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**BEFORE THE STATE OF WASHINGTON**

**ENERGY FACILITY SITE EVALUATION COUNCIL**

In the matter of	)	SEATTLE AUDUBON
Application No. 2009-01	)	SOCIETY'S RESPONSE
	)	BRIEF
WHISTLING RIDGE ENERGY LLC	)	
	)	
WHISTLING RIDGE ENERGY PROJECT	)	
_____	)	

11 Seattle Audubon submits the following comments in response to specific arguments  
12 put forward by other parties in briefs filed on March 18, 2011. Our response is broken  
13 down into four sections: 1) the adequacy of pre-project assessments of potential avian  
14 impacts; 2) the adequacy of the proposed project mitigation; 3) the contribution of the  
15 project to addressing climate change issues; and 4) potential conditions to be included in  
16 any site certification for the proposed project.

17 **1) ADEQUACY OF PRE-PROJECT ASSESSMENTS OF POTENTIAL**  
18 **AVIAN IMPACTS**

19 A. The Counsel for the Environment (CFE) has highlighted a key point in this  
20 proceeding: while not pristine habitat, this Project is in important habitat for a large  
21 number of avian species – 90 types of birds, including 62 forest-associated birds. (CFE  
22 brief page 2, lines 8-15) Friends of the Columbia Gorge (Friends) has also made this  
23 point, noting how the Applicant overlooks or ignores the avian diversity and abundance  
24 at the Project site, with the Applicant inappropriately suggesting that the site is a “green  
25 desert” without actually documenting such a claim. (Friends brief page 49, lines 10-24)

26 The applicant inaccurately asserts that the habitat value for the Project site is  
27 “low” (Applicant brief page 2, line 22), yet this is clearly contradicted by the facts in the  
28 record. In addition to the diversity of avian species found at the project site noted above,  
29 the site also is host to multiple sensitive avian species, including the Northern Goshawk,

1 Olive-sided Flycatcher, Pileated Woodpecker, Vaux's Swift, and Western Bluebird. (CFE  
2 brief page 3, line 1 through page 5, line 10).

3 B. Seattle Audubon agrees with CFE that the applicant's comparison of the  
4 Project site to different habitats is not a good basis for predicting wildlife impacts of the  
5 Project. (CFE brief page 2, lines 16-23) Despite continued assertions by the applicant  
6 that mean overall bird use at the Project site is low (Applicant's brief page 5, lines 3-4),  
7 testimony at the adjudicated hearing demonstrated the meaninglessness of this claim.  
8 The applicant failed to compare avian usage of the Project site to avian use of similar  
9 habitats – i.e. mountainous, damp, coniferous forests. (Friends brief page 50, lines 15-19)

10 C. The Applicant incorrectly claims that they have provided "extraordinary  
11 detail" on existing wildlife populations that would be affected by the Project. (Applicant  
12 brief page 2, lines 11-12) The adjudicative record in fact shows that Applicant has failed  
13 to address fundamental issues of relative abundance of avian species, including multiple  
14 sensitive, forest-dependent species. (CFE brief page 5, lines 12-20) Such data on  
15 abundance is essential for the Council in understanding the potential impacts the  
16 proposed Project may have on avian species.

17 D. Despite their assertions to the contrary, the Applicant failed to "robustly  
18 implement" an assessment of wildlife impacts and habitat conditions (Applicant brief  
19 page 2, lines 13-16) The approach, methodologies, and protocols used by the Applicant  
20 failed to include even a minimalist information review, as called for in the Washington  
21 Department of Fish and Wildlife *2009 Wind Power Guidelines*. (Exhibit 6.09c page 3)

22 Seattle Audubon previously detailed in our March 18<sup>th</sup>, 2011 brief how the  
23 Applicant failed to conduct even the most rudimentary information review of existing  
24 information on avian species and potential habitats in the project vicinity. (Seattle  
25 Audubon page 2, line 12 through page 3, line 16) Yet the Applicant would have the

