

AUG 30 2010

ENERGY FACILITY SITE
EVALUATION COUNCIL



Rob McKenna

ATTORNEY GENERAL OF WASHINGTON

1125 Washington Street • PO Box 40100 • Olympia WA 98504-0100

Via Email and First Class Mail

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EFSEC
905 Plum Street SE
Olympia, Washington 98504-3172
efsec@commerce.wa.gov

BPA
Public Affairs Office - DKE-7
P.O. Box 14428
Portland, Oregon 97293-4428;
www.bpa.gov/comment

Re: Whistling Ridge Energy Project Draft Environmental Impact Statement: Comments

To Whom It May Concern:

Counsel for the Environment (CFE) appreciates this opportunity to comment on the Whistling Ridge Energy Project (Whistling Ridge) Draft Environmental Impact Statement (DEIS). The following comments seek to ensure that the Final Environmental Impact Statement (FEIS) fully captures and analyzes the proposed project's environmental impacts, potential mitigation measures, and reasonable off-site and on-site alternatives so that permitting authorities can make a fully informed decision. CFE takes no position regarding the merits of the project at this time.

1.0 Summary and Purpose of and Need for Action

1.4 ALTERNATIVES ANALYSIS

The Alternatives Analysis is limited to a No Action alternative. While the DEIS states that other locations, project sizes and project configurations were considered, it fails to identify these alternative locations or configurations, or adequately explain why they were not worthy of additional analysis. As described in more detail below, the off-site and on-site alternative analyses should be expanded to include in-depth descriptions of the criteria used to select the proposed site and the proposed project configuration, as well as a focused discussion about why other sites and project configurations were excluded from further review.

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1.4.1 Proposed Action

The second bulleted factor in this section indicates that the site must be large enough to accommodate enough wind turbines to produce a minimum of 70 MW of electricity. Because the wind does not blow at a constant rate, wind turbines rarely operate at 100% percent capacity. Accordingly, references to wind generating capacity should be expressed in nameplate generation capacity.

The fourth bulleted factor in this section states: "The site has a long history of commercial logging and associated absence of *native* habitat, reducing or eliminating the need to clear additional forest land." This and similar statements regarding the "absence of native habitat" are made in several places in the document (e.g., 3.4.1.1), and the statement is misleading. With the exception of the weeds identified at the site and disclosed elsewhere in the document, grass, forb, shrub, and tree species at the site are predominantly native. A more accurate statement would be that the site is heavily managed and manipulated and is not in a *natural* state, being maintained in a state of disclimax and with monotypic forest stands. The affected environment description provided in Chapter 3 (3.4.1.1 and 3.4.1.2) is far more accurate.

The final paragraph in this section states that the project would have a total nameplate capacity of "up to 75 MW." The second bulleted factor in this section states that project's minimum nameplate capacity is 70 MW. It is unclear how these two figures relate to one another. The project's maximum and minimum nameplate generating capacity levels should be clearly identified and described in a single location.

1.4.1.1 Wind Turbines

The generating capacity should be referenced as nameplate capacity. This section should also clarify whether the size of the turbines will be consistent throughout the project or whether the size will vary from tower to tower.

1.4.2 No Action Alternative

This section states that the only circumstance the project will not be built is if the responsible agencies (BPA or EFSEC) withhold their authorization. There are a multitude of reasons why a proposed project may not be built. This statement is not accurate and should be removed from the FEIS.

1.4.3 Alternatives Considered But Eliminated From Detailed Study

This section explains why the no action alternative was the only alternative analyzed. In doing so, it references a set of technical and economic requirements that purportedly eliminated all other potential project sites from consideration. None of the eliminated off-site locations,

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however, are identified, and the DEIS does not contain the underlying technical and economic data the Applicant used to eliminate the undisclosed sites from further consideration. At a minimum, the FEIS should include detailed information regarding the economic and technical data underlying the site selection criteria, as well as the locations of all potential alternative sites considered so that the decision to limit review to the No Action alternative can be independently verified.

1.4.3.1 Alternative Project Locations

The DEIS states that the Applicant applied the following criteria to determine whether alternative project locations were available for EIS review: adequate wind supply, applicant ownership of land, ability to operate wind turbines without impacting commercial timber operations, and proximity to high voltage transmission lines. The DEIS analysis and discussion of the alternative location selection process is set forth in a single sentence:

No other sites were identified that are under the ownership of the Applicant or as close to transmission infrastructure facilities.

DEIS at p. 1-14. This summary analysis should be expanded to include a detailed description of the criteria used to select the project site, the location of the alternative sites that were considered, and discussion regarding why these alternative sites were ultimately eliminated from further consideration.¹ The FEIS should also be expanded to consider the Middle Mountain Project, which is only 12 miles from the proposed project site, as an alternative wind generation site.

1.4.3.2 Larger or Smaller Generation Facility Size

The FEIS should be expanded to address on-site alternatives that reduce the number of turbines and/or reconfigure the turbine strings. The purpose of the alternatives analysis is to explore whether the needs of the project can be accomplished through less environmentally impactful means. During the scoping hearings, the public and National Parks Service raised concerns regarding the project's visual impacts, particularly regarding the location of Turbine String A.²

¹ Ideally, this discussion would include information sufficient to independently verify the decision to eliminate these alternative sites from further consideration. This would include the location of SDS holdings in Southern Washington and Northern Oregon, wind resources available in those areas, the location of transmission lines, economic parameters for the project, as well as economic information regarding the project's interrelationship with timber harvesting activities.

² Turbine String A is also unique in that it contains the turbines in closest proximity to residential dwellings and is located on a parcel of land that is zoned FOR/AG 20, which would require issuance of a conditional use permit under Skamania County's land use laws. See DEIS at p. 3-153.

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This section asserts that the project must be reviewed as an “integrated whole” from which no piece may be eliminated and that if turbines are removed from the project design, “other locations must be found to replace those turbines to maintain the minimum necessary capacity.” These assertions are unsupported by analysis and appear to be inconsistent with the project description in both the Site Certification Application (SCA) and the DEIS. Both the SCA and the DEIS state that the project will have a total nameplate generating capacity of approximately 75 MW and will be comprised of up to 50 towers equipped with turbines with nameplate generating capacities ranging from 1.2 to 2.5 MW.³ Assuming that a 2 MW turbine is selected, the maximum generating capacity of 75 MW could be satisfied with the installation of 38 turbines (resulting in a reduction of 12 turbines).⁴ If a 2.5 MW turbine is selected, the number of towers could be reduced to 30.

Reducing the number of turbines without sacrificing nameplate generating capacity is not merely hypothetical. The Kittitas Valley Wind Power Project recently reduced its total number of turbines from a maximum of 65 to a maximum of 52 turbines without any change in nameplate generating capacity. The FEIS should include a discussion regarding how the project may be reconfigured through the use of turbines with larger generating capacities.

The FEIS should include information regarding the strength and viability of wind resources found throughout the site. This would include information gathered from the on-site meteorological tower regarding the strength, quality, direction and location of on-site wind resources.

1.4.3.4 Alternative Project Configurations

See comments under § 1.4.3.2, Larger or Smaller Generation Facility Size.

1.4.3.6 Alternative Access Roads

Private logging road CG 2930 should be subject to detailed review as an alternative access road. The original Site Certification Application proposed accessing the site using this route. On October 12, 2009, the Applicant submitted an amended application that abandoned the CG 2930

³ The SCA at Section 2.3.3.1, for example, states that “[t]he project would consist of up to 50 wind turbines” and that each turbine would have a nameplate generating power of somewhere between 1.2- to 2.5 MW. (Emphasis added). The DEIS contains an identical description.³ See DEIS at §1.4.1.1. Both the SCA and DEIS also state that the project must have a generating capacity of “up to 75 MW.” See SCA at §2.3.2 (Project Overview – “up to 75 MW”); DEIS at §1.4.1 (“minimum of 70 MW;” “up to 75 MW”).

⁴ Recently permitted projects appear to be installing turbines with nameplate generation capacities of 2.0 MW or larger. The Desert Claim Wind Power Project, for example, will be installing 2 MW turbines. See Desert Claim Wind Power Project Final Supplemental EIS at 2-13. The recent expansion to the Wild Horse Wind Power Project also used 2.0 MW turbines.

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route in favor of the West Pit Road with the stated purpose of removing the entire project outside the CRGNSA boundary. *See* October 12, 2009 Letter from Whistling Ridge Energy Project to EFSEC re: Submittal of Amended Application 2009-01. Although removing this route from the project plan may dispose of certain regulatory hurdles, the West Pit Road is a longer route that traverses steeper terrain and will likely have a higher environmental impact than the CG 2930.⁵ Accordingly, this CG 2930 should be evaluated as an alternative.

1.6 SUMMARY OF POTENTIAL PROJECT IMPACTS AND MITIGATION MEASURES

Earth – p. 1-22 – Impact of Proposed Project: Much of the West Pit Road is located in a Class II Landslide Hazard Area. This section should summarize and address anticipated impacts, if any, related to Class II Landslide Hazard Areas.

Air Quality – p. 1-22 – Impact of No Action Alternative: This section identifies impacts from construction of fossil fuel power plants as a potential impact under the no action alternative. There is nothing in the record establishing that proposed project is being built in lieu of fossil fuel powered plant or that its construction will reduce the number of fossil fuel powered generation facilities in the future. Indeed, intermittent nature of wind generated power may require the construction of fossil fuel facilities to provide a back up power source.⁶

Biological Resources – p. 1-23 – Impact of No Action Alternative: *See* comments regarding Air Quality – p. 1-22 – Impact of No Action Alternative *infra*.

Biological Resources – p. 1-24 – Impact of Proposed Project: This section states that there “would likely be some mortality to birds and bats due to turbine collision and displacement.” This should be revised to state that operation of project “will result in mortality to some birds and bats . . .”

Biological Resources – p. 1-24 – Design and Mitigation Measures: Remove qualifier “extensive” from pre-project assessment of wildlife habitat conducted under WDFW Wind Power Guidelines.

⁵ Long sections of West Pit Road crosses land designated as a Class II landslide hazard area. *See* DEIS Figures 3.1-1, 3.1-4 and 3.11-2

⁶ The No Action Alternative analysis appearing on p. 3-92 and in other section of the DEIS contains a more accurate description of the possible impacts if no action is taken:

It is likely that the region’s power needs would be met through energy efficiency and conservation measures, existing power generation, or the development of new power generation. Base load demands would likely be filled through expansion of existing, or development of new thermal generation such as gas-fired combustion turbine technology. The impacts would depend on the type, location, and size of the facility proposed.

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Biological Resources - p. 1-24 – Design and Mitigation Measures: A Technical Advisory Committee (TAC) is described, including a description of the stakeholders comprising this group. Because the overarching concern for biological resources is bird and bat mortality, a representative of the Audubon Society should be specified and included in the TAC.⁷

Biological Resources - p. 1-25 – Design and Mitigation Measures: The post construction avian mortality monitoring should include bat mortality monitoring as so little is known about bat species' composition and mortality risk at the site. The monitoring program should also analyze the accuracy of the pre-construction risk and mortality predictions. Because the project is being proposed in a new habitat type (forested) for Washington wind energy projects, and because so little is known about bat use of the site, bird and bat monitoring should be conducted for five (5) years, rather than the proposed two (2) years.

Visual Resources – p. 1-28 – Impact of Proposed Project: This section should clearly state that as proposed the project will have low to moderate visual impacts from key viewpoints, including key viewpoints within the CRGNSA.

1.7 SUMMARY OF UNAVOIDABLE ADVERSE IMPACTS

This section should plainly identify and summarize unavoidable adverse impacts. References to beneficial impacts should be removed. The description of unavoidable visual impacts (Table 1-2, p. 1-35) should be re-drafted to read as follows:

This project will have unavoidable adverse visual impacts on the surrounding area. Visual impact analysis establishes that the project will have low to moderate visual impacts from key viewpoints, including viewpoints within the CRGNSA.

1.8 CUMULATIVE IMPACTS

The discussions of existing development in section 1.8.1.1 and reasonably foreseeable future development in section 1.8.1.2 appear to be inconsistent. In section 1.8.1.1, the authors considered wind projects located 35 to 70 miles from the proposed project in their cumulative analysis. In section 1.8.1.2, however, the authors chose to disregard two proposed wind power projects (Juniper Canyon and Summit Ridge) because they are "too far away (generally more than 20 miles) from the Whistling Ridge Energy Project site to result in cumulative impacts." Given that the cumulative analysis of existing impacts considered projects that were located 70 miles away, the analysis of cumulative impacts relating to reasonably foreseeable future

⁷ The TAC should also be expanded to include representatives from local public interest groups, including interveners Friends of the Columbia Gorge and Save Our Scenic Area.

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development should apply similar criteria or include an explanation as to why different criteria were applied.

1.8.1 Projects Considered

The cumulative impact section should discuss the intermittent nature of wind energy generation and the need for easily dispatchable hydro-electric or fossil fuel generating plants to meet demand when the wind is not blowing.

2.0 Proposed Action and Alternatives

2.1 PROPOSED ACTION

2.1.2 Project Overview

Table 2-1 – Permanent disturbance areas should include the permanent parking areas adjacent to each turbine that will be necessary to conduct turbine repairs and maintenance. Also there appears to be some inconsistency in the road width used to determine the impact area outside the project.

2.1.3.7 Access Roads

Neither the Application nor the DEIS include a description of parking areas that will have to be maintained adjacent to each turbine for construction and maintenance purposes. The space consumed by these parking areas should also be included in the calculations for permanently disturbed environment.

