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BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of
Application No. 2009-01
WHISTLING RIDGE ENERGY LLC

WHISTLING RIDGE ENERGY PROJECT

**APPLICANT’S OPENING
ADJUDICATION BRIEF**

To The Parties of Record (See Attached Service List)

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1 **I. INTRODUCTION**

2 The Energy Facility Site Evaluation Council (“EFSEC”) considers issues such as air
3 quality, noise, wetlands, wildlife, water quality and quantity, visual resources, health and
4 safety/public services, seismic/volcanic hazards, traffic and transportation, cultural resources, site
5 restoration and whether Whistling Ridge Energy LLC (“Whistling Ridge”) made a *prima facie*
6 demonstration that the Whistling Ridge Energy Project (“Project”) met the requirements of law
7 and was consistent with RCW ch. 80.50. This brief focuses on issues raised in the adjudicative
8 proceeding and is not intended to catalogue compliance with every EFSEC requirement and
9 standard. The ASC documents compliance with all EFSEC requirements and standards.

10 Most of Friends of the Columbia Gorge (“FOCG”) and Save Our Scenic Area’s
11 (collectively “Opponents”) issues relate to the State Environmental Policy Act (“SEPA”) rather
12 than EFSEC’s WAC ch. 463-60 application requirements or WAC ch. 463-62 performance
13 standards. EFSEC’s performance standards, which are specific to seismicity, noise limits, fish
14 and wildlife, wetlands, water quality, and air quality, implement the policy and intent of
15 RCW 80.50.010. WAC 463-62-010(1).

16 Compliance with the standards within this chapter [463-62] shall
17 satisfy, in their respective subject areas, the requirements for issuance
18 of a site certificate for construction and operation of energy facilities
19 specified in subsection (2) of this section provided, however, that the
20 council may require additional mitigation in the event that documents
21 prepared pursuant to 43.21 RCW (State Environmental Policy Act),
22 demonstrate that the project poses a probable significant adverse
23 impact that is not mitigated by the provisions of this chapter.

24 WAC 463-62-010(3). Consequently, seismicity, noise limits, fish and wildlife, wetlands, water
25 quality, and air quality are the issues most relevant to EFSEC’s adjudicative proceeding. All
26 other issues are fundamentally SEPA issues. Nonetheless Opponents have litigated a variety of
27 issues, such as aesthetics, in EFSEC’s adjudicative proceeding that are properly within the
28 province of the SEPA process. For that reason, this brief addresses some but not all of the
29 environmental issues that EFSEC will likely address in its FEIS.

1 **II. ENVIRONMENTAL CONSIDERATIONS**

2 **A. HABITAT AND WILDLIFE**

3 **1. Applicable EFSEC standards and requirements**

4 **WAC 463-62-040(2). Fish and wildlife.** “Standards. (a) An
5 applicant must demonstrate no net loss of fish and wildlife habitat
6 function and value. . . . (f) Fish and wildlife surveys shall be
7 conducted during all seasons of the year to determine breeding,
8 summer, winter, migratory usage, and habitat condition of the
9 site.” *See also* WAC 463-60-332’s informational requirements.

10 **2. The ASC and supporting materials present extraordinary evidence—
11 consistent with the Washington Department of Fish and Wildlife’s
12 (“WDFW”) 2009 Wind Power Guidelines—detailing habitat and wildlife at
13 the Project site and demonstrating the less than significant impacts from
14 construction and operation of the Project**

15 The ASC and the evidence in the adjudicative record depict, in extraordinary detail,
16 existing wildlife populations and their habitats as well as the level to which they will be affected
17 by the Project. The approach, methodologies, and protocols used to assess wildlife impacts—
18 including avian surveys during all seasons of the year to determine breeding, summer, winter,
19 migratory usage—and habitat conditions robustly implement WDFW’s 2009 *Wind Power
20 Guidelines* (“*WDFW Guidelines*”), as required by WAC 463-60-332(4). The survey efforts are
21 also consistent with prior EFSEC practice on wind energy facilities. Ex. 6.04r at 2:4-16.
22 Whistling Ridge’s comprehensive mitigation plan has been expressly endorsed by WDFW as
23 fully compliant with applicable regulations. *See* Exs. 1.04r, 1.20r (Dec. 20, 2010 letter).
24 Accordingly, Whistling Ridge has demonstrated that the Project will not cause significant
25 impacts to habitat and wildlife, thereby satisfying WAC 463-62-040.

26 **a. Because the Project site is managed for commercial forestry, its
habitat value is low**

ASC § 3.4.1 describes habitats in the Project area. The Project site is managed for
commercial forestry; it contains forest habitat actively managed for on-going commercial timber
harvest. ASC §§ 2.3.6, 3.4.1.1; Ex. 6.04r at 25:22-25. All of the parcels on which the Project

1 would be located are managed for a continual cycle of growth, harvest, and replanting. ASC
2 § 2.3.6. As a longstanding commercial forestry site, no old-growth forests exist. ASC §§ 2.3.6,
3 3.4.1.1. Harvests have occurred in the Project area over time, pursuant to long-established
4 harvesting schedules, and additional harvests on the Project site are planned, subject to
5 requirements of a Forest Practice Application. ASC § 2.3.6. To the extent feasible, areas cleared
6 for the Project would be reforested in accordance with typical commercial forestry management
7 practices. ASC at 2.3-9, § 3.4.1.2.

8 WDFW has recognized the impaired condition of habitat on the Project site: “The
9 Whistling Ridge site is a forested site managed for over 100 years. It is not in a natural or native
10 coniferous forest condition.” Ex. 1.02r. Even-aged, managed forests provide far less suitable
11 habitat for most avian species than natural forests that have been allowed to age naturally with
12 uneven growth. Ex. 6.04r at 25:25-26:2. In fact, sites such as the managed, even-aged forest
13 habitat found on the Project site are sometimes referred to as “green deserts” due to the lack of
14 wildlife abundance and diversity, and present a much lower potential for wildlife impacts than an
15 intact, natural forest. Ex. 6.04r at 26:2-6.

16 Nonetheless, Opponents intimate that EFSEC should deny this ASC because it is the first
17 wind energy facility proposed in a forested area of the Pacific Northwest. This completely
18 ignores the fact that locations with degraded habitat, such as the Project site, are precisely the
19 locations that the *WDFW Guidelines* suggest *should be* considered for wind energy facilities.
20 *See* Ex. 6.09c at 5 (“**2.1 Impact Avoidance and Minimization** • Where appropriate develop in
21 agricultural and other disturbed lands, including using existing transmission corridors and roads
22 where possible.”). In fact, it is one of the *WDFW Guidelines*’ Guiding Principles that wind
23 developers consider degraded habitat first for wind projects. *See* Ex. 6.09c at 2. Consistent with
24 this principle, WDFW’s Renewable Energy Section Manager concluded that

25 [w]hile no similar data exist for constructed wind energy projects in
26 managed coniferous forest habitats that might help inform impact

1 predictions for Whistling Ridge, as we previously confirmed in the
2 attached letters, WDFW confirms that these data represent the best
3 available science for predicting avian impacts at Whistling Ridge.
4 Therefore, if the [Project] is constructed, WDFW anticipates the
5 opportunity to better understand the relationship between wind energy
6 development in western coniferous forests and wildlife response.

7 Ex. 1.02r; *see also* Ex. 1.20r (Dec. 20, 2010 letter). Use of the Project site for a wind energy
8 facility is consistent with the *WDFW Guidelines* and, in WDFW's opinion, the Project presents
9 an opportunity to learn more about wind energy facilities in forest environments.

10 **b. The Project's extensive bat and avian surveys and analysis constitute**
11 **the best available science and indicate that bat and avian mortality**
12 **will likely be low**

13 Expansive acoustic bat studies were conducted for the Project over three years. ASC
14 at 3.4-26 to 27; Ex. 6.00 at 8:17-10:21. ASC Appendices B-7 and B-8 contain detailed
15 information on those studies. The bat studies at the Project site are the most innovative and
16 expansive wind energy-related bat assessment ever conducted in the state of Washington. Ex.
17 6.04r at 46:4-9; Tr. at 836:18-837:1 (Donald McIvor). The assessments conducted support the
18 conclusion that construction of the Project would not result in high bat mortality levels.
19 Ex. 1.03r (May 24, 2010 WEST, Inc. memo at 3).

20 Avian surveys for the Project were conducted during all seasons of the year, including the
21 fall migration period and breeding/nesting season, following conventional study protocols. ASC
22 at 3.4-22; Ex. 1.03r (May 24, 2010 WEST, Inc. memo at 1). All observations, behavior, and
23 flight patterns of birds in and near survey plots, as well as flight patterns, direction and altitude,
24 were recorded. ASC at 3.4-22. Observations of birds beyond the survey radii were also
25 recorded. *Id.* Locations of raptors and other species observed during counts were also recorded
26 on field maps. *Id.* ASC Revised Figs. 3.4-7 and 3.4-8 show the locations of avian surveys.

The annual mean raptor use at the Project site was evaluated and compared with 36 other
wind resource areas ("WRAs") that implemented similar survey protocols with three or four
seasons of data. Exs. 1.03r (May 24, 2010 WEST, Inc. memo at 1), 6.00 at 5:6-12, 6.02. Raptor

1 use at all these WRAs was ranked, and the Project was evaluated within that known range. Ex.
2 6.00 at 5:13-22. Mean raptor use at the Project site is considered low, ranking 29th among the
3 36 other WRAs. *Id.* Using the same methodology for all birds, mean overall bird use at the
4 Project site ranks 19th among 24 other WRAs in the Pacific Northwest. Exs. 1.03r (May 24,
5 2010 WEST, Inc. memo at 1), 6.00 at 5:23-6:2, 6.03. The methodologies applied here have been
6 in uncontested use on numerous wind projects in the state of Washington and many other
7 jurisdictions. Ex. 6.04r at 8:11-17.

8 **c. Opponents have failed to discredit the Project’s avian and bat data**

9 WDFW has confirmed that the avian and bat data for the Project are (i) consistent with
10 standard protocols utilized throughout the U.S., (ii) consistent with the *WDFW Guidelines*, and
11 (iii) “represent the best available science for predicting avian impacts at Whistling Ridge.” Ex.
12 1.02r. Nonetheless, in an effort to discredit the avian and bat surveys performed at the Project
13 site, Opponents used excerpts from an internal WDFW email chain, in which two WDFW
14 staffers with no known role in Project review expressed their confusion about the use of avian
15 point count surveys. *See* Ex. 6.08c. However, WDFW’s definitive opinion, subsequently issued
16 by its Renewable Energy Section Manager, evidences no confusion whatsoever.

17 The pre-project assessment and avian/bat use surveys are consistent
18 with standard protocols utilized throughout the U.S. and are consistent
19 with the WDFW Wind Power Guidelines (WDFW 2009). Because the
20 relationship between avian use and mortality has been reasonably
21 consistent across other habitat types and locations, it is likely that the
22 relationship between avian use and mortality would be similar to that
23 evaluated in other projects.

24 Ex. 1.02r. This formal departmental opinion is consistent with the conclusions drawn in the ASC.

25 Despite these clear and unambiguous departmental conclusions, Opponents’ witness
26 K. Shawn Smallwood criticized Whistling Ridge’s avian biologists’ use of a population estimator
to determine bird populations. *See* Ex. 22.00 at 26:21-27:9. However, Smallwood conveniently
ignored the fact that the population estimator used by Whistling Ridge’s avian biologists is not

1 only the *best* available data on nationwide avian populations, it is the only one available for most
2 bird species in the Pacific Northwest, and therefore represents the best available science. *See*
3 Ex. 6.04r at 30:22-23, 31:26-32:3. Reliance on the best available science is a clearly accepted
4 practice, is mandated by many U.S. laws for making informed policy decisions, and is a keystone
5 requirement of the *WDFW Guidelines*. Exs. 6.04r at 32:1-17, 6.09c at 4 n.1 (“Current protocols
6 are developed using Best Available Science in consultation with WDFW.”).

7 It is telling that Opponents offered no other avian population estimator to better quantify
8 avian populations. In fact, Smallwood cannot even be relied upon to correctly calculate species
9 populations within a defined area. Having challenged Whistling Ridge’s avian biologists’
10 calculation of the population density of golden eagles in the Columbia Plateau Ecoregion,
11 Smallwood subsequently retracted his erroneous testimony, which understated the presence of
12 golden eagles by nearly 90%. Ex. 6.04r at 33:1-12; *see also* Ex. 22.00E at 2:10-21. As
13 Smallwood himself admitted to EFSEC, his testimony contains “[m]ore [bad text] than I would
14 like.” Tr. at 848:22-24.

15 More alarming is Smallwood’s own acknowledgment that his prefiled testimony
16 misrepresented the evidence and scientific methodologies relied upon by Whistling Ridge’s
17 avian experts to generate their mortality predictions for the Project.

18 In my testimony, I addressed the general approach used by WEST to
19 predict fatality rates at wind farms, which appeared to consist of three
20 types of empirical evidence, including a regression between fatality
21 rates and utilization rates, a comparison of exposure index values, and
22 a comparison of nest densities. . . . In the final draft, I changed some
23 wording and inadvertently gave the impression that all three lines of
24 evidence were also used at Whistling Ridge.

25 Ex. 22.00E at 1:17-2:7.

26 This theme of ignoring or misrepresenting guidelines, conventional scientific
methodologies, and prior EFSEC practice permeates Opponents’ entire critique of the ASC’s
wildlife analysis. Utterly ignoring the years of data gathered at the Project site, Opponents flail
about, sounding alarms to distract from the fact that this is likely the most studied wind project

1 ever in the state of Washington. For example, as described in Part II.A.2.d below, the passions
2 surrounding the northern spotted owl are stoked by Opponents in utter disregard for the findings
3 by the most seminal authority on the subject (*i.e.*, U.S. Fish and Wildlife Service) whose
4 scientific review panel found that, assuming that NSOs are present on the Project site, “the risk
5 of spotted owl collision at this site is considered to be discountable.” Ex. 5.04. Opponents make
6 much noise but present absolutely no evidence whatsoever to demonstrate that the agencies
7 charged with management of avian species got anything wrong.

8 When all else fails, Opponents would have EFSEC engage in rulemaking through this
9 adjudication by advocating that the *WDFW Guidelines* simply be disregarded contrary to
10 WAC 463-60-332(4)’s mandate that “wind generation proposals shall consider *Washington state*
11 *department of fish and wildlife Wind Power Guidelines*, August 2003, or as hereafter amended.”
12 Smallwood testified that

13 both the U.S. Fish and Wildlife Service and Washington Department
14 of Fish and Wildlife Wind Power Guidelines are deficient, and
15 therefore should not be relied on to ensure that all reasonable measures
16 have been taken to avoid, minimize, and reduce impacts. In particular,
17 the Washington Department of Fish and Wildlife Wind Power
18 Guidelines (hereafter referred to as WDFW guidelines) are grossly
19 deficient, lacking, among other things, key impacts assessment tools
20 and mitigation measures.

21 Ex. 22.05r at 2:20-3:2. Opponents are not simply overlooking EFSEC’s required use of the
22 *WDFW Guidelines*; they are suggesting that the *WDFW Guidelines* themselves are inadequate
23 and therefore, should be deliberately disregarded. On the same theme, using a different tack,
24 Opponents introduced National Wind Coordinating Committee meeting notes from 2004 opining
25 that WDFW’s wind power guidelines are too weak. *See* Ex. 6.05c at 2. However, Opponents
26 fail to acknowledge that these meeting notes are over six years old, and predate the current
WDFW Guidelines, which were issued in 2009, by *five years*.

Reliance on this out-dated opinion is not even enough for Opponents. In a strained effort
to entirely discredit WDFW, Smallwood urges EFSEC to disregard WDFW’s longstanding

1 practices and protocols and instead adopt his own unique methodology when studying avian
2 impacts, which Smallwood himself acknowledges is “novel.” See Ex. 6.04r at 21:11-13, 41:2-8;
3 see also Tr. at 662:25-663:6 (Greg Johnson). However, the results of wildlife and habitat studies
4 conducted on the Project site, which are based on consistent and conventional approaches used
5 and approved by WDFW and EFSEC on other Washington wind energy projects, should not be
6 discarded here in favor of Smallwood’s unproven “novel” approaches, which “are not only not
7 accepted broadly in Washington, they are not used at all.” Ex. 6.04r at 37:18-19.

8 Consistent application of its administrative rules is a hallmark of EFSEC. In order to
9 bring complete ASCs forward, applicants need to be able to rely on EFSEC’s expressed
10 expectations, which its regulations represent. Furthermore, EFSEC must have the confidence
11 that ASCs will be consistent with EFSEC practice in order to evaluate them not just for
12 completeness, but to interpret them through the lens of EFSEC’s own experience with other wind
13 energy facilities under its jurisdiction. Opponents’ attack on the consistent interpretation and
14 application of the *WDFW Guidelines* is a thinly-disguised effort to discredit EFSEC’s capability
15 to comprehend studies and conclusions, and also disregards EFSEC’s considerable experience in
16 implementing adaptive management at other EFSEC wind energy facilities as well as at others
17 throughout Washington. The Project’s ASC, including the extraordinary amount, depth, and
18 breadth of studies performed to support it, demonstrates a low risk of impacts to wildlife and
19 habitat consistent with the already-impaired habitat present on the Project site.

