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BEFORE THE STATE OF WASHINGTON
ENERGY FACILITIES SITE EVALUATION COUNCIL

In the Matter of)	
Application No 2004-01)	KITTITAS COUNTY
)	RESPONSE TO MOTION
DESERT CLAIM WIND POWER, L.L.C.)	FOR DETERMINATION
)	RE WAC 463-28-030(1)
)	
DESERT CLAIM WIND)	
POWER PROJECT)	
)	
)	

**The Project Proposal Before EFSEC is Fundamentally and Substantially Different from
the Project Reviewed and Rejected by Kittitas County**

The "Desert Claim" project application submitted to Kittitas County and the "Desert Claim" application submitted to EFSEC are the same in name only. The project proposed to EFSEC is different from the project rejected by the County in a multitude of respects. The applicant's application to EFSEC, their testimony at the initial information hearing, and their affidavit in support of their motion all confirm this obvious fact. (see attached portions of application to EFSEC. Kittitas County does not currently have available the transcript from the

1 initial hearing, but presumes those would be in EFSEC possession). Just a few of the more
2 glaring facts that confirm this are as follows:

- 3 1) The two project proposals are in a different location. The eastern edge of the project
4 boundary is approximately 2¾ miles further west in the EFSEC proposal. The western
5 edge of the project is a mile further west in the EFSEC proposal. The EFSEC project
6 proposal contains more than fifteen hundred acres of land that were not part of the
7 proposal the County reviewed.
- 8 2) The two project proposals have substantially different number of turbines,
9 substantially different sized turbines, and turbines will be in different locations in each
10 proposal.
- 11 3) The project proposed to EFSEC is now consolidated from four separate parcels to one
12 contiguous area.

13
14 The applicant in its application has stated that there were a multitude of issues identified by the
15 County and the public through the county process and that the applicant has made “several
16 modifications” to address those issues. The applicant then goes on to provide a summary of the
17 “most significant of those changes” and then lists eight different bullet points. (see attached).
18 EFSEC March 19, 2007 notice of adoption of environmental documents also provides that “this
19 project differs from the 2003 proposal reviewed and denied by Kittitas County in 2005” and then
20 goes on to list four of the those changes. (see attached).

21
22 Darin Huseby Director Northwest Region for enXco has also confirmed that this is a
23 totally different project than the one reviewed and rejected by Kittitas County. His letter of
24 November 30, 2006 to the Kittitas County Board of County Commissioners (BOCC) provides in
25 part:

1 “enXco has worked diligently to improve the project since the time of the
2 County’s denial. We have made concerted effort to specifically address the
3 concerns raised during the County process. The application to EFSEC includes
4 the following improvements, which we feel should please the County:

- The project is now contiguous with regard to land parcels;
- The project now consists of fewer turbines;
- The project has been altered to address noise & shadow flicker issues.

5
6 The Washington State Supreme Court has made it clear that even far less change than the widely
7 different “Desert Claim” proposals are a “substantial change” in an application. In

8 *Hilltop Terrace Ass’n v. Island County*, 126 Wn.2d 22 (1995) the court addressed whether a
9 second application for a cell tower was the same or a substantially different application. In that
10 case the proponent presented a second application for a cellular tower that was to be located on
11 the same parcel as the first application. The Court held:

12 The second application for the conditional use permit substituted a fundamentally
13 different kind of structure, completely rerouted the access road to the site, significantly
14 increased setbacks, and changed the number and kind of antennae. . .

15 We hold these changes in both design and function in the second application together
16 constitute "a substantial change in the application".

17 Id at pg 33-34. As discussed in more detail above, the Desert Claim application before EFSEC
18 involves a multitude of differences from the application reviewed by Kittitas County.

19 **The Applicant Has Failed To Make Application With The County For**

20 **The Project Proposed To EFSEC**

21 WAC 463-28-030(1) provides

22 (1) As a condition necessary to continue processing the application, it shall be the
23 responsibility of the applicant to make the necessary application for change in, or
24 permission under, such land use plans or zoning ordinances, and make all
25 reasonable efforts to resolve the noncompliance.

