BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of Application No. 2009-01: WHISTLING RIDGE ENERGY LLC; WHISTLING RIDGE ENERGY PROJECT	SKAMANIA COUNTY AND KLICKITAT COUNTY PUBLIC ECONOMIC DEVELOPMENT AUTHORITY'S PETITION FOR RECONSIDERATION OF COUNCIL ORDERS 868 AND 869

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LAW OFFICES OF
SUSAN ELIZABETH DRUMMOND, PLLC
1200 FIFTH AVENUE, SUITE 1650
SEATTLE, WASHINGTON 98101
PHONE (206) 682-0767

1. INTRODUCTION

EFSEC's Recommendation exceeds its jurisdictional and statutory authority. The Recommendation removes 15 turbines of 50, almost a third of the Whistling Ridge Energy Project, based on aesthetic impacts to the Columbia River Gorge National Scenic Area. There is no legal or factual basis for so sweeping a Recommendation, particularly when **County zoning authorizes the Project, with most turbines requiring only building permit issuance**.

EFSEC's statutory and regulatory authority, which lack aesthetics standards, does not authorize stripping turbines to such a degree the Project is no longer economically feasible. And, neither the National Scenic Area Act, nor the State Environmental Policy Act can "cure" the Recommendation. EFSEC's Environmental Impact Statement supports approval. And, the NSA prohibits its use outside the Scenic Area; an action particularly problematic for a County reeling from the recession, where only 7% of land outside the Scenic Area is privately held. Skamania County and Klickitat County Public Economic Development Authority petition for reconsideration for four principal reasons:

- **Zoning**. County zoning authorizes the Project. Except for one turbine string subject to conditional use approval, the entire Project is authorized outright, and all the Project needs are building permits. The Applicant is legally entitled to rely upon this zoning.
- **SEPA**. The Recommendation directly contravenes EFSEC's own Environmental Impact Statement (EIS), a document which finds aesthetic impacts can be mitigated and supports approval of all 50-turbines.
- **NSA**. The NSA does not apply outside its boundaries. The Recommendation purports to not rely on the NSA. This is disingenuous. This is precisely what the Recommendation does. This is impermissible under state and federal law, which **prohibit** state agencies from effectively extending Scenic Area boundaries.

LAW OFFICES OF
SUSAN ELIZABETH DRUMMOND, PLLC
1200 FIFTH AVENUE, SUITE 1650
SEATTLE, WASHINGTON 98101
PHONE (206) 682-0767

- **EFSEC Authority**. Without authority from local zoning, SEPA, or the NSA, the only authority remaining to support turbine removal are references in EFSEC statutes and regulations to considering aesthetics.[1] EFSEC lacks aesthetic standards, so may not use these "references" to cut the Project by one-third, rendering it economically infeasible.

Given County zoning, SEPA, the NSA, and EFSEC's own legal authority all support approval, and the Project is located in a County in dire economic straits, without any other wind development, and 35-miles[2] from any other project, approval of all 50-turbines is requested.

2. ARGUMENT

2.1 County Zoning Authorizes the Project

Skamania County zoning authorizes all but one turbine string outright. All the County has to do is issue building permits and much of the Project is permitted. One action. One day. Project approved. The remainder is authorized by conditional use. Given more invasive uses, such as aircraft landing fields, are listed as conditional uses, as the County found, the Project is consistent with CUP criteria,[3] and would be quickly approved. While EFSEC has preemption authority when regulations conflict with its statutory authority, where there is no conflict, it may not simply set aside the local controls applicable to the Project.[4] Unless preempted, the application must be reviewed consistently with County regulations. This regulatory structure may not simply be set aside.

> A property owner has a vested right to use his property under the terms of the zoning ordinance applicable thereto. A building or use permit must issue as a matter of right upon compliance with the ordinance. … The acts of administering a zoning ordinance do not go back to the questions of policy and discretion which were settled at the time of the adoption of the ordinance. Administrative authorities are properly concerned with questions of compliance with the ordinance, not with its wisdom. …[5]

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[1] Council Order 868, p. 18.
[2] Ex. 51.00R (Commissioner Pearce's Testimony), p. 6.
[3] Ex. 2.03 (Skamania County Resolution 2009-54).
[4] RCW 80.50.110(1); WAC 463-28-060(1).
[5] *State ex rel. Ogden v. Bellevue*, 45 Wn.2d 492, 495, 275 P.2d 899 (1956), internal cites omitted.

