Revised Application for Site Certification ("Revised Application") with EFSEC. The Project, as set forth in the Revised Application, consists of 95 wind turbines, with a total capacity of 190 megawatts, and is located on approximately 5,200 acres northwest of Ellensburg in unincorporated Kittitas County (the "Project Area").

In March 2007, EFSEC adopted the Final Environmental Impact Statement ("FEIS") for the Desert Claim Wind Power Project that Kittitas County published in August 2004. In April 2009, EFSEC published a Draft Supplemental Environmental Impact Statement ("SEIS") for the Project.

By letter dated May 4, 2009, the Washington Department of Fish and Wildlife ("WDFW") submitted comments regarding the Draft SEIS. WDFW's comments suggested that additional information be included in the SEIS and recommended that the Project include various mitigation measures to address its potential environmental impacts.



WDFW staff and Desert Claim representatives have met on several occasions to discuss WDFW's recommendations, and have agreed upon the following mitigation measures that fully resolve WDFW's concerns regarding the Project.

**Desert Claim's Commitments**

Desert Claim agrees to the following mitigation measures:

1. **Habitat Mitigation Plan.** Prior to starting construction, Desert Claim will develop a Habitat Mitigation Plan in consultation with WDFW, based upon the 2009 WDFW Wind Power Guidelines, and submit the Habitat Mitigation Plan to EFSEC for approval. Desert Claim and WDFW will work together to develop the Habitat Mitigation Plan as follows:
  - A. Desert Claim and WDFW will agree upon a map of the habitat types found within the Project Area (the "Habitat Map"). The Habitat Map will be based upon the NRCS maps of soils and ecological sites, and field investigations of the Project Area.
  - B. The Habitat Mitigation Plan will specify Desert Claim's Mitigation Obligation. Desert Claim's Mitigation Obligation will be calculated using the mitigation ratios specified in the 2009 WDFW Wind Power Guidelines. For purposes of calculating the Mitigation Obligation, expected habitat impacts will be determined based upon the pre-construction Project layout drawings overlaid on the habitat types shown on the Habitat Map. Pre-construction Project layout drawings will show expected permanent and temporary land disturbances.
  - C. Desert Claim may satisfy its Mitigation Obligation either by purchasing a mutually acceptable mitigation parcel and deeding it to WDFW or a mutually

acceptable third party, contributing money to a mutually acceptable third-party that owns or will purchase a mitigation parcel, or by paying WDFW a fee of one thousand seven hundred fifty dollars (\$1,750.00) per acre in lieu of mitigation. If Desert Claim has not satisfied its Mitigation Obligation prior to commencing construction, Desert Claim will provide a letter of credit to EFSEC in an amount sufficient to provide financial security for its obligation. Desert Claim will be required to satisfy its Mitigation Obligation prior to commencing commercial operation of the Project.

- D. The Habitat Mitigation Plan will include a process to determine the actual impacts to habitat following the completion of construction. In the event that actual impacts to habitat exceed the expected impacts determined prior to construction, the Habitat Mitigation Plan will include a mechanism for Desert Claim to provide supplemental compensatory mitigation ("Supplemental Mitigation").

Supplemental Mitigation, if any, may take the form of an additional mitigation parcel, the contribution of additional funds to a third-party, or the payment of an additional fee of one thousand seven hundred fifty dollars (\$1,750.00) per acre to WDFW in lieu of mitigation.

2. Project Design.

- A. Desert Claim will minimize road construction in the Project Area to the extent practical. Desert Claim will consult with WDFW on ways to minimize road construction and other habitat impacts prior to preparing final construction plans.

- B. Desert Claim will avoid the installation of above-ground collector lines where practical, instead installing collector lines in and/or alongside roadways, in areas currently disturbed, in other areas that will be permanently disturbed by Project construction, or by directionally drilling under surface waters when practical.  
  
When it is not practical to avoid the installation of above-ground collector lines, Desert Claim will consult with WDFW to determine the most practical alternative with the least adverse environmental impacts. Any above-ground collector lines and electrical infrastructure will be designed to comply with the current Avian Power Line Interaction Committee Guidelines.
- C. Ground-level security lighting will be motion-sensitive and pointed downward.
- D. All permanent meteorological towers will be free-standing monopoles without guy wires. Desert Claim will use bird markers on all temporary meteorological towers with guy lines.

3. Construction-Related Plans. Prior to starting construction, Desert Claim will develop the following construction-related plans in consultation with WDFW and then submit them to EFSEC for approval:

- A. Construction Site Management Plan
- B. Habitat Restoration and Revegetation Plan (for temporarily disturbed areas).  
  
Among other things, this plan will address the timing and intensity of grazing during revegetation.
- C. Construction Soil Management Plan
- D. Noxious Weed Control Plan

Desert Claim may combine two or more of these plans into a single plan if convenient.

4. Other Construction-Related Plans. Prior to starting construction, Desert Claim will develop the following construction-related plans and submit them to EFSEC for approval. Desert Claim will provide a copy of these plans to WDFW at the same time it submits them to EFSEC, so that WDFW may provide comments to Desert Claim and EFSEC.
- A. Temporary Erosion and Sediment Control Plan
  - B. Construction Stormwater Pollution Prevention Plan
  - C. Construction Spill Prevention, Control and Countermeasures Plan
  - D. Fire Control and Protection Plan
  - E. Construction Plans and Specifications for ground-disturbing work, including plans for roads, equipment staging areas, tower pads, transmission lines, electrical collector system, quarry sites and substation laydown areas.

Desert Claim may combine the elements of two or more of these plans into a single plan if convenient.

5. Project Construction.
- A. An Independent Environmental Monitor, operating under EFSEC's direction, will monitor Project construction.
  - B. Desert Claim will ensure that the construction team includes a qualified staff person(s) with experience in construction in sensitive arid environments, similar to that found in the Project Area. A preconstruction meeting will be held between the Independent Environmental Monitor and the construction team to review and clarify construction related plans, special concerns, and construction techniques prior to beginning work.

- C. Construction teams will stake work and clearing limits prior to construction or ground clearing.
- D. Desert Claim will avoid temporary or permanent disturbance of wetlands. Although no disturbance to wetlands is anticipated, if an unanticipated disturbance occurs, Desert Claim will prepare a Wetlands Restoration Plan in consultation with WDFW and submit it to EFSEC for approval.
- E. Prior to any work affecting the bed or flow of state waters (including seasonally dry stream channels), Desert Claim will consult with and obtain approval from WDFW.
- F. Construction activities will not be restricted to particular seasons. However, Desert Claim will attempt to sequence construction activities in order to minimize temporary earth disturbances during the wet season where practical. In particular, Desert Claim will avoid earth-disturbing activities that result in distinct areas of temporary habitat disturbance (e.g. cross-country trenching to install electric collector system lines) in shrub-steppe areas when soils are saturated (which commonly occurs from mid-November through April) to the greatest extent possible. If such activities are to take place during periods of soil saturation, Desert Claim will consult with WDFW to develop a specific plan incorporating strategies and best management practices to minimize the environmental impacts of these activities and additional restoration measures to ensure successful restoration of the disturbed habitat.

6. Operations-Related Plans. Prior to commercial operation, Desert Claim will develop the following operations-related plans in consultation with WDFW and submit them to EFSEC for approval:
  - A. Operations Stormwater Pollution Prevention Plan
  - B. Operations Spill Prevention, Control and Countermeasures Plan
  - C. Operations Fire Control and Prevention Plan

7. Raptor, Bald Eagle, and Avian Mitigation Measures

- A. Desert Claim will post, maintain, and enforce a 25 miles per hour speed limit on Project roads.
- B. Desert Claim will promptly remove livestock and big game carcasses and livestock afterbirths from the Project Area.
- C. Desert Claim will not allow calving to be conducted on the land within the Project Area that will be owned by Desert Claim or an affiliate. Cattle ranchers who have leased property for the Project may continue to conduct calving operations within the Project Area.
- D. Desert Claim will avoid the use of rodenticides to control rodent burrowing around towers as much as possible. In the event that Desert Claim believes the use of rodenticides is necessary, Desert Claim will consult with WDFW to develop a plan for appropriate application and use.

8. Avian Monitoring

- A. Desert Claim will conduct a raptor nest survey during June 2009 and the breeding season just prior to the start of construction, if another breeding season occurs before the commencement of construction. The results of the survey will be used to determine timing restrictions and/or buffer distances to active raptor nests.
- B. Prior to commencing commercial operation, Desert Claim will develop an Avian Monitoring Plan in consultation with WDFW and submit the plan to EFSEC for approval. The Avian Monitoring Plan will be based upon the 2009 WDFW Wind Power Guidelines, although Desert Claim and WDFW may agree to depart from the Guidelines if circumstances warrant. The Avian Monitoring Plan will include

one breeding season of raptor nest surveys, and a tracking and reporting system that reports avian fatalities to EFSEC and the Technical Advisory Committee. The Avian Monitoring Plan will also include either two years of fatality monitoring, or one year of fatality monitoring and a second year of focused monitoring or study that the TAC determines may be more beneficial than a second year of fatality monitoring.

9. Bat Surveys. Prior to beginning commercial operation, Desert Claim will conduct a bat survey during the bat migration period in late summer through early fall. The survey will focus on data collection during the period of heaviest migration. The survey will utilize current technology and methodology to document bat use of the site. Detectors will be placed at an appropriate elevation to monitor migrating bats within the rotor sweep zone. Desert Claim will consult with WDFW in developing the protocol for the survey.
10. Technical Advisory Committee. Desert Claim agrees to form a Technical Advisory Committee ("TAC").
  - A. The purpose of the TAC will be to ensure that monitoring data collected pursuant to the Avian Monitoring Plan or other related monitoring data is considered in a forum in which independent and informed parties can collaborate with Desert Claim. The TAC will make recommendations to EFSEC if it deems additional studies or mitigation are warranted to address impacts that were either not foreseen in the Revised Application, the Final EIS or the Final SEIS, or significantly exceed the impacts that were projected in those documents. In order to make advisory recommendations to EFSEC, the TAC will review and consider the results of Project monitoring studies, as well as new scientific findings made at



wind generation facilities with respect to the impacts on habitat and wildlife, as they may relate to the Project. The TAC will assess whether the post-construction restoration and mitigation and monitoring programs for wildlife that have been identified and implemented merit further studies or additional mitigation, taking into consideration factors such as the species involved, the nature of the impact, monitoring trends, and new scientific findings.