2.1.4.1 Construction

The size and location of proposed laydown areas should be disclosed and evaluated in the FEIS.

The size and location of permanent parking lots next to each turbine should be included and evaluated in the FEIS.

This section should include a discussion regarding how concrete will be transported to the construction site. If a concrete batch plant is going to be used, its size and location should be disclosed in the FEIS. If concrete is going to be transported to the site, information regarding the trucking route and potential environmental impacts (air pollution, traffic, etc.) should be disclosed and evaluated in the FEIS.

2.1.6 Forest Harvest During Project Construction and Operation

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Mitigation measures for construction of the project should include off-site mitigation for permanently disturbed or cleared areas that would constitute "forest conversions." This would include turbine parking areas and any permanent laydown area at the site.

2.1.7 Project Decommissioning

The Applicant has indicated that the life of the project is expected to be 30 years, at which time the project will either be upgraded ("re-powered") or decommissioned. If the current project receives EFSEC approval, any proposal to "re-power" the project or extend operation of the project beyond its anticipated life span should be reviewed by EFSEC as an amendment to the Site Certification Agreement. Such review should require an updated evaluation and assessment of the environmental impacts posed by the upgrade or extended life of the project.

2.3. NO ACTION ALTERNATIVE

See comments in response to Section 1.4.3 Summary of No Action Alternative.

2.3.6 Alternative Access Roads

See comments in response to Section 1.4.3.6 Alternative Access Roads.

2.4 BENEFITS AND DISADVANTAGES OF DELAYING PROJECT IMPLEMENTATION

This section summarizes the benefits and disadvantages that will result from delaying the project. It is drafted, however, in a way that minimizes the benefits and over-exaggerates the disadvantages of delay. For example, statements to the effect that a delay will prevent the creation of new construction jobs are simply not accurate. A delay in constructing the project will result in a delay in the creation of new construction jobs, just as a delay in constructing the project will delay visual impacts from the project.

2.5 COMPARISON OF ALTERNATIVES

Government action or inaction is not the only possible reason that the project will not be built. For the reasons discussed earlier, assertions that the No Action Alternative will only arise if EFSEC or BPA deny approval of the project should be redacted.

As discussed above, the DEIS should be expanded to include off site and on site alternatives. Without these additional alternatives, the comparison of the limited alternatives set forth in Table 2-5 is of questionable value for purposes of conducting meaningful environmental impact analysis under NEPA and SEPA.

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3.0 Affected Environment, Impacts and Mitigation

Generally, discussions in this section should be expanded to include off site and on site alternatives.

3.1 EARTH

3.1.1.4 Geologic Hazards

This section should be expanded to address geologic hazard issues related to the proposed access road (West Pit Road). That this road traverses lands identified as Class II Landslide Hazards is of particular concern. *See* Table 3.1-4.⁸

The DEIS should also be revised to include a discussion regarding the extent to which Skamania County has assessed whether the project site or the area traversed by the proposed access road contains Class I landslide hazards (Severe).⁹ If such an assessment has not been done, the discussion regarding landslide hazards should be expanded to determine whether there are affected areas that would otherwise meet the criteria for a Class I landslide hazards, even though they have not been formally designated as such by the County.

3.1.2.1 Proposed Actions

Access Road. This section should be expanded to include a discussion of geologic hazards and their impact on the access road during both the construction and operation of the proposed project, including the environmental impacts that may arise from locating the access road in a Class II landslide area.

Soil Contamination. The discussion regarding soils does not address possible presence of contaminants along the access road right of way or at the project site. The FEIS should include the results of a Phase I Environmental Site Assessment to determine if and where contaminated soils may exist.

Volcanic Activity. This section should discuss how ash from a volcanic eruption may impact the operation of wind turbines, transmission lines, and other elements of the project.

3.1.2.2 Mitigation Measures

⁸ Table 3.1-4 should be revised so that the locations of the proposed access road, as well as other access road alternatives, are easily discernable.

⁹ To qualify as a Class I landslide hazard, the location must be designated as such by the local legislative body, in this case Skamania County. *See* DEIS at § 3.1.1.4 *Landslides*.

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This section should describe containment and remediation measures that will be taken in the event contaminated soils are found during construction.

The scope of the mitigation measures should be expanded to address geologic hazards associated with the access road and address how the project will be accessed if the proposed access road is damaged or destroyed by a catastrophic geologic event.

The project is located in the vicinity of several volcanoes and the access road traverses land designated as a Class II landslide hazard. This section should describe and discuss mitigation measures designed to protect the environment and human health and safety in the event of a catastrophic geologic event.

3.4 BIOLOGICAL RESOURCES

3.4.1.2 Habitats

Conifer Forests – p.3-37. The second to the last sentence in this section states that “[t]he majority of coniferous forests within the project site is managed for commercial timber production, and is replanted following harvest.” “Majority” could mean anywhere from 51 percent to 100 percent. A more quantitative disclosure is needed here.

Conclusion - p. 3-39. The final sentence in this section states that “[t]he project site is not located within any known wildlife corridor, flyway, foraging area, or migratory route.” This statement is problematic as the site lies within the landscape-scale Pacific Flyway, which is adjacent to the Columbia River gorge (which, in turn, is a significant migratory flyway, particularly for water birds), and all north-south cordilleras in the state support at least a weak raptor migration. Elsewhere in the document (e.g., p. 46), raptor activity at the site is ascribed to migratory behavior. Also, some of the bat behavior observed at the site is assumed to be foraging behavior, and birds and other wildlife are known to forage in the project area. Use of the term “known” is also problematic and suggests the need for additional study. For example, no data was collected to assess bird or bat migration activity at the site.

3.4.1.5 Special Status Wildlife Species

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General Comments, Strike Risk Modeling: The avian surveys for the project use a very crude index to rank relative strike risk among the various species of birds recorded at the site. One of the three variables in the strike risk model relies on where in the vertical air column (in or out of the rotor swept zone) birds were initially detected when they were first seen.¹⁰ No observations of bird behavior were made over any extended period of time. The behavior was apparently not even recorded for all observations, as in some years the metric is absent. Furthermore, as highly mobile species, almost any bird will at some point cross the rotor-swept area.

Some very sophisticated strike risk models have been developed around wind energy towers. The validity of at least some of these models is still in question. Nonetheless, they attempt to quantify the amount of time a species spends in the rotor strike zone, and assign risk based in part on the size, speed, and flight paths of birds crossing the rotor swept area. While implementation of such complex models may not be necessary (at this point) for this project, reliance on the simplistic model used for this project is misleading and the results should be removed from the DEIS, or at the very least the model's limitations (which are discussed in some detail in avian survey reports) should be fully disclosed in the body of the DEIS to ensure that the reader is not misled.

The avian survey report (Appendix C-4) indicates that the index is formulated to help rank the relative risk each species might face in the presence of wind towers. At best, the index may give some insight among the species at this site, but comparison to other sites, particularly in different habitat types from the proposed project, is highly suspect and appears to be untested. Appendix C-4 also states "...no relationships have been observed between overall use by bird types other than raptors, and fatality rates of those bird types at wind-energy facility. Such a lack of predictive ability also speaks for a need for long-term follow up monitoring to assess the true impacts of the project on birds.

General Comment, Species Abundance: Discussion regarding the abundance of species at the site lack context. For example, the DEIS reports that fifteen (15) swifts were seen in fall 2004, four (4) in summer 2006, and eleven (11) in summer 2009. The DEIS, however, fails to place these types of figures into a context. Do these observations constitute "a lot"? "Very few"? Compared to the next watershed west, or the core of the species range? In the case of the swifts, and indeed most species recorded in the project area, subjectively it seems that few of any given species are represented. However, in the case of migrating birds (such as the 15 swifts observed in fall 2004), this could represent a rate. In other words, there could be 15 swifts per day, or per hour trying to migrate across the project site. There is simply no contextual information to put

¹⁰ Glancing at a bird and assigning it to "in" or "out" of the rotor swept area is an exceptionally poor predictor of mortality risk. For example, the avian survey report indicates that Horned Larks are often the most commonly found birds killed at wind tower sites. Horned Larks spend a significant amount of time on the ground. Accordingly, it is likely that an index of this species' strike risk formulated based on this project's model would forecast a low mortality risk and be a very poor predictor.

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these numbers into a wider perspective. Similar information subject to this same criticism is provided for other species of concern.

Introduction, p. 3-45: The introductory paragraph states that “[t]wo additional special status species, Keen’s myotis (*Myotis keenii*) and Townsend’s big-eared bat (*Corynorhinus townsendii*), may occur but have not been identified in prior surveys.” A more accurate statement would be that these two species could occur at the site, but surveys conducted at the site were incapable of identifying these or any other bats, except the hoary bat, to the species level.¹¹

Northern Spotted Owl, *Historical Activity Centers*, p. 3-52: This section should be revised to discuss and analyze a May 2010 record of a Spotted Owl in one of the owl circles north of the site. The remaining section addressing Spotted Owl issues should be updated to reflect this finding.

Northern Spotted Owl, *Conservation Support Area*, p. 3.54: Although managed forest is not optimal for spotted owls, it is likely better than wind towers which pose greater mortality risk than young even-aged stands of trees. To that end, the project can only be contrary to the purpose of the CSA. It may be just 0.27% of the area, but it is still a loss that should be disclosed in the discussion (including cumulative impacts).

Northern Spotted Owl, *Spotted Owl Special Emphasis Centers*, p. 3-56: The discussion on this point is obtuse and would benefit from illustration on a map.

The footnote to this discussion indicates that DNR reports that the Mill Creek site has 48 percent of the recommended 40 percent minimum suitable habitat for a spotted owl special emphasis center. The discussion in this section should be expanded to identify what fraction of that suitable habitat occurs where the 1.4 mile circle overlaps with the northwest corner of the project site.

Olive-sided flycatcher, p. 3-56: This section should be expanded to address the following issues. According to Breeding Bird Survey data, this species declined at the rate of 3.3 percent per year between 1966 and 2001. Loss of winter habitat is thought to be one causal mechanism. Another is that managed forests, which superficially replicate the fire-altered forests the birds depend on, may not offer all that the birds need to meet life history requirements.

The last sentence in this paragraph states “none were recorded during the fall of 2004 or the winter of 2008–2009.” The Olive-sided Flycatcher is a late spring arrival and departs in late

¹¹ On page 3-59 states: “Bat surveys conducted during 2007, 2008, and 2009 (Appendices C-8, C-9, and C-10) did not have the ability to detect individual species of bats. Instead, bats were grouped into species with either “high frequency” calls or “low frequency” calls.”

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summer. Recording the species at the site in fall or winter would be most unusual.

Vaux's Swift, p. 3-57. *See General Comment*, Species Abundance above.

Keen's Myotis and Townsend's Big-eared Bat, pp. 59-60: The bat survey, and consequently the distilled discussion in the DEIS, are lacking in detail. The Keen's Myotis discussion discloses "[b]at surveys conducted during 2007, 2008, and 2009 . . . did not have the ability to detect individual species of bats." That species composition at the site could not be determined serves to emphasize that too little is known about the bat fauna. At a minimum, this lack of knowledge demands that there be post-construction studies to evaluate bat mortality and species composition of fatalities. Also, as (potentially) the first wind energy site to be built in a forest setting in the Pacific Northwest, this project should be used to study the impacts of such development on bats and birds. The U.S. Fish and Wildlife Service Wind Turbine Guidelines Advisory Committee draft report of March, 2010 states, "[o]ur current state of knowledge about bat-wind turbine interactions . . . does not allow a quantitative link between pre-construction acoustic assessments of bat activity and operations fatalities."¹² The report goes on to say:

There is growing interest in determining whether "low" position samples (~1.5-2 meters) can provide equal or greater correlation with bat fatalities than "high" position samples because this would substantially lower cost of this work. Developers could then install a greater number of detectors at lower cost resulting in improved estimates of bat activity and, potentially, improved qualitative estimates of risk to bats.

Because the applicant sampled at a variety of sites and elevations within the project area, follow-up monitoring could contribute to the body of knowledge regarding the ability of various approaches to pre-implementation sampling to predict post-project mortality.

The Townsend's discussion states "[t]here are no known roosting structures or maternity colonies occurring in the vicinity of the project area. Consequently, the likelihood of occurrence on the site is considered to be low." The absence of evidence should not be assumed to be evidence of absence, especially in light of the caveat disclosed about inability to distinguish species during the bat surveys. This species (and many other bats) will roost singly in tree cavities or behind loose bark, so it is impossible to completely dismiss their presence at the site.

3.4.1.6 Other Wildlife Species

¹² Wind Turbine Guidelines Advisory Committee. 2010. Wind Turbine Guidelines Advisory Committee Recommendations. US Fish and Wildlife Service Wind Turbine Guidelines Advisory Committee. Draft report to the Secretary of the Interior. March 4.

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Birds, p.3-63: The DEIS states that “[m]ean overall bird use in the study area was low compared to these other wind resource areas studied; ranking 19th compared to 24 other wind resource areas . . .” This section should explain that comparisons to other wind resource areas in Washington and Oregon may be of little value as these other areas occupy different habitat types—primarily shrub-steppe and agricultural lands. Comparisons to sites located in Eastern deciduous forests are also questionable because of the different suite of bird species, different structural components to the surrounding forests, and dissimilar migration behavior.

Fall Migration Surveys (2004), p.3-64:

Eight species of raptors were observed during the survey. Those with the highest use of the site were sharp-shinned hawk, Cooper’s hawk, and red-tailed hawk. The highest raptor use observed at the site during 2004 surveys occurred between September 11 and October 12, 2004.

