BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of Application No. 2009-1: Whistling Ridge Energy Project, LLC for **WHISTLING RIDGE ENERGY PROJECT**	**COUNCIL ORDER No. 870** **ORDER DENYING PETITIONS FOR RECONSIDERATION OF ORDER 868 AND ORDER 869**

SUMMARY

NATURE OF THE PROCEEDINGS: This matter involves Whistling Ridge Energy Project, LLC's ("Applicant"), Application to the Energy Facility Site Evaluation Council ("EFSEC" or "the Council") for certification to build and operate the Whistling Ridge Energy Project in Skamania County, Washington. The project and procedural history regarding this application and adjudication are discussed in detail in Council Order Nos. 868 and 869, approved unanimously at a public meeting on October 6, 2011, and served on all parties on October 7, 2011.

Council Order No. 868 ("Order 868") resolves all contested issues in the land use and adjudicative proceedings conducted in accordance with the requirements of RCW Chapter 80.50. Council Order No. 869 ("Order 869") recommends that the Governor approve in part, and deny in part, the Whistling Ridge Energy Project subject to conditions set out in Order 868, Order 869, and the draft Site Certification Agreement (SCA).

PETITIONS FOR RECONSIDERATION: On October 27, 2011 the Council received five petitions for reconsideration from[1]:

- Whistling Ridge Energy, LLC
- Friends of the Columbia Gorge
- Save Our Scenic Area
- Skamania County and Klickitat County Public Economic Development Authority
- Seattle Audubon Society

1 WAC 463-30-335 describes the process to request reconsideration of a recommendation to the Governor.

ANSWERS TO PETITIONS FOR RECONSIDERATION: The Council received answers from all of the petitioners listed above and the Department of Commerce.

COUNCIL DETERMINATIONS: We have considered the petitions and answers and determine for the reasons discussed in this Order that the petitions should be denied. Both Friends of the Columbia Gorge and Save Our Scenic Areas have requested Oral Argument; in light of the extent and detail of the Adjudicative proceedings, requests for Oral Argument are denied. The Council clarifies several matters raised by the petitions and answers.

INTRODUCTION

EFSEC, when considering applications for siting energy projects, must balance a number of competing interests. In this instance, we have on the one hand the Applicant who has definite ideas about the economic, financial, engineering, and development aspects of the project it proposes. The Applicant is supported by local government and the Department of Commerce because of perceived economic benefits to Skamania County.

We have, on the other hand, the project opponents who care in particular about the environmental and aesthetic impacts they perceive the project would have, if authorized. The Applicant is cognizant of its opponents' concerns and has made efforts to accommodate them. Having done so, the Applicant's position is nonetheless that its proposal should be approved without the imposition of any requirements beyond those it expressed a willingness to accept during the application review process. The opponents, however, are firm in their view that the project is completely unacceptable under any conditions.

Both sides, ably represented by counsel and supported by various expert and lay witnesses, presented well-articulated cases, pro and con, constructed largely within the constraints of governing law, precedent, and experience with the siting process. The Council, in seeking to balance competing interests as required under its governing statutes, satisfied neither the proponents nor the opponents. Hence, we face at this juncture petitions for reconsideration that praise recommendations favoring each individual petitioner's positions on some issues while denigrating recommendations that are inconsistent with their positions on other issues.

The parties' individual advocacy at this late stage shares certain attributes. They are, first, largely predictable and foreseeable.[2] That is to say the Council finds little or nothing in the arguments not previously and carefully considered. Some are marginally or not at all relevant to the issues that must be determined.[3] Nor does it surprise the Council to see arguments again that, even if accepted for purposes of discussion, would not alter the results announced in Orders 868 and 869 because their outcome is not determinative.[4] The question of land use consistency or inconsistency is one such issue. Other arguments such as esthetics and viewscape, while centrally important to the Council's determinations, have been exhaustively considered and are discussed in detail in Orders 868 and 869. For these reasons, we treat such issues summarily.[5]

Both Friends and SOSA raise objections to our orders and the draft SCA with respect to various requirements for post approval of plans and programs: requirements under the Forest Practices Act, road construction and transportation control, wildlife and avian impacts mitigation, the formation of a Technical Advisory Committee, turbine micro-siting, and construction management. The Council's approach to the use of post-approval plans and programs is consistent with its long established and successful procedures. We require development of specific compliance provisions during the final design stages of project development, and during and after project construction, with prescribed Council oversight. Public involvement and public response provisions are aspects of the Council's ongoing oversight responsibilities and the Council has significant experience in providing adequate

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[2] This is not uniformly true. Some of the petitions and answers present novel arguments. These are, however, largely irrelevant and even inappropriate. *See, e.g.,* Skamania County Petition at 3-7 [arguments by Skamania County that we are bound by local land use ordinances], Applicant's Petition at 9:2-4 [argument by Applicant that "the state's energy facility siting process is irreparable [sic] broken."].

