BEFORE THE STATE OF WASHINGTON

ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of the Application No. 2009-01: WHISTLING RIDGE ENERGY LLC WHISTLING RIDGE ENERGY PROJECT	APPLICANT'S RESPONSE TO FRIENDS OF THE COLUMBIA GORGE, SAVE OUR SCENIC AREA, AND SEATTLE AUDUBON SOCIETY'S REQUESTS FOR RECONSIDERATION ORAL ARGUMENT OPPOSED

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APPLICANT'S RESPONSE TO OPPONENTS' PETITIONS FOR RECONSIDERATION

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TABLE OF CONTENTS

		Page
I.	INTRODUCTION	1
II.	GENERAL ISSUES	2
A.	Oral argument is unnecessary and should be denied	2
B.	The Council should strike Opponents' repeated references to, and attachments of, documents not in the record and all legal argument associated therewith.	2
C.	The Council could not have violated WAC 463-30-093, because the Project does not implicate this administrative rule.	6
D.	The Council need not set forth all conditions described in Order Nos. 868 and 869 in the draft Site Certification Agreement ("SCA"), because the SCA expressly incorporates these conditions	8
E.	More public process is not necessary (especially in the context of micro-siting) and would only further Opponents' desire for endless, serial litigation.	8
III.	LAND USE CONSISTENCY	10
A.	The Council properly concluded that Skamania County Resolution No. 2009-54 is a "certificate of land use consistency" under WAC 463-26-090.	10
B.	The Council properly addressed the Project's consistency with Skamania County's 2007 Comprehensive Plan, which is a "guide."	11
C.	The Project is allowed under Skamania County's zoning code and 2007 Comprehensive Plan.	14
D.	The Project does not violate the County's moratorium ordinance	16
E.	The 2009 hearings examiner's decision is irrelevant	17
IV.	RCW 80.50.010	17
A.	The "pressing need for increased energy facilities."	18
1.	"Need" for the Project is not a criterion under RCW 80.50.010, WAC 463-60-021, and Washington Supreme Court precedent	18
2.	The Council does not have authority to require that Whistling Ridge sell power to I-937 utilities	20
B.	"To provide abundant energy at reasonable cost" — the Council and the Washington Supreme Court have already held that "costs" are outside of the Council's jurisdiction under RCW 80.50.010	22
V.	AESTHETICS	22
A.	The adjudicative record, the Council's own FEIS, and the Council's "subjective" determinations do not support or require eliminating more of the Project.	22

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TABLE OF CONTENTS

		Page
B.	FOCG's mathematical critique of Table 1 in Order No. 868 ignores the Council's clear communication that "the degree of reduced visibility [in Table 1] is not a mathematical calculation."	24
C.	FOCG's concern with the "potentially important substantive implications" of the Council's use of the word "must" in Order No. 868 is frivolous.	25
D.	FOCG's desired aesthetic mitigation measures are not "available and reasonable."	25
VI.	HABITAT AND WILDLIFE	27
A.	FOCG mischaracterizes the Washington Department of Fish and Wildlife's ("WDFW") 2009 Wind Power Guidelines ("*WDFW Guidelines*") and the Council's administrative rules that reflect the *WDFW Guidelines*	27
B.	Whistling Ridge's pre-project assessment and surveys fully complied with the *WDFW Guidelines*.	28
C.	The Council correctly concluded that the Project poses a "low likelihood" of killing or harming northern spotted owls; no additional studies are necessary.	31
D.	The parties have had more than sufficient opportunities to evaluate both Whistling Ridge's proposed mitigation measures and the proposed mitigation parcel, both of which satisfy the applicable requirements	32
E.	The *WDFW Guidelines* do not require the "research-oriented" post-construction avian displacement studies Audubon and FOCG request that the Council require.	35
F.	The Council should deny FOCG's other wildlife-related requests	36
VII.	FOREST PRACTICES ACT COMPLIANCE	36
VIII.	OPPONENTS' REMAINING REQUESTS	37
A.	Deed restrictions and a Scenic Area-related siting condition are unnecessary and should not be required.	37
B.	The Council's statements regarding acreage are consistent with the record	38
C.	The Council should clarify the SCA's 18-month construction period	39
D.	The SCA should not be limited to 30 years	40
E.	Contrary to FOCG's assertions, SCA Art. III.K(5) does not limit the Council's "authority to address unanticipated harm to the environment" under SCA Art. VII.H; it simply provides the process for the Council's exercise of that authority and should be retained.	41
IX.	CONCLUSION	42

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I. INTRODUCTION

Whistling Ridge Energy LLC ("Whistling Ridge" or "WREP") submits this response to the petitions for reconsideration submitted by Friends of the Columbia Gorge ("FOCG"), Save Our Scenic Area ("SOSA"), and Seattle Audubon Society ("Audubon") (collectively "Opponents"). Opponents' petitions for reconsideration fail to demonstrate legal error or identify any finding or conclusion that is not solidly founded on substantial evidence in the record. Opponents reiterate arguments made in the past—arguments that continue to be unsupported by both the law and the record and that the Council has already properly rejected—and Opponents interpret selectively quoted portions of the Council's recommendation in ways that conflict with what the Council actually stated. After nearly three years of intensive review under RCW chapter 80.50 and the State Environmental Policy Act ("SEPA") that afforded Opponents and the public every opportunity to critique the Whistling Ridge Energy Project (the "Project") in any way imaginable, Opponents' audacious demand for more ongoing and endless process and review is made with the clear goal of pursuing serial litigation for decades to come. Enough is enough. The Project has been thoroughly vetted and has met every objective standard.

The only "criterion" the Project has apparently has not met is a "subjective" consideration the Council has interpreted into existence at the very end of this long process, doing so for the very first time in the Council's 40-year history. The only aspect of the Council's recommendation that needs to be reconsidered is its "subjective" decision to recommend denial of the A1-A7 and the entire C1-C8 turbine corridors. To best address the groundless attacks on the Council's recommendation, the Council should improve the language in the Orders to better clarify how the Council relied upon its own SEPA review, and how the Council consistently and materially integrated that process and conclusions derived from the Final Environmental Impact Statement ("FEIS") into its recommendations to Governor Gregoire.

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II. GENERAL ISSUES

A. Oral argument is unnecessary and should be denied.

Whistling Ridge opposes Opponents' requests for oral argument. The Council rejected Opponents' prior requests for oral argument because Opponents had not

> offered any reason why their written briefs might not suffice for Council consideration of the issues raised. If Council members have questions and request oral argument to assist them in reaching a decision, we will schedule argument in consultation with the parties.

Order No. 864 at 2. Opponents have not offered any reason why their written requests for reconsideration do not suffice for Council consideration of the arguments. *See* SOSA RFR at 1 (simply requesting oral argument); FOCG RFR at 1 n.1 ("[W]e believe oral argument on any petitions for reconsideration will be time well spent.").[1] Each party made oral argument at the commencement of the adjudicative hearing.[2] Opponents have *each* been afforded the opportunity to submit 175 pages of written argument (not including the response to petitions for reconsideration and multiple motions) to the Council following the close of the adjudicative hearing. The Council should deny this request, which would further Opponents' obvious strategy of causing delay without any benefit to the Council's consideration of the issues.

B. The Council should strike Opponents' repeated references to, and attachments of, documents not in the record and all legal argument associated therewith.

Throughout this proceeding, FOCG and SOSA have consistently communicated that they are above the Council's rules. *See, e.g.*, Order No. 865 ("Particularly troubling is Friends' acknowledgment that its incorporations by reference are made expressly to avoid the Council's briefing limitations."). Now, with the adjudication long behind us and no ability to subject

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[1] "Request for reconsideration" is abbreviated "RFR" for citation purposes in this response. This response uses "LU Br." for the initial brief on land use consistency, "LU Res. Br." for the response brief on land use consistency, "Adj. Br." for the initial brief on adjudicative matters, and "Adj. Res. Br." for the response brief on adjudicative matters.

[2] Whistling Ridge encourages the Council to review the transcripts of Opponents' oral arguments to observe how fruitless that effort was and how little Opponents actually "delivered" during the hearing itself, compared to the bombastic bravado. *See* Tr. at 14:20-21:21 (FOCG), 22:3-26:21 (SOSA).

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evidence to rebuttal and cross-examination, FOCG and SOSA continue this blatant disregard in their petitions for reconsideration by citing and attaching numerous documents that are not in either the adjudicative or the SEPA record. Petitions for reconsideration are limited "to the evidence in the record." WAC 463-30-335(2). Furthermore, as the Council has previously held,

> The problem with considering any such submission is that it is offered after the record is closed and the factual material has not been subjected to the scrutiny of cross-examination. Other parties would no doubt (indeed, they have informed us that they would) appeal any such process as a violation of due process and as illegal procedure in violation of our own rules.

Order No. 757 at 11. *See also* WREP Reply to FOCG and SOSA's Joint Motion to Reopen the Adjudicative Record for a Limited Purpose. FOCG and SOSA do not even attempt to articulate an argument as to why the Council should consider many of these documents. The Council should clearly communicate to FOCG and SOSA that the record is closed and that FOCG and SOSA, like all the other parties, must follow Council rules.

- **Scenic Area book excerpt:** SOSA cites and attaches a document that purportedly "appeared" in the commemorative edition of a book on the Scenic Area. SOSA RFR at 4:16-5:1, Att. A. SOSA makes no attempt to articulate an argument as to why the Council should consider this document. The Council should strike this document and the argument appearing on the cited portions of SOSA's request for reconsideration.
- **Rejected "Exhibit 23.02:"** SOSA cites and attaches Skamania County Ordinance 2010-06, which it describes as "Exhibit 23.02." SOSA RFR at 28:1-5, 29 n.5, 29:16-20, Att. B. However, the Council expressly "rejected" this document from admission into the record. Order No. 864 at 5. Again, SOSA makes no attempt to articulate an argument as to why the Council should consider this document and fails to even disclose to the Council that it is not in the record. The Council should strike this document and the argument appearing on the cited portions of SOSA's request for reconsideration.
- **Cowlitz County Superior Court decision:** FOCG cites and attaches a two-sentence decision from Cowlitz County Superior Court that the Council already held "was not offered into

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evidence during the hearing and no copies were provided to the Council or to other parties." Order No. 868 at 10. FOCG attempts to atone for its prior deliberate violation of Council procedure by now attaching this decision to its request for reconsideration. FOCG RFR at 3:9-22, Ex. A. FOCG makes no attempt to articulate an argument as to why the Council should consider this document, even as it admits that it was aware of this decision well in advance of the adjudicative proceedings. *See* FOCG RFR at 3 n.5. The Council should strike this document and the argument appearing on the cited portions of FOCG's request for reconsideration.

- **Commissioner's Agenda Item Commentary:** FOCG cites and attaches "the most recent moratorium ordinance, [Skamania County] Ordinance 2011-03." FOCG RFR at 9 n.21, Ex. B. Whistling Ridge does not oppose consideration of this ordinance, because a prior version appears as Ex. 1.15c. As Whistling Ridge has previously described and does so again in Part III.D of this response, the moratorium ordinance does not apply to the Project. However, FOCG did not simply attach the ordinance; it also attached a "Commissioner's Agenda Item Commentary." *See* FOCG RFR Ex. B at 5-6. FOCG makes no attempt to articulate an argument as to why the Council should consider this "commentary," and the Council should strike it from FOCG's request for reconsideration.

