

- 1 EXPEDITE
2 No Hearing Set
3 Hearing is Set

4 Date: October 26, 2012

5 Time: 11:00 a.m.

6 The Honorable Judge James J. Dixon

7 **STATE OF WASHINGTON**
8 **THURSTON COUNTY SUPERIOR COURT**

9 FRIENDS OF THE COLUMBIA
10 GORGE, INC., and SAVE OUR SCENIC
11 AREA,

12 Petitioners,

13 v.

14 STATE ENERGY FACILITY SITE
15 EVALUATION COUNCIL (EFSEC) and
16 CHRISTINE O. GREGOIRE, Governor
17 of the STATE OF WASHINGTON,

18 Respondents,

19 and

20 WHISTLING RIDGE ENERGY LLC,
21 SKAMANIA COUNTY, and
22 KLUCKITAT COUNTY PUBLIC
23 ECONOMIC DEVELOPMENT
24 AUTHORITY,

25 Intervenors-Respondents.

NO. 12-2-00692-7

[PROPOSED]
ORDER CERTIFYING
PETITION FOR REVIEW
TO SUPREME COURT
FOR DIRECT REVIEW
PURSUANT TO
RCW 80.50.140

THIS MATTER, having come on before this Court on the 26th of October,
2012, Respondents Governor Christine O. Gregoire and the Energy Facility Site

1 Evaluation Council (“EFSEC”) being represented by ROBERT M. McKENNA,
2 Attorney General of the State of Washington, and KYLE J. CREWS, Assistant
3 Attorney General; Whistling Ridge Energy LLC being represented by
4 TIMOTHY L. McMAHAN and ERIC L. MARTIN; Skamania County and
5 Klickitat County Public Economic Development Authority being represented by
6 SUSAN ELIZABETH DRUMMOND; Friends of the Columbia Gorge, Inc.
7 being represented by GARY K. KAHN and NATHAN J. BAKER; and Save Our
8 Scenic Area being represented by J. RICHARD ARAMBURU, and the Court
9 having heard oral argument of the parties and having considered and reviewed
10 the pleadings, testimony, files and records herein, including the following
11 documents, and the exhibits and attachments thereto:

12 1. Respondents’ Motion to Certify Petition for Review to Supreme
13 Court Pursuant to RCW 80.50.140;

14 2. Petitioners’ Response to Motion to Certify Petition for Review to
15 Supreme Court Pursuant to RCW 80.50.140;

16 3. Declaration of Gary Kahn;

17 4. Declaration of Keith Brown;

18 5. Declaration of Tom Drach;

19 6. Respondents’ Reply to Petitioners’ Response to Motion to Certify
20 Petition for Review to Supreme Court Pursuant to RCW 80.50.140;

21 7. Declaration of Jim Luce;

22 8. Declaration of Jason Spadaro;

23 9. Declaration of Susan Elizabeth Drummond;

24 10. Declaration of Eric L. Martin;

1 11. The updated administrative record filed by EFSEC with this Court
2 on October 9, 2012; and

3 12. Petitioners' Petition for Review.

4 IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

5 1. That Respondents' Motion to Certify Petition for Review to
6 Supreme Court Pursuant to RCW 80.50.140 is hereby GRANTED, the record is
7 CERTIFIED for direct review by the Washington Supreme Court, and further
8 proceedings before this Court are DENIED. This ORDER is based upon the
9 pleadings, files, and records filed with the Court, and the Court hereby makes the
10 following FINDINGS AND CONCLUSIONS in accordance with
11 RCW 80.50.140(1):

12 **A. "Review Can Be Made On The Administrative Record"**

13 EFSEC filed the administrative record with this Court, including the
14 Application for Site Certification, environmental documents related to the
15 Application (including the complete SEPA record and Draft and Final
16 Environmental Impact Statements ("DEIS" and "FEIS") and all comments and
17 responses to the DEIS), comments and responses from Petitioners, members of
18 the public and the applicant, the written transcripts of all hearings and
19 proceedings conducted before EFSEC, all legal arguments and briefs submitted
20 to EFSEC before, during, and after the adjudicative proceeding, all orders issued
21 by EFSEC, Governor Gregoire's letter issued on review of EFSEC's
22 recommendation approving the Whistling Ridge Energy Project (the "Project"), a
23 copy of the Site Certification Agreement ("SCA") signed by Governor Gregoire,
24 and other documents, records, and transcripts that were before EFSEC and form
25 the basis for its recommended decision to Governor Gregoire. The

1 administrative record is over 37,000 pages in length. It is indexed and numbered,
2 and it contains a complete record of all administrative proceedings conducted by
3 EFSEC regarding the Project. At this stage in the proceedings, no Party is
4 objecting to the completeness of the administrative record or moving to add
5 additional documents to the record. The Court finds that the administrative
6 record at this time is sufficient and complete for Supreme Court review and that
7 review can be made on this record.