- B. The TAC may include, but need not be limited to, representatives from WDFW, U.S. Fish and Wildlife Service, EFSEC, Kittitas County, Washington Department of Natural Resources, Audubon Washington or its member chapters, and Desert Claim. EFSEC, at its discretion, may add additional representatives to the TAC from local interest groups as well as state, local, federal and tribal governments. All TAC members shall be approved by EFSEC.
- C. Desert Claim will submit to EFSEC proposed Rules of Procedure describing how the TAC shall operate, including but not limited to a schedule for meetings, a meeting procedure, a process for recording meeting discussions, a process for making and presenting timely TAC recommendations to the Council, and other procedures that will assist the TAC to function properly and efficiently. Desert Claim will provide a copy of the proposed Rules of Procedure at the first TAC meeting for review and comment. The TAC may suggest modifications of the plan; any such modifications must be approved by EFSEC.
- D. The TAC will be convened for the life of the Project, except that EFSEC may terminate the TAC if: the TAC has ceased to meet due to member attrition; the TAC determines that all of the pre-permitting, operational and post-operational

monitoring has been completed and further monitoring is not necessary; or the TAC members recommend that it be terminated. If the TAC is terminated or dissolved, EFSEC may reconvene and reconstitute the TAC at its discretion. EFSEC may decide to reconvene the TAC for reasons including, but not limited to, unanticipated circumstances or impacts or the environmental review of any program.

E. The ultimate authority to require implementation of additional mitigation measures, including any recommended by the TAC, will reside with EFSEC.

11. Big Game. Desert Claim agrees to cooperate with WDFW in its efforts to manage deer and elk in the Project vicinity and its efforts to prevent depredation of private property by big game. Desert Claim will not prohibit hunting on the Project lands, except when hunting would place personnel, property or equipment in jeopardy. However, the private and public owners of property in the Project Area may decide whether or not to allow hunting on their property.
12. Initial Decommissioning and Site Restoration Plan. Prior to commencing construction, Desert Claim will develop an Initial Decommissioning and Site Restoration Plan in consultation with WDFW and submit it to EFSEC for approval. Desert Claim will restore the site to approximate or improved pre-Project condition. The Plan will require removal of the wind turbine nacelles, blades, towers, foundations, cables and other facilities to a depth of four feet below grade, regrading of areas around the Project facilities and final restoration of disturbed land. Among other things, the Plan will address the timing and intensity of grazing to ensure successful revegetation.

### **WDFW's Withdrawal of Objections**

WDFW has reviewed the impact of the Project and provided input regarding habitat and wildlife issues related to the Project. In particular, Desert Claim has undertaken site impact assessments to identify the wildlife and habitat impacts expected from construction and operation of the Project. WDFW has reviewed those assessments and recommended various mitigation measures. WDFW acknowledges that the mitigation measures set forth in the Revised Application, together with those set forth and agreed to above, are consistent with the 2009 WDFW Wind Power Guidelines.

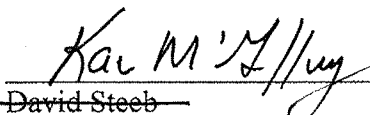
Considering the potential impacts outlined in the FEIS and the Draft SEIS, as well as Desert Claim's commitment to implement the mitigation measures outlined in this Agreement, WDFW agrees that the Project will not result in significant adverse impacts to fish and wildlife or habitat. WDFW further agrees that Desert Claim's commitment to implement the measures outlined in this Agreement fully addresses WDFW's concerns about the Project. WDFW hereby withdraws any recommendations included in its previous comments regarding the Project and the Draft SEIS that are inconsistent with this Agreement. The Parties understand and acknowledge that WDFW may identify concerns and make specific recommendations consistent with this Agreement in the context of developing and reviewing the various plans referenced in this Agreement.

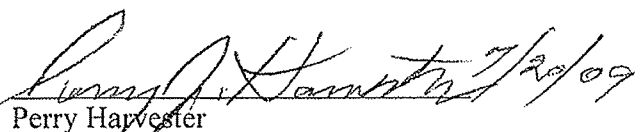
In the event that a material unforeseen change in circumstances occurs or substantial impacts to the environment occur that were not foreseen at the time the Parties entered into this Agreement, the Parties reserve the right to revisit issues addressed in this Agreement.

DATED: July 21, 2009

DESERT CLAIM WIND POWER LLC

WASHINGTON DEPARTMENT  
OF FISH AND WILDLIFE

  
~~David Steeb~~  
~~Project Director~~  
KAREN MCGAFFEY  
PERKINS COIE LLP  
ATTORNEYS FOR  
DESERT CLAIM WIND POWER LLC

  
Perry Harvester  
Regional Habitat Program Manager

## **Attachment 5**

Council Resolution No. 343, approval of the February 26, 2018 SCA Amendment Request.

**WASHINGTON STATE**  
**ENERGY FACILITY SITE EVALUATION COUNCIL**  
**RESOLUTION NO. 343**  
***AMENDMENT NO. 1 TO THE***  
***DESERT CLAIM WIND POWER PROJECT SITE CERTIFICATION AGREEMENT***  
***RECONFIGURATION OF FACILITY***

**Nature of Action**

On February 26, 2018, the Certificate Holder, Desert Claim Wind Power LLC (Desert Claim), requested that the Energy Facility Site Evaluation Council (EFSEC or the Council) amend its Site Certification Agreement (SCA) to allow for the reconfiguration of its site boundary and the installation of fewer, but larger turbines than originally authorized in the February 2010 SCA.<sup>1</sup> The revised Desert Claim Wind Power proposal (Revised Project) would consist of 25-31 turbines not to exceed 492 feet in height and a total capacity of no more than 100 Megawatts (MW). The current SCA for the original project (Original Project) authorizes Desert Claim to construct and operate up to 95 turbines, with a maximum capacity of 190 MW. The Revised Project remains at the same site as the Original Project, with acreage reduced to 4,400 acres including approximately 370 acres that have been added to the west and south; 1,271 acres have been removed east of Reecer Creek. Primary site access during construction and operation has been changed from Reecer Creek Road to Smithson Road (accessed from Hwy 97). All turbines will be located at least 2,500 feet from all residences in the Revised Project.<sup>2</sup> A total of 0.347 acres of new permanent wetland impacts and 0.026 acres of permanent stream impacts are identified in the Revised Project. An additional 1.949 acres (0.126 acres stream and 1.823 acres wetland) temporary impacts are proposed to streams and wetlands.<sup>3</sup> The Original Project did not contemplate wetland or stream impacts. As a result of reducing the number of turbines and changing the types of turbines to be installed, there is an expected 66% decrease in turbine delivery trips and 10% increase in concrete trucks per hour during construction.<sup>4</sup>

**Background**

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<sup>1</sup> Desert Claim Wind Power LLC, Desert Claim Wind Power Project Site Certification Agreement Amendment Request, (Amend. Req.) Cover Letter, February 26, 2018 at 1.

<sup>2</sup> Id. at 3

<sup>3</sup> EFSEC's Revised State Environmental Policy Act (SEPA) Staff Memorandum to the EFSEC Stephen Posner (Rev. SEPA Staff Memo), EFSEC staff compiled environmental review notes and rationale for proposed mitigation measures to support the SEPA Addendum to the Final Supplemental Environmental Impact Statement (FSEIS), November 1, 2018 at 7.

<sup>4</sup> Rev. SEPA Staff Memo at 15-16



The Original Project was first reviewed by Kittitas County (the County) in 2005, prior to Desert Claim's application to EFSEC. At that time, the County conducted an environmental review that resulted in preparation of a Final Environmental Impact Statement (FEIS). In April 2005, the County denied the Original Project as it had been proposed. In January 2009, the Original Project was reconfigured and Desert Claim submitted an Application for Site Certification to EFSEC. Under the State Environmental Policy Act (SEPA), EFSEC prepared a Draft Supplemental EIS (DSEIS) and a Final Supplemental EIS (FSEIS) to the County's FEIS. On December 4, 2009 EFSEC transmitted its recommendation of approval for the Original Project to Governor Christine Gregoire. EFSEC's recommendation to the Governor was based on various sources of information including adjudicative proceedings, public comment, and environmental analysis contained in the FSEIS. On February 1, 2010, Governor Christine Gregoire executed on behalf of the State of Washington an SCA authorizing the construction and operation of the Original Project.

The February 2010 SCA for the Original Project authorized Desert Claim to construct and operate a wind power facility consisting of a maximum of 95 wind turbines on tubular steel towers. The 2010 SCA permits an output capacity of 190 total MW and a tower height not to exceed a maximum of 410 feet, within an approximately 5,200 acre project site. The Original Project was located north and west of Ellensburg near the intersection of U.S. Route 97 and Smithson Road. Site access during construction was primarily from Reecer Creek Road. Seven non-participating residences were located between 1,687 and 2,241 feet of one or more turbines. No temporary or permanent stream or wetland impacts were identified during the environmental analysis initially conducted by EFSEC for the Original Project. As a result, measures to address these kinds of impact were not contemplated in the original SCA.

### **Procedural Status**

EFSEC's SCA amendment procedure is governed by chapter 80.50 RCW<sup>5</sup> and chapter 463-66 WAC<sup>6</sup>.

Desert Claim and EFSEC have complied with procedural requirements of Chapter 463-66 WAC as follows:

- Pursuant to WAC 463-66-030, the request for amendment of the SCA was submitted in writing on February 26, 2018.
- At its monthly meeting of March 20, 2018 the Council determined a schedule for action on the request as follows: April 11, 2018 to conduct a public hearing on the Desert Claim SCA amendment request in Ellensburg, WA.<sup>7</sup>

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<sup>5</sup> RCW (Revised Code of Washington) 80.50

<sup>6</sup> Title 463 WAC (Washington Administrative Code) Chapter 66

<sup>7</sup>Verbatim Transcript of EFSEC Monthly Council Meeting, March 20, 2018.