This observation is consistent with annual observations made at the Chelan Ridge Raptor Observation Project site in northern Washington, also on the east side of the Cascades. Raptors throughout the West migrate along ridge lines. Some ranges are located at geographic restrictions or at the confluence of ranges that funnel concentrations of raptors. Data do not indicate this is such a site, but do support the idea of a weak raptor migration through the area. Based on the number of raptors encountered during fall surveys, a rough estimate of the number of birds migrating through the site each fall should be made and included as part of the FEIS.

3.4.2.1 Proposed Action

Western Gray Squirrel, p. 3-75: This section suggests that the lack of oak trees in the project area indicates that the area has poor habitat quality for this species. In the northern part of the species’ range, however, oaks are completely lacking. Accordingly, the absence of oak trees should not be used to conclude that the squirrels are absent from a site.

Special Status Wildlife Species, p.3-77: This section introduces the collision risk model (or “bird exposure index” as it is called in the avian reports) from the avian survey reports. As discussed above, this model is highly suspect. The avian survey reports present numerous caveats when using this model or index: “This index is only based on initial flight height observations and relative abundance (defined as the use estimate) and does not account for other possible collision risk factors such as foraging or courtship behavior.”

Reliance upon the Index is subject to criticism on several grounds. Intuitively, the model makes little sense.¹³ The model also fails to account for the disproportionate impact of mortality on rare

¹³ In the model, A = mean use for species is averaged across all surveys. Many species, especially raptors, demonstrate distinct seasonal use of the site. For example, a large influx of bald eagles into the Columbia River

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populations.¹⁴ The model also fails to account for many of the other variables that influence strike risk. These include size of the bird, speed of flight, and direction of flight, or weather conditions which could obscure blades or towers.

Ultimately, there is no indication that this model has any predictive value. Neither the DEIS nor the avian surveys indicate that this model has ever been tested in the field or been utilized prior to the construction of a wind energy facility, followed by post-construction surveys to verify its usefulness.

Given these limitations, any use of numbers from the index should be reported judiciously, sparingly, and with all the caveats identified in Appendix C and the DEIS, otherwise unqualified validity and strength are implied for these indices.

Other Wildlife Species, *Birds*, p. 3-79. The final paragraph in the bird impacts lists a host of caveats, which are cause for concern.¹⁵ Although there is no geographic feature suggesting this

Gorge occurs in the winter, and the DEIS does report that the bald eagle was more likely to occur on the project site during winter. However, the species' weight in the model would be greatly reduced by the number of data collection efforts made at other times of year. During most times of the year, the risk of collision for a species with strong seasonal occurrences would be zero—it just isn't at the site. On the other hand, at the peak of its occurrence at the site the risk could be far greater. Distributing the exposure risk across multiple seasons thereby presents a deceptive index of exposure risk.

The model contains two additional parameters: Pf = proportion of all observations of species i where activity was recorded as flying (an index to the approximate percentage of time species i spends flying during the daylight period), and Pt = proportion of all flight height observations of species i within the rotor-swept height. Both of these parameters are based on information captured at the moment of observation during field data collection. Data derived from the literature regarding each species' natural history and behavior could provide a more accurate picture of long-term behavior. As discussed earlier, almost all birds fly at some point during the day (one of the caveats in the DEIS for the model states "[i]f a species was recorded on the site, but never flying at all, then the exposure index would not be applicable") and at some point flight heights are likely to enter elevations swept by rotors. Both of these parameters likely suffer from small sample sizes of the total number of observations, meaning that statistically there would be little ability to accurately describe behavior based on the small sample size.

¹⁴ Models such as this suggest that strike risk is reduced specifically because a species is rare at the site. To illustrate the point, the loss of one bird from a local population of two hundred (200) has little biological meaning. The loss of one bird from a local population of two (2) means 50 percent of the population is gone. Yet in each example, only one bird was killed.

¹⁵ These caveats include:

- ... the level of night migration for species associated with the project site is also not known.
- ... risk analyses ... provide some insight into which species are most vulnerable to turbine collision; however, estimates are based on abundance, proportion of daily activity budget spent flying, and flight height of each species. Observations were made during daylight hours, and do not take into consideration flight behavior or abundance of nocturnal migrants.
- ... the analysis does not account for varying ability among species to detect and avoid turbines, habitat selection, or other factors that may influence exposure to turbine collision.

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site constitutes a migratory bottleneck or should host a concentration of migrants, no effort was made to assess passerine migration, particularly at night (when most of these species migrate). In the absence of such an effort and in light of the long list of caveats associated with the collision index, post-construction monitoring and appropriate mitigation (should significant mortality occur) is warranted. Long term impacts should be assessed over a 5 – 10 year period because of our lack of experience with siting wind projects in Western forested ecosystems, and because of the inter-annual variability in migrating bird numbers.

Other Wildlife Species, *Bats*, p. 3-79: Bats are difficult to study. Nonetheless, the fact that of all the bats detected and all the species that could be present at the site, only the hoary bat was identified to species, leaves much information for the site lacking. The DEIS concludes (based on Appendix C reports) that relatively little bat activity was recorded at elevated heights, and two seasons of monitoring did not detect significant migrations. While these are good signs, the DEIS concludes “variable levels of recorded use by bats across years, habitats and recording height above ground indicate that the extent of impacts is difficult to predict at this time.” This conclusion demands years of follow-up monitoring to assess actual impacts. As one of the first sites placed in a forested setting, such monitoring is particularly critical to understanding the environmental impacts of wind energy sites in forests.

3.4.3 Mitigation Measures

Post-Construction Avian [and Bat] Mortality Study: Given the large number of unknowns discussed above regarding both bats and birds, the avian mortality monitoring mitigation measure should be expanded to include bats and its duration should be expanded from 2 years to a 5-10 year horizon.

Research-oriented Studies: As one of the first wind power projects proposed for construction within a forested habitat in the Pacific Northwest, this project offers a unique opportunity to conduct research-oriented studies regarding the wind energy/wildlife interactions like the research studies identified in the WDFW Wind Power Guidelines (2009) and the USFWS Wind Turbine Guidelines (2010).

Adoption of USFWS BMPs: The proponent should adopt the Best Management Practices set forth by the USFWS Wind Turbine Guidelines Advisory Committee. Most of the BMPs suggested by the committee are already in the DEIS, but a good faith effort should be made to meet all of these guidelines to minimize project impacts. One BMP not presented in the DEIS includes appropriate lighting of on-site facilities (in addition to the towers themselves) to control light pollution and maintain the dark skies needed by bats and migrating birds.

As a result, actual risk may be lower or higher than indicated by these estimates[.]

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The Technical Advisory Committee (TAC): As mentioned earlier, membership in the Technical Advisory Committee should include representatives from Audubon Washington or one of its member chapters, as well as representatives from local, federal and tribal federal and local environmental groups. The TAC should be convened for the life of the project, unless EFSEC determines otherwise.

Procedures for Responding to Avian and Bat Mortality Events: The mitigation measures should include the adoption of procedures specifying how the project will respond to large scale avian or bat mortality events or a take of a Bald Eagle or other species subject to protection under Federal or State law. These procedures should include timeframes for notifying relevant authorities (EFSEC, the TAC, and appropriate local, state and federal authorities) and measures to be taken to ensure no additional environmental harm occurs pending investigation of such an event, including curtailment of operations. Consistent with WDFW Wind Power Guidelines, the Applicant should contact the USFWS to determine appropriate measures to resolve unauthorized take of Endangered Species Act listed species or other species covered by other federal regulations.

Construction Monitoring: Mitigation measures during construction should include retaining an independent environmental monitor to ensure that all Best Management Practices and other mitigation measures are fully observed during the course of construction.

Mitigation for Lost Habitat: Arrangement should be made to mitigate for the permanent and temporary habitat losses caused by the project. Mitigation for permanent loss of habitat should be made on a one to one basis as provided for under the WDFW Wind Power Guidelines and should be developed in conjunction with WDFW and EFSEC.

3.4.4 Unavoidable Adverse Impacts

This section concludes with the statement “[t]he potential for ongoing occurrence of either golden or bald eagles is considered extremely rare.” This statement is misleading. While both of these species appear to be rare at the site, surveys have documented their presence at the site. Moreover, both of these species are known to range widely in search of food, and bald eagles have been appearing in increasing numbers during the winter in a location that is only two miles away. Under these circumstances, the DEIS should state that periodic occurrences (in low numbers) of these species at the project site are predictable and are to be expected.

3.6 PUBLIC HEALTH AND SAFETY

3.6.2.1 Proposed Action

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Construction, Fire and Explosion, p. 3-97: The wind turbine nacelles will be at a height of 262 feet. This section should discuss the technical challenges that are posed by responding to a fire, explosion or medical emergency at such a height, the types of emergency equipment necessary to respond to emergency events, and who (local fire departments, DNR or the Applicant) will be responsible for supplying and operating this equipment.

Operation, Fire and Explosion, p. 3-99: This section acknowledges that turbine malfunctions resulting in fires have been known to occur. Given that the turbines nacelle are located hundreds of feet in the air in a windy area surrounded by land being managed for timber production, it would appear that a fire could pose a serious threat to the project site and surrounding property. This section should be expanded to discuss the potential environmental impacts that may arise from a turbine fire and the actions that would be taken to minimize those impacts. This section should discuss whether equipping the turbines with fire suppression equipment is advisable.

3.6.3 Mitigation

Equipping the turbines with fire suppression equipment should be considered as a possible mitigation measure.

3.7 NOISE

3.7.1.3 Affected Environment

The Applicant intends to harvest trees in the vicinity of the project site prior to construction. This section should discuss whether the harvest of trees will affect the validity of the pre-construction sound study with a specific focus on the residential sites identified in the first paragraph of Section 3.7.1.3.

3.7.2 Impacts

This section should discuss on-site alternatives regarding the placement of wind turbine towers and potential noise impacts.

3.7.3 Mitigation

If warranted, mitigation measures should include removal or reconfiguration of turbines to minimize impacts on residential receptors.

If warranted, mitigation measures should include maintenance of vegetative buffers between the project and residential receptors to minimize sound impacts.

3.8 LAND USE AND RECREATION

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3.8.1.2 Recreation

The Mark O. Hatfield Wilderness Area is within a 25 mile radius of the proposed project. Environmental impacts to this wilderness area should be identified and discussed in this section.

3.8.3.1 Proposed Action

Changes to Existing Land Use Patterns and Recreation, *Project Operation*, p. 3-151:
In this section, the authors suggest that the project will not impact local agricultural tourism because wineries located in southeastern Washington are “thriving” despite the fact that there are four wind power facilities located between Walla Walla and Kennewick. This paragraph should be redacted. Correlation does not establish causation. Without more detailed analysis, the fact that wineries and wind power operations co-exist in Walla Walla County should not be used to predict the environmental impact of this project in Skamania County.

Consistency with Applicable Land Use Regulations, Columbia River Gorge National Scenic Area Management Plan, p. 3-154: Under the bullet point entitled “Scenic Appreciation and Scenic Travel Corridors,” strike “only” from the discussion so that the sentence reads: “The project would have minor to moderate impacts on visual quality as viewed from travel corridors inside the Scenic Area.”

Trails and Pathways. The discussion in this section needs to be clarified. The project will have low to moderate visual impacts on viewpoints from some trails and pathways in the CRGNSA. The statement that “[t]he project would not affect any trails or pathways in the Scenic Area” is incorrect.

3.8.3.2 No Action Alternative

If a No Action Alternative is pursued, there will be no impact on visual resources.

3.8.4 Mitigation Measures

This section should discuss reconfiguration or removal of turbines to minimize visual impact on scenic area as a mitigation measure.

3.8.5 Unavoidable Adverse Impacts

If the applicant is unwilling or unable to reconfigure turbines to minimize visual impacts, then this section should identify minor to moderate impacts on visual resources within the CRGNSA as an unavoidable adverse impact.

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3.9 VISUAL RESOURCES

3.9.1 Methodology

The methodology applied should be expanded to include the Visual Resource Management system employed by the Bureau of Land Management. The CRGNSA has established visual resource objectives for a large and specific area within the Columbia River Gorge. Although the project is located just outside the scenic area boundaries, it will be clearly visible from within the scenic area and will impact the area's scenic values. That the project is located just outside the scenic area boundary should not exclude it from an analysis that fully identifies and discusses the project's visual impact on this nationally-recognized, high value regional view shed.

3.9.1.3 Preparation of Visual Simulations

The photographs underlying the visual simulations are problematic. Visual simulation photographs should be taken with a 50 mm lens, as this focal length most closely captures human visual perception. *See Environmental Impacts of Wind-Energy Projects*, National Research Council (2007) at 247. The use of other focal lengths distorts the image and makes it difficult to compare impacts between different photographs. *Id.* If a digital camera is used, it should be set at the highest resolution possible. *Id.* The visual simulations should also be re-sized to a 10 x 12 inch format, at a minimum, for comfortable arm's length viewing. *Id.* at 250.

Most of the simulations produced in the DEIS appear to be taken from viewpoints along roads and highways. Additional simulation should be provided with views from the Columbia River, hiking trails, and wilderness areas. *See Id.* at 251-52.

The DEIS states that simulations were not prepared for night time conditions. An inventory of current night time lighting conditions would be helpful in assessing the extent to which FAA mandated turbine lighting will impact the night sky.

3.9.2.3 Viewpoints

See comments under sections 3.91 and 3.9.1.3.

Columbia River Gorge National Scenic Area – p.3-194

Visual impacts are among the issues to be addressed in NEPA and SEPA analysis. Although Congress has expressed reluctance to apply Scenic Area restrictions to lands lying outside the scenic area boundary, land uses outside the scenic area will impact the visual quality within the scenic area and should be subject to visual analysis consistent with the values encompassed by the CRGNSA.