20 **d. According to the U.S. Fish and Wildlife Service (“USFWS”), the risk**
21 **of collision posed by the Project to northern spotted owls is**
22 **“discountable”**

23 As previously mentioned, Opponents’ attempt to stoke the passions surrounding the
24 northern spotted owl (“NSO”) utterly disregards the USFWS review panel’s conclusion that even
25 if NSOs are present on the Project site, “the risk of spotted owl collision at this site is considered

26 ///

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1 to be discountable.”¹ Ex. 5.04. NSOs are listed as threatened under the federal Endangered
2 Species Act (“ESA”) and as endangered under Washington State law. ASC Table 3.4-5.
3 Whistling Ridge’s request for interconnection of the Project to the Bonneville Power Adminis-
4 tration’s (“BPA”) system is a federal action for purposes of Section 7 of the ESA.² Exs. 5.00 at
5 10:17-11:2, 5.04 at 2. Given BPA’s role as the NEPA lead agency and the decision to develop a
6 joint SEPA/NEPA record, BPA completed informal consultation with USFWS regarding NSOs
7 on both the interconnection request and the entire Project.³ 5.04 at 2. A WDFW biologist specia-
8 lizing in NSO behavior was on the USFWS scientific panel reviewing the Project, and WDFW
9 coordinated its consideration of the Project’s likely effect on NSOs with USFWS. Ex. 5.04 at 4.

10 USFWS has designated NSO critical habitat and issued an NSO recovery plan. 73 Fed.
11 Reg. 47,326 (Aug. 13, 2008). The Project is not located within habitat designated as critical or
12 identified as essential to NSO recovery. ASC at 3.4-16; Exs. 5.00 at 10:15-26, 5.04 at 1. In 1996,
13 Washington State finalized a rule identifying 10 spotted owl special emphasis areas (“SOSEAs”)
14 to complement protections provided by the Northwest Forest Plan. The Project is located in the
15 southernmost portion of the White Salmon SOSEA. See WAC 222-16-086(10). In such areas,
16 suitable NSO habitat should be maintained. WAC 222-10-041(1). More specifically, all suitable
17 habitat within 0.7 mile of a site center plus 2,605 acres (approximately 40%) of suitable habitat
18 within 1.8 miles (*i.e.*, the median home range) is assumed necessary to maintain the site center’s

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21 ¹ Three federal and state special status species have the potential to occur at the Project site: NSOs, western
22 gray squirrels, and the northern goshawk. ASC at 3.4-16. No party raised any material issues with Whistling
23 Ridge’s evaluation of western gray squirrels and northern goshawks, and the studies show the Project will likely
24 have no effect on these two species. See ASC at 3.4-19 to 22; Ex. 5.00 at 11:12-15:15.

25 ² Section 7 of the ESA prohibits a federal agency from authorizing any action unless the agency can ensure
26 that the action “is not likely to jeopardize the continued existence of any” listed species and is not likely to “result in
the destruction or adverse modification of” designated critical habitat for such species. 16 U.S.C. § 1536(a)(2).

³ Informal consultation is a voluntary process intended to assist the action agency (*i.e.*, BPA) in
determining whether formal consultation with USFWS is required. If the action agency determines during informal
consultation, with the USFWS’s concurrence, that the action is not likely to adversely affect listed species or
designated critical habitat, the ESA consultation process is concluded. 50 C.F.R. § 402.13(a).

1 viability. WAC 222-10-041(4). This 40% suitable habitat threshold corresponds with USFWS
2 research on the level of habitat necessary to avoid take and support recovery. *See* Ex. 5.04 at 2.

3 Two historical NSO activity centers—Mill Creek and Moss Creek—are located north of
4 the Project site. ASC at 3.4-16; Ex. 5.00 at 6:22-23; *see also* Ex. 5.03. The nest cores of both
5 activity centers are located on public lands managed by the Washington Department of Natural
6 Resources (“DNR”) and the U.S. Forest Service. Ex. 5.00 at 6:23-25. The Mill Creek activity
7 center was designated in 1992 and was last considered to have NSOs present in 2000. Ex. 5.00
8 at 6:26-7:1. The Moss Creek activity center was designated in 1994 and was last considered to
9 have NSOs present in 2004. Ex. 5.00 at 7:1-3. Both the Mill Creek and Moss Creek activity
10 centers exceed the 40% suitable habitat threshold. Ex. 5.04 at 2. The Project will not alter that
11 fact. *Id.* Therefore, WAC 222.10.041(4)’s limitations on habitat use or modifications do not
12 restrict use of the Project site as a wind turbine energy facility. Furthermore, forest practices
13 within these activity centers will be allowed to proceed so long as they do not cross the 40%
14 suitable habitat threshold.

15 NSOs prefer forest habitats characterized by multi-layered canopy, and a high incidence
16 of large trees that provide suitable structure for nesting and roosting. ASC at 3.4-16. No such
17 forest habitat is present within the Project site, which does not provide any habitat that NSOs are
18 likely to use for either dispersal or foraging due to its industrial timber use. ASC at 3.4-1 to 2;
19 Tr. at 786:2-25, 792:3-5 (Jeff Reams).

20 Most importantly, however, extensive surveys following USFWS protocol indicate that
21 the Project is not sited near NSOs. NSO surveys were conducted in 2003, 2004, 2008, and 2009,
22 and all surveys followed the USFWS’s currently effective *Protocol for Surveying Proposed*
23 *Management Activities that May Impact Northern Spotted Owls*. Ex. 5.00 at 5:11-26. USFWS
24 has confirmed that all surveys for the Project were done pursuant to applicable survey protocol

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1 requirements.⁴ Ex. 5.04 at 2. No NSOs were detected during the 2003 and 2004 surveys. ASC
2 at 3.4-17; ASC App. B-3. No NSOs were detected during the 2008 and 2009 surveys. Ex. 5.00
3 at 7; ASC App. B-4.

4 Whistling Ridge had another NSO survey conducted in 2010. Ex. 5.00 at 8:6-9:21. This
5 survey detected one male NSO about 2.8 miles north of the Project site and 3.2 miles from the
6 most northerly turbine location on DNR property. Ex. 5.00 at 8:6-10. Based on this NSO's
7 behavior, Whistling Ridge's NSO experts determined that it was a single male with no mate and
8 was not supporting young. Ex. 5.00 at 8:15-22.

9 BPA's informal consultation with USFWS culminated in USFWS's issuance of its July
10 19, 2010 Concurrence Letter to BPA, in which USFWS concurred that "the Project is not likely
11 to adversely affect the spotted owl." Ex. 5.04 at 4. In its Concurrence Letter, USFWS confirmed
12 that Whistling Ridge had completed "protocol surveys" to the satisfaction of the agency. *Id.* at 2.
13 The letter confirms that Whistling Ridge went beyond its breeding season surveys, and in 2009,
14 voluntarily conducted a survey under then-proposed (but not adopted and not enforced) 2010
15 protocols, aimed at determining whether NSOs could be present but not vocalizing. *Id.* The
16 letter explains the results of the 2010 surveys, including the discovery of a single male NSO far
17 from the Project area, and concludes that this discovery "does not change the analysis of effects
18 of the Project to spotted owls, as addressed below, regardless of whether or not a territorial status
19 is established." *Id.* at 3.

20 The USFWS Concurrence Letter confirms that there will be "insignificant" potential
21 effects to NSOs, in terms of both potential loss of habitat and risk of collision, during
22 construction, operation, and maintenance activities. The letter confirms that the single male

23 ⁴ The 2008 and 2009 surveys were conducted in potentially suitable habitat located within 1.8 miles from
24 the Project's proposed turbine alignments (*i.e.*, 14,901 acres) and within the Moss Creek and Mill Creek activity
25 centers (*i.e.*, 7,222 acres). *See* Ex. 5.00 at 6:1-7:9. Suitable habitat was conservatively defined as stands with at
26 least 12-inch diameter at breast height and a canopy cover of 60% or greater. ASC § 3.4-16; Ex. 5.00 at 6:7-19; Tr.
at 768:6-11(Reams). The USFWS's 2008 NSO Recovery Plan characterized "potentially suitable habitat" as at least
30-inch diameter at breast height trees with 60-90% canopy cover. Tr. at 768:8-10 (Reams).

1 NSO discovered in 2010 some two miles to the north is immaterial to these conclusions. *Id.*
2 USFWS documented the finding that operation of the Project would not cause a negative impact:

3 To assess the risk of owl collision with turbine blades or towers, we
4 convened a review panel of three spotted owl biologists from this
5 office and one spotted owl biologist from the Washington Department
6 of Fish and Wildlife. Based on our knowledge of spotted owl flight
7 behaviors and habitat preferences, the group concluded that the risk of
8 spotted owl collisions with turbines at this site is low. Considering the
9 strong association of spotted owls with forest canopy, and spotted owl
10 flight behaviors, we conclude that it is unlikely that spotted owls
11 would cross the Whistling Ridge site at an altitude that would put the
12 owls at risk of collision with turbine blades. *Therefore, the risk of a
13 spotted owl collision at this site is considered to be discountable.*

14 *Id.* at 4 (emphasis added).

15 Whistling Ridge has proposed the Project in a location that avoids habitat areas deemed
16 critical to NSOs or essential to their recovery, and further avoids any risk of NSOs colliding
17 with wind turbines. Given the facts in the extensive record, USFWS, in consultation with
18 WDFW, found that the Project does not pose a risk of taking NSOs under Section 9 of the ESA,
19 and therefore there is no need for an incidental take statement. Additionally, USFWS concurred
20 under Section 7 of the ESA that the Project does not adversely affect NSOs or designated critical
21 habitat, and Project operation does not pose any risk to NSOs. There are simply no expected
22 impacts to NSOs.

23 **e. Whistling Ridge’s mitigation plan exceeds WAC 463-62-040(2)(a)’s
24 objective of no net loss of wildlife habitat or function and has been
25 accepted by WDFW**

26 Whistling Ridge has complied with a number of the siting guidance principles
recommended in the voluntary *WDFW Guidelines*, including locating the Project on previously
disturbed lands near existing transmission corridors and avoiding high value habitats. Rather
than simply mitigating for lost habitat as required by WAC 463-62-040(2)(a), Whistling Ridge
has proposed to comprehensively mitigate potential wildlife impacts identified in the DEIS,
thereby realizing with WDFW a mutually beneficial, long-term habitat enhancement outcome
stemming from the Project. *See Exs. 1.01r at 2:19-8:17, 1.03r.*

1 To meet WAC 463-62-040(2)(a)'s objective of no net loss of wildlife habitat or function,
2 Whistling Ridge will convey a conservation easement interest in approximately 100 acres of oak
3 woodland and coniferous forest habitat in Klickitat County. Ex. 1.01r at 3:5-7:9. Klickitat
4 County has tentatively agreed to act as grantee of this conservation easement, subject to
5 completion of negotiations following issuance of the Site Certificate. Exs. 1.01r at 8:1-17, 1.05r.
6 The mitigation parcel meets important objectives of Klickitat County, and WDFW supports this
7 approach. Ex. 1.01r at 2:15-17, 7:11-24.

8 In a letter dated December 20, 2010, WDFW's Renewable Energy Section Manager
9 formally advised EFSEC that it accepts Whistling Ridge's proposal to mitigate all wildlife and
10 habitat impacts of the Project. See Ex. 1.20r. This letter states in material part:

11 The mitigation offered by the developer is consistent with the wind
12 power guideline in that habitat mitigation is presumed to fully mitigate
13 for habitat losses for all species. No old-growth forest occurs on the
14 proposed project site and there is none on the mitigation site. Both the
15 proposed project site and the mitigation site support a variety of
16 habitats and wildlife species. WDFW understands that even though
17 the proposed project site is a commercial forest, it also provides
18 suitable habitats for a variety of wildlife species, some of which are
19 high priority for WDFW. However, the mitigation site has not and
20 will not be subject to the impacts associated with commercial forestry
21 or wind energy operations.

22 At the proposed project site, no spotted owls were recorded during
23 extensive multi-years surveys following standard protocols. While
24 spotted owls also make use of habitats other than old-growth, the types
25 of suitable habitat are typically not present over large areas on
26 managed commercial forest lands. Additionally, the regular
disturbances to the proposed project site as a result of commercial
logging operations likely further reduces [sic] habitat suitability for
spotted owls, as well as other native and migratory wildlife. . . .

The habitat qualities and wildlife species of the proposed mitigation
parcel are high priority for WDFW. The parcel contains WDFW Pri-
ority Habitats such as Oregon white oak, riparian habitats, and a fish-
bearing stream; Silva Creek, which is a tributary to the Klickitat River.
The parcel also contains WDFW Priority Species such as western gray
squirrel, western bluebird, Merriam's turkey, and black tail deer.
While the proposed project site also supports priority species and
habitats, it does so in the context as a commercial forestry operation.

1 In summary, the developer, SDS Lumber, in consultation with WDFW
2 and through the Wind Power Guidelines, has developed an acceptable
3 mitigation strategy for temporary and permanent impacts that will
4 occur as a result of the Whistling Ridge Wind Energy Development.
5 The proposed mitigation parcel of approximately 100 acres . . . is
6 consistent with the WDFW Wind Power Guidelines.

7 Ex. 1.20r (Dec. 20, 2010 letter at 2-3). The mitigation proposal offers a superb opportunity to
8 obtain better than equivalent habitat, well above and beyond the goal of no net loss, and also
9 provides continued opportunity to study the interaction between wind turbines and the natural
10 environment in a context where EFSEC will oversee the implementation of adaptive
11 management.

12 **B. NOISE**

13 **1. Applicable EFSEC standards and requirements**

14 **WAC 463-62-030. Noise standards.** “Energy facilities shall
15 meet the noise standards established in chapter 70.107 RCW, the
16 Noise Control Act of 1974; and state rules adopted to implement
17 those requirements in chapter 173-60 WAC, Maximum
18 environmental noise levels.” *See also* WAC 463-60-352(1)’s
19 informational requirements.

20 **2. The ASC’s noise modeling indicates that the Project will meet all applicable 21 construction and operational noise performance standards, and the ASC’s 22 recommended conditions ensure compliance**

23 Project maximum noise levels were modeled using manufacturer’s sound power level
24 data for a conventional commercial wind turbine, and internationally recognized noise modeling
25 standards were applied to generate the sound pressure (noise) results.⁵ ASC at 4.1-11; Ex. 7.00
26

27 ⁵ “Sound is generally characterized by several variables, including frequency and intensity. Frequency
28 describes the pitch of the sound and is measured in hertz (Hz), while intensity describes the sound’s loudness and is
29 measured in decibels (dB). Decibels are measured using a logarithmic scale. A sound level of 0 dB is approximately
30 the threshold of human hearing and is barely audible under extremely quiet listening conditions. Normal speech has
31 a sound level of approximately 60 dB.” ASC at 4.1-1.

32 “The method commonly used to quantify environmental sounds consists of evaluating all frequencies of a
33 sound according to a weighting system that reflects that human hearing is less sensitive at low frequencies and
34 extremely high frequencies than at the mid-range frequencies. This is called ‘A weighting,’ and the decibel level

(continued . . .)

1 at 8:7-11; Tr. at 381:23-382:21 (Mark Storm). The results are presented on a Noise Level
2 Contours map that shows where the Project’s noise emissions reach certain levels. ASC Fig. 4.1-
3 1; Ex. 7.00 at 7:11-13. The software used to model the Project noise impacts is a leading
4 industry tool routinely used by acoustical professionals to predict noise level estimates at
5 complex industrial sources including wind turbines. Ex. 7.00 at 7:15-19. The methods,
6 algorithms, and results depicted in the ASC, including the Noise Level Contours map, all support
7 the conclusion that the Project will meet all applicable construction and operational noise
8 performance standards imposed and enforced by EFSEC at adjacent receivers, including the
9 nearest residence over 2,500 feet away. ASC at 4.1-11, 4.1-13; ASC Fig. 4.1-1; Ex. 7.00 at 6:19-
10 23, 11:6-7.

11 Regardless of the modeling, monitoring, and predictive statements contained in the ASC,
12 the Project absolutely must comply with applicable maximum noise emission levels. WAC 463-
13 62-030, 173-60-040. The ASC’s recommended Project conditions would require Whistling
14 Ridge to demonstrate how the Project’s operational configuration will meet those requirements
15 (*i.e.*, an acoustical analysis of the final turbine layout must be prepared prior to construction,
16 using noise level data for the final turbine type selected to ensure that Project noise levels do not
17 exceed regulatory thresholds). ASC at 1.4-7. The ASC and testimony presented to EFSEC in
18 support thereof provide evidence, completely uncontroverted, of full compliance with EFSEC’s
19 noise regulations.