[3] See, *e.g.,* Applicant's Petition at 2 [arguments re: ability of project to succeed financially]; SOSA Petition at 11-13 [arguments re: need for power]; Skamania County Petition at 11-13 [arguments re: the county's need for "an economic life raft"].

[4] *See, e.g.,* SOSA Petition at 21-29; SOSA Answer at 15-19; Friend's Petition at 2-13; Skamania County Petition, *passim;* Skamania County Answer 7-12 [arguments re: land use].

[5] The Council emphasizes that while it may not call out for discussion in this Order every specific issue and argument raised by the petitions for reconsideration and answers, this does not mean the issue or argument was not considered by the Council. Limited or no discussion of a specific issue or argument simply means the Council finds it to be without sufficient merit to warrant discussion. Examples of such issues and arguments are: 1) Friends' arguments that Order 868 at page 24 should use the word "may" rather than "must" and that turbine strings A 1-7 and C 1-8 are not eliminated by legal description from the project boundary; 2) SOSA's arguments that wind generation is variable and unpredictable, that wind energy requires burning carbon based fuels, and that wind energy likely will be sold outside the state 3) Skamania County's arguments that it is economically depressed, and will be plunged into deeper economic depression if the project does not go forward as proposed and that EFSEC has an obligation to help improve standards of living within the county.

opportunities for public participation. Friends' and SOSA's asserted concerns in this regard are simply unfounded.

We address below in the Memorandum section of this Order, several specific arguments raised by the various petitions for reconsideration and answers. While we find no basis in these arguments, we believe a brief response from the Council may serve to clarify the decisions made in those orders.

MEMORANDUM

A. Land Use Consistency

Considering that "[t]he range and intensity of arguments over land use consistency and preemption in this proceeding are unprecedented,"6 the Council addressed the issue at some length in Order 868. Devoting eight pages to the subject, the Council determined in light of its extended discussion that: "the evidence and applicable law support the county's certificate of [land use] consistency, [and the] Project opponents have failed to present a credible case against it."7 A county's certificate of land use consistency establishes "*prima facie* proof of consistency and compliance with land use plans and zoning ordinances absent contrary demonstration by anyone present at the hearing."8

The legal effect of this determination is that Skamania County cannot "change [its] land use plans or zoning ordinances so as to affect the proposed site."9 As we observed in Order 868, such a determination brings the Council's land use inquiry to an end, and RCW 80.50.110, which provides for preemption in the event any inconsistency with existing land use plans or zoning ordinances is found, is not required. 10

The Council, however, is impressed by the subtle and complex, albeit largely misdirected, arguments the project opponents have constructed around the issue of land use consistency. While the Council addresses the merits of the parties' land use arguments in Order 868, and

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6 *In the Matter of: Application No. 2009-01 of Whistling Ridge Energy Project LLC for Whistling Ridge* Energy *Project,* Council Order No. 868 (Whistling Ridge Order No. 23), Adjudicative Order Resolving Contested Issues ("Order 868") at 9.

7 *Id.* at 13.

8 WAC 463.26.090

9 RCW 80.50.090(2).

10 Order 868 at 9.

sees no reason to repeat the discussion here, it may help to lay this issue to final rest for us to discuss the course of our deliberations concerning land use issues. Our purpose, in part, is to clarify and underscore the significance of our observation in Order 868 that "the question of whether the proposed project is consistent with local land use requirements is not dispositive."11

We begin by observing that the statutes and rules concerning the Council's responsibilities relative to land use consistency recognize, and provide the means to resolve, the sometimes conflicting concerns that arise when a proposed project of statewide significance conflicts with a local government's authority and responsibility for regulating land use within the boundaries of its jurisdiction.12 RCW 80.50.090(2), which requires the Council to conduct a public hearing to determine land use consistency, is intended fundamentally to protect the local government's right to regulate land use within its jurisdiction. That is, it provides a process for *the local government* to be heard when such conflicts must be resolved.