1 Council believe that no other information was offered to better quantify avian  
2 populations. (Applicant brief page 6, lines 7-8) In claiming that the “population  
3 estimator used by Whistling Ridge’s avian biologists is not only the best available data on  
4 nationwide avian populations, it is the only one available for most bird species in the  
5 Pacific Northwest, and therefor represents the best available science” (Applicant brief  
6 page 5, line 26 through page 6, line 2), the Applicant is ignoring multiple, credible,  
7 readily accessible data sets for bird species that occur at the Project site. (Seattle  
8 Audubon page 2, line 21 through page 3, line 4) Numerous references to other known  
9 existing avian population data are contained in the adjudicative record – the Applicant  
10 simply chose to not access them. (Transcript page 699, line 8 through page 702, line 8)

11 E. Seattle Audubon concurs with Friends’ argument that the Applicant failed to  
12 adequately survey for avian species, particularly the Olive-sided Flycatcher. (Friends  
13 brief page 45, lines 13-28) The surveys conducted by the Applicant appear to have  
14 missed a key two month window of July 14 through September 11. And contrary to the  
15 assertion by the Applicant that “All observations, behavior and flight patterns of birds in  
16 and near survey plots, as well as flight patterns, direction and altitude, were recorded,”  
17 (Applicant brief page 4, lines 19-21) for an entire season of surveys for the Olive-sided  
18 Flycatcher there is no recorded altitude for observed birds. This missing data is very  
19 important, as this particular sensitive bird species flies at heights which would place it  
20 within the rotor-swept area. (CFE brief page 3, lines 8-14)

21 F. In arguing that they have satisfied the requirements of the WAC and the 2009  
22 *Wind Power Guidelines*, the Applicant misconstrues what the actual standards are.  
23 WAC 463-62-040(2)(a) specifically states the standard as “An applicant must  
24 demonstrate no net loss of fish and wildlife habitat function and value.” Yet the  
25 Applicant seeks to apply a lower, less rigorous standard, claiming that “the Project will

1 not cause significant impacts to habitat and wildlife, thereby satisfying WAC 463-40-  
2 040.” (Applicant brief page 2, lines 20-21) There is a very important difference between  
3 “no net loss” and “not cause significant impacts,” yet the Applicant attempts to create  
4 equivalency between them.

5 The Applicant also inaccurately describes how the *2009 Wind Power Guidelines*  
6 address the issue of habitat mitigation relating to the conversion of commercial forest  
7 lands. While the Applicant seeks to characterize commercial forest lands, such as the  
8 Project site, as what the Guidelines refer to as “degraded” habitat (Applicant brief page 3,  
9 lines 16-23), the Guidelines in fact differentiate between commercial forest lands and  
10 degraded habitat. In classifying various habitat types and the “suitable mitigation  
11 requirements for such habitat,” the Guidelines explicitly separate commercial forest lands  
12 from croplands, pasture, urban and mixed environs that are classified as degraded habitat.  
13 (Exhibit 6.09c page 19) It is a significant mischaracterization of the *Guidelines* for the  
14 Applicant to assert that Project is “precisely” the type of location the *Guidelines* suggest  
15 should be considered for wind energy facilities. (Applicant brief page 3, lines 18-19)

16 G. Seattle Audubon disagrees with the generic, unsubstantiated assertions by the  
17 Department of Commerce that the Project is likely to have “minimal impacts to habitat  
18 and wildlife that can be mitigated.” (Commerce brief page 3, lines 9-10) This claim is  
19 contradicted by the record, as evidenced by potential impacts to sensitive species noted  
20 above (Olive-sided Flycatcher, Vaux’s Swifts, etc.) as well as by the inadequate  
21 mitigations measures noted below.