LAW OFFICES OF
SUSAN ELIZABETH DRUMMOND, PLLC
1200 FIFTH AVENUE, SUITE 1650
SEATTLE, WASHINGTON 98101
PHONE (206) 682-0767

EFSEC held a land use consistency hearing. And, the County, with EFSEC concurrence, found the Project consistent with local land use requirements.[6] Because the County has issued a certificate of consistency, the applicant is entitled to rely on these regulations.

> If it is determined that the proposed site does conform with existing land use plans or zoning ordinances in effect as of the date of the application, the city, county, or regional planning authority shall not thereafter change such land use plans or zoning ordinances so as to affect the proposed site.[7]

The Project is vested. With local zoning authorizing the Project, EFSEC lacks statutory authority to ignore this regulatory structure and excise a third of the Project, based upon vague aesthetics language.[8]

> An ordinance must contain ascertainable standards for adjudication in order to limit arbitrary and discretionary enforcement of the law. A statute which forbids or requires the doing of an act in terms so vague that individuals of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.[9]

Unlike in *Swoboda*, EFSEC has **no** aesthetics standards guiding the Recommendation. As the County addressed in its briefing, the applicant is required to describe aesthetic impacts, but EFSEC's siting criteria do not require setbacks due to the site's visibility from the Scenic Area.[10] EFSEC references RCW 80.50.010(2), but this one statutory reference to aesthetics does not support protecting views at a limited number of viewpoints within an already disturbed viewshed. Further, RCW 80.50.010(2) must be read in its entirety, and in conjunction with .010(3), which include numerous EFSEC siting goals:

- To preserve and protect the quality of the environment; to enhance the public's opportunity to enjoy the esthetic and recreational benefits of the air, water and land resources; to promote air cleanliness; and to pursue beneficial changes in the environment.

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[6] Ex. 2.03 (Skamania County Resolution 2009-54).
[7] RCW 80.50.090(2), emphasis added.
[8] Council Order 868, p. 18, citing RCW 80.50.010(2), RCW 80.50.040(8), WAC 463-014-020.
[9] *Swoboda v. Town of La Conner*, 97 Wn. App. 613, 619 (1999).
[10] Skamania County and Klickitat County Public Economic Development Authority's Adjudication Brief, pgs. 5-10.

LAW OFFICES OF
SUSAN ELIZABETH DRUMMOND, PLLC
1200 FIFTH AVENUE, SUITE 1650
SEATTLE, WASHINGTON 98101
PHONE (206) 682-0767

- To provide abundant energy at reasonable cost.

Focusing only on the one reference to aesthetics comes at the cost of preserving the aesthetics of the air (*i.e.*, visibility) and air cleanliness; and at the cost of promoting beneficial changes in the environment through a project which would help avoid using haze-creating, air pollutant generating, and greenhouse gas emitting combustion sources of power generation. And, the County and State lose a Project which would assist in providing "abundant energy at reasonable cost."

The concurring opinion acknowledges EFSEC lacks a regulatory structure with ascertainable aesthetics standards to guide EFSEC's determination. "Absent rules, the Council proceeds on a case-by-case basis and our decisions inevitably leave room for questioning whether the correct result was reached."[11] But, there are rules. The County's. However, instead of relying on County regulations, the Recommendation excises a third of the Project based on an assessment that it is part of a "scenic and cultural heritage area."[12] This is a reference to the Columbia River Gorge National Scenic Area, as EFSEC acknowledges when stating that the basis for its Recommendation is rooted in visibility from "viewing areas."

