

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

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

APPLICANT WHISTLING RIDGE
ENERGY LLC'S OPENING
STATEMENT

Introduction

Whistling Ridge Energy, LLC (“Whistling Ridge”), which is wholly owned by SDS Lumber Company LLC, has submitted an application for an energy facility site certification (ASC) for the proposed Whistling Ridge Energy Project (“Project”) in Skamania County (“County”). Whistling Ridge filed its ASC on March 10, 2009. Whistling Ridge proposes to construct up to fifty 1.2- to 2.5-MW wind turbines with a total capacity of 75 MW on 1,152 acres of unincorporated land in the County *outside* of the Scenic Area. ASC §§ I.4, 2.1.1. Of these 1,152 acres, a total of up to 54.25 acres will be used for energy generation for the life of the Facility. ASC § 2.1.1. Commercial forestry operation will continue on the remaining approximately 1,100 acres of the Project site. ASC § 2.3.5.

Whistling Ridge has filed with EFSEC with great reluctance, having hoped to seek approvals in Skamania County. This Project establishes precedent for the years of environmental studies leading to today. The Applicant is here with a belief that reliance on adopted standards, guidelines, policy, precedent and law is the hallmark of energy facility siting in Washington EFSEC. The Kittitas Valley case tested the Council’s resolve to preempt a county in accordance with RCW Ch. 58.17. This case tests whether the Council will fairly apply its regulatory framework developed over the past decade, intended to establish a fair and predictable process.

History of the Whistling Ridge Project; Opponent Lawsuits and Land Use Consistency

2008 Lawsuit: The Friends of the Columbia Gorge (FOCG) and Save Our Scenic Area (SOSA) (collectively “Opponents”) have been suing Skamania County and litigating to stop this Project long before Whistling Ridge filed its ASC EFSEC, and including appeals filed in the midst of these proceedings. In February 2008, SOSA filed a lawsuit against Skamania County, seeking an injunction, and arguing that the County had no authority to consider wind energy development under its zoning code. Most of the Project site is un-zoned, meaning that the construction of wind energy facilities in that area is an outright permitted use, with no discretionary land use approvals needed. For the small portion of the site subject to County zoning, the County code requires a conditional use permit. Following the lawsuit, the County conducted an extensive public process, and proposed an ordinance that would have adopted strict, criteria-based standards for any wind energy facility—a vast improvement in regulatory rigor over the existing (and still current) zoning provisions.

2009 SEPA Appeal: The County issued a Determination of Non-Significance (DNS) under SEPA to enable adoption of the new County zoning—a typical local action where projects would be separately reviewed for SEPA compliance during the permitting process. The Opponents appealed that determination, conflating the Skamania County regulatory approach with the “overlay zoning” approach adopted in Klickitat County, arguing that Skamania County should have followed the same process used in neighboring Klickitat County, including completing a programmatic EIS prior to adopting the ordinance. In February, 2009, the reviewing hearing examiner granted the appeal. The Examiner confused the nature of the Skamania County zoning code with the Klickitat County “overlay zoning” approach. The Applicant was not a party to that appeal.

Contested Land Use Consistency: The County recognized that the Opponents would continue to file lawsuits against the County, and that the County lacked the funds to pursue a Klickitat County-type programmatic EIS and overlay ordinance, particularly given the fact that few if any sites other than the Whistling Ridge Energy Project site would ever be capable of development for wind energy in Skamania County. In the wake of the then-recently-issued Kittitas Valley Supreme Court decision, the County recommended that Whistling Ridge abandon County permitting efforts and seek approval through EFSEC.

The initial version of Whistling Ridge's ASC contained an analysis of alternative routes to access the Project site as required by Washington law. WAC 463-60-296; ASC § 2.19.5. Alternative Route 1 contemplated the use of existing roads in the General Management Area (GMA) of the Scenic Area, namely SR-14, Cook-Underwood Road, Ausplund Road, and a private logging road. ASC § 2.19.5. Use of Alternative Route 1 would require road improvements that would impact a non-Project landowner. Alternative Route 2 also contemplated the use of existing roads in the Scenic Area, namely SR-14, Cook-Underwood Road, Kollock-Knapp Road, Scoggins Road, and a private logging road. Use of Alternative Route 2 would have required minor road improvements in the GMA, but these would not directly impact any non-Project landowners. Alternative Route 2 was the preferred alternative in the initial version of Whistling Ridge's ASC.

