☐ EXPEDITE
☐ No Hearing Set
☑ Hearing is Set
Date: September 28, 2012
Time: 11:00 a m
The Honorable Judge James J. Dixon

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

FRIENDS OF THE COLUMBIA GORGE, INC., and SAVE OUR SCENIC AREA, Petitioners, v. STATE ENERGY FACILITY SITE EVALUATION COUNCIL (EFSEC) and CHRISTINE O. GREGOIRE, Governor of the STATE OF WASHINGTON, Respondents, and WHISTLING RIDGE ENERGY LLC, SKAMANIA COUNTY, and KLICKITAT COUNTY PUBLIC ECONOMIC DEVELOPMENT AUTHORITY, Intervenors-Respondents.	NO. 12-2-00692-7 MOTION TO CERTIFY PETITION FOR REVIEW TO SUPREME COURT PURSUANT TO RCW 80.50.140

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COMES NOW Governor Christine O. Gregoire, Energy Facility Site Evaluation Council ("EFSEC"), Whistling Ridge Energy LLC, Skamania County, and the Klickitat County Public Economic Development Authority (collectively, "Respondents") by and through its legal counsel set forth below and jointly move this Court for the entry of an order certifying this matter for direct review by the Washington Supreme Court.

I. RELIEF REQUESTED

In accordance with RCW 80.50.140, Respondents request that this Court immediately certify this matter to the Washington Supreme Court based upon the fundamental and urgent interests at issue in these proceeding that affect the public interest and the development of energy facilities and require a prompt determination by the Supreme Court. In the event Petitioners oppose immediate certification to the Supreme Court, Respondents request that the Court require Petitioners to show cause why this matter should not be immediately certified to the Supreme Court for direct review.

II. STATEMENT OF FACTS

This matter comes before this Court under RCW 80.50.140. Petitioners have appealed Governor Gregoire's approval, upon EFSEC's recommendation, of a Site Certification Agreement ("SCA") for the Whistling Ridge Energy Project (the "Project"). Whistling Ridge Energy LLC is the applicant of the Project. As initially proposed, the Project consisted of up to 50 wind turbines and a substation in Skamania County, Washington. (Rec. Doc. #3 at I-5.) In order to minimize potential visual effects, Whistling Ridge Energy LLC stipulated during the EFSEC review process that the Project would consist of no more than 38 wind turbines. (Rec. Doc. #1625 at 73:20-74:25.) Following an

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exhaustive review of the Project, EFSEC recommended and Governor Gregoire signed a SCA that authorizes construction and operation of the substation and a maximum of 35 wind turbines. (Rec. Doc. #2362 at 9.)

The administrative record EFSEC filed with this Court is exhaustive and voluminous (over 36,500 pages). It includes public comments, oral and written testimony, evidence, the Project's Final Environmental Impact Statement ("FEIS"), and briefing submitted by the parties during EFSEC's review. Petitioners have filed with this Court an objection to the administrative record and motion to correct and "add to" the administrative record ("Objection") that makes the following three requests: (1) the administrative record should be combined into "one or a few," searchable, Bates stamped PDF files, (2) certain inadvertently "omitted" documents should be included in the administrative record, and (3) documents attached to Petitioners' Objection "that were cited, quoted, or otherwise referenced during the proceedings below" should be *added* to the administrative record. As noted in the answer to Petitioners' Objection filed concurrently with this motion, Respondents do not dispute the first two requests in the Objection, but strongly dispute the third request to *add* documents to the administrative record. As described below, pending this Court's resolution of that dispute, Petitioners' Petition for Review will be ready for immediate certification to the Washington Supreme Court.

The Petition for Review contains characterizations of the facts in the proceedings below and takes issue with the factual findings made by EFSEC and Governor Gregoire. Respondents strongly disagree with Petitioners' characterizations of the findings of fact and conclusions of law made by the EFSEC and the Governor and anticipate that the Supreme Court will adjudicate

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these matters under the appropriate standard of review. Respondents provide only a brief response below in order to demonstrate how this matter satisfies RCW 80.50.140's four criteria for immediate certification to the Supreme Court.

III. STATEMENT OF THE ISSUES

Whether the Court should immediately certify this matter to the Supreme Court for direct review in accordance with RCW 80.50.140?

