BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

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

MOTION FOR DETERMINATION
THAT DESERT CLAIM HAS
SATISFIED WAC 463-28-030(1)

1. Introduction

The Applicant, Desert Claim Wind Power ("Desert Claim"), asks the Council to
make a formal determination that it has made "all reasonable efforts to resolve the
noncompliance" with local land use requirements, for purposes of WAC 462-28-030(1), and
therefore, may proceed to file a written request for preemption. Prior to submitting its
Application for Site Certification to this Council, Desert Claim applied for local land use
approvals required under the Kittitas County Code. Desert Claim made all reasonable
efforts to obtain those approvals, but after a more than two-year process, the Kittitas Board
of County Commissioners denied its application. Desert Claim has satisfied WAC 462-28-
030(1). It would not be reasonable to require Desert Claim to make further efforts to obtain
approval at the county level.
II. Background

In 2001, enXco, Inc., Desert Claim's parent corporation, began evaluating potential sites in Kittitas County for a commercial scale wind project. Declaration of David Steeb ¶ 2 (hereinafter "Steeb Decl."). At that time, under Kittitas County Ordinance 2001-12, wind projects were allowed as a conditional use in all Agricultural-20 ("Ag-20"), Forest and Range, Commercial Agriculture and Commercial Forest zoning districts. Steeb Decl. ¶ 2.

In 2002, the County enacted Ordinance 2002-19, which established the wind power siting provisions now found in Kittitas County Code chapter 17.61A. According to the chapter 17.61A, a wind project may be permitted in any area zoned as Ag-20, Forest and Range, Commercial Agriculture or Commercial Forest. KCC 17.61A.020(4). However, it requires a Wind Farm Resource Development Permit and development agreement with the County, a site-specific amendment to the Comprehensive Plan land use designation map, and a site-specific rezone. It is impossible to know whether a project at any particular location would be able to obtain these required approvals without filing an application and going through the County process to obtain a final decision.

After considering the wind resource, land availability, transmission access, potential environmental impacts and neighboring land uses, Desert Claim selected a location for its project approximately 8 miles northwest of Ellensburg. Steeb Decl. ¶ 2. At that point, Desert Claim considered whether to file an application with Kittitas County or with EFSEC. Looking at EFSEC's regulations, Desert Claim understood that, if it filed with EFSEC, the Council's proceedings would be stayed while Desert Claim made reasonable efforts to obtain County land use approvals. See WAC 463-28-030(1). However, if Desert Claim went through the County process and obtained County approvals, it would not need to obtain EFSEC's approval as well. Desert Claim concluded that the most efficient way to proceed.
was to file an application with Kittitas County first. If it did not obtain local approval, it could then proceed with an application to EFSEC. Steeb Decl. ¶ 3.

In January 2003, Desert Claim submitted an application to Kittitas County. Steeb Decl. ¶ 5. As explained in more detail below, the County prepared an Environmental Impact Statement (EIS), conducted public hearings, and ultimately denied Desert Claim’s application. Desert Claim then modified the Project to try to further address concerns raised during the County process, and submitted an Application for Site Certification to this Council in November 2006.

A. January 2003 Application to Kittitas County

Having decided to apply to Kittitas County for local land use approvals to construct and operate its project, Desert Claim met with Community Development Services planning staff. Based on the input from planning staff, Desert Claim finalized its project design in a way it thought would address potential concerns. Steeb Decl. ¶ 4.

On January 28, 2003, Desert Claim filed an application with Kittitas County to obtain the approvals necessary to construct and operate a 180 MW wind power project. The Project described in the original application to the County included 120 turbines spread out over a 5,237-acre project area. Steeb Decl. ¶ 5. The original project area and turbine configuration is shown in Exhibit 1 to David Steeb’s Declaration.

For more than two years, Desert Claim’s application worked its way through the Kittitas County process. In April 2003, the County issued a SEPA Determination of Significance. In December 2003, the County prepared and published a Draft EIS and in August 2004, the County published its Final EIS.

