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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I. INTRODUCTION

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

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

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

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

A. HABITAT AND WILDLIFE

1. Applicable EFSEC standards and requirements

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

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

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

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

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

Nonetheless, Opponents intimate that EFSEC should deny this ASC because it is the first wind energy facility proposed in a forested area of the Pacific Northwest. This completely ignores the fact that locations with degraded habitat, such as the Project site, are precisely the locations that the WDFW Guidelines suggest should be considered for wind energy facilities. See Ex. 6.09c at 5 (“2.1 Impact Avoidance and Minimization • Where appropriate develop in agricultural and other disturbed lands, including using existing transmission corridors and roads where possible.”). In fact, it is one of the WDFW Guidelines’ Guiding Principles that wind developers consider degraded habitat first for wind projects. See Ex. 6.09c at 2. Consistent with this principle, WDFW’s Renewable Energy Section Manager concluded that [w]hile no similar data exist for constructed wind energy projects in managed coniferous forest habitats that might help inform impact
predictions for Whistling Ridge, as we previously confirmed in the attached letters, WDFW confirms that these data represent the best available science for predicting avian impacts at Whistling Ridge. Therefore, if the [Project] is constructed, WDFW anticipates the opportunity to better understand the relationship between wind energy development in western coniferous forests and wildlife response.

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

b. The Project’s extensive bat and avian surveys and analysis constitute the best available science and indicate that bat and avian mortality will likely be low

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

Ex. 1.03r (May 24, 2010 WEST, Inc. memo at 3).

Avian surveys for the Project were conducted during all seasons of the year, including the fall migration period and breeding/nesting season, following conventional study protocols. ASC at 3.4-22; Ex. 1.03r (May 24, 2010 WEST, Inc. memo at 1). All observations, behavior, and flight patterns of birds in and near survey plots, as well as flight patterns, direction and altitude, were recorded. ASC at 3.4-22. Observations of birds beyond the survey radii were also recorded. Id. Locations of raptors and other species observed during counts were also recorded 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
use at all these WRAs was ranked, and the Project was evaluated within that known range. Ex. 6.00 at 5:13-22. Mean raptor use at the Project site is considered low, ranking 29th among the 36 other WRAs. Id. Using the same methodology for all birds, mean overall bird use at the Project site ranks 19th among 24 other WRAs in the Pacific Northwest. Exs. 1.03r (May 24, 2010 WEST, Inc. memo at 1), 6.00 at 5:23-6:2, 6.03. The methodologies applied here have been in uncontested use on numerous wind projects in the state of Washington and many other jurisdictions. Ex. 6.04r at 8:11-17.

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

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

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

Ex. 1.02r. This formal departmental opinion is consistent with the conclusions drawn in the ASC. Despite these clear and unambiguous departmental conclusions, Opponents’ witness 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
only the *best* available data on nationwide avian populations, it is the only one available for most
bird species in the Pacific Northwest, and therefore represents the best available science. *See*
Ex. 6.04r at 30:22-23, 31:26-32:3. Reliance on the best available science is a clearly accepted
practice, is mandated by many U.S. laws for making informed policy decisions, and is a keystone
requirement of the *WDFW Guidelines.* Exs. 6.04r at 32:1-17, 6.09c at 4 n.1 (“Current protocols
are developed using Best Available Science in consultation with WDFW.”).

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

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

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

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

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

When all else fails, Opponents would have EFSEC engage in rulemaking through this adjudication by advocating that the WDFW Guidelines simply be disregarded contrary to WAC 463-60-332(4)’s mandate that “wind generation proposals shall consider Washington state department of fish and wildlife Wind Power Guidelines, August 2003, or as hereafter amended.” Smallwood testified that both the U.S. Fish and Wildlife Service and Washington Department of Fish and Wildlife Wind Power Guidelines are deficient, and therefore should not be relied on to ensure that all reasonable measures have been taken to avoid, minimize, and reduce impacts. In particular, the Washington Department of Fish and Wildlife Wind Power Guidelines (hereafter referred to as WDFW guidelines) are grossly deficient, lacking, among other things, key impacts assessment tools and mitigation measures. Ex. 22.05r at 2:20-3:2. Opponents are not simply overlooking EFSEC’s required use of the WDFW Guidelines; they are suggesting that the WDFW Guidelines themselves are inadequate and therefore, should be deliberately disregarded. On the same theme, using a different tack, Opponents introduced National Wind Coordinating Committee meeting notes from 2004 opining that WDFW’s wind power guidelines are too weak. See Ex. 6.05c at 2. However, Opponents 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
practices and protocols and instead adopt his own unique methodology when studying avian
impacts, which Smallwood himself acknowledges is “novel.” See Ex. 6.04r at 21:11-13, 41:2-8;
see also Tr. at 662:25-663:6 (Greg Johnson). However, the results of wildlife and habitat studies
conducted on the Project site, which are based on consistent and conventional approaches used
and approved by WDFW and EFSEC on other Washington wind energy projects, should not be
discarded here in favor of Smallwood’s unproven “novel” approaches, which “are not only not
accepted broadly in Washington, they are not used at all.” Ex. 6.04r at 37:18-19.

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

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

As previously mentioned, Opponents’ attempt to stoke the passions surrounding the
northern spotted owl (“NSO”) utterly disregards the USFWS review panel’s conclusion that even
if NSOs are present on the Project site, “the risk of spotted owl collision at this site is considered
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to be discountable.”\(^1\) Ex. 5.04. NSOs are listed as threatened under the federal Endangered Species Act (“ESA”) and as endangered under Washington State law. ASC Table 3.4-5.