20 **a. The ASC’s methodology to assess and quantify background noise**
21 **environment was appropriate for the character of the Project**

22 WAC 463-60-352(1)(a) requires that the ASC present a description and quantification of
23 the types of background noise environment that the Project would affect. *See* ASC § 4.1.1.3.

24 _____
25 (. . . continued)

26 measured is called the A-weighted sound level (dBA). In practice, the level of a noise source is conveniently
measured using a sound level meter that includes a filter corresponding to the dBA curve.” ASC at 4.1-2.

1 Neither EFSEC, Washington Department of Energy (“DOE”), nor Skamania County has adopted
2 a prescribed monitoring methodology, equipment, or measurement intervals to quantify such
3 background noise. *See* WAC 463-60-352(1); WAC ch. 173-60; Skamania County Code (“SCC”)
4 ch. 8.22. For the Project, actual short-term and long-term noise measurements were conducted in
5 the field. ASC § 4.1.1.3; Exs. 7.02c to 7.04c. Short-term monitoring measurements were done
6 at two locations (ST1 and ST2), in accordance with ISO 1996a, b, and c, with measurements
7 conducted at six-minute intervals and personally observed so that anomalous events could be
8 recorded in field notes. ASC § 4.1.1.3; Exs. 7.02c to 7.04c, 7.11c, 7.12c. A summary of the
9 results of the short-term noise monitoring is presented in ASC Table 4.1-2; excerpts of the raw
10 data are contained in Exs. 7.03c and 7.04c. At the long-term monitoring location (LT1),
11 measurements of consecutive 15 or 30 minute averages were taken over an uninterrupted 24-
12 hour period. ASC at 4.1-6. A summary of the results of the LT1 monitoring is presented in ASC
13 Table 4.1-3; excerpts of the raw data are contained in Ex. 7.02c.

14 There are two types of background noise environments near the Project site: scattered
15 single-family homes and a single mixed-use cluster of houses, a sport court, and a school to the
16 south and west of the Project site. ASC Fig. 4.1-1; Exs. 7.08c to 7.10c; Tr. at 418:15-18,
17 1445:12-1446:1 (Storm). The scattered single-family home typifies the predominant land use
18 surrounding the Project. ASC Fig. 4.1-1. Background noise measurements were conducted at
19 locations representative of each type of background noise environment closest to the Project site.
20 ASC at 4.1-4.

21 ST1 was selected to characterize the background noise at R1, a single-family residence
22 2,560 feet of the nearest turbine.⁶ ASC Fig. 4.1-1; ASC at 4.1-9. The background noise
23 environment representative of R1 is presented in ASC Table 4.1-2 as Leq 38, 32, and 30 dBA
24

25 ⁶ The potential location of a future residence is shown on ASC Fig. 4.1-1 as R3, approximately 2,000 feet
26 from the nearest turbine. ASC at 4.1-4. The non-existent R3 was considered in the ASC given knowledge of its
potential for development even though the applicable legal standards do not apply to hypothetical receptors.

1 during the morning, afternoon, and evening respectively and after adjustment to remove the
2 sound of cars passing on the roadway.⁷ Tr. at 431:21-25 (Storm). These results typify the
3 background noise environment found at a measurement position considerably distant from
4 passing road traffic, and are representative of an unclustered single-family residence such as R1,
5 over 2,500 feet from the nearest turbine. ASC at 4.1-4.

6 LT1 characterizes the background environment noise over a longer period of time in an
7 area of the Project representative of unclustered single-family homes such as R1. ASC at 4.1-8
8 to 4.1-9. The totality of the 24-hour monitoring period data at LT1 was averaged with the ST1
9 results, both with and without cars. ASC at 4.1-8. ASC Table 4.1-4 presents the average
10 background environment noise at the ST1/LT1 measurement area, which is reflective of what
11 could be expected at R1. These results indicate an average Leq of 38, 35, and 34 dBA during the
12 day, evening, and night respectively, after removal of cars to reflect the background noise
13 environment of a measurement position considerably distant from the road. ASC at 4.1-8; ASC
14 Table 4.1-4.

15 ST2 characterizes the background environment noise at the higher-density
16 residential/recreational/school area to the south and west of the Project area. ASC Fig. 1.4-1; Tr.
17 at 420:7-25 (Storm). The background environment noise representative of this mixed-use
18 environment is Leq 37, 36, and 36 dBA during the morning, afternoon, and evening respectively.
19 ASC Table 4.1-2.

20 All of the monitoring conducted at locations representative of the scattered single-family
21 home such as R1 and the higher-density development to the south and west of the Project site
22 depicted at ST2 yield quantified background noise environments under 40 dBA.

23 ⁷ “Although the dBA may adequately indicate the level of environmental noise at any instant in time, commu-
24 nity noise levels vary continuously. Most environmental noise includes a mixture of noise from distant sources that
25 creates a relatively steady background noise in which no particular source is identifiable. A single descriptor called the
26 equivalent sound level (Leq) may be used to describe sound that is changing in level. Leq is the energy-mean dBA
during a measured time interval. It is the ‘equivalent’ constant sound level that would have to be produced by a given
source to equal the acoustic energy contained in the fluctuating sound level measured.” ASC at 4.1-2.

1 **b. The ASC’s methodology to model Project noise was consistent with**
2 **prior EFSEC practice and appropriate to this Project**

3 The Project’s noise impact analysis is based on manufacturers’ noise emissions data
4 supplied by the vendor for the modeled turbine and internationally recognized noise modeling
5 standards. ASC § 4.1-11; Ex. 7.00 at 8:7-11; Tr. at 382:12-21 (Storm). To assess the noise
6 emissions from this Project, modeling was done using the CADNA-A© software. ASC § 4.1-11;
7 Tr. at 381:17-25 (Storm). The CADNA-A© software incorporates ISO-9613 and industry-
8 accepted algorithms for noise propagation calculations and is one of the two most commonly
9 used software programs used for industrial source noise modeling, including wind energy
10 facilities. ASC at 4.1-11; Tr. at 382:1-3, 448:22-25 (Storm). CADNA-A© inputs include the
11 manufacturer’s specified maximum power levels of the modeled turbine, calculated in
12 accordance with International Electrotechnical Commission standard 61400-11, plus a buffer of a
13 2 dB margin beyond the maximum sound power levels to yield the most conservative results. Tr.
14 at 451:16-18 (Storm).

15 The cross-examination questions asked of Mark Storm invites EFSEC to infer that the
16 Project site is unique in its topography, climate, and vegetative configuration such that the
17 calculations presented in the ASC are unreliable. *See* Tr. at 405:22-406:4 (vegetation), 412:9-13
18 (climate), 450:6-8 (topography). However, each of these data inputs is included in the CADNA-
19 A© software, including weather and humidity; the topographic details of the site; and the effects
20 of presence or removal of vegetation, including ground and atmospheric absorption. Tr. at
21 461:19-22, 463:19-464:9, 464:10-465:13 (Storm).

22 The data inputs to CADNA-A© are synthesized with the cumulative noise of all the
23 turbines through application of the algorithms recommended by ISO 9613-2 in order to generate
24 predicted Project cumulative noise emission levels. Tr. at 461:19-22 (Storm). The results are
25 then placed onto a map as noise contour lines depicting where certain noise emission levels will
26 be reached around the Project. ASC at 4.1-1; Tr. at 463:19-464:9 (Storm). The noise contours

1 are not symmetrical around the Project; the effects of cumulative turbine noise emissions and
2 other attenuating factors on the varied topography input for this Project yield irregular, rather
3 than billiard-table smooth, noise contours around the Project. Tr. at 464:1-9 (Storm). The noise
4 contour lines shown on ASC Fig. 4.1-1 reflect the most current modeling techniques as required
5 by WAC 463-60-352(1)(b), and, significantly, the techniques are the same ones used by EFSEC
6 in the Kittitas Valley and Desert Claim wind energy projects.

7 Significantly, there are *no* existing residences that lie within the 40+ dBA Project noise
8 contours: all existing residences are in areas where the modeled Project noise levels,
9 cumulatively, are below 40 dBA.⁸ ASC Fig. 4.1-1.

10 **c. As analyzed in the ASC, the Project’s predicted noise emissions fall**
11 **well within allowable levels for the most restrictive receiver**

12 WAC 463-62-030 requires that energy facilities meet the absolute noise standards
13 established in RCW ch. 70.107, the Noise Control Act of 1974 as implemented in the
14 requirements in WAC ch. 173-60. Skamania County has adopted identical maximum noise
15 limits and exceptions. *See* SCC ch. 8.22. The applicable noise regulations establish maximum
16 permissible environmental designations for noise abatement (“EDNAs”) for both generators and
17 receivers. WAC 463-62-030, 173-60-040; SCC 8.22.080. The Class A EDNA for a receiver
18 (area or zone typified by residential use) receiving noise from a Class C emitter carries the most
19 restrictive noise limits – 60 dB during the day, and 50 dB at night.⁹ WAC 173-60-040;
20 SCC 8.22.090-.100. Temporary construction noise at a Class A EDNA receiver is exempt from
21 the limits of WAC 173-60-040 if a project’s construction hours are confined to between 7 a.m.
22 and 10 p.m. *See* WAC 173-60-050.

23 _____
24 ⁸ The only receiver shown on ASC Fig. 4.1-1 *within* the 40+ dBA band (*i.e.*, R3) does not exist. Tr. at
25 465:14-25 (Storm). *See supra* note 6.

26 ⁹ For the purpose of the ASC, the most restrictive noise level (*i.e.*, Class A) was applied to all three
receivers, even though R1 and R3 (which again does not exist) are in agriculturally zoned lands normally classified
as Class C EDNA. ASC at 4.1-9.

1 ASC Tables 4.1-6 and 4.1-8 through 4.1-11 present the Project’s modeled construction
2 and operations noise emissions. The Project’s cumulative operational noise impacts at the two
3 existing residences nearest to the turbines, at 2,560 feet and 4,265 feet respectively, do not
4 exceed 42 dBA, nearly 10 decibels below, and certainly well within compliance of, the
5 EFSEC/DOE/Skamania County maximum Class A EDNA levels of 60 dB daytime/50dB
6 nighttime.¹⁰ ASC Tables 4.1-8 through 4.1-11. These are the only applicable standards for
7 EFSEC’s regulation of Project noise emissions,¹¹ and they are fully satisfied by the Project’s
8 modeled results.

9 **d. The ASC ensures that mitigation measures will effectively mitigate**
10 **Project noise to levels that do not exceed the maximum allowable**
11 **noise thresholds during both Project construction and operation**

12 Irrespective of the modeling for noise impacts and the monitoring of background noise
13 environments required by WAC 463-60-352(1), the Project as constructed and operated *must*
14 comply with applicable noise level regulations. WAC 463-62-030; *see also* WAC 173-60-040.
15 To ensure that the applicable maximum noise limits are satisfied, the conditions set forth in the
16 ASC should be incorporated into the Site Certificate for the Project.

17 For construction noise, the ASC sets forth a mitigation measure recommending that
18 construction generally be limited to daytime hours. ASC at 1.4-7. To ensure compliance with
19 the construction noise limits, the specific construction management practices enumerated for
20 noise-producing equipment, as well as a noise complaint process, hotline number, and Whistling
21 Ridge’s responsibility to resolve complaints, should be imposed as a condition of the Project. *Id.*

22 ¹⁰ Low-frequency noise impacts are discussed in the ASC at 4.1-14 through 4.1-15, which demonstrate that
23 the design of modern wind turbines has eliminated the primary source of low-frequency and infrasound emissions
24 from wind turbines, such that the Project presents either no or less than significant low-frequency emissions.

25 ¹¹ There are *no* state or Skamania County regulatory limits for allowable increases above background noise
26 levels caused by industrial projects. Ex. 7.00 at 4:14-5:4. No evidence was presented during this entire adjudication
that demonstrates the existence of such a standard in Washington, and no such standard has ever been applied by
EFSEC in prior wind siting actions regardless of proximity or number of houses in proximity to those other projects.
Even though there is no “change over ambient” performance standard that must be met, ASC Tables 4.1-9 through
4.8-11 demonstrate that the Project will easily satisfy the most restrictive noise emission standards even taking into
consideration the existing background noise at the nearest residence.

1 The ASC also recommends that an acoustical analysis of the final turbine layout be
2 prepared prior to construction, using noise level data for the final turbine type selected, to ensure
3 that Project’s operational noise levels do not exceed regulatory thresholds. *Id.* The Project noise
4 levels, even combined with measured existing sound levels reasonably representing ambient
5 noise levels at the two nearest residential receivers, never reach the applicable maximum noise
6 levels of 60/50 dBA and would result in no need for operational noise mitigation.

7 **C. CULTURAL AND ARCHEOLOGICAL RESOURCES**

8 **1. Applicable EFSEC standards and requirements**

9 No performance standards in WAC ch. 463-62. *But see*
10 WAC 463-60-362(5)’s informational requirements.

11 **2. There is no evidence of protected historic or cultural resources within the**
12 **Project’s area of potential effect**

13 Whistling Ridge conducted cultural resource surveys within the area of potential effect
14 (“APE”) for the Project. *See generally* ASC § 4.2.5. The Washington Department of
15 Archeology and Historic Preservation concurred that the area Whistling Ridge surveyed was
16 appropriate. Ex. 10.02. The cultural resource surveys involved both (i) a review of literature,
17 research, and documents for previously identified cultural resources within the APE, and (ii) an
18 intensive pedestrian inventory covering the entirety of areas within the Project site and West Pit
19 Road where ground-altering activities could occur. ASC § 4.2.5.4; Ex. 10.00 at 5:14-20, 7:22-
20 8:14. The 2009 pedestrian inventory was conducted by two archaeologists, with assistance by
21 three field technicians, in accordance with the federal advisory Council on Historic
22 Preservation’s National Historic Preservation Act regulations with the objective of identifying
23 archaeological resources and historic properties that might be eligible for listing on the National
24 Register of Historic Places. Ex. 10.00 at 5:21-6:1, 7:22-26.

25 One previously recorded historic cultural resource—the Broughton Lumber Company
26 flume—was documented within the APE. Ex. 10.00 at 4:16-20. The segment of the flume

1 within the APE was dismantled around 1987, and no remnants of the former flume alignment are
2 now present in the area. Ex. 10.00 at 11:5-9. The pedestrian inventory identified the so-called
3 Haran farmstead as a site that warranted additional survey efforts, and subsurface probing was
4 done there. Ex. 10.00 at 8:16-9:14. Whistling Ridge’s cultural resource expert determined that
5 the Haran farmstead is not eligible for listing on the National Register of Historic Places.
6 Ex. 10.00 at 9:19-24. Two archaeological “isolates” were also identified. ASC § 4.2.5.4; Ex.
7 10.00 at 5:3-9. Although unlikely, if archaeological sites are encountered during construction,
8 installation, maintenance, and/or repair of the Project, work will be stopped in the area of
9 discovery and a qualified archaeologist will be summoned to identify and document the find to
10 determine if it is significant. ASC § 4.2.5.6; Ex. 10.00 at 12:13-18. If the site is significant,
11 mitigation measures would need to be devised and implemented. ASC § 4.2.5.6.

12 No previously documented TCPs were identified within the APE through the records
13 review. ASC at 4.2-86; Ex. 10.00 at 7:1-2. No pre-contact/Native American site types, such as
14 lithic scatters, petroglyphs, or peeled cedars were observed during the pedestrian inventory.
15 Ex. 10.00 at 11:10-11. No potential rock cairns, rings, walls, or other alignments that could
16 indicate sensitivity were observed on promontories associated with Project turbine strings,
17 including “Chemawa Hill.” Ex. 10 at 11:11-14. Whistling Ridge also actively consulted with the
18 Yakama Nation Cultural Resources Program (“Yakama Nation CRP”), the Yakama Nation
19 Cultural Resources Committee, ancestral chiefs of the Yakama Nation, and two local elders of the
20 Yakama Nation to assist with the identification of potentially sensitive, traditional, and/or sacred
21 resources. ASC at 4.2-85; Ex. 10.00 at 7:11-17. The Yakama Nation CRP, which was established
22 to protect cultural resources on behalf of the Yakama Nation, intervened in this proceeding.
23 Yakama Nation CRP Petition for Intervention at 3. The hereditary Chiefs of the Klickitat and
24 Cascade Tribes of the Yakama Nation also intervened. No intervenor submitted evidence into the
25 adjudicative record that there are TCPs on the Project site or in the vicinity. The Yakama Nation
26 CRP reached a settlement with Whistling Ridge and withdrew from participation in the

1 adjudicatory proceeding. Tr. at 84:18-86:1 (Jason Spadaro). Whistling Ridge has satisfied WAC
2 463-60-362(5).