County's First Land Use Consistency Certification: On May 4, 2009, the Skamania County Director of the County's Community Development Department ("Director") drafted a letter to EFSEC to accompany a "Land Use Consistency Review Staff Report." This staff report analyzed Whistling Ridge's proposed use of Alternative Route 2. It noted the road improvements in the Scenic Area that Alternative Route 2 might require and that these improvements would require review under SCC Title 22 (the County's Scenic Act ordinance). It then analyzed whether these road improvements could be consistent with SCC Title 22's protection of scenic, natural, cultural, and recreational resources. The Director concluded that the contemplated road improvements for Alternative Route 2 were "consistent with SCC Title 22 with conditions of approval. I further find that similar road improvement projects (road widening, realignments, etc.) have been found consistent with SCC Title 22 in the past." The Board of County Commissioners subsequently passed Resolution No. 2009-22, which adopted the staff report and resolved that the Project, as then proposed, was "consistent with the Skamania County land use plans and applicable zoning ordinance."

EFSEC's Land Use Hearing: On May 7, 2009, EFSEC conducted a land use hearing regarding Whistling Ridge's ASC at the Underwood Community Center in Skamania County to receive public testimony regarding whether the Project was consistent with local land use regulations. Resolution No. 2009-22, the Director's letter, and the staff report were entered into evidence at the hearing. The Opponents contested land use consistency.

Opponents' First Appeal to the Gorge Commission: After EFSEC conducted its land use hearing, the Opponents appealed Resolution No. 2009-22 to the Columbia River Gorge Commission ("Gorge Commission"). Opponents argued that "[t]he problem with the County's analysis is that the County failed to review the proposed *purpose and use* of the haul route. In the National Scenic Area and in Skamania County generally, roads must be reviewed for both their construction and their intended uses." (Emphasis in original). Opponents contended that the Project constituted an "industrial use," which is not allowed in the GMA of the Scenic Area, and thus, SCC Title 22 prohibits both the road improvements in the GMA contemplated by Alternative Route 2 and the Project's use of roads in the Scenic Area. The Opponents argued that under Scenic Area regulatory requirements, the Project *could not use any public roads* in the Scenic Area for access to the site, presumably including I-84 and SR 14. This would have meant, by way of one small example only, that the Portland/Vancouver municipalities could not use the railways, interstate highways, state highways or County roads through the Gorge to transport municipal waste.

Applicant's ASC Amendment to Resolve Gorge Commission Appeal: Although Whistling Ridge and the County vigorously contested Opponents' claims and their legal basis, Whistling Ridge sought to resolve the appeal and eliminate road improvements in the Scenic Area by finding another route to access the Project site. On October 12, 2009, Whistling Ridge filed amendments to its ASC with EFSEC that eliminated the initially preferred Alternative Route 2 because it "would require construction within the" GMA. ASC § 2.19.5. Instead, Whistling Ridge proposed Alternative Route 3, which would utilize existing public roads in the GMA, namely SR-14, Cook-Underwood Road, and Willard Road. *See, e.g.*, ASC §§ 2.1.1, 2.3.3.7, 2.19.5, 4.3.2.1. A new connection to West Pit Road would be built outside the Scenic Area. ASC § 2.19.5. The County has considered, and has not identified any needed improvements to roads in the Scenic Area to accommodate the Project's construction phase transportation needs.

County's Second Land Use Consistency Certification: Following Whistling Ridge's ASC Amendment, the County Board of Commissioners adopted Resolution No. 2009-54 advising EFSEC that the Project's proposed use of existing roads in the GMA would not require review under, and is consistent with, the County's Scenic Area ordinance.