- Pursuant to WAC 463-66-030, notice of a public hearing was distributed to approximately 1,031 people. The public notice issued by EFSEC advised that Desert Claim had requested an amendment to their SCA, and that an informational hearing to consider the matter would be conducted on April 11, 2018. The notice stated that public comments could be made at the April public hearing.
- EFSEC conducted a public hearing session in which the public commented on this matter in Ellensburg, WA on April 11, 2018.<sup>8</sup>
- At the Council's August 21, 2018, monthly meeting EFSEC Siting and Compliance Manager, Sonia Bumpus discussed the status of EFSEC's SEPA review and development of new analysis, such as a visual effects assessment to be completed prior to EFSEC making a determination relative to SEPA.<sup>9</sup>
- At the September 18, 2018 monthly council meeting Sonia Bumpus, on behalf of Stephen Posner, EFSEC's SEPA Responsible Official, proposed that a draft SEPA Addendum to the FSEIS be prepared for the Revised Project. After discussion by the Council and its staff, the Council determined that a 15 day public comment period on the draft SEPA Addendum to the FSEIS would be conducted.<sup>10</sup>
- The draft SEPA Addendum, dated September 25, 2018, was prepared and issued for public comment on September 26, 2018 with a deadline for comments on October 10, 2018.
- Three public comment submissions were submitted on the draft SEPA Addendum, EFSEC staff provided a summary of proposed updates to the SEPA addendum and public comments to the Council at the October 16, 2018 monthly Council meeting.<sup>11</sup>
- The Council considered information in Desert Claim's SCA amendment request, the proposed amendments to the Original Project SCA, input from the public, the Final SEPA Addendum, Revised SEPA Staff Memo, and draft Resolution No. 343 at its November 13, 2018 Council meeting.

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<sup>8</sup> Verbatim Transcript of EFSEC Special Council Meeting, April 11, 2018.

<sup>9</sup> Verbatim Transcript of EFSEC Monthly Council Meeting, August 21, 2018.

<sup>10</sup> Verbatim Transcript of EFSEC Monthly Council Meeting, September 18, 2018.

<sup>11</sup> Verbatim Transcript of EFSEC Monthly Council Meeting, October 16, 2018.



## Public Comment

On April 11, 2018, during the public hearing in Ellensburg, WA EFSEC received 10 handwritten comments and 12 oral comments from public speakers. This hearing provided an opportunity for the public to comment on the SCA amendment request submittals and the presentation about the Revised Project provided by Desert Claim.

September 26, 2018 through October 10, 2018 EFSEC conducted a 15-day public comment period on the draft SEPA Addendum to the FSEIS, dated September 25, 2018. EFSEC proposed mitigation measures for potential impacts from the Revised Project. Key environmental review notes and supportive rationale for the proposed mitigation measures were discussed in the SEPA staff memorandum, dated September 25, 2018. The SEPA staff memo was prepared and sent to the EFSEC Manager and SEPA Responsible Official, Stephen Posner. After review, the SEPA Responsible Official made the SEPA Addendum and staff memo available to the Council. The public comment period served as an opportunity for members of the public to comment on the draft SEPA Addendum, SEPA staff memo, and additional and updated studies related to the Revised Project. Concerns raised during the SEPA public comment period included the following:

- Potential water quality impacts to Dry Creek, Green Canyon Creek, Reecer Creek, and Jones Creek for stream heating and bacterial contamination.
- Potential impacts to wetlands and streams.
- Potential impacts from turbine noise- require highest noise standards and monitoring.
- Potential visual impacts from taller turbines, spacing between turbines- visual confusion and disunity.
- Potential impacts from turbine lighting-encourage use of Aircraft Detection Lighting System.
- Cultural Resource- concern from Desert Claim on the proposed mitigation measure and SCA requirement, to adhere to their Memorandum of Understanding (MOU) with the Yakama Nation.
- Potential impacts to transportation during construction associated with concrete truck delivery trips.

The discreet comments listed above are based on EFSEC's technical review of three public comment submissions EFSEC received during the 15-day comment period. Consequently, one of the proposed mitigation measures related to cultural resources was revised in response to comment. Mitigation measures have been finalized and are documented in the Final SEPA Addendum, dated November 1, 2018 (*See attachment 1 to this Resolution*). Final mitigation along with the responses to comments are documented in the Revised SEPA staff memo, dated November 7, 2018 (*See attachment 2 to this Resolution*).

A summary of the comments and EFSEC's responses to comments are also discussed in this resolution below. Each comment is organized under its respective environmental resource area. It is indicated if there are any further revisions suggested for the proposed mitigation measures.

## **Responses to SEPA Public Comment**

### Water Quality, Wetlands, and Streams:

Comment: The Washington Department of Ecology (Ecology) commented regarding the protection of impaired waterbodies. In summary, Ecology commented that Dry Creek, Green Canyon Creek, Reecer Creek, and Jones Creek flow through the Revised Project area and are included in the Upper Yakima River Tributaries Temperature Total Maximum Daily Load (TMDL) water quality improvement project. Therefore, these streams must be protected from additional stream heating. The TMDL also recommends that supplementary shade, via installation of new riparian plants, should be added where possible. In addition, the Reecer Creek reach located immediately upstream of the Kittitas Reclamation District canal is included in Washington State's list of 303(d) impaired waterbodies due to high levels of fecal coliform bacteria. Ecology emphasized the importance that planning and construction, and all future use of the site, include water quality protection to avoid further bacterial contamination in Reecer Creek. Ecology noted that a Construction Stormwater General Permit (CSWGP) and the development of a Stormwater Pollution Prevention Plan (SWPPP) will be required for off-site construction stormwater discharges.

Response: The proposed mitigation in the SCA Amendment includes a requirement for coordination with Washington Department of Fish and Wildlife (WDFW) and Ecology regarding finalizing construction and operating plans to avoid or minimize temporary and permanent impacts on streams and wetlands. Prior to construction, a final set of wetland buffers, setbacks, and mitigation standards for permanent and temporary impacts must be determined by EFSEC in consultation with Ecology. The SCA Amendment includes development of a SWPPP, Wetland Compensatory Mitigation Plan, Habitat Mitigation Plan, and Construction Soil Management and Vegetation Plan. These plans will address protection of impaired waterbodies as will the required CSWGP that is required for discharging construction stormwater off-site.<sup>12</sup>

No revision to the mitigation measure in the SCA amendment is proposed.

### Noise:

Comment: A member of the public commented regarding the noise monitoring plan. In summary, the comment requested that Desert Claim be held to the strictest standards in its noise monitoring plan.

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<sup>12</sup> Rev. SEPA Staff Memo at 6-8



Response: The proposed mitigation in the draft SEPA Addendum includes Complaint-Based Noise Monitoring and Response Plan submittal to EFSEC for review and approval prior to operation to address low frequency noise and aeroacoustic noise.<sup>13</sup>

No revision to the mitigation measure in the SCA amendment is proposed.

Visual:

Comment: A public comment regarding visual impacts of the turbines during operation was received. In summary, the commenter expressed concerns about the “tallest land turbines on earth” being sited next to many homes without EFSEC finding any significant impacts. There were specific concerns regarding visual impacts to residences on Smithson Road, about the variation in size of the turbines, various distances apart from one another, and the use of different turbine models, “causing visual confusion and disunity”.

Response: During EFSEC’s SEPA review of the Revised Project, EFSEC’s consultant determined that from this viewing location, features of the Revised Project would be distinct and would attract viewer attention; however, fewer turbines will be visible than in the previous project configuration in the Original Project.<sup>14</sup>

The independent Visual Effects Assessment conducted by EFSEC’s consultant indicated that construction and decommissioning activities and components of the Revised Project would likely be visible to those viewers adjacent to the work sites (e.g. viewers along Smithson Rd. and at nearby residences) with a localized effect that would be experienced for a relatively short duration (weeks to months). The previous visual effects assessment in the FEIS and FSEIS also indicated a moderate level of visual impact related to this general location from the operating turbines.

The technical approach used in the EFSEC’s Visual Effects Assessment (and in previous visual assessments in the FEIS and FSEIS) included dimensions of vividness, intactness, and unity, as well as the degree of visual dominance of the Revised Project, to determine the changes to visual quality. The established Federal Highway Administration definition of ‘unity’ refers to the visual coherence and compositional harmony of the viewshed where effects are evaluated based on the degree to which they disrupt the harmony of the landscape setting. The Visual Effects Assessment (Section 4.1.1) as well as the photos and simulation provided by Truescape (SCA Amendment request, Appendix A – Sheet 8 and Sheet 9) illustrate that the views of the valley from this area are dominated by agricultural development and currently include evident wind projects in the northwest portion of the study area. Based on the existing visual quality and character visible from this area, while distinct, the Revised Project features would not substantially affect the visual unity of the views or be incoherent within the context of the surrounding landscape.

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<sup>13</sup> Rev. SEPA Staff Memo at 10-11

<sup>14</sup> Rev. SEPA Staff Memo at 12-13

No new or increased adverse environmental impacts to visual and aesthetics are expected from the Revised Project.

No mitigation measures in the SCA Amendment is proposed.

Light and Glare: Turbine Lighting:

Comment: A member of the public commented regarding turbine lighting. In summary, the commenter encouraged the use of Aircraft Detection Lighting System (ADLS).

Response: EFSEC's draft SEPA Addendum proposes mitigation for the Revised Project that requires Desert Claim to investigate the application of ADLS (a more recently available technology) prior to construction and report its finding to EFSEC. The report will include the benefits and feasibility of ADLS for the Revised Project proposal.

No new or increased adverse environmental impacts from light and glare due to turbine lighting are expected from the Revised Project.<sup>15</sup>

No revision to the mitigation measure in the SCA amendment is proposed.

