

NO. 88089-1

SUPREME COURT OF THE STATE OF WASHINGTON

FRIENDS OF THE COLUMBIA GORGE, INC. and
SAVE OUR SCENIC AREA,

Petitioners,

v.

STATE ENERGY FACILITY SITE EVALUATION COUNCIL and
CHRISTINE O. GREGOIRE, Governor of the
STATE OF WASHINGTON,

Respondents,

and

WHISTLING RIDGE ENERGY LLC,
SKAMANIA COUNTY, and KLICKITAT COUNTY PUBLIC
ECONOMIC DEVELOPMENT AUTHORITY,

Intervenors-Respondents.

**RESPONSE BRIEF OF INTERVENOR-RESPONDENT
WHISTLING RIDGE ENERGY LLC**

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NATURE OF THE CASE

The Energy Facility Site Evaluation Council (“EFSEC”) recommended that Governor Gregoire approve in part and deny in part the Whistling Ridge Energy Project (“Project”), a wind energy facility on private land in Skamania County. The Project site is located outside the Columbia River Gorge National Scenic Area. Whistling Ridge Energy LLC (“Whistling Ridge”) had applied to build up to 50 wind turbines, but later voluntarily reduced this number to 38. EFSEC recommended further reducing the Project’s size by eliminating certain turbine corridors and cutting the maximum number of turbines to 35. After reviewing the record, the Governor approved EFSEC’s recommendation. The Friends of the Columbia Gorge, Inc. and Save Our Scenic Area (collectively, “Opponents”) filed a petition for judicial review of EFSEC’s and the Governor’s decisions. Whistling Ridge did not seek review of the decision reducing the size of the Project. The Thurston County Superior Court certified the case for review by this Court pursuant to RCW 80.50.140(1).

STATEMENT OF THE ISSUES

1. Do Opponents’ claims that EFSEC violated RCW 80.50.010, WAC 463-14-020, and WAC 463-60-332, which set out legislative findings and EFSEC’s interpretative rules and application guidelines, fail because they do not confer substantive rights on Opponents?

2. Is EFSEC's finding that Whistling Ridge's application complied with the application guidelines in WAC 463-60-332 and the Washington Department of Fish and Wildlife's ("WDFW") *Wind Power Guidelines* supported by substantial evidence?

3. WAC 463-62-040 sets out performance standards for the Site Certification Agreement relating to wildlife habitat mitigation. Is the Governor's Site Certification Agreement valid because there is substantial evidence that Whistling Ridge conducted wildlife surveys during all seasons, and the Site Certification Agreement requires enforceable habitat mitigation both before and after the Project is constructed and operating?

4. RCW 80.50.040(9) empowers EFSEC to monitor the construction and operation of the Project to ensure compliance with the Site Certification Agreement. Is the Governor's Site Certification Agreement arbitrary and capricious because it authorizes turbine micro-siting within approved turbine corridors and it does not set out public participation and appeal rights related to EFSEC's oversight of the Project?

5. WAC 463-26-090 provides that Skamania County's certificate of land use consistency is *prima facie* proof of the Project's consistency and compliance with the Skamania County's land use plans and zoning ordinances. Did Opponents overcome this presumption?

6. Should Whistling Ridge be subject to costs under RCW 34.05.566(5)(a) for refusing to agree to a shortened record?

STATEMENT OF THE CASE

Whistling Ridge is an affiliate of SDS Lumber Company, which is a forest products company in Bingen, Washington, that has been locally owned and continuously operated since 1946. AR 28153, 28390. In 2009 Whistling Ridge submitted an application to EFSEC for a 75 MW wind energy facility with up to 50 wind turbines. AR 42. The Project is located on 1,152 acres of private land in unincorporated Skamania County outside the Columbia River Gorge National Scenic Area. AR 28192-93. This land has been used for commercial forestry for the last 100 years. AR 2963, 28433. Timber has been harvested from large segments of the Project site in recent years pursuant to long-established harvesting schedules. AR 18452-53, 28203-05. It is crossed by four Bonneville Power Administration long-distance, high-voltage electric transmission lines on massive lattice towers within two approximately 250-foot-wide right-of-way corridors. AR 4550, 17484, 28252, 28357. Less than 57 acres of the Project site will be used for energy generation with commercial forestry operations continuing on the rest of the site. AR 28193, 28199. There are no residences within 4,000 feet of a turbine corridor approved by the Governor. *See* App. A-1 (AR 28539); AR 28339.

Site study for a wind energy facility began on the Project site over a decade ago. AR 2962. In early 2004 Whistling Ridge began consulting with WDFW and the U.S. Fish and Wildlife Service on wildlife survey methods and results. AR 28167-68. In addition to other wildlife and habitat surveys, Whistling Ridge subsequently completed the following bird surveys: (i) northern spotted owls in 2004, 2008, 2009, and 2010; (ii) northern goshawks in 2008 and 2009; and (iii) general avian in the fall of 2004, the summer of 2006, the winter of 2008/2009, and the spring of 2009. AR 11503, 11509, 11481. Whistling Ridge conducted more pre-project assessment and baseline wildlife surveys than any other previously proposed project. AR 15791. WDFW has confirmed that Whistling Ridge's survey methods were consistent with standard survey protocols and represent the best available science. AR 28264.

