

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

REPLY TO PETITIONERS'
RESPONSE TO MOTION
TO CERTIFY PETITION
FOR REVIEW TO
SUPREME COURT
PURSUANT TO
RCW 80.50.140

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

1 (collectively, "Respondents") by and through its legal counsel set forth below
2 and jointly reply to Friends of the Columbia Gorge ("FOCG") and Save Our
3 Scenic Area's ("SOSA") (collectively, "Petitioners") response to Respondents'
4 motion to certify the Petition for Review to the Washington Supreme Court
5 pursuant to RCW 80.50.140.

6 I. ARGUMENT

7 A. Review Can Be Made on the Administrative Record; the Record Is 8 Complete for Review

9 Upon rendering a decision on Petitioners' motion seeking judicial notice,
10 the record will be complete, and review can be made on the record. There
11 appears to be agreement between the parties that the requirements of
12 RCW 80.50.140(1)(a) and (d) are satisfied.

13 B. Fundamental and Urgent Interests Affecting the Public Interest and 14 Development Energy Facilities Are Involved That Require a Prompt 15 Determination

16 The main dispute regarding direct certification to the Supreme Court
17 involves RCW 80.50.140(1)(b). To be clear, while Petitioners contend that
18 Respondents' motion to certify focuses only on 6 of the 32 claims made in the
19 Petition for Review, that is a mischaracterization of the motion to certify.
20 (Petitioners' Resp. at 17.) Essentially, each of the 32 claims has two
21 components: (i) a factual component that will be promptly resolved through the
22 application of the appropriate standard of review (because the Governor
23 approved an EFSEC recommendation that has, in fact, fully adjudicated these
24 factual issues with a massive environmental and adjudication record completely
25 supporting its findings of fact and conclusions of law); and (ii) a legal component

1 that is connected to a fundamental and urgent public interest that affects the
2 development of energy facilities in the State of Washington.

3 This is not the time to respond to the merits, and brief, every one of
4 Petitioners' 32 claims; that is not required for the Court to certify this case to the
5 Supreme Court. However, every one of the 32 claims is addressed and
6 catalogued below, and every claim is connected to a fundamental and urgent
7 public interest requiring expeditious and final resolution available only through
8 Supreme Court review.

9 Moreover, in considering whether this criterion was satisfied in *Residents*
10 *Opposed to Kittitas Turbines v. EFSEC*, 165 Wn.2d 275, 302, 197 P.3d 1153
11 (2008), the Supreme Court reasoned that the

12 legislature has recognized public interests in providing
13 energy at a reasonable cost, RCW 80.50.010(3), and
14 avoiding costly duplication in the siting process and
15 ensuring that decisions are made timely and without
16 unnecessary delay, RCW 80.50.010(5). Such public
17 interests are present in this case, requiring prompt
18 review.

19 This reasoning is equally applicable here. Washington voters have recognized a
20 public interest in renewable energy by requiring that qualifying utilities purchase
21 increasing quantities of renewable energy. RCW 19.285.040(2)(a). Petitioners
22 have already brought two interlocutory appeals concerning the Project, and the
23 application for the Project was submitted to EFSEC over three-and-a-half years
24 ago. Furthermore, Skamania County's economic and fiscal constraints require
25 immediate help, such as that which the Project could bring. (*See, e.g.*, AR 28485
(Project would increase Skamania County's property tax revenues by \$731,500
per year).) These public interests require prompt review by the Supreme Court.

1 **1. Direct Certification Under RCW 80.50.140**

2 Petitioners contend that a number of appeals of EFSEC-permitted energy
3 facilities have been filed in Thurston County Superior Court since 1969, and only
4 the appeal of the Kittitas Valley Wind Power Project was certified to the
5 Supreme Court. This argument is misleading for a number of reasons. First, the
6 legislature recognized the fundamental need for expeditious and final resolution
7 of appeals of energy facility decisions and enacted RCW 80.50.140(1)'s
8 provisions for direct certification to the Supreme Court in 1981. (Martin Decl.,
9 Ex. 1 (1981 Wash. Sess. Laws page nos. 276-77).) The resulting statutory
10 directive does in fact fundamentally contemplate Supreme Court certification,
11 although there may be many situations where litigants can cooperatively resolve
12 appeals rapidly and conclusively without pursuing certification to the Supreme
13 Court. Whatever projects were or were not appealed prior to 1981 are not
14 relevant to the question now before this Court.