Historic and Cultural Preservation: Cultural Resources-MOU with Yakama Nation

Comment: EFSEC received a comment from Desert Claim regarding the proposed mitigation measure that requires they adhere to their MOU with the Yakama Nation. In their comment letter Desert Claim clarified that the MOU document is a "Scope of Work" between Desert Claim and the Yakama Nation, the contents of which EFSEC does not know; and that the MOU is not a binding agreement between the two parties. Desert Claim's letter further explained that some of the activities identified in the "Scope of Work" document have already been completed. Desert Claim also expressed concerns about the appropriateness of EFSEC including a requirement that relates to a private document between Desert Claim and the Yakama Nation.

Response: The proposed requirement in the draft SEPA Addendum to adhere to the MOU was developed based on EFSEC's initial SEPA review of the FSEIS and the SCA amendment request materials provided by Desert Claim. For example, the FSEIS discussed additional surveys to be conducted by Desert Claim; it states, "*the Applicant has also agreed to conduct additional surveys of Traditional Cultural Properties (TCP's) of importance to the Yakama Nation and to work with the Yakama Nation to prepare a Traditional Cultural Resources Mitigation Plan.*"

Mitigation measures in the FSEIS included the development of a cultural resource mitigation plan in consultation with the Yakama Nation and the Washington Department of Archaeology and Historic Preservation (DAHP). According to the FSEIS, the plan "*would include mitigation*

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<sup>15</sup> Rev. SEPA Staff Memo at 13



*measures tailored to the specific circumstances of each resource and would be consistent with applicable federal, state, and local regulations”.*<sup>16</sup>

The Original Project FSEIS also acknowledged the MOU and characterized its intended purpose, that the *“MOU addresses concerns expressed by the Yakama Nation’s comments on the Draft SEIS”*<sup>17</sup>, and *provides a framework for developing a Traditional Cultural Resources Mitigation Plan with the Yakama Nation”*.<sup>18</sup>

In DAHP’s comments to EFSEC, they concurred with the condition regarding Tribal involvement in developing mitigation for the Revised Project. In its correspondence to EFSEC, DAHP stated, *“We agree with the recommendation for Tribal consultation regarding mitigation for impacts to traditional subsistence and medicinal plant resource areas.”*<sup>19</sup>

In addition, DAHP provided the following recommendations to EFSEC:

- Requested additional photos of Historic-period field clearing pile archaeological sites and evidence of tribal consultation, otherwise these resources must be avoided or obtain a DAHP permit prior to any impacts.
- Stated all Revised Project impacts should be avoided to all pre-contact archaeological sites and one historic-period archaeological site and if they can’t be avoided, a permit from DAHP is required for formal archaeological testing with recommendations for further mitigation.
- Requested a robust Inadvertent Discovery Plan be developed for the Revised Project and training of construction and operations crews.
- Requested additional archaeological survey for micrositeing of turbines and for alterations in roadway plans.

In light of the references to the MOU in the FSEIS, and its apparent importance for addressing potential adverse impacts to tribal resources of concern to the Yakama Nation, on September 20, 2018, EFSEC requested a copy of the MOU from Desert Claim. Desert Claim did not provide a copy to EFSEC.

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<sup>16</sup> EFSEC prepared FSEIS, Section 3.3.5, Mitigation Measures.

<sup>17</sup> EFSEC prepared DSEIS, Public Comment Letter #12 from the Yakama Nation in EFSEC prepared FSEIS, Section 4 Draft SEIS Comments and Responses.

<sup>18</sup> EFSEC prepared FSEIS, Section 3.3.2.4, Site Significance Evaluations.

<sup>19</sup> Rev. SEPA Staff Memo at 15

Because the Yakama Nation had not provided public comment to EFSEC relative to the draft SEPA Addendum, in a letter dated October 17, 2018, EFSEC's Siting and Compliance Manager, Sonia E. Bumpus, contacted the Yakama Nation to request that it notify EFSEC of any concerns related to the MOU and/or Desert Claim's SCA amendment request. The Yakama Nation responded to EFSEC and on November 7, 2018 EFSEC staff and the Yakama Nation held a call. The discussion covered four aspects of the Yakama Nation's previous agreements with the Certificate Holder and other concerns related to the Revised Project.

The four aspects discussed included: 1.) Development of a traditional cultural resources mitigation plan prior to construction; 2.) Access for Yakama Tribal members to the root grounds within the Project area; 3.) Yakama Nation participation on the Technical Advisory Committee (TAC); and 4.) Restoration of lands to pre-Project conditions following decommissioning.

This conversation helped to improve EFSEC's understanding of the agreement between Desert Claim and the Yakama Nation and it is expected that Desert Claim's commitments in the FSEIS in conjunction with the new and supplemented mitigation measures in the SCA Amendment, are sufficiently expansive to address the four considerations outlined above.<sup>20</sup>

Recommendations from the Yakama Nation from a 2010 survey of the project area were also discussed during the call. EFSEC staff had previously identified the recommendations during its review of the updated cultural resource assessment prepared by the Certificate Holder's consultant, Archaeological Investigations Northwest, Inc. (AINW), titled, "*Cultural Resource Assessment of Updated Project Design for the Desert Claim Wind Power Project*". Based on input related to EFSEC during the call, it is EFSEC's understanding that the Yakama Nation's recommendations in the AINW report continue to be topics of concern related to the Revised Project. In consideration of the SCA Amendment request, input from DAHP and Desert Claim, and more recently, input from the Yakama Nation, EFSEC staff proposes further revision and clarification to the mitigation initially proposed to improve the mitigation measure to address cultural resource impacts:

**Revised mitigation in the SCA amendment is proposed:<sup>21</sup>**

The development of the Cultural Resources Monitoring and Mitigation Plan must be done in coordination with DAHP and the Yakama Nation and approved by EFSEC. The following must be considered during the plan development:

- Avoidance of the concentrated-resource areas.
- Habitat rehabilitation of impacted-resource area as a means of mitigation for impacts to the diffuse-resource areas.

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<sup>20</sup> Rev. SEPA Staff Memo at 16

<sup>21</sup> Rev. SEPA Staff Memo at 14-16



- Archaeological sites be provided a minimum 30 meter/100 foot buffer.
- Archaeological isolates should be further studied and be provided a minimum 15 meter/50 foot buffer.
- 51 rock features should be re-evaluated and recorded as archaeological sites.
- Archaeological monitoring during construction when ground-disturbing activity is involved.

Transportation: Traffic Impacts during Construction

Comment: A public comment was submitted regarding concerns about concrete truck delivery traffic. In summary, the commenter expressed concerns that, *"approximately 22 concrete delivery trips will be made each hour during a daily 12-hour delivery period which represents a 10% increase in concrete trucks per hour during construction from the transportation numbers presented in the FEIS. Of course the 10% increase is not considered substantial"*. While the commenter seems to acknowledge that the expected 10% increase is not substantial, the commenter asks, *"how long is this daily 12-hour period going to last"* and *"why is the applicant not making its concrete onsite like most other wind farms?"*

Response: Based on the Revised Project description provided by Desert Claim, construction is expected to last approximately 9 months. Concrete trucks would travel to the site during a small portion of the construction period. Desert Claim estimates an average of 22 concrete truck deliveries per hour (see 09/18/2018 email, Desert Claim response to Data Request 3). This is based on:

- 2,067 one-way concrete truck trips for all concrete deliveries;
- Approximately two foundations could be poured in one day; and
- Two foundations would require 134 truck trips- At the rate of 134 delivery truck trips in a day, there would be approximately 15 days of concrete delivery trips.

The draft SEPA Addendum proposed mitigation requiring the submittal of a Construction Traffic Management Plan that would address increased construction traffic on Smithson Road, which is a new access road for the Revised Project. The Construction Traffic Management Plan would address issues such as limiting construction delivery vehicles during peak travel times and accommodating agricultural road use on Smithson Road. The Construction Traffic Management Plan would contain detailed traffic information which would address concerns raised by the commenter. Details about project delivery trips, timeframe, duration and the concrete source would be among the project elements required in the plan (including an option for on-site concrete batch plant).

No revision to the mitigation measure in the SCA amendment is proposed.

## Discussion

WAC 463-66-040 outlines the relevant factors that the Council shall consider prior to a decision to amend a SCA:

In reviewing any proposed amendment, the council shall consider whether the proposal is consistent with:

1. The intention of the original SCA;
2. Applicable laws and rules; and
3. The public health, safety, and welfare; and
4. The provisions of chapter 463-72 WAC.

### 1. Consistency with intention of the original SCA

Under WAC 463-66-040(1), the Council must consider whether the proposed amendment is consistent with the intention of the original SCA.<sup>22</sup> In general, the intention of every SCA is to grant state authorization to a certificate holder to construct and operate an energy facility that has been determined to be in the interest of the State of Washington because the facility will produce a net benefit after balancing need for the facility against impacts on the broad public interest, including human welfare and environmental stewardship.<sup>23</sup> During its initial siting decision of the Original Project, the Council relied upon its overarching policy and intent in RCW 80.50.010. EFSEC Council Order No. 843, Order Recommending Approval of Site Certification Agreement, states *"The Council has carefully considered the state's need for energy at reasonable cost and the need to minimize environmental impacts."*<sup>24</sup> The Council determined that the Original Project would, *"provide the region with significant energy benefits while not resulting in unmitigated, significant adverse environmental impacts. Thus, the proposed Project meets the requirements of applicable law and is consistent with the policy and intent of RCW 80.50."*

In reviewing the SCA amendment request, the Council focused on understanding the proposed changes to the Original Project and any associated impacts identified through its SEPA review. The Council assessed the modified project in conjunction with whether or not the terms and conditions in the SCA Amendment would sufficiently protect *"the environment, ecology of the land and its wildlife, and the ecology of state waters and their aquatic life"* in light of those

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<sup>22</sup> WAC 463-66-040

<sup>23</sup> Tesoro Savage Vancouver Energy Distribution Terminal, Report to the Governor on Application No. 2013-01, Executive Summary, at 4.

<sup>24</sup> EFSEC Council Order No. 843, Order Recommending Approval of Site Certification Agreement for Desert Claim Original Project.



changes.<sup>25</sup> The result of EFSEC's SEPA review indicates the Revised Project will primarily reduce adverse environmental impacts, in comparison to the Original Project. Consistency and compliance with SEPA is discussed in subsection (2) (A) below. The SEPA environmental review also indicates that the Revised Project will meet applicable construction and operation standards for energy facilities, as outlined in WAC 463-62.<sup>26</sup> Consistency with WAC 463-62 is discussed in Subsection (2) (C) below.