EFSEC visited the Project site, held land use and adjudicative hearings, solicited public comment, and held informational and public comment meetings in Skamania County on the Project.¹ AR 1479, 3014,

¹ Contrary to Opponents' claim, the record does not indicate that this Project is the most controversial wind project ever proposed in the State of Washington. Pet. Br. at 1 (citing AR 28772 n.1). Opponents' public comment "statistics" come from their briefing before EFSEC, which just baldly asserted these "statistics" without citing any evidence in the record. See AR 28772 n.1, 29194 n.36. Further, the Kittitas Valley Wind Power Project was previously appealed to the Washington Supreme Court. See *Residents Opposed to Kittitas Turbines v. EFSEC*, 165 Wn.2d 275, 197 P.3d 1153 (2008). Unlike that appeal, in which Kittitas County opposed that project, here Skamania County has intervened in support of this Project. Moreover, the level of controversy is irrelevant to judicial review under RCW 34.05.570(3).

28835-36, 28657-59. During EFSEC's review process Whistling Ridge stipulated that no more than 38 turbines would be constructed to minimize potential visual impacts. AR 16733. EFSEC and the Bonneville Power Administration prepared a joint final environmental impact statement ("FEIS") to satisfy their respective obligations under Washington's State Environmental Policy Act ("SEPA") and the National Environmental Policy Act. AR 28128. Based on the adjudicative record and the FEIS, EFSEC recommended, and Governor Gregoire approved, the construction of 35 turbines in the A8-A13, B1-B21, D1-D3, E1-E2, and F1-F3 turbine corridors, but denied construction in the A1-A7 and C1-C8 turbine corridors. AR 28633, 28844, 36687-88, 36697.

Opponents filed a Petition For Judicial Review in Thurston County Superior Court. CP 4. Whistling Ridge did not seek review of the Governor's decision to reduce the size of the Project. The Superior Court certified the case to this Court pursuant to RCW 80.50.140. CP 861-67.

SUMMARY OF ARGUMENT

1. EFSEC and the Governor did not violate RCW 34.05.570(3)(f), because this standard does not require that an agency address all the issues presented by the parties. Instead, it only requires an agency to resolve the issues requiring resolution. Here, the EFSEC statute and rules relied on by Opponents are legislative findings and EFSEC's interpretative and

procedural rules; they do not have the force and effect of law and do not confer substantive rights on Opponents. Thus, Opponents' issues based on them do not require resolution. For the same reason, EFSEC's adjudicative order does not conflict with these statute and rules, so there is no violation of RCW 34.05.570(3)(h).

2. WAC ch. 463-60 provides guidelines for completing an EFSEC application. To support their argument that Whistling Ridge's application did not comply with WAC 463-60-332 guidelines concerning species and habitat information, Opponents point to isolated parts of the record that Opponents take out of context. There is substantial evidence that Whistling Ridge provided the all the information called for by WAC 463-60-332, and that Whistling Ridge's pre-project assessment was consistent with WDFW's *Wind Power Guidelines*.

3. WAC ch. 463-62 sets out construction and operation standards for the Site Certification Agreement. Contrary to Opponents' arguments, WAC 463-62-040 does not require the entry of findings of fact and conclusions of law in EFSEC's orders. There is substantial evidence in the record that Whistling Ridge conducted wildlife studies during all seasons. The Site Certification Agreement imposes enforceable requirements to ensure no net loss of habitat function and value and off-site mitigation, thereby satisfying WAC 463-62-040.

4. The Site Certification Agreement authorizes post-approval micro-siting of turbine locations within the specific turbine corridors approved by the Governor. This is not arbitrary and capricious. The record contains substantial evidence about the impacts of turbines constructed within the approved corridors, so any turbine locations within the approved corridors are consistent with the Project approval. Pre-application micro-siting is not practical or desirable. For example, projects would be unable to use subsequently-developed turbines that could further reduce environmental impacts. Opponents cite no applicable authority supporting their claim that a Site Certification Agreement is invalid if it does not include post-approval public participation provisions. There is substantial public participation in EFSEC's comprehensive pre-approval review process.

5. Under WAC 463-26-090, Skamania County's certificate of land use consistency is *prima facie* proof that the Project is consistent with Skamania County's comprehensive plan and zoning ordinance. Opponents have not overcome this *prima facie* proof.

6. Opponents are not entitled to record preparation costs under RCW 34.05.566(5)(a), because Whistling Ridge's decision to not stipulate to a shortened record was reasonable given the claims in Opponents' Petition for Judicial Review and Opponents' own reliance on documents they claim are not relevant to their appeal.

ARGUMENT

Opponents' brief raises a very large number of claims.² To support these claims, Opponents recite six of the standards of review set out in RCW 34.05.570(3) (Pet. Br. at 12-14), but their brief provides little analysis applying those standards to the facts. Opponents' submission primarily consists of a discussion of isolated parts of the record followed by a summary conclusion at the end of each section that there is a violation of RCW 34.05.570(3). The Supreme Court is not the place for Opponents to retry their case. There is substantial evidence in the record supporting EFSEC's recommendation and Governor Gregoire's decision.