Whistling Ridge’s request for interconnection of the Project to the Bonneville Power Administration’s (“BPA”) system is a federal action for purposes of Section 7 of the ESA.\(^2\) Exs. 5.00 at 10:17-11:2, 5.04 at 2. Given BPA’s role as the NEPA lead agency and the decision to develop a joint SEPA/NEPA record, BPA completed informal consultation with USFWS regarding NSOs on both the interconnection request and the entire Project.\(^3\) 5.04 at 2. A WDFW biologist specializing in NSO behavior was on the USFWS scientific panel reviewing the Project, and WDFW coordinated its consideration of the Project’s likely effect on NSOs with USFWS. Ex. 5.04 at 4.

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

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

\(^2\) Section 7 of the ESA prohibits a federal agency from authorizing any action unless the agency can ensure 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).
viability. WAC 222-10-041(4). This 40% suitable habitat threshold corresponds with USFWS research on the level of habitat necessary to avoid take and support recovery. See Ex. 5.04 at 2.

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

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

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

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

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

BPA’s informal consultation with USFWS culminated in USFWS’s issuance of its July 19, 2010 Concurrence Letter to BPA, in which USFWS concurred that “the Project is not likely to adversely affect the spotted owl.” Ex. 5.04 at 4. In its Concurrence Letter, USFWS confirmed that Whistling Ridge had completed “protocol surveys” to the satisfaction of the agency. \textit{Id.} at 2.

The letter confirms that Whistling Ridge went beyond its breeding season surveys, and in 2009, voluntarily conducted a survey under then-proposed (but not adopted and not enforced) 2010 protocols, aimed at determining whether NSOs could be present but not vocalizing. \textit{Id.} The letter explains the results of the 2010 surveys, including the discovery of a single male NSO far from the Project area, and concludes that this discovery “does not change the analysis of effects of the Project to spotted owls, as addressed below, regardless of whether or not a territorial status is established.” \textit{Id.} at 3.

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

\textsuperscript{4} The 2008 and 2009 surveys were conducted in potentially suitable habitat located within 1.8 miles from the Project’s proposed turbine alignments (\textit{i.e.}, 14,901 acres) and within the Moss Creek and Mill Creek activity centers (\textit{i.e.}, 7,222 acres). \textit{See} Ex. 5.00 at 6:1-7:9. Suitable habitat was conservatively defined as stands with at least 12-inch diameter at breast height and a canopy cover of 60\% or greater. ASC \textsection 3.4-16; Ex. 5.00 at 6:7-19; \textit{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. \textit{Tr.} at 768:8-10 (Reams).
NSO discovered in 2010 some two miles to the north is immaterial to these conclusions. *Id.*

USFWS documented the finding that operation of the Project would not cause a negative impact:

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

*Id.* at 4 (emphasis added).

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

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

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

The mitigation parcel meets important objectives of Klickitat County, and WDFW supports this approach. Ex. 1.01r at 2:15-17, 7:11-24.

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

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

At the proposed project site, no spotted owls were recorded during extensive multi-years surveys following standard protocols. While spotted owls also make use of habitats other than old-growth, the types of suitable habitat are typically not present over large areas on 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 Priority 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.
In summary, the developer, SDS Lumber, in consultation with WDFW and through the Wind Power Guidelines, has developed an acceptable mitigation strategy for temporary and permanent impacts that will occur as a result of the Whistling Ridge Wind Energy Development. The proposed mitigation parcel of approximately 100 acres . . . is consistent with the WDFW Wind Power Guidelines.

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

B. NOISE

1. Applicable EFSEC standards and requirements

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

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

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

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

“The method commonly used to quantify environmental sounds consists of evaluating all frequencies of a sound according to a weighting system that reflects that human hearing is less sensitive at low frequencies and extremely high frequencies than at the mid-range frequencies. This is called ‘A weighting,’ and the decibel level (continued . . .)
at 8:7-11; Tr. at 381:23-382:21 (Mark Storm). The results are presented on a Noise Level
Contours map that shows where the Project’s noise emissions reach certain levels. ASC Fig. 4.1-
1; Ex. 7.00 at 7:11-13. The software used to model the Project noise impacts is a leading
industry tool routinely used by acoustical professionals to predict noise level estimates at
complex industrial sources including wind turbines. Ex. 7.00 at 7:15-19. The methods,

algorithms, and results depicted in the ASC, including the Noise Level Contours map, all support
the conclusion that the Project will meet all applicable construction and operational noise
performance standards imposed and enforced by EFSEC at adjacent receivers, including the

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-


Regardless of the modeling, monitoring, and predictive statements contained in the ASC,
the Project absolutely must comply with applicable maximum noise emission levels. WAC 463-
62-030, 173-60-040. The ASC’s recommended Project conditions would require Whistling
Ridge to demonstrate how the Project’s operational configuration will meet those requirements
(i.e., an acoustical analysis of the final turbine layout must be prepared prior to construction,

using noise level data for the final turbine type selected to ensure that Project noise levels do not
exceed regulatory thresholds). ASC at 1.4-7. The ASC and testimony presented to EFSEC in

support thereof provide evidence, completely uncontroverted, of full compliance with EFSEC’s

noise regulations.

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

WAC 463-60-352(1)(a) requires that the ASC present a description and quantification of

the types of background noise environment that the Project would affect. See ASC § 4.1.1.3.

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

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

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

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6 The potential location of a future residence is shown on ASC Fig. 4.1-1 as R3, approximately 2,000 feet 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.
during the morning, afternoon, and evening respectively and after adjustment to remove the
sound of cars passing on the roadway. Tr. at 431:21-25 (Storm). These results typify the
background noise environment found at a measurement position considerably distant from
passing road traffic, and are representative of an unclustered single-family residence such as R1,
over 2,500 feet from the nearest turbine. ASC at 4.1-4.