In this case, however, two nongovernmental parties—Friends of the Columbia Gorge (Friends) and Save Our Scenic Area (SOSA)—make novel use of the relevant law in their effort to persuade the Council that it should, or even must, recommend to the Governor that she reject the Whistling Ridge Energy Project application. While we do not question the propriety of these parties availing themselves of every possible legal avenue in the zealous pursuit of their cause, we observe that their novel use of the law is ironic in that it would frustrate and defeat, if successful, the local government's strong and unwavering support for the Whistling Ridge project.13 We find it ironic, too, that it is most unlikely that this project would ever have been brought to the Council were it not for the successful challenge by Friends and SOSA to Skamania County's effort in 2008 to revise its zoning ordinance to specifically allow for such projects.14 Indeed, it was with the advice and support of county government officials given in the wake of a Hearing Examiner's rejection of the county's effort to revise its zoning ordinance, that the Applicant brought this project to the Council.15

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11 Order 868 at 9.

12 *See, e.g., Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wn.2d 275 (2008).

13 *See generally* Skamania County and Klickitat County Development Authority's Land Use Brief; Skamania County and Klickitat County Development Authority's Land Use Response Brief; County Petition for Reconsideration; County Answer to Petitions for Reconsideration.

14 Adjudicative Hearing Transcript at 87-88 (Spadaro).

15 *Id.*; Adjudicative Hearing Transcript at 1343-45 (Pearce).

Whistling Ridge Energy, LLC, submitted its application to the Council on March 10, 2009. One of the Council's first obligations when it receives an application such as this one is to conduct a public hearing to determine whether the proposed site is consistent and in compliance with city, county, or regional land use plans or zoning ordinances.16 On May 7, 2009, the Council convened a land use hearing, as required under RCW 80.50.090 and Chapter 463-26 WAC, in Underwood, Washington, near the proposed project site. Skamania County Commissioner, Jim Richardson, submitted a resolution from the Skamania County Board of Commissioners, Resolution 2009-22,17 which he described as "a certification of land use consistency review of the Whistling Ridge Energy Project which passed unanimously by the Board of Commissioners on May 5, including this letter of consistency from our planning director and staff report."18

The Council elected not to enter an early order determining the question of land use consistency. Instead, the Council allowed the parties to present additional evidence and argument concerning land use consistency and preemption during the adjudicative hearings conducted during January 2011 and, subsequently, in briefs devoted exclusively to the subject of land use consistency. This approach of combining the "proceeding for preemption" with "the adjudicative proceeding held under RCW 80.50.090(3)" is expressly authorized under WAC 463-28-060(2). It is an efficacious means to proceed, allowing the Council to consider the full range of arguments concerning land use consistency. If the Council determines under WAC 463-26-110 that a site is inconsistent with local land use requirements, this approach allows the Council to exercise its preemption authority under RCW 80.50.110(2) and determine what conditions, if any, should be included in a site certification to protect the interests of the local government or community affected by the proposed facility, as required by RCW 80.50.100(1), without the need for yet another adjudicative proceeding.

The parties briefed the land use issues during February 2011. The Council initiated deliberations on these issues during March 2011. The Council recognized that Friends and SOSA had put in play the question of burden of proof by challenging the proponents' evidence that Skamania County had issued a valid Certificate of Land Use Consistency.

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16 RCW 80.50.090(2).

17 Land Use Hearing Exhibit 1, Adjudicative Hearing Exhibit 2.02.

18 Land Use Hearing Transcript at 5:18-22. During the subsequent adjudicative hearing, the Applicant submitted a substitute Certificate of Land Use Consistency, County Commissioners' Resolution 2009-54, dated December 22, 2009, which was received into evidence on January 4, 2011, as Adjudicative Hearing Exhibit 2.03. Adjudicative Hearing Transcript at 195:13-21.