IV. EVIDENCE RELIED UPON

This motion is based upon the following evidence and information: (1) the Petition for Review filed with this Court; (2) the administrative record EFSEC filed with this Court on July 30, 2012; (3) Petitioners' Objection to the administrative record filed by EFSEC and motion to correct and "add to" the administrative record; and (4) Respondents' answer to Petitioners' Objection filed concurrently with this motion.

V. LEGAL AUTHORITY AND ARGUMENT

Pursuant to RCW 80.50.140, the Thurston County Superior Court is required to conduct its review of the matter "at the earliest possible date and shall expedite such petition in every way possible." This Court's responsibility is set forth as follows:

> (1) . . . The Thurston county superior court shall certify the petition for review to the supreme court upon the following conditions:
>
> (a) Review can be made on the administrative record;
>
> (b) Fundamental and urgent interests affecting the public interest and development of energy facilities are involved which require a prompt determination;

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(c) Review by the supreme court would likely be sought regardless of the determination of the Thurston county superior court; and

(d) The record is complete for review.

RCW 80.50.140 fundamentally contemplates certification to the Supreme Court without review and hearing by the Thurston County Superior Court regarding the substantive merits of the Petition for Review. *Residents Opposed to Kittitas Turbines v. EFSEC*, 165 Wn.2d 275, 286, 197 P.3d 1153 (2008) ("That [superior] court *will certify* the petition to this court if it determines that" the criteria in RCW 80.50.140(1) are satisfied [Emphasis added.]). The Supreme Court then has discretion whether to accept or decline this Court's certification. *Id.* at 300. Thus, this Court's role to certify the sufficiency of the record for review and make a determination that the matter involves "fundamental and urgent interests" and that Supreme Court review would be sought "regardless of the determination" of the Superior Court. This case meets all four required criteria.

A. Review can be made on the administrative record in this case.

Review of the issues raised in Petitioners' Petition for Review can be made on the administrative record. The record is extensive consisting of over 36,500 pages and reflects the comprehensive administrative process conducted by EFSEC. EFSEC conducted informational public hearings on the Project on May 6-7, 2009, in Stevenson and Underwood, Washington. (Rec. Doc. #193, #194.) EFSEC conducted a land use consistency hearing on the Project on May 7, 2009, in Underwood near the Project site and an adjudicative hearing on the Project on January 3-7, 10-11, and 20, 2011 in Stevenson, Underwood, and Olympia, Washington. (Rec. Doc. #2280 at 6, 8.) Both sides presented expert testimony during those hearings. As part of the adjudicative hearing, EFSEC

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held sessions on January 5 and 6, 2011 in Underwood and Stevenson, at which members of the public could testify. (*Id.* at 6.) EFSEC also received 396 comments letters and evidentiary submissions regarding land use consistency and 399 written submissions regarding the application adjudication. (*Id.* at 7.)

In full compliance with the State Environmental Policy Act ("SEPA"), EFSEC also conducted a scoping hearing on May 6, 2009, in Stevenson and Underwood, Washington, issued a Draft Environmental Impact Statement ("DEIS") for public comment on May 24, 2010, conducted public hearings on the DEIS on June 16-17, 2010, in Underwood and Stevenson, and accepted written comments on the DEIS until August 27, 2010 (extended from the original July 19 deadline). (Rec. Doc. #2279 at 4.) On August 12, 2011, EFSEC's responsible official under SEPA issued the Project's FEIS, which contains responses to the public comments. (*Id.* at 4.) The FEIS is a joint environmental impact statement, produced cooperatively by the State of Washington and the United States Department of Energy, Bonneville Power Administration ("BPA") as joint lead agencies, to meet both SEPA and National Environmental Policy Act (NEPA) standards and requirements. (Rec. Doc. #45; Rec. Doc. #2255 at 2.)

Petitioners' issues were briefed and argued extensively during the EFSEC adjudicative proceeding, they were addressed in various EFSEC orders, and they have been fully adjudicated in EFSEC Orders Nos. 868 and 869, filed with this Court as Rec. Doc. #2280 and Rec. Doc. #2279, respectively. This information is in the record before this Court and review can be made on this record.