A. The Majority Of Opponents' Claims Fail Because They Are Based On A Statute And Rules That Do Not Have The Force And Effect Of Law

Most of Opponents' claims are based on two standards of review. Opponents allege violations of RCW 34.05.570(3)(f) because they claim EFSEC did not decide all the contested issues, and they allege violations of RCW 34.05.570(3)(h) because they claim EFSEC's recommendation

² Opponents summarily assign error to a host of findings of fact and conclusions of law. Pet. Br. at 7-8. However, Opponents' subsequent arguments do not even cite a great number of these findings and conclusions, specifically Overview Conclusions 1, 3, 4, §§ II.B, III.D.1, III.D.7, III.E, Finding of Fact and Conclusion of Law IV.11, IV.20, IV.22, IV.28, IV.30, IV.42, and IV.43 in Order No. 868 ("Adjudicative Order"), and Finding of Fact and Conclusion of Law 6, 8, 14, 15, 17, 18, 19, 20, 21, 32, and 42, and Conclusion of Law 6 in Order No. 869 ("Recommendation Order"). The Court should not consider this assignment of error, because neither Respondents nor the Court should be obligated to decode this assignment of error. *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 624, 818 P.2d 1056 (1991) ("If a party fails to support assignments of error with legal arguments, they will not be considered on appeal.").

conflicts with EFSEC statutes and rules. These arguments fail because the statute and rules Opponents rely on do not have the force and effect of law and do not confer any substantive rights on Opponents.

1. Standards Of Review

Opponents carry the burden of demonstrating that EFSEC's recommendation and the Governor's decision violated RCW 34.05.570(3). RCW 34.05.570(1)(a). RCW 34.05.570(3) provides in part that the relief is to be granted only if:

(f) [t]he agency has not decided all issues requiring resolution by the agency; [or]

....

(h) [t]he order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency[.]

Neither of these standards of review supports Opponents' claims. The thrust of their claim that EFSEC violated RCW 34.05.570(3)(f) is that EFSEC's orders did not address all the arguments that Opponents made.³ However, this is not the standard. The court of appeals rejected this argument in *Skagit County v. Skagit Hill Recycling, Inc.*, 162 Wn. App.

³ Opponents make a similar claim that EFSEC failed to decide all the issues in the case based on WAC 463-14-080 and WAC 463-30-320(6). Pet. Br. at 19, 30-32, 36, 48. RCW 34.05.546(7) requires that a petition for judicial review contain the "petitioner's reasons for believing that relief should be granted." The Court should not consider Opponents' claims based on WAC 463-14-080 and WAC 463-30-320(6) because those claims were not included in their Petition For Judicial Review.

308, 253 P.3d 1135 (2011). In that case Skagit Hill Recycling argued that a decision of the Pollution Control Hearings Board did not resolve all the issues requiring resolution. The court rejected this argument stating:

Skagit Hill appears to suggest that RCW 34.05.570(3)(f) requires the agency to consider all issues presented by the parties. But it provides no authority for such a proposition. In this case, the [Pollution Control Hearings Board] properly considered all of the issues “requiring resolution,” which was one primary issue: did Skagit Hill violate the conditions of its 2007 inert waste permit?

Skagit Cnty., 162 Wn. App. at 321. Here, many issues that Opponents claim require resolution are based on a statute and rules that do not have the force and effect of law and do not confer any substantive rights on Opponents. The same is true of Opponents’ claims under RCW 34.05.570(3)(h) that EFSEC’s decision is in conflict with EFSEC statutes and rules.

2. RCW 80.50.010 Sets Out A Statement Of Legislative Policy, Not Substantive Requirements

There is no basis for Opponents’ argument under RCW 34.05.570(3)(f) and (h) that RCW 80.50.010 requires EFSEC to address radar-activated lighting on turbines (Pet. Br. at 43-48) and turbine blade spin time (Pet. Br. at 40-43, 48-49). RCW 80.50.010 sets out legislative policy, not substantive requirements. RCW 80.50.010 begins by stating:

The legislature finds that the present and predicted growth in energy demands in the state of Washington

requires the development of a procedure for the selection and utilization of sites for energy facilities and the identification of a state position with respect to each proposed site.

(Emphasis added.) It subsequently explains that it

is the policy of the state of Washington to recognize the pressing need for increased energy facilities, and to ensure through available and reasonable methods, that the location and operation of such facilities will produce minimal adverse effects on the environment, ecology of the land and its wildlife, and the ecology of state waters and their aquatic life.

(Emphasis added.) Policy statements by the legislature are important. They are a “constituent part of the [law] and [are] to be considered in construing, interpreting, and administering [the law]. *Whatcom Cnty. v. Langlie*, 40 Wn.2d 855, 863, 246 P.2d 836 (1952). EFSEC relies on these policy statements to guide its decision-making. AR 28669.

However, these policy statements by the legislature do not give rise to enforceable rights by Opponents. The beginning phrase of RCW 80.50.010, “[t]he legislature finds,” conclusively establishes this point. As this Court held in *Judd v. American Telephone & Telegraph Co.*, 152 Wn.2d 195, 203, 95 P.3d 337 (2004): “When the legislature employs the words ‘the legislature finds,’ . . . it sets forth policy statements that do not give rise to enforceable rights and duties.” *See also Melville v. State*, 115 Wn.2d 34, 38, 793 P.2d 952 (1990) (“The basic principle is that statutory policy statements as a general rule do not give rise to enforceable rights and duties.” (internal quotation marks and citation omitted)).