## 22 **2) ADEQUACY OF PROPOSED MITIGATION MEASURES**

23 A. Seattle Audubon concurs with CFE that the proposed mitigation parcel offered by  
24 the Applicant doesn’t provide replacement habitat for the sensitive bird species that  
25 would be adversely impacted by the Project, particularly given the large number of

1 unknowns regarding the interrelationship between wind turbines and wildlife in western  
2 coniferous forests. (CFE brief page 11, lines 7-11 and 25-26) Friends also highlights this  
3 problem, correctly noting that that there is no evidence presented by the Applicant that  
4 the proposed mitigation parcel would provide habitat for the sensitive wildlife species  
5 whose habitat would be impacted by the proposed project. (Friends brief page 57, lines  
6 15-18)

7 In addition, Seattle Audubon agrees with Friends' argument that the Applicant has  
8 proposed a mitigation plan that fails to preserve important habitat functions and values  
9 that would be lost at the site. (Friends brief page 42, lines 10-11) We also concur that the  
10 Applicant failed to address the standard set in WAC 463-60-332(3) regarding a detailed  
11 discussion of the proposed habitat mitigation measures, including the applicant's failure  
12 to comply with the Council's standard for replacement habitat to be of equal *type* as the  
13 impacted habitat. (Friends brief page 57, line 24 through page 58, line 6, emphasis added)  
14 The applicant's own avian expert witnesses had not visited the parcel nor were they  
15 willing to speculate on its adequacy. (Friends brief page 54, line 20 through page 55, line  
16 18)

17 All parties, including Seattle Audubon, were not afforded an opportunity to fully  
18 evaluate the proposed mitigation parcel. We concur with CFE's concerns that applicant  
19 did not retained a wildlife expert to assess the parcel, that the wildlife expert witnesses  
20 were unwilling or unable to offer an opinion on whether the parcel would serve as  
21 comprehensive mitigation, and that the WDFW letter offered by the Applicant does not  
22 address whether the parcel is likely to improve in habitat function and value over time.  
23 (CFE brief page 12, lines 12-14 and page 13, lines 1-10) Seattle Audubon agrees with  
24 CFE's concerns that the proposed habitat mitigation parcel is not integrated into a

- 1 broader conservancy plan that will lead to a “net habitat benefit” that improves “habitat  
2 function and value over time.” (CFE brief page 11, lines 12-18)

3           So while the Applicant asserts that their mitigation plan exceeds the WAC  
4 objective and that the mitigation proposal offers a “superb opportunity” which is “well  
5 above and beyond the goal of no net loss,” (Applicant brief page 13, lines 18-19 and page  
6 14, lines 5-6), the actual record for the proceeding demonstrates the opposite. The  
7 Applicant seems to ignore the key requirement in WAC 463-62-040(2)(a) for the  
8 Applicant to “demonstrate no net loss of fish and wildlife habitat ***function and value.***”  
9 (emphasis added) The habitat function and values likely to be lost if the Project is built  
10 are for coniferous forest dependent species, yet the Applicant’s mitigation proposal offers  
11 a landscape with very different habitat functions and values.

12           B. Seattle Audubon previously detailed the significant issues associated with the  
13 potential project mitigation measures related to turbine placement relative to the Northern  
14 Spotted Owl(NSO) recently detected in the project vicinity. (Seattle Audubon brief page  
15 6, line 1 through page 8, line 7) The Applicant claims that this detection is “immaterial”  
16 (Applicant brief page 12, line 1); they have dismissed Seattle Audubon’s concerns, citing  
17 the U.S. Fish and Wildlife Service letter on the issue as the “seminal authority” and  
18 claiming that “absolutely no evidence whatsoever” was presented to demonstrate that the  
19 agency “got anything wrong.” (Applicant brief page 7, lines 1-7) Yet the transcript  
20 includes testimony from the applicant’s own NSO expert that the agency letter in fact ***had***  
21 gotten multiple facts wrong. (Friends brief page 53, lines 5-16) The numerous errors and  
22 omissions in the agency’s letter call into question whether it truly represents the “seminal  
23 authority” on this topic.

24           In addition, the Washington Department of Natural Resources (DNR), which is  
25 the land manager for the habitat where this owl was first detected (Transcript page 762,

1 line 18 through page 763, line 3) and the responsible entity for implementing the Habitat  
2 Conservation Plan (HCP) intended to protect NSOs such as this one, specifically states in  
3 its comment letter on the Project DEIS that the Project may interfere with a spotted owl's  
4 ability to disperse from the DNR HCP conservation area to other areas in the vicinity.  
5 (Exhibit 1.16c, page 3)