3 **D. TURBINE VIEWS AND AESTHETICS**

4 **1. Applicable EFSEC standards and requirements**

5 No performance standards in WAC ch. 463-62. *But see*
6 WAC 463-60-362(3)'s informational requirements.

7 **2. Whistling Ridge has satisfied EFSEC's informational requirements**

8 EFSEC does not have any performance standards related to aesthetics. *See*
9 WAC ch. 463-62. Instead, SEPA is the primary legal tool applicable to Project aesthetics.¹²
10 Whistling Ridge has satisfied WAC 463-60-362(3)'s informational requirements. ASC § 4.2.3
11 describes the likely aesthetic impacts of the Project in great detail. Whistling Ridge
12 supplemented this information with 93 pages of prefiled written testimony concerning the
13 Project's likely aesthetic impacts. *See* Exs. 8.00, 8.03r, 9.00, 9.02r. Whistling Ridge also
14 provided seven additional exhibits, including large-format visual simulations from 21 different
15 viewpoints, that provide Project-specific information concerning likely aesthetic impacts.¹³ *See*
16 Exs. 8.04r through 8.10r. ASC § 2.3.6 describes how the temporary aesthetic impacts caused by
17 construction (*i.e.*, limited forest clearing around the turbines) will be addressed, namely by
18 replanting temporarily cleared areas with trees and replanting permanently cleared areas with
19 appropriate native grasses and low-growing shrubs.

20 ///

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22

23 ¹² Through three prior wind energy project FEISs, EFSEC has established a rigorous methodology for the
24 consideration of aesthetic issues. Given the fact that aesthetic analysis is fundamentally a SEPA function,
25 application of the EFSEC precedent established in prior FEISs is critical to efforts to satisfy EFSEC requirements.

26 ¹³ The term "viewpoint" is not synonymous with the Scenic Area term "key viewing area" or KVA, which
is a Scenic Area regulatory term concerning locations or corridors "from which large numbers of people view the
National Scenic Area portions of the Gorge." Ex. 9.05r at 10.

1 **a. Whistling Ridge used the appropriate methodology to assess the**
2 **Project’s likely aesthetic impacts**

3 **(i) Whistling Ridge’s methodology was consistent with prior**
4 **EFSEC practice and appropriate for the Project**

5 According to uncontradicted expert testimony, the ASC used the *same* methodology to
6 assess the Project’s likely aesthetic impacts as was used for the Kittitas Valley, Desert Claim,
7 and Wild Horse projects that EFSEC previously approved. Ex. 9.00 at 15:26-16:3; Ex. 9.02r at
8 6:18-22, 8:22-9:1; Tr. at 308:18-22, 367:6-10 (Dautis Pearson). Just like the methodology used
9 in the three prior EFSEC projects, the ASC’s aesthetic impact methodology was primarily based
10 on the Federal Highway Administration’s (“FHWA”) visual assessment methodology and
11 incorporated elements of the U.S. Forest Service’s (“USFS”) Scenery Management System
12 (“SMS”). ASC § 4.2.3.1; Ex. 9.00 at 13:23-14:5; Tr. at 292:18-22, 306:13-16 (Pearson).

13 Although some of the terminology is different, the FHWA methodology is based on the
14 USFS’s SMS and the U.S. Bureau of Land Management’s Visual Resource Management
15 (“VRM”) methodologies. Ex. 9.00 at 14:9-23; Ex. 9.02r at 5:22-6:16. For purposes of assessing
16 the Project’s likely aesthetic impacts, the FHWA methodology has two important advantages over
17 the SMS and VRM methodologies. First, it is designed for linear projects that move through
18 differing and diverse landscapes that might have changing uses and changing perspectives.
19 Ex. 9.00 at 16:3-5; Ex. 9.02r at 5:23-6:2; Tr. at 300:23-301:4, 307:5-8 (Pearson). Second, unlike
20 the SMS and VRM methodologies, which are more appropriately used in the planning processes
21 for public lands, the FHWA methodology can be readily used for projects on private property for
22 which no public policy choices have been made about how to manage the land from an aesthetic
23 standpoint. Exs. 9.00 at 15:4-19, 9.02r at 6:10-16; Tr. at 309:8-310:21 (Pearson).

24 The ASC’s aesthetic impact analysis was conducted by an interdisciplinary team led by
25 Dautis Pearson. Tr. at 299:1-5, 311:23-312:2 (Pearson). Mr. Pearson, a former USFS land use
26 planner and NEPA coordinator, has extensive experience assessing likely aesthetic impacts using
27 the FHWA, SMS, and VRM methodologies. Tr. at 289:1-290:3, 299:23-300:9 (Pearson).

1 According to uncontradicted expert testimony, aesthetic impact analyses do not require the
2 involvement of a landscape architect. Tr. at 288:9-22 (Pearson). The ASC’s aesthetic impact
3 methodology was consistent with prior EFSEC practice, appropriate for a linear project on
4 private property, and conducted by an experienced expert.

5 **(ii) Opponents’ desired use of a Scenic Area visual quality**
6 **objective (“VQO”) is inconsistent with SMS methodology, was**
7 **prohibited by Congress in the Scenic Act’s savings clause, and**
8 **would have far-reaching impacts on economic development in**
9 **the Columbia Gorge region**

8 Opponents’ primary interest in this proceeding is to stop the construction of wind
9 turbines that are visible from Scenic Area KVAs. To accomplish this goal, Opponents’ witness
10 Dean Apostol testified that Whistling Ridge should have departed from accepted EFSEC practice
11 and instead used the Scenic Area “visually subordinate” VQO to evaluate the Project’s likely
12 aesthetic impacts.¹⁴ Ex. 21.00 at 10:9-11:10. According to Apostol, EFSEC must simply
13 assume that the Project fails to meet the Scenic Area “visually subordinate” VQO and “by
14 definition will thus have a high impact on scenic resources.” Ex. 21.00 at 11:9, 11:15.
15 Consequently, Apostol testified that wind turbines should not be sited at locations outside the
16 Scenic Area from which they would be visible at Scenic Area KVAs. See Ex. 21.00 at 11:19-22,
17 30:7.¹⁵ In other words, Apostol advocated that EFSEC establish a *de facto* buffer zone around
18 the Scenic Area to protect the Scenic Area. However, as detailed below, applying a Scenic Area
19 VQO to a project outside the Scenic Area is inconsistent with the SMS methodology upon which
20 the Scenic Area VQOs were developed, and Congress expressly prohibited the establishment of

21 ¹⁴ Apostol’s testimony that Scenic Area VQOs “can and should be used” to evaluate the Project is in direct
22 conflict with the testimony of Opponents’ witness Michael Lang who testified that no one is proposing to “apply the
23 Scenic Area guidelines to lands outside the Scenic Area.” Compare Ex. 21.00 at 10:9-12 with Ex. 25.00 at 4:7.

24 ¹⁵ Apostol concurred with highly suspect recommendations in a U.S. Department of Interior NEPA/SEPA
25 comment letter attached to his testimony as Ex. 21.05, which incorporated comments from the National Park Service
26 (“NPS”). Ex. 51.01r evidences that NPS cultural resource professionals arrived at irreconcilable differences of
opinion regarding the Project’s likely effects two historic trails, the routes of which are both on the Columbia River.
However, the NPS’s deletion of one professional’s “no impact” comment in favor of another professional’s “high
impact” comment “for two trails that follow the same route, reflects a division of agency opinion, as well as
subjective bias.” Ex. 51.00r at 10:21-23 (emphasis added).

1 the buffer zone that Opponents seek. In addition, applying Scenic Area VQOs (even indirectly)
2 to development entirely outside the Scenic Area would have far-reaching negative impacts on
3 economic development in the Columbia Gorge region.

4 **(a) The SMS methodology, under which Scenic Area VQOs were**
5 **developed, provides that VQOs are specific to the Scenic Area**
6 **and are not to be applied outside the Scenic Area regardless of**
7 **Scenic Area visibility**

7 The Project site is located entirely outside the Scenic Area, and no VQO has been
8 established for the Project site. ASC § 4.2.3.2; Ex. 9.00 at 15:26. Nonetheless, Apostol testified
9 that the “visually subordinate” VQO in the Scenic Area Management Plan should be used to
10 assess the Project’s likely aesthetic impacts, because a development outside the Scenic Area that
11 is visible from Scenic Area KVAs “is seen by the same numbers and types of viewers that the
12 Scenic Area was established to protect.” Ex. 21.00 at 11:7-8. Apostol’s sightline-based
13 argument directly conflicts with, and is not supported by, SMS methodology.¹⁶

14 The VQOs in the [Scenic Area] Management Plan should not be
15 applied to development outside the Scenic Area for at least one very
16 important reason. *Applying these VQOs to development on the Project*
17 *site is inconsistent with SMS methodology.* Mr. Apostol correctly
18 recognized that VQOs are a goal for managing a scenic landscape.
19 (Page 10, line 3.) The [Scenic Area] Management Plan, for example,
20 defines VQOs as “a set of visual management goals established by the
21 Forest Service to achieve a desired visual objective.” However, no
22 visual objective has been established for the Project site. *Applying a*
23 *visual objective established for one area to another area simply*
24 *because they are adjacent is inappropriate under the SMS*
25 *methodology.* For example, it is not uncommon for timber harvest
26 units to be located near the borders of wilderness areas within national
forests. The VQOs for these two areas may be “preservation” in the
wilderness area and “modification” in the harvest areas. The
wilderness area’s VQO, however, is not applied to actions in the
timber harvest unit, even though such actions may well be visible from
the wilderness area. Similarly, *the VQO of “visually subordinate” is*
specific to the area for which it was established as the goal, and it
does not extend outside the Scenic Area and onto the Project site.

16 The Scenic Area VQOs were developed under the USFS’s predecessor to the SMS methodology. See Exs. 8.15c at I-1; 9.04r at 1.

1 Ex. 9.02r at 15:11-20 (emphases added). As both Mr. Pearson and Apostol testified, VQOs are
2 *management goals*. They are used to assess whether a given development meets a pre-
3 established visual objective and are specific to a delineated area, which in this situation is the
4 Scenic Area. Under the SMS methodology, a VQO established for one area is not to be applied
5 to an adjacent area merely because development in the adjacent area is visible from the VQO
6 area.¹⁷ Consequently, it is utterly inconsistent with the SMS methodology to apply the Scenic
7 Area “visually subordinate” VQO to the Project. EFSEC’s evaluation of the Project’s likely
8 aesthetic impacts should not be at odds with aesthetic impact methodology.

9
10 **(b) Congress expressly prohibited the establishment of a buffer**
11 **zone around the Scenic Area if done solely to protect the Scenic**
Area; Congress also provided that Scenic Area VQOs cannot
be used to establish a buffer zone around the Scenic Area

12 In the Scenic Act’s savings clause, Congress expressly precluded the establishment of a
13 buffer zone around the Scenic Area (*e.g.*, by prohibiting or restricting uses outside the Scenic
14 Area) if done for the sole reason of protecting the Scenic Area. In addition, Congress provided
15 that the Scenic Area VQOs cannot be used to establish a buffer zone around the Scenic Area.
16 Thus, Congress prohibited exactly what Opponents seek—the establishment of a buffer zone
17 around the Scenic Area through the application of a Scenic Area VQO for the sole reason of
18 protecting the Scenic Area.

19 Construction of the Scenic Act is a question of federal law. *Skamania Cnty. v. Columbia*
20 *River Gorge Comm’n*, 144 Wn.2d 30, 42, 26 P.3d 241 (2001).

21 In interpreting a federal statute, the Court must first determine
22 whether the language is clear and unambiguous, and if so, apply it as
23 written. “The plainness or ambiguity of statutory language is
24 determined by reference to the language itself, the specific context in
25 which that language is used, and the broader context of the statute as a
26 whole.” The Court must consider “not only the bare meaning of the

25 ¹⁷ Furthermore, none of the USFS documents in the record about the Scenic Area methodology indicate that
26 it was designed or intended to be applied to development outside the Scenic Area. See Ex. 9.02r at 11:23-26.

1 critical word or phrase but also its placement and purpose in the
2 statutory scheme.”

3 *Thrifty Oil Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 322 F.3d 1039, 1057 (9th Cir. 2002)
4 (citations omitted).

5 In the Scenic Act's savings clause, Congress provided that

6 *Nothing* in [the Scenic Act] shall - . . .

7 (10) *establish protective perimeters or buffer zones around the*
8 *scenic area or each special management area.* The fact that activities
9 or uses inconsistent with the management directives for the scenic area
10 shall not, of itself, preclude such activities or uses up to the boundaries
of the scenic area or special management areas.

11 16 U.S.C. § 544o(a) (emphases added). Congress enacted this unambiguous prohibition with full
12 knowledge of the transmission facilities and other uses that are clearly visible from the Scenic
13 Area. *See, e.g.*, 16 U.S.C. § 544o(a)(6) (providing that the Scenic Act shall not “affect or modify
14 the ability of the Bonneville Power Administration to operate, maintain, and modify existing
15 transmission facilities”). The Scenic Act's savings clause could not be any clearer. Nothing
16 shall establish a buffer zone around that Scenic Area precluding activities outside the Scenic
17 Area that are visible from within the Scenic Area.

18 Courts have interpreted provisions nearly identical to the Scenic Act's savings clause in
19 the context of various federal wilderness acts.¹⁸ The leading case is *Northwest Motorcycle Ass'n*
20 *v. United States Department of Agriculture*, 18 F.3d 1468 (9th Cir. 1994), in which an off-road
21 vehicle (“ORV”) association argued that the USFS's decision to prohibit ORV use in an area
22 around a wilderness area violated the following provision in the Washington Wilderness Act:

23 ¹⁸ *See Newton Cnty. Wildlife Ass'n v. Rogers*, 141 F.3d 803, 810 (8th Cir. 1998) (Arkansas Wilderness
24 Act); *Stupak-Thrall v. United States*, 89 F.3d 1269, 1280 (6th Cir. 1996) (Boggs, J. dissenting) (a split *en banc*
25 decision affirming district court's unpublished interpretation of Michigan Wilderness Act); *Nw. Motorcycle Ass'n v.*
26 *U.S. Dep't of Agric.*, 18 F.3d 1468 (9th Cir. 1994) (Washington Wilderness Act); *Stewart v. United States*, 639 F.
Supp. 2d 1190, 1202 (D. Or. 2009) (Oregon Wilderness Act); *Izaak Walton League of Am., Inc. v. Kimbell*, 516 F.
Supp. 2d 982, 988-89 (D. Minn. 2007) (citing Arkansas and Washington Wilderness Acts).

1 Congress does not intend that designation of wilderness areas in the
2 State of Washington lead to the creation of protective perimeters or
3 buffer zones around each wilderness area. The fact that nonwilderness
4 activities or uses can be seen or heard from areas within the wilderness
5 shall not, of itself, preclude such activities or uses up to the boundary
6 of the wilderness area.

7 *Id.* at 1480 (quoting Pub. L. 98-339, § 9, 98 Stat. 299, 305 (1984)). The Ninth Circuit held that
8 this *unambiguous* provision

9 prohibits use restrictions on nonwilderness areas based *solely* on the
10 potential impact that use might have on the Wilderness. . . . When
11 Congress used the words “of itself,” it implicitly stated that the effects
12 on a Wilderness area can be considered when allocating uses of
13 adjoining nonwilderness area, so long as it is not the only reason.

14 *Id.* at 1480-81. Under the Ninth Circuit’s construction, the legal authority under which a use
15 outside a wilderness area is prohibited or restricted is irrelevant; the key issue is the rationale for
16 prohibiting or restricting the use. If the only rationale is to protect the wilderness area, Congress
17 has expressly precluded the imposition of that use prohibition or restriction.

18 Given the nearly identical language in the Scenic Act’s savings clause, the Ninth
19 Circuit’s interpretation in *Northwest Motorcycle Ass’n* must be used to construe the Scenic Act’s
20 savings clause. *See Timberline Air Serv., Inc. v. Bell Helicopter-Textron Inc.*, 125 Wn.2d 305,
21 313, 884 P.2d 920 (1994) (“When the same words are used in different parts of the same statute,
22 it is presumed that the Legislature intended that the words have the same meaning.”). The legal
23 authority—whether that be SEPA or any other non-federal law¹⁹—under which prohibitions or
24 restrictions are imposed on uses outside the Scenic Area is irrelevant. Neither Washington nor
25 Oregon can restrict uses (*i.e.*, create a buffer zone) outside the Scenic Area based solely on the
26 uses’ potential impact on the Scenic Area, which necessarily includes impacts on recreational

23 ¹⁹ Opponents’ witness Michael Lang testified that SEPA could be used to protect the Scenic Area from
24 impacts of development outside the Scenic Area. *See* Ex. 25.00 at 3:7-14. However, state law that conflicts with
25 federal law is preempted under the Supremacy Clause of the U.S. Constitution. *See English v. Gen. Elec. Co.*, 496
26 U.S. 72, 79, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990). Consequently, the Scenic Act’s savings clause precludes
SEPA from being used to impose restrictions on development outside the Scenic Area if the sole reason for the
restrictions is to protect the Scenic Area.

