

→ Exhibit # (b). 00

**To:** Washington State Energy Facility Site Evaluation Council

**From:** Wirt T. Maxey

**Re:** Comments about the Proposed Whistling Ridge Energy Project

**Date:** January 5 2011



**THE PROPOSED WHISTLING RIDGE ENERGY PROJECT IS  
ILLEGAL UNDER TITLE 22 OF THE SKAMANIA COUNTY CODE**

**Background Facts:**

Whistling Ridge Energy LLC is proposing a wind farm in an area of Skamania County which is located just outside the boundaries of the Columbia River Gorge National Scenic Area. (NSA) The proposed wind turbines are 430+/- feet tall and must be equipped with strobe lights at the top to satisfy FAA regulations. Cook Underwood Road is a designated "Key Viewing Area" within the NSA, located in Skamania County. Many, if not all, of the proposed turbines and the strobe lights thereon will be highly visible from the Cook Underwood Road Key Viewing Area, as well as from numerous Key Viewing Areas throughout the NSA.

**Issue:** Is the proposed project legal under Title 22 of the Skamania County Code (Title 22)?

**Summary:** Although the National Scenic Area Act prohibits the creation of buffer zones<sup>1</sup>, there are no provisions in The Act which prevent Skamania County, or any other governmental entity with jurisdiction, from protecting the NSA from scenic intrusions originating from outside the Scenic Area. For example, Oregon has recognized this principal. The Oregon EFSC provides that before issuing a site certificate the Council must determine by a preponderance of evidence that there will be no significant adverse impacts to the scenic, aesthetic, recreational, and wildlife resources of the Columbia River Gorge. OAR 345-022-0000(1)(a).

Title 22 includes numerous provisions demonstrating that Skamania County, like Oregon, has protected the NSA Key Viewing Areas within Skamania County from scenic intrusions originating from both inside and outside the Scenic Area.

**Conclusion:** Title 22 protects the “Viewshed” of Cook Underwood Road, and requires that any development which can be seen from Cook Underwood Road be “Visually Subordinate” to its setting as seen from Cook Underwood Road. Because the proposed Whistling

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<sup>1</sup> “SEC. 17 SAVINGS PROVISIONS.

(a) Nothing in sections 544 to 544P of this title shall-

(10) establish protective perimeters or buffer zones around the scenic area or each special management area. The fact that activities or uses inconsistent with the management directives for the scenic area or special management areas can be seen or heard from these areas shall not, of itself, preclude such activities or uses up to the boundaries of the scenic area or special management areas. 16 USC 544o (a)(10).”

Ridge Energy Project cannot meet the test of visual subordination the project is illegal. The proposed project violates both the letter and the spirit of Title 22.

**Analysis** Section 22.02.050 of Title 22 provides, in pertinent part, that “This title applies to all lands in that portion of Skamania County lying within the Columbia River Gorge National Scenic Area...and to no other lands within the county...” The Cook Underwood Road Key Viewing Area lies within the National Scenic Area. Thus, Title 22 applies to the Cook Underwood Road Key Viewing Area.

“Viewshed” is defined in Section 22.04.010 as “a landscape unit seen from a key viewing area.”<sup>2</sup>

“Development” is defined in Section 22.04.010 to mean “any land division or structure, including but not limited to new construction of buildings and structures, and mining, dredging, filling, grading, paving and excavation.”

Section 22.04.010(j) of Title 22 designates Cook Underwood Road as a “Key Viewing Area”.

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<sup>2</sup> “Landscape Unit” is an undefined term and must therefore be given its’ ordinary and common meaning, which would include any structure which is visible from a key viewing area.