26 The applicant has not made any application to Kittitas County to seek change in Kittitas
27 County land use plans and zoning regulation for the area of the project. To the contrary, the
28 applicant has stated in no uncertain terms that they “do not intend to submit a new application to

1 the County.” (See November 30, 2006 letter from Darin Huseby Director, Northwest Region for
2 enXco.)

3 In response to Mr. Husby letter, the Kittitas County Board of County Commissioner
4 (BOCC) advised Mr. Husby in part that they

5 “have no interest in violating the legal process by making a decision on a project
6 outside of the legally adopted process already established. To so would be a
7 violation of both the law and the public trust.”

8 The BOCC went on to say, however, that if the applicant wanted to meet with the BOCC that a
9 public meeting would be arraigned for them to discuss the application with the BOCC. The
10 County has received no response from the applicant to the BOCC December 5, 2006 offer to
11 meet.

12 **Petitioners Motion Is Premature And A Ruling On This Issue Should Be Made Only**
13 **After Parties Have Been Allowed To Intervene And After There Has Been A Full Hearing**
14 **On The Merits.**

15 EFSEC has not yet allowed nor called for intervention petitions in this matter.
16 Applicant’s motion asks EFSEC to make a definitive ruling on a critical issue in this process
17 without the appropriate procedural and substantive safeguards that the various potential
18 intervenors would be entitled to. Based upon the past practices of the council, EFSEC has
19 always declined to make any decisions regarding preemption issues prior to a full hearing on the
20 merits in the adjudication process.

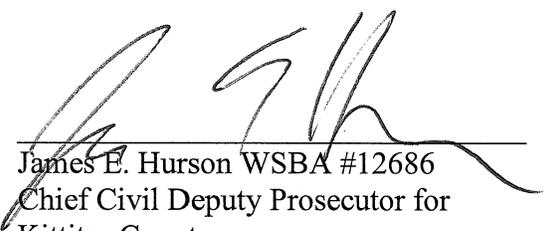
21
22 The determination the applicant seeks requires a full hearing on the complete details of
23 the application process. For example, one of the factual issues regarding “reasonable efforts to
24 resolve noncompliance” would involve the full record of the applicant’s efforts to resolve
25 compliance in the application reviewed by the County. That would necessarily also require an

1 understanding and analysis of the lack of reasonableness of the applicants position regarding the
2 conditions of approval for the application Kittitas County reviewed. In the Desert Claim
3 application process reviewed by Kittitas County, the applicant insisted upon 1000 foot setbacks.
4 The 1000 foot setback the applicant was proposing would be an unreasonable position in light of
5 the FEIS and unreasonable even under the Kittitas Valley Wind Power 2003-01 EFSEC Council
6 Order No 826 that calls for a setback “distance of four times the height of structure” for that
7 project. (See attached page 31 to the Council order) The “Desert Claim” Project EFSEC has
8 been asked to review would locate 11 of the 90 proposed turbines inside the “four times the
9 height of structure” distance (See Table 1 of Application at Tab 1 page 5 copy attached.) Thirty
10 three of the proposed turbines (more than one third of the total) would be within one half mile of
11 residences. A full hearing on the merits is necessary to fully evaluate and determine whether the
12 applicant has made “all reasonable efforts to resolve noncompliance”.

14 Conclusion

15 The applicant motion is premature and necessitates a full discussion of all facts after
16 parties have been allowed to seek intervention. The applicant has failed to comply with WAC
17 463-28-030. The applicant has not made application with Kittitas County for the project
18 proposed to EFSEC. The applicant has made no good faith attempt to resolve the land use and
19 zoning issues. The motion must be denied.