Opponents' Second Appeal to the Gorge Commission: Notwithstanding the Applicant's efforts to resolve all appeal issues, the FOCG and SOSA appealed Resolution No. 2009-54 to the Gorge Commission, initiating yet another round of litigation during the EFSEC proceedings. This time, they retooled their legal attack, and claimed that notwithstanding EFSEC's preemptive authority, the County should have conducted a full adjudicatory hearing on Resolution No. 2009-54.

Gorge Commission Dismissal of Appeal: The Columbia River Gorge Commission held a hearing and dismissed the appeal. The Gorge Commission acknowledged EFSEC's preemptive authority, and found that it did not have jurisdiction under the Scenic Act, because Resolution No. 2009-54 is merely advisory staff report to EFSEC, offered as evidence in the EFSEC process. Further, the Commission confirmed that no portion of the Project is proposed within the Scenic Area, and the Gorge Commission therefore has no jurisdiction or authority to review the County's decision.

With its finding that no portion of the Project is proposed within the Scenic Area and that the Scenic Act is not implicated in these proceedings, the Gorge Commission withdrew its intervention with EFSEC.

Prima Facie Compliance: Resolution No. 2009-54 constitutes *prima facie* evidence in EFSEC's review of Whistling Ridge's amended ASC. WAC 463-26-090. No evidence has been offered to rebut land use consistency. Paradoxically, while Resolution No. 2009-54 is not a "decision," Opponents, in studious disregard of the Kittitas Valley decision, and in full reliance on the Scenic Act, ***insisted that the Gorge Commission in fact order the Board to conduct an adjudicatory proceeding and to actually issue a "decision," in derogation of EFSEC's preemptive authority.*** The Gorge Commission refused to issue that order. Unlike the Kittitas Valley case, here, Skamania County has confirmed land use consistency. And here, the opponents want EFESC to ***deny*** the project based on an arcane and misapplied legal analysis of local land use plans and zoning.

Yes, the Opponents apparently demand that the very Siting Council that preempted Kittitas County's efforts to stop the Kittitas Valley Wind Power Project now disregard Skamania County's favorable review of the Whistling Ridge Project and its efforts to fairly and

appropriately administer local land use controls. Here, in stark contrast to Kittitas County, Skamania County has made every effort to work cooperatively and in good faith, within EFSEC's process, in full respect of EFSEC's and the Governor's authority.

General Theme of Opponents' Witnesses and Argument

Each of the Opponents' witnesses reflect a common theme—adopted precedent, law and regulatory guidelines do not apply and should not be followed. Where objective standards are applied, they are applied subjectively, with pre-ordained results, and with patent bias. All of the Opponent testimony is entirely result-driven and deeply flawed. The Siting Council is told, again and again, that it has no choice under objective legal criteria, and that it must surrender its good judgment and sound discretion and deny the Project notwithstanding its compliance with all applicable laws, criteria, regulatory guidelines and standards.

Scenic and Aesthetic Issues

For visual and aesthetic issues, the Council is told that the methods used by EFSEC in three prior wind energy EISs are flawed and somehow not appropriate for this Project, despite a unanimous Supreme Court endorsement of these methodologies. Mr. Apostol misrepresents both the methodology the Applicant uses, as well as the methodology he uses, and he seems not to understand any of it. He boldly uses the Scenic Act's Management Goals to assess visual impacts, utterly disregarding both that the Project is wholly outside the Scenic Area and the Savings Clause of the Scenic Act. He contends that *distance does not matter—that if something is visible from 20 miles or 2 miles, if it is visible from a Key Viewing Area (KVA) it is de facto a high impact*. He contends that if something is visible from a KVA, it by definition is in “high contrast” to its surroundings. He contends that wind turbines indisputably blend in better with large flat and (in his opinion) visually uninteresting landscapes (*e.g.* the dryland wheat fields of Eastern Oregon and Washington and the Midwest prairies), but they highly contrast with the complex mountainous landscapes of the Project site, where high elevation, varied land forms, thick vegetation, highways, railroads, transmissions lines, homes, industrial sites and dams provide a significant backdrop and allow for visual absorption. He focuses heavily on one viewpoint on Interstate 84, where the view around a bending interstate highway, at 65 mph, would be fleeting at best, and dangerous for a viewer who chooses to stop to ponder the Project.