Since the policy statements in RCW 80.50.010 do not grant Opponents any enforceable rights, EFSEC did not violate RCW 34.05.570(3)(f) and (h) by not making findings that expressly addressed Opponents' arguments related to radar-activated lighting and turbine blade spin time.⁴

3. WAC 463-14-020 Is An Interpretative Rule That Does Not Have The Force And Effect Of Law

Opponents also claim that EFSEC violated WAC 463-14-020 by not making findings addressing turbine blade spin time. Pet. Br. at 40-43. WAC 463-14-020 provides:

RCW 80.50.010 requires the council “to recognize the pressing need for increased energy facilities.” *In acting upon any application for certification, the council action will be based on the policies and premises set forth in RCW 80.50.010 including, but not limited to: . . .*

(Emphasis added.) WAC 463-14-020 sets out EFSEC's policies in considering an application. As such, it is an interpretative rule. RCW 34.05.328(5)(c)(ii) defines interpretative rule as “a rule, the violation of which does not subject a person to a penalty or sanction, that sets forth the agency's interpretation of statutory provisions it administers.” Such rules do not have the force and effect of law. They “are not binding on the

⁴ Opponents make a similar claim that WAC 463-47-110 obligates EFSEC to expressly address radar-activated lighting and turbine blade spin time. Pet. Br. at 41-49. However, WAC ch. 463-47 implements SEPA, RCW ch. 43.21C, as it applies to EFSEC. WAC 463-47-010, -030. Thus, WAC 463-47-110 deals with the preparation of the FEIS. Because Opponents have not assigned error to the FEIS, Opponents have no argument that EFSEC violated WAC 463-47-110.

public. They serve merely as advance notice of the agency's position should a dispute arise and the matter result in litigation." *Ass'n of Wash. Bus. v. State Dep't of Revenue*, 155 Wn.2d 430, 447, 120 P.3d 46 (2005). Since WAC 463-14-020 does not have the force and effect of law, Opponents have no basis to require that EFSEC make express findings addressing turbine blade spin time.

4. WAC 463-60-332 Is A Procedural Rule That Provides Guidance For Completing An EFSEC Application

The thrust of Opponents' claim that EFSEC violated WAC 463-60-332 is that Whistling Ridge's application did not contain enough information. *See* Pet. Br. at 19-32, 40. WAC ch. 463-60 sets "forth guidelines for preparation of applications for energy facility site certification pursuant to chapter 80.50 RCW. Applications for siting energy facilities must contain information regarding the standards required by chapter 463-62 WAC." WAC 463-60-010. Opponents' claim fails for two reasons.

First, the WAC ch. 463-60 application guidelines do not require that an application include all the information that will eventually be developed in the adjudicative proceeding or the FEIS. Indeed, EFSEC's administrative rules recognize that the "guidelines can only be comprehensive in a relative sense." WAC 463-60-065. Thus, the "basic

guideline [is] that an applicant for site certification must identify in the application all information known to the applicant which has a bearing on site certification.” *Id.* The WAC ch. 463-60 guidelines inform potential applicants about what EFSEC believes should be included in an application so that EFSEC will be in position to begin its review.

Second, WAC ch. 463-60 does not give Opponents any substantive right to complain about the adequacy of the application. WAC 463-60-010 provides that the information in the application “shall be in such detail as determined by the council to enable the council to go forward with its application review.” In this case the application was sufficiently detailed for EFSEC to go forward with review.

Opponents’ argument also ignores the fact that the application was only the beginning of a long review process that included public hearings, an adjudicative proceeding, and the preparation of the FEIS. To require that an application contain all information that could be developed during an extensive agency and public review process would vitiate the need and opportunity for agency and public review and comment on the application. To the extent Opponents believed that EFSEC should require additional wildlife information, they had ample opportunity to argue their points in the public process that followed the submission of the application.

B. EFSEC’s Findings That Whistling Ridge’s Application Satisfied WAC 463-60-332 And WDFW’s *Wind Power Guidelines* Are Supported By Substantial Evidence

Opponents allege that EFSEC erred in finding that Whistling Ridge had complied with the WAC 463-60-332 application guidelines and WDFW’s *Wind Power Guidelines*. These arguments ignore substantial evidence in the record supporting EFSEC’s finding.

1. Standard Of Review

RCW 34.05.570(3)(e) provides that relief should be granted only if the agency order “is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter.” Substantial evidence is “a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.” *Residents Opposed to Kittitas Turbines v. EFSEC*, 165 Wn.2d 275, 317, 197 P.3d 1153 (2008) (“*ROKT*”). Courts are to view evidence in the light most favorable to the party that prevailed before EFSEC, and the review is to be deferential. *See City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001). Opponents carry the burden of demonstrating a lack of substantial evidence. RCW 34.05.570(1)(a).