That is, Friends and SOSA argued that Adjudicative Hearing Exhibit 2.03, the Certificate of Land Use Consistency, County Commissioners' Resolution 2009-54, dated December 22, 2009, failed to meet the requirements for such certificates under WAC 463-26-090. This would mean the hearing record included no prima facie proof of consistency. In that circumstance, the burden to show consistency by substantial, competent evidence remained with those parties advocating it in the face of opposition from parties asserting inconsistency.

The Council put the dispute concerning the Certificate of Land Use Consistency to one side and considered the record and arguments as if it did not exist. The Council agreed in this context that the project opponents presented evidence and argument that, while insufficient independently to demonstrate inconsistency, instilled sufficient doubt on the question to preclude a definitive determination one way or the other. Given that the burden of proof remained with the project advocates absent a certificate of land use consistency, the Council settled on a conservative approach in its deliberations. It treated the project as being inconsistent with local land use requirements and considered what such a result would mean in the context of RCW 80.50.110. The Council's conclusion at the end of this analytical path was that to the extent of any inconsistency or failure to comply with Skamania County's zoning ordinance or Comprehensive Plan, it would be appropriate for the state to preempt the regulation and certification of the location, construction, and operational conditions of certification of the energy facilities at issue, as authorized by RCW 80.50.110(2).

The Council discussed that a determination of inconsistency, coupled with a determination in favor of preemption under RCW 80.50.110(2), would be a satisfactory outcome and, were the project to be otherwise approved, had the advantage of potentially avoiding further controversy over land use issues in a county with a comprehensive plan and zoning ordinances that arguably are less than fully developed works of planning art.19 On the other hand, this outcome would be unsatisfactory to the extent it relied on the Council declining to expressly resolve the dispute over whether the Certificate of Land Use Consistency, County Commissioners' Resolution 2009-54, dated December 22, 2009, should be accepted as prima facie proof of land use consistency. If so, the Council would need to deliberate again, considering the evidence and argument in light of the project opponents having the burden of proof.

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19 The county's challenges in this regard are entirely understandable, considering the complexity of land use statutory requirements, the county's financial challenges, the impediments imposed by federal and state forest lands and the National Scenic Area, the critical need for economic development and the costs of staffing and litigation that could be required in order to bring the county comprehensive plan and zoning ordinances into a clear and comfortable congruence.

The Council agreed that given its legal significance, determining as it does the burden of proof on the question of land use consistency, the dispute over the validity of the Certificate of Land Use Consistency must be resolved. This the Council did, finding the Certificate of Land Use Consistency, County Commissioners' Resolution 2009-54, dated December 22, 2009, valid, as addressed in Order 868:

> Friends argues that the substituted resolution is not a valid "certificate" under WAC 463-26-090 because the county did not identify the second certificate as a "decision." The document itself and the testimony of County Commissioner Pearce verify that Resolution 2009-54 is the county's certification to the Council upon a lawful vote of the Commissioners. The Council has no procedural requirements for validation of a certificate except lawful procedure, which is demonstrated here.20

WAC 463-26-090 provides:

> This rule contemplates that applicants will enter as exhibits, at the land use hearing, certificates from local authorities attesting to the fact that the proposal is consistent and in compliance with land use plans and zoning ordinances. In cases where this is done, such certificates will be regarded as *prima facie* proof of consistency and compliance with such land use plans and zoning ordinances absent contrary demonstration by anyone present at the hearing.

The Council ultimately agreed, again after considerable internal discussion and debate, that the project opponents failed to rebut by their evidence and arguments the presumption of consistency established by the Certificate of Land Use Consistency. That is, the project opponents failed to demonstrate that the project is specifically inconsistent, or demonstrably not in compliance, with applicable zoning law in Skamania County or with the county's 2007

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20 Order 868 at 9-10. Friends also argues that a certification of consistency is a decision requiring SEPA review under RCW 43.21C.030, citing a superior court order in another proceeding. Order 868 rejects this challenge as being unsupported. The decision was not offered into evidence during the hearing and no copies were provided to the Council or to other parties. The Council nevertheless examined the order and found it does not support Friends' argument. Indeed, given the lack of context (*e.g.*, neither the "opinion letter" to which the brief order refers, nor the "defendants' motions to dismiss" are included), and references to statutes that do not exist (i.e., RCW 30.70C.020 and .040), it is not possible to divine any meaning at all from the face of the court's order. The order makes no reference at all to RCW 43.21C.030.