> The remainder of the Project, which is visible much less or not at all from most viewing areas, does not pose a threat to the integrity of the Columbia Gorge aesthetic or heritage values and may be permitted.[13]

"Viewing areas" are designated through the NSA. They are located within the Scenic Area.[14] The concurring opinion also acknowledges this in describing the relevant landscape.[15] Consequently, the Recommendation is impermissibly based, not on EFSEC regulations or SEPA, but the NSA.

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[11] Council Order 868, p. 45, emphasis added.
[12] Council Order 868, p. 22.
[13] Council Order 869, p. 7.
[14] "Within the Columbia River Gorge National Scenic Area, Key Viewing Areas (KVAs) have been established…." EIS, p. 3-170. (The Columbia River Gorge Commission adopted a Management Plan establishing these "KVA's")
[15] *See* Council Order 868, p. 45 and footnote iii.

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SUSAN ELIZABETH DRUMMOND, PLLC
1200 FIFTH AVENUE, SUITE 1650
SEATTLE, WASHINGTON 98101
PHONE (206) 682-0767

EFSEC recognizes the site is outside NSA jurisdiction, is not "pristine," and includes "industrial agriculture, regional utility, commercial and industrial development."[16]

> A series of dams now slow the river, generate power for the Northwest and permit commercial barge transportation. Heavily traveled highways and rail lines follow both sides of the Columbia River, and commercial barge traffic shares the river with divers, fishers and windsurfers. Industrial, commercial and residential development exists along the river. **Electric and natural gas transmission lines, requiring clear cuts through forests [for] their rights-of-way are visible in the vicinity of the proposed project and directly through the proposed site**.[17]

But, despite this recognition, EFSEC recommends cutting the Project by one-third, based on the Scenic Area, using the term "scenic and cultural heritage area." "[W]e find an adverse effect of the original proposal upon a scenic and cultural heritage area."[18] With its Recommendation, EFSEC has used not its own regulatory structure, but the presence of the Scenic Area to extend buffers outside of it. EFSEC has done so based not on objective standards, but its own "**subjective effort**" to reduce turbine visibility.[19]

Perhaps most problematic, this occurs in a County in which the vast majority of land will remain undeveloped, given the extremely limited acreage in private ownership. Unlike any other jurisdiction in Washington, **93%** of Skamania County is protected through the NSA or owned by government.[20] Simply because turbines can be seen on a fraction of this 7% of the County from highways and the Columbia River (a River which has long been an economic development powerhouse – having been bridged, dammed, and motored on daily by shipping traffic), provides no basis for turbine removal. The Kittitas turbines, the Stateline turbines, the Klickitat turbines, and the turbines in Oregon, can all be seen from highways, many of the turbines from the very same highways as Whistling Ridge. And, many turbines can be seen from the Columbia River.

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[16] Council Order 868, p. 21.
[17] Council Order 868, pgs. 16-17.
[18] Council order 868, p. 22.
[19] Council Order No. 868, p. 22.
[20] Ex. 51.005 (Commissioner Pearce's Testimony), p. 4:4-9.

LAW OFFICES OF
SUSAN ELIZABETH DRUMMOND, PLLC
1200 FIFTH AVENUE, SUITE 1650
SEATTLE, WASHINGTON 98101
PHONE (206) 682-0767

Whistling Ridge, the only project proposed in Skamania, has no more aesthetic impact than these projects.

Cutting the Project by one-third on a century-old logging site,[21] under zoning which authorizes the Project, is not supportable. Because local zoning authorizes the Project, and EFSEC lacks aesthetics standards, EFSEC lacks authority to render the Project infeasible based on subjective notions of aesthetics, and to effectively create new NSA boundaries.

2.2 EFSEC May Not Redraw NSA Boundaries

EFSEC may not utilize the NSA to impose Scenic Area setbacks. Congress has spoken:

> **Nothing in this Act shall … establish protective perimeters or buffer zones around the scenic area or each special management area**. **The fact that activities or uses** inconsistent with the management directives for the scenic area or special management areas **can be seen or heard from these areas shall not, of itself, preclude such activities or uses up to the boundaries of the scenic area** or special management areas.[22]

This "no buffer on a buffer" requirement was a key component of the 1986 legislative compromise allowing NSA passage.[23] Any Project curtailment due to the fact it can be seen from the Scenic Area is without basis. This language is jurisdictional. EFSEC may not, based on open-ended statutory references to aesthetics in Ch. 80.50 RCW, create protective "perimeters or buffer zones."

