

KC PEDA
X-EXAMINATIVE
EXHIBIT

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**Re: SEPA Comment and Notice of Administrative Appeal of Threshold Determination
Windy Flats West Wind Energy Project (County File Nos. SEP2010-22, EOZ2010-01)**

To Whom It May Concern:

This Comment and Notice of Appeal is filed on behalf of Friends of the Columbia Gorge, Inc. Friends is a non-profit organization with approximately 5,000 members dedicated to protecting and enhancing the resources of the Columbia River Gorge. Friends' membership includes hundreds of citizens who reside in the six counties in which the Columbia River Gorge National Scenic Area is located.

Friends has substantial concerns regarding the environmental impacts of the proposed wind facility, including but not limited to adverse impacts to scenic resources, wildlife and plants and their habitat, recreational resources, cultural resources, the resources of the Columbia River Gorge National Scenic Area and the Columbia Hills Natural Area Preserve, and water and air quality; as well as noncompliance with applicable land use requirements.

The County's threshold determination under the State Environmental Policy Act (SEPA) must be "based upon information reasonably sufficient to evaluate the environmental impact of a proposal." WAC 197-11-335. Friends is deeply concerned about the unfortunately narrow scope of study, material non-disclosure of essential information, and misleading or erroneous analysis. In addition, the information that is available, although largely marginalized in the review process to date, suggests that this project will likely have significant impacts to the natural and human environment. The mitigation measures included in the County's SEPA decision do not reduce the impacts below the level of significance.

Ex. C

Friends challenges the County's threshold determination (including but not limited to the Adoption Notice, the SEPA Addendum, the Mitigation Measures, and the other documents relied upon in these documents). The County's determination is deficient because the record does not demonstrate that the County has actually required thorough disclosure and investigation of the environmental impacts of this project. Friends requests that the County withdraw the Mitigated Determination of Nonsignificance (MDNS), replace it with a Determination of Significance (DS), and require preparation of an Environmental Impact Statement (EIS). This appeal is not limited to the specific claims and examples provided in the Notice of Appeal; rather, the claims and examples raised in this Notice are non-exclusive examples of the many areas of noncompliance.

The Requirements of SEPA

SEPA's general purpose is to require consideration of environmental factors at the earliest possible stage in order to allow decisions to be based on a complete disclosure of environmental consequences. *See Stempel v. Dept. of Water Resources v. City of Kirkland*, 82 Wn. 2d 109, 118 (1973). Under SEPA, agencies are required to engage in an open and public study of environmental impacts at the earliest possible time. RCW § 43.21C.030(b). This threshold consideration of environmental factors must be integrated into early planning in order to avoid thwarting SEPA's policies. *See WAC § 197-11-300*. The threshold determination is required so that actions do not improperly avoid environmental scrutiny at an early stage. *Juanita Bay Valley Community Ass'n v. City of Kirkland*, 9 Wn. App. 59, 73 (1973). The regulatory agency must be able to show that environmental factors were actually considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA. *Id.*

The lead agency must assess the "likely" cumulative, direct, indirect, short-term, and long-term impacts to the environment. WAC 197-11-030(2)(b), (2)(g); *see also State Environmental Policy Act Handbook* (SEPA Handbook) at 2 (2003). The lead agency must also evaluate alternatives and mitigation measures. WAC 197-11-055(2)(e); *see also SEPA Handbook* at 2. The lead agency "shall not limit" its consideration only to impacts within the boundaries of its jurisdiction. WAC 197-11-060(4). In addition, SEPA provides lead agencies with the substantive authority to mitigate likely adverse impacts to the natural and built environment. RCW § 43.21C.030.

SEPA's objective of ensuring the full disclosure of environmental information so that environmental matters can be given proper consideration during decision making "is thwarted whenever an incorrect 'threshold determination' is made." *Norway Hill*, 87 Wn.2d at 273. For that reason, if a governmental body "makes a threshold determination of 'no significant impact' under SEPA, it must then demonstrate that environmental factors were considered in a manner sufficient to be a prima facie compliance with the procedural dictates of SEPA." *Lassila v. City of Wenatchee*, 89 Wn.2d 804, 814, 576 P.2d 54 (1978) (citations omitted). As the Court further explained,

before a court may uphold a determination of "no significant impact," it must be presented with a record sufficient to demonstrate that *actual* consideration was given to the environmental impact of the proposed action or recommendation.

Lassila, 89 Wn.2d at 814 (emphasis added).

An environmental impact statement is required when the impacts from a proposed project would be significant. WAC § 197-11-794(1). Washington courts have interpreted this provision as requiring an EIS "whenever more than a moderate effect on the quality of the environment is a reasonable probability." *Norway Hill Preservation & Protection Ass'n v. King County Council*, 87 Wn. 2d 267, 273 (1976).