In September 2004, Desert Claim worked with the planning staff and County attorney to prepare a "draft" development agreement, which the County then circulated to

MOTION FOR WAC 463-20-030(1)
DETERMINATION – 3

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the public. On October 25 and 26, 2004, the Kittitas County Planning Commission and the
Kittitas County Board of County Commissioners (BOCC) held joint hearings. At the
conclusion of those hearings, the Planning Commission recommended denial of Desert

For the next five and a half months, the BOCC held a series of hearings and meetings
to consider Desert Claim's application. After hearings held on November 8, November 9
and December 7, 2004, the BOCC asked Desert Claim to revise its draft development
agreement. Id. The County Commissioners then indicated that further revisions might be
necessary and deferred any decision until January 2005, when two new commissioners
would take office. Id. At meetings held on January 11, 20 and 27, 2005, Desert Claim
reported on additional modifications to the revised development agreement. Id. At a
hearing held on February 15, 2005, Desert Claim presented another revised development
agreement, which the BOCC decided to put out for public comment. Id. The BOCC then
held public comment hearings on March 1 and 9, 2005. Id. At the conclusion of the March
9, 2005, hearing, the BOCC deliberated and voted to deny Desert Claim's application. Id.
On April 5, 2005, more than twenty-six months after Desert Claim had filed its application
with the County, the BOCC issued Findings of Facts, and Resolution 2005-46 formally
denying Desert Claim's application. Id.

Desert Claim appealed the decision to Superior Court, but the court upheld the
decision. Desert Claim Wind Power, LLC v. Kittitas County, No. 05-2-00243-6, slip. Op. at
11 (Kittitas Cty. Super. Ct. Nov. 4, 2005). In its decision, the Superior Court noted that
"Desert Claim made extraordinary efforts to satisfy two different boards of county
commissioners over the process of the application it submitted to the County." Id. at 10-11.
B. November 2006 Application for Site Certification

Following the BOCC's decision, Desert Claim considered whether additional changes could be made to the Project to address concerns that were raised during the County process. Steeb Decl. ¶ 8. After obtaining a lease on neighboring DNR land, Desert Claim was able to consolidate the Project on contiguous parcels and eliminate the western portion of the Project. *Id.*

On November 6, 2006, Desert Claim submitted an Application for Site Certification ("the Application") to EFSEC. The Application describes the Project now proposed for certification, which consists of 90 turbines (2.0 MW capacity each), located on 4,783 acres of public and private land northwest of Ellensburg. **Exhibit 2** to the Steeb Affidavit compares the Project Area to the area identified in the original application to Kittitas County.

The revised Project has several advantages over the original proposal:

- The Project Area has been consolidated from four separate parcels to one contiguous area.
- The Project Area has been reduced from 5,237 acres to 4,783 acres.
- The total number of turbines has been reduced by 25% from 120 to 90.
- 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 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 landowners in lieu of stopping the turbine.

- The Project will not result in any temporary or permanent impacts to wetlands, stream or their buffers.
- Daytime white strobe lighting has been eliminated and nighttime red lighting has been reduced to only 36 of the Project turbines.

See Desert Claim Wind Power, Application for Site Certification (Nov. 2006).

On January 30, 2007, EFSEC held a Land Use Consistency Hearing pursuant to RCW 80.50.090 and WAC 463-26-050. At the conclusion of that hearing, the Council determined that the Project is not consistent with the Kittitas County Code because Desert Claim has not obtained the approvals required by KCC chapter 17.61A.

At this time, Desert Claim seeks a determination that it has already satisfied WAC 463-28-030(1) by making reasonable efforts to obtain land use consistency, and therefore, that Desert Claim may proceed to file a written request for preemption.

III. Argument

Through RCW chapter 80.50, the Legislature established a one-stop process for permitting certain energy facilities. A Site Certification Agreement (SCA), recommended by EFSEC and approved by the Governor, authorizes the construction and operation of energy facilities covered by RCW chapter 80.50. The decision of EFSEC and the Governor takes precedent over local land use requirements. The SCA supersedes and takes the place of all state and local permits that would otherwise be required for these projects. See RCW 80.50.120 ("The issuance of a certification shall be in lieu of any permit, certificate or similar document required by any department, agency, division, bureau, commission, board, or political subdivision of this state").
Although the Legislature gave EFSEC and the Governor the ultimate permitting authority over these energy facilities, it did not allow EFSEC to simply ignore local land use requirements in making its recommendation to the Governor. Rather, the Legislature required EFSEC to consider whether a proposed facility was consistent with local land use requirements. In that regard, RCW 80.50.090(2) provides that "the council shall conduct a public hearing to determine whether or not the proposed site is consistent and in compliance with city, county, or regional land use plans or zoning ordinances."