As detailed in the Final SEPA Addendum and Revised staff memo, the Revised Project reconfiguration will not result in potential significant adverse impacts to the natural environment of the site and all adverse impacts that have been identified will be avoided or mitigated, see also subsection (3) below. Mitigation measures included in the SCA Amendment address adverse impacts to Water Resources-Water quality, Environmental health, Noise, Light and Glare, Historic and Cultural Preservation, Transportation, and Environmental monitoring.

The majority of environmental impacts addressed within the FSEIS and in the Final SEPA Addendum are similar and by comparison, most resource impacts identified for the Original and Revised Project have not substantively changed. However, impacts to wetlands and streams were not contemplated as part of the Original Project. In light of these new impacts, Desert Claim is required to comply with the mitigation standards for impacted wetlands, as outlined in WAC 463-62-050.<sup>27</sup> The Final SEPA Addendum and Revised SEPA staff memo (Attachments 1 and 2) identify specific mitigation which requires Desert Claim to coordinate, *"with WDFW and Ecology regarding finalizing construction and operating plans to avoid or minimize temporary and permanent impacts on streams and wetlands. Prior to construction a final set of wetland buffers, setbacks, and mitigation standards for permanent and temporary impacts must be determined by EFSEC in consultation with Ecology."* Additionally, Desert Claim is required to develop a Temporary Erosion and Sediment Control Plan (TESC), Stormwater Pollution Prevention Plan (SWPPP), Wetland Compensatory Mitigation Plan, Habitat Mitigation Plan, and Construction Soil Management and Vegetation Plan. These plans are expected to address protection of impaired waterbodies as will the Construction Stormwater General Permit (CSWGP), which is required for discharging construction stormwater off-site.<sup>28</sup>

The Council carefully considered the results of the new and updated analyses conducted under SEPA, the proposed mitigation measures in the Final SEPA Addendum and Revised SEPA staff

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<sup>25</sup> RCW 80.50.010

<sup>26</sup> Chapter 463-62 WAC outlines EFSEC's Construction and Operation Standards for Energy Facilities under EFSEC's jurisdiction. Performance standards and mitigation requirements are included for: Seismicity, Noise standards, Fish and wildlife, Impact and mitigation standards for wetlands, Water quality, and Air quality.

<sup>27</sup> Chapter 463-62-050 WAC outlines EFSEC's construction and operation standards for impacts and mitigation standards for wetlands.

<sup>28</sup> Rev. SEPA Staff Memo at 6-8

memo, and construction and operational aspects of the Revised Project. The Council determines that the Revised Project meets the requirements of applicable law and is consistent with the policy and intent of RCW 80.50. The Council finds that within the terms of the SCA amendment, which includes the mitigation measures discussed above and below, the Revised Project will not result in unmitigated significant adverse impacts to the environment, the ecology of the land and its wildlife, and the ecology of the state waters and their aquatic life. None of the proposed facility modifications for the Revised Project or the respective SCA amendment terms and conditions effect the Council's previous determination of approval, with respect to "significant energy benefits" the facility is expected to provide to the region, or to the "state's need for energy at reasonable cost."<sup>29</sup>

## **2. Consistency with applicable laws and rules**

Under WAC 463-66-040(2), the Council must consider applicable laws and rules, including chapter 80.50 RCW, chapter 43.21C RCW and chapter 197-11 WAC (the State Environmental Policy Act and SEPA rules)<sup>30</sup>, WAC 463-66-070 through -080, and the construction and operation standards for energy facilities in WAC 463-62<sup>31</sup>.

### **A. Consistency with SEPA (chapter 43.21C RCW and chapter 197-11 WAC).**

The Council is charged with the responsibility to review proposed projects under SEPA, RCW 43.21C and chapter 197-11 WAC. That law provides for the consideration of probable adverse environmental impacts and possible mitigation measures. Pursuant to WAC 463-47-140, EFSEC is the lead agency for environmental review of projects under the jurisdiction of RCW 80.50; the Council Manager is the SEPA responsible official, per WAC 463-47-051.

Desert Claim submitted a SEPA Checklist which EFSEC staff reviewed along with the other materials submitted to EFSEC. The Council invited public comment on the SCA amendment request at a public hearing conducted in April 2018<sup>32</sup> in Ellensburg, WA. While the hearing is not required under SEPA rules, the preliminary concerns expressed by the public at the hearing were taken into account by EFSEC staff during the environmental review of the SCA amendment. Concurrently, EFSEC gathered input from other coordinating agencies. Key notes about the environmental resources analyzed and their respective mitigation are documented in

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<sup>29</sup> EFSEC Council Order No. 843, Order Recommending Approval of Site Certification Agreement for Desert Claim Original Project.

<sup>30</sup> Title 197 WAC (Washington Administrative Code) Chapter 11

<sup>31</sup> Chapter 463-62 WAC EFSEC's Construction and Operation Standards for Energy Facilities under EFSEC's jurisdiction.

<sup>32</sup> Chapter 463-66-030 WAC requires the Council to hold one or more public hearing sessions upon the request for Amendment to an SCA. The Council conducted a public hearing for Desert Claim's SCA Amendment request on April 11, 2018.



the Revised SEPA staff memo, dated November 7, 2018 (See attachment 1 to this Resolution). While no new significant adverse impacts for the Revised Project were identified, EFSEC developed supplemental mitigation measures to address adverse impacts concerning water resources-water quality, wetlands and streams, riparian areas, noise, light and glare, and historic and cultural resources, transportation, and environmental monitoring.

Though not required by SEPA, the Council conducted a 15-day public comment period on the draft SEPA Addendum that included the supporting draft SEPA staff memo. This provided the public with an opportunity to comment on the Revised Project, proposed mitigation measures, and associated reports for the SCA Amendment request. Three public comment submissions were received and considered by EFSEC to finalize mitigation measures. Summarized public comments and responses to comments are discussed in detail in the Revised SEPA staff memo and final mitigation measures are documented in the Final SEPA Addendum. In response to comments, EFSEC further revised the mitigation measure requirement concerning historic and cultural resources, which now requires Desert Claim to develop their Cultural Resource and Mitigation Plan in consultation with the Yakama Nation and DAHP.<sup>33</sup> Based on input EFSEC received from the Yakama Nation, EFSEC revised the mitigation measure to improve and clarify which tribal concerns must be considered during Desert Claim's plan development.

In general, SEPA requires an agency to perform a threshold determination to determine whether a proposed action will have a significant adverse effect on the environment (See WAC 197-11-310). For Desert Claim's SCA amendment request for the Revised Project, EFSEC has conducted an environmental analysis of the changes to the proposal following WAC 197-11-600(3)(b) which states:

For Determinations of Nonsignificance (DNSs) and EISs, preparation of a new threshold determination or supplemental EIS is required if there are:

- (i) Substantial changes to a proposal so that the proposal is likely to have significant adverse environmental impacts (or lack of significant adverse impacts, if a DS is being withdrawn); or
- (ii) New information indicating a proposal's probable significant adverse environmental impacts (this includes discovery of misrepresentation or lack of material disclosure). A new threshold determination or SEIS is not required if probable significant adverse environmental impacts are covered by the range of alternatives and impacts analysis in the existing environmental documents.

If EFSEC's SEPA Responsible Official determines that the new information and analysis does not substantially change the analysis of significant impacts and alternatives in the existing environmental document (WAC 197-11-600 (4)(c)), an addendum is appropriate for documenting this review under SEPA.

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<sup>33</sup> Rev. SEPA Staff Memo 14-16

The Council's SEPA Responsible Official, Stephen Posner, reviewed and considered the Revised Project and the SCA Amendment request from Desert Claim, submitted on February 26, 2018. The SEPA Responsible Official published the draft SEPA Addendum to the FSEIS for a 15-day public comment period on September 26, 2018. The SEPA Responsible Official considered several sources of information to make a determination with respect to SEPA. Public comments, new information and updated analyses provided by Desert Claim and EFSEC's consultant, EFSEC staff recommendations for proposed mitigation in the draft and revised SEPA staff memo, were all considered by EFSEC's SEPA Responsible Official in order to develop the Final SEPA Addendum, dated November 1, 2018. The SEPA Responsible Official determined that the Revised Project will not result in significant adverse impacts to the natural environment. The Council hereby accepts the determination and acknowledges the measures to be implemented by Desert Claim to modify the Project proposal to further avoid, minimize and mitigate environmental impacts. As described in the preceding SEPA section, the Council took several steps to finalize the SEPA Addendum and comply with SEPA requirements. The Council finds that the Revised Project is consistent and in compliance with chapter 43.21C RCW and chapter 197-11 WAC.

**B. Consistency with WAC 463-66-070: Approval by Council Action and -080: Approval by governor.**

WAC 463-66-070 and -080 discuss the two options available to the Council for approval of a request for amendment to an EFSEC site certification agreement.

WAC 463-66-080 provides:

*"An [SCA] amendment which substantially alters the substance of any provision of the SCA or which is determined to have a significant detrimental effect upon the environment shall be effective upon the signed approval of the governor."*

On the other hand, WAC 463-66-070 provides:

*"An amendment request which does not substantially alter the substance of any provisions of the SCA, or which is determined not to have a significant detrimental effect upon the environment, shall be effective upon approval by the council. Such approval may be in the form of a council resolution."*

The Council examined the Revised Project and the revisions to the SCA Amendment request in consideration of whether provisions in the Original Project SCA would be substantially altered. The Original Project is discussed in more detail in the Background discussion above. The Project Description in Article I, Part C of the SCA Amendment has been updated to reflect the changes to the project description and describes modifications such as the installation of taller but fewer turbines. The remaining revisions are primarily associated with the updates and revisions to mitigation formed through SEPA.