Adoption of SEPA Documents

RCW § 43.21C.034 and WAC 197-11-600 provide limitations for adopting and amending existing environmental documents. Each type of adoption or amendment is designed to fulfill a particular purpose, and existing environmental documents may be adopted only if they "adequately address environmental considerations set forth in RCW 43.21C.030." RCW § 43.21C.034. SEPA allows agencies to use existing documents only when the adoption will not result in a circumvention of an agency's duty to study significant adverse impacts on the environment:

The agency adopting an existing document must independently review the content of the document and determine that it meets the adopting agency's environmental review standards and needs for the proposal.

WAC 197-11-630(1).

Improper adoption of 2003 EOZ DEIS. The Adoption notice unlawfully purports to adopt the "Klickitat County Energy Overlay Draft Environmental Impact Statement (Klickitat County, Aug. 2003)" for this project. That 2003 document was merely a draft, and thus cannot be adopted or relied upon to meet the County's SEPA responsibilities for this project. While the DEIS was later transformed into a Final Environmental Impact Statement (FEIS), the County cannot adopt a draft document for this project.

Cumulative Impacts

Inadequate analysis of cumulative impacts. Under SEPA, the lead agency is specifically required to consider whether several marginal impacts when considered together may cumulatively result in a significant adverse impact. WAC 197-11-792(2)(c)(iii). The likelihood of an accumulation of adverse impacts of wind energy development and energy transmission projects in this region is identifiable and must be included in the agency's SEPA analysis.

The County failed to perform adequate review of the potential cumulative impacts of this proposal when considered in conjunction with other wind energy projects in the region. The applicant recently constructed several wind energy facilities, including Windy Point, Windy Point II, and Windy Flats, immediately adjacent to the Windy Flats West Project Site. More than 1,900 MW of wind energy development has been approved or is under review in Klickitat County, and thousands more MW of energy has been proposed, permitted, and/or constructed in the surrounding ecoregion, including projects in Oregon south of the Windy Flats West project and to the southeast (including Summit Ridge; Golden Hills 1, 2, and 3; and Thresher 1 and 2). The County has failed to analyze Windy Flats West's contribution to the cumulative effects of industrial wind development on wildlife, aesthetics, the energy grid capacity, cultural and recreational resources, and other factors.

In addition, the County failed to analyze the potential cumulative impacts of this proposal in conjunction with the proposed Big Eddy-Knight Transmission Project. The three alternatives currently under consideration for the Big Eddy-Knight project cross over the top of the Columbia Hills and are each within seven miles of the Windy Flats West project. Alone, the three alternatives have the potential of significant adverse effects to plants, wildlife, aesthetics, cultural resources, and recreation. The impacts of the Big Eddy-Knight project in conjunction with the impacts of the Windy Flats West project would likely result in cumulative adverse effects to the surrounding environment.

The 2004 EOZ FEIS is no longer a valid gauge of the cumulative impacts of wind energy development within Klickitat County. Energy development within Klickitat County has greatly exceeded the scope and rate of development reviewed in the FEIS for the Energy Overlay Zone ordinance. This FEIS, issued in September 2004, evaluated the potential environmental impacts of four wind projects in Klickitat County with a total capacity of 1,000 MW over a twenty-year period. EOZ EIS at 1-2, 3-12. The actual rate and extent of development of wind facilities under the Klickitat EOZ ordinance, however, has far exceeded what was reviewed in this FEIS. Over the course of only five and a half years, more than fifteen different wind facilities have been approved or proposed in Klickitat County, for a combined capacity of more than 1,900 MW. This means that wind energy facilities have been developed in Klickitat County at a rate roughly seven times as fast as projected, with no end in sight. A majority of these facilities are already constructed or under construction. At this point, the FEIS is outdated and no longer a valid gauge of the cumulative impacts of wind energy development within Klickitat County.

The information in the FEIS must be updated to reflect the reality of the development and impacts that have actually occurred. Although the County has adopted two addendums to the EOZ EIS, they address only impacts to wildlife, and as discussed below, are inadequate and inaccurate even in addressing wildlife impacts. And although the County is currently considering revisions to its EOZ ordinance, the County has failed to adopt a Supplemental EIS as required by SEPA. A supplemental EIS is required if there are substantial changes in conditions that is likely to have significant adverse environmental impacts not within the range of alternatives and impacts included in the EOZ EIS. WAC

197-11-600(3)(b)(i), (4)(d)(i). A supplemental EIS is also required if there is new data indicating that the proposal will have significant adverse environmental impacts beyond those analyzed in the EOZ EIS. WAC 197-11-600(3)(b)(ii), 4((d)(ii). *See Kiewit Construction Group v. Clark County*, 83 Wash. App. 133 at 142, 920 P.2d 1207 (1996).

A new county-wide EIS (either prepared by the County in the context of its legislative revisions to the EOZ ordinance or prepared by an applicant in a project-specific context) is warranted to address the cumulative impacts of the Energy Overlay Zone. In the absence of such an analysis, no further wind energy projects can be approved in Klickitat County.