Comprehensive Plan. Under this analysis, then, with an unrebutted presumption of consistency under WAC 463-26-090, a determination that the project is consistent and in compliance with existing land use plans or zoning ordinances is the only possible outcome. As previously discussed, such a determination brings the Council's land use inquiry to an end.

In sum, the Council considered the full range of possible outcomes in terms of land use consistency. The Certificate of Land Use Consistency, County Commissioners' Resolution 2009-54, dated December 22, 2009, accepted into our record as Adjudicative Hearing Exhibit 2.03, is prima facie proof of land use consistency, creating a rebuttable presumption to that effect. Friends and SOSA failed to present evidence and argument overcoming the presumption. It follows that the project is consistent and in compliance with existing land use plans or zoning ordinances. Even had the Council reached the opposite result, however, it would have determined that preemption under RCW 80.50.110(2) is appropriate and required, subject to the imposition of appropriate conditions, such as are imposed in any event, in other sections of Order 868. It is for these reasons that the question of whether the proposed project is consistent with local land use requirements is not dispositive. Under either outcome, local land use requirements would impose no barrier to approval of the Whistling Ridge Energy Project, as recommended by the Council in Orders 868 and 869.

B. Aesthetics, Viewscape and Turbine Reduction Issues

Context on this and other issues is important.

The Council's enabling statute and rules specifically direct it to consider and balance the interests of all Washington State citizens. RCW 80.50.010(1). These interests frequently but not always are well aligned with those who live in the area where the project is proposed. The Council has an obligation to all citizens, both those who live in the area and others throughout the state, to "...preserve and protect the quality of the environment [and] to enhance the public's opportunity to enjoy the esthetic and recreational benefits of the air, water, and land resources...." RCW 80.50.010(2). There is virtually identical language in the Council's rules making the legislative intent of RCW 80.50.010 binding upon the Council in considering the siting of projects. WAC 463-14-020(2). Notwithstanding arguments to the contrary, it is not required that the Council adopt regulations on these issues to consider them in its siting decisions. These and other issues can be, and are, frequently addressed on a case-by-case basis, often applying standards brought before and considered by the Council during its adjudicative process and in its deliberations.

Against this backdrop, Friends argues that the Council erred by not considering that the approved turbine strings will result in a "cluttered and chaotic" appearance from certain viewing locations. The Council considered the overall visual impact of the project and did not focus on a single criterion. The Applicant initially proposed a 50 turbine project, later reduced to 38 turbines. Conditions established in Order 868 further reduced the number of turbines to 35. The Council made its determination to eliminate certain proposed turbine strings after reviewing all relevant evidence in the record and considering its own viewscape analysis , including the Council members' two-day site visit on May 2-3, 2011. The Council remains convinced that the conditions it imposed reduce the visual impact of the Project to an acceptable degree.

Skamania County and the Department of Commerce (Commerce) argue that the Council has no established aesthetic siting standards and is therefore prohibited from imposing conditions to mitigate aesthetic concerns. This is simply incorrect. There is no requirement that EFSEC must establish specific standards by which to evaluate every conceivable impact a proposed project may have. It is generally well accepted that siting criteria are project specific to a significant degree. For example, there are no standards adopted for consideration of economic or recreational impacts, yet such issues are frequently considered by the Council.

Skamania County and Commerce also argue that the Council impermissibly applied the National Scenic Area (NSA) aesthetic standards to justify elimination of certain tower strings. Skamania County also argues that the Council recognizes the project area is not "pristine," yet uses NSA standards for pristine areas to prohibit development. Finally, in this connection, the county argues that the Council has impermissibly redrawn the NSA boundaries, created a buffer zone outside the NSA, or has reinterpreted the NSA Law in some fashion.

The Council clarifies that it did not rely on NSA standards in its deliberations and decisions. The Council considered the historic and scenic values of the broader Columbia River Gorge. The Council agrees that it would be improper to apply NSA standards to areas outside of the NSA (Order No. 869 at 7).

Indeed, if the Council used the NSA criteria to evaluate the Whistling Ridge Project, it would have rejected the project during scoping. The Council specifically recognized, in its orders, that the Whistling Ridge area is partially developed, not pristine, and that maintenance of a pristine landscape is not an applicable standard. The assertions that the Council uses NSA

criteria, redraws NSA boundaries, establishes NSA buffer zones, or reinterprets the NSA statue are simply incorrect.