15 Second, Petitioners have not, and cannot, describe what actually occurred
16 in post-1981 EFSEC appeals. Did the parties jointly agree to an accelerated
17 review by the Superior Court? Was a remand considered the most expeditious
18 means of addressing a discrete handful of factual issues? Did the parties settle
19 these cases during the appeal? Who filed the petitions for review—applicants,
20 environmental opponents, the appointed counsel for the environment, neighbors,
21 competitors, or perhaps even state agencies? In essence, the fact that the Kittitas
22 Valley appeal was the first to be certified to the Supreme Court says nothing
23 about whether this appeal meets the criteria for direct certification to the Supreme
24 Court.

1 Third, despite a number of appeals of EFSEC-permitted energy facilities
2 over the years, the Governor and EFSEC have only once sought direct
3 certification to the Supreme Court. (Luce Decl. ¶ 1.) This indicates that the
4 Governor and EFSEC carefully weigh whether to seek direct certification and
5 only do so when an appeal likely involves fundamental and urgent interests
6 affecting the public interest and development of energy facilities that require a
7 prompt determination by the Supreme Court.

8 Here, the Governor, EFSEC, the applicant, and the county all jointly seek
9 Supreme Court certification, and all concur that the prompt and final resolution
10 of this case is essential, due to pressing and fundamental public interests that
11 impact not only the Whistling Ridge Energy Project (the “Project”), but other
12 permitted but un-built projects and future projects. (Luce Decl. ¶ 2; Spadaro
13 Decl. ¶ 8.) In addition, Petitioners’ history in this case and their litigious stance
14 beyond these proceedings, coupled with the issues Petitioners have raised,
15 demonstrate a genuine intention to cause the serial adjudication and litigation of
16 this Project and would open the door for opponents of other energy facilities to
17 do the same. Only an expeditious and final conclusion by the Supreme Court
18 will resolve this situation.

19 **2. The Issues Raised in This Appeal Require Prompt Resolution**

20 Petitioners assert there is “no urgency whatsoever” to resolve this appeal
21 because (i) the Applicant has not signed the Site Certification Agreement
22 (“SCA”), (ii) the Project may not be economically viable, and (iii) there are no
23 other applications pending before EFSEC such that this appeal “would be
24 resolved long before the Governor would issue a decision on any new
25 application.” (Petitioners’ Resp. at 7-9.) The Applicant has not signed the SCA

1 because of the uncertainties this appeal has raised regarding the requirements and
2 interpretation of the SCA, yet the Applicant continues to actively work to move
3 the Project forward. (Spadaro Decl. ¶¶ 6, 10-12.) The Applicant testified on
4 January 3, 2011, that the Project was not viable at that time if proposed turbine
5 strings were eliminated, that the wind turbine market and technology changes,
6 that wind turbines are selected based on site-specific performance considerations,
7 and that there are other factors, such as the price for power, that determine
8 economic viability. (AR 16732-33, 16756, 16760, 16781, 16805-06, 16811.)
9 The fact that turbine string removal impacted Project viability nearly two years
10 ago and that there is uncertainty in today's renewable energy market does not
11 mean that there is not an urgent need to resolve this appeal. Indeed, it is critical
12 for the Applicant that Petitioners' issues be resolved with finality.

13 Furthermore, the lack of other applications pending before EFSEC at this
14 time actually supports the need to promptly resolve this appeal and the
15 uncertainty it has created for EFSEC's review process. (Spadaro Decl. ¶ 8.)
16 There are currently 10 energy generation facilities seeking approval from the
17 Oregon Energy Facility Siting Council and two transmission lines, which
18 demonstrates a real demand for energy facilities in the Pacific Northwest.
19 (Martin Decl., Ex. 2.) EFSEC's jurisdiction is not limited to wind energy
20 facilities, but also includes solar, geothermal, landfill gas, wave or tidal, biomass,
21 electric transmission lines, nuclear, thermal, LNG, and refineries. *See*
22 RCW 80.50.020, 80.50.040(2). Issues raised in this appeal implicate EFSEC's
23 ability to site all of these types of energy facilities. (Luce Decl. ¶¶ 1-2.)