The **Second Addendum to the Klickitat County EOZ EIS is fundamentally flawed and does not adequately analyze cumulative impacts to wildlife.** The County has adopted the *Second Addendum to Klickitat County Energy Overlay Final Environmental Impact Statement* (Klickitat County, Feb. 2010), which incorporates by reference *Avian, Bat and Habitat Cumulative Impacts Associated with Wind Energy Development in the Columbia Plateau Ecoregion of Eastern Washington and Oregon* (West, Feb. 2010) (hereinafter The West Study). The West Study is fundamentally flawed and does not adequately analyze the cumulative impacts to wildlife. The West Study used flawed regional population estimates and underestimated fatality rates due to flawed analysis. The West Study also failed to account for species-specific detection functions and variation in visible airspace due to topographic occlusion. Because of this, comparisons of use rates between various projects in the study area are not reliable.

EOZ Ordinance Reevaluation

The County cannot approve any further wind energy projects in Klickitat County until it actually reevaluates the EOZ ordinance. The County is not in compliance with the 2005 Settlement Agreement regarding the EOZ FEIS, and cannot this project or any other future wind energy development until the County is in compliance. The 2005 Settlement Agreement includes the following condition:

In seven years, or after 1000 MW of wind energy is constructed (as calculated from the date of the Agreement), whichever occurs first, the Planning Commission will hold a public hearing. *The purpose of the public hearing will be to reevaluate the energy overlay zone and take public comment on the energy overlay development regulations and comprehensive plan policies.* Following the Planning Commission hearing, *the Board of County Commissioners will also hold a public hearing for the same purposes.* Neither the Planning Commission nor the Board of County Commissioners is required to take any action as a result of these hearings, although it may elect to amend the comprehensive plan policies and/or development regulations.

2005 Settlement Agreement at § 3.2(c) (emphasis added). The clear, unambiguous intent of this condition requires the County to hold public hearings for the purpose of reevaluating the EOZ. The settlement agreement is a contract, and the County is required to perform its contractual obligations. Here, this means the County (including both the Planning Commission and the Board of County Commissioners) must reevaluate the ordinance as a whole, and all options must be considered as part of this reevaluation, including rescinding or phasing out the EOZ ordinance.

The County Planning Commission and the Board of County Commissioners have both held hearings related to *specific revisions* to portions of the EOZ ordinance, but neither body has undertaken an independent reevaluation of the ordinance as a whole, nor announced to the public that they will be doing so, despite requests by the public to comply with the Settlement Agreement.

The County has failed to comply with its express obligation for both the Planning Commission and the BOCC to take the lead in reevaluating the ordinance regardless of comments from the public, and of announcing to the public that these bodies will be undertaking this task. Absent actual reevaluation, the County is in violation of the Settlement Agreement, and must not approve this project or any further wind energy development until it becomes compliant.

Consultation

Failure to consult with federal and interstate agencies. The County has failed to consult with several federal and interstate government agencies with jurisdiction or expertise regarding the impacted environment. These agencies include the Columbia River Gorge Commission, the United States Forest Service, and the National Park Service. To Appellant's knowledge, there has been no government-to-government consultation with these entities, either on the project-specific level or for any of the documents adopted by the SEPA adoption notice. The County must consult with and obtain comments from these agencies because they have jurisdiction or expertise regarding the impacted environment. RCW 43.21C.030(2)(d). Relevant issues include the aesthetic impacts to federally designated scenic resources; impacts to views from national trails such as the Lewis and Clark National Historic Trail and the Oregon Pioneer National Historic Trail, and impacts to the Columbia River Gorge National Scenic Area. The County has failed to meet its consultation duties, which must be met prior to a final SEPA decision.

Failure to consult with state agencies. The proposed project would be sited in the immediate vicinity of the Columbia Hills State Park and the Columbia Hills Natural Area Preserve. The County apparently failed to consult with state agencies including the Washington State Parks and Recreation Commission, the Columbia Hills Natural Area Preserve, and the Washington Natural Heritage Program, to ensure that all potential impacts were analyzed during the decision-making process, including an evaluation of whether the project would be consistent with those agencies' relevant management documents. These state agencies are expert agencies that must be consulted under SEPA.

See WAC 197-11-920. The County has failed to meet its consultation duties, which must be met prior to a final SEPA decision.

Failure to consult with tribal governments and the Bureau of Indian Affairs. The proposed facility would be sited near tribal lands and on lands that are rich with cultural resources. In addition, the proposed project would be located directly across from Celilo Village, which is held in trust by the federal Bureau of Indian Affairs for the Wy'am people, and the proposed wind towers would break the skyline and be highly visible from the Celilo area. The County must ensure that there is adequate consultation with the BIA, the Yakama Nation, and the Wy'am Board.

Previous wind development by Cannon Power in the immediate area has caused irreparable harm to cultural resources. It is critical that the County ensure that the Yakama Nation and other tribal interests have an opportunity to participate in the decision-making process to ensure that the project would avoid adverse impacts to cultural resources.

