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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**

**DESERT CLAIM'S SUPPLEMENTAL  
BRIEFING RE WAC 463-28-030(1)**

During its April 10, 2007 meeting, the Council invited parties to submit supplemental briefing. In the following sections, Desert Claim addresses some of the questions raised during the Council meeting, and offers a possible middle ground between Desert Claim's original request and the position advocated by Kittitas County.

**1. Does WAC 463-28-030(1) require a local land use application to be filed and "reasonable efforts" to be made after an applicant has invoked EFSEC's jurisdiction?**

Chair Luce asked the parties to consider the "jurisdictional issue" of whether WAC 463-28-030(1) limits the Council's consideration to applications and efforts made after an applicant has invoked EFSEC's jurisdiction by filing an Application for Site Certification ("ASC").<sup>1</sup> Put another way, does the regulation require an applicant to file an application to

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<sup>1</sup> In the hope of minimizing confusion between the Application for Site Certification that a project developer files with EFSEC and an application for local land use approval filed with a local jurisdiction, this brief refers to an Application for Site Certification as an "ASC."

1 change local land use requirements at some point after it files an ASC with EFSEC? Desert  
2 Claim believes the answer to these questions is no. There is no jurisdictional limitation that  
3 prevents the Council from considering efforts to achieve local land use consistency that are  
4 made prior to the filing of an ASC.  
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8 Initially, it is worth noting that not even Kittitas County has argued that the Council's  
9 jurisdiction is limited in this way. The County argues that Desert Claim must file a new  
10 local application because it now proposes an "entirely different" project, but the County has  
11 never taken the position that a new local application would be required even if no changes  
12 had been made to the Project. The County appears to have taken for granted, as Desert  
13 Claim does, that EFSEC may consider prior applications and related efforts to achieve land  
14 use consistency. Instead, the disagreement between Desert Claim and the County concerns  
15 whether the prior application and efforts made in this case are relevant in light of the ways  
16 that Desert Claim has revised its project proposal.  
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20 Consideration of the jurisdictional question raised during last week's meeting begins  
21 with the language of WAC 463-28-030(1) itself. The language of that section does not limit  
22 the Council's consideration to applications and efforts made subsequent to the filing of an  
23 ASC. In the absence of unambiguous language establishing such a limitation, the Council  
24 should interpret its regulation in light of the requirements and policies set forth in the  
25 Council's governing statute, and in light of the policies and purposes reflected in the  
26 Council's overall regulatory scheme. Several reasons favor an interpretation that would  
27 allow the Council to consider applications filed with local jurisdictions before filing an ASC  
28 with the Council.  
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32 First, the Legislature has directed the Council to "avoid costly duplication in the  
33 siting process." RCW 80.50.010(5). An interpretation of WAC 463-28-030(1) that would  
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1 prevent the Council from considering local applications filed before an ASC was filed  
2 cannot be reconciled with that statutory command. This is seen most clearly if we isolate  
3 the jurisdictional question from other arguments that have been made in connection with  
4 Desert Claim's motion. Assume, hypothetically, that an applicant filed a local application  
5 and, despite all reasonable efforts, the county denied the application, and then assume that  
6 the applicant submitted an ASC to EFSEC without making any changes to the project. If  
7 section 463-28-030(1) were interpreted to impose a jurisdictional limitation preventing the  
8 Council from considering prior local applications, the interpretation would result in EFSEC  
9 requiring the applicant to go back through the identical local process a second time. That  
10 interpretation of the regulation must be wrong because it would result in just the sort of  
11 duplication the Legislature directed EFSEC to avoid.  
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22 Second, EFSEC's governing statute has, for many years, required the Council to  
23 make decisions within 12 months of receiving an ASC. RCW 80.50.100(1). In 2001, the  
24 Legislature amended the statute and further directed the Council to "ensure that decisions  
25 are made timely and without unnecessary delay," RCW 80.50.010(5). It is difficult to  
26 imagine how the Council would be able to make a decision within 12 months after an  
27 applicant filed an ASC, if an applicant could only begin attempting to cure a land use  
28 inconsistency after filing its ASC. Interpreting section 463-28-030(1) to require the Council  
29 to ignore efforts made to cure local land use inconsistencies before filing an ASC would  
30 cause unnecessary delay, which the Legislature has directed the Council to avoid.  
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40 Third, interpreting WAC 463-28-030(1) to limit the Council's ability to consider  
41 prior applications for local approval would serve no purpose. Presumably, the original  
42 purpose underlying WAC 463-28-030(1) was the idea that an applicant should try to get a  
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1 local jurisdiction to change its land use requirements before asking EFSEC to overrule them.  
2 That purpose is served whether an applicant does so before or after filing its ASC.  
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4 For these reasons, the Council should not interpret WAC 463-28-030(1) to include  
5 an unwritten jurisdictional limitation on its consideration of an applicant's efforts to cure  
6 land use inconsistencies prior to filing its ASC with EFSEC.  
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11 **2. Does WAC 463-28-030(1) require an applicant to submit a new local application**  
12 **whenever it makes changes to its project proposal?**  
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14 Having concluded that the Council may, and indeed should, consider an applicant's  
15 efforts to cure local land use inconsistencies prior to filing its ASC, the next question is  
16 whether an applicant must start over again with a new local application whenever it makes  
17 changes to its project proposal. Again, Desert Claim believes the answer is no.  
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20 As the Council knows from its experience, energy projects often evolve and change  
21 over time. Changes in available equipment and technology may allow or necessitate  
22 changes in a proposed project. Issues often come to light during public hearings and the  
23 SEPA process that applicants try to address through project modifications or mitigation  
24 enhancements. Other issues may arise during the adjudicatory process that lead to  
25 negotiated settlements between parties or unilateral offers by applicants to modify their  
26 projects or provide additional mitigation. These kinds of changes are common during the  
27 EFSEC process and generally result in better projects.  
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30 The question that the Council must now consider, however, is how much can a  
31 project change before WAC 463-28-030(1) requires an applicant to go back to the local  
32 jurisdiction and file a new application. The regulation does not itself address this question.  
33 Presumably, everyone would agree that some changes are so minor that they would not  
34 require an applicant to go back and file a new local application. On the other hand,  
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1 everyone would presumably also agree that at some point a project has changed so  
2 dramatically that a new application should be required. There is no obvious place to draw  
3 the line between these results, but in this case, the Council needs to decide which side of the  
4 line the Desert Claim project falls. For the reasons outlined in its original motion, Desert  
5 Claim believes the Project has not changed so dramatically that a new application is  
6 required.  
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12 In making that decision, it is important to realize that this issue is not unique to  
13 Desert Claim. Whenever there has been a finding of Land Use Inconsistency, a subsequent  
14 change to the project proposal could prompt the same argument – that the applicant should  
15 be required to file a new local application to determine whether the project change will  
16 enable the applicant to obtain the approvals necessary to cure the land use inconsistency.<sup>2</sup>  
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18 Given the Council's long-standing policy of encouraging applicants to address project  
19 impacts and to enter into stipulations and settlements to address concerns, the Council  
20 should allow applicants considerable leeway to revise their projects without requiring them  
21 to go back through a local permitting process. To decide otherwise would strongly  
22 discourage applicants from making project modifications or offering additional mitigation to  
23 address identified concerns.  
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34 During last week's meeting, the County's attorney argued that Desert Claim's  
35 position reflected a "shocking lack of understanding of land use laws." Although counsel  
36 did not explain this statement, it apparently refers to the *Hilltop Terrace Association v.*  
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43 <sup>2</sup> For example, during the Kittitas Valley Project hearings, when the applicant offered  
44 further mitigation during the adjudicatory hearing, the County argued that this mitigation had not been  
45 presented to the County Commissioners during the County land use process. The Council, however,  
46 did not require the applicant to re-apply to the County in light of this change to the project.  
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1 *Island County*, 126 Wn.2d 22 (1995), decision cited in the County's earlier brief. The  
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3 *Hilltop Terrace* case involved the question of whether the legal doctrine of *res judicata*  
4 precluded a developer from filing a second permit application after the developer's first  
5 permit application had been denied. The court concluded that *res judicata* would only bar  
6 the second application if the project described in the second application were "identical" to  
7 the project that had been the subject of the first application. This decision simply is not  
8 relevant to the question before the Council. Desert Claim does not contend that legal  
9 doctrines preclude it from filing another application under the County's Wind Farm Overlay  
10 Ordinance. Rather, Desert Claim contends that EFSEC's regulations do not require it to do  
11 so – and indeed, that such a requirement would be contrary to EFSEC's governing statute.  
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22 Local land use law sheds no light on how EFSEC should interpret its own regulations.