1 and cultural resources found within the Scenic Area. Simply put, Congress has expressly
2 prohibited the buffer zone sought by Opponents, because the only rationale for this *de facto*
3 buffer zone is to protect the Scenic Area from a use visible from within the Scenic Area.

4 Although the Scenic Act’s savings clause is nearly identical to the federal wilderness act
5 provision interpreted in *Northwest Motorcycle Ass’n*, it differs in one important respect. Unlike
6 the federal wilderness act provisions, the Scenic Act’s savings clause provides that “Nothing in
7 [the Scenic Act] shall” rather than “Congress does not intend.” *Compare* 16 U.S.C. § 544o(a)
8 *with* Pub. L. 98-339, § 9, 98 Stat. at 305. The Scenic Act’s savings clause, as introduced,
9 followed the example of the prior federal wilderness acts by providing that “Congress does not
10 intend that establishment of the Scenic Area . . . lead to the creation of protective perimeters or
11 buffer areas.”²⁰ However, after receiving testimony for both strengthening the introduced
12 savings clause and eliminating it altogether, the introduced savings clause was revised to provide
13 that “Nothing in this [Scenic] Act shall – . . . (10) establish protective perimeters or buffer
14 zones.”²¹ This change evidences a legislative intent to strengthen the Scenic Act’s savings
15 clause. *See State v. Gonzales Flores*, 164 Wn.2d 1, 14, 186 P.3d 1038 (2008) (“Another
16 fundamental principle of statutory interpretation is that when the legislature uses different words
17 in statutes relating to a similar subject matter, it intends different meanings.”). Congress did not
18 just provide that it had no intent to establish a buffer zone around the Scenic Area, but instead
19 expressly and forcefully provided that “[n]othing in this [Scenic] Act shall” establish a buffer
20 zone around the Scenic Area. The plain meaning of this revised and strengthened text is that
21 *nothing* in the Scenic Act can be used to establish a buffer zone around the Scenic Area.

22
23 ²⁰ S. 2055 § 17(g), 99th Cong. (1986), 132 Cong. Rec. 1887, 1894; *Hearing on S. 2055 Before the*
Subcomm. on Public Lands, Reserved Water and Resource Conservation, 99th Cong. (June 17, 1986) (“*Hearing on*
S. 2055”) at 55.

24 ²¹ *See* Amendment to S. 2055 § 17(a)(12), 99th Cong. (1986), 132 Cong. Rec. 29,564, 29,572. The
25 Washington State Commissioner of Public Lands testified that the savings clause should be strengthened by making
26 it more specific. *See Hearing on S. 2055* at 90, 92, 126. In contrast, conservation organizations, including FOCG,
recommended that the savings clause be eliminated. *Id.* at 181, 438-41.

1 The Scenic Act required the development of standards (*e.g.*, VQOs) regulating the visual
2 aspects of development within the Scenic Area. *See* 16 U.S.C. §§ 544a(1), 544d(c)-(d).
3 However, the savings clause provides that nothing in the Scenic Act shall be used to establish
4 buffer zones around the Scenic Area. Consequently, Congress has prohibited Opponents’
5 desired use of the Scenic Area “visually subordinate” VQO to establish a *de facto* buffer zone
6 around the Scenic Area.

7 Furthermore, applying the Scenic Act “visually subordinate” VQO to development
8 outside the Scenic Area is inconsistent with the Columbia River Gorge Commission’s (“Gorge
9 Commission”) findings. EFSEC should defer to the Gorge Commission’s interpretation of the
10 Scenic Act, because the Gorge Commission is the agency responsible for administering the
11 Scenic Act. *See Skamania Cnty.*, 144 Wn.2d at 43. In this administrative role, the Gorge
12 Commission is responsible for reviewing county Scenic Area land use ordinances, through which
13 the Scenic Act is implemented, and determining their consistency with the Management Plan,
14 and thus the Scenic Act. *Tr.* at 1383:11-19 (Michael Lang).²² Consequently, a Gorge
15 Commission consistency determination evidences the Gorge Commission’s own interpretation of
16 the Scenic Act.

17 The Gorge Commission has reviewed Skamania County’s Scenic Area ordinance—
18 SCC Title 22—and found it consistent with the Management Plan. *Tr.* at 1383:20-1384:1
19 (Lang). SCC Title 22 incorporates the Scenic Area “visually subordinate” VQO. *See, e.g.*,
20 SCC 22.04.010 (defining “visually subordinate”). However, SCC Title 22 expressly provides
21 that it applies to the Scenic Area and “to no other lands within the county.” SCC 22.02.050. The
22 Gorge Commission, by finding SCC Title 22 consistent with the Management Plan, necessarily
23 found that SCC 22.02.050 is also consistent. Thus, the Gorge Commission has found that under

24
25 ²² *See also Skamania Cnty.*, 144 Wn.2d at 36 (“The Act also required each of the six counties within the
26 Scenic Area to adopt a local land use ordinance, which was to be consistent with the Management Plan and subject
to the Gorge Commissioner’s review and approval.”).

1 the Scenic Act the “visually subordinate” VQO is only to be applied within the Scenic Area.
2 Applying it to development outside the Scenic Area contradicts the Gorge Commission’s
3 interpretation of the Scenic Act.

4 In addition, nothing in SCC Title 22 “[e]stablish[es] protective perimeters or buffer zones
5 outside of the Columbia River Gorge National Scenic Area.”²³ SCC 22.02.120(A)(10). Again,
6 the Gorge Commission, by finding SCC Title 22 consistent with the Management Plan,
7 necessarily found that SCC 22.02.120(A)(10) is also consistent. SCC 22.02.120(A)(10) is clear:
8 nothing in SCC Title 22—including the “visually subordinate” VQO—is to be used to establish a
9 buffer zone around the Scenic Area. Again, applying this VQO to development outside the
10 Scenic Area contradicts the Gorge Commission’s interpretation of the Scenic Act.

11 In summary, the Scenic Act’s saving clause has two undeniable effects. First, it
12 precludes the establishment of a buffer zone around the Scenic Area if the sole rationale is to
13 protect the Scenic Area. Second, it precludes the Scenic Area “visually subordinate” VQO from
14 being used to establish a buffer zone around the Scenic Area. For these reasons, Opponents’
15 attempted use of the Scenic Area “visually subordinate” VQO to establish a *de facto* buffer zone
16 around the Scenic Area is prohibited by the Scenic Act, and EFSEC should not allow it.

17
18 **(c) Applying Scenic Area VQOs (even indirectly) to development**
19 **entirely outside the Scenic Area would s economic development**
20 **in the Columbia Gorge region**

21 In addition to the methodological and legal implications of applying Scenic Area VQOs
22 to development outside the Scenic Area, EFSEC also needs to consider the economic

23 ///

24 ///

25 ²³ This is echoed in the Gorge Commission’s own land use ordinance. *See* Commission Rule 350-81-
26 070(1)(g) (identifying the following provision as implementing the Scenic Act’s savings clause: “Neither the Forest
Service nor the Gorge Commission may establish any buffer zones or protective perimeters outside the boundaries
of the Scenic Area.”).

1 implications of doing so. This is especially true in light of the Scenic Act’s stated purpose of
2 “protect[ing] and support[ing] the economy of the Columbia River Gorge.” 16 U.S.C. § 544a(2).

3 The Washington Department of Commerce presented testimony that “county policy
4 goals, and state goals and policies regarding both renewable energy development and economic
5 development in general would be thwarted” if the Project is rejected in order to protect the
6 Scenic Area. Ex. 36.00r at 5. As Leonard Bauer, Managing Director of Growth Management
7 Services for the Department of Commerce, testified, communities in the Gorge (*e.g.*, those in the
8 urban exempt areas of the Scenic Area) have experienced difficult economic times due to the
9 collapse of the timber and fishing industries and the withdrawal of developable land due to the
10 Scenic Act. *Id.* at 6. In response, Congress and the State of Washington have invested millions
11 of dollars to support economic development.

12 For Skamania County alone, Commerce has provided approximately
13 \$195,000 per year since 2001 for NSA planning, and over \$14 million
14 in Community Development Block Grant (CDBG) and Community
15 Economic Revitalization Board (CERB) grants, and Public Works
16 Project (PWP) loans and grants to the nine cities for infrastructure and
other economic development projects. And these are just investments
administered by Commerce. We know that federal and state funds
from other agencies supporting other community programs have been
invested in these communities as well.

17 *Id.* at 7. If Opponents are successful in stopping the Project due to assumed visual impacts on
18 Scenic Area KVAs,

19 it would set a precedent that opponents of other projects in the area
20 might try to leverage to defeat those projects. And that would create
21 great uncertainty about future economic development for private
22 property owners in the areas outside the boundaries of the [Scenic
23 Area]. Uncertainty over what potential uses could be developed on
24 certain properties typically stifles interest in investing in those
properties. Thus, the areas outside the [Scenic Area] would find it
difficult to attract or even retain businesses or residents, resulting in
county or city revenues that remain stagnant at best. Counties or
cities, in turn, would be unable to invest in community facilities and
resources, affecting the families’ and individuals’ quality of life.

25 *Id.* at 7-8. Opponents have opposed and are currently opposing projects to which Opponents
26 admit the Scenic Area VQOs do not “directly” apply. Ex. 25.00 at 6:17-18; Tr. at 1381:20-23

1 (Lang); FOCG Pet. for Intervention at 4. Furthermore, FOCG admitted that in deciding whether
2 to support or oppose development in urban exempt areas it makes subjective decisions as to
3 whether or not a particular project “deplete[s] Gorge resources.” Ex. 25.05c; Tr. at 1380:7-17
4 (Lang). If EFSEC were to set a precedent by applying Scenic Area VQOs to the Project,
5 Opponents’ weapons would be fully loaded, thereby realizing the uncertainty and furthering the
6 economic stagnation the State of Washington has invested millions of dollars to combat. EFSEC
7 needs to carefully consider these economic ramifications of applying Scenic Area VQOs to the
8 Project.

9 **b. Whistling Ridge’s 21 visual simulations accurately illustrate how a**
10 **“worst case” Project would appear relative to its surroundings**

11 Whistling Ridge provided large-format visual simulations of the Project from 21 different
12 viewpoints.²⁴ *See generally* Ex. 8.08r. These simulations “seek to present as complete a
13 representation as possible of the relevant view that a human would perceive if standing at a given
14 viewpoint.” Ex. 8.03r at 5:4-6. They simulate a Project design consisting of 50 2.5-MW Clipper
15 Liberty turbines, which stand 415 feet tall.²⁵ Ex. 8.00 at 7:15-8:9. To minimize aesthetic
16 impacts, Whistling Ridge has since stipulated that it will construct no more than 38 2-plus MW
17 turbines. Tr. at 73:20-74:6 (Spadaro). The “E” and “F” turbine strings have been eliminated.
18 Tr. at 74:7-12 (Spadaro). No more than five turbines are now proposed in the southern half of
19 the “A” string (*i.e.*, former A1-A7 turbines). Tr. at 74:13-17 (Spadaro). This will improve the
20 Project’s visual coherence, further mitigating any likely aesthetic impacts.²⁶ In addition, due to

21 _____
22 ²⁴ In the Kittitas Valley proceeding, EFSEC found that the *six* simulations in the FEIS constituted an
“extensive” visual and aesthetic impact analysis. Order No. 826 at 30 (emphasis added).

23 ²⁵ The “11-foot difference between the [415-foot-tall turbines in the] simulations and the [426-foot]
24 maximum height allowed under the ASC does not affect the visual impact analysis.” Ex. 9.02r at 3:25-26
(uncontradicted testimony).

25 ²⁶ Apostol identified visual coherence as means of mitigating the Project’s visual impacts. *See, e.g.*,
26 Ex. 21.00 at 24:5 (identifying “rearranging the turbines within [a] view to present a less chaotic appearance” as a
mitigation measure), 29:14 (“[G]ood design that is visually coherent is crucial to mitigating visual impacts.”).
Apostol then identified Viewpoint 11: I-84 Westbound, Viewpoint 13: I-84 Eastbound, and Viewpoint 14: Viento

(continued . . .)

1 the visual simulations' haze visibility settings, the turbines are "*slightly more visible* in the final
2 composites than they would actually be if an observer were standing on the ground viewing them
3 from the exact place, date, and time that the photos were taken." ASC at 4.2-67-68 (emphasis
4 added). Thus, the 21 visual simulations illustrate a "worst case" scenario. Ex. 8.00 at 7:19.
5 Each visual simulation also contains a host of valuable information beyond the simulation itself,
6 including the precise location of the viewpoint and the distance to the nearest turbine, the time,
7 date, directional bearing, and effective focal length of the simulation; identification of the visible
8 turbines; and the distance the simulation should be held from the viewer's eye to replicate real-
9 world size. *See generally* Ex. 8.08r.

10 The ASC's aesthetic impact assessment specifically called out the Project's proximity to
11 the Scenic Area. ASC § 4.2.3.2. For this reason, Whistling Ridge prepared visual simulations
12 for all eight Scenic Area KVAs from which some portion of the Project would be visible.²⁷ *See*
13 Ex. 9.00 at 5:26-8:23. Visual simulations were prepared from multiple locations along four of
14 the five Scenic Area KVA corridors from which the Project would be visible: the Columbia
15 River, I-84, Cook-Underwood Road, and SR 141.²⁸ Whistling Ridge also conducted an
16 extensive analysis assessing and mapping Project visibility from the Columbia River and I-84
17 Scenic Area KVA corridors. *See* Exs. 8.04r-8.05r. Viewpoints simulated were those from which
18 the greatest number of turbines would be visible at the least distance. Ex. 8.03r at 12:19-15:20,
19 18:16-19:10. At other locations, the terrain, vegetation, or direction of travel makes the Project

20 _____
(. . . continued)

21 State Park as having a chaotic appearance in the "worst case" simulations. Ex. 21.00 at 23:20-21, 25:13, 26:1.
22 However, the visual simulations from these three viewpoints included turbines in strings that have since been either
23 eliminated altogether or reduced in scope. *See* Ex. 8.08r. Consequently, visual coherence from the three viewpoints
24 Apostol identified should improve.

25 ²⁷ The Project will be visible from the following eight Scenic Area KVAs: the Historic Columbia River
26 Highway, I-84, Panorama Point Park, Cook-Underwood Road, Washington SR 141, the Columbia River, Oregon
Highway 35, and Wyeth Bench Road. *See* Ex. 9.00 at 5:26-8:23.

²⁸ Oregon Highway 35 is also a Scenic Area KVA corridor. *See* Ex. 9.00 at 5:18. However, Project
visibility from Oregon Highway 35 is extremely limited with Viewpoint 20 being the location closest to the Project
with relatively unimpeded visibility of the Project site. Ex. 8.03r at 24:5-15.

1 less visible.²⁹ *Id.* In other words, the selected viewpoint locations are the ones from which the
2 Project would be most visible.³⁰ *See id.*

3 As for the fifth Scenic Area KVA corridor—the Historic Columbia River Highway—
4 Whistling Ridge prepared one simulation, again, at the location from which the greatest number
5 of turbines would be visible at the least distance. *See Ex. 8.06r.* Additional simulations were not
6 prepared for unconnected remnants of the Historic Columbia River Highway closer to the Project
7 site, because Whistling Ridge’s visibility analyses found that only portions of two to three
8 turbines would be visible at Mitchell Point and Ruthton Point, which did not justify additional
9 simulations. *Ex. 8.03r at 16:14-18:2; Tr. at 260:1-263:13 (Tom Watson).* Visual simulations
10 were not prepared from other unconnected remnants of the Historic Columbia River Highway
11 because vegetation blocked views of the Project site, and the visibility analyses indicated that
12 terrain would limit Project visibility in the absence of any vegetation. *Tr. at 270:20-272:20*
13 *(Tom Watson).*

14 In order to comply with WAC 463-60-362(3)’s requirement to “show how the installation
15 will appear relative to its surroundings,” Whistling Ridge did not confine its visual simulations to
16 Scenic Area KVAs but rather created simulations from seven other locations within the Scenic
17

18 ²⁹ The one arguable exception might be from I-84 and the Columbia River west of the Project site.
However, Tom Watson testified that

19 the only things that would change as you travel to the west toward Hood River [from
20 Viewpoint 11: I-84] would be incremental decreases in the quantity of partially
obscured turbines and incremental increases in the apparent size of the turbines, with
21 that apparent size increasing from the equivalent of about a 0.18-inch-tall object held
two feet away from one’s face at Mosier to about a 0.3-inch-tall object held two feet
22 away from one’s face at exit 64 at the eastern end of Hood River, which is
approximately 5.5 miles from the nearest proposed turbines. West of exit 64, the
23 Project site is only visible through short visibility windows. In my opinion, little
would be learned by additional simulations on this stretch.