6 The Applicant also claims that the Project site does not provide any habitat that  
7 NSOs are likely to use for either dispersal or foraging, citing testimony by the  
8 applicant's owl expert witness Jeff Reams to support this claim. (Applicant brief page 10,  
9 lines 15-19) Yet in his actual testimony under cross examination, Mr. Reams explicitly  
10 acknowledged that the project site does contain scattered patches of suitable Spotted Owl  
11 dispersal habitat, (Transcript page 783, lines 9-14) and that while NSOs prefer a more  
12 mature forested environment, the owl detected had limited options in the project area.  
13 (Transcript page 786, lines 7-25)

14 Seattle Audubon also disagrees with the claims by the Applicant that "the Project  
15 is not sited near NSOs" and that the owl detected in in 2010 is "far from the project area."  
16 (Applicant brief page 10, lines 20-21, and page 11, lines 16-17) In this context, the  
17 definitions of "near" and "far" are important. Seattle Audubon urges the council to look  
18 at Mr. Reams' testimony under cross examination that the owl was detected less than 2  
19 miles from the project site, and also his testimony that NSOs can and do travel 2+ miles  
20 in a single day. Given these facts, Seattle Audubon would argue that the Project is in fact  
21 "near" the NSO that was detected in 2010. In addition, we reiterate the DNR formal  
22 comment noted above that that project could adversely impact an NSO's ability to  
23 disperse.

24 C. While Seattle Audubon acknowledges that the applicant has developed a  
25 habitat mitigation strategy acceptable to WDFW, (Applicant brief page 13, lines 6-10), it

1 is also important to note that the Council has a separate, distinct responsibility to identify  
2 appropriate habitat mitigation measures which must meet a more robust standard of “no  
3 net loss of habitat functions and values.” (WAC 463-62-040) The Applicant also has a  
4 responsibility under the *2009 Wind Power Guidelines* to consult not only with WDFW  
5 but also with EFSEC as the permitting authority (Exhibit 6.09c, page 9) that has not been  
6 met.

7 Seattle Audubon concurs with CFE that the Council should make its own  
8 independent assessment of the adequacy and appropriateness of proposed mitigation  
9 parcel. (CFE brief page 13, lines 11-14) While the Council should consult with other  
10 agencies, ultimately it must assess the full record and reach its own independent  
11 determination. The Council cannot delegate its jurisdiction to another agency. (Friends  
12 brief page 41, lines 14-20)

13 D. The Applicant claims the mitigation proposal “provides continued opportunity  
14 to study the interaction between wind turbines and the natural environment in a context  
15 where EFSEC will oversee the implementation of adaptive management.” (Applicant  
16 brief page 13, lines 5-9) Assuming that the Applicant meant to say the project operation  
17 would provide such an opportunity [since the mitigation proposal is focused on a  
18 replacement habitat site that will not have any wind turbines], Seattle Audubon strongly  
19 agrees that if the project is built, EFSEC can and should oversee the implementation of  
20 adaptive management. Unfortunately, the Applicant has included almost no details for  
21 ongoing project monitoring and other adaptive management activities.

22 E. Seattle Audubon strongly disagrees with the Applicant’s claim that in the  
23 adjudicative proceeding, “Opponents failed to show that the Project is likely to cause  
24 significant environmental or ecological impacts.” (Applicant brief, page 58, lines 20-23  
25 and page 59, lines 3-7) While Seattle Audubon has not taken a position either in support

1 of or in opposition to the proposed Project, we have demonstrated throughout the  
2 adjudicative proceeding that the Project does in fact have significant environmental and  
3 ecological impacts and that the measures proposed to avoid, minimize and mitigate these  
4 impacts are not sufficient to address the identified problems.

5 F. As Seattle Audubon was an active participant in the development and updating  
6 of the *WDFW Wind Power Guidelines*, we appreciate the Applicant's passionate defense  
7 of those guidelines. (Applicant brief page 7, line 8 through page 8, line 19) Yet the  
8 Applicant's brief seems to suggest that the Guidelines serve as a ceiling rather than a  
9 floor. Wind power projects can and in fact are encouraged to go beyond the minimum  
10 standard established in the guidelines. In addition, as is pointed out in multiple places in  
11 this brief, the Applicant has failed to meet met the minimum standard as established by  
12 *Guidelines*, notwithstanding the Applicant's claims to the contrary.