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3.9.3.2 No Action Alternative

There is no evidence in the record that construction of project will result in an appreciable decrease in this region's development or reliance on fossil fuels or prevent the construction of such plants in the future. The assertion that failure to build the project will result in continued impairment of air quality and visual resources is not well-founded and should be removed from the discussion.

3.9.4 Mitigation Measures

In addition to painting the turbines an unobtrusive, non-reflective color and following FAA lighting guidelines, the following additional mitigation should be included:

- Either reducing or reconfiguring the turbine locations to minimize visual impacts.
- Explore whether vegetative buffers can be grown or maintained to minimize visual impacts.
- To the extent visual impacts are unavoidable, mitigation should include the preservation of off-site visual resources.

3.10 HISTORICAL AND CULTURAL RESOURCES

3.10.2.2 Cultural Resources Overview

The FEIS should incorporate the results of archaeological field inventory conducted by Yakama Nation's Cultural Resources Department.

3.11 TRANSPORTATION

3.11.2 Impacts

This section should identify likely haul routes for concrete that will be used for the wind turbine foundations and discuss any associated environmental impacts.

3.14.3 CUMULATIVE IMPACT ANALYSIS

3.14.3.5 Habitat and Wildlife

Bird and Bat Species, p. 3-274: This section provides: "Erickson et. al. (2005) concluded that these sources of mortality [i.e., other anthropogenic sources] are likely much larger than the

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potential impacts of wind power development.” This statement of relativism is misleading and is not consistent with the intent of a cumulative impacts analysis. While on its face the statement is likely true, the question is whether wind energy, by adding incrementally to mortality, would be enough to negatively impact bird or bat species.

Discussion of West Cumulative Impact Study, pp. 3-275-76: The cumulative impact study prepared by West, Inc. for the Klickitat County Planning Department has contextual issues that need to be addressed. As the DEIS points out, habitat assessed by West for Klickitat County is significantly different from that at the project site. The DEIS states that “none of the estimated fatalities were anticipated to cause a significant loss in population, and no cumulative impacts were anticipated.” Since the completion of the West report, however, the number of occupied Ferruginous Hawk nests in Washington has dropped precipitously.¹⁶ The West report does disclose that this species could be at risk from wind energy facilities, and suggests that exclusion zones around core habitats might be warranted. In light of the current plight of this species, the “no impact” conclusion needs to be re-evaluated.

Another problem with the West report is that it focuses solely on impacts from the full build out of all anticipated wind development projects in the Columbia Plateau Ecoregion. While informative, this analysis misses the point of a cumulative impacts analysis, which is to evaluate the impact of the current project (in the West report, all anticipated wind energy development) in conjunction with all other reasonably foreseeable stresses on the resource – the analysis should have been wider ranging and not restricted to wind energy development.

Cumulative effects result from spatial (geographic) and temporal (time) crowding of environmental perturbations. The effects of human activities will accumulate when a second perturbation occurs at a site before the ecosystem can fully rebound from the effect of the first perturbation.¹⁷ Fragmentation and habitat degradation are two of the major problems in the shrub-steppe. Development, land conversion, fire, incompatible grazing practices, and weed invasion are all driving mechanisms. The question of whether wind energy development in the Columbia Plateau Ecoregion could add synergistically to these sources of stress is not addressed in the West report.

The DEIS mentions that climate change is not evaluated as a source of stress. Climate change projections for Washington and the Pacific Northwest suggest dramatic changes in East-slope forests (as well as shrub-steppe), and these changes should be discussed in the context of cumulative impacts.

The cumulative impacts discussion in the DEIS concludes with the following sentence:

¹⁶ McCullen, K. 2010. Eastern Washington sees fewer ferruginous hawks. Tri-city Herald. May 9.

¹⁷ Council on Environmental Quality. 1997. Considering Cumulative Effects Under the National Environmental Policy Act. Council on Environmental Quality.

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For example, one study from 2009 estimated that, based on performance in the United States and Europe, wind farms and nuclear power stations are responsible each for between 0.3 and 0.4 bird fatalities per gigawatt-hour (GWh) of electricity while fossil-fueled power stations are responsible for about 5.2 fatalities per GWh (Sovacool 2009).

The Sovacool (2009) paper appears to be fundamentally flawed in its assumptions. Willis et al. (2010)¹⁸ published a rebuttal to this paper that would suggest that its premises are unsound. This line of reasoning should either be removed from the FEIS, or better supporting literature provided to support the point.

Thank you for this opportunity to submit comments on the Whistling Ridge DEIS. Please feel free to contact me if you have any questions or need clarification regarding my comments.

Sincerely,



H. BRUCE MARVIN
Assistant Attorney General
Counsel for the Environment

HBM:cv

cc: By email:
BPA (and by mail)
EFSEC (and by mail)
Al Wright
C. Robert Wallis
Jason Spadaro
Kyle Crews
Tim McMahan
Darrel Peebles
Tony Usibelli
Gary Kahn
Dorothy H. Jaffe
Nathan Baker
J. Richard Aramburu

¹⁸ Willis, C. R., R. M. R. Barclay, J. G. Boyles, R. M. Brigham, V. Brack, Jr., D. L. Waldien, and J. Reichard. 2010. Bats are not birds and other problems with Sovacool's (2009) analysis of animal fatalities due to electricity generation. *Energy Policy* 38:2067-2069.

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Robert Wittenberg, Jr.
Peggy Bryan
Skamania County Agri-Tourism Assoc.
Chris McCabe
Shawn Cantrell
Isa Anne Taylor
Jill Arens
John McSherry
David Poucher
Michael Canon
Don McIvor
By mail:
Save our Scenic Area
Klickitat and Cascades Tribes of the Yakama
Johnson Meminick

ARAMBURU & EUSTIS, LLP

Attorneys at Law

J. Richard Aramburu
[REDACTED]@aramburu-eustis.com
Jeffrey M. Eustis
[REDACTED]@aramburu-eustis.com

ENERGY FACILITY SITE
EVALUATION COUNCIL

720 Third Avenue, Suite 2112
Seattle, WA 98104
Tel 206.625. [REDACTED]
Fax 206.682. [REDACTED]
www.aramburu-eustis.com

August 24, 2010

Stephen Posner
Energy Facility Site Manager
Washington EFSEC
905 Plum Street SE, 3rd Floor
PO Box 43712
Olympia WA 98504-3172

Andrew M. Montaña
Environmental Protection Specialist
Bonneville Power Administration
PO Box 3621 KEC-4
905 NE 11th Avenue
Portland OR 97208-3621

Re: Comments on Draft EIS for Whistling Ridge Energy Project
DOE EIS - 0419: Failure to Consider Alternatives

Dear Messrs. Posner and Montaña:

This office represents Save Our Scenic Area (SOSA), a Washington corporation representing persons interested in the Whistling Ridge Energy Project (WRE). SOSA's primary mission is to preserve the Columbia River Gorge National Scenic Area view-shed; to further maintain the existing rural and scenic character of Underwood, Washington, and surrounding communities in Washington and Oregon; and work to preserve the intent of the Columbia River Gorge National Scenic Area Act. I write today to provide comments on the recently issued draft environmental impact statement (DEIS) for the WRE proposal.

WRE proposes to construct as many as 50 wind turbines on ridge lines on its property in Skamania County to produce a minimum of 70 MW. The project includes the construction and operation of a substation to be owned and operated by BPA that will connect the project to the Federal Columbia River Transmission System (FCRTS or the Grid). As discussed herein the project includes the turbines, the electrical connection system, the necessary infrastructure and the BPA substation. Though this project has been under development for some time, the applicant has identified only a range of wind turbine generators which "would likely range in size from 1.2 to 2.5 MW." DEIS at 1-9. However, the larger capacity turbines have larger diameter rotors (up to 100 meters), so it is unknown what the size of the machines would actually be. The proposal has multiple serious environmental impacts, including severe impacts on the visual surroundings of the Columbia River Gorge National Scenic Area.

A severe deficiency in the EIS is the failure to consider any alternative other than the applicant's minimum 70 MW proposal on its own property. Page 1-13 of the "Alternate Project Locations" includes only sites within the ownership of SDS. On page 1-14, the EIS states that the applicant considered a lesser number of turbines, but rejected such an alternative because it did not fit within SDS's concept of "economic feasibility." The failure to consider either alternate locations or alternate site configurations (with fewer wind turbines) is a fundamental and fatal defect in the DEIS, as was previously pointed out at the public hearing on the document. The responsible official must prepare a supplemental DEIS to address and thoroughly consider reasonable alternatives. This supplemental DEIS should be circulated for comment in the same manner as any DEIS under NEPA/SEPA rules and regulations.

After the DEIS was issued, the EFSEC and BPA issued Council Order No. 848 (June 29, 2010), which acknowledged public comments during the DEIS comment hearing on June 16, 2010 that identified "potentially serious errors in, or omissions from, the draft EIS." See page 2 of Order 848. That order requested that the applicant "incorporate into its direct presentation any information needed to address asserted significant flaws in the DEIS." Order 848 also indicated that the Final Environmental Impact Statement (FEIS) would not be issued before the adjudicative hearings began on December 8, 2010. SOSA and Friends of the Columbia Gorge (Friends) objected to Order 848 on July 8, 2010, requesting that the Council's responsible official require that the FEIS be issued prior to the commencement of the adjudicative hearings.

In its Order 850, the Council responded to the objections of Friends and SOSA. In that order, the Council indicated that:

The comments [on the DEIS] are reviewed, responses are prepared and then the general agency practice is that the responsible official issues a draft final EIS (DFEIS).

The DFEIS precedes the beginning of the adjudicative hearing. Its information is public and available. The environmental record is received in evidence; its information is available to the parties and the public during the adjudicative hearing. The content of the DFEIS is the equivalent of a FEIS. At the conclusion of the hearing process, the responsible official issues a FEIS, which may incorporate additional information received in the adjudicative hearing.

Order 850 at pages 3-4. Order 850 raises multiple issues regarding the proper procedures under SEPA and NEPA, as well as several unanswered questions, as follows:

1. There are no procedures under SEPA or NEPA by which an agency can issue a "DFEIS." Accordingly, it cannot be considered part of the SEPA or NEPA process.
2. Order 850 does not indicate whether interested parties may comment on the "DFEIS." Given that it is a draft document (though not one authorized by SEPA or NEPA), the DFEIS, if issued, should be properly noticed to agencies and persons who commented on the DEIS. There should be a comment period of a minimum of 45 days on the DFEIS.
3. Order 850 does not explain how the responsible official "may incorporate additional information received in the adjudicative hearing." Will the responsible official go through the entire administrative record to revise the DFEIS? More information is required on how that process will be implemented.

Based on the foregoing, SOSA still believes that the correct procedure to be followed, and one authorized by the rules under both SEPA and NEPA, is to issue a supplemental DEIS (SDEIS) correcting basic errors in the issued DEIS. The SDEIS would be subject to comment by interested agencies and members of the public. Our legal basis for this request is as follows:

The starting point for analysis of the alternative requirement is SEPA itself. RCW 43.21C.030(1)(c)(iii) makes clear that the "detailed statement" (which is now the environmental impact statement requirement) must consider "alternatives to the proposed action." Alternatives are so important under SEPA that each state agency, including EFSEC, has the responsibility to:

Study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.

The details of consideration of alternatives in an EIS is found at WAC 197-11-440(5).

Under NEPA Rules, the consideration of alternatives is considered the heart of the EIS:

Sec. 1502.14 Alternatives including the proposed action.
This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (Sec. 1502.15) and the Environmental Consequences (Sec. 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

- (a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.
- (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.
- (c) Include reasonable alternatives not within the jurisdiction of the lead agency.
- (d) Include the alternative of no action.
- (e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.
- (f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

(Emphasis supplied.)

As noted above, based on the applicant's own opinion of financial feasibility, the DEIS has not considered other alternatives; a position which appears to be unquestioned by the drafters of the DEIS. However, the applicant has not provided any information on financial feasibility and cannot so stricture and limit its proposal to avoid alternatives.

It appears that the applicant asserts, and EFSEC and BPA concur, that the proposal is for a private project on private property. See 197-11-440(5)(d). This exemption does not apply if the project includes a rezone or:

if other locations for the type of proposed use have not been included or considered in existing planning or zoning documents.

The portion of the DEIS addressing land use regulation does not disclose that wind turbines were ever included or considered in planning documents adopted in Skamania County. See DEIS at pages 3-140 to 3-155.

The failure of the DEIS to consider alternatives is a fatal flaw for several reasons.

First, there are serious issues as to whether the proposal is consistent with local zoning. While the DEIS seems to claim that the project is consistent with Skamania County's comprehensive plan and zoning code, there are many reasons to believe it is not. On May 6, 2009 SOSA filed a lengthy letter directed to both Skamania County and EFSEC challenging the consistency of the proposal with local zoning. Among other matters, that letter pointed out that wind turbines or wind farms are not listed as permitted uses in the

Skamania County Zoning Ordinance or in the 2007 Skamania County Comprehensive plan.

The latter conclusion is confirmed by decision of the Skamania County Hearing Examiner made in February 2009 in a SEPA challenge to a determination of nonsignificance for adoption of a new zoning ordinance for Skamania County, which ordinance proposed regulating wind turbine development. Questions arose during the course of that hearing regarding whether the 2007 Skamania County Comprehensive Plan actually permitted or considered wind energy facilities. In her decision, the Hearing Examiner found as follows:

The 2007 Comprehensive Plan does not contemplate the type of energy facilities described in the Planning Commission Recommended Draft.