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

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

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

Although the dBA may adequately indicate the level of environmental noise at any instant in time, commu-
nity noise levels vary continuously. Most environmental noise includes a mixture of noise from distant sources that
creates a relatively steady background noise in which no particular source is identifiable. A single descriptor called the
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.
b. The ASC’s methodology to model Project noise was consistent with prior EFSEC practice and appropriate to this Project

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

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

The data inputs to CADNA-A© are synthesized with the cumulative noise of all the turbines through application of the algorithms recommended by ISO 9613-2 in order to generate predicted Project cumulative noise emission levels. Tr. at 461:19-22 (Storm). The results are then placed onto a map as noise contour lines depicting where certain noise emission levels will be reached around the Project. ASC at 4.1-1; Tr. at 463:19-464:9 (Storm). The noise contours
are not symmetrical around the Project; the effects of cumulative turbine noise emissions and
other attenuating factors on the varied topography input for this Project yield irregular, rather
than billiard-table smooth, noise contours around the Project. Tr. at 464:1-9 (Storm). The noise
contour lines shown on ASC Fig. 4.1-1 reflect the most current modeling techniques as required
by WAC 463-60-352(1)(b), and, significantly, the techniques are the same ones used by EFSEC
in the Kittitas Valley and Desert Claim wind energy projects.

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

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

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

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\(^8\) The only receiver shown on ASC Fig. 4.1-1 within the 40+ dBA band (i.e., R3) does not exist. Tr. at

\(^9\) 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.
ASC Tables 4.1-6 and 4.1-8 through 4.1-11 present the Project’s modeled construction and operations noise emissions. The Project’s cumulative operational noise impacts at the two existing residences nearest to the turbines, at 2,560 feet and 4,265 feet respectively, do not exceed 42 dBA, nearly 10 decibels below, and certainly well within compliance of, the EFSEC/DOE/Skamania County maximum Class A EDNA levels of 60 dB daytime/50dB nighttime. ASC Tables 4.1-8 through 4.1-11. These are the only applicable standards for EFSEC’s regulation of Project noise emissions, and they are fully satisfied by the Project’s modeled results.

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

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

For construction noise, the ASC sets forth a mitigation measure recommending that construction generally be limited to daytime hours. ASC at 1.4-7. To ensure compliance with the construction noise limits, the specific construction management practices enumerated for noise-producing equipment, as well as a noise complaint process, hotline number, and Whistling Ridge’s responsibility to resolve complaints, should be imposed as a condition of the Project. Id. 10

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

11 There are no state or Skamania County regulatory limits for allowable increases above background noise 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.
The ASC also recommends that an acoustical analysis of the final turbine layout be prepared prior to construction, using noise level data for the final turbine type selected, to ensure that Project’s operational noise levels do not exceed regulatory thresholds. *Id.* The Project noise levels, even combined with measured existing sound levels reasonably representing ambient noise levels at the two nearest residential receivers, never reach the applicable maximum noise levels of 60/50 dBA and would result in no need for operational noise mitigation.

C. CULTURAL AND ARCHEOLOGICAL RESOURCES

1. Applicable EFSEC standards and requirements

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

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

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

   One previously recorded historic cultural resource—the Broughton Lumber Company flume—was documented within the APE. Ex. 10.00 at 4:16-20. The segment of the flume...
within the APE was dismantled around 1987, and no remnants of the former flume alignment are
now present in the area. Ex. 10.00 at 11:5-9. The pedestrian inventory identified the so-called
Haran farmstead as a site that warranted additional survey efforts, and subsurface probing was
done there. Ex. 10.00 at 8:16-9:14. Whistling Ridge’s cultural resource expert determined that
the Haran farmstead is not eligible for listing on the National Register of Historic Places.
Ex. 10.00 at 9:19-24. Two archaeological “isolates” were also identified. ASC § 4.2.5.4; Ex.
10.00 at 5:3-9. Although unlikely, if archaeological sites are encountered during construction,
installation, maintenance, and/or repair of the Project, work will be stopped in the area of
discovery and a qualified archaeologist will be summoned to identify and document the find to
determine if it is significant. ASC § 4.2.5.6; Ex. 10.00 at 12:13-18. If the site is significant,
mitigation measures would need to be devised and implemented. ASC § 4.2.5.6.
No previously documented TCPs were identified within the APE through the records
review. ASC at 4.2-86; Ex. 10.00 at 7:1-2. No pre-contact/Native American site types, such as
lithic scatters, petroglyphs, or peeled cedars were observed during the pedestrian inventory.
Ex. 10.00 at 11:10-11. No potential rock cairns, rings, walls, or other alignments that could
indicate sensitivity were observed on promontories associated with Project turbine strings,
including “Chemawa Hill.” Ex. 10 at 11:11-14. Whistling Ridge also actively consulted with the
Yakama Nation Cultural Resources Program (“Yakama Nation CRP”), the Yakama Nation
Cultural Resources Committee, ancestral chiefs of the Yakama Nation, and two local elders of the
Yakama Nation to assist with the identification of potentially sensitive, traditional, and/or sacred
resources. ASC at 4.2-85; Ex. 10.00 at 7:11-17. The Yakama Nation CRP, which was established
to protect cultural resources on behalf of the Yakama Nation, intervened in this proceeding.
Yakama Nation CRP Petition for Intervention at 3. The hereditary Chiefs of the Klickitat and
Cascade Tribes of the Yakama Nation also intervened. No intervenor submitted evidence into the
adjudicative record that there are TCPs on the Project site or in the vicinity. The Yakama Nation
CRP reached a settlement with Whistling Ridge and withdrew from participation in the
adjudicatory proceeding. Tr. at 84:18-86:1 (Jason Spadaro). Whistling Ridge has satisfied WAC 463-60-362(5).