- **Pioneer Wind Parks (altered excerpts):** FOCG cites and attaches five pages excerpted from what appears to be a 54-page document concerning a wind energy project in Wyoming. FOCG RFR at 20:17-22, Ex. C. FOCG asks that the Council take official notice of this document because it "was not issued until July 18, 2011." FOCG RFR at 20 n.58. However, the Council's rule on official notice—WAC 463-30-230—specifically requires that "[p]arties shall be notified either before or during [the] hearing . . . of the material so noticed and the sources thereof . . . and they shall be afforded an opportunity to contest the facts and material so noticed." Whistling Ridge was not noticed before or during the adjudicative hearing of these excerpted pages, has not been afforded an opportunity to contest these excerpted pages, and has been provided with less than 10% of the document, which prevents both Whistling Ridge and the

Council from considering this document in its entirety. The five pages FOCG has attached have also been selectively highlighted, which suggests that FOCG attached altered excerpts rather than true copies. Moreover, a decision based on an unknown evidentiary record by some Wyoming decision-maker operating pursuant to unknown procedural rules is categorically irrelevant, lacks precedential value, and is utterly unreliable to influence the Council's recommendations.[3] The Council should not consider these altered pages and should strike them from the record.

- **Wildlife information for other Washington locations:** In criticizing Order No. 868 (*i.e.*, the Adjudicative Order), FOCG cites three documents purportedly prepared for other Washington wind energy projects in 2007 and 2009 that FOCG claims the "Whistling Ridge FEIS cites and relies" upon.[4] *See* FOCG RFR at 26 n.67 & n.69, 27 n.70. However, the Council made clear that Order No. 868 "does not consider the FEIS or its supporting documents, except those specifically received on the record of the adjudication." Order No. 868 at 6-7. FOCG never sought to admit these three documents into the adjudicative record, notwithstanding that they were prepared well in advance of the adjudicative proceeding. The evidentiary reliability and relevance of these documents to the adjudicative proceeding is unknown, and consistent with all other elements in FOCG's request for reconsideration and its overall conduct in these proceedings, FOCG's self-serving interpretation of any document outside the adjudicative record must be considered highly suspect. The Council should strike these citations and all arguments related to them.
- **Hearings Examiner Briefing:** Most outrageously, FOCG's criticism of the Council's characterization of the Skamania County hearings examiner's 2009 decision relies on what

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[3] Interesting, the altered excerpts indicate that this Wyoming decision-maker only considers evidence received before its record is closed, which stands in stark contrast to FOCG and SOSA's apparent belief that they can rely on any document outside the record whenever they wish, regardless of the blatant due process violation.

[4] One of the three documents FOCG claims was cited and relied upon in the Council's FEIS for the Project was the "Coyote Crest Final Environmental Impact Statement ('Coyote Crest FEIS')." FOCG RFR at 26 n.67. Although the Council's FEIS for the Project cites a draft report prepared for the Coyote Crest Wind Resource Area, the Coyote Crest FEIS is *not* cited. *See* FEIS at 3-299.

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FOCG purports to be a quote from the County's response brief in that other proceeding. *See* FOCG RFR at 6:1-7. However, the brief from that proceeding is *not* in the record for this proceeding, and the parties therefore are afforded no opportunity to respond. FOCG does not even attempt to provide the brief to the Council or the parties nor articulate an argument as to why the Council should consider a purported quote from this brief. The Council should strike line 1 through line 7 from page 6 of FOCG's request for reconsideration.

The Council has generously afforded Opponents every opportunity to admit whatever documents they desired into the record. *See, e.g.*, Tr. at 283:12-14 (Mr. Kahn describing how the Council admitted the entirety of a "number of [cross-examination] documents" even though Opponents had only asked "a question or two about one portion" of them). Whistling Ridge and the other parties have studiously followed the Council's rules and will continue to do so. Whistling Ridge only asks that the Council hold Opponents to the same standard, stand firm on the due process protections afforded by the adjudicative proceeding, and order Opponents to adhere to those protections.

C. The Council could not have violated WAC 463-30-093, because the Project does not implicate this administrative rule.

At the eleventh hour, near the conclusion of the Council's almost three-year review of the Project, FOCG and SOSA desperately argue for the first time that the Council has failed to ensure compliance with WAC 463-30-093. FOCG RFR at 40:23-41:17; Objection of FOCG and SOSA. Whistling Ridge is similarly unaware of how the Council conducted its deliberations, but Whistling Ridge is certain that WAC 463-30-093 was not violated.

FOCG and SOSA's argument ignores the fact that the Council sites transmission facilities (which can cross local jurisdictional boundaries) and energy plants (the "associated facilities" of which can cross local jurisdictional boundaries). *See* RCW 80.50.020(4), (11). Each local jurisdiction in which a facility is proposed must "appoint a member or designee as a voting member to the council. The member or designee so appointed shall sit with the council only at

such times as the council considers the proposed site for the [local jurisdiction] which he or she represents." RCW 80.50.030(4)-(5). In other words, the appointed council member participates in the entire review process except when the Council is considering part of a facility's site that is not within the local jurisdiction that appointed the Council member. For example, in the context of a proposed electrical transmission facility in two counties, the appointed member from one county would not discuss or vote on issues related to a proposed facility's consistency with the other county's land use regulations. Here, the Project is entirely within Skamania County. For that reason, WAC 463-30-093 was not triggered, and there was no need for the Council to "reflect compliance with the rule." FOCG RFR at 41:11.

Whistling Ridge understands that Skamania County is part of Washington, that citizens and businesses in the County use electricity generated inside and outside of the County, and that the County has an interest in ensuring that all activities within its borders comply with federal, state, and local law. There is no way that the aesthetic impacts of a facility proposed to be built in Skamania County do not concern Skamania County regardless of where those impacts might be perceived. The same is true for wildlife, noise, traffic, and every other environmental impact. Skamania County has a clear interest in the Columbia River. Skamania County has a keen interest in ensuring the Project "produce[s] minimal adverse effects on the environment, ecology of the land and its wildlife" under RCW 80.50.010. Skamania County has a clear interest in preserving cultural resources that may be found within its borders, including the Yakama Nation's tribal heritage. Skamania County has a keen interest in transportation impacts. FOCG and SOSA have not identified a single aspect of this Project that does not affect or concern Skamania County. It is patently absurd to demand that the Skamania County appointee only participate and deliberate in some narrow window of issues subjectively defined by the Opponents, then exit participation and deliberation on some ill-defined issue-by-issue basis. The Council need not make findings on a totally inapplicable administrative rule. FOCG and SOSA's argument lacks merit and should be denied.

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D. The Council need not set forth all conditions described in Order Nos. 868 and 869 in the draft Site Certification Agreement ("SCA"), because the SCA expressly incorporates these conditions.

At various points in its request for reconsideration, FOCG argues that Order Nos. 868 and 869 "discuss recommendations and explicit conditions that have not been included in the draft SCA. The SCA should be revised to explicitly include all terms and conditions." FOCG RFR at 22:23-25; *see also* FOCG RFR at 23:11-18 (micro-siting for aesthetics), 39:20-28 (micro-siting for wildlife), 41:18-42:2 ("omitted" conditions), 47:1-18 (transportation), 48:1-13 (noise). FOCG's argument ignores the express language of the draft SCA, which states:

> The State of Washington hereby authorizes Whistling Ridge Energy LLC (WRE or Certificate Holder) . . . to construct and/or operate the Project, as described in Article I.A. of this Agreement, *subject to the terms and conditions set forth in Council Order No. 869*, Council Order Recommending Site Certification on Condition (Attachment 4 to this Agreement), and this Site Certification Agreement.

SCA Art. I.B (emphasis added). Order No. 868 is attached and appended to Order No. 869. Order No. 869 at 4, 19. Thus, Order Nos. 868 and 869 are expressly attached to the SCA, and the Project is "subject to the terms and conditions set forth" in Order Nos. 868 and 869, regardless of whether such terms and conditions are individually set forth in the SCA.[5] FOCG's request to copy certain conditions into the SCA is unnecessarily duplicative and should be denied.

E. More public process is not necessary (especially in the context of micro-siting) and would only further Opponents' desire for endless, serial litigation.

FOCG makes multiple requests for conditions requiring yet more public process. *See, e.g.*, FOCG RFR at 13:17-14:6 (forest practices), 23:19-24:15 (micro-siting), 35:1-15 (habitat mitigation parcel), 43:22-44:22 (turbine replacement). FOCG's requested conditions ignore the Council's extensive, nearly three-year, multiple-tract public review process for the Project in which Opponents have actively participated. The requested conditions are shamelessly aimed at

[5] For this reason, FOCG's desire to specifically call out Order Nos. 868 and 869 in SCA's "Order of Precedence" is unnecessary. *See* FOCG RFR at 42:3-43:2 (seeking revisions to SCA, Art. III.L). Furthermore, the Governor does not have authority to modify the draft SCA or impose any conditions or terms on the Project. *See* RCW 80.50.100(3). Consequently, listing the "Governor's Decision" in the "Order of Precedence" is unnecessary.

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interminable, serial litigation with no finality of this process. There is no need for more process, costs, and delay to address issues that have been thoroughly vetted and definitively resolved (against Opponents' desires) in this proceeding.

FOCG further requests the micro-siting occur and be approved prior to the Council sending its recommendation to the Governor. FOCG RFR at 23:11-24:2. The draft SCA clearly defines micro-siting as "the final technical and engineering process by which the Certificate Holder shall recommend to the Council the final location of each wind turbine generator." SCA Art. II.21. The Project will not "change" in micro-siting. Instead, actual turbine locations will be identified within the turbine corridors permitted by the SCA. This has been clear throughout this proceeding.

> Q. . . . If you say, well, turbine string A is from this point to that point, but with micro-siting it may be adjusted, you know, 500 feet this way or that, or 200 feet. How much flexibility are you looking for?
>
> A. So to be clear we are not seeking [Council approval] for individual turbine locations. We're seeking corridors and if in micro-siting we want to find that ideal spot for a turbine it has to be within those corridors where we have the site certificate approval to do so.
>
> Q. So micro-siting would not make any adjustments to the corridor itself?
>
> A. No.

Tr. at 158:24-159:11 (Spadaro); *see also* ASC § 2.1.1. The Council is experienced in the construction of wind energy facilities, and it knows that micro-siting is a final design function that involves construction phase, site specific considerations that cannot be known until final engineering and mobilization to build a project. Micro-siting at this time is impossible and unnecessary.

The public and Opponents have had nearly three years to review the Project. The Council has already determined that its recommendation, including the micro-siting requirement described in Order No. 868, "appropriately assess the required mitigation for those impacts." Order No. 869

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at 14. If Whistling Ridge wanted to change the Project, a public process would be required to amend the SCA.[6] WAC 463-66-030. The Council has robust compliance, monitoring, and enforcement processes and mechanisms that ensure compliance with the SCA. *See* RCW 80.50.150; WAC ch. 463-70. There is no need for more public process to review this Project.

III. LAND USE CONSISTENCY

The Council "conclude[d] that the evidence and applicable law support the County's certificate of [land use] consistency, that the Project opponents have failed to present a credible case against it, and that the project is therefore consistent with the Conservancy designation in the Comprehensive Plan." Order No. 868 at 13. Indeed, the Council described Opponents' arguments concerning land use consistency as having "little or no relevance to the proceeding, or legal support." Order No. 868 at 9. Nonetheless, Opponents continue to pursue their meritless arguments on this issue.

A. The Council properly concluded that Skamania County Resolution No. 2009-54 is a "certificate of land use consistency" under WAC 463-26-090.