See Findings and Decision, Finding 18 at page 8. The Hearing Examiner went on to rule that Skamania County was required to prepare an environmental impact statement prior to the adoption of its new zoning ordinance. Skamania County has never prepared the environmental impact statement ordered by the Examiner and the proposed zoning ordinance was not adopted.

Since Skamania County has adopted a zoning ordinance that does not provide for wind energy facilities, and its comprehensive plan does not contemplate such facilities, the exception in the SEPA Rules does not apply. Either WRE must apply for a rezone (which it has not) or EFSEC must preempt local zoning. The preemption decision by EFSEC would be the functional equivalent of a rezone because it provides approval for a previously unpermitted use.

In fact, EFSEC must make a determination of land use consistency and held a hearing on that subject on May 6, 2010. However, EFSEC did not make a decision on land use consistency at that time and has deferred such decision to be made in the course of the adjudicative hearings.

The consistency of the proposed project with local zoning has yet to be determined. The responsible official under SEPA, the EFSEC manager, accordingly cannot determine whether the WRE project is consistent with local zoning. If it is not, the Council may preempt local zoning, which would be the functional equivalent of a rezone for the project. Alternatives must accordingly be fully considered.

Second, the proposal is not a private project within the meaning of the SEPA Rules. This issue was previously considered in a Washington Supreme Court decision:

Under the present statutes and administrative code, the question now before the court as to whether the EIS is adequate turns on whether the proposed project is a "public project" or a "private project".FN1

FN1. It is unnecessary in this case to determine whether the "public"/ "private" distinction drawn in the administrative code accords with SEPA policy. We recognize that one commentator has suggested that in certain cases, the distinction may be unsound. See Richard L. Settle, The Washington State Environmental Policy Act: A Legal and Policy Analysis §14(b)(ii) (4th ed. 1993).

WAC 197-11-440(5)(d) provides in relevant part:

When a proposal is for a private project on a specific site, the lead agency shall be required to evaluate only the no action alternative plus other reasonable alternatives for achieving the proposal's objective *on the same site...*

(Italics ours.) A "private project" is defined in WAC 197-11-780: "'Private project' means any proposal primarily initiated or sponsored by an individual or entity other than an agency."

Weyerhaeuser v. Pierce County, 124 Wn. 2d 26, 38-39, 873 P.2d 498, 505 (1994).

The project in *Weyerhaeuser* was a land fill proposed by a private applicant on private property. However, the court concluded it was a public project because of the close relationship between the county actions and the supposedly private project. The court went on to hold:

We agree with the Weyerhaeusers that, as a matter of law, the proposed landfill is a public project, and the EIS must contain a sufficient discussion of offsite alternative proposals. Because it does not do so, it is inadequate as a matter of law.

The WRE project is similarly public for several reasons. First, the DEIS contains extensive discussion as to need for electric power to meet public needs for the region. See DEIS pages 1-4 to 1-7. This is clear in the DEIS at page 1-4: "The Applicant's purpose in proposing the Whistling Ridge Energy Project is to help meet the future need for energy resources." SDS also seeks to provide an additional renewable resource for electric utilities in Washington. Second, this project has been referenced by its proponents as a "semi-public" facility under the Skamania County zoning ordinance. See DEIS at page 3-147 to 149.

The WRE proposal is not exempt from alternatives analysis under SEPA or NEPA as it must be classified as a public facility.

Third, the DEIS cites numerous public documents that the project will supposedly comply with, including the Fifth Northwest Electric Power and Conservation Plan (DEIS at 1-4), the draft Sixth Northwest Electric Power Plan ("NPCC 2009", DEIS at 1-5), the "establishment of Renewable Portfolio Standards (RPS) at the state level" (DEIS at 1-

5), the requirement for "qualified alternative energy products" pursuant to state law (DEIS at 1-5). Each of these regulations and policies is substantially similar to the relationship between Pierce County and the developer in the *Weyerhaeuser* case. The DEIS touts the current proposal as meeting public needs and legislative mandates. WRE cannot promote the project "public" for one purpose, but claim it is "private" for another, especially where careful review of alternatives is required by SEPA and NEPA.

The result of the *Weyerhaeuser* case was as follows:

The hearing examiner's decisions on the conditional use permit and the EIS appeal are reversed. The EIS must be revised to adequately address alternatives to the proposed project. In any new public hearing on this proposed project where county-staff-authored reports and an environmental impact statement are involved, the opportunity for oral cross examination of the staff members must be accorded.

124 Wn.2d at 47. The failure of the BPA and EFSEC to consider alternatives, including alternate locations and different configurations are fatal flaws in the DEIS. The current EIS should be withdrawn and a supplemental EIS complying with NEPA/SEPA rules and guidelines must be circulated for comment.

Fourth, there is considerable discussion of the need for the project's resources on a regional basis. See DEIS at 1-4 and 1-5. However, there are real questions as to need for this variable energy facility.

At the outset, it appears that most wind energy is not, as indicated at page 1-4 of the DEIS, used or useful in the Northwest. As indicated in the April 12, 2010 submission of BPA to the Federal Energy Regulatory Commission (FERC) on their docket Docket No. RM10-11-000 regarding regulation of "variable energy resources" (VER) at page 2:

The need to clearly define balancing authority roles and responsibilities is especially important to BPA, because approximately 80 percent of the almost 2,800 MW of wind generation currently on BPA's system is exported to other balancing authorities, and BPA's preference customers should not bear costs of integrating wind generation that is exported to serve load outside of BPA's balancing authority.

Thus the EIS must consider whether the WR project or other wind projects actually meet loads in the Northwest.

In addition, as the BPA submission to FERC makes clear, it is necessary for balancing power to be available to meet loads when the wind does not blow. As noted by BPA in their comments on Docket No. RM10-11-000, at page 5, there are additional problems with balancing loads when wind energy resources are exported to California or to other

sink authorities. These facilities might include increased reliance on hydro resources or peaking facilities such as gas turbine plants. The EIS should consider whether additions of a VER like WR will result in the need for other peaking facilities to balance loads and whether the addition of a VER like WR is consistent with meeting demand.

Fifth, the DEIS repeatedly refers to the “economic feasibility” of the project when referring to the minimum output (70 MW) that is acceptable to the applicant. DEIS at 1-14. There is also reference to what utilities might require for the project at page 2-20 (project objectives “include providing a minimum level of generation to be attractive to utilities seeking to fulfill their RPS requirements, as well as providing a return on investment to the applicant.”). However, most of this discussion is self-serving conclusions with no backup documentation. If the applicant seeks unilaterally to foreclose alternatives, then it must provide the economic and financial information to support these conclusions. The necessary data consists of costs of each of the various project elements, including labor and materials costs, costs for construction of roads, transmission lines and the substation, all leading to the overall cost and cost per kW or MW.

On the other side of the equation, the applicant must produce estimations of sales prices for the energy from the project, as well as actual support for the proposition that there is a minimum output that utilities would require. Further, actual land costs, by way of leases or property purchase, should be compared with other sites. Given the representations of the applicant, and the investment to date in the permitting, this “pro forma” type financial material should be readily available.

In addition, the EIS should consider whether placing a VER like WR on line will simply require construction of other facilities to balance loads, such as gas turbines or other facilities.

Sixth, the alternatives section of the DEIS must consider the problems of integrating wind power into the existing electric grid. These issues are discussed in the May 22, 2010 edition of the Seattle Times, which is incorporated by reference.

Because wind turbines only work while wind is blowing, other energy sources must be turned on when the wind stops or turned off or ramped down when the wind blows. This is illustrated by the recent review of the “BPA Balancing Authority Load and Total Wind, Hydro, and Thermal Generation, Near-Real-Time” for the period August 10-17, 2010. See Attachment A hereto. The load balancing data shows that wind generation on August 10, 2010 went from 2,202 MW to only 168 MW in just 12 hours. The simple meteorological explanation is that wind conditions went from higher speeds to near calm over this period. The new supplemental EIS should discuss the issues and problems related to integrating the Northwest power grid with wind power from this and other wind turbine projects.

Of more importance, the period of highest wind production did not correlate with increased electric loads for the Northwest. Thus when wind production was essentially zero on July 8-9, total loads in the BPA region were over 12,000 MW due to greater demand for cooling during this very hot spell. (The Clackamas weather station showed a high of 99°F on July 8 and 95°F on July 9.) When wind power generation rose on July 12 with increasing winds, loads dropped because of cooler temperatures (a high of 70°F on July 13.) Thus, if the wind is not blowing, base loads in the BPA region must be met by other power sources.¹ Accordingly, to meet loads, new wind power projects must be accompanied by new, firm, baseload power resources. While the region relies extensively on hydro power, in low water years, hydro power can be problematic. Indeed, according to the Seattle Times the BPA grid recently has cut back on receipt of wind energy because of capacity issues.

The new supplemental DEIS should discuss the erratic nature of wind energy and whether the addition of small quantities of wind energy will actually provide meaningful solutions to energy needs.

Seventh, in examining alternatives, the draft needs to compare the impacts of developing the proposed project with other alternate sources of wind energy being developed within the jurisdiction of EFSEC.

There are serious impacts related to the WRE proposal based largely on its location. The Underwood location will have serious visual and aesthetic impacts to extremely valuable and unique scenic resources found in the Columbia River Gorge, where because of its elevation the project will be seen by many persons over a broad area. Further, this forested location increases substantially the risks of bird and bat collisions with the turbine blades. Other environmental impacts are of concern because of the location of the turbines on steep ridgelines, which may restrict options for micrositing and increase impacts due to road building. This location should be compared with other possible sites, especially in southeast Washington where wind turbines are located away from populated areas and have lesser risk for bird or bat collisions.

Eighth, the section on alternatives in SEPA explicitly calls for an analysis of the alternative of future development of the proposal under WAC 197-11-440(5)(c) where the alternatives section of the EIS includes obligation to:

- (vii) Discuss the benefits and disadvantages of reserving for some future time the implementation of the proposal, as compared with possible approval at this time. The agency perspective should be that each

¹The phenomenon is not limited to summer conditions. During the 10 day cold spell in January 2008, BPA records show very high loads, but no contribution from wind energy projects for more than 10 days.

generation is, in effect, a trustee of the environment for succeeding generations. Particular attention should be given to the possibility of foreclosing future options by implementing the proposal.

For the present application, the DEIS must discuss the alternative of delaying the implementation of the WR proposal. In light of visual impacts, bird and bat kills and other serious impacts of the WR proposal, the DEIS should discuss the option of reserving the WRE project until such time as projects with lesser impacts have been permitted and constructed. The DEIS should accordingly discuss potential wind turbine sites, including those permitted, those under application, and those in areas where new applications are likely, for example, where land commitments in the form of leases are made by property owners to wind turbine developers.

Ninth, the proposed project requires an interconnection with the BPA transmission line together with the construction of a substation. That is clearly a public project, not a private project, and thus alternatives must be fully considered. As related to the substation it is understood that the BPA substation must be built with capacity to receive additional electric energy for interconnection with the FCRTS. Thus, the EIS must consider whether the BPA substation will act as an attraction for other energy projects to locate nearby. In this regard, SOSA notes that a natural gas pipeline traverses the north portion of the project area. See DEIS, Figure 2-3. In the recent past, the land owner SDS has promoted plans for a gas turbine for electrical generation in this area. The EIS must consider the possibility of a gas turbine project in the area, especially one that may have enhanced financial feasibility because of the proximity to both a fuel source (the gas pipeline) and a substation to connect that energy to the FCRTS. Given the need for balancing resources for VERs like WR, location of such a facility nearby appears more likely. Accordingly, the EIS must consider the impacts of such a gas turbine facility, including air emissions, noise, wildlife impacts and other impacts common to these facilities.

In addition, reports indicate that this year 68% of new wind turbine energy will be sold to California. The FEIS should identify whether power from the WR project will be sold and used in California or at any other location outside the state of Washington. Further, analysis should be made as to the capacity of transmission lines to accept the power from the WR project. Any contract or informal commitment between this applicant and public or private utilities should be identified in the FEIS and whether such parties are providing up front costs for this application and construction. If the power from this project is to be sold to out of state public or private consumers, then alternatives should be considered closer to where the power will be consumed.

Tenth, while SEPA contains the public v. private distinction, NEPA and the NEPA Guidelines contain no such exception. Since this DEIS is to meet NEPA requirements, there must be a full exploration of available alternatives under the terms of both NEPA

ARAMBURU & EUSTIS, LLP

July 16, 2010

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and SEPA rules. As cited above, the NEPA Guidelines require consideration of alternatives even though they may not be within the agency's jurisdiction.

Given the importance of alternatives analysis under both NEPA and SEPA, the failure of EFSEC and BPA to do this analysis now may mean that upcoming processes will have to be repeated should a court determine that the procedure adopted is illegal, resulting in a huge waste of time and resources of all involved.

In summary, the failure of the DEIS to discuss reasonable alternatives is a fatal flaw in that document. EFSEC and BPA should immediately withdraw the noncompliant DEIS and prepare a supplemental DEIS that considers all reasonable alternatives, not just those identified in this letter. The supplemental DEIS should be circulated for comment as required for any DEIS and no work on the final EIS should begin until all comments are in for the supplement.

Sincerely yours,

ARAMBURU & EUSTIS, LLP

A handwritten signature in black ink, appearing to read "J. Richard Aramburu". The signature is written in a cursive style with a large initial "J" and "A".

