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Whistling Ridge Energy Project

Applicant's Memorandum Regarding Consistency with Local and Regional Land Use Plans and Zoning Ordinances
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I. Consistency Determination Process

WAC 463-26-090
Procedure where certificates affirming compliance with land use plans and zoning ordinances are presented.

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

WAC 463-26-110
Determination regarding land use plans and zoning ordinances.

The council shall make a determination as to whether the proposed site is consistent and in compliance with land use plans and zoning ordinances pursuant to RCW 80.50.090(2).

RCW 80.50.090
Public hearings.
* * *
(2) Subsequent to the informational public hearing, the council shall conduct a public hearing to determine whether or not the proposed site is consistent and in compliance with city, county, or regional land use plans or zoning ordinances. If it is determined that the proposed site does conform with existing land use plans or zoning ordinances in effect as of the date of the application, the city, county, or regional planning authority shall not thereafter change such land use plans or zoning ordinances so as to affect the proposed site. [Emphasis added]

* * *

Oregon Washington
California Utah Idaho Colorado Minnesota

II. Preemption Authority if the Council Determines that the Facility is Not Consistent with Land Use Plans and Zoning Ordinances

RCW 80.50.110
Chapter governs and supersedes other law or regulations — Preemption of regulation and certification by state.

(1) If any provision of this chapter is in conflict with any other provision, limitation, or restriction which is now in effect under any other law of this state, or any rule or regulation promulgated thereunder, this chapter shall govern and control and such other law or rule or regulation promulgated thereunder shall be deemed superseded for the purposes of this chapter.

(2) The state hereby preempts the regulation and certification of the location, construction, and operational conditions of certification of the energy facilities included under RCW 80.50.060 as now or hereafter amended. [Emphasis added]

RCW 80.50.120
Effect of certification.

(1) Subject to the conditions set forth therein any certification shall bind the state and each of its departments, agencies, divisions, bureaus, commissions, boards, and political subdivisions, whether a member of the council or not, as to the approval of the site and the construction and operation of the proposed energy facility.

(2) The certification shall authorize the person named therein to construct and operate the proposed energy facility subject only to the conditions set forth in such certification.

(3) The issuance of a certification shall be in lieu of any permit, certificate or similar document required by any department, agency, division, bureau, commission, board, or political subdivision of this state, whether a member of the council or not. [Emphasis added]

WAC 463-28-060
Adjudicative proceeding.

(1) Should the council determine under WAC 463-26-110 a site or any portions of a site is inconsistent it will schedule an adjudicative proceeding under chapter 463-30 WAC to consider preemption.

(2) The proceeding for preemption may be combined or scheduled concurrent with the adjudicative proceeding held under RCW 80.50.090(3).

(3) The council shall determine whether to recommend to the governor that the state preempt the land use plans, zoning ordinances, or other development regulations for a site or portions of a site for the energy facility or alternative energy resource proposed by the applicant. [Emphasis added]

WAC 463-28-070
Certification — Conditions — State/local interests.

If the council approves the request for preemption it shall include conditions in the draft certification agreement which consider state or local governmental or community interests affected by the construction or operation of the energy facility or alternative energy resource and the purposes of laws or ordinances, or rules or regulations promulgated thereunder that are preempted pursuant to RCW 80.50.110(2).

WAC 463-28-080
Preemption — Recommendation.

The council's determination on a request for preemption shall be part of its recommendation to the governor pursuant to RCW 80.50.100.

III. Consistency with Skamania County's Land Use Plan and Zoning Ordinances

Skamania County (County) has certified consistency with its locally-adopted land use plan and zoning ordinances. This determination of consistency constitutes "*prima facie* proof of consistency and compliance with such land use plans and zoning ordinances." WAC 463-26-090. This means that the burden is on opponents of the Whistling Ridge Energy Project (Project) to disprove the County's determination. The Project is consistent with both the County's comprehensive plan and zoning ordinances.

1. **Comprehensive Plan Consistency:** As the County has determined in its Land Use Consistency certification, the Project is within the area designated "conservancy" in the County's 2007 Plan. Public utilities and facilities and utility substations are allowed uses. In accordance with the County's determination, the Project is an allowed use, subject to applicable zoning requirements.

2. **Most of the Project is Proposed in the "Unmapped Zoning" Area (UNM) of the County—The Project is an Outright Permitted Land Use:** With the exception of one proposed turbine corridor (the "A" string, containing up to seven turbines), all wind turbines are proposed in the UNM zone. The Project is an outright permitted use in the UNM zone, and is consistent with and in compliance with all applicable land use plans and zoning ordinances related to the UNM zone.