RCW 80.50.140(1)(a)'s requirement that "[r]eview can be made on the administrative record" is not an invitation for a party to present substantive evidence about the Project, such as testimony by an additional expert. Rather,

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this criterion implicates the situation where the superior court confronts a claim that "there are alleged irregularities in the procedure before the council not found in the record," in which case the superior court, "shall proceed to take testimony and determine such factual issues raised by the alleged irregularities and certify the petition and its determination of such factual issues to the supreme court." RCW 80.50.140(1). For example, the petitioners in *Residents Opposed to Kittitas Turbines* alleged that EFSEC's chairman engaged in a conflict of interest and improper ex parte communications and exhibited bias. *Residents Opposed to Kittitas Turbines*, 165 Wn.2d at 301. The superior court properly allowed those petitioners to supplement the administrative record with testimony to support the alleged procedural irregularities not found in the record. *Id.*

Here, Petitioners' Petition for Review does not allege any irregularities in EFSEC procedure not found in the record. Instead, it simply requests that this Court "allow the administrative record to be supplemented in order to allow meaningful review of Petitioners' claims." (Pet. for Rev. at 26 ¶ 8.2.) According to Petitioners' Objection, they desire to supplement the record with certain documents "that were cited, quoted, or otherwise referenced during the proceedings below." Consequently, unlike the situation the superior court faced in *Residents Opposed to Kittitas Turbines*, there is no need to take additional evidence, and this criterion is satisfied.

Respondents do not dispute the first two requests in Petitioners' Objection that certain inadvertently "omitted" documents should be included in the administrative record and that the administrative record should be combined into "one or a few," searchable, Bates stamped PDF files. Consequently, the only issue facing this Court vis-à-vis the contents of the administrative record is

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whether to *add* documents attached to Petitioners' Objection "that were cited, quoted, or otherwise referenced during the proceedings below." Regardless of how this Court rules on that request, review of the issues raised in Petitioners' Petition for Review can be made from the resulting record, and this criterion is satisfied.

B. This case involves numerous "fundamental and urgent interests affecting the public interest and development of energy facilities are involved which require a prompt determination."

This case involves fundamental and urgent interests because it involves a key energy project, it implicates I-937's (Energy Independence Act) mandate that renewable energy be developed in Washington, its substation would address reliability concerns in Skamania County (*See* Rec. Doc. #2255 at 3-91), it would provide desperately needed tax revenues for Skamania County (Rec. Doc. #1887 at 1335:17-1336:3, 1356:13-1357:22), and it is in the public's interest to avoid unnecessary duplication, cost, and delay in the siting process. The Governor's approval of an SCA is "in lieu of any permit, certificate or similar document required by any department, agency, division, bureau, commission, board, or political subdivision of this state." RCW 80.50.120(3). "[E]nergy facility certification decisions by other governmental entities" are preempted. *Residents Opposed to Kittitas Turbines*, 165 Wn. 2d at 285. The Supreme Court explained this second of RCW 80.50.140's four certification criteria in *Residents Opposed to Kittitas Turbines*. According to the Supreme Court in that case, the:

> legislature has recognized public interests in providing energy at a reasonable cost, RCW 80.50.010(3), and avoiding costly duplication in the siting process and ensuring that decisions are

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> made timely and without unnecessary delay, RCW 80.50.010(5). Such public interests are present in this case, requiring prompt review.

Residents Opposed to Kittitas Turbines, 165 Wn.2d at 302.

In this case, Petitioners urge this Court to hear the case rather than certifying it to the Supreme Court. (Pet. for Rev. at 25 ¶ 8.1.) The only reason for this request is to cause further delays and increase Respondents' expenses in connection with the Project. The record before this Court and the Supreme Court will be the same, and the Supreme Court "sits in the same place as the superior court when reviewing a superior court's direct review of an administrative decision." *Residents Opposed to Kittitas Turbines*, 165 Wn.2d at 295. Delay is a key tool for any party opposing an energy project. However, in enacting RCW 80.50.140, the Legislature removed that tool from the opponents' arsenal.

Although this case, by its very nature, involves fundamental and urgent interests, the Petition for Review raises at least six legal issues that threaten the EFSEC siting process and require prompt resolution by the Supreme Court, before other energy facilities can be reviewed and permitted by EFSEC and the Governor. First, Petitioners challenge EFSEC's determination of land use consistency. (Pet. for Rev. at 6-9 ¶¶ 7.1.1-7.1.5.) Petitioners argue that EFSEC erred in finding that Skamania County had in fact adopted a certificate of land use consistency, and Petitioners argue that a certificate of land use consistency is a "land use decision." These arguments present the legal issues of what constitutes a certificate of land use consistency under WAC 463-26-090, by what means may local authorities issue such certificates, and whether such certificates are separately appealable outside of the EFSEC proceedings under the Land Use Petition Act ("LUPA"). *See* RCW 36.70C.010 (LUPA establishes the process for