FOCG advances two arguments as to why it believes Skamania County did not adopt a certificate of land use consistency. First, FOCG argues that the Council "misunderstands" FOCG's argument that a land use decision must be made in order to issue a certificate of land use consistency, which again relies on an out-of-context, outside-the-record, irrelevant two-sentence Superior Court decision that FOCG claims interpreted the Land Use Petition Act ("LUPA") in another proceeding. FOCG RFR at 3:10-22; *see also* FOCG LU Res. Br. at 2:20-3:6. However, the Council has definitively confirmed that it "has no procedural requirements for validation of a certificate except lawful procedure, which is demonstrated here" in Skamania

[6] FOCG seeks a condition requiring a public process for "repowering," yet its desired condition applies to any turbine replacement. FOCG RFR at 43:22-44:22. If approved by the Governor, Whistling Ridge can construct any turbine that falls within the size and generating capacity described in the SCA and ASC. No additional public process should be required for replacement turbines that meet these parameters. In the event that Whistling Ridge wishes to utilize replacement turbines that exceed these parameters, the SCA would need to be amended pursuant to the Council's existing procedures under WAC ch. 463-66.

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County's adoption of Resolution No. 2009-54. Order No. 868 at 9-10. Thus, regardless of whether Resolution No. 2009-54 is a land use decision for purposes of review under LUPA,[7] it is most definitely a certificate of land use consistency for the Council's purposes.

Second, FOCG argues that unless the Council concludes that Resolution No. 2009-54 is not a certificate of land use consistency, it will "shift the burden to those arguing the project is inconsistent with local land use authorities." FOCG RFR at 4:21-22. However, that is precisely the effect of WAC 463-26-090; as "*prima facie* proof," a certificate of land use consistency creates a mandatory, rebuttable presumption of land use consistency and the burden shifts to Opponents. *See* WREP LU Br. at 6-7. FOCG is not arguing against Resolution No. 2009-54, but rather against WAC 463-26-090. FOCG's arguments are a rehash of prior baseless arguments that continue to lack merit and should be denied.

B. The Council properly addressed the Project's consistency with Skamania County's 2007 Comprehensive Plan, which is a "guide."

SOSA argues that "RCW 80.50.090(2) requires that EFSEC determine whether the proposed project is consistent, compliant, and in conformance with the comprehensive plan and the zoning code." SOSA RFR at 21:23-22:2. This is exactly what the Council did. *See* Order No. 868 at 10 ("[W]e recognize that our task is to determine whether the Project complies with the County's zoning ordinance and is consistent with its comprehensive plan."). Although the terminology for the review may have differed (compliance versus consistency), the substance of the Council's review of the Project against Skamania County's zoning ordinance and 2007 Comprehensive Plan was the same.

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[7] FOCG appealed the County's first certificate of land use consistency to the Gorge Commission. *See* Exs. 2.02, 25.02c, 25.03c. After Whistling Ridge amended its ASC, the County adopted a certificate of land use consistency (*i.e.*, Resolution No. 2009-54) for the amended ASC. Exs. 2.03, 25.04c. In light of FOCG's appeal, the County included in Resolution No. 2009-54 language meant to avoid a costly and unmeritorious second appeal. Skamania County LU Res. Br. at 3 n.6. FOCG nonetheless appealed again, and the Gorge Commission ultimately dismissed this second appeal for lack of subject matter jurisdiction. Ex. 25.04c.

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SOSA then takes issue with the Council's characterization of Skamania County's comprehensive plan being a "guide," arguing that under RCW 36.70.450 it should instead be used as the "basic source of reference."[8] SOSA RFR at 23:16-24:3. However, RCW 36.70.450 describes comprehensive plans developed under the Planning Enabling Act as being the "*basic source of reference and as a guide* in reporting upon or recommending any proposed project." (Emphasis added.) SOSA gives no reason why "basic source of reference" should be given precedence over "guide" in RCW 36.70.450. In fact, courts have repeatedly described comprehensive plans developed under the Planning Enabling Act as "guides" that do not have controlling effect, either directly or indirectly. *See, e.g.*, *Barrie v. Kitsap Cnty.*, 93 Wn.2d 843, 848, 613 P.2d 1148 (1980) ("[T]he comprehensive plan shall not be considered other than a guide to development."); *see also* RCW 36.70.020(6) ("Such plan . . . shall serve as a policy guide."), RCW 36.70.340 ("In no case shall the comprehensive plan . . . be considered to be other than in such form as to serve as a guide."). The Council's use of "guide," which is consistent with Washington statutes and case law, was not in error.

SOSA argues that RCW 36.70.545's enactment in 1990 made comprehensive plans "the controlling planning document" in Planning Enabling Act counties. SOSA RFR at 24:7-26. However, as Whistling Ridge has previously described, this argument misrepresents what RCW 36.70.545 requires and deliberately obscures the controlling authority of RCW 36.70.340 and RCW 36.70.450. *See* WREP LU Br. at 17-18. Statutes must be read in their entirety, not in

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[8] SOSA claims that Order No. 868 at 11 cited *West Hill Citizens for Controlled Development Density v. King County Council*, 29 Wn. App. 168, 627 P.2d 1002 (1981), "to argue the comprehensive plan is just a 'guide' with little significance." SOSA RFR at 24:4-7. The Court of Appeals in that case did hold that "a comprehensive plan is merely a 'blueprint' that suggests various regulatory measures. Strict adherence to a comprehensive plan has not been required. Even a zoning ordinance which conflicts with a comprehensive plan is not necessarily void." 29 Wn. App. at 172 (citations omitted). Nonetheless, the Council did not cite *West Hills* in Order No. 868 at 11. Instead, it cited *Westside Hilltop Survival Committee v. King County*, 96 Wn.2d 171, 634 P.2d 862 (1981). *See* Order No. 868 at 11 n.19. In that case, the Washington Supreme Court similarly held that "a comprehensive plan is advisory rather than regulatory. Such a plan suggests regulatory measures but does not impose them and, thus, does not itself deprive the landowner of any use of his property. The zoning ordinance is the regulatory measure under this state's scheme." 96 Wn.2d at 176 (citations omitted).

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a piecemeal fashion that is not faithful to the statute's language and underlying policy. *Vaughn v. Chung*, 119 Wn.2d 273, 282, 830 P.2d 668 (1992). Statutes are to "be construed to effect their purpose and unlikely, absurd or strained consequences should be avoided." *Kadoranian v. Bellingham Police Dep't*, 119 Wn.2d 178, 189, 829 P.2d 1061 (1992). SOSA's interpretation of RCW 36.70.545 ignores RCW 36.70.340 and RCW 36.70.450, which were enacted approximately 30 years prior to RCW 36.70.545 and which the legislature did not change when it enacted RCW 36.70.545. In other words, the legislature's clear statement in RCW 36.70.340 and RCW 36.70.450 that comprehensive plans under the Planning Enabling Act are not to be considered anything other than a "guide" remains true. Furthermore, SOSA's interpretation of RCW 36.70.545 leads to the "absurd or strained consequence[]" that the County's 2007 Comprehensive Plan controls over its zoning code, which is utterly inconsistent with the Planning Enabling Act. Indeed, as recently as 2008, the Court of Appeals reconfirmed that Planning Enabling Act comprehensive plans are "admittedly only in the nature of a 'guide' or 'blueprint' and have little force or effect. The zoning codes were the primary source of regulating property use." *Coffey v. City of Walla Walla*, 145 Wn. App. 435, 439 n.1, 187 P.3d 272 (2008).

SOSA next argues that the Council erred in concluding that Skamania County has not clearly indicated that compliance with its 2007 Comprehensive Plan is required, citing a *comprehensive plan policy* that SOSA claims requires conformance to the comprehensive plan. SOSA RFR at 24:17-25:23. Yet, in order for a comprehensive plan to have regulatory effect, Washington courts require that the *zoning code*—not the comprehensive plan—mandate compliance with the comprehensive plan. *See Cingular Wireless v. Thurston Cnty.*, 131 Wn. App. 756, 770, 129 P.3d 300 (2006) ("To the extent a comprehensive plan prohibits a use that the zoning code permits, the use is permitted. But where, as here, the zoning code itself expressly requires that a proposed use comply with a comprehensive plan, the proposed use must satisfy both the zoning code and the comprehensive plan." (citation omitted)). SOSA's citation

to this comprehensive plan policy does not undermine the validity of the Council's conclusion.[9] The Council properly addressed the Project's consistency with the 2007 Comprehensive Plan, which is a "guide."

C. The Project is allowed under Skamania County's zoning code and 2007 Comprehensive Plan.

SOSA argues the Project is not consistent with the zoning code because the zoning code does not "mention wind turbines or wind farms as a permitted, conditional or special use." SOSA RFR at 26:4-5. This specious argument completely disregards the fact that the vast majority of the Project site is in the "unmapped" zone, in which "all uses which have not been declared a nuisance by statute, resolution, ordinance, or court of jurisdiction are allowable." SCC 21.64.020. Thus, the inclusion or exclusion of wind turbines in the zoning code is irrelevant.

SOSA then argues that the Skamania County "Commissioners, knowing what wind turbines were, deliberately chose to not include wind turbines as permitted uses" in the 2007 Comprehensive Plan. SOSA RFR at 26:14-16. However, there is no evidence that the definition of wind turbines used in the zoning ordinance played any role in the County's adoption of the 2007 Comprehensive Plan. *See* WREP LU Res. Br. at 11:16-12:19 (discussing how "background information" is not legislative history). The 2007 Comprehensive Plan is clear that the listed uses are not exclusive. *See, e.g.*, Comp. Plan at 22 ("*Precise standards, such as* building setbacks, *permitted uses* within a particular zoning district . . . are included in the various implementing ordinances (official controls)." (emphases added)). Consequently, it was entirely appropriate for the Council to evaluate the Project's consistency in light of the range of uses the 2007 Comprehensive Plan contemplates. *See* Skamania County LU Res. Br. at 4:8-5:2.

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[9] SOSA's additional argument based on language in the County's 1977 Comprehensive Plan is simply not relevant to the question of whether the 2007 Comprehensive Plan is a guide rather than a regulatory document. *See* SOSA RFR at 25:11-23.

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SOSA criticizes Order No. 868's conclusion that wind is a natural resource by focusing on a purported definition of "natural resources" in the Growth Management Act, which SOSA argues does not include wind. *See* SOSA RFR at 26:25-27:13 (quoting RCW 36.70A.020(8)). However, RCW 36.70A.020(8) does not define anything; instead, it describes various goals, including some related to "natural resource industries," that are to "be used exclusively" by counties planning under the Growth Management Act. Of course, Skamania County is a Planning Enabling Act—rather than a Growth Management Act—county, and RCW 36.70A.020(8) has absolutely no relevance to the Project. The requirement that Skamania County "assure the conservation of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170" similarly does not refute the Council's conclusion that wind is a natural resource.

FOCG argues that the Council erred in concluding that the Project is "permitted as of right in the underlying unmapped area." FOCG RFR at 8:3-7 (citing arguments previously made in FOCG LU Br. at 9-12; SOSA LU Br. at 11-17). Whistling Ridge has already shown the errors in Opponents' reasoning as to each issue raised in the cited portions of Opponents' prior briefing.[10] None of these are new issues, and none warrant reconsideration of the Council's decision that wind energy facilities are allowed in unmapped parts of the County. Whistling Ridge and Skamania County's references to preemption simply reflect that "the question of whether a proposed project is consistent with local land use requirements is not dispositive" due to the Council's preemption authority.[11] Order No. 868 at 9. Contrary to FOCG's assertions,

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[10] *See* WREP LU Res. Br. at 5:11-8:14 (Forest Practices Act compliance), 9:1-10:16 (Skamania County's moratorium ordinance), 10:17-14:2 (2007 Comprehensive Plan consistency), 14:3-17 (Skamania County zoning ordinance compliance). On the pages of SOSA's prior briefing cited by FOCG, SOSA also advanced arguments about a zoning ordinance the County never adopted. This argument was so clearly irrelevant that it did not even warrant a response.

[11] FOCG expresses concern that one sentence of Order No. 868 could be misinterpreted to provide for preemption of Skamania County's land use regulations without the procedure required by RCW chapter 80.50. FOCG RFR at 2:16-3:36. However, because the Project is consistent with Skamania County's land use regulations, preemption is not required.