20 Dated this 30th day of March, 2007

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James E. Hurson WSBA #12686
Chief Civil Deputy Prosecutor for
Kittitas County

Jim Luce, EFSEC Chair
November 3, 2006

for permitting energy projects. In recent years, however, EFSEC's land use consistency process has been interpreted to require an applicant to attempt to obtain approval from a local land use authority in instances where local zoning codes do not unequivocally authorize a project. This has created an unusual situation for renewable energy projects proposed in counties with case-by-case permitting processes. If an applicant applies to EFSEC for approval, it must suspend the EFSEC proceedings so that it can go through the County process in an attempt to obtain local "land use consistency." Of course, if an applicant obtained local land use approval, it not would require EFSEC's approval because EFSEC does not have exclusive jurisdiction over renewable energy projects.¹

Recognizing that the EFSEC process would require Desert Claim to at least try to obtain land use approval from Kittitas County as a prerequisite to EFSEC making a decision on an application, Desert Claim decided to begin its permitting efforts with the County. It hoped it would receive County approval, and would not need to file an application with EFSEC. However, it intended to file an application with EFSEC and request preemption if it did not obtain County approval. This approach seemed more efficient than first filing an application with EFSEC, then asking EFSEC to suspend its proceedings so that it could file an application with the County, and then later resuming the EFSEC process.²

For these reasons, Desert Claim filed an application with Kittitas County in January 2003. In connection with this application, the County prepared an Environmental Impact Statement (EIS). Following publication of the Final EIS and after conducting various public meetings and hearings, the Kittitas County Board of County Commissioners ultimately issued a resolution denying Desert Claim's application in April 2005.

Changes from the Original Project Proposal

Desert Claim has considered the issues identified in the Board of County Commissioners' decision as well as the issues raised by citizens during the local permitting process, and has made several modifications to the Project to address those issues. Having already made considerable efforts to obtain local land use consistency, Desert Claim now applies to EFSEC for a Site Certification Agreement authorizing construction and operation of the Project.

The following is a summary of the primary changes Desert Claim has made to the Project since the Kittitas County Board of County Commissioners' decision:

¹ In contrast, EFSEC does have exclusive jurisdiction over thermal facilities with a capacity of 350 MW or more. Thus, depending upon its size, a traditional fossil fuel fired generation facility either must obtain local approval or must obtain EFSEC approval.

² This is, in effect, what has occurred in connection with the Kittitas Valley Project that is now under review by the Council.

Jim Luce, EFSEC Chair
November 3, 2006

- The Project Area has been consolidated from four separate parcels to one contiguous area. The Project Area has also been reduced from 5,237 acres to 4,783 acres, removing approximately 2,046 acres of private land that previously made up the eastern portion of the Project and adding approximately 1,592 acres of land leased from the Washington Department of Natural Resources (WDNR).
- The total number of turbines has been reduced by 25%, from 120 to 90.
- The turbine model has changed from the General Electric Wind Energy 1.5sl turbine to the REpower MM92 turbine.
- There are only 32 non-participating residences located within 3,000 feet of a proposed turbine. Only seven of those are located less than 1,500 feet from a proposed turbine and the closest one is 1,106 feet from a proposed turbine.
- Sound from the Project will be no more than 50 dBA, the state nighttime limit for residential properties, at the Project Area boundary.
- Shadow flicker at adjacent residences has been substantially reduced. For those residences (if any) that are affected by perceptible shadow flicker, Desert Claim will stop the blades of the wind turbine that causes the flicker during those hours and conditions when shadow flicker occurs, or offer a voluntary waiver agreement to the land-owners in lieu of stopping the turbine.
- The Project will not result in any temporary or permanent impacts to wetlands, streams or their buffers.
- Daytime white strobe lighting has been eliminated and nighttime red lighting has been reduced to only 36 of the Project turbines.

A more detailed description of the Project is provided in the Project Description, which is attached at Tab 1.

Materials Supporting Application

Applications to the Council for Site Certification have typically been organized in a way that closely tracks the standard organization of Environmental Impact Statements prepared pursuant to the State Environmental Policy Act (SEPA) in order to facilitate the Council's preparation of an EIS. EFSEC regulations generally require this organization. *See* WAC 463-60-012. In this instance, however, Kittitas County has already published a Final EIS on the Project. Reorganizing that information would be inefficient and seems unnecessary when EFSEC can rely upon the existing SEPA document. *See* RCW 43.21C.034; WAC 197-11-600, -630.