Mr. Apostol has no understanding of modern visual simulation methods, and his own professional work betrays his own failure to implement even the most basic of the methods he finds lacking in the Applicant's analysis.

The Whistling Ridge ASC does not disregard the Project's location. We have offered more information regarding viewpoints, more sophisticated simulations, and a greater number of visual simulations than offered in any of the prior EFSEC wind energy project. The Applicant's testimony harmonizes the locations within the Scenic Area with objective evaluation methodologies accepted by EFSEC in prior proceedings. The evaluation is candid and transparent and shows insignificant impacts. And to reflect the Applicant's commitment to full understanding and review by EFSEC, the Rebuttal testimony of Pearson and Watson in fact provides much of the information found "lacking" in the Apostol testimony.

The Opponents' Direct Application of the National Scenic Act

The Opponents take great pains to convince the Council that they are not arguing that the Scenic Act "applies *directly*" to the Project. As is clear from their efforts to strip the Council of its authority through two interlocutory Gorge Commission appeals, the Opponents' position is deceptive. They have used the Scenic Act as a battering ram. It is cold comfort to the Applicant that the Act is not applied "*directly*." Mr. Apostol applies it "*directly*," giving full force to the Act's Management Goals as if the Project were entirely within the Scenic Act boundary. In one breath Apostol acknowledges the Scenic Area's boundary, and in the next he states that it is immaterial, as a viewer cannot distinguish the boundary. The Opponents' "indirect" application of the Scenic Act means nothing more than the fact that they will use these adjudicatory proceedings to "directly" apply the Scenic Act through SEPA, in studious disregard of Skamania County's Scenic Act ordinance which prohibits this use of SEPA, and in further disregard of the Council's admonitions that these proceedings will not be used to litigate the Draft EIS.

Avian and Wildlife Considerations

Without question, the Whistling Ridge Energy Project site is the most studied wind energy project in the Northwest, and perhaps in the nation. The Applicant understands that this may be the first commercial wind energy project sited on industrial forestry lands. However,

notwithstanding the mischaracterizations by the Opponents, this is and will continue to be an *industrial* forest site. As WDFW has confirmed in writing, a highly managed commercial/industrial forest simply does not have the habitat values or wildlife risks of a native forest. As Applicant's wildlife expert, Greg Johnson states, these forests have often been called "green deserts" for their lack of biodiversity. In fact, this site does not begin to compare to the biodiversity and wildlife interaction and risks present right now at the model Wild Horse Wind Power project—a project permitted and managed for compliance by EFSEC and the Puget Sound Energy Technical Advisory Committee—and managed with great success.

The Whistling Ridge site finds very low presence of avian species, including raptors. Despite the volume in the Opponents' SEPA comments, the site has no presence of Northern Spotted Owls, as confirmed by the USFWS in its July 2010 ESA Informal Consultation letter. Moreover, the "review panel" convened by USFWS finds that the behavior of this species, even if present on the site, demonstrates very low risk of turbine strikes ("the risk of spotted owl collision at this site is considered to be discountable.") Finally, after an unprecedented three years of season-specific, protocol-based biological studies (including an unprecedented final year's study at turbine hub height), the biological reports show no significant risk to bats.

In harmony with their general theme Opponents' wildlife witness is a loud drone, "warning" EFSEC that it should not apply the "best available science" and the Wind Power Guidelines and applicable agency policy applied to every other wind energy project in the state of Washington. Mr. Smallwood tells EFSEC that it must jettison the entire, well-accepted and applied science of pre-application biological site evaluations. Mr. Smallwood has built a career as a consulting expert witness out of his four years' PhD studies at a single project site—the Altamont Wind Resource Area in California—leveraging that experience into multiple publications in journals, at least one of which he served as Associate Editor. In fact, many, many of his "peer-reviewed" publications were published in journals on which he contemporaneously sat as either Associate Editor or Editorial Board Member. Smallwood, primarily through his experience at the one single wind resource area (Altamont), has adopted what he himself calls a "novel" theory and "novel" applications (or misapplications) of statistical modeling, all aimed at pre-ordained, result-driven conclusions of high impacts. This testimony demands that the Siting Council disavow its own expertise and practical experience in permitting and managing wind

energy facilities and disregard the advice and recommendations of the USFWS and WDFW, all in favor of a self-acknowledged “novel” approach grounded in methods and work that has been critically peer-reviewed and utterly discounted even in the Altamont Wind Resource Area.