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these references do not imply that Whistling Ridge and Skamania County believe the zoning code does not allow the Project. *See* FOCG RFR at 8:17-18. FOCG's concern is motivated by the simple fact that in "unmapped" parts of the County, "all uses which have not been declared a nuisance by statute, resolution, ordinance, or court of jurisdiction are allowable." SCC 21.64.020. This is the existing law in this part of the County. There is no reason for the Council to reconsider its conclusion, much less a need for the Council to preempt nonexistent zoning regulations.

D. The Project does not violate the County's moratorium ordinance.

SOSA and FOCG again argue that the Project violates the County moratorium ordinance against accepting and processing SEPA checklists for forest practice conversions. *See* SOSA RFR at 27:19-30:27; FOCG RFR at 9:5-12:2. This is the same argument that the Council previously concluded "makes a leap of logic not required by any statute and not supported by evidence or reason." Order No. 868 at 12. As previously explained by both Whistling Ridge and Skamania County, the moratorium ordinance only applies to the acceptance and processing of the following three things: (i) various permits for 20+ acre parcels created by deed after January 1, 2006; (ii) subdivisions and short subdivisions; and (iii) SEPA checklists related to Forest Practice Act ("FPA") conversions within unincorporated and unzoned parts of the County. Ex. 1.15c; WREP LU Res. Br. at 9:16-10:7; Skamania County LU Br. at 5:3-12. The first two categories clearly do not apply to the Project, and the third category does not apply because SCC 16.04.070(A) expressly provides that a SEPA checklist "is not needed if SEPA compliance has been completed or *SEPA compliance has been initiated by another agency*." (Emphasis added.) Because the Council has assumed lead agency status for SEPA purposes, the Project does not violate Skamania County's moratorium ordinance.[12] The Council did not err.[13]

[12] FOCG states that "the Applicant has even implicitly requested that the State preempt the moratoria pursuant to WAC Chapter 463-28." FOCG RFR at 10:2-3 (citing amended ASC at 4.2-14). Whistling Ridge has never requested that the Council preempt the moratorium ordinance, because the ordinance does not apply. The amended ASC at 4.2-14 states:

(continued . . .)

E. The 2009 hearings examiner's decision is irrelevant.

FOCG takes issue with one sentence of the Council's characterization of the Skamania County hearings examiner's 2009 decision. FOCG RFR at 5:1-7:22 (disputing the intent of the County's proposed zoning code amendments and SEPA considerations). In Part II.B of this response, Whistling Ridge argued that the Council should strike that part of FOCG's argument that relies on a brief that is not in the record. Substantively, FOCG's argument ignores that the hearings examiner's decision has no relevancy to the Council's review of the Project.

> Contrary to assertions in parties' briefing, however, the examiner's findings of fact and conclusions of law do not bind us as they are based on a different record in a different context with different elements for a different purpose involving different parties. *Res judicata* does not apply to those findings and conclusions, which have no binding or precedential effect on the Council's discretion. *DeTray, supra*; *Rains v. State*, 100 Wn.2d 660, 674 P.2d 165 (1983).

Order No. 868 at 8 n.10. The hearings examiner's conclusions regarding the 2007 Comprehensive Plan have no import here. FOCG's concerns about this one-sentence characterization do not merit reconsideration of the Council's determination of land use consistency.

IV. RCW 80.50.010

Whistling Ridge previously articulated how RCW 80.50.010's expressions of legislative policy and intent are not decision-making criteria under the fundamental tenants of Washington's legal framework for statutory construction. WREP Adj. Br. at 53:1-55:12. Nonetheless, the

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(. . . continued)

> Because of EFSEC's well-established preemptive role in permitting wind energy facilities, including acting as Lead Agency for associated SEPA review, the County's moratorium on acceptance of SEPA checklists for forest practices conversions does not affect the project.

This statement is consistent with Whistling Ridge's position that the County's moratorium ordinance does not apply because the Council, rather than the County, is the lead agency for purposes of SEPA compliance.

[13] Whistling Ridge requests that the Council clarify the implication that the County's moratorium ordinances are not zoning ordinances under RCW chapter 80.50. Order No. 868 at 11. As Ex. 1.15c does reference the Planning Enabling Act, out of an abundance of caution the Council should simply find that the Project is not prohibited by the County moratorium, because the County is not the lead agency for purposes of SEPA. *See* RCW 80.50.020(22).

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Council based its recommended denial of the A1-A7 and the entire C1-C8 turbine corridors on its interpretation of RCW 80.50.010(2)'s expression of legislative intent concerning aesthetics. *See* Order No. 868 at 18. The Council's interpretation stands in stark contrast to the lack of aesthetic guidelines adopted by the Council under RCW 80.50.040(2) and SEPA's objective consideration of aesthetics, and it ignores County regulatory policy.[14] *See* SCC 22.02.050 (Scenic Area restrictions "appl[y] to all lands in that portion of Skamania County lying within the Columbia River Gorge National Scenic Area . . . and to no other lands within the county.")

Whistling Ridge warned that the Council's chosen interpretation of RCW 80.50.010 was improvident. *See* WREP RFR at 4:3-10:5. Indeed, SOSA's request for reconsideration is based in large part on RCW 80.50.010. However, as set forth in more detail below, the Council's rules and Washington Supreme Court precedent make clear that the Council's review authority does not extend into the RCW 80.50.010 economic matters upon which SOSA focuses.

A. The "pressing need for increased energy facilities."

1. "Need" for the Project is not a criterion under RCW 80.50.010, WAC 463-60-021, and Washington Supreme Court precedent.

SOSA restates its desperate argument that the Project should be denied because there is no "need" for the Project. *Compare* SOSA RFR at 8:9-18:25 *with* SOSA Adj. Br. at 33:1-54:25. Boiling SOSA's verbose "need" argument down to its essence, SOSA argues that

> Order 868 rests its decision regarding need for the project on the "legal requirement to increase the proportion of power obtained from renewable resources . . . ." But as described above, the rapid development of wind energy in Washington has seen the state meet its legal requirements, even though in real world terms of electric supply and demand, there is no need for additional power. There is no need to approve Whistling Ridge to meet I-937 renewable standards[.]

SOSA RFR at 13:18-23.

Whistling Ridge has previously described the flaws that riddle SOSA's "need" argument.

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[14] Whistling Ridge has consistently argued throughout the adjudicative proceeding that aesthetics are primarily a SEPA issue. *See* Tr. at 18:2-12, 20:7-11 (Dec. 21, 2010 prehearing conference); WREP Adj. Br. at 23:9 ("EFSEC does not have any performance standards related to aesthetics. *See* WAC ch. 463-62. Instead, SEPA is the primary legal tool applicable to Project aesthetics."); WREP Adj. Res. Br. at 6:12-15.

See WREP Adj. Br. at 50:8-58:2; WREP Adj. Res. Br. at 24:21-28:4; *see also* Ex. 18.00r. As relevant here, Order No. 868 did not rest on I-937 but rather relied "on the statutory statement of need for power, RCW 80.50.010." Order No. 869 at 6. Indeed, the Council's rejection of SOSA's "need" argument in Order No. 868 begins by quoting RCW 80.50.010's policy of "recogniz[ing] the pressing need for increased energy facilities." Order No. 868 at 15. This statutory directive regarding need is further reflected in the Council's own administrative rules:

> RCW 80.50.010 requires the council to "recognize the pressing need for increased energy facilities." For that reason, applications for site certification need not demonstrate a need for the energy facility.

WAC 463-60-021. As SOSA itself has recognized, "[u]nder the plain language of this rule, the application need not address the issue of project need." SOSA Res. Br. at 9:7. This is consistent with the Washington Supreme Court's holding in *Residents Opposed to Kittitas Turbines v. EFSEC*, 165 Wn.2d 275, 197 P.3d 1153 (2008).

Furthermore, SOSA's factual premise—"I-937 goals are already met due to the explosion of wind power"—is simply wrong. SOSA RFR at 12:6-7. The Director of the State Energy Office testified that Puget Sound Energy ("PSE"), Washington's largest independently owned utility, was only two-thirds of the way toward meeting I-937's requirement that 15% of its load be met from renewable resources in 2020.[15] Tr. at 1281:13-20 (Usibelli); *see also* Ex. 16.00r at 12:11-14 ("[M]ost P[acific] N[orth]W[est] utilities have yet to meet their 2015 (Oregon) or 2016 (Washington) RPS milestones."). SOSA also erroneously claims that "the state of Washington has twice the amount of wind energy required to meet I-937 RPS standards." SOSA RFR at

[15] The testimony that PSE is currently selling renewable energy credits on "short-term contracts" to California is consistent with I-937's stair-step renewable energy requirements: 3% by 2012, 9% by 2016, and 15% by 2020. Tr. 1281:24-1282:17 (Usibelli); RCW 19.285.040(2)(a). Although PSE may have more than enough renewable energy to meet the 2012 requirement, this does not mean that PSE has enough renewable energy to meet the 2020 requirement.

Furthermore, the record evidences PSE's interest in the Project. Tr. at 92:13-94:5 (Spadaro); *see also* Tr. at 92:20-23 (Spadaro), Ex. 29.04. SOSA continues to misrepresent Mr. Spadaro's testimony regarding PSE. *See* SOSA RFR at 13:15-17. Mr. Spadaro testified that PSE was interested in the Project "until Save Our Scenic Area sent nasty letters to the CEO of Puget Sound Energy." Tr. at 93:14-15. Contrary to SOSA's argument, this does *not* indicate that the Project is not needed to meet I-937. SOSA RFR at 13:16-17.

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13:7-8. Yet the testimony reflected that significant portions of this wind energy are now being sent to California. Tr. at 1281:22-1282:21 (Usibelli). Thus, the amount of wind energy generated in Washington does equate with the amount of wind energy that is available to satisfy I-937. Moreover, SOSA's argument misses a fundamental point: if there is no "need" for the Project, no one will enter into an off-take agreement with Whistling Ridge and the Project will not be built. *See* Tr. at 122:6-11 (Spadaro).

SOSA then regurgitates its attack against all renewable energy claiming that it is difficult to integrate into the transmission system and requires carbon-based fuels for balancing.[16] SOSA RFR at 14:1-16:5. These are not new arguments. *See* SOSA Adj. Br. at 44:2-48:14; WREP Adj. Res. Br. at 25:12-26.3. SOSA demands that the Council deny a project with a long life under temporary and fleeting conditions that are at present being solved on multiple fronts. SOSA's battle is with renewable energy, all intermittent energy resources, and in fact, all new energy generation of any source proposed within the Northwest. If the Council accepts SOSA's reasoning, the Council will further close its door to renewable energy projects, and in fact, under such findings it would be impossible for the Council to permit any other energy generation facility of any other kind. Most importantly, SOSA's argument continues to be in studious disregard of WAC 463-60-021 and RCW 80.50.010.

2. The Council does not have authority to require that Whistling Ridge sell power to I-937 utilities.

SOSA argues that the Council should impose a condition that limits Whistling Ridge to selling power to Washington utilities subject to I-937. SOSA RFR at 18:23-25. To support this argument, SOSA does not rely on RCW chapter 80.50, but rather purports to rely on I-937. SOSA RFR at 16:16-18:25. I-937 did not change the Council's authority under RCW chapter 80.50 or require that energy from Council-sited renewable energy projects be sold only to I-937

[16] In support of its argument, SOSA references a document that the Council itself previously declined to admit into the record. *See* SOSA RFR at 14:17-19; Order No. 867.