The Energy Grid

The County failed to consider the direct and cumulative impacts of the proposed development on the energy grid and its infrastructure. There are limits to the amount of energy development that may occur in Klickitat County and within the Columbia Plateau Ecoregion. Wind energy production will ultimately be limited by the capacity of the Bonneville Power Administration to integrate new wind energy resources into the BPA electricity grid. Recently, BPA expressed concern about how it will reliably integrate over 6,000 MW of wind energy by 2013. Northwest Power and Conservation Council, Sixth Power Plan, at 12-11 (available at <http://www.nwccouncil.org/energy/powerplan/6/default.htm>). A critical component of integrating new wind resources into the grid is building adequate transmission facilities. The County's environmental analysis failed to address the impacts the Windy Flats West project will have on the BPA's transmission capacity and the resulting demand for additional transmission facilities.

By adding more energy to the grid, the project increases the need for more capacity and more transmission lines and other infrastructure. The County failed to analyze reasonably foreseeable future actions that may be directly or indirectly related to this project. These may include BPA's proposed Big Eddy-Knight Transmission Project, which is currently undergoing environmental review. The various alternatives under consideration for the Big Eddy-Knight Transmission Project would run through or near the proposed Windy Flats West facility, including alternatives that would adversely affect the Columbia Hills Natural Area Preserve and the Columbia River Gorge National Scenic Area. Windy Flats West, along with the larger Windy Point/Windy Flats projects, would contribute to the need for this new transmission capacity. The County failed to analyze the possible influence of approving the Windy Flats West project on the potential location chosen for the Big Eddy-Knight project and its impacts.

No Analysis of Alternatives

No analysis of alternatives, including a “no action” alternative. Alternatives analysis is a central element of an adequate EIS. WAC 197-11-440. Because the impacts of this project will be significant, the applicant and County must consider possible alternatives.

The adequacy of an EIS is reviewed under the “rule of reason,” which requires a “reasonably thorough discussion of the significant aspects of the probable environmental consequences’ of the agency’s decision.” *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn. 2d 619, 633, 860 P.2d 390 (1993) (quoting *Cheney v. City of Mountlake Terrace*, 87 Wn. 2d 338, 344-45, 552 P.2d 184 (1976)); *Leschi Improvement Council v. State Highway Comm’n*, 84 Wn. 2d 271, 286, 525 P.2d 774 (1974) (“The role of a reviewing court would seem to be one of determining whether the environmental effects of the proposed action *and reasonable alternatives are sufficiently disclosed, discussed and that they are substantiated by supportive opinion and data.*”) (emphasis added).

While the adopted EOZ EIS considers alternatives, none of them are specific to this project. The application and the County’s SEPA determinations provide no reasonable alternatives for the project itself, the proposed Project Site, and the proposed site and designs of the individual project components. For example, alternative sites for a relatively small number of turbines could dramatically reduce their scenic impact within the National Scenic Area viewshed, yet the applicant and county fail to consider this alternative. Alternative siting options may also dramatically reduce adverse impacts to wildlife. The County must require a thorough exploration of alternatives.

Mitigation Measures

The County’s mitigation measures are inadequate. The proposed mitigation measures fail to provide an adequate level of protection to the affected environment to ensure nonsignificance. For example, while the MDNS includes conditions relating to future surveying for wildlife impacts, it fails to include any conditions that would require any concrete actions in response to actual wildlife impacts.

Numerous mitigating conditions are speculative and rely on future actions by the applicant and future review by the County to evaluate environmental impacts, long after the SEPA process is complete and the project is approved. SEPA requires that those impacts actually be considered during the SEPA process, not at some unspecified time in the future.

Examples of flawed mitigating conditions include Condition No. 25 regarding road construction. That condition requires that the applicant “[i]dentify and assess cumulative impacts of the Project in combination with use of haul routes by other known projects.” Condition No. 25 also requires the applicant to “[i]dentify location of all routes used during the implementation, construction, maintenance, operation, and decommissioning of the project.” These elements must be addressed

during the SEPA process, not later. Mitigating conditions cannot be used to postpone environmental analysis to a future date.

Similarly, the mitigating conditions for impacts to avian species improperly defer critical reviews and siting decisions to a later date. With respect to impacts to wildlife, Condition No. 42 requires the applicant to "prepare a restoration plan in consultation with WDFW." Similarly, Condition No. 43 requires preparation of a "formal riparian vegetation restoration plan" and Condition No. 44 requires preparation of a "mitigation plan to compensate for impacts to grasslands." Condition Nos. 51 and 52 allows for micro-siting decisions at a later date. Condition No. 55 requires the applicant to "[c]onduct a raptor nesting survey prior to issuance of the building permit to identify active raptor nest sites in the vicinity of the project." Condition No. 56 requires the preparation of "an avian and bat monitoring plan."