Significantly, EFSEC's governing statute does not require an applicant to make any effort to cure an inconsistency with local land use requirements identified during the land use hearing. On the contrary, the statute makes clear that EFSEC and the Governor have final permitting authority regardless of consistency with local land use requirements. RCW 80.50.110(1) provides:

The state hereby preempts the regulation and certification of the location, construction, and operational conditions of certification of the energy facilities included under RCW 80.50.060 as now or hereafter amended.

Nonetheless, for several years, the Council's regulations have required an applicant to attempt to cure whatever inconsistency may exist between the proposed project and local land use requirements. WAC 463-28-030 provides:

If the council determines during the hearing required by RCW 80.50.090 that the site of a proposed energy facility or any portion of a site is not consistent and compliance with land use plans or zoning ordinances in effect at the date of the application, the following procedures shall be observed:

(1) As a condition necessary to continue processing the application, it shall be the responsibility of the applicant to make the necessary application for change in, or permission under, such land use plans or zoning ordinances, and make all reasonable efforts to resolve the noncompliance.
(2) All council proceedings on the application for certification may be stayed at the request of the applicant during the period when the plea for resolution of noncompliance is being processed by local authorities.

(3) The applicant shall submit regular reports to the council regarding the status of negotiations with local authorities on noncompliance issues.¹

Desert Claim requests that the Council issue a formal determination that it has satisfied 463-28-030(1). Subsection (1), which is set forth in full above, requires an applicant "to make the necessary application for change in, or permission under, such land use plans or zoning ordinance, and all reasonable efforts to resolve the noncompliance." In this case, Desert Claim has clearly done so. In January 2003, Desert Claim filed an application with Kittitas County to obtain necessary approvals, including site-specific changes to the Comprehensive Plan and Zoning designations. During a County process that took more than two years, Desert Claim made all reasonable efforts to obtain those approvals. Indeed, the Kittitas County Superior Court found that Desert Claim made "extraordinary efforts" to obtain those approvals. Desert Claim Wind Power, LLC v. Kittitas County, No. 05-2-00243-6, slip. Op. at 11 (Kittitas Cty. Super. Ct. Nov. 4, 2005). Having been unsuccessful, however, Desert Claim should be permitted to move forward with the EFSEC process without further delay.

During EFSEC's Land Use Hearing, Kittitas County nonetheless argued that Desert Claim should be required to file a new application with the County because it has made changes to the Project since the BOCC's 2005 decision. EFSEC should reject the County's argument for several reasons.

¹ The Council is currently considering an amendment to these regulations that would make them more closely track the relevant statutory provisions.
First, the County's argument is factually incorrect. During EFSEC's Land Use Hearing, County representatives claimed that Desert Claim is now proposing a new and different project that occupies different properties and is located within a different zoning district. These statements are inaccurate and/or misleading. Desert Claim continues to propose a wind power project occupying roughly five thousand acres located northwest of Ellensburg. Although Desert Claim has eliminated a portion of the original Project Area and has added some other property to the Project, the Project Area remains in the same general location. Two-thirds of the current Project Area was part of the original proposal, and all of the revised Project Area falls within the same Comprehensive Plan "Rural" designation and within the same "Ag-20" and "Forest and Range" zoning districts as the original project. No reasonable person one would characterize Desert Claim's project proposal as an entirely new and different project. To the contrary, a common theme expressed by those who spoke against the Project during the Council's Initial Public Hearing and Land Use Hearing was that the Project had already been denied at the local level. In fact, EFSEC's own SEPA consultant has stated that the project Desert Claim proposed to the County was "essentially the same as the one proposed to the Council (i.e. same technology, of similar size [i.e. not an expansion], at similar location by an identical applicant)." Goldar Associates, Analysis in Support of a SEPA Threshold Determination for the Desert Claim Wind Power Project 3 (Feb. 2007).