D. TURBINE VIEWS AND AESTHETICS

1. Applicable EFSEC standards and requirements

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

2. Whistling Ridge has satisfied EFSEC’s informational requirements

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

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

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

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

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

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

   The ASC’s aesthetic impact analysis was conducted by an interdisciplinary team led by Dautis Pearson. Tr. at 299:1-5, 311:23-312:2 (Pearson). Mr. Pearson, a former USFS land use planner and NEPA coordinator, has extensive experience assessing likely aesthetic impacts using the FHWA, SMS, and VRM methodologies. Tr. at 289:1-290:3, 299:23-300:9 (Pearson).
According to uncontradicted expert testimony, aesthetic impact analyses do not require the involvement of a landscape architect. Tr. at 288:9-22 (Pearson). The ASC’s aesthetic impact methodology was consistent with prior EFSEC practice, appropriate for a linear project on private property, and conducted by an experienced expert.

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

Opponents’ primary interest in this proceeding is to stop the construction of wind turbines that are visible from Scenic Area KVAs. To accomplish this goal, Opponents’ witness Dean Apostol testified that Whistling Ridge should have departed from accepted EFSEC practice and instead used the Scenic Area “visually subordinate” VQO to evaluate the Project’s likely aesthetic impacts. Ex. 21.00 at 10:9-11:10. According to Apostol, EFSEC must simply assume that the Project fails to meet the Scenic Area “visually subordinate” VQO and “by definition will thus have a high impact on scenic resources.” Ex. 21.00 at 11:9, 11:15. Consequently, Apostol testified that wind turbines should not be sited at locations outside the Scenic Area from which they would be visible at Scenic Area KVAs. See Ex. 21.00 at 11:19-22, 30:7. In other words, Apostol advocated that EFSEC establish a de facto buffer zone around the Scenic Area to protect the Scenic Area. However, as detailed below, applying a Scenic Area VQO to a project outside the Scenic Area is inconsistent with the SMS methodology upon which the Scenic Area VQOs were developed, and Congress expressly prohibited the establishment of

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

15 Apostol concurred with highly suspect recommendations in a U.S. Department of Interior NEPA/SEPA comment letter attached to his testimony as Ex. 21.05, which incorporated comments from the National Park Service (“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).
the buffer zone that Opponents seek. In addition, applying Scenic Area VQOs (even indirectly)
to development entirely outside the Scenic Area would have far-reaching negative impacts on
economic development in the Columbia Gorge region.

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

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

The VQOs in the [Scenic Area] Management Plan should not be
applied to development outside the Scenic Area for at least one very
important reason. Applying these VQOs to development on the Project
site is inconsistent with SMS methodology. Mr. Apostol correctly
recognized that VQOs are a goal for managing a scenic landscape.
(Page 10, line 3.) The [Scenic Area] Management Plan, for example,
defines VQOs as “a set of visual management goals established by the
Forest Service to achieve a desired visual objective.” However, no
visual objective has been established for the Project site. Applying a
visual objective established for one area to another area simply
because they are adjacent is inappropriate under the SMS
methodology. For example, it is not uncommon for timber harvest
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.
Ex. 9.02r at 15:11-20 (emphases added). As both Mr. Pearson and Apostol testified, VQOs are management goals. They are used to assess whether a given development meets a pre-established visual objective and are specific to a delineated area, which in this situation is the Scenic Area. Under the SMS methodology, a VQO established for one area is not to be applied to an adjacent area merely because development in the adjacent area is visible from the VQO area. Consequently, it is utterly inconsistent with the SMS methodology to apply the Scenic Area “visually subordinate” VQO to the Project. EFSEC’s evaluation of the Project’s likely aesthetic impacts should not be at odds with aesthetic impact methodology.

(b) Congress expressly prohibited the establishment of a buffer 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

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


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

Furthermore, none of the USFS documents in the record about the Scenic Area methodology indicate that it was designed or intended to be applied to development outside the Scenic Area. See Ex. 9.02r at 11:23-26.
critical word or phrase but also its placement and purpose in the statutory scheme.”


In the Scenic Act’s savings clause, Congress provided that

\[ \text{Nothing in [the Scenic Act] shall - . . .} \]

(10) establish protective perimeters or buffer zones around the scenic area or each special management area. The fact that activities or uses inconsistent with the management directives for the scenic area or special management areas can be seen or heard from these areas shall not, of itself, preclude such activities or uses up to the boundaries of the scenic area or special management areas.

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

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

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

\textit{Id.} at 1480 (quoting Pub. L. 98-339, § 9, 98 Stat. 299, 305 (1984)). The Ninth Circuit held that this \textit{unambiguous} provision prohibits use restrictions on nonwilderness areas based \textit{solely} on the potential impact that use might have on the Wilderness. . . . When Congress used the words “of itself,” it implicitly stated that the effects on a Wilderness area can be considered when allocating uses of adjoining nonwilderness area, so long as it is not the only reason.

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

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

\textsuperscript{19} Opponents’ witness Michael Lang testified that SEPA could be used to protect the Scenic Area from impacts of development outside the Scenic Area. \textit{See Ex. 25.00} at 3:7-14. However, state law that conflicts with federal law is preempted under the Supremacy Clause of the U.S. Constitution. \textit{See English v. Gen. Elec. Co.}, 496 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.
and cultural resources found within the Scenic Area. Simply put, Congress has expressly prohibited the buffer zone sought by Opponents, because the only rationale for this *de facto* buffer zone is to protect the Scenic Area from a use visible from within the Scenic Area.

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


21 *See* Amendment to S. 2055 § 17(a)(12), 99th Cong. (1986), 132 Cong. Rec. 29,564, 29,572. The Washington State Commissioner of Public Lands testified that the savings clause should be strengthened by making 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.
The Scenic Act required the development of standards (e.g., VQOs) regulating the visual aspects of development within the Scenic Area. See 16 U.S.C. §§ 544a(1), 544d(c)-(d).