2. The Application Assessed Avian Collision Risk “During Day And Night” As Called For By WAC 463-60-332(2)(g)

WAC 463-60-332(2)(g) calls for an application to assess the “risk of collision of avian species with any project structures, during day and night.” This guideline does not call for a separate assessment of the risk of nighttime collisions, as Opponents imply, but rather an assessment that considers the risk “during day and night.” Contrary to Opponents’ assertion, the application did *not* admit that Whistling Ridge’s “risk assessments ‘do not take into consideration flight behavior or abundance of nocturnal migrants.’” Pet. Br. at 21. In fact, the application states that “*observations* were made during daylight hours, and do not take into consideration flight behavior or abundance of nocturnal migrants.” AR 4472 (emphasis added). This statement about Whistling Ridge’s surveys—rather than its risk assessment—does not mean that the application lacked an assessment of the risk of avian collisions “during day and night.”⁵

⁵ Opponents quote testimony from two witnesses as supporting Opponents’ claim that the application did not contain a collision risk assessment during day and night. Pet. Br. at 21 n.53. However, the quoted testimony from both witnesses concerned Whistling Ridge’s survey data, not its risk assessment. Moreover, one of those witnesses, Don McIvor, testified that

Mr. Johnson did not conduct surveys for nighttime migration. And the fact that he did not do that is *actually pretty consistent with the wind energy guidelines* in the since [sic] that it’s recommended that those types of surveys be conducted if it appears that the site is one which supports an important passerine migration. And based on my understanding of the

To assess the risk that birds might collide with turbines Whistling Ridge’s wildlife experts first used avian survey data to calculate a turbine exposure index. AR 857, 859, 872-74, 4466, 4471. They recognized that because the survey data was based on daytime observations (*i.e.*, diurnal), the exposure index did not account for nocturnal activity. AR 859, 4472. To address this, the wildlife experts assessed the relationship between daytime pre-construction survey data and subsequent post-construction turbine-related mortality from existing wind energy facilities in the Pacific Northwest. AR 861, 4472. Because pre-construction observed avian use at Whistling Ridge was within the range of pre-construction observed avian use at these other facilities, the expert wildlife reports attached to the application estimated a “total”—*i.e.*, during day and night—range of avian mortality of “0.9-2.9 fatalities/MW/year.” AR 862. This was the assessment called for by the WAC 463-60-332(2)(g) application guideline and is substantial evidence supporting EFSEC’s finding.

3. The Application Contained The Habitat And Species Information Called For By WAC 463-60-332(3)

WAC 463-60-332(3) calls for an application to discuss measures to avoid and/or minimize habitat and species impacts and proposed

site I would tend to concur that there are not any obvious features which would funnel songbirds to concentrate in that area.

AR 18282-83 (emphasis added).

mitigation (compensation or preservation and restoration of existing habitats and species) to compensate for impacts to these resources. The thrust of Opponents' argument is that the wildlife "mitigation measures" section of the application is too short. Pet. Br. at 29.

In response to WAC 463-60-332(3), Whistling Ridge's application described, using numerous habitat and species surveys, how the Project was designed to avoid impacts. AR 4443, 4453, 4474. Turbine corridors "avoid[] sensitive riparian areas," siting the Project "in an actively-managed commercial forest avoids impacts to higher quality habitats," and best practices will be used "to avoid introduction of noxious weeds." AR 4453-54. "[I]mproving and using existing roads [to the extent possible] instead of constructing new roads" and planting "native plant species as soon as possible after construction is complete" will minimize impacts. AR 4454. The application noted that timber harvests will occur on the Project site in absence of the Project. AR 4452. The Project's layout avoids impacts to aquatic species, and the application lists "B[est] M[anagement] P[ractice]s that would be incorporated to protect water quality and quantity" for aquatic species. AR 4456. Based on extensive surveys, the application expected effectively no impacts to federally listed or candidate species (*i.e.*, no impacts on northern spotted owls, negligible impacts on western gray squirrels, and low risk for impacts to northern

goshawks). AR 4470-71. Impacts to species would also be minimized by micro-siting, Project design features (*e.g.*, tubular steel turbine towers), and the additional mitigation determinations made by a technical advisory committee including representatives from WDFW and the U.S. Fish and Wildlife Service based on post-construction studies.⁶ AR 4475. Whistling Ridge's application also proposed to repair, rehabilitate, or restore affected environment in consultation with the wildlife agencies. *Id.* All of this information about avoiding, minimizing, and mitigating impacts to species and habitat is substantial evidence supporting EFSEC's finding.

Opponents' argument ignores that Whistling Ridge's habitat and wildlife surveys were completed by qualified biologists pursuant to standard protocols and used to avoid impacts. Opponents' argument ignores that avoiding impacts is sound science, it avoids cumulative impacts associated with the energy facility, and it has a 100% probability of success of full and adequate implementation. Because timber harvests will occur on the Project site with or without the Project, Opponents' argument ignores how the application's measures preserve habitat quality, value or function. Focusing solely on the wildlife "mitigation measures"

⁶ Technical advisory committees have proven valuable at other wind energy facilities sited by EFSEC. *See* AR 15959, 15990 (testimony from Mr. Johnson noting the monitoring and adaptive management by the technical advisory committee for the EFSEC-regulated Wild Horse project, a 149-turbine facility that was the first in Washington to be sited in an area containing rare, fractured critical shrub-steppe habitat and that also contains sage grouse and abundant raptor populations).

section of the application, Opponents ignore the habitat, vegetation, and fish “mitigation measures” sections. *See* AR 4453-54, 4456. Whistling Ridge’s application satisfied the WAC 463-60-332(3) guideline.