24 Resolution of the issues raised in the appeal and the uncertainty created
25 thereby is needed *before* energy facility developers will again be willing to

1 submit applications to EFSEC. (Spadaro Decl. ¶ 8.) One cannot reasonably
2 imagine an energy facility developer, reflecting on EFSEC's review of this
3 Project and this appeal, will decide, "I don't know how the courts will resolve
4 these many issues that affect EFSEC's review process, but nonetheless I'm going
5 to expose my project to the EFSEC review process anyway because an answer
6 will exist before the Governor makes a decision on my project." The state of
7 affairs when permitting begins is a key consideration.

8 **3. Resolution of Appeals**

9 Petitioners claim that Supreme Court certification will be less expeditious
10 than adjudication by the Superior Court. (Petitioners' Resp. at 9-10.) The
11 legislature acknowledged the falsehood of this argument in 1981 when it added
12 Supreme Court certification to RCW 80.50.140. The record is clear—
13 Petitioners' repeatedly stated goal is to stop the Project.¹ Assuming Petitioners
14 prevail at the Superior Court (and Respondents do not appeal), Petitioners will
15 almost certainly return to Superior Court if EFSEC does not grant them the relief
16 they desire (after what will inevitably be many months of hearings, motions,
17 testimony and briefing costing the parties untold thousands of dollars for EFSEC
18 expenses and attorney fees), and the entire judicial review process will
19 recommence afresh. If they do not prevail at the Superior Court, Petitioners'

21 ¹ See AR 16542 (Petitioners' Opening Statement to EFSEC: "The WREP would per-
22 manently harm internationally significant resources as well as local community interests
23 Simply put, this is the wrong site for an industrial-scale wind energy facility."), AR 16561
24 (Petitioners' Opening Statement to EFSEC: "The application for site certification for this
25 Project should be denied."), AR 28799 (SOSA Pet. for Reconsideration: "SOSA requests that
the Council expand its elimination of part of the project and deny it in its entirety."), AR 28860
(FOCG's Pet. for Reconsideration: "[T]he Application for site certification should be
denied.").

1 record indicates that they will almost certainly continue to pursue a remand by
2 appealing to the Court of Appeals and/or the Supreme Court. The likely result—
3 regardless of whether Petitioners prevail in this Court—is *years* of additional
4 process that continues until it is ultimately halted by a final judicial decision. In
5 contrast, the Supreme Court fully and finally resolved the appeal of the
6 Governor’s decision regarding the Kittitas Valley Wind Power Project
7 approximately *eight months* after it received the order certifying the petition for
8 direct review. (Luce Decl. ¶ 1.) Moreover, even if the Supreme Court were to
9 remand this matter to EFSEC, the Supreme Court, in full recognition of its role
10 pursuant to RCW 80.50.140, could retain jurisdiction to ensure its expeditious
11 resolution. There is simply no credible scenario that speeds a resolution *with*
12 *finality* without Supreme Court certification. Certification to the Supreme Court
13 is the only path to finality consistent with RCW 80.50.140(1)’s direction that
14 judicial review of the Governor’s decision be “expedite[d] . . . in every way
15 possible.”

16 **4. Petitioners’ Issues Raising Fundamental and Urgent Public**
17 **Interests**

18 **a. Land Use Consistency (Pet. for Rev. Issues ¶¶ 7.1.1 to 7.1.6)²**

19 Petitioners’ arguments that their challenge to EFSEC’s determination of
20

21 ² Petitioners’ land use consistency issues in Pet. for Rev. ¶¶ 7.1.2 to 7.1.5 share a
22 common legal component that is tied to one of the certificate of land use consistency issues
23 raised in Pet. for Rev. ¶ 7.1.1, namely the deference EFSEC affords a local government’s
24 certificate of land use consistency under WAC 463-26-090. In Pet. for Rev. ¶ 7.1.6, Petitioners
25 allege that EFSEC concluded that “Skamania County’s land use authorities should be
preempted.” This allegation is connected to the issues raised in Pet. for Rev. ¶¶ 7.1.1 to 7.1.5,
because if (as EFSEC and Skamania County determined) the Project is consistent with
Skamania County’s land use regulations, preemption is unnecessary.

1 land use consistency do not raise fundamental and urgent issues are an
2 unfortunate “shell game.” To avoid Supreme Court certification, they appear to
3 trivialize their own assignments of legal error and contend that the purported
4 defect in Skamania County’s certificate of land use consistency can be resolved
5 simply by changing the words a local government ascribes to its land use
6 certification document. However, Petitioners’ own actions and legal arguments
7 illustrate the fundamental and urgent implications of the result they seek.