1. INTRODUCTION

This Project Description is part of the Application for Site Certification (Application) for the Desert Claim Wind Power Project (the Project). The Project is a renewable wind energy generation facility that will consist of up to 90 wind turbines and have a nameplate capacity of up to 180 megawatts (MW). The Project will be located in unincorporated Kittitas County, approximately 8 miles northwest of Ellensburg, Washington (**Figure 1**).

Desert Claim Wind Power LLC (Desert Claim or the Applicant) originally applied to Kittitas County for the land use approvals and permits necessary to construct and operate an earlier version of the Project. Kittitas County evaluated the environmental impacts associated with the original project proposal in a Final Environmental Impact Statement published in August 2004 (County FEIS). The Kittitas County Board of County Commissions ultimately denied Desert Claim's application. Since the County's decision, Desert Claim has made significant modifications to the Project to further reduce potential impacts and to respond to feedback from Kittitas County and its residents.

This Project Description includes the following sections. **Section 2** identifies the Project site and describes the existing conditions at that site. **Section 3** describes the facilities that will comprise the completed Project. **Section 4** addresses the construction process. **Section 5** addresses operation and maintenance. **Section 6** summarizes mitigation measures that have been incorporated in the Project. **Section 7** addresses provisions for future decommissioning of the Project. **Section 8** contains a list of cited references. All figures are grouped together at the end of the Project Description.

Many of the topics addressed in this Project Description are discussed in greater detail in the County FEIS, an electronic copy of which is provided with this Application. This Project Description highlights the revisions that have been made in the Project since it was considered by Kittitas County from 2003 to 2005. The following are the most significant of those changes:

- The Project Area has been consolidated from four separate parcels to one contiguous area. The Project Area has also been reduced from 5,237 acres to approximately 4,783 acres, removing approximately 2,046 acres of private land that previously made up the eastern portion of the Project and adding approximately 1,592 acres of land leased from the Washington Department of Natural Resources (WDNR).
- The number of turbines has been reduced by 25%, from 120 to 90.
- The turbine model has changed from the 1.5 MW General Electric Wind Energy 1.5sl turbine to the 2.0 MW REpower MM92 turbine.
- There are only 32 non-participating residences located within 3,000 feet of a proposed turbine. Only seven of those are located less than 1,500 feet from a proposed turbine, with the closest one at 1,106 feet from a proposed turbine.

- 
- Sound from the Project will be 50 dBA or less at the Project Area boundary.
 - Shadow flicker at adjacent residences has been substantially reduced. For those residences (if any) that are still affected by perceptible shadow flicker, Desert Claim will stop the blades of the wind turbine that causes the flicker during those hours and conditions when shadow flicker occurs, or offer a voluntary waiver agreement to the landowners in lieu of stopping the turbine.
 - The Project will not result in any temporary or permanent impacts to wetlands, streams or specified buffers.
 - Daytime white strobe lighting has been eliminated and nighttime red lighting has been reduced to thirty-six of the Project turbines.

2. EXISTING PROJECT SITE CONDITIONS

The revised Project Area is shown in **Figure 2**. It contains approximately 4,783 acres of land owned by five private landowners and WDNR, all of whom have signed agreements authorizing the Applicant to seek permits to construct and operate the Project on their lands.

The southern edge of the Project Area is located approximately 8 miles north of the central part of Ellensburg. The Project Area extends approximately 3.5 miles from west to east and up to 4.5 miles in a north-to-south direction. The southwestern corner of the Project Area is more than 1.5 miles east of U.S. Route 97 and can be accessed from U.S. Route 97 via Smithson Road. Access to the Project Area from Ellensburg can be via Wilson Creek Road, Robbins Road, Pheasant Lane, Reecer Creek Road or Lower Green Canyon Road.

2.1 Physical Setting

The Project Area is situated along the northern margin of the Kittitas Valley, which is the broad valley area of central Kittitas County on either side of the Yakima River between Lookout Mountain and the Yakima Canyon. Unlike many wind projects that consist of turbine strings located along high ridgelines, the Desert Claim Project is generally spread out over the rising valley floor. The terrain within the Project Area is relatively flat and open, with a gradual south-to-north rise in elevation totaling approximately 1,000 feet over a distance of approximately four miles. Surface elevations range from approximately 2,100 feet to 2,500 feet above sea level across most of the Project Area. The northernmost portion of the Project Area lies within the foothills of the Wenatchee Mountains (a portion of the Cascade mountain range). The highest elevations and steepest slopes in the Project Area are in Township 19N, Range 18E, Sections 9 and 4, where the Project Area includes a foothill ridge rising from approximately 2,600 feet to approximately 3,100 feet in elevation.