4. Whistling Ridge’s Pre-Project Avian Assessments And Surveys Were Consistent With WDFW’s *Wind Power Guidelines*

The WAC 463-60-332(4) guideline calls for consistency with WDFW’s *Wind Power Guidelines*, which state that (i) “[e]xisting information on species and potential habitats in the vicinity of the project area should be reviewed” and “used to develop field and analysis protocols” and (ii) a “minimum of one full year of avian use surveys is recommended.” App. E-9-E-10 (AR 18005-06). Arguing that EFSEC erred in finding that Whistling Ridge’s pre-project assessments and surveys were consistent with these recommendations, Opponents disregard the evidence in the record, the most important of which is WDFW’s determination that

[t]he pre-project assessment and avian/bat use surveys [completed by Whistling Ridge] are consistent with standard protocols utilized throughout the U.S. *and are consistent with the WDFW Wind Power Guidelines* (WDFW 2009). . . . WDFW confirms that these data represent the best available science for predicting avian impacts at Whistling Ridge.

App. B-1 (AR 15820; emphasis added).

Quoting snippets of testimony from Whistling Ridge’s wildlife expert Greg Johnson, Opponents erroneously claim that Whistling Ridge failed to collect existing avian use information from other commercial

forestlands and from resource agencies. Pet. Br. at 24-25. In fact, Whistling Ridge did obtain northern spotted owl survey data from the Washington Department of Natural Resources (“DNR”) for the two historical northern spotted owl activity centers on DNR property north of the Project site. AR 11507. Consistent with the *Wind Power Guidelines*, Whistling Ridge used that information and elected to survey potentially suitable northern spotted owl habitat within these activity centers, which added 7,222 acres to the potential northern spotted owl survey area. AR 11504-05; *see also* AR 771-73. Whistling Ridge also considered the avian surveys performed for an energy overlay zone in Klickitat County that included two observation points in Skamania County in the vicinity of the Project site. AR 4456-57, 4272. Mr. Johnson also testified that he was not aware of any existing similar general avian use data collected on other commercial forestlands.⁷ AR 18155, 18158.

Opponents claim Whistling Ridge should have sought out data from the Radar Ridge, Coyote Crest, and Middle Mountain wind energy projects. Pet. Br. at 26. Radar Ridge and Coyote Crest, though, are in

⁷ Mr. Johnson also testified how the methods used to collect avian use data for wind projects (*e.g.*, 800-meter plot radius and 20-minute time periods) differ from the point counts that are normally done in forests (*e.g.*, 50- to 100-meter plot radius and 5- to 8-minute time periods). AR 18075, 18155; *see also* AR 830, 856. These differences mean that if any “survey information on species and potential habitats in the vicinity of the project area” existed, that data would have little comparative value to the avian use data Whistling Ridge collected. AR 18155. Instead, the value of normal avian use surveys is simply that “you might know if the species occur there.” AR 18157.

extreme western Washington in a different eco-region. AR 28503; App. E-36 (AR 18032). These two projects do not constitute “nearby wind facilities” under the *Wind Power Guidelines*. App. E-9 (AR 18005). As for the Middle Mountain project, biological resource studies were never conducted for that now-discontinued project. AR 28492, 28494.

The only other existing survey information Opponents criticize Whistling Ridge for not reviewing is the Partners in Flight breeding data for the olive-sided flycatcher and the vaux’s swift. Pet. Br. at 24. However, Opponents do not explain how this data would have been relevant in developing the Project’s field and analysis protocols, which did consider both species. *See, e.g.*, AR 868, 872, 875, 884. In fact, Opponents’ own “expert” wildlife witness strongly criticized the reliability of the Partners in Flight data.⁸ AR 15402-03, 15411. Moreover, Mr. Johnson testified that the Partners in Flight breeding data was useful for nationwide population estimates for cumulative effect analyses, not for designing field surveys. AR 15985-86. The record does not evidence that

⁸ By basing their argument on data their own “expert” witness Smallwood criticized, perhaps Opponents are conceding that Smallwood’s testimony was riddled with errors, as Smallwood himself acknowledged before EFSEC. *See, e.g.*, AR 18408-09 (errata sheet for Smallwood’s pre-filed testimony conceding that parts of his pre-filed testimony were “unfounded”), 18301 (Smallwood admitting that he “was in error” in criticizing Mr. Johnson’s use of nesting data), 18304 (Smallwood admitting that his testimony contained “[m]ore [bad text] than [he] would like”); *see also* AR 25138 (unchallenged FEIS noting that Smallwood’s estimates of raptor mortality “are flawed”), 25144 (unchallenged FEIS noting that studies have demonstrated a flaw in an assumption Smallwood uses in his “novel” approach to estimating bird and bat fatalities, which leads Smallwood to overestimate fatality rates).

this data would have been useful in designing Whistling Ridge's field surveys. Simply put, the record contains substantial evidence that Whistling Ridge reviewed existing information on species and potential habitats in the vicinity of the Project site and used that information to develop its survey plans, as recommended by the *Wind Power Guidelines*.

Mr. Johnson, who has worked on 10 wind projects in Washington since WDFW adopted its first wind power guidelines, also testified that Whistling Ridge's surveys were consistent with the "full year" recommendation in *Wind Power Guidelines*. AR 15957, 18126. "Wind siting guidelines such as those of the WDFW suggest that surveys cover all four seasons. Nowhere does WDFW state that these have to be consecutive seasons." AR 15968. The unchallenged FEIS also concluded:

The studies were conducted in compliance with the WDFW windpower guidelines, as *one full year* of avian baseline data were collected to cover all four seasons. In addition, the avian baseline studies were conducted in 2004, 2006, 2008 and 2009 which accounts for inter-annual variation.