13 **3) PROJECT CONTRIBUTION TO ADDRESSING CLIMATE CHANGE**

14 A. Seattle Audubon recognizes the significant threat climate change poses to birds  
15 and bird habitat, including threatened and endangered bird species. That is why we  
16 support well-designed, appropriately-sited renewable energy projects as a critical step in  
17 reducing carbon emissions. As noted in our written opening statement for the January  
18 2011 adjudicative hearing, we are greatly encouraged by the potential for this project to  
19 avoid the emissions from combustion of an estimated 114,000 barrels of crude oil or 654  
20 million cubic feet of natural gas, leading to the displacement of over 131,000 tons of  
21 carbon dioxide annually. The beneficial biological impact of such a displacement to  
22 birds and other wildlife in the region appears significant.

23 B. The claim by the Department of Commerce that the Project will help electric  
24 utilities in Washington State acquire renewable resources to meet the mandate of  
25 Initiative 937 (Commerce brief page3, lines 2-6) is contradicted by the testimony of the

1 Applicant. Jason Spadero stated that the Applicant was unwilling to commit to making  
2 local preference for the sale of the Project power even a factor for consideration.  
3 (Transcript page 160, line 8 through page 161, line 11) There was significant other  
4 testimony during the hearing that demonstrates that project output likely to go out of state  
5 rather than helping local utilities meet the I-937 mandate. (Save Our Scenic Area brief  
6 page 49, lines 18-24 and page 50, line 25 through page 51, line 2) In light of this  
7 testimony, the Council should not consider any potential I-937 compliance benefits when  
8 evaluating whether to recommend site certification for the Project.

9 **4) CONDITIONS FOR INCLUSION IN ANY SITE CERTIFICATION**

10 If EFSEC is to recommend site certification, that recommendation should include, at  
11 minimum, each of the following conditions:

12 A. The specific conditions articulated by CFE regarding pre-construction species  
13 abundance studies, best management practices, a technical advisory committee, post-  
14 construction mortality studies, adaptive management strategies, public reports and  
15 studies, and low-impact lighting. (CFE brief page 9, line 3 through page 10, line 19 and  
16 page 14, lines 17-19)

17 B. Completion of a full year of surveys for Olive-sided Flycatchers, including the  
18 two month window missed by previous surveys, as well as documentation of the altitude  
19 of all observed birds. (Friends brief page 45, lines 13-28)

20 C. Specific details for the TAC, including the composition of its membership, its  
21 specific authority, independence from the applicant, and resources, including funding, to  
22 carry out those responsibilities. (Seattle Audubon brief page 10, lines 18-21)

23 D. Inclusion of a “re-opener” clause that explicitly states that the council shall re-evaluate  
24 the terms of the certification if the TAC identifies areas of concern regarding avian

1 impacts from project operation. (Seattle Audubon brief page 10, line 23 through page 11,  
2 line 2)

3 D. A requirement for post-construction surveys of live birds to evaluate the extent  
4 to what project construction and operation displaces species from the project area and the  
5 abilities of various bird species to adapt to the project presence (Transcript  
6 page 726, line 13 through page 727, line 20)

7 E. Completion of a new consultation with the USFWS regarding potential impacts  
8 to NSOs prior to the beginning of Project construction. (Seattle Audubon brief page 8,  
9 lines 6-7)

10 F. A requirement that all turbines locations for the project be specifically  
11 identified in the certification documents, and that all turbines be located at least 2 miles  
12 from any detected owl detection site. (Seattle Audubon brief page 8, lines 4-6)

13 G. An independent assessment of the proposed habitat mitigation parcel and, if  
14 determined necessary, identification of a different or additional habitat mitigation parcel  
15 that fully meets the standard of no net loss of habitat value and function. (CFE brief page  
16 13, lines 11-17)

17 Thank you for your consideration of Seattle Audubon's concerns.

18

19 SIGNED this 1<sup>st</sup> day of April, 2011 at Seattle, Washington.

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23



24 Shawn Cantrell

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