Geologically, the Project Area is located on a broad alluvial fan at the base of the mountains. The alluvial fan is a gently sloping area built up by soils carried down and deposited over millennia by water generated by receding glaciers that at one time covered the mountainous area to the north. Several small, gently sloping creeks flow generally north to south across the Project Area, forming shallow depressions across the otherwise even landscape.



STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL
PO Box 43172 • Olympia, Washington 98504-3172

MAR 23 2007

ADOPTION OF ENVIRONMENTAL DOCUMENT
AND PREPARATION OF
SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT

Desert Claim Wind Power Project - Application No. 2006-02

Description of Proposal: The Desert Claim Wind Power Project (Project) is a 180 megawatt (MW) wind power project located eight miles northwest of Ellensburg, in Kittitas County, Washington. The Project consists of a maximum of 90 turbines and associated electrical collection system that would connect the Project to the regional high-voltage transmission grid. The Project area includes land leased from private and public land owners.

The Desert Claim Wind Power Project will use REpower MM92 model turbines. This turbine model has a tower height of 262.5 feet, a rotor diameter of 303 feet with a total height of 414 feet. Each turbine has a nameplate generating capacity of 2.0 MW.

The Project would interconnect directly with either Puget Sound Energy's 230kV Rocky Reach-White River transmission line or Bonneville Power Administration's (BPA) Grand Coulee-Olympia or Columbia-Covington 287 kV lines, all of which pass directly over the Project site.

This Project differs from the 2003 proposal reviewed and denied by Kittitas County in 2005. The changes include:

1. Consolidation from four separate parcels to one contiguous area.
2. Reduction from 5,237 to 4,783 acres; removal of approximately 2,046 acres of private land and adding 1,592 acres of Department of Natural Resources land.
3. Reduction of the number of turbines from 120 to 90.
4. Changing the nameplate generating capacity of each turbine from 1.5 megawatts to 2.0 megawatts.

Proponent: Desert Claim Wind Power, L.L.C., PO Box 4, Woodinville, WA 98072.

Location of Proposal: The Project area is situated on 4,783 contiguous acres along the northern margin of the Kittitas Valley eight miles northwest of Ellensburg. The Project area extends approximately 3.5 miles from west to east and up to 4.5 miles in a north-to-south direction and occupies portions of Township 19N, Range 18E, Sections 4, 9, 16, 17, 18, 20, 21, 22, 27, and 29.

Title of document being adopted: Desert Claim Wind Power Project Final Environmental Impact Statement.

EFSEC has identified and adopted this document as being appropriate for this proposal after independent review. The document meets our environmental review needs for the current proposal and will accompany the proposal to the decision maker.

Agency that prepared document being adopted: Kittitas County.

Date adopted document was prepared: August 2004.

residences is unwarranted. Even so, neither the Applicant nor the Intervenors provided specific data or visual simulations with regard to topography or other potential obstructions to views of the turbines from each of the affected non-participating residences within one-half mile of the Project.⁸⁹ Therefore, individualized accommodations to best suit each affected non-participating residence or to address only each non-participating home's primary viewshed cannot be addressed herein or in the accompanying Site Certification Agreement (SCA). Further, as EFSEC is not equipped to receive and rule on non-agreed individual post-approval modifications to the SCA for the siting of one or more of the turbines (i.e. a variance process), a more generalized rule to best mitigate potential visual impacts to these nearby homes must be adopted for this Project.

The Applicant presented expert testimony that a quarter-mile setback (1,320 feet) would be adequate to mitigate against any potential effect of a turbine visually dominating the view from a residence.⁹⁰ The Applicant's expert explained that studies of visual dominance have established that an object ceases to dominate a person's normal field of view when seen from a distance of four times the height of the structure (4xh).⁹¹ Although cross-examination pointed out the subjective nature of how much any particular item of varying horizontal dimensions might visually dominate one's viewshed,⁹² the Council finds that for structures predominantly defined by height rather than by width, such as wind turbines, the Applicant's proffered formula for determining the minimum distance necessary for preventing visual dominance (also known as "looming") is appropriate.