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utilities. However, I-937 did establish state policy that supports, and indeed requires, the development of renewable sources of energy. The Project is consistent with that policy. Moreover, it is just as likely that the Project's power will be sold to Washington utilities as to any out-of-state buyer. Tr. at 92:13-94:5, 122:3-18 (Spadaro); Ex. 16.00r at 12:6-14. Regardless of whether renewable energy is sold to a California or Washington utility, its generation reduces greenhouse gases on a megawatt-to-megawatt basis, and satisfies a binding policy to address climate change, regardless of its destination. Moreover, it is hard to imagine why the Council would decide to blatantly violate the Commerce Clause of the U.S. Constitution by prohibiting Whistling Ridge from selling electricity to non-Washington utilities. *Granholm v. Heald*, 544 U.S. 460, 476, 125 S. Ct. 1885, 161 L. Ed. 2d 796 (2005) ("State laws that discriminate against interstate commerce face 'a virtually *per se* rule of invalidity.'" (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978))).

The Council has already ruled in this proceeding that the potential delivery point of power is an issue for the market, not an issue for the Council, to decide.

> Intervenors urge that Applicant's statement [in the DEIS] that the proposed facility complies with the legislative intent [in RCW 80.50.010] in creating the Council requires the Council to evaluate the volume and cost of power anticipated from proposed facilities. The Council disagrees strongly. The RCW section in question is a statement of the legislative intention in enacting the law. It announces the purpose and intent of the Act's operative provisions. The State Supreme Court has upheld the Council's refusal to consider economic issues in its review of a proposed merchant plant *(see below). The Council's jurisdiction includes the power to evaluate ecological and environmental issues. It will not receive evidence concerning costs, prices or volume of power of merchant plants, which are market-driven and rely on markets to determine need and prices.*

Order No. 856 at 2-3 (footnotes omitted; emphasis added). Clearly, market-based determinations, including the ultimate purchaser of the Project's power, are outside the scope of the Council's review. Indeed, "[i]n this proceeding, as in the KVWPP proceeding, the Council declines to consider the economic attributes of the proposed facility." Order No. 856 at 3.

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B. "To provide abundant energy at reasonable cost" — the Council and the Washington Supreme Court have already held that "costs" are outside of the Council's jurisdiction under RCW 80.50.010.

SOSA claims the Council erred by not discussing whether the Project satisfies the legislative intent expressed in RCW 80.50.010 of "provid[ing] abundant energy at reasonable cost," which SOSA believes should be construed using I-937. SOSA RFR at 19:1-20:24. However, as the Council previously held,

> [t]he Council's jurisdiction includes the power to evaluate ecological and environmental issues. It will not receive evidence concerning costs, *prices* or volume of power of merchant plants, which are market-driven and rely on markets to determine need and prices.

Order No. 856 at 3 (emphasis added). The Council's holding is consistent with the Washington Supreme Court's holding that

> EFSLA requires EFSEC to develop environmental and ecological guidelines regarding energy facility siting. RCW 80.50.040(2). As economic analysis does not relate to environmental or ecological concerns, we believe EFSEC was within its authority to refuse to review the economic viability of the KVWPP.

Residents Against Kittitas Turbines v. EFSEC, 165 Wn.2d 275, 321, 197 P.3d 1153 (2008). There is no legal support for SOSA's argument in RCW chapter 80.50, and I-937 is irrelevant to this issue. Moreover, SOSA's argument utterly ignores that electricity is bought and sold in a market operating within regulatory sideboards. Whistling Ridge's power will not be purchased if comparable power is available at a lower cost. This market-based determination means that the "cost" of Whistling Ridge's power to its purchaser will be reasonable.

V. AESTHETICS

A. The adjudicative record, the Council's own FEIS, and the Council's "subjective" determinations do not support or require eliminating more of the Project.

Whistling Ridge strongly disagrees with the Council's recommendation that the Governor deny the A1-A7 and the entire C1-C8 turbine corridors. *See generally* WREP RFR (arguing this likely makes the Project economically unviable and conflicts with the proper interpretation of RCW 80.50.010(2)). FOCG, though, demands that the Council find that only the A8-A13 and

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F1-F3 turbine corridors satisfy RCW 80.50.010(2). FOCG RFR at 14:19-15:4, 15:13-17:5 (arguing that turbines in the remaining B1-B21, D1-D3, and E1-E2 turbine corridors "would present an overlapping and chaotic appearance" when viewed from KVAs, such as I-84, the Columbia River, the Historic Columbia River Highway, and Washington State Route 141).[17] Because 1.5-MW turbines were used to calculate the turbine capacity of these corridors, FOCG is in effect requesting that the Council permit a 13.5 MW facility (*i.e.*, nine 1.5 MW turbines in the A8-A13 and F1-F3 turbine corridors). *See* WREP RFR at 2:6-21. A facility of such small size is clearly not commercially viable, and the law does not call for any reduction in the size of the Project, much less the elimination of the Project sought by FOCG.

FOCG's argument is also at odds with the weight of the evidence in the record. It ignores the rudimentary facts that the visual simulations represent a 50-turbine facility and that the Council has only recommended approval of what it purports to be a 35-turbine facility. Exs. 8.00 at 7:17-19, 9.00 at 21:6-10; Order No. 868. In addition, residential, roadway, and recreating viewers are not the necessarily highly sensitive viewers that FOCG claims. *Compare* FOCG RFR at 16:7-10 *with* Ex. 9.02r at 8:1-10:13 (describing Apostol's mistaken assumption that all viewers at KVAs are highly sensitive by definition); Tr. at 335:18-336:18 (Pearson: discussing how the ASC at 4.2-31, which is consistent with the FEIS at 3-165, provides that distance can affect viewer sensitivity). The same is true for "visitors to the Lewis and Clark National Historic Trail," *i.e.*, travelers on I-84. *See* WREP Adj. Br. at 39:11-15, 40:20-41-7, 41:20-42:2, 43:3-11, 45:2-3; WREP Adj. Res. Br. at 3:9-6:4. Furthermore, the U.S. Forest Service's Scenic Area visual inventories—Ex. 21.06—do not document "high scenic quality" for the area within the

[17] FOCG also references Project visibility from the City of White Salmon. FOCG RFR at 16:5, 17:1. However, testimony in the adjudicative proceeding indicates that the Project would not be visible from SR-14 in the City of White Salmon. *See* Tr. at 278:7-21, 279:6-9 (Watson). There was no testimony that the Project would be visible from other parts of the City of White Salmon. *See* Exs. 8.00, 8.03r, 9.00, 9.02r, 21.00; Tr. at 221:17-371:4 (Tom Watson, Pearson, Apostol). Figure 4.2-5 in the ASC, which suggests that small numbers of turbines may be visible from the City of White Salmon, does not account for vegetative screening. Ex. 8.03r at 2:1-9. FOCG also claims that Viewpoint 1 is "located within the City of White Salmon." FOCG RFR at 17:18. Unless FOCG is capable of unilaterally expanding city limits, Viewpoint 1 is not within the City of White Salmon.

Scenic Area that abuts the east side of the Project site. *Compare* FOCG RFR at 16:11-15 *with* Ex. 21.06 (placing this area in the middle classification for landscape diversity, in the "not seen" classification from KVAs, the second and third classifications for landscape significance, the top two classifications for visual absorption capability, and the bottom two classifications for landscape sensitivity); *see also* Ex. 9.02r at 12:4-23 (describing how these visual inventories support the conclusions in the ASC, which is consistent with the FEIS). Most importantly, the Council's own FEIS concluded that views from east of the Project site had (i) moderate viewer sensitivity; (ii) visual quality ranging from low up to moderately high; and (iii) anticipated visual impacts ranging from low to moderate up to moderate. FEIS Table 3.9-2.

The Council's recommendation to approve turbine corridors is solidly based on substantial evidence in the record, including the FEIS and the adjudicative proceeding. There is no reason nor legal basis for the Council to reassess its determinations to approve these corridors under RCW 80.50.010(2). The relevant question on reconsideration is whether RCW 80.50.010(2) is properly construed to allow for consideration of the Council's "subjective" determinations that are in contrast to the environmental record. *See* WREP RFR at 4:3-10:5. Whistling Ridge again requests that the Council clarify its recommendation, resolve the confusion it has created regarding the "deleted" turbine corridors, and resolve this issue in accordance with its own precedent and Washington law by relying on its own FEIS.

B. FOCG's mathematical critique of Table 1 in Order No. 868 ignores the Council's clear communication that "the degree of reduced visibility [in Table 1] is not a mathematical calculation."

FOCG argues that the Council needs to revise Table 1 because it "includes erroneous calculations about the reductions in numbers of visible turbines." FOCG RFR at 17:7-8. For example, FOCG states that for Viewpoint 1

> the Table erroneously states that Option 3 would reduce by one-half the number of turbines visible. In fact, according to the turbines listed in the table, the actual reduction would be only one-third (a reduction from 24 visible turbines to 16 visible turbines).

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FOCG RFR at 17:18-22. However, the Council clearly stated that "[t]he degree of reduced visibility is not a mathematical calculation but rather the Council's subjective effort to approximate the reduced visibility obtained from tower reductions." Order No. 868 at 22. FOCG's argument has absolutely no merit.[18]

C. FOCG's concern with the "potentially important substantive implications" of the Council's use of the word "must" in Order No. 868 is frivolous.

FOCG expresses concern with the "potentially important substantive implications" of the Council's statement that portions of the Project that "are not impermissibly intrusive into overall viewscape or the area's heritage . . . *must* be allowed." Order No. 868 at 24 (emphasis added). FOCG believes "must" could be interpreted to prevent the Council from "deny[ing] these turbine locations if other unacceptable impacts are identified" and should be revised to "may be allowed." FOCG RFR at 18:15-19:5. However, the Council's statement was clearly made only in the context of aesthetics, and outside of the Council's questionable authority to recommend denial of part of the Project under RCW 80.50.010(2), it has no adjudicative authority to recommend denial of any part of the Project for aesthetics. SEPA provides the applicable framework for the Council to exercise its authority. FOCG's concern is frivolous and no revision to Order No. 868 in this regard is necessary.

D. FOCG's desired aesthetic mitigation measures are not "available and reasonable."

FOCG requests that the Council require "radar-triggered aviation lighting, locking turbine blades . . . and the provision of off-site mitigation to compensate for the Project's impacts." FOCG RFR at 19:21-23. However, requiring these mitigation measures would violate WAC 463-62-010(3), which allows the Council to require "additional mitigation" beyond what is necessary to satisfy the requirements of WAC chapter 463-62 "in the event that documents prepared

[18] FOCG similarly argues that Table 1's reflection of "approximately zero turbine visibility" from Viewpoint 4 is wrong because the A8 turbine would still be visible. FOCG RFR at 17:23-18.4. A small part of the A8 turbine tower is visible through tree branches in the Viewpoint 4 simulation. *See* Ex. 8.08r. But this is consistent with Table 1's reflection of "approximately zero turbine visibility." The same is true for Viewpoints 16, 22, and 23. To the extent that the Council wishes this extremely minute visibility from Viewpoints 22 and 23 to be more clearly reflected in Table 1, it certainly has discretion to do so.

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pursuant to 43.21[C] RCW (State Environmental Policy Act), demonstrate that the project poses a probable significant adverse impact that is not mitigated by the provisions of" WAC chapter 463-62. Because WAC chapter 463-62 does not concern aesthetics, aesthetic impact mitigation must respond to "probable significant adverse impact[s]" identified in the FEIS. Here, the Council's own FEIS did not identify "probable significant adverse impact[s]" related to aesthetics, nor did it identify FOCG's requested mitigation measures, such that WAC 463-62-010(3) precludes the additional mitigation desired by FOCG.[19] *See* FEIS at 3-201. FOCG's demanded "mitigation" would only exacerbate the Council's error with respect to these turbine locations.