> The governor, the Columbia River Gorge commission, **and all state agencies** and counties **are hereby directed** and provided authority **to carry out their respective functions and responsibilities in accordance with** the compact executed pursuant to RCW 43.97.015, **the Columbia River Gorge National Scenic Area Act**, and the provisions of this chapter.[24]

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[21] Amended ASC, Introduction, p. I-2.
[22] 16 USC §544o(a)(10), emphasis added.
[23] Skamania County and Klickitat County Public Economic Development Authority Adjudication Brief, pgs. 5-7; Ex. 51.00r (Commissioner Pearce's Prefiled Rebuttal Testimony), pgs. 3-5.
[24] RCW 43.97.025, emphasis added.

LAW OFFICES OF
SUSAN ELIZABETH DRUMMOND, PLLC
1200 FIFTH AVENUE, SUITE 1650
SEATTLE, WASHINGTON 98101
PHONE (206) 682-0767

This language directs EFSEC to act consistently with the NSA (including its corresponding language in state law), and may not utilize Scenic Area existence to setback the Project.

The legislature and appellate courts will enforce agency jurisdictional boundaries. For example, when the Growth Board imported Growth Management Act requirements into the Shoreline Management Act, the legislature took just four months to reverse.[25] The legislature explained that that the two regulatory regimes were separate and distinct.[26] The Washington State Department of Commerce, Growth Management Services, similarly recognized the importance of maintaining distinct NSA/EFSEC regulatory regimes.

> The development standards in the NSA Management Plan were adopted to guide development within the NSA. If the same standards that are appropriate for the NSA are used for areas outside the NSA, the same projects will be approved, and none other, regardless of the policy goals of the county or city elected officials. That is why we are concerned.[27]
>
> Applying standards developed to guide development within the NSA [National Scenic Area] to the WREP project [Project] would … **establish a protective perimeter or buffer zone around the scenic area, in direct contradiction to the law**. And if, as a result, the WREP should be rejected on this basis, county policy goals, and state goals and policies regarding both renewable energy development and economic development in general would be thwarted. … The Act set boundaries for a purpose, including the purpose of allowing development outside the NSA that would not be approved in it. The Act set aside special management areas within the NSA with even stricter standards, and exempted the urban areas to encourage economic growth there. The urban areas have land use ordinances that allow both commercial and industrial uses. Over the years, these communities have experienced difficult economic times, with the collapse of the timber and fishing industries, and now from the recent recession.[28]

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[25] *Futurewise v. WWGMHB*, 164 Wn.2d 242, 246, 189 P.3d 161 (2008).

[26] RCW 90.58.030, findings ("The legislature intends that critical areas within the jurisdiction of the shoreline management act shall be governed by the shoreline management act and that critical areas outside the jurisdiction of the shoreline management act shall be governed by the growth management act.")

[27] Ex. 36R.00 (Dept. of Commerce, Growth Management Services Director, testimony), p. 4.

[28] Ex. 36R.00 (Testimony of Managing Director of Dept. Commerce, Growth Management Services), pgs. 5-6.

LAW OFFICES OF
SUSAN ELIZABETH DRUMMOND, PLLC
1200 FIFTH AVENUE, SUITE 1650
SEATTLE, WASHINGTON 98101
PHONE (206) 682-0767

This jurisdictional limitation is reinforced by County regulations, which do not impose "setbacks on a setback." Consistent with federal law, the County's land use regime does not use the NSA to impose setbacks on projects within either the urban exempt areas or outside the Scenic Area. The County's Scenic Act aesthetic protocols, guidelines and regulatory requirements are incorporated into SCC Title 22, which applies only to the Scenic Area and "**to no other lands within the county**…."[29] EFSEC must follow the County's approach.