J. Richard Aramburu

JRA:cc

cc: SOSA
Friends

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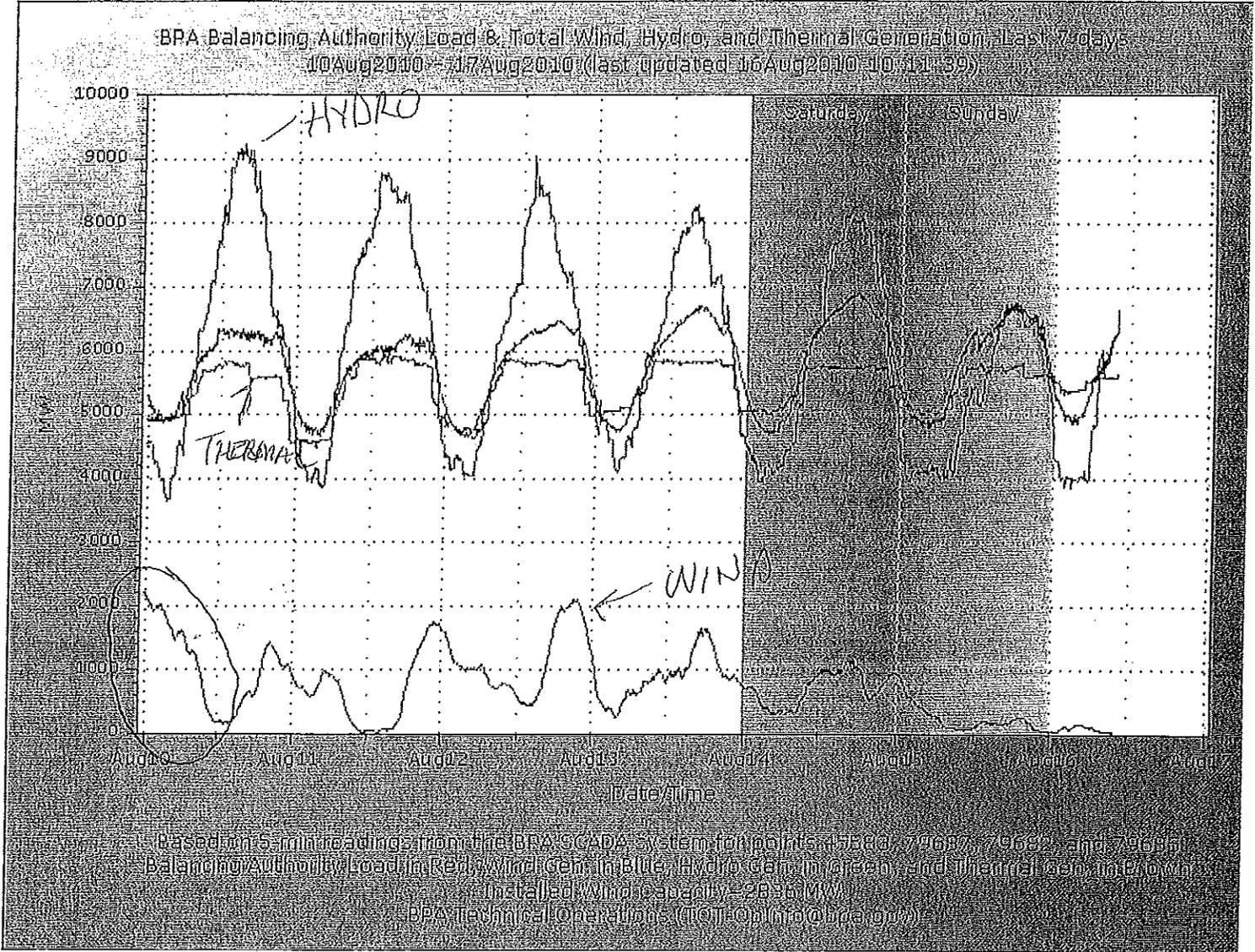


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ARAMBURU & EUSTIS, LLP

Attorneys at Law

J. Richard Aramburu

[REDACTED]@aramburu-eustis.com

Jeffrey M. Eustis

[REDACTED]@aramburu-eustis.com

ENERGY FACILITY SITE
EVALUATION COUNCIL

720 Third Avenue, Suite 2112

Seattle, WA 98104

Tel 206.625. [REDACTED]

Fax 206.682. [REDACTED]

www.aramburu-eustis.com

August 24, 2010

Stephen Posner
Energy Facility Site Manager
Washington EFSEC
905 Plum Street SE, 3rd Floor
PO Box 43712
Olympia WA 98504-3172

Andrew M. Montaña
Environmental Protection Specialist
Bonneville Power Administration
PO Box 3621 KEC-4
905 NE 11th Avenue
Portland OR 97208-3621

Re: Comments on Draft EIS for Whistling Ridge Energy Project DOE EIS - 0419:
Recreation and Land Use Section

Dear Messrs. Montaña and Posner:

This office represents Save Our Scenic Area (SOSA), a Washington corporation representing persons interested in the scenic, recreational and natural values of the Columbia Gorge. SOSA's primary mission is to preserve the Columbia River Gorge National Scenic Area view-shed; to further maintain the existing rural and scenic character of Underwood, Washington, and surrounding communities in Washington and Oregon; and work to preserve the intent of the Columbia River Gorge National Scenic Area Act. WRE proposes to construct as many as 50 wind turbines on ridge lines on their property in Skamania County to produce a minimum of 70 MW. I write today to provide comments on the recently issued draft environmental impact statement (DEIS) for the WRE proposal.

In this letter, I provide comments on behalf of SOSA regarding the "Land Use and Recreation" chapter of the DEIS found at Section 3.8 at page 3-134 to 3-155. SOSA's comments will be divided between the recreation and land use sections.

1. RECREATION IMPACTS.

The DEIS provides only a listing of recreational resources in the area with minimal discussion of the impacts that the wind turbine facilities will have on such areas. This discussion is inadequate. The DEIS should not only disclose the affected areas, but also the impacts on such areas.

Of particular concern is the impact that the turbine operations will have on these areas, particularly visual impacts. This section should be expanded to include impacts on key viewing areas within the scenic area and other areas affected by visual and noise impacts from wind turbine operations. Discussion of mitigation measures should be included which describe alternatives of reduction or relocation of turbines as well as alternative site locations.

2. LAND USE REGULATION.

This section of the DEIS includes discussion of applicable land use regulations. The only land use regulations discussed are the Skamania County's comprehensive plan and land use regulations.

EFSEC has previously taken up the issue of land use consistency during proceedings held on May 6, 2009. Comments and briefs were filed by various parties during that time, including SOSA. Instead of making a decision on land use consistency at the time, EFSEC decided that this issue would be passed to the project adjudicative hearings. Accordingly, we find it inconsistent with the Council's responsibility to enter conclusions regarding land use consistency in the DEIS before it hears evidence in adjudicatory hearings. This is plainly prejudgment of a matter before the Council in violation of the appearance of fairness doctrine.

As to the sections of the DEIS dealing with land use regulation, a determination made that the proposal is "consistent" with the Skamania County comprehensive plan and development regulations is erroneous. SOSA has provided comments on that subject in its letter to the Council dated May 6, 2009 which is attached hereto and incorporated by reference herein. In that letter SOSA provided detailed legal authority and factual background that demonstrated that the construction and operation of wind turbines at the location proposed by the applicant is clearly contrary to the 2007 Skamania County Comprehensive Plan. Since the zoning code of the county preceded the 2007 comprehensive plan, it cannot be considered to implement any of its terms.

Fundamentally, Skamania County has never considered whether or not wind turbines are appropriate in any part of the County, much less within the conservancy designation in the comprehensive plan. As described in SOSA's May 6, 2009 letter, consideration of a draft ordinance that might have regulated the wind turbines was abruptly dropped, and never taken up again, by the Skamania County Commissioners after they learned they had to do an environmental impact statement before considering it. The apparent attempt of the DEIS to blame "local interest groups" for keeping the old zoning ordinance in effect is accordingly misplaced. The statement in the DEIS at page 3-145 that the "proposed updates are currently under appeal by local interest groups" is wrong. As noted in SOSA's May 6, 2009 letter attached hereto, Skamania County did not appeal the ruling against it by the Hearing Examiner and her decision is final.

In summary, the proposal is not consistent with local planning and zoning regulations and the findings and conclusions regarding this ISSUE should be revised for the final EIS.

3. FOREST LAND UNDER G.M.A.

In addition, this section of the DEIS fails to discuss or describe the impact of the Growth Management Act, RCW ch. 36.70A and its regulations on the subject proposal. Though Skamania County is not a county required to plan under GMA, it is required by GMA to designate natural resource land, including:

(b) Forest lands that are not already characterized by urban growth and that have long-term significance for the commercial production of timber[.]

RCW 36.70A.170. The purpose of such designation is to assure that forest lands of long term commercial significance will be protected by appropriate land use regulation.

It is apparent from the discussion in the EIS that the project site meets the definition of forest lands of long term commercial significance. As the DEIS indicates:

This site has been in commercial forestry use for the last century, during which the site has been logged over a series of approximately 50 year rotations.

DEIS at page 2-18. See also DEIS at page 1-9, "the site has a long history of commercial logging . . . "

The reason that forest lands are required to be identified is that such lands are intended to be protected and preserved from nonforestry uses. In the present case, industrial wind turbines are intended to cover significant portions of this commercial forest land, contrary to GMA's directives.

Further, this proposal is the first, or one of the first, to be sited in the timbered forest lands near the Columbia Gorge. Under these circumstances, the FEIS must consider whether this project will serve as a precedent for other or future projects impacting the scenic values of the Gorge and forested areas.

Finally, the DEIS at page 3-151 says that there will be no "changes to existing land uses, land use activities or development patterns." This conclusionary statement is unsupported by any objective evidence and is incorrect. It is well known that the placement of industrial wind turbines has a significant adverse impact on residential uses and tourism activities. This is true for most wind turbine locations, but is especially true in areas highly valued for scenic resources, including the Columbia Gorge, which

are prized for their aesthetic surroundings. Much more detailed analysis is required for adequate consideration of these issues.

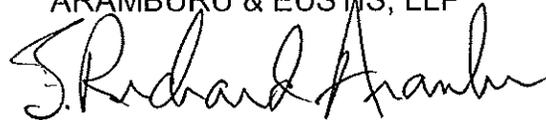
4. SOLAR ENERGY FACILITY

The DEIS discusses only the development of the site for wind energy facilities. The consideration of alternatives should be expanded to consider other alternate energy sources such as solar energy. Recently, a proposal for a 75 MW solar reserve has been made in Kittitas County (the Teamaway Solar Reserve, or "TSR"). The proposal will consist of approximately 145 acres for photovoltaic solar panels spread out over 900 acres. Such a proposal would reduce visual impacts and eliminate the noise impacts associated with wind turbine facilities, as well as eliminating the need for transportation of large towers and blades for wind turbines. This alternative should be fully considered in the DFEIS or FEIS.

Thank you for this opportunity to comment on the DEIS. SOSA trusts that the FEIS will provide facts and analysis discussed herein.

Sincerely yours,

ARAMBURU & EUSTIS, LLP

A handwritten signature in black ink, appearing to read "J. Richard Aramburu". The signature is written in a cursive style with a large initial "J" and "A".

J. Richard Aramburu

JRA:cc
cc: Client

ARAMBURU & EUSTIS LLP

ATTORNEYS AT LAW
720 THIRD AVENUE, SUITE 2112
SEATTLE, WASHINGTON 98104
(206) 625- [REDACTED] • FAX (206) 682- [REDACTED]

May 6, 2009

Allen Fiksdal, Manager
Energy Site Facility Site Evaluation Council
905 Plum Street SE, 3rd Floor
PO Box 43712
Olympia WA 98504-3172

Skamania County
Community Development Department
Post Office Box 790
Stevenson WA 98648

Re: Certificate of Land Use Consistency Review for
Whistling Ridge Wind Energy Project

Dear EFSEC:

This office represents the Save Our Scenic Area (SOSA), a Washington non-profit corporation concerned with the preservation of scenic, recreational and residential values and assets in the Columbia Gorge.

SOSA has closely followed the proposal of SDS Timber Company's Saddleback wind turbine proposal since its public announcement in late 2007. SDS changed the name of the proposal to the "Whistling Ridge Energy Project" (herein "WREP") when it applied to EFSEC. Most recently, SOSA was an appellant before the Skamania County Hearing Examiner in a successful challenge to the issuance of a determination of nonsignificance issued by Skamania County for its zoning code revisions. The Hearing Examiner has ruled that an environmental impact statement (EIS) will be required for the adoption of the new zoning code by the County.

SOSA writes today in response to the notice issued by EFSEC of a hearing on the question of whether the SDS proposal is consistent with local land use plans and zoning codes. The proposal is for multiple

wind turbines (50) on property located in eastern Skamania County. As will be demonstrated herein, the WREP proposal is not consistent with local zoning and there is no basis upon which EFSEC should attempt to preempt this local zoning.

1. STRUCTURE OF SKAMANIA COUNTY PLANNING AND ZONING.

Skamania County planning and zoning is governed by RCW 36.70, the County Planning Enabling Act. It is not one of the counties governed by the Growth Management Act RCW ch. 36.70A (GMA) and has not exercised the option to become a GMA county.

Skamania County first adopted a comprehensive plan in 1977, which was revised in 1991 with the creation of the Columbia River Gorge National Scenic Area (the "Scenic Area"). The 1977 Comprehensive Plan ("the 1977 Plan") is attached hereto as Attachment A. As will be described below, Skamania County recently (June, 2007) adopted a completely revised Comprehensive Plan, referenced herein as the "2007 Plan."