The Council considered whether the SCA Amendment request would result in, "*significant detrimental effects*" on the environment. EFSEC relied upon its SEPA review to identify potential significant adverse impacts. If potential significant unavoidable adverse impacts were identified, these would be categorically characterized as "*significant detrimental effects*". The



SEPA Addendum and SEPA staff memo indicate that no significant unavoidable adverse impacts have been identified. New or revised mitigation in the SCA Amendment will adequately addresses impacts for Water resources-water quality, Environmental health, Noise, Light and Glare, Historic and Cultural Preservation, Transportation, and Environmental monitoring. The Council acknowledges that impacts to wetlands and streams were not contemplated or analyzed for the Original Project; however, new mitigation measures have been developed and added to the SCA amendment to address those impacts. Additionally, the requirement for a full-time, onsite environmental monitor is also retained as a condition in the SCA amendment, which will provide further protection for any unanticipated impacts to wetland and streams should any arise during construction.

EFSEC's SEPA review supports the conclusion that the Revised Project will not result in significant detrimental effects as no significant unavoidable adverse impacts to the environment have been identified. Final mitigation measures have been incorporated into the SCA Amendment as terms and conditions appropriate for the Revised Project. Owing to the modifications of the Revised Project combined with the fact that none of the modifications result in significant unavoidable adverse environmental effects, the Council determines that the SCA Amendment does not substantially alter the substance of any provisions of the SCA. The Council finds that the majority of provisions in the SCA for the Original Project remain substantively unchanged, recognizing that some conditions have been supplemented with additional or more refined measures (See Revised SEPA Staff Memo). The Council therefore concludes that this amendment may be approved by Council resolution pursuant to WAC 463-66-070.

**C. Consistency with WAC 463-62 Construction and Operation Stands for Energy Facilities.**

The purpose of chapter 463-62 WAC implements EFSEC's policy and intent outlined in RCW 80.50.010. Performance standards and mitigation requirements which address seismicity, noise limits, fish and wildlife, wetlands, water quality, and air quality are identified in the rule. Within the terms and conditions of the SCA amendment, the Revised Project demonstrates compliance with the construction and operation conditions outlined in WAC 463-62. The Revised Project changes relative to these requirements are detailed in the revised SEPA staff memo and Final SEPA Addendum.

**Seismicity:**

While seismicity issues are not anticipated for the Revised Project, final facility design plans are required for the Revised Project prior to start of construction.

**Noise:**

Noise modeling for the Revised Project indicated no exceedances of noise standards.

**Fish and wildlife habitat and function:**

Fish and wildlife habitat and function are addressed through mitigation measures in the SCA amendment. The SCA amendment will require Desert Claim to coordinate with Ecology and WDFW regarding the finalization of construction and operation plans to avoid and minimize temporary and permanent impacts to streams and wetlands. A Wetland Compensatory Mitigation Plan and Habitat Management Plan are also required.

#### Wetland Impacts and mitigation:

Ecology and EFSEC reviewed the May 2018 Wetland Delineation and Analysis Report submitted by Desert Claim. As discussed in the Revised SEPA staff memo, permanent impacts to approximately 0.026 acres associated with 13 streams and 0.347 acres associated with 8 wetlands are anticipated from the Revised Project. Desert Claim proposes to conduct required mitigation by enhancing three onsite wetlands and final mitigation would be developed to fully mitigate for any permanent impacts identified, and for the size of buffers based on Best Available Science (BAS). Wetland enhancement may include removing existing cattle grazing uses, installing exclusion fencing, and planting bare areas with plug sized herbaceous vegetation. EFSEC and Ecology also reviewed the credit/debit analysis proposed by Desert Claim and concluded there would be “no net loss” of wetland function within the project area with proposed mitigation.

#### Water Quality:

Desert Claim is required to obtain a Construction Stormwater General Permit. This permit is a regulatory requirement as part of the SCA. Desert Claim is required to comply with the permit to protect water quality during construction activities. In addition to the permit, Desert Claim is required to prepare and submit a Stormwater Pollution Prevention Plan (SWPPP) which is required for off-site construction stormwater discharges.

#### Air Quality:

No air emissions are anticipated nor are any air permits required to construct and operate the Revised Project.

Based on the results of the SEPA environmental review conducted by EFSEC and within the terms of the SCA amendment, the Council hereby concludes that the standards for construction and operation in chapter 463-62 WAC are satisfied. Therefore, the Council determines that the ore the Revised Project is consistent with WAC 463-62.

### **3. Consistency with the public health, safety, and welfare**

Under WAC 463-66-040(3) and -050, the Council must consider whether the SCA Amendment request would be consistent with public health, safety, and welfare. In considering whether a proposed amendment is consistent with the public health, safety and welfare, WAC 463-66-050 requires the Council to consider the long-term environmental impacts of the proposal, and further requires a consideration of “*reasonable alternative means by which the purpose of the proposal might be achieved*” along with the “*availability of funding to implement the proposal.*”

#### **A. Public health, safety and welfare:**

The majority of activities associated with the installation and operation of the Revised Project will be conducted in the area approved for the Original Project. The Original Project area previously analyzed in EFSEC’s FSEIS has been reduced for the Revised Project with the removal of the 1,271 acres east of Reecer Creek, with wind turbines no longer to be installed in this area. To the West and South of the site of the Original Project, the Revised Project adds 370



acres to the total Project area. Consequently, the overall permanent footprint for the Revised Project has been reduced in comparison to the footprint of the Original Project.<sup>34</sup> The Revised Project also reduces the number of turbines originally permitted from 95 to no more than 31. For the 31 turbines to be installed, the maximum height of the turbines increased from 410 feet (ft.) to a max height of 492 ft. The distance between the turbines and residences originally permitted for the Original Project has been increased and turbines in the Revised Project will no longer be located within 2,500 feet of any residence.

Due to the reconfiguration of the turbines and increased turbine height, EFSEC's consultant conducted an independent Visual Effects Assessment to determine impacts to visual and aesthetics. The assessment considered factors such as the reconfiguration design, the reduced number of turbines to be installed, and the increased height of the turbines. The results of the assessment indicated no significant impacts to visual and aesthetics.

Noise modeling for the Revised Project was conducted which does not show any exceedances of noise standards; however, the SCA conditions have been supplemented to include a new requirement for a complaint-based noise monitoring and response plan, the intent is to address noise complaints should any arise during facility operations.<sup>35</sup>

Mitigation measures to address shadow flicker were retained for the Revised Project. While additional mitigation measures have been developed to address certain aspects of the Revised Project, none of these changes substantially alter the substance of the SCA or result in any significant or new detrimental effects on the public health, safety or welfare. The Revised Project continues to implement the purpose of the Original Project, though with a smaller energy output, to address the pressing need for energy facilities, and will provide additional abundant affordable renewable power. The Revised Project will not have potential significant adverse impacts on public health and safety. Consequently, as supported by the documentation in the Final SEPA Addendum and the Amended SCA, the Revised Project is consistent with the public health, safety and welfare.

#### **B. Environmental impacts:**

Environmental impacts related to public health, safety and welfare have been addressed either in the FSEIS or in the Final SEPA Addendum. For the reasons set forth above and below related to SEPA compliance and EFSEC's environmental review, the Revised Project will not result in significant unavoidable adverse environmental impacts. Desert Claim will continue to abide by all the terms and conditions of the Amended SCA.

EFSEC's SEPA review relied on the FSEIS analysis combined with information gathered for the Final SEPA Addendum. The FSEIS analyzed impacts to water resources and water quality, plants and animals, historic and cultural resources, visual and aesthetics, environmental health,

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<sup>34</sup> Amend. Req. at 6.

<sup>35</sup> Rev. SEPA Staff Memo at 10-11.

and transportation. For water resources, Desert Claim is required to obtain a Construction Stormwater General Permit (CSWGP). This permit is a regulatory requirement and is part of the SCA approval. Desert Claim is required to comply with the permit to protect water quality during construction activities.

For new impacts to wetlands and streams, which were not previously analyzed for the Original Project, the SCA amendment requires Desert Claim to coordinate with Ecology and WDFW agencies regarding the finalization of construction and operation plans to further avoid and minimize temporary and permanent impacts to streams and wetlands. A Wetland Compensatory Mitigation Plan and Habitat Management Plan are also required.<sup>36</sup> Ecology and EFSEC reviewed the May 2018 Wetland Delineation and Analysis Report submitted by Desert Claim. As discussed in the Revised SEPA staff memo, permanent impacts to approximately 0.026 acres associated with 13 streams and 0.347 acres associated with 8 wetlands are anticipated from the Revised Project. Desert Claim proposes to conduct required mitigation by enhancing three onsite wetlands and final mitigation would be developed to fully mitigate for any permanent impacts identified, and for the size of buffers based on Best Available Science (BAS). Wetland enhancement may include removing existing cattle grazing uses, installing exclusion fencing, and planting bare areas with plug sized herbaceous vegetation. EFSEC and Ecology also reviewed the credit/debit analysis proposed by Desert Claim and concluded there would be “no net loss” of wetland function within the project area with proposed mitigation.<sup>37</sup>

To determine impacts to visual and aesthetics due to installation of fewer but taller turbines, EFSEC conducted an independent effects assessment.<sup>38</sup> That assessment determined that no new or increased adverse environmental impacts to visual and aesthetics are expected. Furthermore, mitigation for shadow flicker from the wind turbines remains in the SCA amendment to address potential issues should any arise during operation. The Revised Project is not expected to have short-term or long-term significant adverse impacts to the environment, consequently, as documented in the SEPA Addendum and the Amended SCA, the proposed amendment is consistent with the public health, safety and welfare.

**C. Reasonable alternatives means to achieve the purpose of the proposal; Funding to implement the proposal:**

Alternatives to the Original Project as it was presented to the County were considered in the FEIS. The Revised Project does not change those considerations and related findings and conclusions. Desert Claim has conducted environmental surveys over the course of reconfiguring its proposal; consequently it is uniquely familiar with the terrain and habitat of the site where the Revised Project is to be located. Desert Claim intends to lease 2,625.8 acres from

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<sup>36</sup> Amend. SCA, Article IV.E.

<sup>37</sup> Ecology letter to EFSEC, dated September 07, 2018.