Any other approach, if used in other permitting situations, would impair the County's economic future, with potential ramifications for major urban and urbanizing areas of Clark County and Multnomah County (*e.g.*, Washougal, Camas and areas in southeast Vancouver, as well as Gresham and Troutdale). At the Gorge's west end, in full view of any number of key viewing areas sits the entire town of Washougal and the stacks of the Camas Paper mill. On the east end, right on the Scenic Area boundary, is the Maryhill Winery & Amphitheatre, and in the distance, wind turbines.[30] There is no basis for prohibiting the paper mill or stopping urban redevelopment and renewal, just as there is no basis for prohibiting any turbines on a limited portion of the 7% of the County's private land base outside the Scenic Area. State and federal law prohibit state agencies from effectively revising Scenic Area boundaries.

[29] SCC 22.02.050, emphasis added; *See* 16 USC 544e(c)(2) ("Upon approval of a land use ordinance by the Commission it shall supersede any regulations for the county developed by the Commission, subject to valid existing rights.").
[30] Ex. 51.00R (Commissioner Pearce's testimony), p. 5.

LAW OFFICES OF
SUSAN ELIZABETH DRUMMOND, PLLC
1200 FIFTH AVENUE, SUITE 1650
SEATTLE, WASHINGTON 98101
PHONE (206) 682-0767

2.3 SEPA – The EIS Supports Approval of All 50-Turbines

The Recommendation is not consistent with EFSEC's own EIS, which found low to moderate visual impacts from this Project, located outside the Scenic Area:

> **The Project would cause some visual impact to surrounding areas where turbines were visible, including some areas inside the Columbia River Gorge National Scenic Area. However, the visual impact analysis showed that the anticipated level of visual impact would not be higher than low to moderate at any of the viewpoints examined**.[31]
>
> **The presence of the Project would cause low to moderate visual impacts to viewpoints within the Scenic Area. Congress has determined that the National Scenic Act is not to be used to regulate activities outside of the Scenic Area boundary**.[32]

Attached to this brief is Table 3.9-2 from the EIS detailing this analysis. The column to the far right titled, "Anticipated Level of Visual Impact" is highlighted. Visual impacts are described as "Low," "Low to Moderate," and "Moderate."[33] **At not one of these locations are high impacts found**. Not one.

The Project is proposed on private property used not for public open space or recreation, but **logging.**[34] EFSEC implicitly recognizes it lacks SEPA authority for excising one-third of the Project, as it does not rely on SEPA for cutting the Project by one-third. Lacking aesthetic regulations, and prohibited by the NSA from placing setbacks on the Scenic Area, EFSEC may not remove turbines on a subjective basis. The Recommendation must be based on applicable laws.

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[31] EIS, p. 3-201.
[32] EIS, p. 3-99.
[33] EIS, p. 3-182.
[34] Amended ASC, Introduction, p. I-2 (site used for past century for commercial forestry).

LAW OFFICES OF
SUSAN ELIZABETH DRUMMOND, PLLC
1200 FIFTH AVENUE, SUITE 1650
SEATTLE, WASHINGTON 98101
PHONE (206) 682-0767

2.4 Skamania County is Desperate for an Economic Life Raft

Whistling Ridge is the only wind project which has been proposed for location in Skamania County, despite the many turbines (permitted locally) visible from the Scenic Area. These turbines are an economic life-raft to the region. A life-raft Skamania may not board, despite an increasingly desperate need to do so.

Skamania County struggles under the weight of rural poverty. The Recommendation acknowledges this fact.[35] The County suffers high domestic violence rates.[36] In the central-County area, half the children require subsidized school lunches to eat.[37] To address the violence of poverty and ensure these children have a future, and their schools are not shuttered, economic development is key. County prospects are grim.