The County's conditions also completely defer preparation and analysis of turbine foundation and pad designs, road designs, stormwater drainage plans, geologic hazard analysis, stormwater management and pollution prevention plans, construction traffic management plans, decommissioning plans, restoration plans for vegetation and critical areas, weed management plans, fire and explosion protection plans, and plans for responses to discovery of unanticipated cultural resources.

Without these plans and information, it is impossible for the County and public to fully understand the project and its potential environmental impacts. The County's approach of deferring necessary information to some post-approval stage of development circumvents SEPA's unequivocal mandate that the County must actually consider the environmental impacts of its action before issuing a SEPA threshold determination. These plans and information are crucial for the County and the public to know whether the impacts of the project will be significant. Deferring the required review of these materials to a later date violates the express purposes and requirements of SEPA.

Special and Sensitive Areas

Failure to consider impacts to special and sensitive areas. SEPA requires that the environmental analysis include discussion of specific resources. The SEPA official "shall" consider whether a "proposal may to a significant degree . . . [a]dversely affect environmentally sensitive or special areas, such as loss or destruction of historic, scientific, and cultural resources, parks, prime farmlands, wetlands, wild and scenic rivers, or wilderness." WAC 197-11-330(3)(e)(I). The proposed energy facility would likely cause significant impacts to multiple sensitive areas in the vicinity. These include the Columbia River Gorge National Scenic Area, Columbia Hills State Park, and the Columbia Hills Natural Area Preserve. In addition, the facility would be within a National Audubon Society-designated Important Bird Area. The County has failed to ensure that environmental impacts to these areas have been thoroughly analyzed. *See Swift v. Island County*, 87 Wn. 2d 348, 552 P.2d 175 (1976) (requiring an EIS for a residential development that would have significantly impacted sensitive areas in the vicinity, including Whidbey Island Historical District, which is listed on the National Register of

Historic Sites; Fort Casey Historical State Park; and Crockett Lake, which is valuable waterfowl and shorebird habitat that is designated by the Audubon Society as an Important Bird Area).

Precedent for Future Projects

Failure to consider the precedent set by this project. The County has failed to adequately consider the degree to which approving this project as proposed would establish a precedent for future actions with significant effects. The SEPA official "shall" consider whether a "proposal may to a significant degree . . . "[e]stablish a precedent for future actions with significant effects." WAC 197-11-330(3)(e)(iv). If the County approves this application as proposed, it will establish a precedent—not just in Klickitat County, but throughout the region—that wind farms may be constructed adjacent to National Scenic Areas without considering alternative sites—both for the projects themselves and for individual wind turbines. In addition, a precedent could be set that wind farms may be sited in areas with high concentrations of migratory birds, with minimal review of potential avian impacts and minimal mitigation and enforcement measures for addressing avian impacts in the event that they do occur.

Scenic Impacts

The applicant and County have failed to adequately evaluate the scenic impacts of the proposed development. The most relevant and appropriate sets of guidelines for evaluating scenic impacts include the scenic resource protection standards in the Management Plan for the Columbia River Gorge National Scenic Area, the Forest Service's Visual Management System, and the Forest Service's Scenery Management System. The County also failed to consider the National Academy of Sciences' recent document entitled "Environmental Impacts of Wind-Energy Projects" (2007), which includes methodology for analyzing possible impacts from wind development on aesthetic resources.

The application and environmental review improperly diverge from the standards in the EOZ EIS and the Klickitat County Comprehensive Plan. The Energy Overlay Zone Environmental Impact Statement (EOZ EIS), which was adopted for this project, includes recommended measures to mitigate impacts to aesthetic resources. EOZ EIS at 3-109-10 (§§ 3.8.4.2, 3.8.4.3.2). The EOZ EIS explicitly recommends siting facilities away from scenic areas and vistas and recommends the use of buffers as a mitigation measure to protect scenic resources. In addition, the EOZ process resulted in amendments to the Klickitat County Comprehensive Plan declaring that projects that are not "sensitively sited" will result in significant aesthetic impacts.

The project would cause significant adverse scenic impacts. Regardless of which methodology is used, the scenic impacts of the proposed wind facility will be significant and warrant an EIS. Several of the proposed wind turbines would break the skyline and/or be highly visible as viewed from public vantage points such as Interstate 84, the Columbia River, Celilo Village, Celilo Park, Deschutes State Park, Columbia Hills State Park, the Klickitat Trail, Dalles Mountain Road, and Stacker Butte.

In the near future, a viewing walkway and platform, designed by renowned artist/architect Maya Lin, will be installed at Celilo Park as part of the Confluence Project. The applicant and County have failed to discuss and evaluate the impact of the proposed wind facility on scenic resources as viewed from the Confluence Project site.