23 **3. As an alternative to finding the Desert Claim has satisfied WAC 463-28-030(1),**  
24 **could EFSEC waive the requirement found in 463-28-030(1) on the ground that**  
25 **requiring Desert Claim to file a new application with Kittitas County would be**  
26 **a "useless act"?**  
27

28 EFSEC's regulations do not address the question of whether the Council may waive  
29 the procedural provisions found in WAC 463-28-030. There is, however, general authority  
30 in Washington law for the idea that an agency or court should not require a party to perform  
31 a "useless act."<sup>3</sup>  
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40 <sup>3</sup> *E.g. Orion Corp. v. State*, 103 Wn. 2d 441, 458, 693 P.2d 1369, 1379 (1985) ("courts will  
41 not require vain and useless acts"); *Jaramillo v. Morris*, 50 Wn. App. 822, 833, 750 P.2d 1301, 1307  
42 (1988) (declining to remand the case for a new trial despite error in liability finding because damages  
43 award was already offset by settlement payment and, therefore, conducting a new trial would be a  
44 "useless act and a waste of judicial resources"); *Heriot v. Lewis*, 35 Wn. App. 496, 502, 668 P.2d  
45 589, 592 (1983) (declining to remand case to trial court for fact finding because remand would be a  
46 "useless act" in light of the undisputed evidence in the record).  
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1 In this case, requiring Desert Claim to file a new application for approval under the  
2 Wind Project Overlay Ordinance, Kittitas County Code chapter 17.61A, would likely be a  
3 useless act in two respects. First, there is no reason to believe that the Board of County  
4 Commissioners ("BOCC") would reach a different conclusion than it reached in connection  
5 with Desert Claim's 2003 application, particularly in light of its similar denial of the Kittitas  
6 Valley Project application. Second, and even more significant, this Council has already  
7 concluded that the County's Wind Farm Overlay Ordinance process attempts to improperly  
8 usurp EFSEC's authority to site energy facilities.  
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17 **4. Is there a middle ground?**