The Council further finds that siting individual wind turbines to remove any "looming" effect on non-participating residences in the immediate surrounding area sufficiently balances the impacts on those homeowners with the public's interest in developing new sources of wind power. Therefore, the Council hereby adopts criteria to eliminate any potential "looming" effect to be caused by any turbine in the Kittitas Valley Wind Power Project, to wit: no KVVPP turbine may be placed closer to any point of a non-participating residential structure than four times that turbine's tip height (4xh; i.e. for the proposed 1.5 MW turbines with tip heights of 330 feet, the required minimum setback from a non-participating residence would be 1,320 feet; for

⁸⁹ The Applicant's expert surveyed potential view impacts to all 16 properties from above (via helicopter) and from the closest public road access. However, because some of these owners did not agree to allow the Applicant's consultant access onto their properties, he was not able to determine actual visual impacts to each of the non-participating residences within one-half mile of the Project. *See* EFSEC Transcript, September 18, 2006, at 274-279, 284, and 296-97.

⁹⁰ *See* Exhibit 34-SUP, at 11 (line 15-16) and at 16 (line 6-9).

⁹¹ *See* Exhibit 34-SUP, at 16-18; *see also* EFSEC Transcript, September 18, 2006, at 298-99 and 320.

⁹² *See* EFSEC Transcript, September 18, 2006, at 306-07 and 312-14.

**Table 1
Nearby Residences and Distances from Nearest Proposed Turbine**

Residence Number (See Figure 4)	Distance to Nearest Proposed Turbine	Residence Number (See Figure 4)	Distance to Nearest Proposed Turbine
1	1,182 feet	19*	1,119 feet
2*	1,057 feet	20	2,450 feet
3	1,661 feet	21	2,652 feet
4	1,351 feet	22	2,449 feet
5	1,311 feet	23	2,434 feet
6	1,576 feet	24	2,119 feet
7	1,743 feet	25	2,178 feet
8	1,543 feet	26	2,482 feet
9	1,453 feet	27	2,960 feet
10	2,022 feet	28	2,474 feet
11	1,953 feet	29	1,694 feet
12	1,433 feet	30	2,439 feet
13*	2,179 feet	31	2,802 feet
14*	1,937 feet	32	1,662 feet
15	2,224 feet	33	2,052 feet
16	1,106 feet	34	1,896 feet
17	1,746 feet	35	1,832 feet
18	1,475 feet	36	1,947 feet

*Participating Property Owner

The Project Area is within a major cross-state electrical transmission corridor that links hydroelectric dams on the Columbia River with the large power consumer market of western Washington. Six high-voltage transmission lines cross or are adjacent to the Project Area; five are owned and operated by BPA and one by PSE. A BPA regional substation is located on a 133-acre parcel two and a half miles east of the Project Area.

The Kittitas Reclamation District North Branch Canal, which provides irrigation water for much of the northern part of the Kittitas Valley, traverses east to west in the vicinity of Smithson Road, generally along or near the southern edge of the Project Area. Most irrigated agriculture occurs downhill and south of the canal and the Project Area.

Wenatchee National Forest lands north of the Project Area are used for recreation, grazing and commercial forestry. Recreational activities include camping, hiking, horseback riding, mountain biking, off-road vehicle use, hunting, snowmobiling and cross-country skiing. Members of the Yakama Nation hunt, gather plants, and conduct other traditional activities in the vicinity of the Project Area, pursuant to reserved treaty rights applicable to ceded lands. The private lands of the Project Area are not open to general public use. Some low-intensity outdoor recreational uses, including hunting, horseback riding, snowmobiling and off-road vehicle use, occur with the permission of individual landowners.

Most of the land within the Project Area is zoned Ag-20 (agricultural use, with a 20-acre minimum parcel size) under the Kittitas County Code. The northwestern portion of the Project