However, the savings clause provides that nothing in the Scenic Act shall be used to establish buffer zones around the Scenic Area. Consequently, Congress has prohibited Opponents’ desired use of the Scenic Area “visually subordinate” VQO to establish a *de facto* buffer zone around the Scenic Area.

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

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

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22 See also *Skamania Cnty.*, 144 Wn.2d at 36 (“The Act also required each of the six counties within the 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.”).
the Scenic Act the “visually subordinate” VQO is only to be applied within the Scenic Area. Applying it to development outside the Scenic Area contradicts the Gorge Commission’s interpretation of the Scenic Act.

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

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

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

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

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23 This is echoed in the Gorge Commission’s own land use ordinance. See Commission Rule 350-81-070(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.”).
implications of doing so. This is especially true in light of the Scenic Act’s stated purpose of
The Washington Department of Commerce presented testimony that “county policy
goals, and state goals and policies regarding both renewable energy development and economic
development in general would be thwarted” if the Project is rejected in order to protect the
Scenic Area. Ex. 36.00r at 5. As Leonard Bauer, Managing Director of Growth Management
Services for the Department of Commerce, testified, communities in the Gorge (e.g., those in the
urban exempt areas of the Scenic Area) have experienced difficult economic times due to the
collapse of the timber and fishing industries and the withdrawal of developable land due to the
Scenic Act. Id. at 6. In response, Congress and the State of Washington have invested millions
of dollars to support economic development.

For Skamania County alone, Commerce has provided approximately $195,000 per year since 2001 for NSA planning, and over $14 million
in Community Development Block Grant (CDBG) and Community Economic Revitalization Board (CERB) grants, and Public Works
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.

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

it would set a precedent that opponents of other projects in the area
might try to leverage to defeat those projects. And that would create
great uncertainty about future economic development for private
property owners in the areas outside the boundaries of the [Scenic
Area]. Uncertainty over what potential uses could be developed on
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.

Id. at 7-8. Opponents have opposed and are currently opposing projects to which Opponents
admit the Scenic Area VQOs do not “directly” apply. Ex. 25.00 at 6:17-18; Tr. at 1381:20-23
(Lang); FOCG Pet. for Intervention at 4. Furthermore, FOCG admitted that in deciding whether to support or oppose development in urban exempt areas it makes subjective decisions as to whether or not a particular project “deplet[e]s Gorge resources.” Ex. 25.05c; Tr. at 1380:7-17 (Lang). If EFSEC were to set a precedent by applying Scenic Area VQOs to the Project, Opponents’ weapons would be fully loaded, thereby realizing the uncertainty and furthering the economic stagnation the State of Washington has invested millions of dollars to combat. EFSEC needs to carefully consider these economic ramifications of applying Scenic Area VQOs to the Project.

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

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

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).

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

26 Apostol identified visual coherence as means of mitigating the Project’s visual impacts. See, e.g., 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 . . .)
the visual simulations’ haze visibility settings, the turbines are “slightly more visible in the final composites than they would actually be if an observer were standing on the ground viewing them from the exact place, date, and time that the photos were taken.” ASC at 4.2-67-68 (emphasis added). Thus, the 21 visual simulations illustrate a “worst case” scenario. Ex. 8.00 at 7:19.

Each visual simulation also contains a host of valuable information beyond the simulation itself, including the precise location of the viewpoint and the distance to the nearest turbine, the time, date, directional bearing, and effective focal length of the simulation; identification of the visible turbines; and the distance the simulation should be held from the viewer’s eye to replicate real-world size. *See generally* Ex. 8.08r.

The ASC’s aesthetic impact assessment specifically called out the Project’s proximity to the Scenic Area. ASC § 4.2.3.2. For this reason, Whistling Ridge prepared visual simulations for all eight Scenic Area KVAs from which some portion of the Project would be visible. See Ex. 9.00 at 5:26-8:23. Visual simulations were prepared from multiple locations along four of the five Scenic Area KVA corridors from which the Project would be visible: the Columbia River, I-84, Cook-Underwood Road, and SR 141. Whistling Ridge also conducted an extensive analysis assessing and mapping Project visibility from the Columbia River and I-84 Scenic Area KVA corridors. *See* Exs. 8.04r-8.05r. Viewpoints simulated were those from which the greatest number of turbines would be visible at the least distance. Ex. 8.03r at 12:19-15:20, 18:16-19:10. At other locations, the terrain, vegetation, or direction of travel makes the Project visual coherence from the three viewpoints Apostol identified should improve.

(. . . continued)

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

27 The Project will be visible from the following eight Scenic Area KVAs: the Historic Columbia River 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.
less visible. In other words, the selected viewpoint locations are the ones from which the Project would be most visible. See id.

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

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

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

the only things that would change as you travel to the west toward Hood River [from 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 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 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 Project site is only visible through short visibility windows. In my opinion, little would be learned by additional simulations on this stretch.

Ex. 8.03r at 19:17-25.

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

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

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

For example, a viewer on I-84 is not standing still but rather is moving
at 65 miles per hour, often in traffic, down a curvy interstate highway.
Ignoring the fact that traffic alone will tend to focus a driver’s
attention on the road, Dautis Pearson has testified that as an observer’s
speed increases, the observer tends to focus along the line of travel,
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.

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

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landmark and still not see it.” 31 Ex. 8.13c at 63. Furthermore, as distance increases, contrast
tends to decrease. Ex. 9.02r at 25:19-21. Finally, the Project is located
above the visual plane of most viewers. The line of sight for most
visitors in the Columbia Gorge is likely focused on the Columbia
River itself and other features well below the skyline, such as hydro-
electric dams, towns, roads, railroads, and vegetation.