The County originally adopted a zoning code and map in 1985, which has been amended at various times over the years, the most recent of which was by Ordinance 2005-02 in 2005. The existing zoning code would presumably be consistent with the then adopted comprehensive plan from 1977.¹

After review by the planning commission, Skamania County adopted a new comprehensive plan in June, 2007. In the fall of 2007, Skamania County proposed a new zoning ordinance to implement the new comprehensive plan.

The adoption of the new zoning code requires procedural and substantive compliance with the terms of the State Environmental Policy Act, RCW 43.21C (SEPA). Skamania County has also adopted a local SEPA ordinance that governs the County's procedures under

¹ The Council is requested to take judicial notice of both the 2007 Plan and the current Skamania County zoning code.

SEPA. Skamania County is required by SEPA and its SEPA ordinance to make a "threshold determination" as to whether to prepare an EIS for its new zoning ordinance. This new zoning ordinance, for the first time in the history of planning and zoning in Skamania County, had specific provisions for large scale wind turbine facilities.²

Skamania County's responsible SEPA official, Planning Director Karen Witherspoon, issued a "mitigated determination of nonsignificance" or MDNS for the new zoning code proposal, which included large scale wind turbine regulations. Consistent with the terms of the Skamania County SEPA ordinance, the responsible official's MDNS was appealed to the Skamania County Hearing Examiner by both SOSA and the Friends of the Gorge. The Hearing Examiner held an open record hearing on January 21 and 22 at which the County vigorously defended its MDNS decision.

According to testimony from county officials at the hearing before the County's Hearing Examiner, representative of SDS had met several times with the Skamania County staff to discuss their proposed Saddleback project, but never submitted an application. BPA officials also were in attendance at such meetings according to Ms. Witherspoon's testimony.

On February 19, 2009, the Hearing Examiner entered her decision reversing the MDNS issued by the Responsible Official. See Attachment B hereto. As may be seen from the Findings and Decision, the testimony at the hearing focused on the adverse environmental impacts from wind turbines, centering on SDS's Saddleback proposal. That decision was not appealed by the County to Superior Court and is final. Under this ruling, before any decision is made by Skamania County on a zoning code map, an environmental impact statement must be prepared. Because the environmental impact statement must "accompany the proposal through the agency review process" (SEPA), the Skamania County Planning Commission must also reconsider any decisions it makes on the zoning ordinance based on the upcoming EIS.

² A copy of this proposed zoning ordinance is attached to the WREP application as Appendix F.

As of the date of this submission, no steps have been taken by Skamania County to prepare an environmental impact statement on its proposed zoning code and map.

2. THE WIND TURBINE PROPOSAL IS NOT CONSISTENT WITH THE EXISTING COMPREHENSIVE PLAN.

As noted above, Skamania County adopted a new comprehensive plan for the County in June, 2007. That ordinance replaced a now 30 year old comprehensive plan. See the 2007 Plan at 7.

The 2007 Plan adopted three land use designations, Rural I, Rural II and Conservancy. Rural I was intend to "foster the optimum utilization of land within growing areas of the county. . . ." See page 23. Rural I is the only one of the three designations that allows commercial activity and light or heavy industry. The Rural II designation "is intended to provide for rural living without significant encroachment for land used for agricultural and timber." Page 24. The Conservancy designation is "intended to provide for the conservation and management of existing natural resources" and "logging, timber management, agricultural and mineral extraction are the main use activities that take place in this area." 2007 Plan page 25. Importantly, there has been no effort to amend the comprehensive plan since its adoption in June 2007 by the applicant here or any other party. In this regard, it is important to note that the state Growth Management Act requires that all counties designate "natural resource land" pursuant to RCW 36.70A.170 which includes forest, agricultural and mineral lands of "long term commercial significance." The County recognizes its responsibilities under GMA in the comprehensive plan at page 9 of the 2007 Plan. However, the County has not made a formal designation of such lands. The 2007 Plan essentially provides that designation in the Conservancy designation, which meets the RCW 36.70A.170 criteria: "Conservancy areas are intended to conserve and manage existing natural resources in order to maintain a sustained yield and/or utilization." 2007 Plan at page 25. The WREP is located in the Conservancy and Rural II land use designations.

Significantly, there is no mention of allowance for wind turbines or wind energy in the Rural II or Conservancy designations. "Industry" is permitted in the Rural I category, but not in the other two designations. The Conservancy designation includes only the following relating to utilities:

Public facilities and utilities, such as parks, public water access, libraries, schools, utility substations and telecommunication facilities.

2007 Plan, p. 25-26. The 2007 comprehensive plan does not allow "private" or "semi-public facilities and utilities." Once again, the failure to include these uses as "appropriate uses" within the 2007 Plan is significant. These uses were defined in the existing zoning ordinance in the "Definition-Interpretation" section at SCC 21.08.010:

"Semi-public facilities" means facilities intended for public use which may be owned and operated by a private entity.

That this definition was not incorporated into the 2007 Plan is indicative of the intent of the legislative body not to allow such uses and that they were not included within the 2007 Plan indicates a deliberate exclusion. Further, note that the 2007 Plan does not mention electrical energy facilities at all, indicating such facilities are not allowed.

It cannot be that the failure to mention wind energy facilities or wind turbines was a matter of oversight. As the Skamania County Hearing Examiner found in her MDNS decision, there was interest expressed by the applicant here in developing a wind farm well before the Comprehensive Plan was adopted:

However, SDS Lumber has approached Skamania County on multiple occasions over the past several years to discuss a possible large-scale wind energy project (Saddleback Project) on its property within the County. Ms. Witherspoon (the Skamania County Planning Director) met with representatives of SDS and entities such as the Bonneville Power Administration on two or three occasions

for "pre-application meetings" to discuss the permitting requirements for the project. Multiple pre-application meetings have been held because of changes in the development team. The project, if developed, would consist of at least 40 wind turbines. Although the last formal pre-application meeting was approximately two years ago, individuals associated with the project have been involved in the County's code update process and the president of SDS was present at the subject appeal hearing.

Findings, Conclusions and Decision of the Hearing Examiner for Skamania County ("FCD"), Finding 37, page 13. In fact, as the Hearing Examiner found:

The Bonneville Power Administration (BPA) has produced a map entitled "Current and Proposed Wind Energy Interconnections to BPA Transmission Facilities" (Exhibit D.4). This map depicts the SDS Saddleback project as a proposed wind generation facility of 70 megawatts (MW).

FCD, Finding 38, p. 14. Skamania County and its commissioners have long been aware of the Energy Overlay Zone adopted by the neighboring county to the east (Klickitat); indeed, testimony at the Hearing Examiner hearing on the MDNS revealed that Skamania County was asked by Klickitat County to participate in the EIS process for its overlay zone, but Skamania County declined.

As described herein, the 2007 Comprehensive Plan does not authorize or permit electrical energy or wind turbines within the County. Policy LU6.1 deals with uses authorized under the comprehensive plan:

Three types of uses should be established for each land use designation under this plan and for any zone established to implement this plan. If any use is not listed as one of the following types of developments, then the use is prohibited within that land use designation.

The Plan goes on to describe uses that may be listed as allowable uses, review uses and conditional uses. Policy LU6.2 specifies that:

In the development regulations, land uses which are neither allowed without review by the Planning Department, permitted subject to conditions, nor named as a conditional use under a land use designation made in this plan or in an ordinance implementing this plan should be prohibited without proof of a substantial change in circumstances.

As such, uses not described as appropriate under each land use designation are to be prohibited. As applied to the WREP proposal, wind turbines are not mentioned as an allowable, review or conditional use in either the Conservancy or Rural II designations and are thus not allowed.

Under the County Planning Enabling Act, RCW ch. 36.70, a county is required to prepare and adopt a comprehensive plan. RCW 36.70.320 provides that:

Each planning agency shall prepare a comprehensive plan for the orderly physical development of the county, or any portion thereof, and may include any land outside its boundaries which, in the judgment of the planning agency, relates to planning for the county. The plan shall be referred to as the comprehensive plan, and, after hearings by the commission and approval by motion of the board, shall be certified as the comprehensive plan. Amendments or additions to the comprehensive plan shall be similarly processed and certified

The statute goes on to proscribe that the comprehensive plan will be the basic source of reference when the County reviews any proposed project under RCW 36.70.450:

After a board has approved by motion and certified all or parts of a comprehensive plan for a county or for any part of a county, the planning agency shall use such plan as the

basic source of reference and as a guide in reporting upon or recommending any proposed project, public or private, as to its purpose, location, form, alignment and timing. The report of the planning agency on any project shall indicate wherein the proposed project does or does not conform to the purpose of the comprehensive plan and may include proposals which, if effected, would make the project conform. If the planning agency finds that a proposed project reveals the justification or necessity for amending the comprehensive plan or any part of it, it may institute proceedings to accomplish such amendment, and in its report to the board on the project shall note that appropriate amendments to the comprehensive plan, or part thereof, are being initiated.

Unlike the GMA, zoning codes and maps are not required in counties operating under the county enabling act as RCW 36.70.550 provides:

From time to time, the planning agency may, or if so requested by the board shall, cause to be prepared official controls which, when adopted by ordinance by the board, will further the objectives and goals of the comprehensive plan. The planning agency may also draft such regulations, programs and legislation as may, in its judgment, be required to preserve the integrity of the comprehensive plan and assure its systematic execution, and the planning agency may recommend such plans, regulations, programs and legislation to the board for adoption.

As may be seen above, the 2007 Plan does not permit or allow wind turbine facilities by its terms. The County and this Council must apply the 2007 Plan as the "basic source of reference" in reviewing the SDS proposal and conclude that the present proposal is inconsistent with that plan.

3. PROPOSAL INCONSISTENT WITH SKAMANIA COUNTY ZONING ORDINANCE.

As described above, the proposal is inconsistent with the recently

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adopted (June 2007) Skamania County Comprehensive Plan. Notwithstanding this defect, the applicant urges that the proposal is consistent with the existing zoning code. However, the existing zoning ordinance was adopted before the adoption of the 2007 Comprehensive Plan. Neither the Skamania County Planning Commission nor County Commissioners have adopted the existing zoning code as consistent with the 2007 Plan. Accordingly, the policies of the 2007 Comprehensive Plan cannot be applied to that code. Moreover, it is clear that the existing zoning ordinance does not permit the subject proposal.

Under Washington state law, development regulations or the zoning code must be consistent with the adopted Comprehensive Plan:

36.70.545. Development regulations--Consistency with comprehensive plan. Beginning July 1, 1992, the development regulations of each county that does not plan under RCW 36.70A.040 shall not be inconsistent with the county's comprehensive plan. For the purposes of this section, "development regulations" has the same meaning as set forth in RCW 36.70A.030.

Accordingly, if the existing development regulations are not consistent with the adopted 2007 Comprehensive Plan, then the zoning regulations are ineffective.

The applicant makes two attempts to demonstrate that its wind turbine proposal is consistent with the existing code, neither of which is persuasive.

This analysis begins with the important fact that the existing zoning code does not make wind turbines, wind energy or wind farms an allowable, review or conditional use in any zone. It is significant that "geothermal energy facilities" are listed as a conditional use in the FOR/AG10 and 20, Rural Estate zones. See SCC 21.56.030, 21.44.030. Indeed, "geothermal energy" is a specific type of an "Alternative energy resource" under the EFSEC statute at RCW 80.50.020(18). This indicates that the county was aware of types of alternate energy facilities, but only chose to allow only "geothermal

energy" as a conditional use, whereas "wind," another specifically listed "alternate energy resource" under RCW 80.50.020(18), is not permitted anywhere. Once again, this is not an oversight as "wind turbines" are specifically mentioned in the current code as exempt from height limitations in SCC 21.70.050. However, wind turbines, wind farms or a use related thereto is not listed as a permitted review use or conditional use in the zoning code. The only conclusion to be reached is that wind turbines are not authorized or permitted under the existing code.

The applicant also argues that Table 2-1 in the 2007 Plan at page 23 declares that certain uses are permissible in certain zones. The applicant states at page 4.2-6 of its application that:

There are three land use designations outside of the specific subarea plans: Rural I, Rural II, and Conservancy. The project area is designated as "Conservancy." Table 2-1 of the Comprehensive Plan identifies zones that are consistent with the Conservancy designation, including: Residential 10 (R-10), Rural Estates 20 (RES-20), Forest Land 20 (FL 20), Commercial Resource Land 40 (CRL 40), Natural (NAT) and Unmapped (UNM). The project site is located in the FL 20, R-10, and UNM zones, all of which are consistent with the Conservancy designation.

However, Table 2-1 refers not to the current code, but to code that might be adopted after the 2007 Plan was adopted. This is clear from the explanation of the table at page 22:

Table 2-1 shows the comprehensive plan designations and consistency of each potential zoning classification. The Plan Designation to Zoning Classification table is provided to identify those zoning districts that are consistent with each plan designation. Those districts, which are not consistent with the plan designation, are not permitted within the plan designation. This information is necessary to determine when, where and under what circumstances these designations should be applied in the future.

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(Emphasis supplied). Thus the table references "potential" and "future" zoning classifications, not ones under the existing code. This is further demonstrated by the fact that the zoning classifications in Table 2-1 do not refer to the existing code, but to future code classifications. Thus, the "Commercial Resource Land 40" zone is a potential new zone as referenced in the draft zoning ordinance at Appendix F to the application. Under the existing code, the like zone is the Resource Production Zone or (FOR/AG20) zone, which is not mentioned in Table 2.1.