The applicant's materials analyze scenic impacts only from the Columbia Hills Natural Area Preserve. For scenic impacts from other viewpoints, the County relies on a prior analysis for the Windy Flats project. However, the Windy Flats documents analyze a different project layout than the one presented here, and were flawed even for the prior layout. For example, they do not sufficiently analyze the visual impact of the project as viewed from linear viewing areas, such as Interstate 84, Highway 97, and the Columbia River. Basic information such as the distance along linear viewing areas from which the project would be visible, an estimate of the amount of time the project would be visible when traveling along these linear viewing areas, and a simulation of the most visible portion of the project as viewed from these viewing areas, is missing from the application.

The applicant's materials fail to analyze scenic and recreational impacts of the project as viewed from the Klickitat Trail, a popular recreational trail north and west of the project site.

The application also fails to supply sufficient information to understand and review potential impacts from lights on the proposed wind turbines—particularly nighttime impacts. While FAA lighting standards may be required, compliance with federal regulations does not obviate the duty to comply with state law requiring full disclosure of all environmental impacts. The applicant must document how many lights will be visible within the National Scenic Area viewshed. The applicant needs to provide additional information regarding what type of lighting would be installed, and which turbines would contain lighting. Without this information, it is impossible to accurately evaluate the scenic impacts of the project.

The application also fails to include a detailed explanation of both the methodology used to create the visual simulations and the proper technique for viewing the simulations. Lens size, field of view, the format of the image in the simulations, and the viewer's distance from the image all play critical roles in presenting an accurate depiction of aesthetic impacts. For example, the wider the angle of view of a camera lens, the further away an object appears, and the narrower the angle of view, the nearer an object appears. Similarly, the viewer's distance from the image can dramatically alter the perceived impacts of development. The County should require clarification on these points to ensure there is no discrepancy between the simulations and the built reality.

The applicant's supplemental analysis also contains substantial flaws. The supplemental analysis argues that the visual impacts from roads and electric lines would be negligible. However, road and power lines have direct visual impacts and also contribute to the cumulative impacts of a

project. As such, they must be included in the visual simulation and analysis. In particular, they are likely to be highly visible when viewed from Stacker Butte and other nearby vantage points.

The application claims that Dalles Mountain Ranch receives 1,500 visitors a year. This figure is too low and does not accurately reflect the expectations of those viewers or the growing trend for the number of visitors to the area year-to-year. The Dalles Mountain Ranch portion of the Columbia Hills State Park is a recent addition to the Washington State Parks system. As the public becomes more familiar with the park and its scenic resources, the park will receive more visitors. The application fails to reflect this trend.

The supplemental analysis should also include a visibility map depicting the areas in the Columbia Hills NAP that the project would be visible from, including the number of turbines that would be visible from various locations.

The conclusions regarding scenic impacts in the application are also in error. The project would have high scenic impacts, given viewer expectations, the quality of the views that would be impacted, and the cumulative impacts of the proposed development and other wind energy development in the vicinity and the region. The proposed development would dominate the middleground views, whereas existing wind energy development is restricted to background views. The impacts to middleground views alone would be significant, but combining that impact with the existing impacts to background views would generate even greater adverse cumulative impacts.

If adequate scenic impacts analysis were conducted, the County could craft mitigating conditions that may reduce these impacts. Conditions could include requiring the use of earth-tone colors so that turbines would blend with the background as seen from higher-elevation viewpoints. Also, radar-triggered aviation warning lighting has recently been approved by the FAA for wind facilities. Such technology could reduce the visual impacts of lighting. The County failed to consider such possibilities for mitigation.

Wildlife Impacts

Noncompliance with the Bald Eagle Protection Act, RCW Chapter 77.12 and regulations promulgated pursuant thereto, located at WAC 232-12-292. There is no evidence of compliance, despite the presence of bald eagles and their habitat within the Project Site. There is no evidence that the Washington Department of Fish and Wildlife has been consulted pursuant to the Bald Eagle Protection regulations.

Noncompliance with the federal Bald and Golden Eagle Protection Act ("BGEPA"), 16 USC § 668-668d. There is no evidence of compliance, again despite the presence of bald eagles and their habitat within the Project Site. The BGEPA prohibits any person, association, partnership or corporation from taking a bald or golden eagle at any time or by any manner without a permit. 16 USC

§ 668(a). A permit may be issued only if the take would be compatible with the preservation of the species. *Id.* § 668a.

Noncompliance with the federal Endangered Species Act of 1973 (ESA), 16 U.S.C. §§ 1531-1544. Under the ESA, "take" is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Section 9 of the ESA prohibits both acts that would "take" a species, as well as acts that would cause an act that constitutes a "taking." The Ninth Circuit has held that "a habitat modification which significantly impairs the breeding and sheltering of a protected species amounts to 'harm' under the ESA." *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1067 (9th Cir. 1996). The applicant and County have failed to demonstrate that they will be in compliance with Section 9 of the ESA in the event that the County issues an Energy Overlay Zone permit for the project.