AR 25146, 25159 (emphasis added). This is substantial evidence that Whistling Ridge's avian surveys constitute "a full year" of surveys under the *Wind Power Guidelines* and that the inter-annual approach added greater value to the biological significance of the data achieved over the multi-year survey period, versus a single year of data collection.

C. The Site Certification Agreement Satisfies The Construction And Operation Standards of WAC 463-62-040

Opponents argue that EFSEC violated the construction and operation standards in WAC 463-62-040 because they claim that Whistling Ridge did not conduct wildlife studies throughout the year and EFSEC failed to make findings of fact and conclusions of law regarding these studies (Pet. Br. at 18-19); that EFSEC failed to enter findings and conclusions regarding the net loss of wildlife habitat function and value (Pet. Br. at 34-36); and that EFSEC failed to require Whistling Ridge to include an off-site mitigation parcel in its application (Pet. Br. at 36-38). These arguments are based on Opponents' misunderstanding of the application of WAC ch. 463-62.

1. The Construction And Operation Standards Of WAC Ch. 463-62 Apply To The Site Certification Agreement, Not The Adjudication

There are two errors in Opponents' WAC ch. 463-62 arguments. First, Opponents claim that the standards in WAC ch. 463-62 apply to the adjudication. Opponents argue:

One of EFSEC's most fundamental rules concerning wildlife impacts is that "[a]n applicant must demonstrate *no net loss* of wildlife habitat function and value." WAC 463-62-040(2)(a) (emphasis added). EFSEC's rules further state that the agency "shall apply" this standard during its administrative adjudications. WAC 463-62-010(1).

Pet. Br. at 34. Opponents’ selective quotation of the phrase “shall apply” is misleading. WAC 463-62-010 does not state that the chapter shall apply to adjudications. Instead WAC 463-62-010 states:

This chapter sets forth performance standards and mitigation requirements specific to seismicity, noise limits, fish and wildlife, wetlands, water quality, and air quality, associated with site certification for construction and operation of energy facilities under the jurisdiction of the council. The council shall apply these rules to site certification agreements issued in connection with applications[.]

(Emphases added.) The standards in WAC ch. 463-62 apply to the Site Certification Agreement—not the adjudication.

Opponents’ second error follows from the first. Opponents claim that WAC 463-62-040 requires the entry of findings of fact. Pet. Br. at 35. WAC 463-62-040 sets out standards for wildlife in the Site Certification Agreement. The rule does not require the entry of findings of fact at the conclusion of the adjudicative proceeding.

2. In Compliance With WAC 463-62-040(2)(f), Whistling Ridge Conducted Avian Studies “During All Seasons”

WAC 463-62-040(2)(f) provides that “wildlife surveys shall be conducted during all seasons of the year to determine breeding, summer, winter, migratory usage, and habitat condition of the site.” Opponents claim that EFSEC erred because Whistling Ridge did not conduct avian “surveys between July 15 and September 10,” which is allegedly a “key

migration period.”⁹ Pet. Br. at 17-18. Opponents’ argument does not withstand scrutiny.

Opponents admit that Whistling Ridge conducted avian surveys in the summer and cite no evidence or authority for their proposition that “during all seasons” in WAC 463-62-040(2)(f) actually means “during the entirety of all seasons.” See Pet. Br. at 18. Mr. Johnson testified that Whistling Ridge’s avian use data “covers all four seasons.” AR 11481. More importantly, the unchallenged FEIS concluded 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” and that Whistling Ridge’s “avian baseline data were collected to cover all four seasons.” AR 25146, 25159, 28277 (emphasis added). These conclusions are EFSEC’s

⁹ Opponents misrepresent the record when claiming that “WDFW *employees* noted during their review” that Whistling Ridge’s surveys did not include the olive-sided flycatcher migration period. Pet. Br. at 17 (emphasis added). In fact, a single WDFW employee—James Watson—made this comment in a July 19, 2010 internal email Opponents used for purposes of cross-examination. AR 17996. Opponents cite no evidence in the record as to (i) why Mr. Watson’s personal views should have any significance when they are inconsistent with WDFW’s official position, (ii) whether Mr. Watson had any formal, assigned role in the review and agency consideration of the biological sufficiency of the data, or (iii) Mr. Watson’s professional qualifications. Opponents did not have Mr. Watson testify before EFSEC, even though EFSEC had authorized counsel to subpoena witnesses under RCW 34.05.446(1). AR 15656.

Moreover, WAC 463-62-040(2)(f) does not require surveying the migratory periods of all birds observed at a site. Instead, it calls for conducting wildlife surveys “during all seasons,” as Whistling Ridge did, and then using this information to assess wildlife usage. The record shows that WDFW did not recommend that Whistling Ridge conduct surveys in August or express any concern to EFSEC that August avian use data had not been collected. Indeed, the unchallenged FEIS concluded that “[t]he Project habitat is not very conducive for [the olive-sided flycatcher], and that is why only a few individuals were observed.” AR 28273.

resolution of this issue, as EFSEC’s recommendation was expressly “[b]ased on the . . . Final EIS.” AR 28650.