Moreover, there is no support for FOCG's contention that its desired mitigation is "available and reasonable." In Part II.B of this response Whistling Ridge argued that the Council should strike the altered excerpts of a document purported to concern a wind energy project in Wyoming. In the event the Council considers these altered excerpts, they do not support FOCG's contention that radar-activated lighting has "been employed" for that project. Instead, the altered excerpts clearly indicate that radar-activated lighting has not yet been approved by the Federal Aviation Administration.[20] Thus, these altered excerpts suggest that this technology is not yet "available and reasonable." More importantly, evidence actually in the record of this proceeding indicates that this technology is not yet "available and reasonable."

> Because concerns exist today about radar-activated lighting system vendors' ability to provide adequate assurances concerning system failure, it is unclear whether this is a viable mitigation measure yet."

Ex. 9.02r at 4:20-22. Unless and until vendors can provide these assurances, this technology will not be "available and reasonable" and from an industry standpoint, radar-triggered light modification may well be perilous to aviation safety. The Council should deny this request.

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[19] WAC 463-62-010(3) also conflicts with the Council's recommended denial of the A1-A7 and the entire C1-C8 turbine corridors under RCW 80.50.010(2).

[20] The excerpted pages twice reference the "FFA" rather than the "FAA." FOCG RFR Ex. C at 13 and 54. For purposes of this response, Whistling Ridge assumes that the FAA (Federal Aviation Administration) was in the intended reference rather the FFA (Federal Finance Administration). However, this is just supposition as FOCG has not provided the entire document, the missing pages of which could conceivably explain why "FFA" is referenced.

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As for locking turbine blades, FOCG cites *nothing* in the record (or outside the record) that even addresses this concept, much less supports FOCG's assertion that this is an "available and reasonable" mitigation measure. *See* FOCG RFR at 21:5-22.[21] FOCG's failure to timely raise this issue during the adjudicative proceeding deprives Whistling Ridge of its right to respond with evidence. The Council should deny this requested mitigation measure.

Finally, FOCG requests that the Council require "off-site mitigation measures to address any of the unavoidable aesthetic impacts of the Project." FOCG RFR at 22:7-9. First, this request directly conflicts with the Council's own FEIS, which found no unavoidable adverse impacts. FEIS at 3-201. Second, FOCG bases this request on testimony from its own Conservation Director, who testified that another wind developer paid FOCG off by contributing money to the Friends of the Colombia Gorge Land Trust. Tr. at 1401:4-10 (Lang). Under cross-examination, Lang did not provide requested details of this payoff. FOCG asks that the Council require that Whistling Ridge pay off FOCG. This suggested extortion is a complete anathema to the Council siting process. Moreover, there are no standards or guidelines for determining what off-site mitigation would be sufficient. FOCG is just putting out its hand and demanding a payoff. Whistling Ridge is disgusted by FOCG's attempted extortion. The Council should deny FOCG's request.

VI. HABITAT AND WILDLIFE

A. FOCG mischaracterizes the Washington Department of Fish and Wildlife's ("WDFW") 2009 *Wind Power Guidelines* ("*WDFW Guidelines*") and the Council's administrative rules that reflect the *WDFW Guidelines.*

FOCG erroneously claims that the Council misconstrued the *WDFW Guidelines* and its own administrative rules because sensitive-status and priority species have been observed above or on the Project site. FOCG RFR at 24:22-27:9. FOCG supports this assertion by selectively

[21] Later in its request for reconsideration, FOCG insinuates that Smallwood testified about locking turbine blades as a wildlife mitigation measure. *See* FOCG RFR at 40:1-12 (citing Ex. 21.00 at 32:12-20). However, Smallwood did not testify about locking blades, but rather testified about cut-in speeds. *See* Ex. 22.00 at 32:12-20.

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quoting two of the *WDFW Guidelines*' fifteen "*considerations* for avoiding and minimizing impacts to wildlife." Ex. 6.09c at 5 (emphasis added). However, FOCG studiously ignores the *WDFW Guidelines*' other thirteen "considerations," including the very first one: "[w]here appropriate develop in agricultural and other *disturbed lands, including using existing transmission corridors and roads where possible*." *Id.* (emphasis added). The Council properly found that the Project "is consistent with that approach since it occurs on a tract of industrial timberland that has been heavily disturbed for many decades and has an extensive road system and existing transmission line bisecting the project." Order No. 868 at 24. The fact that sensitive-status and priority species have been observed on or above the Project site does mean that the Council misconstrued the *WDFW Guidelines*, as is evident by WDFW's own conclusion that the Project is consistent with the *WDFW Guidelines*. *See* Exs. 1.02r, 1.04r, 1.20r.

B. Whistling Ridge's pre-project assessment and surveys fully complied with the *WDFW Guidelines*.

FOCG and Audubon repeat the argument advanced in the adjudicative proceeding that Whistling Ridge's pre-project assessment and surveys did not comply with the *WDFW Guidelines*. *Compare* FOCG RFR at 28:3-31:9 *with* FOCG Adj. Br. at 43:10-46:20, 49:24-50:19; *compare* Audubon RFR at 1:18-2:9 *with* Audubon Adj. Br. at 2:2-4:16. This argument continues to ignore WDFW's definitive conclusion that

> [t]he pre-project assessment and avian/bat use surveys are consistent with standard protocols utilized throughout the U.S. and *are consistent with the WDFW Wind Power Guidelines* (WDFW 2009). . . . [A]s we previously confirmed in the attached letters, WDFW confirms that *these data represent the best available science for predicting avian impacts* at Whistling Ridge.

Ex. 1.02r (emphases added). Furthermore, Greg Johnson, who has extensive experience with the *WDFW Guidelines*, testified that "[t]he surveys that were performed on the site are all consistent with the WDFW's guidelines." Ex. 6.04r at 2:4-5. Whistling Ridge comprehensively addressed compliance with the *WDFW Guidelines* in its prior briefing. *See* WREP Adj. Br. at 2:2-8:19; WREP Adj. Res. Br. at 10:16-14:6. FOCG and Audubon's argument continues to have no merit.

When Whistling Ridge's "data represent the *best available science* for predicting avian impacts," FOCG's request that the Council require that Whistling Ridge "collect and analyze preexisting information on species abundance and distribution" serves no purpose other than delay.[22] The Council correctly found that Whistling Ridge's "wildlife studies comply with the requirements of the WDFW Guidelines and WAC 463-60-362," and rejected Audubon's request for additional preconstruction studies. Order No. 868 at 25, 38.

FOCG complains that Whistling Ridge's surveys did not cover the time periods required by the *WDFW Guidelines* and Council rules. FOCG RFR at 28:5-29:11. However, the Council's own FEIS states that "[b]irds were surveyed during all seasons of the year in the fall of 2004, summer of 2006, winter 2008-2009 and spring of 2009. . . . Avian surveys were conducted in the Project Area across all seasons in multiple years."[23] FEIS at 3-60; *see also* ASC at 3.4-21 to -29, App. B-3 to B-6; WREP Adj. Res. Br. at 10:18-14:6. This complies with both the *WDFW Guidelines* and the Council's rules. *See, e.g.*, WAC 463-62-040(2)(f) ("[S]urveys shall be conducted during all seasons of the year.").

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[22] In light of "the best available science for predicting avian impacts" that Whistling Ridge has provided, two conclusions are inevitable. First, FOCG's claim about the uncertainty of avian uses at and near the Project site completely ignores the available information. *See* FOCG RFR at 31:10-32:11. Second, the public is well aware of wildlife usage of the Project site. *See* FOCG RFR at 32:12-22. The Council should not reconsider its conclusion that more preconstruction surveys are unnecessary.

[23] FOCG inaccurately asserts that July 14 through September 14 is a "key migratory period." FOCG RFR at 28:25-29:1 (citing Ex. 6.08c). This assertion is based on a single internal July 19, 2010 email from an unknown WDFW employee, who did not appear in the adjudicative proceeding, whose email is inconsistent with WDFW's September 17, 2010 official position that Whistling Ridge's surveys complied with *WDFW Guidelines*, and whose position was a surprise to an expert with over 23 years of avian survey experience. *See* Tr. at 668:9-12 (Johnson: "I really can't attest to some internal email communications. All I can really attest to is that the official corresponders [sic] from Washington Department of Fish and Wildlife Service states that all surveys and impact predictions were done in accordance with their guidance.").

FOCG's insinuation that Whistling Ridge erred by not surveying for olive-sided flycatcher migration overlooks at least two key facts. FOCG RFR at 29:1-5. First, "[t]he Project habitat is not very conducive for this species." FEIS at 3-56; *see also* Tr. at 704:17-21 (Johnson: olive-sided flycatchers are most often associated with riparian corridors). Second, and most importantly, WDFW itself reviewed the studies and concluded that "[t]he pre-project assessment and avian/bat use surveys . . . are consistent with the WDFW Wind Power Guidelines (WDFW 2009)." Ex. 1.02r at 1.

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FOCG also misrepresents the record when it claims that "virtually nothing is known about potential impacts" to two priority bat species. FOCG RFR at 26:1. The adjudicative record and the SEPA record contain a wealth of information about bats generally and about Keen's Myotis and Townsend's Big-Eared Bats specifically. *See, e.g.*, ASC 3.4-26 to -29, 3.4-31 to -33, Ex. B-7 (2007 Bat Acoustic Studies), ASC Ex. B-8 (2008 Bat Acoustic Studies); Exs. 1.03r (May 24, 2010 WEST, Inc. memo), 6.00 at 8:14-10:21, 6.04r at 27:1-28:24, 39:5-16, 44:5-48:10; Tr. at 681:2-684:2 (Johnson); Tr. at 821:1-22 (McIvor); FEIS at 3-59 to -60, 3-66 to -69. Greg Johnson testified that

> I concur [with McIvor] that the WREP area is within the range of these two species [Keen's Myotis and Townsend's Big-Eared Bats] and some potential habitat is present. However, we know from years of monitoring at wind projects across the country that neither of these two species has ever been documented as a turbine fatality at any wind project in the U.S. In addition, they are not long-distance migratory tree bats. Therefore, the potential to impact these species is very low at the site, as they do not seem susceptible to turbine collisions.

Ex. 6.04r at 48:5-10; *see also* Tr. at 821:11-12 (McIvor: "So this species being a myotis is at a relatively lower risk of being wind tower mortality."). Whistling Ridge provided the Council with all the required information regarding avian and bat usage of the Project site.

Finally, FOCG complains that the Council's conclusion that Opponents "failed to discredit the validity" of Whistling Ridge's *WDFW Guidelines*-compliant wildlife studies improperly places the burden of persuasion on Opponents. FOCG RFR at 27:12-28:2 (quoting Order No. 868 at 38). The Council's statement does not place the burden of persuasion on Opponents. Instead, it is a simple recognition of the Council's conclusion that Whistling Ridge carried its burden in the face of Opponents' specious legal and scientific advocacy and their incredible wildlife witness who admitted his testimony contained "[m]ore [bad text] than I would like." Tr. at 848:22-24 (Smallwood).

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C. The Council correctly concluded that the Project poses a "low likelihood" of killing or harming northern spotted owls; no additional studies are necessary.