Noncompliance with the federal Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712. The MBTA requires that the U.S. Fish and Wildlife Service (USFWS) enforce the MBTA against "any person, association, partnership, or corporation" that "by any means or in any manner," pursues, hunts, takes, captures, kills or attempts to take, capture or kill a migratory bird or any part, nest or eggs of any migratory bird. 16 U.S.C. §§ 703, 707. Under the MBTA, a person may take or kill migratory birds only as permitted under USFWS regulations and based on the USFWS's determination that the take or kill is compatible with the migratory bird treaties. *Id.* §§ 703, 704. The USFWS's determination must take into account scientific factors such as species abundance and distribution, migratory patterns, and breeding habits, as well as the economic value of birds. *Id.* § 704. The killing of a single migratory bird is sufficient to create criminal liability. *United States v. Corbin Farm Service*, 444 F.Supp. 510 (E.D. Cal), *aff'd*, 578 F.2d 259 (9th Cir. 1978). The killing of a migratory bird does not need to be intentional and the killing can occur "by any means or in any manner." *United States v. Moon Lake Electric Ass'n, Inc.*, 45 F.Supp. 2d 1070, 1075-79 (D. Col. 1999) (upholding the prosecution of a utility for unintentionally electrocuting and killing seventeen birds). The application fails to demonstrate regulatory compliance. The County fails to demonstrate that it will be in compliance with the MBTA in the event that it issues an Energy Overlay Zone permit for the project.

Failure to include adequate mitigation measures. The application and MDNS fail to include adequate mitigation measures to protect wildlife. The MDNS includes conditions relating to future surveying for wildlife impacts, but it fails to include any conditions that would require any concrete actions in response to actual wildlife impacts.

Failure to acknowledge the Columbia Hills Important Bird Area designation. The project is proposed in an area designated by the Audubon Society as the Columbia Hills Important Bird Area (IBA). It appears that the applicant and county have failed to even acknowledge the existence of this designation, let alone the significance of the IBA designation and the expected impacts on the special features that resulted in the designation. The SEPA decision must evaluate potential impacts to the Important Bird Area. *See Swift v. Island County*, 87 Wn. 2d 348, 552 P.2d 175 (1976).

Failure to include Best Available Science in the analysis. The avian impacts analysis in the Windy Flats Environmental Documents is inadequate and not based on the Best Available Science. The baseline surveys were too cursory to support a scientifically credible baseline assessment. Failings include an inadequate sample size (3 of 12 plots) and an inadequate amount of time dedicated to surveys (apparently only 23.5 hours of bird surveys). Avian utilization of a site can vary greatly from year to year, so the limited time span of these baseline surveys introduces large uncertainty into the resulting utilization rates. The sample sizes were grossly inadequate for what is needed for comparing bird utilization among project sites or for guiding wind turbine locations to minimize collision rates. Numerous other methodological errors in the analysis introduce additional biases that undermine the SEPA review.

Wildlife surveys should be conducted using current state-of-the-art field and analysis protocol. At the least, surveys must take into account survey bias including, but not limited to, searcher efficiency, carcass "life expectancy" or persistence, and scavenger removal. The entire site should be surveyed before and after construction. Both pre-development survey and post-development monitoring should take into account the episodic nature of some bird migrations and nocturnal bird migrations. For example, long or inappropriately timed intervals between searches may miss a significant avian presence. The application and SEPA materials fail to account for these factors.

Inaccurate information regarding concentrations of raptor use. Prior environmental studies have stated affirmatively that concentrations of raptor populations in Klickitat County are highest west of Highway 97. However, for this project, the same consultants now state that "raptor mortality will not likely be concentrated in any one portion of the county but would likely be uniformly distributed across the county." The conclusory statements that the Project Site does not contain a higher-than-average concentration of raptor use as compared to the rest of Klickitat County, in the face of prior conflicting statements otherwise, warrants more specific evidence and documentation. The applicant must thoroughly document concentrations of raptors in an Environmental Impact Statement in order to ascertain the potential impacts of this project.

Inadequate consideration of displacement effects on avian populations. The applicant and county have failed to adequately consider displacement effects on avian populations. The avian studies contain conclusory findings that displacement effects are "unlikely," but also note that additional review of this issue is necessary. Impacts of wind projects on birds are not limited to collisions. When a landscape is industrialized by strings of giant machines, birds and other animals may be driven away rather than killed. And when multiple projects are concentrated in one area, there may be no location left for sensitive species to take refuge. The environmental analysis is incomplete and must be supplemented with specific assessments of cumulative displacement impacts.

Impacts on butterflies. The applicant and county have failed to evaluate potential impacts on butterflies. Here again, the impacts are typically not from direct turbine strikes, but rather from habitat

disruption or destruction. There are several species of butterflies of particular concern in this area, particularly the rare Western Oak Dusky Wing (*Propertius duskywing*), which has been reported near the project area.