Section 22.18.030 entitled “ADDITIONAL STANDARDS GOVERNING NEW DEVELOPMENTS VISIBLE FROM KEY VIEWING AREAS” provides extensive standards for developments, such as the Whistling Ridge Energy Project, which are visible from key viewing areas. Section 22.18.030A provides that “The provisions in this section shall apply to proposed developments on sites topographically visible from key viewing areas”. *Thus, to the extent any of the turbines and/or their strobe lights are visible from Cook Underwood Road, (or any other key viewing area) the requirements of Section 22.18.030 must be met.*

In order to meet the requirements of Section 22.18.030B, the portion of the Whistling Ridge Project which is visible from Cook Underwood Road must be “visually subordinate to its setting as seen from” Cook Underwood Road. Visually Subordinate is defined in Section 22.04.010 as follows:

“Visually Subordinate” means a description of the relative visibility of a structure or use where that structure or use does not noticeably contrast with the surrounding landscape, as viewed from a specified vantage point, generally a key viewing area. As opposed to structures that are fully screened, structures that are visually subordinate may be partially visible. They are not visually dominant in relation to their surroundings. Visually

subordinate forest practices in the SMA shall repeat form, line, color, or texture common to the natural landscape, while changes in their qualities of size, amount, intensity, direction, pattern, etc., shall not dominate the natural landscape setting". (Emphasis added).

Clearly, the proposed wind turbines and their strobe lights which are visible from Cook Underwood Road can not pass the test of visual subordination.

Additionally, Section 22.18.030L of Title 22 provides that "Exterior lighting shall be directed downward and sided, hooded and shielded such that it is not highly visible from key viewing areas". Section O. provides that "The silhouette of new buildings shall remain below the skyline of a bluff, cliff or ridge as seen from key viewing areas". Clearly, the proposed Whistling Ridge project cannot pass these tests.

The project's proponents are likely to point to the language in Section 22.02.050 of Title 22 stating that "This title applies to all lands in that portion of Skamania County lying within the Columbia River Gorge National Scenic Area...*and to no other lands within the county...*" and argue that, based on the italicized language, Title 22 is not applicable to the proposed project because it lies (in some cases

approximately just 60+/- feet) outside the NSA. While it may be true that the project lies outside the NSA,<sup>3</sup> it is undeniable that Cook Underwood Road does lie within of the NSA. It is also undeniable that some or all of the turbines and their strobe lights will be highly visible from Cook Underwood Road and therefore lie within the view shed of Cook Underwood Road. Application of Title 22 to the Cook Underwood Road "Key Viewing Area" results in the proposed project being illegal, because the proposed project would impact the Cook Underwood Road view shed in a manner that is prohibited by Title 22.

Section 22.02.050 merely states that lands lying outside the NSA boundaries are not entitled to scenic protection and in no way whatsoever states or implies that Key Viewing Areas within the NSA are not protected from scenic intrusions originating outside the boundaries of the NSA.

The project's proponents may also point to section 22.02.120(A)(10) of Title 22 and argue that, since Title 22 does not create "buffer zones", Title 22 does not apply to the project. Section 22.02.120(A)(10) provides:

A. Nothing in this Title shall:

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<sup>3</sup> The proposed project is so close to the NSA, that an on the ground survey should be required to insure no encroachment.

10. Establish protective perimeters or buffer zones outside of the Columbia River Gorge National Scenic Area.

“Buffer Zone” is a defined term in Title 22, therefore in order to interpret section 22.02.120(A)(10) it is necessary to consider and apply the statutory definition of “buffer zone”. Section 22.04.010 (18) of Title 22 provides:

18. **BUFFER or BUFFER ZONE** means an area adjacent to a water resource or other sensitive area that is established and managed to protect sensitive natural resources *from human disturbance*. In instances that involve a wetland, stream or pond, the buffer zone includes all or a portion of the riparian area.(emphasis added)

Reading section 22.02.120(A)(10) in conjunction with the statutory definition of “buffer zone” makes it plain that the prohibition against buffer zones in no way detracts from the protection given to key viewing area viewsheds elsewhere in Title 22. *Rather, it merely provides that nothing in Title 22 shall be interpreted to protect areas outside the NSA from “human disturbance”.* WRE is legally entitled to disturb the project areas outside the NSA however they wish (subject to Skamania County Zoning and Comprehensive Plan limitations), so long as the project doesn’t impinge on the protection granted Key Viewing areas elsewhere in Title 22.