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

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

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

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

31 Tom Watson testified that animated simulations’ tendency to overstate likely aesthetic impacts from Scenic Area KVAs would be lessened at those Scenic Area KVAs where viewers are not moving. Tr. at 247:7-248:6. Of the eight Scenic Area KVAs from which some portion of the Project would be visible, viewers would not be moving at Panorama Point Park and viewers have the opportunity to stop along the Historic Columbia River Highway. Id. Panorama Point Park is 6.68 miles from the closest turbine, at which distance the nearest turbine’s apparent height would be 0.28 inch. See Ex. 8.08r: Viewpoint 10. Similarly, the viewpoint on the Historic Columbia River Highway from which the greatest number of turbines would be visible at the least distance is 6.46 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).
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 below, the ASC’s assessment is consistent with the visual inventories prepared by the USFS for the Scenic Area in the late 1980s.\(^{33}\)

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

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

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

\[^{33}\] Even though these USFS inventory maps were not used for the analysis in the ASC because they do not cover the Project site, the analysis in the ASC corresponds very well with the information provided in these maps.” Ex. 9.02r at 14:20-22.

\[^{34}\] 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).
moderate to high capability to absorb features or structures that are not common on the
landscape.” Ex. 9.02r at 14:7-10 (uncontroverted expert testimony).

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

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

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

There is nothing in the written information obtained from the USFS
about the creation of the Scenic Area inventories (Exhibit No. 9.04r)
that suggests the [Scenic Area] KVAs should be assumed to have high
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
because they were “[a]reas from which large numbers of people view the National Scenic Area portions of the Gorge.” (Exhibit No. 9.05r.)

As the ASC recognized, the number of viewers is a factor in assessing viewer sensitivity, but it is not the only factor; the type of viewers, viewing conditions, and quality of the view must also be considered. (ASC page 4.2-30.) In short, although [Scenic Area] KVAs play an important role in regulating development within the Scenic Area, it is inappropriate for purposes of a visual impact assessment for a project located outside the Scenic Area to simply assume that [Scenic Area] KVAs have “by definition” high viewer sensitivity.

Ex. 9.02r at 9:15-10:13. Finally, Apostol assumed that “wind turbines have high contrast independent of any real consideration of the landscape.” Ex. 9.02r at 10:14-15; see, e.g., Ex. 21.00 at 14:18, 23:3-5. However, as Mr. Pearson testified, “unless you consider the landscape in which wind turbines are proposed/located, there is nothing to contrast the wind turbines against.” Ex. 9.02r at 10:15-17. By assuming (i) that scenic quality is high because the Project site is adjacent to the Scenic Area, (ii) that viewer sensitivity is high from all Scenic Area KVA viewpoints, and (iii) that wind turbines inherently result in high contrast, Apostol effectively assumed away the aesthetic impact analysis, thereby rendering EFSEC’s discretion and decision-making authority moot. Ex. 9.02r at 11:6-16.

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

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

Viewpoint 11’s scenic quality was rated “Moderate” in the ASC with “Moderate” viewer 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

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

Even an untrained eye can see that the wind turbines in the original simulation (with clouds) contrast no less with the background than the edited simulation (without clouds). This is due to a basic principle of 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.

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

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

It should be obvious that viewers do not see wirelines. Wirelines are useful for understanding position and relative scale, but should not be used as a basis for evaluating visual impacts. This is evident in Exhibit 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.

Ex. 9.02r at 29:13-18.

Finally, Apostol pulled out his safety blanket of assumptions.

[T]he visual contrast of the 25 turbines within the view is high, and that the visual sensitivity from this Key Viewing Area within a Federally designated National Scenic Area is by definition high. Therefore the impact is high.
Ex. 21.00 at 23:5-7. As described above, the repeated use of these inappropriate assumptions renders Apostol’s analysis unsound and unreliable.

(ii) Viewpoint 12: Koberg Beach State Park

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

As a designated [Scenic Area] KVA and a State Park, the viewers from this location would have very high sensitivity irrespective of the 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.

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

(iii) Viewpoint 13: I-84 Eastbound

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

35 The duration of time some portion of the Project would be visible from the I-84 Scenic Area KVA corridor is quite small relative to the total time a person views the Scenic Area from this Scenic Area KVA corridor. 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.
and viewer sensitivity is high, and given the strong skyline effect, the impacts from this viewpoint should be rated as high.” Ex. 25:13-14. Apostol’s repeated use of these inappropriate assumptions renders his analysis unsound and unreliable.

(iv) Viewpoint 14: Viento State Park

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

(v) Viewpoint 19: Historic Columbia River Highway

Viewpoint 19’s scenic quality was rated “Moderately High” in the ASC with “Moderate” viewer sensitivity and a “Low” level of impact. ASC Table 4.2-5. Apostol testified this viewpoint “may not reflect the actual impacts to this Key Viewing Area” due to its distance from the Project. Ex. 21.00 at 25:8. However, as Ex. 8.06r demonstrates, this is the closest point along the Historic Columbia River Highway recreational trail from which the Project would be most highly visible. Ex. 8.03r at 22:24-23:11. Apostol again claimed that clouds diminish turbine visibility in this simulation. Ex. 21.00 at 26:9. However, due to the location of the sun, the presence of the clouds causes the turbines to have no less contrast than if the clouds were
3. By using the appropriate aesthetic impact methodology, providing the necessary visual simulations, and properly assessing the Project’s likely aesthetic impacts, Whistling Ridge has satisfied the informational requirements of WAC 463-60-362(3).