Failure to conduct adequate acoustical surveys for bats. The applicant and County have apparently failed to conduct acoustical surveys for bats, although the technology needed to do these surveys is now widely available. New information indicates that wind turbines pose a more serious threat to bats than previously realized. For example, recent studies in Alberta (in areas with habitat similar to the Windy Flats project site) have found high bat kills. Recent bat surveys have discovered Townsend big-eared bats in unexpected areas in Klickitat County, such as in barns and grasslands near Bickleton. The applicant needs to perform a thorough acoustical survey within the Project Area.

Failure to demonstrate sufficient protections for non-avian wildlife. The application and threshold determination fail to demonstrate sufficient protections for sensitive and rare wildlife species, including a number of sensitive and rare species that the application notes have been observed within the project site.

Plants

Failure to adequately analyze impacts on rare plants. The applicant and the County failed to adequately analyze the potential impacts of this project on plants. For example, the Columbia Hills have the largest populations in Washington of three rare plants: obscure buttercup (*Ranunculus riccordinus*), state endangered; Douglas' draba (*Cuscutella Douglasii*), state threatened; and hot rock penstemon (*Penstemon deustus* var. *variabilis*), state threatened. The ground-disturbing activities for this project have the potential to adversely affect these rare plants.

Failure to review and protect against the potential impacts of introducing noxious and invasive plants. Proposed Condition No. 42 requires preparation of a restoration plan that would include plans for noxious weed control. The condition requires only five years of monitoring of reseeded and restored areas. However, the next sentence requires the plan to be updated and implemented for the life of the project. This condition fails to meet SEPA requirements. First, it defers preparation of critical planning documents until after SEPA review is complete. Second, five years of monitoring would not be sufficient to ensure that noxious weeds have not or will not be established in restored and reseeded areas. Monitoring for noxious weeds should continue for the lifetime of the project. Moreover, the application and threshold determination do not address potential adverse impacts to the Columbia Hills NAP and the threatened and endangered plants that occur in the area. The applicant must address how noxious weeds will be prevented from establishing in the area and spreading to the Columbia Hills NAP. Finally, the County and applicant must consult with the Washington Natural Heritage Program regarding preparation of the restoration plan before the SEPA process is complete.

Recreational Resources

Failure to review impacts to recreational resources. The application does not acknowledge the existence of numerous recreational resources in the vicinity of the project. Columbia Hills State Park, Dalles Mountain Road, the Klickitat Trail, Celilo State Park, Stacker Butte, and the Columbia River are all in the vicinity of the Project Site. Recreational enjoyment of these resources will likely be adversely impacted by the proposed facility. The failure to even estimate the potential impacts to these resources is reversible error.

Cultural Resources

Failure to demonstrate adequate review and avoidance of the potential effects to cultural resources. The applicant's fieldwork discovered a number of cultural resources within the project area, including resources potentially eligible for listing on the National Register of Historic Places. The application and threshold determination fail to demonstrate adequate consultation with the Yakama Indian Nation, the Washington Department of Archaeology and Historic Preservation, and other interested entities; and fail to demonstrate that cultural resources will be adequately protected. While the County need not release specific confidential information, the County must still demonstrate during the SEPA process that the project has been designed to avoid cultural resources. The County's approach of deferring this demonstration to some unspecified point in the future violates SEPA.

Air Quality

Failure to document potential use of internal combustion engines. Some wind turbines use internal combustion engines to initiate rotor movement. The applicant should be required to clarify whether the turbines would require such priming and describe any potential emission to the air.

Noise Impacts

Inadequate noise analysis, without any data to support the conclusory remarks made and relied upon in the application materials. The applicant should be required to model potential noise impacts on a site-specific basis. This should include evaluation of potential noise impacts to recreational resources at Columbia Hills State Park and along Dalles Mountain Road.

Fire Risk

Failure to evaluate the risk of nacelle fires. Nacelle fires have occurred at other wind facilities and the risks of such occurrences should be analyzed in an EIS. Such a fire could lead to a wildfire, and such risks should be analyzed and addressed through a fire protection plan prior to a final SEPA determination.

Brenda Sorensen, Klickitat County Auditor
Curt Dreyer, Director
June 11, 2010
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Decommissioning

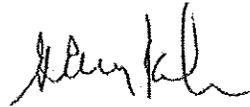
Failure to specify the amount of financial security required to ensure decommissioning. The applicant must prepare a decommissioning plan that must include sufficient financial security to ensure proper decommissioning of the project. Unfortunately, the proposal would allow the dollar amount of the financial security to be determined at a later date, once the project is installed. While deferring the dollar amount of the financial security may be allowed under the County's EOZ ordinance, it is not sufficient under SEPA to demonstrate that the impacts of this project to the human and natural environment will not be significant.

Conclusion

The environmental impacts of this project have not been sufficiently evaluated to demonstrate compliance with SEPA. The impacts that are known show that this project—both individually and in conjunction with other nearby wind facilities—is reasonably likely to have significant adverse impacts, and thus a comprehensive EIS is warranted.

Sincerely,

REEVES, KAHN & HENNESSY



Gary K. Kahn

cc: Nathan Baker
Brian Knox