> *"In the UNM zone all uses which have not been declared a nuisance by statute, resolution, ordinance or court of jurisdiction are allowable. The standards, provisions, and conditions of this title [SCC Title 21] shall not apply to unmapped areas (SCC 21.64.020)."*

SCC 8.30.010 enumerates the sum total of the nuisances established by the Board of County Commissioners by resolution and ordinance. The proposed wind energy use does not and will not constitute a "nuisance" under Washington law.

3. **Approximately 7 of the Turbines are Proposed in Areas Zoned For/Ag-20:** As the County has determined in its Land Use Consistency certification, semi-public utilities are defined in SCC 21.08.010 as *"facilities intended for public use which may be owned and operated by a private entity."* For the For/Ag-20 zone, "semi-public utilities" are allowed by conditional use permit. The proposed Project is a semi-public utility under SCC Title 21 with turbine corridor A1-A7 located in the For/Ag-20 zones. This corridor would be subject to the local conditional use provisions outlined in SCC 21.16.070.

The zoning code would require a determination of whether the proposed use is compatible with existing or permitted uses in the specific area using six criteria. The A string would complies with the applicable criteria. Conditions may be imposed based on the health, safety, and general welfare of the public, any environmental standards in force, and provisions of SCC Title 21.

V. Legal Relationship Between the Comprehensive Plan and Zoning Code

The Project is consistent with the County's comprehensive plan. That is the County's determination. Even if project opponents disprove the *prima facie* consistency determination by the County, *Skamania County is not a GMA County*. The County's comprehensive plan is a

"blueprint" and is considered no more than a "guide" to the later development and adoption of official controls. Washington appellate courts have been consistent in this distinction:

> "**Kitsap County plans and zones pursuant to the Planning Enabling Act of the State of Washington**, RCW 36.70, which is designed to assure "the highest standards of environment for living." RCW 36.70.010. CARPENTER v. ISLAND COUNTY, 89 Wn.2d 881, 887, 577 P.2d 575 (1978). RCW 36.70.320 directs the county planning agency (commission) to prepare a comprehensive plan. That plan is defined as a source of reference and policy guide for official regulations and controls. RCW 36.70.020(6)(c) and (d). "Official controls," including zoning ordinances, are "the means of translating into regulations and ordinances . . . the general objectives of the comprehensive plan." RCW 36.70.020(11). RCW 36.70.340 states the comprehensive plan shall not "be considered to be other than . . . a guide to the later development and adoption of official controls.""

Barrie v. Kitsap County, 93 Wn.2d 843 (1980). [*NOTE: This is a seminal cases. Over the years, particularly for non-GMA counties, this holding has been quoted repeatedly by Court of Appeals and the Supreme Court.*]

In short, to the extent any project opponent that the County's zoning map and ordinances do not sufficiently implement the comprehensive plan, the zoning plan and ordinances control over the "blueprint guidance" offered by the comprehensive plan. Further, even if the Siting Council somehow found that the Project is "inconsistent" with the comprehensive plan, the Council's preemption authority can resolve any inconsistency. RCW Ch. 80.50 anticipates that the imposition of appropriate conditions is the principal tool to resolve any inconsistency.

VI. Critical Areas Ordinance ("CAO")

The County has determined that the Project is consistent with the locally adopted CAO. The aspect of the County's critical areas ordinance (CAO) that is potentially applicable to the Project relates to geological hazards. While the Project is consistent with the CAO, the CAO is principally an environmental regulation, addressed through SEPA review.

VII. Skamania County Code, Title 22, Columbia River Gorge National Scenic Area ("NSA") – Access Road

In its Land Use Consistency certification, the County had determined that the minor roadway improvements proposed within the General Management Area of the NSA are consistent with the locally adopted and applicable land use and environmental ordinances and plans applicable to

this area of the County. *In its Staff Report, the planning department emphasizes that by law, the applicable criteria cannot be used as grounds to deny the road improvements, but may form the basis for conditions.* Staff Report at p. 20. Such conditions may include minimization of clearing and revegetation as practicable and necessary. *In the Planning Department's letter to the Council, the County notes that similar road improvements "have been found consistent with SCC Title 22 in the past*." County Letter at p. 2.

As discussed below, the principal legal issue related to the NSA location of the roadway is whether the preemptive provisions of RCW Ch. 80.50 are compromised by the fact that the roadway improvements are proposed within the NSA, notwithstanding the fact that the approval decision would be exclusively within the County staff's authority, with no decisionmaking role for the Gorge Commission. The law does not require such a duplicate and inefficient process, which would significantly erode both the policy and legal objectives of the State of Washington in siting energy facilities, and potentially lead to the absurd conclusion that the Governor's decision would be appealable to a County Hearing Examiner, the Gorge Commission, and three tiers of judicial review.