Skamania is faced with the prospect of losing Federal funds from the Secure Rural Schools and Forest Counties Act.[38] The loss of such funds would lead to decrease in services to the County's residents, including the provision of a basic education, without which a child cannot thrive in today's economy.[39] The Project offers the County a way out. It provides an important opportunity to have a new industry bring in jobs and allows the County a more secure tax base.[40]

It is hard for this County, facing such difficult economic conditions, to fathom how expensive the Project has been and how long permitting has taken, to approve a Project so limited it is not viable,[41] when **local regulations authorize the Project**. For Skamania County,

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[35] Council Order 868, p. 31 ("Skamania County is uniquely challenged financially. The economic benefits from the project will be real and, to the county, the school system and the public, not insignificant.").
[36] TR (January 11, 2011 Hearing), p. 1357:16-21.
[37] TR (January 11, 2011 Hearing), pgs. 1357-58.
[38] Ex. 51.00r (Commissioner Pearce's Prefiled Rebuttal Testimony), pgs. 6-7.
[39] Ex. 51.00r (Commissioner Pearce's Prefiled Rebuttal Testimony), p. 7.
[40] Ex. 41.02 (Economic and Fiscal Benefits Memorandum), p. 2.
[41] *See e.g.* TR at 74:21-24, 149:2-10 (Spadaro).

LAW OFFICES OF
SUSAN ELIZABETH DRUMMOND, PLLC
1200 FIFTH AVENUE, SUITE 1650
SEATTLE, WASHINGTON 98101
PHONE (206) 682-0767

EFSEC was not a siting process of "last resort."[42] Rather, the County referred the applicant to EFSEC, because EFSEC was established for the specific purpose of siting power generating facilities, and the County presumed the process would be more efficient and cost-effective for both the County and applicant. This has not proven to be the case. This is perhaps the most expensive project for an applicant in EFSEC history.[43]

It is legally unsupportable for subjective views of turbines; with their long, crisp lines, symbolizing local economic development and clean energy, and presenting a beautiful sight for many, to take precedence over local codes authorizing the entire Project. Without aesthetic regulations, and given state and federal law addressing Scenic Area setbacks, EFSEC lacks authority to effectively terminate a Project so essential to Skamania's economic future.

3. CONCLUSION

EFSEC reviews projects with an eye to attaining the widest range of beneficial uses of the environment, and achieving a balance to "permit high standards of living and a wide sharing of life's amenities…."[44] With the Recommendation, Skamania will not share in these amenities or high standards of living, because it loses a Project necessary for bolstering the local economy. This loss is due to a subjective aesthetics rationale, not specific legal standards.

The Project is outside the Scenic Area. No further buffering is required or authorized by federal and state law. Setbacks are not appropriately imposed simply because turbines can be seen from a "viewing area," or from a state highway or the Columbia River, which are routes of commerce passing through highly industrialized areas.

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[42] Order No. 868, p. 47 (concurring opinion). Local jurisdictions have planned for renewable energy and have identified locations where it should be sited. Skamania County, by retaining this unmapped zoning, has identified the limited portion of the County where wind development is appropriate (93% of the County is on public land or subject to the NSA).

[43] The Applicant must reimburse EFSEC for 2 ½ years of permitting costs. Ch. 463-58 WAC.

[44] WAC 463-47-110(1)

LAW OFFICES OF
SUSAN ELIZABETH DRUMMOND, PLLC
1200 FIFTH AVENUE, SUITE 1650
SEATTLE, WASHINGTON 98101
PHONE (206) 682-0767

With only 7% of its land privately held and outside the Scenic Area, and given the severe economic conditions in Skamania, the County cannot afford a Recommendation which effectively kills this Project. And, EFSEC lacks jurisdictional and statutory authority to do so.

Skamania County and the Klickitat County Economic Development petition EFSEC to reconsider its Recommendation and recommend approval of the Project as proposed.

DATED this 27th day of October, 2011.

ADAM NATHANIEL KICK
Prosecuting Attorney for Skamania County

LAW OFFICES OF
SUSAN ELIZABETH DRUMMOND, PLLC

_____
Adam N. Kick, WSBA #27525
Susan Drummond, WSBA #30689

LAW OFFICES OF
SUSAN ELIZABETH DRUMMOND, PLLC
1200 FIFTH AVENUE, SUITE 1650
SEATTLE, WASHINGTON 98101
PHONE (206) 682-0767