8 If Petitioners prevail on their claim that certificates of land use consistency
9 must be land use decisions, there is no case law that prevents them or any other
10 opponent from arguing that a local government’s adoption of a certificate of land
11 use consistency requires a public process and is separately appealable outside the
12 EFSEC process. The two-sentence 2007 Cowlitz County Superior Court decision
13 cited by Petitioners is not binding precedent, and opponents in future energy
14 facilities could argue that *Lathrop v. EFSEC*, 130 Wn. App. 147, 121 P.3d 774
15 (2005), only concerns appeals of EFSEC decisions rather than local
16 government’s issuance of a certificate of land use consistency. Indeed, that is
17 *exactly* what Petitioners themselves argued before the Columbia River Gorge
18 Commission when they appealed Skamania County’s second certificate of land
19 use consistency for this Project.

20 [T]he court held that the Kittitas County Superior Court
21 did not have jurisdiction. *Lathrop*, 121 P.3d at 777.
22 Appellants fully agree that under the plain language of
23 RCW 80.50.140, a party may challenge *an EFSEC*
24 *decision* only in Thurston County Court. The present
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1 appeal, however, challenges a decision made by
2 *Skamania County*, not a decision made by EFSEC.³

3 In fact, Petitioners *twice* appealed Skamania County's certificates of land use
4 consistency to the Columbia River Gorge Commission. Before the Columbia
5 River Gorge Commission, Petitioners argued that their substantial rights had been
6 prejudiced because Skamania County had adopted a "final" land use decision
7 without public notice and an opportunity to comment, seeking remand of the
8 certificate of land use consistency to Skamania County for further review.⁴
9 Petitioners also argued that the certificate of land use consistency was not
10 supported by substantial evidence in the County record. FOCG continued these
11 arguments before EFSEC claiming that Skamania County had developed the
12 certificate of land use consistency "behind closed doors, and expressly avoided
13 undertaking the public processes required for government decisions."
14 (AR 21863.) FOCG also claimed that the Cowlitz County Superior Court
15 decision decided that "certificates of consistency . . . are land use decisions under
16 the Land Use Petition Act ('LUPA'), RCW Chapter 36.70C." (AR 28814.)

17 Respondents have not manufactured these issues out of thin air. If a
18 certificate of land use consistency must be a "land use decision" as Petitioners'
19 claim, the door will open wide for the type of interlocutory appeals that
20 Petitioners filed twice here, and the desired local government process with
21 opportunity for public comment on proposed certificates of land use consistency

22 ³ Martin Decl., Ex. 3, page 7 (emphasis in original). Interestingly, when appealing the
23 Cowlitz County Superior Court decision, FOCG's own counsel argued that "[s]imply because
24 EFSEC has a separate administrative process does not mean that the County's decision is not
25 reviewable under LUPA." (Martin Decl., Ex. 4, page 6.)

⁴ Martin Decl., Ex. 3, pages 8-14. The Columbia River Gorge Commission dismissed
Petitioners' appeal for lack of subject matter jurisdiction. (AR 18813.)

1 could be used to derail EFSEC's review process. Such an outcome will ensure
2 endless litigation over local land use compliance for energy facilities being
3 reviewed by EFSEC. This issue needs the finality and certainty of Supreme
4 Court review, and because this issue impacts any energy facility seeking
5 certification before EFSEC, it requires prompt and final Supreme Court review.

6 **b. EFSEC's Authority to Manage Projects Following Approval by**
7 **the Governor (Pet. for Rev. Issues ¶¶ 7.2.5 to 7.2.7, 7.5.1, 7.6.1,**
8 **7.7.1, 7.7.2, 7.8.1, 7.8.2 and 7.9.3)**

9 Petitioners argue that the important legal issue of whether and by what
10 means EFSEC can regulate and manage this Project and any other EFSEC-
11 permitted energy facility following the Governor's approval cannot satisfy
12 RCW 80.50.140(1)(b), because "[t]here are no other new applications before
13 EFSEC, and this Court will likely render a decision before EFSEC reaches any
14 decision-making point on any future applications."⁵ (Petitioners' Resp. at 12.)
15 Petitioners' response ignores that a judicial holding concerning EFSEC's
16 authority to manage this Project could arguably apply to the other existing and
17 permitted energy facilities over which EFSEC has jurisdiction. Furthermore,
18 until this important legal issue is resolved by a final judicial decision (*i.e.*, by the
19 Supreme Court), the uncertainty created by this issue will discourage energy
20 facility developers from submitting their projects to EFSEC. (Spadaro Decl. ¶ 8.)
21 For these reasons, this is a fundamental and urgent issue that requires prompt
22 resolution by the Supreme Court.