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appeal of "land use decisions"). These are important legal issues because Petitioners' arguments, if successful, would control EFSEC's process for determining "whether or not the proposed site is consistent and in compliance with city, county, or regional land use plans or zoning ordinances" as required by RCW 80.50.090(1), circumscribe the deference EFSEC affords local governments under WAC 463-26-090 in interpreting their own land use regulations, and open the door for interlocutory LUPA appeals of local government actions taken in the EFSEC process, thereby duplicating the fundamental "one stop" permitting process ensconced in RCW Ch. 80.50. If successful, Petitioners' arguments would undermine the authority of EFSEC and the Governor to implement the legislative scheme for siting jurisdictional energy facilities. In enacting RCW Ch. 80.50, the Legislature recognized the fundamental public interest in providing reliable energy resources (RCW 80.50.010) and established a process that is unique to any other land use in the State of Washington, Petitioners seek to destroy the foundation of that process. It is in the utmost interest to the citizens of Washington that the Supreme Court promptly reviews these issues in order to provide certainty to energy facility siting and to ensure the continuation of a stable process for the development, construction, and operation of energy generation and transmission facilities.

Second, Petitioners challenge EFSEC's authority to manage the Project after it has been approved. For example, Petitioners claim EFSEC's recommendation erred by allowing the applicant to wait until after Project approval to resolve forest practice issues. (Pet. for Rev. at 21 ¶ 7.7.1.) Petitioners also claim that EFSEC erred by failing to state the process for

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interested persons to participate in EFSEC's future review and management of the Project. (Pet. for Rev. at 22 ¶ 7.8.1.) These claims raise the important legal issue of whether and by what means EFSEC can regulate and manage this Project and any other EFSEC-jurisdictional energy facilities following the Governor's approval.

Third, Petitioners make a number of claims that EFSEC failed to make findings or impose requirements necessary to protect the environment. For example, Petitioners claim that EFSEC "failed to consider and require available and reasonable methods to avoid, minimize, and mitigate these [aesthetic heritage and recreational resource] impacts." (Pet. for Rev. at 18 ¶ 7.3.2.) However, EFSEC's recommendation to the Governor also considered the joint EFSEC/BPA FEIS for the Project. (Rec. Doc. #2279 at 14.) The basic purpose for requiring a FEIS is "to require local governments to consider total environmental and ecological factors to the fullest extent when taking major actions significantly affecting the quality of the environment." *Residents Opposed to Kittitas Turbines,* 165 Wn.2d at 311. Although Petitioners complain about EFSEC's environmental findings, their Petition for Review does not challenge the FEIS, which includes extensive analysis of environmental impacts and identifies measures to avoid, minimize, and mitigate these very impacts. (Rec. Doc. #2255 at 1-22 to 1-34.) Petitioners' claims effectively constitute an end around attack on the SEPA process followed by EFSEC and evidenced in the issuance of the FEIS by EFSEC's SEPA responsible official. Petitioners' arguments raise the legal issue of whether a petition for review can challenge EFSEC's conclusions regarding the environment without assigning error to, and irrespective of, the

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extensive environmental analysis and mitigation measures imposed through the FEIS.

Petitioners also claim that SCA is arbitrary and capricious because of ambiguity about its expiration date. (Pet. for Rev. at 23 ¶ 7.9.1.) This claim raises a fourth and fifth legal issue to be resolved by the Supreme Court: (4) Whether the SCA expires 10 years after the Governor signs it or 10 years after the SCA has been executed by both parties, and (5) Does the Governor act within her fundamental discretion under the statute and have the authority to agree that the expiration of the SCA may be stayed while the applicant obtains all necessary state and federal permits and during the period needed to finally resolve all appeals related to those permits. These arguments seek an interpretation of EFSEC's rules and RCW Ch. 80.50 and would allow opponent to effectively "run the clock" on the SCA for this Project and any future EFSEC energy facilities by endless appeals, thereby undermining the statutory scheme. If successful, Petitioners' arguments would have a large impact on statewide energy planning and investment and impede the State's interest in, and regulation of, the construction and operation of energy facilities to supply abundant power within the scheme and timeframe enacted by the Legislature. Again, these are legal issues that require prompt resolution by the Supreme Court.