<sup>38</sup> Golder Associates, Inc. Visual Effects Assessment for Desert Claim Wind Power Project, dated September 7, 2018.



four private land owners, with 636.7 acres leased from the Washington Department of Natural Resources, and 1,130.5 acres owned by an affiliate of Desert Claim.<sup>39</sup> Five Bonneville Power Administration (BPA) owned transmission lines and Puget Sound Energy's Rocky Reach-Cascade 230 Kilovolt (kV) line are located in the Revised Project area. According to Desert Claim, these regional transmission lines have been identified as options for interconnecting the Revised Project to the regional transmission network.<sup>40</sup> Due to the unique ability of Desert Claim to develop the Revised Project area and its location that provides access for transmission interconnection, the Council finds there is no reasonable alternative means to efficiently achieve the objectives of the amended proposal—the production of renewable energy available to Desert Claim on the Revised Project site. Based on Desert Claim's written request that EFSEC amend its SCA, the Council concludes that Desert Claim has the capability to fund and complete the construction of the amended Project reconfiguration.

#### **4. Consistency with WAC 463-72**

WAC 463-72-020 provides:

Site restoration or preservation plans shall be prepared in sufficient detail to identify, evaluate, and resolve all major environmental and public health and safety issues, to include provisions for funding or bonding and monitoring. Specific plans shall:

(1) Describe the process and/or assumptions used to evaluate the options considered and the measures selected to restore or preserve the site to protect the environment and all segments of the public against risks and dangers resulting from the site operations and activities.

(2) Address provisions for funding or bonding to meet restoration or preservation costs. Financial assurance shall be provided to ensure that funding is available and sufficient for site restoration or preservation. Such financial assurances shall include evidence of pollution liability insurance coverage in an amount justified for the project, and a site closure bond, sinking fund, or other financial instrument or security in an amount justified in the initial site restoration plan.

(3) Address the scope of monitoring to be conducted during site restoration or preservation and possible continued monitoring to ensure site restoration is achieved.

Compliance with WAC 463-72 is addressed in the SCA amendment under site restoration, which requires Desert Claim to develop and prepare an Initial Site Restoration Plan (ISRP) in consultation with WDFW, and to submit the plan for EFSEC approval.<sup>41</sup> The objective of the

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<sup>39</sup> Amend. Req., Revised Project description, Section 2.3 Land Ownership at 36.

<sup>40</sup> Amend. Req., Revised Project description, Section 3.2.3 Transmission Interconnections at 10.

<sup>41</sup> Amended SCA, Article III. H Site Restoration at 10.

ISRP is to conduct restoration of the site to “approximate pre-Project condition or better”.<sup>42</sup> Based on its previous findings that the proposed amendment has no significant adverse environmental impacts and no significant adverse impacts on public health, safety, and welfare; and second, that it does not substantially alter the substance of Desert Claim’s legal responsibilities under the SCA, the Council concludes that this amendment is consistent pursuant to WAC 463-72.

### **Conclusion**

The Council concludes as follows: (1) the proposed SCA Amendment is consistent with the intent of the Original Project SCA; (2) the proposed SCA Amendment of Desert Claim’s SCA to allow reconfiguration of the Project as-proposed is consistent with the public health, safety, and welfare; (3) the proposed SCA Amendment is consistent with all applicable laws (including SEPA); and (4) the proposed amendment is consistent with the purpose pursuant to WAC 463-72. The Council hereby determines that it is appropriate to approve Amendment 1 to the Desert Claim Wind Power Project SCA, necessary to reflect the proposed changes to the Project; *Provided*, Desert Claim Wind Power LLC, shall continue to implement mitigation measures identified in the SCA, as amended by this decision.

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<sup>42</sup> Amended SCA, Article IV.D Initial Site Restoration Plan at 14.

## RESOLUTION

For the foregoing reasons, the Council grants Desert Claim's request to amend its SCA to allow Desert Claim to construct and operate the Revised Project. The Council's approval is memorialized in the attached SCA Amendment.

- The proposed amendment to the SCA for the reconfiguration of the Project and its boundaries, reducing the Project area to approximately 4,400 acres, by removal of 1,271 acres located east of Reecer Creek and the addition of approximately 370 acres to the west and south of the Project area.
- Primary site access during construction and operation will be changed to Smithson Road, for internal access roads.
- The Project will include approximately twenty (20) miles of internal roads for access to the wind turbine generators and other Project facilities.
- Installation of wind turbine generators for a maximum of thirty-one (31), 3-bladed wind turbines on tubular steel towers, not to exceed a maximum height (hub height plus blade tip height) of 150 meters (492 feet), with a capacity ranging from 2.0 to 4.2 megawatts (MW). The total capacity for the reconfigured Project will not exceed 100 MW. Wind turbines will be equipped with turbine control, safety and braking systems, and will be interconnected to a central Supervisory Control and Data Acquisition (SCADA) system.
- Turbine setbacks shall meet the following setback requirements:
  - Setback from occupied residences = 2,500 feet
  - Setback from external Project Area boundaries = 1.25 x tip height
  - Setback from road and transmission line rights of way = 1.25 x tip height
  - Setback from barns and buildings = tip height
- All applicable SCA conditions and mitigation measures apply to the construction and operation of the Facility. Desert Claim Wind Power LLC, shall comply with all additional mitigation measures as set forth in the SCA, as amended.
- The SCA changes are shown in the Amended SCA.
- The mitigation measures and supporting SEPA review notes are set out in attachment 1 and attachment 2 to this resolution.




## Appeals:

A request for judicial review of the SCA amendment for the Revised Project is subject to the requirements of the Administrative Procedures Act, Chapter 34.05 RCW.

DATED at Olympia, Washington and effective on November 13, 2018

WASHINGTON ENERGY FACILITY SITE EVALUATION COUNCIL

By:   
Kathleen Drew, EFSEC Chair

Attested:   
Sonia E. Bumpus, Siting and  
Compliance Manager

Attachments: 1. EFSEC SEPA Addendum to the FSEIS  
2. EFSEC SEPA revised staff memorandum to Stephen Posner

## **Attachment 6**

Council Resolution No. 353, approval of the October 18, 2023 SCA Amendment Request.

**WASHINGTON STATE**  
**ENERGY FACILITY SITE EVALUATION COUNCIL**  
**RESOLUTION NO. 353**  
***AMENDMENT NO. 2 TO THE***  
***DESERT CLAIM WIND POWER PROJECT SITE CERTIFICATION AGREEMENT***  
***EXTENSION OF TERM***

**Nature of Action**

On May 5, 2023, the Washington Energy Facility Site Evaluation Council (EFSEC or Council) received a written request from the certificate holder, Desert Claim Wind Power LLC (Desert Claim), to extend the deadline for substantial completion by five years to November 13, 2028.

According to the certificate holder's request, "The proposed amendment would allow additional time for the company to secure a long-term power purchase commitment, which is necessary to proceed with financing construction of the project."

**Background**

Governor Gregoire executed the Desert Claim Site Certification Agreement (SCA) in February 2010 based on the Council's recommendation following an adjudicative hearing and an environmental impact statement. The original February 2010 SCA authorized Desert Claim to construct and operate a wind power facility consisting of a maximum of 95 wind turbines on tubular steel towers. The 2010 SCA permitted an output capacity of 190 total megawatts (MW) and a tower height not to exceed a maximum of 410 feet, within an approximately 5,200-acre project site. The project was located north and west of Ellensburg near the intersection of U.S. Route 97 and Smithson Road.

Having not yet started construction, in February 2018 Desert Claim requested that the Council amend its SCA to allow for the reconfiguration of its site boundary and the installation of fewer, but larger turbines than were originally authorized. Following a public hearing in Ellensburg and an addendum to the original SEPA environmental impact statement, the Council granted Desert Claim's request to amend its SCA in Resolution No. 343, dated November 13, 2018.

The resulting SCA Amendment No. 1 reconfigured the project and its boundaries, reducing the project area to approximately 4,400 acres by removing 1,271 acres located east of Reecer Creek and adding approximately 370 acres to the west and south of the original project area. The number of authorized wind turbines was reduced to a maximum of 31 three-bladed turbines on tubular steel towers, not to exceed a maximum height of 150 meters (492 feet), with a capacity ranging from 2.0 to 4.2 megawatts (MW). The total capacity for the reconfigured project is not to exceed 100 MW. Primary site access during construction and operation was changed from Reecer Creek Road to Smithson Road (accessed from U.S. Route 97). All turbines are to be located at least 2,500 feet from all residences to mitigate the possibility of residents experiencing shadow flicker.

SCA Amendment No. 1 also extended the original SCA's deadline for commencement of commercial operations (also referred to as "Substantial Completion") by three years, to November 13, 2023. The original SCA's deadline for beginning construction was eliminated.

## **Procedural Status**

EFSEC's SCA amendment procedure is governed by chapter 80.50 RCW and chapter 463-66 WAC.

Desert Claim and EFSEC have complied with procedural requirements of Chapter 463-66 WAC as follows:

- Pursuant to WAC 463-66-030, Desert Claim submitted its request for amendment of the SCA and a State Environmental Policy Act (SEPA) Environmental Checklist in writing on May 5, 2023.
- At the Council's monthly meeting on May 17, 2023, EFSEC staff announced that a public hearing session had been scheduled for the proposed SCA amendment consistent with WAC 463-66-030.
- Pursuant to WAC 463-66-030, notice of a virtual public special meeting was distributed on July 7, 2023G to the Desert Claim project distribution list. The notice advised that the certificate holder had requested an amendment to the SCA, and that a public hearing session to consider the matter would be conducted on July 13, 2023. The notice stated that public comments would be heard from 5:00pm to 7:00pm or until the last speaker, whichever comes first, and that written comments could also be submitted online or via U.S. mail.
- The public hearing session was held on July 13, 2023, as a virtual public special meeting on the Microsoft Teams meeting platform and via a conference telephone number.
- An online public comment database was open during the July 13, 2023, public hearing session for submission of written comments.
- The certificate holder gave a presentation on the proposed amendment to the SCA at the July 13, 2023, hearing session.
- One written comment was submitted to the record as a result of the public comment opportunity. The comment was from Neil Caulkins, Deputy Prosecuting Attorney representing Kittitas County and was in opposition to the request on the grounds that the failure of the certificate holder to secure a contract for the purchase of the power demonstrates a lack of need for the power.<sup>1</sup>
- At the Council's September 20, 2023, monthly meeting Amí Hafkemeyer, Director of Siting and Compliance, proposed that the Council approve the SCA amendment request subject to conditions. The Council considered information in the Desert Claim's SCA amendment request, advice from legal counsel, and the EFSEC staff recommendation and

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<sup>1</sup> Mr. Caulkins stated that "If the power is not needed by Washington state, then amending this site certification agreement to keep this apparently failed venture going does not accomplish EFSEC's statutory charge of providing for the state's energy needs - this particular need is simply absent."

directed staff to draft a resolution for Council review consistent with the staff recommendation.