23 _____
24 ⁵ Petitioners inaccurately claim that resolution of forest practice issues is one of the
25 important legal issues Respondents identified. (Petitioners' Resp. at 12.) Respondents' motion
to certify clearly communicates that this is one "example" of Petitioners' challenge to
EFSEC's post-approval authority. (Respondents' Motion to Certify at 10.)

1 **c. Appeal of EFSEC's Adjudication of Environmental Issues**
2 **Without Appeal of the SEPA/NEPA EIS (Pet. for Rev. Issues**
3 **¶¶ 7.2.1 to 7.2.11, 7.3.1 to 7.3.3, 7.4.1, 7.5.1 and 7.6.1)**

4 EFSEC considered environmental issues (including wildlife, aesthetic,
5 heritage, and recreational resources and noise and transportation considerations)
6 in both the adjudicatory proceeding and the NEPA/SEPA EIS, and EFSEC's
7 recommendation and the Governor's decision relied on the record developed in
8 both processes. (AR 28633, 36687.) Petitioners' claims regarding these
9 environmental issues are focused solely on the adjudicative record. (*See*
10 *Petitioners' Resp. at 12.*) However, the EFSEC order concluding the adjudicative
11 proceeding expressly noted that,

12 [t]he conclusion of this order [No. 828] regarding
13 approval or denial of the Application is *preliminary* and
14 subject to the Council's later concurrent consideration
15 of the results of this order and the FEIS. If the Council
16 recommends approval, it will forward to the Governor a
17 separate Site Certification Agreement (SCA). *Any SCA*
18 *will be based upon both this Order and the FEIS to*
19 *ensure compliance with requirements and mitigation*
20 *found necessary as conditions of facility construction*
21 *and operation.*

22 (AR 28653 (footnote omitted; emphases added).) Petitioners effectively seek
23 judicial review of "preliminary" environmental conclusions but not the ultimate
24 environmental conclusions that were based on both the adjudicative and SEPA
25 records.

 This raises the important issue of whether Petitioners can narrow judicial
review of environmental determinations, so as to exclude consideration of the

1 FEIS in judicial review of EFSEC's final decision.⁶ This would be a precedent-
2 setting decision by the court, disrupting not only judicial review of EFSEC's
3 business under RCW 80.50, but also judicial review of the environmental
4 decision-making on land development applications in cities and counties
5 throughout the state. This issue needs the finality and certainty of Supreme Court
6 review. This is an extremely important issue to Whistling Ridge, Skamania
7 County, and the Governor and requires prompt and final resolution by the
8 Supreme Court.

9 RCW 80.50.140(1)(b) is satisfied.

10 **d. SCA's Effective Date and Expiration Date and the Governor's**
11 **Discretion to Stay the SCA's Timing Until Final Permits Are**
12 **Secured and Appeals Are Exhausted (Pet. for Rev. Issues ¶¶ 7.9.1**
13 **and 7.9.2)**

14 Seeking to avoid certification to the Supreme Court, Petitioners attempt to
15 trivialize the importance of these issues by assuming the SCA will be remanded
16 and claiming that if the SCA is amended or reissued on remand the 10-year clock
17 "may restart" at that time. (Petitioners' Resp. at 14 (emphasis added).)
18 Respondent Whistling Ridge concurs that the SCA is not clear about the
19 commencement of the 10-year timeframe and accordingly has declined to
20 execute the SCA until this appeal is resolved. (Spadaro Decl. ¶ 11.) Petitioners

21 ⁶ Further, Petitioners admit that the alleged SEPA violations in the Kittitas Valley
22 appeal were fundamental and urgent issues of statewide importance. (Petitioners' Resp. at 14
23 n.25.) However, the SEPA issues in that appeal simply concerned evaluation of two mitigation
24 measures specific to wind energy facilities and EFSEC's use of evidence outside the FEIS in
25 its decision to recommend approval of the SCA. *Residents Opposed to Kittitas Wind Turbines*
v. EFSEC, 165 Wn.2d 275, 311-13, 197 P.3d 1153 (2008). As these alleged SEPA violations
were sufficient to satisfy RCW 80.50.140(1)(b) in that appeal, certainly this criterion must also
be satisfied by the issue Petitioners have raised concerning whether judicial review of
environmental determinations must consider the analysis and determinations in the FEIS.