Sixth, Petitioners challenge the SCA's "Order of Precedence" claiming that it puts higher precedence on state law than federal law. (Pet. for Rev. at 25 ¶ 7.10.2.) This raises the legal issue of whether the state is required to look to federal law first in resolving any legal question involving the Project, without regard to well established and extensive state and federal jurisprudence

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concerning how federal and state law must coincide in the regulation of state-licensed and regulated land development.

These are not the only legal issues involved in this case. However, they demonstrate that the case involves significant legal issues that require prompt resolution by the Supreme Court because they go to the heart of the State's energy facility siting process and cast a cloud over the State's ability to implement the Legislature's direction in accordance with RCW Ch. 80.50. Just as in *Residents Opposed to Kittitas Turbines*, delay in resolving these issues "will result in uncertainty for all existing and pending siting projects. Such uncertainty could lead to delay in the construction and operation of energy facilities and ultimately restrict the availability of energy at reasonable costs in the state." *Residents Opposed to Kittitas Turbines*, 165 Wn.2d at 302-3. The certification procedure in RCW 80.50.140 was designed to resolve such questions and avoid additional duplication, cost, and delay, in order to ensure the energy generation and transmission is provided to serve the public without interruption or unreasonable delay. For these reasons, the second of RCW 80.50.140's four certification criteria is satisfied.

C. Review by the Supreme Court would likely be sought regardless of this Court's determination.

Petitioners and Respondents are equally likely to seek Supreme Court review if this Court declined to follow RCW 80.50.140 by not certifying this matter and instead resolving it on the merits. Petitioners have been involved in stopping wind energy development in Skamania County for years. They successfully appealed Skamania County's 2008 zoning amendments that implicated wind energy development in certain parts of the County (Rec. Doc.

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#1633), they unsuccessfully appealed Skamania County's two certificates of land use consistency for the Project to the Columbia River Gorge Commission (Rec. Doc. #683 at 2, #1879), and they have now appealed EFSEC's recommendation and the Governor's approval of the SCA for the Project. Indeed, Order No. 868 states that "this aggressively litigated proceeding appear[s] to have set a record for length, volume, and number of issues addressed for a facility of this type." (Rec. Doc. #2280 at 16.) Considering the aggressive nature of this litigation and that delay favors these Petitioners (and is a key tool they have deliberately deployed throughout the process), it is difficult to believe that the Petitioners would not seek Supreme Court review if they were unsuccessful on the merits before this Court.

Governor Gregoire and EFSEC would appeal an adverse decision on the important legal issues in this case, because these issues have importance not only for this Project but also future energy facilities. Furthermore, all Respondents would likely appeal an adverse decision, because Petitioners seek a remand of the matter to EFSEC. (Pet. for Rev. at 26 ¶ 8.3.) Again, delay is Petitioners' main weapon in opposing this Project. Respondents would seek Supreme Court review to prevent this delay. For these reasons, this criterion is satisfied.

D. The record is complete for review.

After this Court rules on Petitioners' request that documents attached to Petitioners' Objection "that were cited, quoted, or otherwise referenced during the proceedings below" be *added* to the administrative record, the record will be settled and complete. *See Residents Opposed to Kittitas Turbines*, 165 Wn.2d at 302 ("Upon supplementing the record [under RCW 80.50.140(1)(a) with testimony to support allegations of irregularities in EFSEC procedure not found

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in the record], the court determined that the record was complete for review in satisfaction of RCW 80.50.140(1)(d).”). The record will be ready for review and the fourth of RCW 80.50.140’s four certification criteria will be satisfied, once EFSEC files a record combined into “one or a few,” searchable, Bates stamped PDF files that includes (i) the inadvertently “omitted” documents and (ii) if this Court so rules, documents attached to Petitioners’ Objection.

In summary, this Court should certify this matter to the Supreme Court as provided in RCW 80.50.140.

VI. CONCLUSION

For all the reasons set forth above, Governor Gregoire, the Energy Facility Site Evaluation Council, Whistling Ridge Energy LLC, Skamania County and the Klickitat County Public Economic Development Authority jointly request that this Court make findings in accordance with RCW 80.50.140 and certify the Petition for Review for direct review by the Washington Supreme Court.

DATED this 20th day of September 2012, at Olympia, WA.

ROBERT M. MCKENNA
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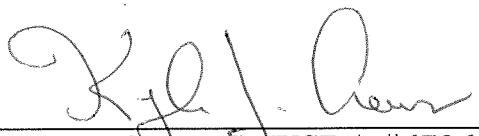

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PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 20th day of September, 2012, at Olympia, Washington.

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