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

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

1. Applicable EFSEC standards and requirements

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

2. The Project complies with EFSEC’s informational requirements

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

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

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

Well, the initial investigation is done as a combination of feasibility for the site, for the proposed facility, and also to determine whether 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
for it... It’s common to have at least a two-phase sometimes more
approach to the geotechnical investigation work. You need to show
where the—you have targets to design a final investigation in order to
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.

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

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


Opponents’ cross-examination focused on landslide risk and sought to confuse issues of
erosion on lower slope areas with unproven landslide risks in the areas proposed for turbine
construction. The Geotechnical Report described several potential engineering and construction
design methodologies that would reduce, minimize, and eliminate any risk of erosion or slope
stability concerns. See ASC App. A at 5-1 to 5-11. As Mr. Meier testified, test pits typically
were limited to a maximum depth of 15 feet, because the rock underlying that 15-foot depth was
so hard (and so stable) that excavation was impossible. Tr. at 1122:11-25, 1100:23-1101:6.
To address any potential concerns relating to landslides along the slopes adjacent to the final turbine locations, the geotechnical engineer and geologist provided data to show that the site is fully capable for the Project’s use, but deferred the actual engineering solutions to final engineering and design work conducted prior to construction. The Geotechnical Report concludes with the following recommendation and conclusions:

Exposure of the towers to headward erosion of the steep slope drainages can be minimized by providing maximum possible setbacks from the tops of the steep slopes and-or by siting the turbines along portions of the ridgelines that are above intervening spur ridges. The 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.

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

Mr. Meier explained in both cross-examination and redirect testimony that while final placement would occur during the preconstruction micrositing process, it is ideal to “place the turbines where those spur ridges would intersect the main ridge because that gives you a broader area to work, and it also keeps you away from the potential headward erosion of the spur values.” Tr. at 1119:18-21. Mr. Meier further testified that Whistling Ridge’s proposal to minimize the southern half of the “A” turbine string to not more than five turbines would best implement the geotechnical engineering recommendations, in that five spur ridges exist, likely providing the best platform for construction of turbines in these locations. Tr. at 1119:12-1120:20.

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

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F. ROADS AND TRANSPORTATION

1. Applicable EFSEC standards and requirements

No performance standards in WAC ch. 463-62. But see WAC 463-60-296 and 463-60-372’s informational requirements.

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

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

The transportation and traffic analysis in the ASC was performed using a blade length (or 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 498:24-25 (Nathan Larson). The ASC provided that specialized trucks with a drivable rear axle would require a 135-foot inside turning radius to navigate through the Scenic Area from SR-14 and on Cook-Underwood Road.\(^{37}\) ASC at 4.3-14. Based on the information in the ASC, the County Engineer testified that use of Whistling Ridge’s preferred access route does not require any road improvements within the Scenic Area, provided that oversize, overweight vehicles, such as those transporting wind turbines, use the east intersection of SR-14 and Cook-Underwood Road and the east intersection of Cook-Underwood Road and Willard Road. Ex. 12.00 at 5:24-6:8. In other words, regardless of blade length (or load length) no road improvements within the Scenic Area are necessary if Whistling Ridge uses specialized trucks with a drivable rear axle and a 135-foot inside turning radius.

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\(^{37}\) A 20-foot allowance for “tip swing” is also necessary. ASC at 4.3-14. “Tip swing” is an extra allowance 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).
The ASC provided that turbine blades could be up to 164 feet in length, depending upon turbine selection. ASC § 2.3.3.1. Blade lengths for 2.0- to 2.5-MW turbines range from 125 to 164 feet in length. Jan. 10, 2011 URS Supplemental Information on Turbine Blade Length.\(^{38}\) Turbine blades over 150 feet in length can be transported with specialized trucks with a drivable rear axle and a 135-foot inside turning radius. \(\text{Id. at 2.}\) Consequently, no road construction or improvements within the Scenic Area are needed to transport 150- to 164-foot-long turbine blades through the Scenic Area to the Project site.

G. “NEED FOR FACILITY”

1. Applicable law and regulations

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

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

It is the intent to seek courses of action that will balance the increasing demands for energy facility location and operation in conjunction with the broad interests of the public. 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 aesthetic 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,

\(^{38}\) An exhibit number was not assigned to this memorandum during the adjudicative proceeding. \(\text{See Tr. at 1321:15-17, 1414:3-9.}\) However, on four occasions EFSEC member Mr. Moss stated that the blade length information requested by EFSEC would be part of “the record.” \(\text{See Tr. at 503:25, 504:11, 505:15, 505:16.}\)
including economic development, under the regulatory and management control of local governments and port districts. (5) To avoid costly duplication in the siting process and ensure that decisions are made timely and without unnecessary delay.”

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

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

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

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

During the adjudicative proceeding, Opponents confidently organized their case, witness testimony, and cross-examination around a topic they called “Energy and Need for Facility.” Opponents’ witness, Robert Michaels, summarized his testimony as follows: “Taken together, these facts lead to a conclusion that Whistling Ridge is not necessary to meet future PNW power demands.” Ex. 30.00 at 30:18-19. However, project “need” is not a relevant consideration in any EFSEC proceeding. WAC 463-60-021. The State of Washington, through a Department of Commerce witness, has emphasized that Michaels’ testimony and argument are irrelevant to
appropriate considerations of EFSEC. Ex. 35.00r at 2 (Michaels’ “argument is irrelevant, rendering most of the supporting testimony irrelevant.”). 39 “Need” is simply not a criteria considered by EFSEC. Michaels’ testimony, in its entirely, is irrelevant and aimed at disproving Whistling Ridge’s compliance with a standard that does not exist and need not be proven. As such, and given the massive rebuttal testimony filed, Michaels’ testimony is entitled to no weight whatsoever. 40

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

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

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

41 Opponents stated their intent to call a BPA representative as a witness, but never did so. See Nov. 1, 2010 letter from Mr. Aramburu.
a. Construction of applicable statutes and rules—RCW 80.50.010 does not impose a “need” standard

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

Read together, EFSEC considers the environmental and ecological impacts and benefits of energy facilities, but in a fashion that advances, and does not impair, Washington’s imperative to meet the “pressing need for increased energy facilities.”