1 seek multiple “processes for interested persons to participate” as EFSEC makes
2 ministerial decisions, such as approving final engineering and design decisions,
3 thereby exposing implementation of the SCA to serial adjudication and further
4 delay. (Pet. for Rev. ¶ 7.8.1.) These issues need the finality and certainty of
5 Supreme Court review. These are profoundly important issues, both to Whistling
6 Ridge and the Governor, and require prompt and final resolution by the Supreme
7 Court.

8 **e. “Order of Precedence” Concerning Federal and State Law**
9 **(Pet. for Rev. Issues ¶¶ 7.10.1 and 7.10.2)**

10 Petitioners similarly trivialize this issue by claiming that “there does not
11 appear to be any current identified conflict between federal and state law.”
12 (Petitioners’ Resp. at 14.) This response, though, is belied by the Petition for
13 Review’s assertion that it identifies issues that “adversely affected and
14 aggrieved” Petitioners. (Pet. for Rev. ¶ 6.) Petitioners cannot be aggrieved by a
15 lack of conflict.

16 This is an extremely important legal issue that implicates how EFSEC
17 conducts its business in the context of overlapping, sometimes inconsistent, and
18 sometimes inapplicable (or separately applicable) federal law. This issue
19 involves constitutional jurisprudence, including the extent and applicability of
20 federal preemption under the Commerce Clause, and its eventual review by the
21 Supreme Court is likely inevitable. This is a profoundly important issue, both to
22 Whistling Ridge and the Governor, and requires prompt and final resolution by
23 the Supreme Court.

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1 **C. Review by the Supreme Court Would Likely Be Sought Regardless of**
2 **the Determination of the Thurston County Superior Court**

3 Petitioners claim this criterion is not satisfied for several reasons. First,
4 Petitioners assert they have not decided whether to appeal an adverse decision
5 and they are less likely to appeal that if they prevail on some claims. (Brown
6 Decl. ¶¶ 4-5; Drach Decl. ¶¶ 4-5.) Petitioners' self-serving assertions must carry
7 little, if any, weight because otherwise every opponent seeking to avoid direct
8 certification would simply make the same assertions thereby effectively
9 nullifying RCW 80.50.140's provision for direct certification. Further,
10 Petitioners have been using the legal system to stop wind energy development in
11 Skamania County, and this Project specifically, for at least the past five years.
12 (See AR 16864; Drummond Decl. ¶ 4.) Again, their repeatedly stated goal is to
13 stop the Project.⁷ If Petitioners did not prevail in this Court and/or in the Court of
14 Appeals, the record indicates that Petitioners will likely seek review by the
15 Supreme Court to subject the Project to further proceedings and expenses in the
16 hope of ultimately stopping the Project. (See Drummond Decl. ¶ 3.)

17 Second, Petitioners claim they are not litigious organizations. However,
18 their litigious history is a matter of record. In just the past five years, federal and
19 state courts have published 14 opinions in 9 cases involving FOCG.⁸ FOCG was

20 ⁷ See footnote 1 *supra*.

21 ⁸ *Friends of the Columbia Gorge, Inc. v. Elicker*, 598 F. Supp. 2d 1136 (D. Or. 2009),
22 *vacated by* 2011 U.S. Dist. LEXIS 82833 (D. Or., July 26, 2011); *Friends of the Columbia*
23 *Gorge, Inc. v. Schafer*, 624 F. Supp. 2d 1253 (D. Or. 2008); *Friends of the Columbia Gorge,*
24 *Inc. v. United States Forest Serv.*, 546 F. Supp. 2d 1088 (D. Or. 2008); *Friends of the*
25 *Columbia Gorge, Inc. v. Columbia River Gorge Comm'n*, 248 Or. App. 301, 273 P.3d 267
(2012); *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge*
Comm'n, 215 Or. App. 557, 171 P.3d 942 (2007), *aff'd in part and rev'd in part*,
346 Or. 366, 213 P.3d 1164 (2009); *Friends of the Columbia Gorge, Inc. v. Columbia River*