24 *Ex. 8.03r at 19:17-25.*

25 ³⁰ In fact, the closest point at which the Project has any visibility from the I-84 and Columbia River Scenic
Area KVA corridors is approximately 2.5 miles, at which distance the turbines have an apparent height of 3/4ths of
26 an inch. *See Exs. 8.04r, 8.07r.* The nearest viewpoint of any significance along these two Scenic Area KVA
corridors is even farther away. *See Ex. 9.02r at 29:25-30:2.*

1 Area and three locations outside the Scenic Area. See ASC Fig. 4.2-5. Public input was used to
2 determine viewpoint locations. Ex. 8.03r at 20:13-16; Tr. at 318:10-21 (Pearson); see also ASC
3 at 4.2-65 (describing how public input shaped the impact analysis).

4 Tom Watson provided testimony directly refuting Apostol’s insinuations that visual
5 simulations were purposefully created using cloudy skies to minimize contrast. Ex. 8.03r at
6 20:1-21:4. Mr. Watson further testified (as illustrated in Ex. 8.10r) that cloudy backgrounds do
7 not necessarily minimize contrast between wind turbines and their surroundings. Ex. 8.03r at
8 21:5-22:15, 23:12-22; Tr. at 275:4-13, 276:8-18. Instead, the determining factor is the apparent
9 color of the background and the turbines, which changes as lighting changes throughout the day
10 (e.g., the location of the sun in relation to the turbines and the viewer). Ex. 8.03r at 21:5-24; Tr.
11 at 233:7-14, 242:15-17, 275:14-18 (Tom Watson).

12 Whistling Ridge did not provide animated simulations of the Project because they tend to
13 overstate likely visual impacts by a moving viewer. Ex. 8.03r at 11:1-3.

14 For example, a viewer on I-84 is not standing still but rather is moving
15 at 65 miles per hour, often in traffic, down a curvy interstate highway.
16 Ignoring the fact that traffic alone will tend to focus a driver’s
17 attention on the road, Dautis Pearson has testified that as an observer’s
18 speed increases, the observer tends to focus along the line of travel,
19 such that travelling down the highway at this speed will tend to
decrease the visual impact of the moving blades. (Exhibit No. 9.02r,
page 26.) Because a static animation (*i.e.*, one in which the viewer is
not moving) will not represent the viewer’s movement, the visual
impacts will tend to be overstated in such an animated simulation.

20 *Id.* at 11:3-11; Tr. at 245:7-18 (Tom Watson). In fact, the FHWA Handbook provides that
21 “[h]ead-mounted cameras, for instance, have demonstrated that a driver can look directly at a

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1 landmark and still not see it.”³¹ Ex. 8.13c at 63. Furthermore, as distance increases, contrast
2 tends to decrease. Ex. 9.02r at 25:19-21. Finally, the Project is located

3 above the visual plane of most viewers. The line of sight for most
4 visitors in the Columbia Gorge is likely focused on the Columbia
5 River itself and other features well below the skyline, such as hydro-
electric dams, towns, roads, railroads, and vegetation.

6 Ex. 9.02r at 26:6-12. Here, where most viewpoints are from highways and roads located quite a
7 distance from the Project site, animated simulations would not accurately represent what the
8 viewer would comprehend while travelling through these corridors.³²

9 In summary, Whistling Ridge has provided EFSEC with the most comprehensive,
10 informative set of visual simulations that have ever been submitted to EFSEC. None of
11 Opponents’ criticisms of these visual simulations have any merit. Whistling Ridge has complied
12 with WAC 463-60-362(3)’s requirement that it “show how the installation will appear relative to
13 its surroundings.”

14 **c. Whistling Ridge’s aesthetic impact analysis is appropriate and**
15 **consistent with the USFS’s Scenic Area inventories**

16 ASC § 4.2.3 included an assessment of the Project’s likely aesthetic impacts from the 21
17 viewpoints using the same methodology used to evaluate the likely aesthetic impacts of wind
18 energy projects previously reviewed and recommended for approval by EFSEC. Ex. 9.00 at

19 ³¹ Tom Watson testified that animated simulations’ tendency to overstate likely aesthetic impacts from
20 Scenic Area KVAs would be lessened at those Scenic Area KVAs where viewers are not moving. Tr. at 247:7-
21 248:6. Of the eight Scenic Area KVAs from which some portion of the Project would be visible, viewers would not
22 be moving at Panorama Point Park and viewers have the opportunity to stop along the Historic Columbia River
23 Highway. *Id.* Panorama Point Park is 6.68 miles from the closest turbine, at which distance the nearest turbine’s
24 apparent height would be 0.28 inch. *See* Ex. 8.08r: Viewpoint 10. Similarly, the viewpoint on the Historic
25 Columbia River Highway from which the greatest number of turbines would be visible at the least distance is 6.46
26 miles from the closest turbine, at which distance the nearest turbine’s apparent height would be 0.29 inch. *See*
Ex. 8.08r: Viewpoint 19. The moving part of the turbine (*i.e.*, the blades) comprises only a portion of that apparent
height, such that an animated simulation from either of these locations would not provide much additional
information. *See* Exs. 8.11c at 4, 8.13c at 116 (both identifying views between 3 to 5 miles of the viewer as more
important).

³² The moving nature of wind turbine blades was considered in the Project’s aesthetic impact analysis.
Tr. at 356:9-11 (Pearson).

1 15:26-16:3; Ex. 9.02r at 6:18-22, 8:22-9:1; Tr. at 308:18-22, 367:6-10 (Pearson). As described
2 below, the ASC’s assessment is consistent with the visual inventories prepared by the USFS for
3 the Scenic Area in the late 1980s.³³

4 Each viewpoint was assessed for scenic quality and viewer sensitivity using the factors
5 described in ASC § 4.2.3.1, and a rating was assigned.³⁴ The scenic quality ratings for the 21
6 viewpoints ranged from “Low” to “Moderately High to High.” ASC Table 4.2-5. These scenic
7 quality ratings are consistent with the USFS’s Scenic Area “Landscape Significance” map (Ex.
8 21.06 at 5), which “identifies the area within the Scenic Area that is adjacent to the Project site as
9 of second or third order of significance. In other words, these are not the most significant
10 landscapes in the Scenic Area.” Ex. 9.02r at 14:1-4 (uncontroverted expert testimony).

11 The viewer sensitivity ratings for the 21 viewpoints ranged from “Low” to “Moderate to
12 High.” ASC Table 4.2-5. These viewer sensitivity ratings are consistent with the USFS’s Scenic
13 Area “Landscape Sensitivity” map (Ex. 21.06 at 7), which provides that the area within the
14 Scenic Area that is adjacent to the Project site is “not the most sensitive or critical lands when
15 considering development.” Ex. 9.02r at 14:16-17 (uncontroverted expert testimony).

16 Using this baseline information, the Project’s likely aesthetic impacts were assessed using
17 the visual simulations, and a level of impact was assigned. ASC § 4.2.3.3. The level of impact
18 ratings for the 21 viewpoints ranged from “No change” to “Moderate.” ASC Table 4.2-5. These
19 ratings are consistent with the USFS’s “Visual Absorption Capability” map (Ex. 21.06 at 6),
20 which “identifies the area within the Scenic Area that is adjacent to the Project site as having a

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23 ³³ “[E]ven though these USFS inventory maps were not used for the analysis in the ASC because they do
24 not cover the Project site, the analysis in the ASC corresponds very well with the information provided in these
25 maps.” Ex. 9.02r at 14:20-22.

26 ³⁴ Contrary to Opponents’ selective reading of ASC § 4.2.3.1, none of the individually identified factors for
viewer sensitivity was determinative of the viewer sensitivity rating given in the ASC. See ASC at 4.2-29 (“The
final assessment of scenic quality was made based on professional judgment that took a broad spectrum of factors
into consideration, including” the identified factors); Tr. at 326:14-329:1 (Pearson).

1 moderate to high capability to absorb features or structures that are not common on the
2 landscape.” Ex. 9.02r at 14:7-10 (uncontroverted expert testimony).

3 **d. Opponents’ critique of Whistling Ridge’s aesthetic impact analysis is**
4 **riddled with assumptions and flaws**

5 The errors in Apostol’s critique of Whistling Ridge’s aesthetic impact analysis are
6 abundant and pervade his entire critique. *See generally* Exs. 8.03r, 9.02r (identifying Apostol’s
7 numerous errors). For example, using one of the four approaches to assessing scenic quality
8 discussed in the FHWA Handbook, Apostol declared that Whistling Ridge should have assumed
9 high scenic quality of views within the Scenic Area, and from Scenic Area KVAs in particular,
10 simply because Congress passed the Scenic Act. Ex. 21.00 at 8:8-12. *But see* Ex. 9.02r at 8:1-
11 17. In fact, the FHWA Handbook “quite quickly” dismisses the approach Apostol relied upon
12 and instead recommended evaluating scenic quality based on actual visual relationships.
13 Ex. 9.02r at 8:16-17. Furthermore, because “Apostol based the subsequent analysis in his
14 testimony on this mischaracterization of the FHWA methodology,” Apostol’s critique in its
15 entirety is unsound and unreliable. Ex. 9.02r at 8:18-19.

16 Apostol’s analysis relies on a series of “inappropriate assumptions that undermine the
17 validity of his conclusions.” Ex. 9.02r at 9:12-13; *see generally* Ex. 9.02r at 9:12-11:2
18 (cataloging Apostol’s “inappropriate assumptions”). First, using the approach dismissed by the
19 FHWA Handbook, Apostol assumed that scenic quality from all Scenic Area KVA viewpoints
20 should have been “at least high by definition.” Ex. 9.02r at 8:1-9-6. Second, Apostol assumed
21 that viewer sensitivity from Scenic Area KVAs “is by definition high.” Ex. 21.00 at 23:6. There
22 is no technical or evidentiary foundation for this assumption.

23 There is nothing in the written information obtained from the USFS
24 about the creation of the Scenic Area inventories (Exhibit No. 9.04r)
25 that suggests the [Scenic Area] KVAs should be assumed to have high
26 viewer sensitivity. That information evidences that [Scenic Area]
KVAs were identified in the drafting of the Interim Guidelines for the
Scenic Area *before* the USFS’s inventories were completed, and the
Interim Guidelines provide that [Scenic Area] KVAs were selected

1 because they were “[a]reas from which large numbers of people view
2 the National Scenic Area portions of the Gorge.” (Exhibit No. 9.05r.)
3 As the ASC recognized, the number of viewers is a factor in assessing
4 viewer sensitivity, but it is not the only factor; the type of viewers,
5 viewing conditions, and quality of the view must also be considered.
6 (ASC page 4.2-30.) In short, although [Scenic Area] KVAs play an
7 important role in regulating development within the Scenic Area, it is
8 inappropriate for purposes of a visual impact assessment for a project
9 located outside the Scenic Area to simply assume that [Scenic Area]
10 KVAs have “by definition” high viewer sensitivity.

11 Ex. 9.02r at 9:15-10:13. Finally, Apostol assumed that “wind turbines have high contrast
12 independent of any real consideration of the landscape.” Ex. 9.02r at 10:14-15; *see, e.g.*, Ex.
13 21.00 at 3:21 (“*Due to their large scale and unique appearance, modern wind turbines by their
14 very nature result in high visual contrast to most landscapes.*”). However, as Mr. Pearson
15 testified, “unless you consider the landscape in which wind turbines are proposed/located, there
16 is nothing to contrast the wind turbines against.” Ex. 9.02r at 10:15-17. By assuming (i) that
17 scenic quality is high because the Project site is adjacent to the Scenic Area, (ii) that viewer
18 sensitivity is high from all Scenic Area KVA viewpoints, and (iii) that wind turbines inherently
19 result in high contrast, Apostol effectively assumed away the aesthetic impact analysis, thereby
20 rendering EFSEC’s discretion and decision-making authority moot. Ex. 9.02r at 11:6-16.

21 In addition to these flaws in Apostol’s general critique, his critique of the ASC’s aesthetic
22 impact analysis for the following five Scenic Area KVA viewpoints demonstrates an utter lack of
23 understanding of how to evaluate aesthetic impacts:

24 **(i) Viewpoint 11: I-84 Westbound**

25 Viewpoint 11’s scenic quality was rated “Moderate” in the ASC with “Moderate” viewer
26 sensitivity and a “Moderate to Low” level of impact. ASC Table 4.2-5. Apostol claimed that the
ASC should not have considered distance in rating viewer sensitivity from Viewpoint 11,
because “[v]iewpoints are inherently sensitive or not, regardless of the distance to a
development.” Ex. 21.00 at 14:18, 23:3-5. However, as Mr. Pearson testified in rebuttal,
distance is actually supposed to be considered when assessing viewer sensitivity. Ex. 9.02r at

1 18:20-19:4. Apostol’s asserted deficiency is simply not grounded in any accepted aesthetic
2 impact methodology.

3 Apostol also claimed that clouds visible in this simulation “greatly reduce[] the contrast
4 presented by the white turbines. The turbines would show stronger contrast against a blue or gray
5 sky, both equally plausible in this location.” Ex. 21.00 at 23:2. However, Ex. 8.10r contains a
6 version of the Viewpoint 11 simulation in which the clouds behind the turbines were digitally
7 replaced with sky gradient that matches the surrounding photographed sky. Ex. 8.03r at 21:7-8.

8 [E]ven an untrained eye can see that the wind turbines in the original
9 simulation (with clouds) contrast no less with the background than the
10 edited simulation (without clouds). This is due to a basic principle of
11 landscape lighting and contrast, namely that the level and perception
of contrast of the landscape object (*i.e.*, the turbines) in relation to a
background object (*i.e.*, the clouds) depends on the apparent colors of
these two objects.

12 Ex. 8.03r at 21:11-16. Mr. Pearson further testified that Ex. 8.10r evidences that “removing
13 these clouds does not result in more contrast.” Ex. 9.02r at 30:25. Again, Apostol’s asserted
14 deficiency regarding the clouds’ effect on contrast lacks merit.

15 Apostol based his analysis of Viewpoint 11 on wirelines/wireframes, which he asserted
16 are “a very useful tool for analyzing impacts of wind projects.” Ex. 21.00 at 22:12. However,
17 wirelines are not to be used to evaluate likely aesthetic impacts. Ex. 9.02r at 29:10-13.

18 It should be obvious that viewers do not see wirelines. Wirelines are
19 useful for understanding position and relative scale, but should not be
20 used as a basis for evaluating visual impacts. This is evident in Exhibit
21 No. 9.06r, which is taken from the DEIS for the Project and shows the
wireline and simulation for Viewpoint 11: I-84 Westbound. If the
Project is built, no one will “see” this wireline image or anything close
to it, such that it should not be used to assess visual impacts.

22 Ex. 9.02r at 29:13-18.

23 Finally, Apostol pulled out his safety blanket of assumptions.

24 [T]he visual contrast of the 25 turbines within the view is high, and
25 that the visual sensitivity from this Key Viewing Area within a
26 Federally designated National Scenic Area is by definition high.
Therefore the impact is high.

1 Ex. 21.00 at 23:5-7. As described above, the repeated use of these inappropriate assumptions
2 renders Apostol’s analysis unsound and unreliable.

3 **(ii) Viewpoint 12: Koberg Beach State Park**

4 Viewpoint 12’s scenic quality was rated “Moderately High” in the ASC with “Moderate”
5 viewer sensitivity and a “Moderate” level of impact. ASC Table 4.2-5. Apostol’s critique of the
6 ASC’s aesthetic impact analysis for this viewpoint just relies on his bevy of assumptions.

7 As a designated [Scenic Area] KVA and a State Park, the viewers
8 from this location would have very high sensitivity irrespective of the
9 Applicant’s analysis. Based on the high visual quality, high viewer
sensitivity, and the moderate to high contrast, the project would have
moderate to high impacts from this viewpoint.

10 Ex. 21.00 at 24:19-21. Again, the repeated use of these inappropriate assumptions renders
11 Apostol’s analysis unsound and unreliable.

12 **(iii) Viewpoint 13: I-84 Eastbound**

13 Viewpoint 13’s scenic quality was rated “Moderately High” in the ASC with
14 “Moderately Low” viewer sensitivity and a “Moderate to Low” level of impact. ASC Table 4.2-
15 5. While nonetheless recognizing that view duration can affect viewer sensitivity, Apostol
16 criticized the ASC’s recognition that viewers travelling on an interstate highway with fleeting
17 views of the Project site are less sensitive. Ex. 21.00 at 25:2-5. However, Ex. 8.05r confirms the
18 fleeting nature of these one- to six-second visibility windows from eastbound I-84, and renders
19 Apostol’s criticism meritless.³⁵ See Ex. 8.03r at 12:23-13:15. Apostol also relies on wirelines.
20 Ex. 21.00 at 25:10. Again, wirelines should not be used to evaluate likely aesthetic impacts. Ex.
21 9.02r at 29:13-18. Finally, Apostol embraced his old friend the assumption: “[A]ll [Scenic
22 Area] KVAs should be considered to have high sensitivity. This is inherent in their designation
23 as Key Viewing Areas.” Ex. 21.00 at 25:7-8. “Since the existing scenic quality is outstanding

24 ³⁵ The duration of time some portion of the Project would be visible from the I-84 Scenic Area KVA
25 corridor is quite small relative to the total time a person views the Scenic Area from this Scenic Area KVA corridor.
26 Ex. 9.02r at 27:25-28. The longest duration view on eastbound I-84 is near Mitchell Point where only portions of
two to three turbines would be visible for a total of 38 seconds. Ex. 8.03r at 13:16-26.