FOCG and Audubon reiterate their faulty assertions that the U.S. Fish and Wildlife Service's ("USFWS") Endangered Species Act Concurrence Letter "was premised on a number of factual inconsistencies" and contains mistakes "regarding the status of the northern spotted owl detected in the project vicinity" in 2010, thereby inferring that the USFWS's conclusions are not reliable, and that turbine locations at the north end of the Project should be eliminated. *Compare* Audubon RFR at 2:10-3:10 *with* Audubon Adj. Br. at 5:25-7:7; *compare* FOCG RFR at 33:1-17 *with* FOCG Adj. Br. at 53:5-16. As Whistling Ridge previously showed, there is no evidence in the adjudicative record that refuted the USFWS's review panel's (in which WDFW participated) conclusion that the risk of injury or mortality posed by the Project is "discountable." Ex. 5.04 at 4; *see also* WREP Adj. Res. Br. at 14:7-16:18, WREP Adj. Br. at 8:20-12:17. The FEIS explains why the single male northern spotted owl detected in 2010 does not change the conclusions reached in the USFWS's letter. FEIS at App. G at 196 ("Only one spotted owl was detected in 2010 after 5 years of survey effort approximately 1.2 miles from the proposed Project. This single male was later found multiple times approximately 3 miles away and confirmed to be a territorial male outside the 1.8 mile buffer."), 274 ("The service reviewed the 2010 observations of a single owl and based its determination on owl behavior as well as the proposed Project's location and habitat."). The Council correctly found that the Project is not expected to cause "any mortality to threatened or endangered species." Order No. 869 at 14; *see also* Order No. 868 at 25.

FOCG and Audubon's desire for three more years of northern spotted owl surveys following the USFWS's current survey protocol ignores at least three critical facts. *See* FOCG RFR at 39:7-19; Audubon RFR at 5:14-22. First, Whistling Ridge has already done *five years* of surveys of all potentially suitable habitat located within 1.8 miles of any turbine corridor *and* all potentially suitable habitat located within the two historic spotted owl activity centers in the

vicinity of the Project site using the USFWS's current survey protocol. Ex. 5.00 at 5:11-7:9. Second, the two historic spotted owl activity centers have not had owls present since 2000 and 2002. Ex. 5.00 at 6:26-7:3. Third, the USFWS has already determined that "the risk of a spotted owl collision at this site is considered to be discountable." Ex. 5.04 at 4. As the northern spotted owl experts (*i.e.*, the USFWS's review team) have determined that even if owls were present on the Project site, the risk of collision is "discountable," additional owl surveys serve no purpose whatsoever and should not be required.

D. The parties have had more than sufficient opportunities to evaluate both Whistling Ridge's proposed mitigation measures and the proposed mitigation parcel, both of which satisfy the applicable requirements.

FOCG also confuses the Council's wildlife application requirements (*i.e.*, WAC 463-60-332) with the Council's wildlife decisional standards (*i.e.*, WAC 463-62-040). *See* FOCG RFR at 35:6-13, 36:2-12. The ASC clearly contains all the information required to meet WAC 463-60-332. *See* ASC § 3.4. The conditions the Council has imposed are not focused on compliance with WAC 463-60-332, but rather on compliance with WAC 463-62-040. Nothing is being improperly delayed. The parties have had every opportunity imaginable to comment on the Project's wildlife mitigation measures.

FOCG appears to mistakenly believe that the habitat mitigation plan is the only wildlife mitigation required. *See* FOCG RFR at 35:1-36:12. In fact, the draft SCA would require that Whistling Ridge "implement the mitigation measures set forth in this Agreement, including, but not limited to, those presented in the revised Application or identified in the final FEIS as commitments made by Whistling Ridge Energy." SCA Art. IV.B. Thus, compliance with a host of mitigation measures described in the SCA, the ASC, and the FEIS is required, just one of which is a habitat mitigation plan that meets the *WDFW Guidelines*. SCA Art. IV.E(1). The Council correctly determined that WAC 463-62-040 has been met. Order No. 868 at 38. The

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Council did not rely on the proposed mitigation parcel in making this determination.[24] Order No. 868 at 27, 38. It is not necessary for the Council to cut and paste every element of the FEIS into the narrative of its Orders.

Audubon and FOCG complain that they and other parties have not had an adequate opportunity to evaluate whether the approximately 100 acres of oak woodland and coniferous forest habitat over which Whistling Ridge proposes to convey a conservation easement to Klickitat County meets the standards of WAC 463-62-040.[25] Audubon RFR at 3:12-4:2; FOCG RFR at 35:1-15. This is surprising in light of the extensive prefiled testimony concerning the mitigation parcel. Exs. 1.01r at 3:5-8:17, 1.02r. at 2, 1.03r at 2-5 (and attachments thereto), 1.04r, 1.05r, 1.20r (Dec. 20, 2010 WDFW letter). This is surprising in light of cross-examination exhibits concerning the mitigation parcel that FOCG submitted before the adjudicative hearing. Exs. 1.12c, 1.13c. This is surprising in light of the hours Audubon and FOCG devoted to cross-examining multiple witnesses about the mitigation parcel during the adjudicative proceeding. *See, e.g.*, Tr. at 723:4-725:15 (Audubon cross-examining Johnson), 817:13-819:20 (FOCG cross-examining McIvor), 947:12-954:1 (Audubon cross-examining Spadaro). This is surprising given

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[24] FOCG expresses confusion about how the Council treated the proposed mitigation parcel. FOCG RFR at 36:15-22. Whistling Ridge reads Order No. 868 to provide that the Council did not use the proposed mitigation parcel to find that the Project satisfied applicable mitigation requirements, because it was not formally offered, but that if it was formally offered, it would satisfy applicable mitigation requirements. To be clear, Whistling Ridge is committed to this offer. However, until a commercially viable Project is approved, Whistling Ridge will not convey its property to mitigate for impacts to what at present remains a speculative Project.

[25] This approximately 100-acre proposed mitigation parcel has better habitat than the approximately 100 acres of permanent and temporary impacts caused by a 50-turbine facility on the Project site. (Part VIII.B of this response discusses the acreage that would be temporarily and permanently impacted by the Project.) Further, because Whistling Ridge stipulated that it would construct no more than 38 turbines, the area permanently and temporarily impacted will shrink, satisfying the Council's "greater than 1:1" mitigation ratio. *See* WAC 463-62-040(2)(d). *See also* Ex. 1.20r (Dec. 20, 2010 WDFW letter: "SDS Lumber, in consultation with WDFW and through the Wind Power Guidelines, has developed an acceptable mitigation strategy for temporary and permanent impacts that will occur as a result of the Whistling Ridge Wind Energy Development.").

Whistling Ridge agrees with FOCG that there is no reason why Whistling Ridge should be required to purchase "a mutually acceptable mitigation parcel" if it already owns one. *See* FOCG RFR at 36 n.87. SCA Art. IV.E(1)(c) should be revised as follows: "The Certificate Holder may satisfy its Mitigation Obligation either by ~~purchasing a mutually acceptable mitigation parcel and~~ deeding a mutually acceptable mitigation parcel ~~it~~ to WDFW or a mutually acceptable third party, by . . . ."

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Opponents' extensive briefing about the mitigation parcel. FOCG Adj. Br. at 54:19-60:2; Audubon Adj. Br. at 9:10-10:8; *see also* CFE Adj. Br. at 10:20-13:20. Opponents' demand that they "be given an opportunity to participate in the evaluation [of the mitigation parcel] and present evidence" totally ignores the extensive opportunities they have already had and utilized to do just that. FOCG RFR at 37:10-11. No more process is required or needed on this issue.

Audubon again argues that Whistling Ridge's habitat mitigation plan does not satisfy WAC 463-62-040(2)(a)'s requirement that an applicant "demonstrate no net loss of fish and wildlife habitat function and value" and requests that "like-kind" habitat be required.[26] *Compare* Audubon RFR at 3:12-4:17 *with* Audubon Adj. Br. at 9:10-10:8. The Project site is actively managed for commercial forestry and has been for over 100 years, and even-aged, managed forests are sometimes referred to as "green deserts" due to the lack of wildlife abundance and diversity. Exs. 1.02r, 6.04r at 25:22-26:6; *see also* WREP Adj. Br. at 2:22-3:15; WREP Adj. Res. Br. at 16:16-17:8. As such, it is debatable whether Whistling Ridge's voluntary offer is even required by the *WDFW Guidelines*. Whistling Ridge's proposed mitigation parcel meets many of WDFW's objectives in conserving important habitat in the vicinity of the Project. Ex. 1.20r. WDFW has found that the mitigation parcel satisfies the *WDFW Guidelines*, which allow for conveyance of "[l]ike-kind . . . *and/or* of equal or higher habitat value than the impacted area." Exs. 1.04r, 1.20r (Dec. 20, 2010 WDFW letter), 6.09c at 9 (emphasis added). The proposed mitigation parcel has "better, better habitat than the project site." Tr. at 724:20-21 (Johnson). Conveyance of a parcel that has "equal or higher habitat value" than the Project site clearly meets the "no net loss" standard in WAC 463-62-040(2)(a). The Council properly concluded that Whistling Ridge satisfied WAC 463-62-040.

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[26] Audubon also requests that the Council expand the TAC's role to include consultation with the habitat mitigation plan. Audubon RFR at 4:16-17. However, the *WDFW Guidelines* specify that the TAC's role is to review post-construction monitoring data and, if needed, suggest operational adjustments. Ex. 6.09r at 6-7. The TAC's role should not be expanded beyond what is specified in the *WDFW Guidelines*.

E. The *WDFW Guidelines* do not require the "research-oriented" post-construction avian displacement studies Audubon and FOCG request that the Council require.

Audubon (again) and FOCG ask that the Council require three years of post-construction avian displacement studies. *Compare* Audubon RFP at 4:19-5:13 *with* Audubon Adj. Br. at 8:17-9:8; FOCG RFR at 38:19-39:6. The *WDFW Guidelines* distinguish pre-project and operational monitoring surveys and studies from "research-oriented studies," such as avian displacement studies. *Compare* Ex. 6.09c §§ 1, 3 *with* § 4.

> **4.0 RESEARCH-ORIENTED STUDIES**
>
> *Standard pre-project assessment surveys and studies and standard fatality operational monitoring are separate from research-oriented studies.* At some projects, additional studies that utilize pre-construction data may be conducted to test specific research hypotheses about impacts to a particular species or group of species. Rather than being necessary for pre-project assessment, such studies are focused on research, such as indirect impacts (e.g. displacement, cumulative impacts, etc.), that potentially provide information for future projects.
>
> . . . Funding and/or support for these more research-oriented studies should be solicited from multiple sources, *including the wind industry, environmental groups, state and federal agencies, advocacy groups and other sources.*

Ex 6.09c at 7 (emphases added). The research-oriented focus of post-construction avian displacement studies and their potential value for future projects is consistent with the testimony cited by Audubon. Tr. at 726:15-16 (Johnson: an avoidance behavior study "would help inform decisions for future development in forested landscapes."), 829:14-18 (McIvor: post-construction avian monitoring would "expand[] our knowledge of how birds are going to react to these new features as well as a way to inform, better inform cumulative impacts analysis in the future"). However, it is inappropriate and inconsistent with the *WDFW Guidelines* to impose the costs of general research studies (rather than Project-related studies) on Whistling Ridge. Because the *WDFW Guidelines* call for Whistling Ridge to conduct post-construction mortality studies, but not post-construction avian displacement studies, the Council appropriately required three years of post-construction mortality studies. *See* Ex. 6.09c at 6; Order No. 868 at 26; SCA IV.E(7).

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F. The Council should deny FOCG's other wildlife-related requests.

Whistling Ridge detailed why the Council should reject FOCG's requested wildlife-related conditions earlier in this Part VI of its response. The Council should also reject FOCG's request that turbine blades be locked when not in operation. FOCG RFR at 40:1-12. Contrary to FOCG's claims, Smallwood did not testify about locking blades, but rather testified about cut-in speeds. *See* Ex. 22.00 at 32:12-20. He even testified that no project had yet adopted this plan, so this is not an "available and reasonable" mitigation measure. The Council should deny this request.

FOCG also requests that Seattle Audubon Society have a representative on the Technical Advisory Committee ("TAC") rather than a designee from Audubon Washington or its member chapters, as provided in the draft SCA. FOCG RFR at 40:13-22. Whistling Ridge strongly opposes this suggestion, because Seattle Audubon has actively sought to deny the entire Project. The Council has deep experience in appointing TAC members who are not singularly driven by the goal of destroying the facility the Council sited. Because Seattle Audubon is not impartial when it comes to the Project and continues to demonstrate no credibility, it should not have a TAC representative. Whistling Ridge requests that the Council keep the TAC membership as described in the draft SCA.