## Discussion

The current SCA for the Desert Claim Wind Facility, as amended by Amendment No. 1 in 2018, states:

This Site Certification Agreement authorizes the Certificate Holder to construct the Project *such that Substantial Completion<sup>2</sup> is achieved no later than five (5) years from the date that Amendment No. 1 is approved by the Council*; provided, however, that such construction is not delayed by a force majeure event,<sup>3</sup> and that the construction schedule that the Certificate Holder submits pursuant to Article IV.K of this Agreement demonstrates its intention and good faith basis to believe that construction shall be completed within eighteen (18) months of beginning Construction.

[Emphasis and footnotes added.] The SCA's terms are clear that Substantial Completion must be achieved no later than five years from the date of Amendment No. 1—i.e., by November 13, 2023. The SCA does not indicate a deadline by which construction must start. However, it appears that the Council simply chose to remove or suspend any deadline for the start of construction, and instead only imposed a deadline for the delivery of energy to the electrical grid (i.e., Substantial Completion).

The certificate holder requests a five year extension of the current deadline for Substantial Completion of the Project.

WAC 463-66-040 outlines the relevant factors that the Council shall consider prior to a decision to amend an SCA. That rule provides that in reviewing any proposed amendment, the Council shall consider whether the proposal is consistent with:

- (1) The intention of the original SCA;
- (2) Applicable laws and rules;
- (3) The public health, safety, and welfare; and
- (4) The provisions of chapter **463-72** WAC.

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<sup>2</sup> Desert Claim SCA Art. II.34 states: "'Substantial Completion' means the Project is generating and delivering energy to the electric power grid."

<sup>3</sup> SCA Art II.21 states: "'Force Majeure Event' means any event beyond the control of the Party affected that directly prevents or delays the performance by that Party of any obligation arising under this Agreement, including an event that is within one or more of the following categories: condemnation; expropriation; invasion; plague; drought; landslide; tornado; hurricane; tsunami; flood; lightning; earthquake; fire; explosion; epidemic; quarantine; war (declared or undeclared), terrorism or other armed conflict; material physical damage to the Project caused by third parties; riot or similar civil disturbance or commotion; other acts of God; acts of the public enemy; blockade; insurrection, riot or revolution; sabotage or vandalism; embargoes; and, actions of a governmental authority other than EFSEC."



Because the requested amendment only concerns the SCA’s termination date, it would not affect the intention of the original SCA, except in regard to that narrow issue. In addition, the provisions of 463-72 WAC, which are concerned with site restoration requirements at the end of a project’s useful life and financial assurances for that purpose, is in no way implicated by the request. The certificate holder proposes no changes to the SCA’s requirements on that topic, and because construction has not commenced, the requirement to provide financial assurance for site restoration has not yet been triggered.

Thus, the chief considerations are whether the proposed extension is consistent with applicable laws and rules, and with the public, health, safety, and welfare. A good starting point for analysis of both of these topics is the language added to RCW 80.50.010 by Laws of 2022, ch. 183, § 1, which states:

It is the policy of the state of Washington to reduce dependence on fossil fuels by recognizing the need for clean energy in order to strengthen the state's economy, meet the state's greenhouse gas reduction obligations, and mitigate the significant near-term and long-term impacts from climate change while conducting a public process that is transparent and inclusive to all with particular attention to overburdened communities.

Facilitating the certificate holder’s ability to construct this clean energy facility would align with this policy goal of RCW 80.50.010. However, this is not the only consideration; the Council has indicated previously that an unlimited “build window” is not appropriate,<sup>4</sup> and this is why EFSEC rules provide a presumptive ten year term for site certification agreements.

The policies behind EFSEC’s adoption of a presumptive ten year term for site certification agreements are not insurmountable in this case.

The Project underwent an EFSEC public comment process and EFSEC prepared an addendum to the Supplemental Environmental Impact Statement for the 2018 SCA amendment that authorized the Project’s redesign.

Although the Council’s statutory directive does not include evaluating the financial viability of the specific energy facility proposals that are presented to it for review, the certificate holder represents that it has actively been competing in requests for proposals for power purchase contracts. It also represents that it expects more such requests in the near term, and that it is ready and able to proceed with construction as soon as it is able to secure a power purchase contract.

Whether or not the project ultimately proves financially viable will be demonstrated during the requested extension. If it is not viable, it will not be built. The Council’s charge is “to recognize the pressing need for increased energy facilities, and to ensure through available and reasonable

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<sup>4</sup> Although “there is a benefit to the public to have permitted facilities ready to be constructed whenever it becomes known that more generation capacity is needed . . . an unlimited ‘build window’ for a proposed project is not appropriate as, over time, technology or mitigation measures presented in an application may no longer be protective of environmental standards and conditions at the time the facility is constructed.” Council Order No. 860, Order Recommending Approval of Amendment No. 5 of Site Certification Agreement of the Satsop CT Project (Grays Harbor Energy Center) p. 13. (Dec. 21, 2010).

methods that the location and operation of all energy facilities and certain clean energy product manufacturing facilities will produce minimal adverse effects on the environment, ecology of the land and its wildlife, and the ecology of state waters and their aquatic life.” RCW 80.50.010.

Neither staff’s review, nor any public comment indicates the likelihood of any substantial changes in technology or in the site’s environmental conditions since the 2018 SCA amendment that would necessitate a significant new review of the project’s impacts. Since the SCA was last amended, there have been some changes in requirements applicable to wind energy projects, as well as in the requirements imposed on similar projects sited through the EFSEC process, but these changes can be incorporated as conditions of the requested extension.

Under these circumstances, granting the extension subject to protective conditions would be more appropriate than to let the SCA expire by its present terms and thereby require the certificate holder to submit a new application for site certification.

EFSEC staff recommended that the request extension be granted subject to the limitation that no further extension requests be allowed unless construction is reasonably underway, although not yet to point of “Substantial Completion.”

EFSEC staff also recommended that the following changes be included in the SCA:

- Given the new state law requirement, in RCW 70A.550.020, Laws of 2023, ch. 334, § 2, that the project apply to the Federal Aviation Administration (FAA) for approval to install an aircraft detection lighting system (ADLS), there is the potential for additional impacts or permitting considerations associated with this installation. If approved by the FAA, EFSEC shall review the proposed ADLS system prior to installation to determine whether any additional permits and conditions are required.
- The SCA should be amended to require the certificate holder to include in its waste management plan a commitment to recycle project components, both during operation and maintenance and at decommissioning, when recycling opportunities are reasonably available.<sup>5</sup>
- The certificate holder’s most recent site layout included turbines located less than 0.5 miles from seven (7) non-participating residences. The certificate holder should be required to submit, for the Council’s review prior to micro-siting, an analysis of the feasibility of placing all turbines more than 0.5 miles from non-participating residences to avoid dominating views from these sensitive viewing locations.

The Council finds the conditions recommended by EFSEC Staff to appropriate under the circumstances of this extension request, and the certificate holder has indicated that the conditions are acceptable.

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<sup>5</sup> See Laws of 2023, ch. 324, § 1, directed Washington State University extension energy program to “conduct a study on the feasibility of recycling wind turbine blades installed at facilities in Washington that generate electricity for distribution to customers in Washington.”

## RESOLUTION

For the foregoing reasons, the Council:

Grants Desert Claim's request to amend the SCA's expiration date subject to the following conditions:

- Given the new state law requirement, in RCW 70A.550.020, Laws of 2023, ch. 334, § 2, that the project apply to the Federal Aviation Administration (FAA) for approval to install an aircraft detection lighting system (ADLS), there is the potential for additional impacts or permitting considerations associated with this installation. If approved by the FAA, EFSEC shall review the proposed ADLS system prior to installation to determine whether any additional permits and conditions are required.
- The SCA should be amended to require the certificate holder to include in its waste management plan a commitment to recycle project components, both during operation and maintenance and at decommissioning, when recycling opportunities are reasonably available.<sup>6</sup>
- The certificate holder's most recent site layout included turbines located less than 0.5 miles from seven (7) non-participating residences. The certificate holder should be required to submit, for the Council's review prior to micro-siting, an analysis of the feasibility of placing all turbines more than 0.5 miles from non-participating residences to avoid dominating views from these sensitive viewing locations.

The Council's approval is memorialized in the attached SCA Amendment.

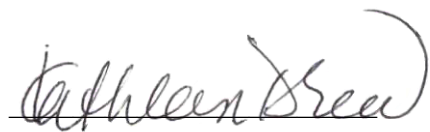
The approved SCA changes are shown in the Amended SCA.

### Appeals:

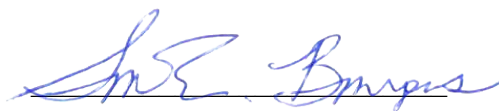
A request for judicial review of the SCA amendment is subject to the requirements of the Administrative Procedures Act, Chapter 34.05 RCW.

DATED at Lacey, Washington and effective on October 18, 2023

WASHINGTON ENERGY FACILITY SITE EVALUATION COUNCIL



Kathleen Drew, EFSEC Chair



Sonia E. Bumpus, EFSEC Director

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<sup>6</sup> See Laws of 2023, ch. 324, § 1, directed Washington State University extension energy program to "conduct a study on the feasibility of recycling wind turbine blades installed at facilities in Washington that generate electricity for distribution to customers in Washington."