1 and viewer sensitivity is high, and given the strong skyline effect, the impacts from this
2 viewpoint should be rated as high.” Ex. 25:13-14. Apostol’s repeated use of these inappropriate
3 assumptions renders his analysis unsound and unreliable.

4 **(iv) Viewpoint 14: Viento State Park**

5 Viewpoint 14’s scenic quality was rated “Moderately High to High” in the ASC with
6 “Moderately to High” viewer sensitivity and a “Moderate” level of impact. ASC Table 4.2-5.
7 Here, Apostol’s comment that the “very light clouds” present in the simulation may diminish
8 contrast is accurate insofar as it applies to the four turbines at the top of the hill. *See* Ex. 8.03r at
9 22:5-10. However, as Tom Watson testified, “there was neither an intention nor the opportunity
10 to manipulate the selection of weather at each viewpoint for supposed advantage.” Ex. 8.03r at
11 21:2-4. In fact, partly sunny days, such as the one used in this visual simulation, and very hazy
12 days are frequent in the Columbia Gorge. Tr. at 242:3-5 (Tom Watson). Consequently, there is
13 nothing unusual in the visual simulation. Furthermore, the closest turbine is 4 miles from this
14 Viewpoint 14, meaning that the turbines have an apparent height of approximately 0.3 inch. *See*
15 Ex. 8.07r. Finally, Apostol again inappropriately used the wireline to assess impacts. Ex. 21.00
16 at 25:21. This, along with Apostol’s continued reliance on his assumptions, undercuts his brief
17 critique of this viewpoint.

18 **(v) Viewpoint 19: Historic Columbia River Highway**

19 Viewpoint 19’s scenic quality was rated “Moderately High” in the ASC with “Moderate”
20 viewer sensitivity and a “Low” level of impact. ASC Table 4.2-5. Apostol testified this
21 viewpoint “may not reflect the actual impacts to this Key Viewing Area” due to its distance from
22 the Project. Ex. 21.00 at 25:8. However, as Ex. 8.06r demonstrates, this is the closest point
23 along the Historic Columbia River Highway recreational trail from which the Project would be
24 most highly visible. Ex. 8.03r at 22:24-23:11. Apostol again claimed that clouds diminish
25 turbine visibility in this simulation. Ex. 21.00 at 26:9. However, due to the location of the sun,
26 the presence of the clouds causes the turbines to have no less contrast than if the clouds were

1 digitally removed. Ex. 8.03r at 23:12-22; *see also* Ex. 8.10r. Apostol again inappropriately used
2 a wireline to assess contrast. Ex. 21.00 at 26:9. Finally, he repeated his erroneous assumption
3 regarding viewer sensitivity. Ex. 21.00 at 26:5. In short, Apostol’s critique has no merit.

4 **3. By using the appropriate aesthetic impact methodology, providing the**
5 **necessary visual simulations, and properly assessing the Project’s likely**
6 **aesthetic impacts, Whistling Ridge has satisfied the informational**
7 **requirements of WAC 463-60-362(3)**

8 In summary, Whistling Ridge used the *same* methodology as was used for the Kittitas
9 Valley, Desert Claim, and Wild Horse projects that EFSEC previously approved. Use of the
10 Scenic Area “visually subordinate” VQO would have been inconsistent with the SMS
11 methodology under which Scenic Area VQOs were developed. Furthermore, in the Scenic Act’s
12 savings clause, Congress prohibited the establishment of a buffer zone around the Scenic Area if
13 the sole rationale is to protect the Scenic Area, which, according to Apostol, is “by definition”
14 the result of applying this Scenic Area VQO. Whistling Ridge simulated the Project’s “worst
15 case” appearance from 21 viewpoints, including from all Scenic Area KVAs from which any
16 portion of the Project would be visible. Based on these simulations, and appropriately applying
17 the aesthetic impact methodology, Whistling Ridge rated the likely level of impact at each
18 viewpoint, which ranged from “No change” to “Moderate.”³⁶ Whistling Ridge’s ratings are
19 consistent with the USFS visual inventories of the Scenic Area. Whistling Ridge has satisfied
20 the informational requirements of WAC 463-60-362(3).

21 ³⁶ Whistling Ridge’s aesthetic impact analysis is consistent with prior EFSEC findings. In the Kittitas
22 Valley proceeding, EFSEC found that wind turbines lack “visual dominance” when viewed at a distance of four
23 times turbine height. Order No. 826 at 31. EFSEC subsequently provided that micro-siting determinations for
24 turbines within 2,500 feet of non-participating landowners’ existing residences shall give the highest priority to
25 increasing the distance between turbines and residences to more than the four times turbine-height distance. Order
26 No. 831 at 4. In the Desert Claim proceeding, EFSEC reiterated the 2,500-foot distance. Order No. 843 at 19.

Here, nearly half-a-mile (2,560 feet) separates the turbines from the closest residence. ASC at 4.1-4. The
closest viewpoint is Viewpoint 23: Ausplund Road End, which is 0.64 mile away from the nearest turbine. Ex.
8.08r. The closest points on the Columbia River and I-84 Scenic Area KVA corridors from which the Project would
be visible are approximately 2.5 miles away from the nearest turbine. *See* Exs. 8.04r, 8.05r. Accordingly, based on
EFSEC’s prior findings, the Project’s turbines will lack “visual dominance.”

1 **E. GEOLOGY**

2 **1. Applicable EFSEC standards and requirements**

3 No performance standards in WAC ch. 463-62. *But see*
4 WAC 463-60-302(1)(a) informational requirements.

5 **2. The Project complies with EFSEC’s informational requirements**

6 Whistling Ridge retained the services of a Washington-licensed geologist, Dan Meier, to
7 oversee and conduct a soils and geological investigation on the Project site. The investigation
8 and its conclusions were documented in a “Preliminary Geotechnical Report” (“Geotechnical
9 Report”) dated February 2009, which is stamped by Brian M. Willman, a Washington-licensed
10 professional engineer. ASC App. A; Tr. at 1095:21-24 (Meier). ASC § 3.1 summarizes the
11 Geotechnical Report and draws conclusions to show compliance with EFSEC requirements.

12 The ASC and Geotechnical Report describe the geology on the Project site. The
13 engineering geologist analyzed both desk-top source information and existing publicly available
14 maps, and conducted a site reconnaissance, including 12 test pits to evaluate subsurface geology,
15 risk of landslides, and erosion concerns. ASC App. A. A very large-scale third-party map shows
16 a potential landslide area at the far north end of the site (the “C” turbine string). ASC at 3.1-19
17 to 20; Tr. at 1113:17-1114:10 (Meier). However, Whistling Ridge’s site investigation
18 demonstrated there is “little geomorphic evidence for landslide activity,” and the area does not
19 appear to pose an actual risk of landslides. ASC at 3.1-20; Tr. at 1113:18-20 (Meier).

20 Importantly, and as was emphasized repeatedly in the cross-examination of geologist
21 Mr. Meier, to meet EFSEC’s standards, a preliminary investigation is required. Whistling Ridge,
22 at this stage, is not required to conduct final engineering, and Mr. Meier was clear that the
23 geological investigation is an “initial investigation only.” He explained:

24 Well, the initial investigation is done as a combination of feasibility
25 for the site, for the proposed facility, and also to determine whether
26 there are safety hazards that cannot be mitigated and to determine what
level of mitigation, if any may be necessary going forward; not to
design the mitigation but to determine whether there is a potential need

1 for it. . . . [I]t's common to have at least a two-phase sometimes more
2 approach to the geotechnical investigation work. You need to show
3 where the—you have targets to design a final investigation in order to
4 concentrate your efforts on correct areas. . . . We've worked on siting
natural gas pipelines, and we've had other siting councils where we've
basically taken the same approach, and even all the way through, I
believe the Oregon Supreme Court, the approach has been vetted.

5 Tr. at 1124:8-1125:3. While the Geotechnical Report used a hypothetical tower foundation
6 design, including rock anchors, a final design of the Project is not known at this time, equipment
7 has not been purchased, and more than a preliminary investigation is impossible at this stage.

8 In cross-examination, Mr. Aramburu spent an extensive amount of time attempting
9 without success to prove that potential "A" turbine string locations are in an area with substantial
10 landslide or erosion risk. In fact, none of the proposed turbine strings are located within Class II
11 Landslide Hazard Areas ("LHAs"). Ex. 3.00 at 9:22-10:3. Several towers along the western side
12 of the Project site ("A" and "B" turbine strings) are proposed along ridge lines with descending
13 slopes that are greater than 35 degrees (70%). ASC at 3.1-20. This distinction is important. The
14 actual turbine corridors are *not* proposed in areas that demonstrate landslide, earth flow, debris
15 flow, or erosion risks. The proximity to adjacent slopes has little relevance and is a matter that is
16 routinely addressed in final design, engineering, and construction. Further, Mr. Aramburu failed
17 to establish that there was any risk whatsoever to the stability of the slopes below turbine
18 locations, as a consequence of any construction activity, including, without limitation, blasting.
19 See Tr. at 1101:20-1102:16, 1114:20-23, 1123:14-25 (Meier).

20 Opponents' cross-examination focused on landslide risk and sought to confuse issues of
21 erosion on lower slope areas with unproven landslide risks in the areas proposed for turbine
22 construction. The Geotechnical Report described several potential engineering and construction
23 design methodologies that would reduce, minimize, and eliminate any risk of erosion or slope
24 stability concerns. See ASC App. A at 5-1 to 5-11. As Mr. Meier testified, test pits typically
25 were limited to a maximum depth of 15 feet, because the rock underlying that 15-foot depth was
26 so hard (and so stable) that excavation was impossible. Tr. at 1122:11-25, 1100:23-1101:6.

1 To address any potential concerns relating to landslides along the slopes adjacent to the
2 final turbine locations, the geotechnical engineer and geologist provided data to show that the
3 site is fully capable for the Project's use, but deferred the actual engineering solutions to final
4 engineering and design work conducted prior to construction. The Geotechnical Report
5 concludes with the following recommendation and conclusions:

6 Exposure of the towers to headward erosion of the steep slope
7 drainages can be minimized by providing maximum possible setbacks
8 from the tops of the steep slopes and-or by siting the turbines along
9 portions of the ridgelines that are above intervening spur ridges. The
10 most critical area of exposure to Class II LHAs is the narrow ridge at
the southern portion of the "A" line. It is URS's opinion that the
proposed [Project] facilities can be constructed and operated without
danger to human life or the surrounding environment due to landslide
hazards.

11 ASC App. A, concluding page (no page numbers provided in this portion of the document).

12 Mr. Meier explained in both cross-examination and redirect testimony that while final placement
13 would occur during the preconstruction micrositing process, it is ideal to "place the turbines
14 where those spur ridges would intersect the main ridge because that gives you a broader area to
15 work, and it also keeps you away from the potential headward erosion of the spur values."

16 Tr. at 1119:18-21. Mr. Meier further testified that Whistling Ridge's proposal to minimize the
17 southern half of the "A" turbine string to not more than five turbines would best implement the
18 geotechnical engineering recommendations, in that five spur ridges exist, likely providing the
19 best platform for construction of turbines in these locations. Tr. at 1119:12-1120:20.

20 As a matter of substance, the geological and soils investigation and accompanying
21 narratives in both the ASC and the Geotechnical Report provide the information required by
22 WAC 463-60-302, and demonstrate that the Project can be constructed and operated without
23 hazards to life, safety, property, or the environment.

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1 **F. ROADS AND TRANSPORTATION**

2 **1. Applicable EFSEC standards and requirements**

3 No performance standards in WAC ch. 463-62. *But see*
4 WAC 463-60-296 and 463-60-372's informational requirements.

5 **2. Turbine blades up to 164 feet in length can be transported to the Project site**
6 **without any improvements to roads in the Scenic Area**

7 ASC § 4.3 describes how construction and operation of the Project would affect
8 transportation and traffic. *See also* ASC §§ 2.19.5, 2.19.6; Exs. 11.00, 12.00. The primary
9 transportation issue concerns transporting turbine blades over 150 feet in length through the
10 Scenic Area on SR-14 and Cook-Underwood Road.

11 The transportation and traffic analysis in the ASC was performed using a blade length (or
12 load length) of 150 feet. *See* ASC at 4.3-10; Exs. 11.00 at 7:8-11, 12.00 at 4:1-3; Tr. at 498:24-
13 25 (Nathan Larson). The ASC provided that specialized trucks with a drivable rear axle would
14 require a 135-foot inside turning radius to navigate through the Scenic Area from SR-14 and on
15 Cook-Underwood Road.³⁷ ASC at 4.3-14. Based on the information in the ASC, the County
16 Engineer testified that use of Whistling Ridge's preferred access route does not require any road
17 improvements within the Scenic Area, provided that oversize, overweight vehicles, such as those
18 transporting wind turbines, use the east intersection of SR-14 and Cook-Underwood Road and
19 the east intersection of Cook-Underwood Road and Willard Road. Ex. 12.00 at 5:24-6:8. In
20 other words, regardless of blade length (or load length) no road improvements within the Scenic
21 Area are necessary if Whistling Ridge uses specialized trucks with a drivable rear axle and a
22 135-foot inside turning radius.

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25 ³⁷ A 20-foot allowance for "tip swing" is also necessary. ASC at 4.3-14. "Tip swing" is an extra allowance
26 for a load that moves laterally as the truck turns. Tr. at 488:9-11 (Larson). A 164-foot long turbine blade is unlikely
to require more than the 20-foot "tip swing" allowance provided for in the ASC. Tr. at 498:10-13 (Larson).

1 The ASC provided that turbine blades could be up to 164 feet in length, depending upon
2 turbine selection. ASC § 2.3.3.1. Blade lengths for 2.0- to 2.5-MW turbines range from 125 to
3 164 feet in length. Jan. 10, 2011 URS Supplemental Information on Turbine Blade Length.³⁸
4 Turbine blades over 150 feet in length can be transported with specialized trucks with a drivable
5 rear axle and a 135-foot inside turning radius. *Id.* at 2. Consequently, no road construction or
6 improvements within the Scenic Area are needed to transport 150- to 164-foot-long turbine
7 blades through the Scenic Area to the Project site.

8 **G. “NEED FOR FACILITY”**

9 **1. Applicable law and regulations**

10 **RCW 80.50.010. Legislative finding — Policy — Intent.** “The
11 legislature finds that the present and predicted growth in energy
12 demands in the state of Washington requires the development of a
13 procedure for the selection and utilization of sites for energy facilities
14 and the identification of a state position with respect to each proposed
15 site. The legislature recognizes that the selection of sites will have a
16 significant impact upon the welfare of the population, the location and
17 growth of industry and the use of the natural resources of the state.

18 It is the policy of the state of Washington to recognize the
19 pressing need for increased energy facilities, and to ensure through
20 available and reasonable methods, that the location and operation of
21 such facilities will produce minimal adverse effects on the
22 environment, ecology of the land and its wildlife, and the ecology of
23 state waters and their aquatic life.

24 It is the intent to seek courses of action that will balance the
25 increasing demands for energy facility location and operation in
26 conjunction with the broad interests of the public. Such action will be
based on these premises: (1) To assure Washington state citizens that,
where applicable, operational safeguards are at least as stringent as the
criteria established by the federal government and are technically
sufficient for their welfare and protection. (2) To preserve and protect
the quality of the environment; to 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. (3) To provide abundant energy at reasonable
cost. (4) To avoid costs of complete site restoration and demolition of
improvements and infrastructure at unfinished nuclear energy sites,
and to use unfinished nuclear energy facilities for public uses,

25 ³⁸ An exhibit number was not assigned to this memorandum during the adjudicative proceeding. *See* Tr.
26 at 1321:15-17, 1414:3-9. However, on four occasions EFSEC member Mr. Moss stated that the blade length
information requested by EFSEC would be part of “the record.” *See* Tr. at 503:25, 504:11, 505:15, 505:16.

1 including economic development, under the regulatory and
2 management control of local governments and port districts. (5) To
3 avoid costly duplication in the siting process and ensure that decisions
4 are made timely and without unnecessary delay.”

