

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of)	FRIENDS OF THE COLUMBIA
Application No. 2009-01)	GORGE’S STATEMENT OF
)	LEGAL ISSUES AND POSITIONS
WHISTLING RIDGE ENERGY LLC)	
)	
WHISTLING RIDGE ENERGY)	
PROJECT)	
_____)	

Pursuant to Prehearing Order No. 1 (Council Order No. 842), Friends of the Columbia Gorge (“Friends”) submits the following statement of legal issues and positions in this matter.

I. APPLICABLE LAWS

Numerous laws apply to this project, including but not limited to the laws discussed herein. As the Council has noted, it is too early to determine compliance with many of these laws, because evidence regarding compliance is not yet available. Where possible, Friends will state its legal positions regarding compliance with these laws.

A. Columbia River Gorge National Scenic Area Act

The Columbia River Gorge National Scenic Area Act and its implementing rules apply to this project.

1. Jurisdiction

The Council does not have jurisdiction over the portions of this project proposed within the National Scenic Area. All land use and development activities proposed within the National Scenic Area must be reviewed according to the federally mandated process in the Scenic Area Act. That process requires County review, with the right for adversely affected or aggrieved parties to appeal

County decisions to the Columbia River Gorge Commission, an interstate agency acting under the authority of federal and interstate law.

2. Whether the project is allowed within the National Scenic Area

The project, including construction and use of the proposed “haul route,” is an industrial use that is prohibited within the General Management Area of the National Scenic Area.

3. Whether the Scenic Area Act creates scenic buffers

Other parties have raised the legal issue of whether the Scenic Area Act establishes scenic buffers prohibiting uses that would be located outside the National Scenic Area, but visible from within the National Scenic Area. The Scenic Area Act does not, in and of itself, establish buffers. However, other laws (including the State Environmental Policy Act (“SEPA”), the National Environmental Policy Act of 1969 (“NEPA”), state and federal laws regarding the licensing of new energy projects, and local land use laws) provide authority to deny or condition approval of this project in order to avoid or mitigate adverse impacts to scenic and other resources.

B. Other federal and state laws

A number of federal and state statutes and their implementing regulations apply to this project, including the laws listed below. For the most part, there is insufficient information available to evaluate compliance with these laws at this time.

One legal position can currently be stated: Friends adopts SOSA’s legal arguments regarding the proposal to allow the applicant and its consultants to prepare the Draft and Final Environmental Impact Statements. That approach would violate NEPA, and may violate SEPA as well. (*See* SOSA’s April 22, 2009 letter and SOSA’s May 7, 2009 oral and written scoping statements.)

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- 1. Federal laws**
 - a. National Environmental Policy Act of 1969**
 - b. Endangered Species Act of 1973**
 - c. Migratory Bird Treaty Act**
 - d. Bald and Golden Eagle Protection Act**
 - e. Federal Water Pollution Control Act**
 - f. Clean Air Act**
 - g. Archaeological Resources Protection Act of 1979**
 - h. Archaeological and Historical Preservation Act of 1974**
 - i. Native American Graves Protection & Repatriation Act**
 - j. National Historic Preservation Act of 1966**
 - k. Occupational Safety and Health Act of 1970**
- 2. State laws**
 - a. Energy siting laws**
 - b. State Environmental Policy Act**
 - c. State wildlife protection laws**
 - d. Bald Eagle Protection Law of 1984**
 - e. Forest Practices Act**
 - f. Planning Enabling Act**
 - g. Growth Management Act**
 - h. Water Resources Act of 1971**
 - i. Surface Water Code**

- j. Ground Water Code**
- k. Archaeological sites and resources laws**
- l. Indian graves and records laws**

C. County laws

Several county laws and rules apply to this project, including but not limited to the Comprehensive Plan, the Zoning Ordinance, the National Scenic Area Ordinance, the Forest Practices Moratorium Ordinance, the current moratorium prohibiting forest practice conversions in certain areas of the County, the Critical Areas Ordinance, the Building Code, the Health and Safety Ordinance, the Street Ordinance, the SEPA Ordinance, and the Clearing and Grading Ordinance.

For many of these county laws and rules, there is not yet enough information available to determine compliance. However, several legal conclusions can be made at this time. The written and oral statements of Friends and Save our Scenic Area (“SOSA”) at the May 7, 2009 land use consistency hearing in Underwood, Washington discuss many of these issues and conclusions in greater detail. Some of the major points are summarized below.

1. Whether the 2008 draft revisions to the Comprehensive Plan and Zoning Ordinance apply to this project

The draft revisions to the Comprehensive Plan and Zoning Ordinance proposed by the County Commissioners and Planning Commission in 2008 were never adopted, and do not apply to this project.

However, the Skamania County Hearing Examiner’s legal and factual analysis of the potential environmental impacts of adopting these code amendments—particularly of the provisions

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that would have authorized large-scale wind energy facilities in the County—is relevant in these proceedings.

2. Whether the project is allowed under the current Comprehensive Plan and Zoning Ordinance

The current Comprehensive Plan and Zoning Ordinance do not allow large-scale commercial wind energy facilities on the subject property.

3. Whether the project is allowed under the current moratorium prohibiting forest practice conversions

The project necessarily entails forest practice conversions on unzoned lands. Such conversions are currently prohibited by a County moratorium.

Dated: August 20, 2009.

REEVES, KAHN & HENNESSY

FRIENDS OF THE COLUMBIA GORGE

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