1 involved in 12 pending cases on May 15, 2012 alone: one in U.S. District Court,
2 two in the Oregon Court of Appeals, four in superior court in Washington, two
3 before the Columbia River Gorge Commission, two before the Federal Energy
4 Regulatory Commission, and one before a county hearings examiner. (Martin
5 Decl., Ex. 5. *See also* Drummond Decl. ¶¶ 5-6.) This does not include the case
6 FOCG and SOSA filed in Clark County Superior Court against Skamania County
7 in September of this year. (Drummond Decl. ¶ 4.1) As for SOSA, its federal tax
8 filings for October 2008 to September 2011 evidence that its only activities
9 concern litigation opposing wind energy development in Skamania County (*i.e.*,
10 this Project), and the organization's IRS-reported expenses are almost entirely for
11 lawyer fees. (Martin Decl., Exs. 6-8.)

12 Third, Petitioners assert that Respondents cannot credibly claim that they
13 would seek Supreme Court review to prevent delay because, according to
14 Petitioners, "pursuing a discretionary appeal at that point would likely only create
15 delay." (Petitioners' Resp. at 18.) This assertion ignores this Project's lengthy
16 and highly contentious adjudicative history. A remand by this Court to EFSEC
17 for further adjudication coupled with subsequent opportunities for Petitioners to
18 appeal this Project will undoubtedly far exceed the amount of time necessary for
19 the Supreme Court to issue a final decision.

20 It is unmistakable that Petitioners' strategy concerning this Project, of
21 which this appeal is an integral part, is to cause and seek serial adjudication and

22 *Gorge Comm'n*, 218 Or. App. 261, 179 P.3d 700 (2008), *aff'd*, 346 Or. 415, 212 P.3d 1243
23 (2009); *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n*,
24 218 Or. App. 232, 179 P.3d 706 (2008), *aff'd*, 346 Or. 433, 213 P.3d 1191 (2009); *Friends of*
25 *the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n*, 236 Or. App. 479, 238 P.3d 378
(2010), *rev den*, 349 Or. 654, 249 P.3d 542 (2011); *Columbia River Gorge Comm'n v. Hood*
River County, 210 Or. App. 689, 152 P.3d 997, *rev den*, 342 Or. 727, 160 P.3d 992 (2007).

1 appeals. For this reason, the record indicates that Petitioners are more than likely
2 to seek review by the Supreme Court were they not to prevail in this Court.
3 Similarly, because this strategy can only be stopped one way—with the finality
4 that attends review by the Supreme Court—Respondents are likely to seek review
5 by the Supreme Court were this Court to remand the Project to EFSEC.

6 RCW 80.50.140(1)(c) is satisfied.

7 II. CONCLUSION

8 The necessary final and conclusive answers to the important legal
9 questions raised in the Petition for Review can only be given by the Supreme
10 Court. These answers will allow this Project to move forward, resolve existing
11 uncertainty attending EFSEC's review process, and enable EFSEC to undertake
12 the necessary process to correct the fault lines exposed through this proceeding.
13 For all the reasons set forth above, Governor Gregoire, EFSEC, Whistling Ridge
14 Energy LLC, Skamania County and the Klickitat County Public Economic
15 Development Authority jointly request that this Court make findings in
16 accordance with RCW 80.50.140 and certify the Petition for Review for direct
17 review by the Washington Supreme Court.

18 DATED this 23rd day of October, 2012, at Olympia, WA.

19 ROBERT M. MCKENNA
20 Attorney General

21 
22 _____
23 Kyle J. Crews, WSBA #6786
24 Assistant Attorney General
25 Attorneys for Energy Facility Site Evaluation
Council and Governor Gregoire

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STOEL RIVES LLP



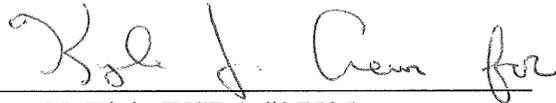
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1 **PROOF OF SERVICE**

2 I certify that I served a copy of this document on all parties or their
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12 I certify under penalty of perjury under the laws of the state of Washington
13 that the foregoing is true and correct.

14 DATED this 23rd day of October, 2012, at Olympia, Washington.

15 
16 KEELY TAFOYA
17 Legal Assistant