Skamania County and the Department of Commerce argue that the FEIS supports approval of a 50-turbine project and that the Council's recommendation to the Governor is inconsistent with this FEIS "mandate". The State Environmental Protection Act (SEPA) and the FEIS guide, but do not "mandate"; they inform the Council's decisions but the Council's FEIS contains no "mandates for action." The FEIS provides analysis and estimates of various impacts to the environment from proposed actions, as required under SEPA. The FEIS does not evaluate and document all of the possible effects and considerations that inform the Council's decisions. The Council considered the FEIS in its recommendation to the Governor, but the FEIS is only one consideration.21 On the basis of the adjudicative record and the FEIS, the Council determined that the C and southern A turbine corridors intrude impermissibly into the aesthetic, cultural and natural heritage of the state, the region, and adversely affect Native People's interests, thus requiring denial of use of those portions for tower construction or wind-power generation (Order 869 at 7.)

The Applicant argues that the Council substituted its own "subjective" evaluation of visual impacts for the impliedly "objective" determination in the FEIS. The challenge that the Council's visual impact analysis is a "one man opinion" or a "subjective" amateur attempt at science, while the analysis in the FEIS is an interdisciplinary, qualified and quantified determination misses the mark. The Council's analysis in the adjudicative proceeding shares with the expert analysis in the FEIS both qualitative and quantitative aspects. Both analyses have objective and subjective qualities. The FEIS reflects the judgment of one consultant applied to the criteria he selected. The seven members of the Council applied their individual and collective judgments considering the same criteria, informed further by the extensive evidence on this issue presented in the adjudicative proceeding and their independent view of the project in May, 2011, which was based in significant part on the viewscape analysis performed by the FEIS consultant. Additionally, it is worth noting that the evidence in the adjudicative proceeding included testimony by both proponents and opponents that offered different "standards" for evaluating visual effects. The Council weighed these standards of the Federal Highway Administration and the US Forest Service in considering the case.

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21 SEPA does not require that an EIS be an agency's only decision making document (WAC 197-11-448) *See Solid Waste Alternative Proponents v. Okanogan Cnty.*, 66 Wn. App. 439, 832 P.2d 503 (1992).

The Applicant argues that the Council erred in Order 868 by stating that approval of 35 turbines preserves the project's ability to achieve a 75 MW Generating Capacity and be economically feasible. The Council's observation that 35 turbines are sufficient to achieve a 75 MW capacity is consistent with the Applicant's testimony during the adjudicative hearing showing that 38 turbines could produce a 75 MW capacity and with other evidence in the record. However, even if the Council is incorrect in observing that 35 turbines can produce 75 MW, this is not a determinative factor and would not result in any change in the Council's orders. The Council's decision does not turn on questions of whether the project would be economically feasible for the Applicant,.

C. Economics, Need for Power, and Reasonable Cost Issues

SOSA argues that the Council failed to consider the requirement of "reasonable cost" in its orders and recommendation as required by RCW 80.50.010(3). The Council had previously determined that it does not need to conduct an independent evaluation of this issue.22 The market determines what constitutes power at reasonable cost in the context of an application by an independent power merchant to build a power generation facility.

D. Avian and Wildlife Issues

Friends argues that the Council failed to address in its orders the issues of species identification and project impacts mitigation as required by the Washington Department of Fish and Wildlife (WDFW) wind power guidelines. The Seattle Audubon Society argues that the Applicant's habitat mitigation plan is inadequate by not including definitive information about the mitigation parcel discussed during the adjudicative hearing.

The proposed Project complies with all applicable requirements of the WDFW Wind Power Guidelines.23 During the application review process, the Applicant and WDFW discussed a potential mitigation parcel; however, the final details were not offered to the Council. The SCA requires the Applicant to present a specific habitat mitigation plan to EFSEC for approval at least 60 days prior to the beginning of site preparation. The mitigation obligation can be satisfied by purchasing a mutually acceptable mitigation parcel and deeding it to WDFW or a mutually acceptable third party, by contributing money to a mutually acceptable third party that owns or will purchase a mitigation parcel, or by payment of a fee to WDFW

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22 *See Residents, supra,* at page 321, "... we believe EFSEC was within its authority to refuse to review the economic viability of the KVWPP."