Whistling Ridge has proposed a highly beneficial mitigation strategy for all potential habitat and wildlife impacts. This strategy is described in detail in the Rebuttal Testimony of Jason Spadaro, and is strongly endorsed by WDFW in its December 2010 letter to the Council.

Energy and Need for the Project

The very apex of the Opponents’ theme is found in the Michaels testimony and rebuttal—a remarkable study in “strange bedfellows,” bedding down to stop renewable energy development in the Northwest. Ostensibly a conservation organization, the FOCG rolls out a Cato Institute scholar with his predictable antipathy toward renewable energy, and thinly veiled advocacy for EFSEC to jettison Washington law and policy in favor of a future that paves the way for fossil fuel baseload generation plant development. This testimony has almost nothing to do with the Project and virtually everything to do with whether EFSEC should approve any other wind energy generation projects, ever—in fact, the testimony could be used to stop *any* future generation facilities of any kind. The only real theme attaching to the Whistling Ridge Energy Project is that it is a “small” project and therefore cannot provide “abundant” power, “balanced” against the purported volume and integration challenges of wind energy in the electrical grid. If the Michaels testimony and the Opponents arguments in this regard are at all honest and credible, they would support very large wind generation projects. But this is of course impossible, given the Opponents’ arguments and the Michaels testimony regarding grid constraints—contentions that would militate against any future energy generation development in the Northwest.

The Michaels testimony is fantastic on many scores, and its content has already been found to be irrelevant by EFSEC (Prehearing Order No. 12). In rulemaking, EFSEC has *expressly disavowed a “need for facility”* standard. Yet the Opponents confidently offer the Michaels testimony to demand that the Council make a determination that this merchant plant is not “needed.” To accept the Michaels testimony, EFSEC would need to turn the clock back to 1999, prior to its own regulatory reform, which was launched to adopt a predictable, criteria-based process. To accept the testimony, EFSEC would need to reverse its own regulatory

decisions, and evaluate the “need” for merchant plant development on a project-by-project basis. Michaels demands that the Council deny the Project based on clearly transitory transmission constraints and pure speculation that the Project’s power could, maybe, be sold into the California power market (where, even if sold there, it would *still* offset greenhouse gas emissions). Michaels betrays deep ignorance in the BPA system and the many, rapidly evolving solutions aimed at integrating wind energy into the Western Power grid.

In furtherance of the Cato Institute agenda, Michaels defies national knowledge, and dismisses what a host of professional and citizen witnesses know from both intuition and experience—that the Project will bring much needed jobs and tax revenues to a starving county, with little or no offsetting public service impacts. Michaels’ bias is clear in how he manipulates economic models and sophomorically translates the economic benefits of the Project into the most simple terms, attributing a “cost” to each job by each dollar invested in the Project. This is not an objective economic opinion. It’s an effort to undermine Washington policy and law and national efforts to combat climate change.

The Michaels testimony is packed with issues not appropriately considered by EFSEC. Should EFSEC decide to “go down this road,” the Council should think long and hard about its own future as a fair and objective, standards-based permitting venue intended to secure the widest possible choices of power, to ensure “abundance” and “affordability” of power—power that, by law and policy, should preferably be renewable, sustainable power, offsetting greenhouse gas emissions. To accept the Michaels testimony, EFSEC would by necessity decide that it will not use objective standards to evaluate projects that serve long-term needs and statewide and regional interests, but rather use shifting, subjective and vague standards and temporary circumstances. EFSEC would then decide that it will be the arbiter of power markets and need for power in the Western power grid, setting itself very much apart from every other agency that has chosen not to involve itself in commercial, market based decisions.