If title 22 had been intended to limit the protection granted key viewing areas to intrusions originating from within the NSA, then the definitional and other sections referenced herein would have been so written and so limited and SCC 22.02.120(A)(10) would read something like; ... 'Establish protective perimeters or buffer zones outside the NSA, or prohibit visual intrusions on key viewing areas which originate from outside the boundaries of the NSA.' Alternatively, the definition of "buffer zone" would have been written differently to specifically negate the scenic protections granted key viewing area viewsheds elsewhere in Title 22.

Although the National Scenic Area Act prohibits the creation of buffer zones, there are no provisions in The Act which prevent Skamania County, or any other governmental entity with jurisdiction, from protecting the NSA from scenic intrusions originating from outside the Scenic Area. As previously stated, Oregon has recognized this principal. See OAR 345-022-0000(1)(a).

Title 22 includes numerous provisions demonstrating that this Ordinance protects the NSA Key Viewing Areas within Skamania County from scenic intrusions originating from both inside and outside the Scenic Area. Title 22 clearly asserts jurisdiction over visual impacts seen from Cook Underwood Road which originate from

outside the NSA boundaries and clearly prohibits intrusions on the Cook Underwood Road view shed which originate from outside the NSA.

Viewshed is defined in Section 22.04.010 as “a landscape unit **seen from** a key viewing area”. (emphasis added) **This definition is not limited to landscape units which originate from within the NSA boundaries.**

Section 22.04.010 provides that “Development means **any** land division or **structure**, including but not limited to new construction of buildings and structures, and mining, dredging, filling, grading, paving and excavation.”(emphasis added) **Section 22.04.010 does not define development to mean “any land division or structure, including but not limited to new construction of buildings and structures, and mining, dredging, filling, grading, paving and excavation *within the National Scenic Area Boundary*” The definition or the term “development” is not limited to developments which are located within the NSA boundaries.**

Section 22.18.030A provides that “The provisions in this section shall apply to proposed developments on sites topographically visible from key viewing areas”. **Section 22.18.030A does not state “...shall apply to proposed developments on sites *within the National Scenic***

*Area Boundary* topographically visible from key viewing areas". *The protection afforded the Cook Underwood key viewing area view shed by Section 22.18.030, is not limited to protection from visual impacts of development located within the NSA boundaries.*

Section 22.18.030O also demonstrates that Title 22 protects the Cook Underwood Road key viewing area from scenic impacts originating from outside the NSA boundaries. Section O. provides that "The silhouette of new buildings shall remain below the **skyline** of a bluff, cliff or ridge as seen from key viewing areas".(emphasis added) This section **does not state** that "The silhouette of new buildings **within the National Scenic Area Boundary** shall remain below the skyline of a bluff, cliff or ridge as seen from key viewing areas".

"Skyline" is defined by Section 22.04.010 as follows: " Skyline means the line that represents the place at which a landform, such as a cliff, bluff or ridge, meets the sky, as viewed from a specified vantage point, only a key viewing area... " Once again, this definition is **not limited** to skylines within the NSA.

As well, as a matter of fact, the only "skyline of a bluff, cliff or ridge" within Skamania County which can be seen from the Cook Underwood Road Key Viewing Area is from looking in a Northerly direction, towards the proposed project. Cook Underwood Road itself

is located on the Underwood bluff and to the south the topography slopes downward to the Columbia River. Oregon lies on the other side of the river.

Pursuant to well established rules of statutory construction, if Title 22 had been intended to protect the view shed of the Cook Underwood Road Key Viewing Area (or any other key viewing area) only from visual impacts originating from within the boundaries of the NSA, the Ordinance would have specifically done so by including that limitation in the definitional sections discussed above. Since no such limitations exists in Title 22, it is clear that the View Shed of Cook Underwood Road is protected by the express provisions of Title 22 from visual impacts originating from both within and outside of the NSA boundaries.

Title 22 includes numerous provisions demonstrating that Skamania County, like Oregon, has protected the NSA Key Viewing Areas within Skamania County from scenic intrusions originating from both inside and outside the Scenic Area.

**THE PROPOSED WHISTLING RIDGE ENERGY PROJECT IS ILLEGAL UNDER TITLE 22, BECAUSE IT CANNOT PASS THE TEST OF VISUAL SUBORDINATION.**

Respectfully Submitted

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