VII. FOREST PRACTICES ACT COMPLIANCE

Although FOCG cannot identify a single aspect of the FPA with which the Project does not comply, FOCG disputes the Council's approach to FPA compliance. FOCG RFR at 12:3-14:6. Whistling Ridge has already addressed all of FOCG's FPA-related arguments. *See* WREP LU Res. Br. at 5:11-8:14. Whistling Ridge reiterates its request that the many references to documents outside the record on pages 7:1 through 9:15 of FOCG's initial land use consistency brief should not be considered and should be stricken from the record, and the legal argument therein should be summarily denied. *See* WREP LU Res. Br. at 5:13-6:5. As relevant here, the FPA provides that if a landowner decides to initiate an actual conversion within six years of

receiving an FPA approval for which an intent to convert was not stated, the landowner must stop all forest practices activities on the site; contact the Department of Ecology, the county, and the DNR; and withdraw any pending FPA applications. RCW 76.09.470(1). Conversions can then be authorized once (i) the landowner complies with SEPA, (ii) the county receives notification that any outstanding DNR final orders or decisions have been resolved, and (iii) the county either determines that the land in question fully complies with local ordinances and regulations or requires the implementation of a mitigation plan to address violations of local ordinances and regulations. RCW 76.09.460(2), 76.09.470(2)(b). Here, there is no "violation," and the government action necessary to approve the conversion for the Project is already well under way in this proceeding: (i) SEPA compliance is complete; (ii) there are no outstanding DNR final orders or decisions to resolve; and (iii) the County has already determined that the Project fully complies with local ordinances and regulations. *See* RCW 76.09.470(2). For these reasons, there is nothing preventing the Council from finding that the Project can comply with the FPA and from requiring FPA compliance in the draft SCA. For the reasons set forth in Part II.E of this response, the Council should not require more public process and create more appeal opportunities for these simple FPA-related issues.

VIII. OPPONENTS' REMAINING REQUESTS

A. Deed restrictions and a Scenic Area-related siting condition are unnecessary and should not be required.

FOCG requests that the Council require Whistling Ridge "record deed restrictions prohibiting wind energy development" on lands outside the turbine corridors permitted in the SCA. FOCG RFR at 23:1-10. Yet FOCG describes no rationale for this request. A legal description of the permitted turbine corridors will be included in the SCA. Order No. 869 at 13 n.23. Thus, Whistling Ridge cannot build turbines in areas outside the permitted turbine corridors under the SCA. There is no legitimate Council siting reason to also require the

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recording of deed restrictions, and the Council has never required deed restrictions for prior projects. It should not start now.

FOCG also requests a condition that "all portions of the Project, including all WTG blades and all forest practice activities for the Project" be located outside the Scenic Area. FOCG RFR at 48:14-16. FOCG's concern is apparently driven by a map it purportedly received in response to a discovery request and got into the record as a cross-examination exhibit.[27] *See* FOCG RFR at 48:18 (citing Ex. 1.11c). Let there be no doubt—Whistling Ridge has never submitted any documentation to the Council even suggesting the Project, or any portion of the Project, will be within the Scenic Area. The draft SCA provides that

> [t]he construction and operation authorized in this Agreement shall be located within the areas designated herein and in the modifications to Revised Application for Site Certification submitted by WRE on October 12, 2009 (Revised Application).

SCA Art. I.B. The areas designated in the SCA and the amended ASC are all outside the Scenic Area. *See, e.g.*, ASC at 2.1-1, 2.2-1, 2.3-1 ("The project would be located . . . outside of the Columbia Gorge National Scenic Area."), 2.2-1 (expressly excluding all "lands within the Columbia River Gorge National Scenic Area" from the legal description of the Project site). Constructing or operating any part of the Project within the Scenic Area would be a clear violation of the SCA. FOCG's requested condition is unnecessary and should be denied.

B. The Council's statements regarding acreage are consistent with the record.

FOCG claims that the Council made "conflicting statements as to how many acres the Project would affect." FOCG RFR at 33:19-21. Unsurprisingly, FOCG's claims cannot survive any degree of scrutiny. The entire Project site is 1,152 acres. FEIS Table 2-1. Potential development is limited to an area covering 384 of these 1,152 acres. *Id.* If a 50-turbine facility was constructed, 56.15 of the 384 acres would be permanently impacted *Id.* This includes the

[27] During the adjudicative proceeding, Whistling Ridge disputed that it had prepared Ex. 1.11c. Tr. at 55:8-11, 57:6-9, 57:15-58:9. FOCG claimed it had been provided in discovery. Tr. at 58:11-12. Whistling Ridge has reviewed the documents it produced in response to Opponents' discovery requests and has been unable to find the map that appears as Ex. 1.11c.

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50-foot clearance zone around each turbine and the overhead transmission line. *Id.* In addition, 5.22 acres would be permanently impacted outside the Project site for the new connection to West Pit Road. *Id.* In other words, the total permanent impact would be approximately 60 acres. If a 50-turbine facility was constructed, 52.1 of the 384 acres would be temporarily impacted. *Id.* This includes the timber buffer area around each turbine.[28] *Id.* In addition, 1.74 acres would be temporarily impacted outside the Project site due to the new connection to West Pit Road. *Id.* Total permanent and temporary impacts for a 50-turbine facility would be 108.25 acres within the Project site and 6.96 acres for West Pit Road. ASC Table 2.1-1. The Council's statements are consistent with these acreage figures, and the mitigation the Council has required considers both permanent and temporary impacts. *See* draft SCA Art. IV.E(1)(b). The Council did not ignore these impacts. *See* FOCG RFR at 34:23-24.

C. The Council should clarify the SCA's 18-month construction period.

FOCG raises a question concerning the following language in the draft SCA Art. I.K:

> However, providing that such construction is not delayed by a *force majeure* event, and that the construction schedule that the Certificate Holder submits pursuant to Article IV.K of this Agreement demonstrates its intention and good faith basis to believe that construction shall be completed within eighteen (18) months of beginning Construction.

See FOCG RFR at 43:3-22. This language is not a sentence, and although its intent and that of the preceding paragraphs is not exactly clear, Whistling Ridge believes the following language is consistent with the Council's intent and reflects the litigation Opponents will likely pursue following the Governor's approval of the SCA:

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[28] FOCG erroneously claims that Whistling Ridge "plan[s] to place height restrictions on hundreds of acres of forestland to provide wind clearance outside the fifty-food [sic] radius" of the turbine clearance zone. FOCG RFR at 34:16-17. The FEIS clearly indicates that the turbine buffer areas would involve 36.4 acres. FEIS Table 2-1. Furthermore, the FEIS clearly states that "trees that are planted at the time of construction in the cleared area [surrounding the turbines] would regrow at a rate that would not interfere with wind energy production." FEIS 2-15. Thus, the height of these trees will not need to be artificially limited.

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This Site Certification Agreement authorizes the Certificate Holder to begin Ceonstruction of the Project ~~such that Substantial Completion is achieved~~ no later than ten (10) years from the date that all final state and federal permits necessary to construct and operate the Project are obtained and associated appeals have been exhausted, provided the construction schedule the Certificate Holder submits pursuant to Article IV.K of this Agreement demonstrates that Substantial Completion is scheduled to occur within eighteen (18) months of beginning Construction; however, said ten- (10-) year period shall be extended for any *force majeure* event.

If the Certificate Holder does not begin Ceonstruction of the Project within five (5) years from the date that all final state and federal permits necessary to construct and operate the Project are obtained and associated appeals have been exhausted~~of the execution of the SCA~~, the Certificate Holder will report to the Council their intention to continue and will certify that the representations in the application, environmental conditions, pertinent technology and regulatory conditions have remained current and applicable, or identify any changes and propose appropriate revisions to the Site Certification Agreement to address changes. Construction may begin only upon prior Council authorization and approval of such certifications. If the Certificate Holder does not begin construction of the Project within ten (10) years from the date that all final state and federal permits necessary to construct and operate the Project are obtained and associated appeals have been exhausted~~of the execution of the SCA~~, all rights under this SCA will cease.

~~However, providing that such construction is not delayed by a *force majeure* event, and that the construction schedule that the Certificate Holder submits pursuant to Article IV.K of this Agreement demonstrates its intention and good faith basis to believe that construction shall be completed within eighteen (18) months of beginning Construction.~~

Whistling Ridge requests that the Council consider this language to clarify the condition, in lieu of FOCG's request.

D. The SCA should not be limited to 30 years.

FOCG requests that the Council limit the SCA to 30 years. FOCG RFR at 43:23-44:22. The Council has never before imposed a time limit on its projects, and FOCG provides no real reason for the Council to do so now. The Council has no regulatory or statutory authority to impose such a condition. This is a private Project on private land. It must be removed and the

site restored when it ceases operation. *See* WAC ch. 463-72; SCA Art. III.H. The SCA contains mechanisms for the Council to address unanticipated significant adverse environmental impact. *See* SCA Arts. III.K(5), VII.H. The Council should not limit the SCA to 30 years.

E. Contrary to FOCG's assertions, SCA Art. III.K(5) does not limit the Council's "authority to address unanticipated harm to the environment" under SCA Art. VII.H; it simply provides the process for the Council's exercise of that authority and should be retained.

FOCG claims that part of SCA Art. III.K(5) should be deleted because it limits the Council's "authority to address unanticipated harm to the environment" under SCA Art. VII.H. FOCG at 46:5-25. However, SCA Art. III.K(5) simply provides a reasonable and prudent process for the Council to exercise its authority under SCA Art. VII.H. It should be retained.

SCA Art. III.K(5) and Art. VII.H authorize the Council to address unanticipated significant adverse environmental impact. This authority includes "permanent shutdown, decommissioning, and removal" of wind turbines. SCA Art. VII.H. However, to do so, the Council must follow the procedure described in SCA Art. III.K(5). *See* SCA Art. VII.H ("In accordance with Article III, Section K, paragraph 5, of this agreement . . ."). Under SCA Art. III.K(5), the Council can unilaterally impose conditions reasonably necessary to address unanticipated significant adverse environmental impact for up to 90 days. The Council can unilaterally extend these conditions for an additional 90 days "to pursue ongoing, or continuing temporary, arrangements under other authority, including but not limited to RCW 34.05, RCW 80.50 RCW [sic] or Title 463 WAC." SCA Art. III.K(5). In other words, the Council can unilaterally impose conditions for up to 180 days but during the latter 90 days it must follow the Administrative Procedures Act (*i.e.*, afford Whistling Ridge the opportunity to contest the imposition of the conditions) in order for permanent or continuing temporary conditions to extend beyond the 180-day period. SCA Art. III.K(5)'s time limits are important because they protect Whistling Ridge's due process rights. These time limits should be retained.

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IX. CONCLUSION

For the reasons set forth above, Opponents' requests for reconsideration fail to identify any legal error or any finding or conclusion that is not solidly founded on substantial evidence in the record. Certain aspects of the Council's recommendation should be clarified, particularly the Council's integration of the SEPA process and the FEIS's conclusions into its recommendations, and the Council should reconsider its "subjective" application of RCW 80.50.010(2) to the Project and its resulting recommendation of a Project that is likely not economically viable. That said, the Council, the parties, and the public have thoroughly vetted the Project over the last three years. Indulging Opponents' desire for endless Council process and review followed by serial litigation directly conflicts with RCW 80.50.100(1)(a)'s directive for a review process lasting no more than 12 months, and a policy and legal framework that require finality of regulatory decisions.

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