8 **B. “Fundamental and Urgent Interests Affecting the Public Interest and**
9 **Development of Energy Facilities Are Involved Which Require a**
10 **Prompt Determination”**

11 The Court finds and concludes that this matter involves fundamental and
12 urgent interests affecting the public interest and the development of energy
13 facilities, requiring a prompt determination and expeditious Supreme Court
14 review. Providing energy at reasonable cost, avoiding costly duplication in the
15 siting process, and ensuring that decisions are made timely and without
16 unnecessary delay are public interests present in this case that require prompt
17 review. *See Residents Opposed to Kittitas Turbines v. EFSEC*, 165 Wn.2d 275,
18 302, 197 P.3d 1153 (2008). Washington voters have recognized a public interest
19 in renewable energy by requiring that qualifying utilities purchase increasing
20 quantities of renewable energy. RCW 19.285.040(2)(a). ~~Petitioners have already~~ *the application*
21 ~~brought two interlocutory appeals concerning the Project, and the application for~~
22 the Project was submitted to EFSEC over three-and-a-half years ago.
23 Furthermore, Skamania County has pressing economic and fiscal constraints, and
24 Skamania Public Utility District No. 1 has system reliability concerns. The
25 Project would help address these constraints and concerns. Legal issues

1 implicated by the Petition for Review involve fundamental and urgent public
2 interests requiring prompt resolution. These issues concern:

3 ~~1. Land use consistency (e.g., what constitutes a certificate of land use~~
4 ~~consistency under WAC 463-26-090, by what means may local authorities issue~~
5 ~~such certificates, and whether such certificates are separately appealable outside~~
6 ~~of the EFSEC proceedings);~~

7 2. EFSEC's authority to manage projects after approval;

8 3. Whether petitioners can narrow judicial review of environmental
9 determinations, so as to exclude consideration of the FEIS;

10 4. The SCA's effective date and expiration date;

11 5. The Governor's discretion to stay the SCA's timing until final
12 permits are secured and appeals are exhausted; and

13 6. The SCA's "order of precedence."

14 **C. "Review of the Supreme Court Would Likely Be Sought Regardless of**
15 **the Determination of the Thurston County Superior Court"**

16 Based on the records and pleadings filed by the Parties, prior litigation and
17 the hotly disputed adjudicative proceeding, and in view of the nature of the issues
18 set forth above, the Court finds that Supreme Court review will, in all likelihood,
19 be sought regardless of the determination of this court.

20 **D. "The Record Is Complete for Review"**

21 For the reasons set forth in Section A above, the record is complete for
22 review. No Party alleged irregularities in EFSEC procedure not found in the
23 record or otherwise.

24 2. All pleadings, files, and records herein shall be expeditiously
25 certified and transferred to the Washington Supreme Court for review.

M^u

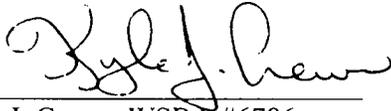
1 DATED this 26 day of October, 2012

2
3 

4 Judge James J. Dixon

5 **PRESENTED BY:**

6 ROBERT M. MCKENNA
7 Attorney General

8 

9 Kyle J. Crews, WSBA #6786
10 Assistant Attorney General
11 Attorneys for Energy Facility Site
12 Evaluation Council and Governor Gregoire

13 **APPROVED AS TO FORM:**

14 REEVES, KAHN, HENNESSY & ELKINS

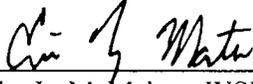
15
16 _____
17 Gary K. Kahn, WSBA #17928
18 Attorney for Friends of the Columbia Gorge, Inc.

19 _____
20 Nathan J. Baker, WSBA #35195
21 Staff Attorney, Friends of the Columbia Gorge, Inc.

22 ARAMBURU & EUSTIS LLP

23 _____
24 J. Richard Aramburu, WSBA #466
25 Attorney for Save Our Scenic Area

1 STOEL RIVES LLP

2 

3 Timothy L. McMahan, WSBA #16377
4 Eric L. Martin, WSBA #45147
5 Attorney for Whistling Ridge Energy LLC

6 SKAMANIA COUNTY PROSECUTOR, and
7 LAW OFFICES OF SUSAN ELIZABETH
8 DRUMMOND, PLLC

9 
10 Adam N. Kick, WSBA #27525
11 Attorneys for Intervenor-Respondent
12 Skamania County
13 Susan Drummond, WSBA #30689
14 Attorneys for Intervenor-Respondents
15 Skamania County and Klickitat County
16 Public Economic Development Authority
17
18
19
20
21
22
23
24
25