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

42 “Every single MWh of wind energy delivered to a receiving utility is serving a MWh of customer load that would have otherwise been met by a conventional resource. Wind energy is most often displacing the carbon (continued . . .)
costs of coal, gas, and nuclear plants.\(^{43}\) That is precisely how EFSEC has considered wind
energy generation over the past decade. Cameron Yourkowski, Transmission Policy Associate
for Renewable Northwest Project, testified that Michaels’
testimony ignores the fact that the utilities receiving wind energy
transmitted over BPA transmission lines are displacing higher-cost
resources, which are typically either natural gas or coal. Displacing
fossil fuels and associated emissions and carbon dioxide production,
along with reduced exposure to natural gas price uncertainty and
volatility, is a primary benefit of wind and other forms of renewable
energy.

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

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

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

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dioxide and associated emissions from natural gas fired power plants and, increasingly, coal fired plants.”
Ex. 18.00r at 9:26-10:4; \textit{see also} Ex. 18.00r at 14:1-7.

\(^{43}\) Mr. Hardy testified that “[t]he need for WREP, and other Northwest wind projects, is not driven by
traditional need for power considerations but instead by state RPS requirements. These requirements, whether
created by I 937 in Washington State or legislated in Oregon and California, were specifically designed to both
avoid construction of new green house gas (GHG) emitting resources to meet load growth and to \textit{replace existing}
fo\textit{ssil fuel resources} in those states with non GHG emitting renewable resources.” Ex. 16.00r
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.” \textit{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.
economic analysis does not relate to environmental or ecological concerns, we believe EFSEC was within its authority to refuse to review the economic viability of the KVWPP.

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

b. The Project will help implement Washington State energy policy

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

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

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45 “Under rules of statutory construction each provision of a statute should be read together (in para materia) with other provisions in order to determine the legislative intent underlying the entire statutory scheme. The purpose of interpreting statutory provisions together with related provisions is to achieve a harmonious and 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).
8:3-12. The Energy Office “very strongly” supports permitting of the Project, due to its implementation of State energy policy. *Id.* at 3:8-24. The Energy Office emphasized that under RCW ch. 19.285 (the Washington Renewable Portfolio Standard, “RPS”) a substantial portion of energy generation for the State “must be” found from renewable energy sources. *Id.* at 4:8-11.

RCW 43.21F.090 requires the Department of Commerce to adopt a new State energy strategy, to advance nine specific principles, with an action plan to implement those principles. This includes clean energy innovation, reduced dependence on fossil fuels, meeting the State’s greenhouse gas limitations, and expanding and integrating additional carbon-free and carbon-neutral energy. *Id.* at 7:1-8:11. Mr. Usibelli testified that the Project meets these directives, and further stated that the State, as a matter of policy, should “support projects like the WREP, and even more, develop strategies to help such projects be permitted and constructed.” *Id.* at 10:9-12.

Howard Schwartz, Washington’s Energy Policy Analyst and Washington’s Policy Advisor to the Northwest Power Planning and Conservation Council, testified that wind power is the “least costly renewable energy resource that can be constructed in significant quantities . . . in the Pacific Northwest.” Ex. 35.00 at 10 (no line numbers provided). BPA is working on four new transmission projects to address the grid constraints discussed in the Michaels testimony. *Id.* at 5-8.\(^{46}\) The recent “over-generation” event is currently being addressed by BPA; BPA managed the event successfully and is taking actions to resolve the problems. Further, the Project itself will provide system benefits to help best manage the system. Quoting BPA, Mr. Schwartz testified that the Project provides enhanced diversity of wind energy production that further reduces the potential for any contribution of the proposed project to indirect cumulative impacts to fish species during periods of

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\(^{46}\) BPA is also working on a variety of new pilot projects and requirements, including: (1) DSO 216, which creates incentives for facility operators to better forecast and schedule output; (2) Dynamic Transfer, enabling electronic control of generators; (3) improved wind forecasting capability; (4) better scheduling of transmission, at half-hour intervals; (5) allowing wind generators to find their own backup generation (balancing reserves); and (6) finding its own backup/balancing reserves outside of the hydro system. BPA expects these and other innovations to allow the integration of more than 6,000 MW of new wind energy over the next three years. Ex. 35.00 at 6-8.
time when generation needs to be decreased to maintain transmission
stability. The added diversity should assist BPA in implementing
regulation requirements on the hydro system.

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

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

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

III. CONCLUSION

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

While EFSEC’s adjudicative proceeding is undoubtedly important, SEPA is the mechanism through which environmental and ecological concerns of the Project are addressed, including the consideration of appropriate mitigation measures. EFSEC’s FEIS is the fundamental tool for this determination, not the adjudicative proceeding. However, one thing is true of the adjudicative proceeding: Opponents failed to show that the Project is likely to cause significant environmental or ecological impacts, particularly considering both the multi-year survey efforts completed to fully understand habitat and wildlife issues and the measures proposed to avoid, minimize, and mitigate these impacts. Further, Opponents’ effort to prove that the Project is not “needed” both utterly disregards WAC 463-60-021 and completely failed, which was only made massively worse by misdirected efforts to cross-examine a host of witnesses sponsored by the State of Washington, Skamania County, the Skamania County PUD,
the Skamania County EDC, Klickitat County EDC, Whistling Ridge itself (including a former BPA administrator), and a neutral third party (the Renewable Northwest Project).

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

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