1. The energy facility is outside the Columbia River Gorge National Scenic Area (NSA). The Project is proposed adjacent to the NSA; however, access to the Project site would be through the NSA. The NSA expressly states:

> *"Nothing in Sections 544 to 544p of this title [the Act] shall * * * establish protective perimeters or buffer zones around the scenic area or each special management area. The fact that activities or uses inconsistent with the management directives for the scenic area or special management areas can be seen or heard from these areas shall not, of itself, preclude such activities or uses up to the boundaries of the scenic area or special management areas (16 USC § 544(o) Section 17(a)(10)."*

Thus, siting the Project up to the NSA boundary is acceptable under the Act as approved by the United States Congress.

The NSA has no regulatory effect on the land use consistency of the Project site. Any ramifications for visual or aesthetic effects would be addressed both through the Council's substantive review and through the SEPA process.

2. Roadway improvements are proposed within the NSA. The private road is "associated" with the energy facility. The Project application proposes the Council's consideration of minor improvements to 2.1 miles of private road (CG2930) for access roadway improvements through an area designed under the NSA as a "General Management Area" (GMA). This road crosses private lands that are in the GMA but outside the Project boundary. This road is considered an "associated facility" to the Project under RCW 80.50.020.

Improvement of the existing access road (CG 2390) through the NSA would fulfill the Act's second purpose by supporting the Columbia River Gorge economy in areas exempt from NSA regulations. Further, the road improvements within the NSA will be designed to comply with applicable provisions of SCC Title 22. SCC Title 22 is the locally adopted ordinance that implements the Act and would be directly applicable to the Project.

The NSA review principally relates to a consideration of the visual impacts of the road improvements, and these standards may not be used to deny the required improvements. Existing vegetation would be retained to the maximum extent practicable along improved NSA roadways, and any disturbed areas would be re-vegetated to maximize vegetative screening of the road locations from Key Viewing Areas ("KVAs") where topographic screening is not possible. It is likely that most, if not all, of the proposed road improvements would be fully screened from KVAs by a combination of existing and planted vegetation and topographic screening. Due to its location and the minor nature of the roadway improvements proposed, the road is consistent with the NSA's scenic, cultural, natural and recreation standards, as regulated by the County's zoning ordinance, specifically SCC Title 22.

3. County Review of the NSA Roadway Improvement Application (Process) is Preempted by EFSEC. EFSEC Should Apply the Substantive Criteria in SCC Title 22 to its Consideration of the Roadway Improvements through Site Certification and SEPA Review. Under both RCW 80.50.110 and .120, any permitting process and any decision issued by the County, whether issued by its administrative staff or other body, would be preempted by the site certification recommended by EFSEC and ultimately approved by the Governor. The road improvement approval is specifically within the County's authority under the NSA. The law empowers County planning staff to issue an administrative decision concerning the road improvements. An appeal of that decision ***is first heard by the County Hearing Examiner.*** A further appeal, if filed, would then be heard, on the record (with no hearing) before the Gorge Commission. Further appeals would be taken to the Skamania County Superior Court, the Washington Court of Appeals, and finally the Washington Supreme Court.

The approval of road improvements itself is not a Gorge Commission decision. Rather, the Gorge Commission is simply one of numerous appellate bodies should someone file an appeal. The Commission has no original decision-making authority, and Commission review of a decision is entirely hypothetical until an appeal is actually filed. The Gorge Commission neither provides a recommendation to the County, nor does it make the final land use decision. All original decision-making authority would be with the County planning department. The hypothetical role of the Gorge Commission as an appellate body does not undermine the authority of EFSEC to approve any portion of the Project, whether it be the energy facility itself or an associated facility, including any associated road improvements proposed within the NSA. For EFSEC to hold otherwise would be in contravention of the Governor's authority under RCW Ch. 80.50, potentially subjecting a minor component of the Project decision to a separate appeal

through the County hearing examiner, the Gorge Commission, and then possibly three tiers of judicial appeals.

EFSEC is authorized to preempt state laws that conflict with the Energy Facilities Site Locations Act ("EFSLA") in RCW chapter 80.50 (as characterized by the Washington Supreme Court in *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wash 2d 275, 309 (2008)) while at the same time ensuring that the site certification recognizes the purpose of the preempted laws, regulations, or rules by imposing conditions.

EFSEC preempts local land use and environmental regulations. SCC Title 22 is a local land use and environmental regulation. The permit decisions made thereunder are County permits, not Gorge Commission approvals. The County, through its planning staff, is a political subdivision of the State of Washington. A decision by EFSEC is required in order to accomplish Washington's policy of one-track decisionmaking for energy facilities, including a single track of appeals through the Washington Supreme Court.

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