23 Exhibit No. 6.09c, *letter from WDFW.*

in lieu of mitigation. If the fee option is selected, it must be in an amount equivalent to the value of permanently disturbed project areas. The Council remains satisfied that the Habitat Mitigation Plan requirements in the SCA are adequate to their purpose and to meet statutory requirements.

We believe the FEIS provides sufficient information on preexisting project species abundance and distribution as described in detail in FEIS Section 3.4, Section 4.2-4.7, Appendices C-F.

Friends argues that the Council failed to require the Applicant to provide adequate information concerning avian and bat usage and that the findings by the USFWS, related to the determination of no significant impacts, should be reassessed. The Seattle Audubon Society also argues that pre-project avian assessments are inadequate and do not comply with the WDFW guidelines.

Again, the Council is satisfied that the FEIS provides adequate information on the subject of avian and bat usage at the site. The pre-project assessment and avian/bat use surveys are consistent with standard protocols utilized throughout the United States and are consistent with the WDFW Wind Power Guidelines. WDFW confirmed that data presented by the Applicant represents the best available science for predicting avian impacts at the proposed Project. The FEIS acknowledges that some avian mortality will occur but finds no evidence that it is likely to pose a threat to populations.

In regard to the determination of no significant impacts, the FEIS finds no evidence that mortality to a threatened or endangered species is expected. The protection of endangered species remains in the hands of the USFWS and they have not indicated the need for any changed conditions justifying additional action on the part of EFSEC.

The Seattle Audubon Society also argues that the post-construction avian monitoring plan is inadequate because it does not require the applicant to conduct a three-year post-construction avian displacement monitoring study. The WDFW Guidelines require post-construction mortality studies be conducted but do not require post-construction research-oriented avian displacement studies. In lieu of additional preconstruction study, particularly given WDFW's acceptance of the existing analysis, EFSEC determined that three years of post-construction mortality studies would be more productive. The purpose of the post-construction avian monitoring plan is to quantify impacts to avian species and to assess the adequacy of mitigation measures implemented, including any mitigation necessary under the Migratory Bird Treaty Act.

E. SCA Issues

Friends argues that the SCA does not adequately address construction duration, unexpected impacts from turbines, noise, roads and transportation. This is incorrect. The SCA provides an 18-month construction period with a force majeure limitation. The SCA also includes a provision allowing for an extension of time, subject to EFSEC approval. The SCA includes provisions for addressing unexpected impacts from the Project that were not previously analyzed or anticipated. The SCA also has provisions for addressing wildlife issues if additional studies or mitigation are warranted to address impacts not foreseen in the Application or the FEIS.

Specific requirements for noise are contained in Article 5 of the SCA, which requires compliance with all local and state regulations. In addition, the SCA requires that all noise mitigation measures identified in the FEIS must be implemented during construction and operation of the Project.

Article IV F. of the SCA establishes road and transportation requirements that must be satisfied during construction and operation of the Project. Compliance with all local and state regulations is required.

DISPOSITION: The Council has considered all petitions for reconsideration as required under RCW 34.05.470 and WAC 463-30-335. EFSEC finds and concludes that none of the petitions raises any factual or legal arguments that EFSEC has not already heard during the adjudication and in post-hearing briefs, deliberated upon, and discussed in Orders 868 and 869 and the draft Site Certification Agreement. No basis has been provided to justify any changes in the Council's findings, conclusions, or recommendations. Hence, the Council denies all motions for reconsideration.

ORDER

THE COUNCIL ORDERS that the motions for reconsideration by Friends of the Columbia Gorge, Save Our Scenic Areas, Seattle Audubon, Skamania County, and Whistling Ridge Energy LLC are denied.

WASHINGTON STATE ENERGY FACILITY SITE EVALUATION COUNCIL

SIGNATURES

DATED and effective at Olympia, Washington, this 21st **day of,** December 2014.

James O. Luce, Chair

Richard Fryhling,
Department of Commerce

Hedia Adelsman,
Department of Ecology

Jeff Tayer,
Department of Fish and Wildlife

Andrew Hayes,
Department of Natural Resources

Dennis Moss,
Utilities and Transportation Commission

Doug Sutherland,
Skamania County