Second, the County's argument is not supported by the language of WAC 463-28-030. Nothing in the language of the regulation requires a project developer to re-file with the local land use authority every time it modifies its project proposal to address concerns expressed by interested parties.
Third, the County's interpretation of WAC 463-28-030 is contrary to the Council's regulations, when read as a whole. Under Washington law, statutes and regulations are properly interpreted by looking at the statute or regulation as a whole. Read as a whole, chapter 463-28 of the Council's regulations merely requires a project developer to make "reasonable" and "good faith" efforts to cure inconsistencies with local land use requirements. See 463-28-030(1) and 463-28-040(1). This Chapter does not require repeated re-application to local authorities every time a project proposal is changed in any way.

Fourth, the County's interpretation is contrary to EFSEC's governing statute and the Legislature's intent. In Washington, an agency's regulation must be interpreted in a manner that is consistent with the agency's governing statute, and the Legislature's intent. In this case, however, the County advocates an interpretation that is contrary to several aspects of EFSEC's statute. Through EFSEC's governing statute, the Legislature plainly intended to give EFSEC and the Governor, not local land use jurisdictions, the primary role of permitting energy facilities. See RCW 80.50.110(1); RCW 80.50.120. In 2001, the Legislature amended the EFSEC statute to require that its implementation "avoid costly duplication in the siting process and ensure that decisions are made timely and without unnecessary delay." RCW 80.50.010(5). Likewise, by amending the EFSEC statute in 2001

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to allow renewable energy projects to "opt in" to the EFSEC process, the Legislature clearly intended to provide a way that renewable energy projects could avoid permitting proceedings in unfriendly local jurisdictions. The County's interpretation, which would require a renewable project developer who has already spent more than two years going through the County's process to restart the same process a second time, is contrary to each of these policies embodied in EFSEC's governing statute.

Fifth, the County's interpretation would by contrary to public policy. Washington law requires regulations to be interpreted in way that furthers the underlying policies of the agency's regulations and the governing statute. The County's interpretation is contrary to public policy because it would discourage project developers from modifying their projects to minimize or mitigate potential environmental impacts. This is contrary to the statute's policy of using reasonable methods to minimize adverse effects on the environment, RCW 80.50.010, and is contrary to the State Environmental Policy Act's policy encouraging the mitigation of environmental impacts, see RCW 43.21C.020, 43.21C.060. Indeed, it is contrary to the Council's regulation encouraging negotiated resolution of issues identified during the EFSEC process. See WAC 462-30-251 (providing for alternative dispute resolution); WAC 462-30-252 (authorizing settlements).

Sixth, the County's interpretation would lead to absurd results. Washington law requires regulations to be interpreted in a rational, sensible way. Under the County's


interpretation, however, an EFSEC applicant would be required to file a new local land use
application every time it made any change to its project proposal. Since the Council and the
Council’s regulations encourage applicants to address concerns raised during the EFSEC
process, and to compromise and reach negotiated settlements with participants in the EFSEC
process, the County's interpretation would lead to the absurd result of requiring an applicant
to re-file at the local level every time it modified its project proposal. The Council has never
followed this approach in the past.

Finally, the County's interpretation is contrary to the general principle that parties
should not be required to pursue processes that would be futile. As the Superior Court
found, Desert Claim made "extraordinary efforts" to obtain approval from the BOCC, yet
was ultimately unable to convince the BOCC to grant approval. EFSEC should not require
Desert Claim to repeat a lengthy local approval process that may well lead to the same
result.

V. Conclusion

For the foregoing reasons, the Council should make a formal determination that
Desert Claim has made "all reasonable efforts to resolve the noncompliance" with local land
use requirements, for purposes of WAC 462-28-030(1), and therefore, may proceed to file a
written request for preemption.

7 South Hollywood Hills Citizens Ass'n for Preserv. of Neighborhood Safety & Env't v. King
County, 101 Wash. 2d 68, 74, 677 P.2d 114, 118 (1984); Harrington v. Spokane County, 128 Wash.
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MOTION FOR WAC 463-20-030(1)
DETERMINATION – 13

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