18 During last week's Council meeting, some council members seemed to be searching  
19 for a middle ground, something in between requiring no further efforts by Desert Claim and  
20 requiring Desert Claim to go through the County's lengthy Wind Farm Overlay Ordinance  
21 process a second time. In the spirit of compromise, Desert Claim now suggests a possible  
22 middle ground.  
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28 Desert Claim is willing to agree to the key additional mitigation measures that the  
29 Council required in its decision concerning the Kittitas Valley Project. In particular, Desert  
30 Claim is in the process of developing a new turbine configuration that will ensure that all  
31 turbines are located at a distance from existing residences that is at least four times the  
32 maximum turbine tip height. Desert Claim is also willing to agree to the specific shadow  
33 flicker mitigation set forth in Article VII, Section I of the Kittitas Valley Project Site  
34 Certification Agreement, which is similar to but more detailed than the mitigation offered in  
35 Desert Claim's ASC. In the near future, Desert Claim will be submitting materials to  
36 formally amend its ASC to incorporate these changes, which will then be addressed in the  
37 Supplemental Environmental Impact Statement.  
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1 Desert Claim is also willing to spend the next 30 days meeting with Kittitas County  
2 staff and the BOCC to determine whether the revisions Desert Claim has made to the Project  
3 satisfy the County's concerns. As in the past, Desert Claim is willing to meet with the  
4 BOCC in public sessions to discuss these issues. However, Desert Claim does not want to  
5 initiate an ill-defined County process with no clear end point or objective. If EFSEC  
6 concludes that further meetings between Desert Claim and Kittitas County are appropriate,  
7 then EFSEC should spell out the specific purpose of such meetings and impose a deadline  
8 for trying to accomplish that purpose.  
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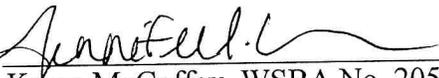
10 Desert Claim had meetings and discussions with County representations during Fall  
11 2006. At that time, County representatives indicated that the only way the County could  
12 evaluate the revised Project would be for Desert Claim to file a new development permit  
13 application pursuant to the Wind Farm Overlay Ordinance. Desert Claim respectfully  
14 disagrees. The Project is now within EFSEC's jurisdiction, and Kittitas County is not the  
15 permitting authority. Without attempting to usurp this Council's energy facility siting  
16 authority, the BOCC could now consider and determine by resolution whether the revised  
17 project is consistent with the policies and goals of the County's land use requirements.  
18 Given the BOCC's experience addressing wind project issues, and the Desert Claim Project  
19 in particular, we believe that 30 days should be a sufficient period of time for the BOCC to  
20 consider these issues and reach a decision.  
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22 Although Desert Claim firmly believes that it has already done all that it is legally  
23 required to do under WAC 463-28-030(1), Desert Claim is willing to spend the next 30 days  
24 making an additional effort to try to reach agreement with Kittitas County. Desert Claim  
25 has tried very hard to further minimize the Project's impacts, and hopes to build a positive  
26 long-term relationship with the local community. However, it would not be consistent with  
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1 EFSEC's governing statute to require Desert Claim to go through the County's lengthy and  
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3 duplicative siting process a second time.  
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9 DATED: April 17<sup>th</sup>, 2007

**PERKINS COIE LLP**

10  
11  
12 By:   
13 Karen McGaffey, WSBA No. 20535  
14 Jennifer Schorr, WSBA No. 36840  
15 1201 Third Avenue, Suite 4800  
16 Seattle, WA 98101-3099  
17 Telephone: 206.359.8000  
18 Facsimile: 206.359.9000  
19 Emails: [KMcGaffey@perkinscoie.com](mailto:KMcGaffey@perkinscoie.com)  
20 [JSchorr@perkinscoie.com](mailto:JSchorr@perkinscoie.com)

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22 Attorneys for Applicant  
23 Desert Claim Wind Power  
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DESERT CLAIM'S SUPPLEMENTAL  
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**Perkins Coie LLP**  
1201 Third Avenue, Suite 4800  
Seattle, WA 98101-3099  
Phone: 206.359.8000  
Fax: 206.359.9000