Thus Table 2-1 does not establish consistency with the existing code, but serves as a guide to a new zoning code, which has not yet been adopted and cannot be until an environmental impact statement is prepared under the Hearing Examiner's ruling.

The applicant argues that wind turbines are allowed as a use under the terms of the "Unmapped" area of the code. However, the terms of the 2007 Comprehensive Plan specifically provide that if a use is not listed as a conditional or allowable use within the land use designation under the plan then it will be prohibited. See discussion above and 2007 Plan at pages 30-31. The 2007 Comprehensive Plan also specifically provides under Policy LU2.6 that: "Building permits, septic tank permits, or other development permits issued by the County for any project will be in conformance with this Comprehensive Plan." (Emphasis supplied.) Since the "Unmapped" areas do not have a specific zone designation they must be regulated by the designation given by the 2007 Plan.

In addition, to determine the meaning of language within the 2007 comprehensive plan, it is useful to review the 1977 comprehensive plan it replaced. A copy of that plan is Attachment A hereto. That plan had identical land use designations, Rural 1, Rural 2 and Conservancy. See pages 91-92. Importantly, the 1977 comprehensive plan "Conservancy" designation provided:

The following inappropriate uses may be allowed on a conditional or temporary basis:

- a. Industrial
- b. Commercial

See page 92. The "NOTE" at the bottom of page 92 states:

Land uses which are considered by this plan to be inappropriate, may be established in Rural 2 and Conservancy land use areas, subject to public review and approval by the Board of County Commissioners. Such uses might include light industrial facilities, small commercial businesses, airstrips, portable sawmills, and other wood processing equipment.

(Emphasis in original). When the 2007 comprehensive plan was adopted, it retained verbatim the sentence setting the purpose and objective:

"Conservancy areas are intended to conserve and manage existing natural resources in order to maintain a sustained resource yield and/or utilization."

Compare page 25 of the 2007 comprehensive plan with page 92 of the 1977 comprehensive plan. However, the 2007 comprehensive plan removed any allowance for "Industrial" or "Commercial" uses either as permitted, review or conditional uses in the Conservancy designation.

The inclusion in the 1977 Plan of the "inappropriate" industrial and commercial uses also explains why the "Unmapped" zone (guided by the 1977 Plan) allowed uses which were "not nuisances," to take account of their characterization as "inappropriate." However, with the adoption of the 2007 comprehensive plan, and the elimination of any possibility of any "inappropriate uses," allowance of uses that were not nuisances became inconsistent with the comprehensive plan and thus illegal.

In addition, the applicant contends that its private wind turbine proposal should be considered "semi-public facilities and utilities" and thus an allowable conditional use in the existing FOR/AG10 and 20 zones. However, the Comprehensive Plan says that "Public Facilities and Utilities" (emphasis supplied) are allowed in the Conservancy and Rural II Land Use Designations, not "Semi-public Facilities and Utilities." Since both of these uses are defined terms in the existing

code, it is very clear that when the Commissioners chose to include only one in the comprehensive plan, it was a deliberate decision. In addition, the 1977 plan made specific provisions in the Rural 2 zone for "Semi-public" uses. See page 91. "Semi-public" uses were specifically eliminated from the 2007 comprehensive plan in all land use designations, including "Conservancy." See 2007 Plan, p. 24-26. Further, the provision in the comprehensive plan gives examples of the kinds of "public facilities and utilities" which are appropriate in the zone "such as parks, public water access, libraries, schools, utility substations and telecommunication facilities." It cannot be said up to 50, 425 foot tall wind turbines as the WREP would intend, with an extensive road network, can be equated to such modest and common place uses as parks, public accesses and schools. If these were intended to include wind turbines, wind farms and other alternative energy facilities, the comprehensive plan would have said so by simply adding a definition of such uses. Of course if there was a proposal to include large wind farms within the 2007 Plan, it would have likely ignited significant controversy.

In essence, inclusion of a large scale wind farm as a "facility and utility" permissible in the Conservancy designation is a de facto amendment of the comprehensive plan. It does so without adherence to the requirement that the planning commission first review the comprehensive plan or any amendments under RCW 36.70.320 and .410, that there be a public hearing and a final decision by the Commissioners. RCW 36.70.380 and .420. In addition, the inclusion of wind turbine or other facilities in the comprehensive plan would have required new SEPA compliance. Given that the inclusion in the zoning code of provisions for wind farms has resulted in the requirement for an environmental impact statement, the same would likely be true for the comprehensive plan adoption.

In addition to the foregoing, the issue of consistency between the existing zoning code and the comprehensive plan arose in the hearing before the Skamania County on the appeal of SOSA and Friends challenging the County MDNS for the new zoning code. SOSA in particular alleged that the 2007 Comprehensive Plan was inconsistent with the proposed zoning ordinance. In response, the County argued that the allowance of wind turbines in the proposed

zoning ordinance did not have a significant impact because wind turbines were already allowed. This issue was resolved in favor of SOSA when the Hearing Examiner found:

The 2007 Comprehensive Plan does not contemplate the type of energy facilities described in the Planning Commission Recommended Draft.

FCD, Finding 18, page 8. As an issue regarding the comprehensive plan, which was actually litigated between the County, SOSA and Friends, the County is now prevented from contesting this conclusion under the doctrine of claim preclusion or *res judicata*. Washington law is clear that *res judicata* applies to administrative proceedings:

Res judicata, modernly called claim preclusion, P. Trautman, Claim and Issue Preclusion in Civil Litigation in Washington, 60 Wash.L.Rev. 805 (1985), applies to quasi-judicial decisions by administrative tribunals as well as to judicial decisions by courts. *State v. Dupard*, 93 Wn. 2d 268, 274, 609 P.2d 961 (1980); *Miller v. St. Regis Paper Co.*, 60 Wn. 2d 484, 485, 374 P.2d 675 (1962); see *McCarthy v. Department of Social and Health Servs.*, 110 Wn. 2d 812, 823, 759 P.2d 351 (1988) (collateral estoppel); *Malland v. Department of Retirement Sys.*, 103 Wn. 2d 484, 490, 694 P.2d 16 (1985) (same). The Board's 1985 decision was quasi-judicial because it denied a proposed plat, and an administrative decision denying a proposed plat is quasi-judicial. *Miller v. Port Angeles*, 38 Wn. App. 904, 908, 691 P.2d 229 (1984), review denied, 103 Wn. 2d 1024 (1985); *Lechelt v. Seattle*, 32 Wn. 2d 831, 835, 650 P.2d 240 (1982), review denied, 99 Wn. 2d 1005 (1983); see RCW 58.17.100 (findings of fact required); RCW 58.17.180 (review is by writ of review). Therefore, the Board's 1985 decision was subject to *res judicata* at such time as it became final. *Columbia Rentals, Inc. v. State*, 89 Wn. 2d 819, 821, 576 P.2d 62 (1978) (final judgment is *res judicata*); *Pinkney v. Ayers*, 77 Wn. 2d 795, 796, 466 P.2d 853 (1970) (interlocutory order is not *res judicata*).

Lejeune v. Clallam County, 64 Wn. App. 257, 264-265, 823 P.2d 1144, (1992).

The finding by the Hearing Examiner that the 2007 comprehensive plan did not contemplate the wind energy facilities described in the zoning ordinance is binding on the County. Further, the existing zoning code, even if adopted by the County to implement the 2007 Plan (which it was not), does not permit large scale wind facilities.

5. THE RECOMMENDED DRAFT OF THE PLANNING DEPARTMENT CANNOT BE CONSIDERED BY EFSEC.

At Appendix F of its application, SDS argues that the EFSEC should consider a draft, unadopted zoning code and map. EFSEC will commit error if it considers the proposed code for two reasons.

First, zoning codes do not become effective until they are adopted by the legislative body with jurisdiction. Zoning codes and maps are considered "official controls" under RCW 36.70.02(11):

(11) "Official controls" means legislatively defined and enacted policies, standards, precise detailed maps and other criteria, all of which control the physical development of a county or any part thereof or any detail thereof, and are the means of translating into regulations and ordinances all or any part of the general objectives of the comprehensive plan. Such official controls may include, but are not limited to, ordinances establishing zoning, subdivision control, platting, and adoption of detailed maps.

See also RCW 36.70.560. RCW 36.70.570 specifically requires that:

Official controls shall be adopted by ordinance and shall further the purpose and objectives of a comprehensive plan and parts thereof.

(Emphasis supplied). Zoning ordinances and zoning maps may only be

adopted after a public hearing and recommendations by the Planning Commission under RCW 36.70.320 and .420. There is no provision in EFSEC legislation to consider unadopted codes, or ones under consideration.

Second, the Skamania County Hearing Examiner has ruled the MDNS issued by the responsible official in Skamania County was issued in error. The ruling of the Examiner is as follows:

The Determination of Nonsignificance is reversed, and remanded to the County for preparation of an Environmental Impact Statement for the zoning code map and text amendments.

FCD, p. 29.

Under the terms of SEPA, the EIS when completed "shall accompany the proposal through the agency review processes; . . ." RCW 43.21.030(2)(d). In the present case, the Planning Enabling Act requires that before an agency adopts a zoning ordinance or maps, a public hearing must be held by the Planning Commission under RCW 36.70.580:

Before recommending an official control or amendment to the board for adoption, the commission shall hold at least one public hearing.

Following the public hearing, the Planning Commission must make a recommendation to the County Commissioners under RCW 36.70.600.

The recommendation to the board of any official control or amendments thereto by the planning agency shall be by the affirmative vote of not less than a majority of the total members of the commission. Such approval shall be by a recorded motion which shall incorporate the findings of fact of the commission and the reasons for its action and the motion shall refer expressly to the maps, descriptive and other matters intended by the commission to constitute the plan, or amendment, addition or extension thereto.

The indication of approval by the commission shall be recorded on the map and descriptive matter by the signatures of the chairman and the secretary of the commission and of such others as the commission in its rules may designate.

For SEPA purposes, the "existing agency review process" involves, at a minimum, public hearings before the Planning Commission, a recommendation by the Planning Commission and action by the County Commissioners. Each of these processes will require that a final EIS be prepared and available for those bodies. Thus any action previously taken, or recommendations made, must be reconsidered in light of Hearing Examiner's requirement that an EIS be prepared. Since the County has not yet prepared an EIS on its zoning ordinance, any existing drafts of a proposed ordinance may not be considered by EFSEC.

6. THE ROAD ACCESS TO THE SITE IS NOT PERMITTED BY SCENIC AREA RULES.

The application filed herein describes the improvement and widening of a road that appears to be the primary access to the site. Approximately 2.1 acres of this road are located in the National Scenic Area and are controlled by Skamania County Scenic Area regulations. The Friends of the Columbia River Gorge has addressed this issue in correspondence and SOSA adopts by reference the position stated by Friends on this issue in their submission.

7. SKAMANIA COUNTY CERTIFICATE OF LAND USE CONSISTENCY.

SOSA has just received Skamania County Resolution 2009-22 which purports to adopt a Certificate of Land Use Consistency for the WREP proposal. This Resolution was adopted on May 5, 2007 by the Skamania County Commissioners. Copies of the Resolution and its accompanying 28 page staff analysis were not available prior to adoption. Because of its late adoption, and lack of notice, SOSA is not able to provide a detailed response to the Resolution at this time. Neither county staff nor the commissioners provided notice of the

content of what was intended to be adopted and there were no public hearings on the matter. The Planning Commission for Skamania County was neither contacted or consulted regarding this matter. Accordingly, SOSA requests a two week delay in the close of the record on the land use consistency hearing to provide comments on the county's resolution.

SOSA does have one preliminary comment. As noted above, the County's 2007 comprehensive plan contains no provisions for wind energy facilities in any land use designation. Notwithstanding this obvious deficiency, the County Commissioners proposed a zoning ordinance and map that would allow wind energy facilities in Conservancy designations. The County's decision not to prepare an environmental impact statement on the zoning code and map was appealed to Skamania County's own Hearing Examiner. She not only reversed the MDNS issued by the County (see Attachment B), but also ruled that the "2007 Comprehensive Plan does not contemplate the type of energy facilities [among them large scale wind energy facilities] described in the Planning Commission Recommended Draft." The County did not appeal the Hearing Examiner decision to the Superior Court.

Now, in the letter accompanying the submission of Resolution 2009-22 to this Council, everyone is told that:

Since this decision (of the Hearing Examiner requiring the environmental impact statement) the map and updates for the Zoning Ordinance project have been permanently placed on hold. It has not been decided whether or not the County will continue with this project or start from scratch when the zoning update process resumes.

May 4, 2009 letter from Karen Witherspoon to EFSEC, page 2.

It is clear that the County, having been denied the approval of wind turbines in legally appropriate processes, has now decided to go through the "back door" to try to legalize large scale wind farms by simply deciding that they are consistent with existing codes. However, as demonstrated above, the adopted comprehensive plan and zoning ordinances do not allow such facilities. It is likely that the County's

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actions, as interpretations of land use codes, will be challenged as illegal under the Washington Land Use Petition Act. In the meantime, EFSEC should refuse to consider the county's position on this matter or dismiss it and hold that the proposed project is not consistent with the comprehensive plan and zoning ordinances.

Based on the foregoing, SOSA submits that the WREP is inconsistent with the 2007 Skamania County Comprehensive Plan and current zoning code and EFSEC should so conclude.

Thank you in advance for your consideration of our views.

Sincerely yours,

ARAMBURU & EUSTIS LLP

A handwritten signature in black ink, appearing to read "J. Richard Aramburu". The signature is written in a cursive style with a large initial "J" and "A".

J. Richard Aramburu

JRA/py
cc: SOSA