5 **RCW 80.50.040. Energy facility site evaluation council — Powers**
6 **enumerated.** “The council shall have the following powers: (1) To
7 adopt, promulgate, amend, or rescind suitable rules and regulations,
8 pursuant to chapter 34.05 RCW, to carry out the provisions of this
9 chapter, and the policies and practices of the council in connection
10 therewith; (2) To develop and apply environmental and ecological
11 guidelines in relation to the type, design, location, construction, and
12 operational conditions of certification of energy facilities subject to
13 this chapter”

14 **WAC 463-14-020. Need for energy facilities — Legislative intent**
15 **binding.** “RCW 80.50.010 requires the council ‘to recognize the
16 pressing need for increased energy facilities.’ In acting upon any
17 application for certification, the council action will be based on the
18 policies and premises set forth in RCW 80.50.010 including, but not
19 limited to: (1) Ensuring through available and reasonable methods that
20 the location and operation of such facilities will produce minimal
21 adverse effects on the environment, ecology of the land and its
22 wildlife, and the ecology of state waters and their aquatic life; (2)
23 Enhancing the public's opportunity to enjoy the esthetic and
24 recreational benefits of the air, water and land resources; and (3)
25 Providing abundant power at reasonable cost.”

26 **WAC 463-60-021. Council recognizes pressing need for energy**
27 **facilities.** “RCW 80.50.010 requires the council to ‘recognize the
28 pressing need for increased energy facilities.’ For that reason,
29 applications for site certification need not demonstrate a need for the
30 energy facility.”

31 **2. EFSEC does not have, and does not enforce, a “need” standard; the Project**
32 **will provide substantial public benefits**

33 During the adjudicative proceeding, Opponents confidently organized their case, witness
34 testimony, and cross-examination around a topic they called “Energy and Need for Facility.”
35 Opponents’ witness, Robert Michaels, summarized his testimony as follows: “Taken together,
36 these facts lead to a conclusion that Whistling Ridge is not necessary to meet future PNW power
37 demands.” Ex. 30.00 at 30:18-19. However, project “need” is *not* a relevant consideration in
38 any EFSEC proceeding. WAC 463-60-021. The State of Washington, through a Department of
39 Commerce witness, has emphasized that Michaels’ testimony and argument are irrelevant to

1 appropriate considerations of EFSEC. Ex. 35.00r at 2 (Michaels’ “argument is irrelevant,
2 rendering most of the supporting testimony irrelevant.”).³⁹ “Need” is simply not a criteria
3 considered by EFSEC. Michaels’ testimony, in its entirety, is irrelevant and aimed at disproving
4 Whistling Ridge’s compliance with a standard that does not exist and need not be proven. As
5 such, and given the massive rebuttal testimony filed, Michaels’ testimony is entitled to no weight
6 whatsoever.⁴⁰

7 Michaels’ testimony has been repudiated and utterly discredited by a host of witnesses,⁴¹
8 whose qualifications are beyond dispute and whose testimony starkly contrasts with both
9 Michaels’ cynical fabrication of an impossible future scenario that depends on utter stasis in
10 transmission planning and electrical grid management, and his obvious and complete ignorance
11 of Washington policy and the many innovations currently underway to enable a clean energy
12 future for Washington and the western United States. The Project is an important element of that
13 future, especially as it presents a remarkable opportunity to bolster the State’s failing timber
14 economy, and to salvage a local economy that has suffered from the failure of timber and the
15 heavy hand of federal regulation that, with other factors, has devastated Skamania County’s
16 natural resource industrial base and tax revenues.

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20 ³⁹ Former BPA Administrator Randall Hardy summarized his rebuttal testimony on pages 13-15 as follows:
21 “In summary, virtually all the issues regarding WREP raised in Professor Michaels’ testimony are either: (1) of little
22 or no relevance to the actual value of WREP; (2) tell only part of the story; and/or (3) essentially ignore state RPS
23 requirements which are the principal drivers of wind development in the PNW.” Ex. 16.00r at 15:11-14.

24 ⁴⁰ EFSEC has already held in this proceeding that RCW 80.50.010 “is a statement of the legislative
25 intention in enacting the law. It announces the purpose and intent of the Act’s operative provisions. The State
26 Supreme Court has upheld the Council’s refusal to consider economic issues in its review of a proposed merchant
27 plant (*see below*). The Council’s jurisdiction includes the power to evaluate ecological and environmental issues. It
28 will not receive evidence concerning costs, prices or volume of power of merchant plants, which are market-driven
29 and rely on markets to determine need and prices.” Council Order No. 856 (Prehearing Order No. 12) at 2-3.

30 ⁴¹ Opponents stated their intent to call a BPA representative as a witness, but never did so. *See* Nov. 1,
31 2010 letter from Mr. Aramburu.

1 **a. Construction of applicable statutes and rules—RCW 80.50.010 does**
2 **not impose a “need” standard**

3 RCW 80.50.010 is a section titled “Legislative finding—Policy—Intent.” It does not
4 trump, and it must be read to complement RCW 80.50.040 (a section titled “Energy facility
5 siting council—Powers enumerated”). WAC 463-14-020 is similarly found in a section of the
6 EFSEC rules titled “Policy and Interpretation.” The language of both RCW 80.50.010 and
7 WAC 463-14-020 is general and sets forth a policy framework to guide EFSEC’s adoption and
8 application of actual “environmental and ecological guidelines in relation to the type, design,
9 location, construction, and operational conditions of certification of energy facilities subject to
10 this chapter” pursuant to RCW 80.50.040, and now found in WAC chs. 463-60 and 463-62.
11 Conversely, WAC 463-60-021 was adopted as a substantive criteria and standard for EFSEC’s
12 review and consideration of ASCs. In contrast to RCW 80.50.010 and WAC 463-14-020’s
13 general language, WAC 463-60-021’s language is specific and directive: “RCW 80.50.010
14 requires the council to ‘recognize the pressing need for increased energy facilities.’ For that
15 reason, applications for site certification need not demonstrate a need for the energy facility.”
16 Read together, EFSEC considers the environmental and ecological impacts and benefits of
17 energy facilities, but in a fashion that advances, and does not impair, Washington’s imperative to
18 meet the “pressing need for increased energy facilities.”

19 Enabling the construction and operation of energy facilities in an environmentally
20 responsible fashion is the fundamental business of EFSEC. Renewable energy is one of many
21 different types of energy facilities (*e.g.*, coal-fired and gas-fired generation, nuclear generation,
22 natural gas pipelines, and electrical transmission lines) considered within this framework.
23 Hence, the environmental benefits of a wind energy facility that displaces thermal plants on a
24 megawatt-to-megawatt basis⁴² must be balanced against the known comparative environmental

25 ⁴² “Every single MWh of wind energy delivered to a receiving utility is serving a MWh of customer load
26 that would have otherwise been met by a conventional resource. Wind energy is most often displacing the carbon

(continued . . .)

1 costs of coal, gas, and nuclear plants.⁴³ That is precisely how EFSEC has considered wind
2 energy generation over the past decade. Cameron Yourkowski, Transmission Policy Associate
3 for Renewable Northwest Project, testified that Michaels’

4 testimony ignores the fact that the utilities receiving wind energy
5 transmitted over BPA transmission lines are displacing higher-cost
6 resources, which are typically either natural gas or coal. Displacing
7 fossil fuels and associated emissions and carbon dioxide production,
8 along with reduced exposure to natural gas price uncertainty and
9 volatility, is a primary benefit of wind and other forms of renewable
10 energy.

11 Ex. 18.00r at 13:4-9. The fabrication offered by Michaels is utterly off the mark, and is ignorant
12 of EFSEC’s fundamental legislative and policy directives.⁴⁴

13 As EFSEC has already found in Prehearing Order No. 12, the Washington Supreme
14 Court in *Residents Opposed to Kittitas Turbines v. EFSEC* recognized the clear distinction
15 between standards EFSEC is authorized to apply pursuant to its authority in RCW 80.50.040:

16 EFSLA requires EFSEC to develop environmental and ecological
17 guidelines regarding energy facility siting. RCW 80.50.040(2). As

18 (. . . continued)
19 dioxide and associated emissions from natural gas fired power plants and, increasingly, coal fired plants.”
20 Ex. 18.00r at 9:26-10:4; *see also* Ex. 18.00r at 14:1-7.

21 ⁴³ Mr. Hardy testified that “[t]he need for WREP, and other Northwest wind projects, is not driven by
22 traditional need for power considerations but instead by state RPS requirements. These requirements, whether
23 created by I 937 in Washington State or legislated in Oregon and California, were specifically designed to both
24 avoid construction of new green house gas (GHG) emitting resources to meet load growth and to replace existing
25 fossil fuel resources in those states with non GHG emitting renewable resources.” Ex. 16.00r
26 at 5:1-6 (emphasis in original). Mr. Hardy explained that “Michaels’ testimony essentially ignores this public policy
driver which led to passage of RPS laws and which has fostered the recent dramatic increases in wind development.
Looked at from an environmental perspective, these RPS requirements are a rough way of forcing utilities to
internalize the cost of GHG emissions and their impact on the global environment.” *Id.* at 5:7-11.

⁴⁴ Mr. Yourkowski testified that Michaels’ “testimony mischaracterizes how renewable energy is integrated
into the region’s electric transmission grid and marketed in the Northwest and California energy markets. The
Michaels’ Testimony mischaracterizes (1) how renewable energy is reliably integrated in the Northwest, (2) how
renewable energy is scheduled in the Northwest, and (3) BPA’s role in buying and consuming, and relative demand
for, renewable energy in the Pacific Northwest. The Michaels’ Testimony gave no weight to the broad public
support in the Pacific Northwest and California for expanding the use of new, renewable energy resources as a way
to reduce reliance on fossil fuels and offset the emission of greenhouse gases associated with the generation of
electricity from coal and natural gas.” Ex. 18.00r at 3:18-4:2.

1 economic analysis does not relate to environmental or ecological
2 concerns, we believe EFSEC was within its authority to refuse to
review the economic viability of the KVVPP.

3 165 Wn.2d 275, 321, 197 P.3d 1153 (2008). This construction is consistent with fundamental
4 tenets of Washington’s legal framework for statutory construction.⁴⁵ A general legislative
5 finding cannot be elevated above a specific enumerated power. While EFSEC does, in its
6 decisions, provide generalized findings that the Site Certificate meets the legislative policy
7 directives of RCW 80.50.010, the fundamental task is to evaluate a project’s environmental and
8 ecological concerns. This practice avoids the risk of elevating a general statement of legislative
9 policy and intent over a specific substantive statutory mandate and specific standards, which
10 would abrogate the entire land use and environmental permitting scheme (focused on statewide
11 interests) in favor of an arbitrary project-by-project evaluation of “need” and subjective and
12 parochial considerations of perceived policies and politics.

13 **b. The Project will help implement Washington State energy policy**

14 To the extent project benefits are considered, the value or benefit of a wind energy
15 project can be obtained from many sources, including general opinion testimony such as that
16 from the project proponent. EFSEC has historically accepted the evaluation performed by the
17 State itself, through its Energy Office, as key testimony and evidence to show that a project
18 satisfies the policy of RCW 80.50.010. Here, the State of Washington, through its Department of
19 Commerce Energy Office, has been explicit that the Project offers substantial benefits and
20 implements important State legislative directives and policies.

21 Tony Usibelli, Director of the State of Washington Energy Office, testified that the Project
22 “will create green jobs” and “expand the clean energy economy in Washington.” Ex. 34.00 at

23 ⁴⁵ “Under rules of statutory construction each provision of a statute should be read together (*in para*
24 *materia*) with other provisions in order to determine the legislative intent underlying the entire statutory scheme.
25 The purpose of interpreting statutory provisions together with related provisions is to achieve a harmonious and
26 unified statutory scheme that maintains the integrity of the respective statutes. Statutes relating to the same subject
will be read as complementary, instead of in conflict with each other.” *State v. Chapman*, 140 Wn.2d 436, 448, 998
P.2d 282 (2000) (footnotes omitted).

1 time when generation needs to be decreased to maintain transmission
2 stability. The added diversity should assist BPA in implementing
3 regulation requirements on the hydro system.

4 *Id.* at 9. Other existing and new technologies could further help to integrate wind resources,
5 including demand management and energy storage. Ex. 35.00 at 10. The Project “does not face
6 the same transmission constraints of many other wind farms, especially those in the Columbia
7 Gorge.” *Id.* at 11. Close proximity to transmission means that no costly transmission lines are
8 needed. “Avoiding the construction of such associated facilities represents both costs savings
9 and reduced environmental impacts. The WREP is uniquely situated as supported by existing
10 transmission.” *Id.* Further, the small size of the Project makes it easy to integrate into the BPA
11 system, and its unique location offers diversity and system benefits. *Id.*

12 The Project will provide very real benefits that serve important public health and safety
13 concerns for Skamania and Klickitat Counties. Robert Wittenberg, Jr., Manager of Skamania
14 County Public Utility District No. 1 (“SCPUD”), testified regarding these benefits. SCPUD,
15 which serves Skamania County, has historically relied on backup power from the Condit Dam.
16 Ex. 43.00 at 4:17-7:25. However, the substation has not been operated since 2006, and the dam
17 is scheduled for removal in 2011. *Id.* at 3:18-24. Without the dam, there will be “insufficient
18 alternate backup power to serve both Klickitat County and Skamania County.” *Id.* at 3:19-20.
19 This poses very real public health and safety concerns, specifically for the communities of
20 Stevenson, Carson, and Underwood, where the existing system is historically unreliable with a
21 pattern of failures over time. *Id.* at 5:1-9. Whistling Ridge will develop a substation west of the
22 congested area on the transmission system. The Project substation will be available for
23 installation of transmission facilities to provide *major* grid support and reliability to Klickitat
24 County and Skamania County’s electrical systems, needed to serve both counties. Without the
25 Project, this improvement is not likely to occur. *Id.* at 7: 9-21; Tr. at 1194:18-1195:6, 1195:19-
26 1196:1, 1198-9:19 (Wittenberg). In summary, the Project will “provide redundancy and

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1 reliability that SCPUD will lose in 2011 with the removal of the Condit Dam, and at a cost to
2 SCPUD that is affordable to the community and its customers.” Ex. 43.00 at 7:22-25.

3 **III. CONCLUSION**

4 EFSEC routinely receives information about project benefits when performing its siting
5 tasks. That evidence includes opinions on the desirability of diverse fuel sources in utility
6 portfolios, state and federal policy regarding the alternative energy generation, and the
7 environmental value associated with wind energy projects displacing or deferring the
8 consumption of fossil fuels and the concomitant benefit to the planet through the reduction of
9 greenhouse gasses, nitrogen oxide, and sulfuric oxide. The social benefits of renewable fuel
10 supply and the national security implications stemming from a domestic fuel supply are
11 additional project benefits. Local and state economic development benefits derived from jobs
12 and tax revenues are ascertainable and provide further Project benefits. None of these lend
13 themselves to a precise quantification of project benefit by a single metric that can then be
14 weighed against the environmental impacts of a project (which also does not lend itself to
15 quantification by a single metric to be weighed against project benefits).

16 While EFSEC’s adjudicative proceeding is undoubtedly important, SEPA is the
17 mechanism through which environmental and ecological concerns of the Project are addressed,
18 including the consideration of appropriate mitigation measures. EFSEC’s FEIS is the
19 fundamental tool for this determination, not the adjudicative proceeding. However, one thing is
20 true of the adjudicative proceeding: Opponents failed to show that the Project is likely to cause
21 significant environmental or ecological impacts, particularly considering both the multi-year
22 survey efforts completed to fully understand habitat and wildlife issues and the measures
23 proposed to avoid, minimize, and mitigate these impacts. Further, Opponents’ effort to prove
24 that the Project is not “needed” both utterly disregards WAC 463-60-021 and completely failed,
25 which was only made massively worse by misdirected efforts to cross-examine a host of
26 witnesses sponsored by the State of Washington, Skamania County, the Skamania County PUD,

1 the Skamania County EDC, Klickitat County EDC, Whistling Ridge itself (including a former
2 BPA administrator), and a neutral third party (the Renewable Northwest Project).

3 To “balance” significant environmental and ecological costs against the “benefit” or
4 “need” of a project (assuming such a balance is warranted or allowed by law), the Opponents
5 must first convince EFSEC that there are significant, unmitigated environmental and ecological
6 costs to “balance” against. As described in this brief, they failed to do so in the adjudicative
7 proceeding. However, the final determination of environmental and ecological impacts is within
8 the domain of the SEPA Responsible Official. Nothing in the adjudicative record would “tip”
9 this balance, or compel EFSEC to consider whether the Project somehow undermines the State’s
10 efforts to meet “pressing needs” for new energy facilities, or the State’s policy to enable and
11 provide “abundant energy at reasonable cost.” In fact, the record is very much to the contrary.
12 As confirmed by the State’s own witnesses, the Project meets and advances all applicable and
13 relevant State policy objectives.

14 DATED: March 18, 2011.

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