

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of
Application No. 2009-01

WHISTLING RIDGE ENERGY LLC

WHISTLING RIDGE ENERGY
PROJECT

SEATTLE AUDUBON SOCIETY'S
STATEMENT OF LEGAL ISSUES
AND POSITIONS

Pursuant to Prehearing Order No. 1 (Council Order No. 842), Intervenor Seattle Audubon Society (Seattle Audubon) submits the following statement of legal issues and positions in this matter.

Below is a preliminary list of issues that Seattle Audubon may raise in the adjudicative proceeding. Seattle Audubon is aware of the fact that a draft environmental impact statement (DEIS) is not yet completed as of the date of this filing. Therefore, Seattle Audubon specifically requests the right to add or delete issues following the completion of the DEIS for the Whistling Ridge Energy Project. Seattle Audubon also specifically requests the right to raise any issue identified by any other intervenors in this matter.

I. Preliminary Issue List

Numerous local, state, and federal laws apply to this project, including but not limited to the laws discussed herein. Evidence regarding compliance with many of these laws is not yet available. Seattle Audubon will state its legal position regarding compliance with these laws where possible. The proposed project is one of the first wind power projects located in a forested landscape in Washington State, and may present different issues than similar projects located on agricultural and/or shrub steppe habitat.

Seattle Audubon requests that the Council specifically address the following issues during the environmental review of this proposed project. Seattle Audubon incorporates by reference its written comments submitted to the Council in response to the April 21, 2009 Scoping Notice, and its Petition for Intervention, to this statement of legal issues and positions.

A. WAC 463-60-332 Natural Environment – Habitat, vegetation, fish and wildlife

1. Northern Spotted Owl

Northern Spotted Owls (NSO) are documented present within the vicinity of the proposed project. They are listed as a threatened species under the federal Endangered Species Act, and as an endangered species by the State of Washington. The project application states that “no impacts to northern spotted owls are expected”. Seattle Audubon requests much greater information and documentation to support this claim, specifically information related to the proximity of the project to the state designated Columbia Gorge Spotted Owl Special Emphasis Area (SOSEA), the Department of Natural Resources’ Habitat Conservation Plan (DNRHCP) “Klickitat Planning Unit”, and the federally delineated Conservation Support Area (CSA). The environmental review of this project should include a detailed evaluation of the potential impacts of this project on current and future owl habitat in areas designated by the state and federal government for private forest lands to provide support for owl conservation and recovery.

Seattle Audubon requests the environmental study to consider the limitations of current NSO survey protocols for detecting NSO and the pending changes to those survey protocols by the United States Fish and Wildlife Service (USFWS). Seattle Audubon requests additional surveys with the revised protocols. Also, consistent with the

Washington Department of Fish and Wildlife's 2009 Wind Power Guidelines, the environmental review should evaluate the potential for NSO to utilize the area in the future, even if NSO are determined to be absent from the project area.

Finally, Seattle Audubon requests that the environmental study quantify the amount of suitable habitat for NSO in the proposed project site, and discuss the potential for existing "degraded" habitat to develop into suitable habitat during the projected life span of the project. The environmental study should include a more detailed description of existing habitat conditions for NSO, and it should evaluate the impact of the proposed project on dispersal habitat for NSO from nearby federal lands.

2. Other Avian Species

Northern Goshawks, Golden Eagles, Pileated Woodpeckers, and Vaux's Swifts are documented present within the vicinity of the proposed project, and are State Candidate Species for listing. Turkey Vultures and Western Bluebirds are also present, and are listed as State Monitor Species. Olive-sided flycatchers, Cooper's Hawks, and MacGillivray's Warblers are also documented present within the vicinity of the proposed project, and are included on Audubon Washington's Vulnerable Birds List.

Avian surveys conducted at the project site included in the application are limited in scope and duration, and may not present accurate descriptions of species numbers or abundance. Seattle Audubon requests that the environmental study include much more robust surveys conducted in every season and in multiple years to more accurately reflect species use of the project site. It is particularly important to conduct adequate surveys because this proposed project is among the first forested sites in Washington to undergo environmental review.

Finally, the application includes unsubstantiated conclusions regarding bird mortality rates for Vaux's swifts, western bluebirds, and olive-sided flycatchers. The environmental review should more fully investigate the possibility of turbine-related mortality to these and other species, and document facts related to this issue.

3. Monitoring and Mitigation

Seattle Audubon requests that detailed mitigation and monitoring programs be developed prior to project approval. The application should contain much more detail on the type and scope of ongoing monitoring and mitigation measures that the applicant would provide if the project is approved. Opportunities for public involvement should be included in any Technical Advisory Committee.

4. Climate Change and Carbon Emission

Seattle Audubon requests that the applicant comply with any and all laws, regulations and guidelines related to carbon and greenhouse gas emissions that may apply to this proposed project.

B. Other Federal, State and Local Laws that May Apply to this Proposed Project

A number of federal and state statutes, guidelines, and their implementing regulations may apply to this project, including but not limited to the laws listed below. There is insufficient information available at this time to determine compliance with most of these laws. Seattle Audubon requests the applicant to comply with any and all laws listed below, and any other laws, rules, regulations or guidelines that may apply to this proposed project.

1. Federal Laws and Considerations

- 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. US Fish and Wildlife Service survey protocols**

2. State Laws, Considerations, and Guidelines

- a. Energy siting laws**
- b. Washington State Environmental Policy Act of 1971**
- c. State wildlife protection laws**
- d. Bald Eagle Protection Law of 1984**
- e. Forest Practices Act**
- f. Washington Department of Fish and Wildlife 2009 Wind Power Guidelines**
- g. White Salmon Spotted Owl Special Emphasis Area**
- h. Department of Natural Resources' Habitat Conservation Plan Klickitat Planning Unit**

Respectfully submitted this 21st day of August, 2009.

Meagan Carmichael, WSBA No. 39924
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the service of the foregoing document upon all parties of record in this proceeding, by authorized method of service pursuant to WAC 463-30-120(3).

Dated this 21st day of August, 2009.

Meagan Carmichael, WSBA No. 39924
Attorney for Petitioner