3. The Site Certification Agreement Satisfies WAC 463-62-040(2)(a) and (d)’s Provisions Related To Net Loss Of Habitat Function And Value And Replacement Habitat

The Site Certification Agreement satisfies the standards of WAC 463-62-040(2)(a) and (d). WAC 463-62-040(2) provides in part: “(a) An applicant must demonstrate no net loss of fish and wildlife habitat function and value . . . [and] (d) [t]he ratios of replacement habitat to impacted habitat shall be greater than 1:1 to compensate for temporal losses, uncertainty of performance, and differences in functions and values.”

The Site Certification Agreement satisfies this rule by imposing requirements that meet these standards. Section IV.E.1 requires that Whistling Ridge submit a Habitat Mitigation Plan prior to site preparation. AR 36708-09. The plan “will be calculated using the mitigation ratios specified in the 2009 WDFW Wind Power Guidelines.”¹⁰ AR 36709. Under Section IV.E.1(c), Whistling Ridge may satisfy its mitigation obligation in one of three ways. First, “by purchasing a mutually acceptable mitigation parcel and deeding it to WDFW or a mutually

¹⁰ WDFW concluded that Whistling Ridge’s proposed mitigation parcel is consistent with its *Wind Power Guidelines* at a 2:1 replacement ratio. App. B-2 (AR 15821); *see also* App. C-1 (AR 15825), App. D-1-D-3 (AR 20226-28).

acceptable third party[.]” *Id.* Second, “by contributing money to a mutually acceptable third-party that owns or will purchase a mitigation parcel[.]” *Id.* Third, by “the payment of a fee equivalent to the value of permanently disturbed project area to [WDFW] in lieu of mitigation.” *Id.* If Whistling Ridge “has not satisfied its Mitigation Obligation prior to commencing Site Preparation, [it] will provide a letter of credit to EFSEC in an amount sufficient to provide financial security for the Mitigation Obligation.” *Id.* Whistling Ridge must “satisfy its Mitigation Obligation prior to commencing commercial operation of the Project.” *Id.*

The Site Certification Agreement goes further to ensure mitigation because it also requires mitigation based on the actual operation of the Project, not just mitigation based on the pre-construction surveys. Section IV.E.1(d) provides that the Habitat Mitigation Plan “will include a process to determine the actual impacts to habitat following completion of construction.” *Id.* If the “actual impacts to habitat exceed the expected impacts determined prior to construction, the Habitat Mitigation Plan will include a mechanism for [Whistling Ridge] to provide supplemental compensatory mitigation[.]” *Id.*

Section VI.C. of the Site Certification Agreement also provides that prior to commercial operation of the Project, Whistling Ridge must “submit to EFSEC for review and approval a Post-Construction Avian

Monitoring Plan.” AR 36723. “The purpose of the plan shall be to quantify impacts to avian species and to assess the adequacy of mitigation measures implemented[.]” *Id.* The plan must include “an avian casualty/fatality reporting” [and] “a minimum of two breeding season’s [sic] raptor nest survey of the Project Area[.]” *Id.*

The Site Certification Agreement requires mitigation that ensures the standards in WAC 463-62-040(2)(a) and (d) will be satisfied, and EFSEC has the authority to ensure that Whistling Ridge complies with the Site Certification Agreement. EFSEC has the authority to “prescribe the means for monitoring of the effects arising from the construction and the operation of energy facilities to assure continued compliance with terms of certification.” RCW 80.50.040(9). EFSEC has the authority to suspend or revoke Whistling Ridge’s certificate “[f]or failure to comply with the terms or conditions of the original certification[.]” RCW 80.50.130(2). The “courts are authorized to grant such restraining orders, and such temporary and permanent injunctive relief as is necessary to secure compliance with this chapter and/or with a site certification agreement issued pursuant to this chapter.” RCW 80.50.150(1). In addition, “[e]very person who violates the provisions of certificates and permits issued or administered by the council shall incur, in addition to any other penalty as

provided by law, a penalty in an amount of up to five thousand dollars a day for every such violation.” RCW 80.50.150(5).

WAC 463-62-040 does not require that EFSEC make findings of fact regarding the adjudication. Instead, it requires that the Site Certification Agreement it prepares after the adjudication satisfy the mitigation standards set out in the rule. The comprehensive mitigation requirements in the Site Certification Agreement do much more to ensure mitigation than any finding of fact.

D. The Site Certification Agreement Does Not Unlawfully Delay Requisite Decision-Making And The Law Does Not Require That It Provide For Further Public Participation

Opponents make two claims related to EFSEC’s responsibilities to monitor the Project after it has been approved. First, Opponents contend that the Site Certification Agreement’s use of post-approval micro-siting of turbines within approved turbine corridors is unlawful. Pet. Br. at 64. Second, they contend that the Site Certification Agreement is unlawful unless it provides for notice to interested parties of post-approval decisions, opportunities for public involvement, and appeal rights. Pet. Br. at 68-69. Neither the record nor the law support these arguments.

1. The Project's Layout Is Known And Its Impacts Comprehensively Analyzed; Post-Approval Micro-Siting Within Approved Turbine Corridors Is Not Unlawful

Opponents contend that micro-siting cannot occur after approval of the Site Certification Agreement, because until turbines are micro-sited (i) all contested issues (*e.g.*, layout and impacts) have not been resolved, (ii) substantial evidence does not exist, and (iii) any approval is arbitrary and capricious. Pet. Br. at 64. Micro-siting is the process by which the final locations of turbines and other Project elements are established within the approved turbine corridors. AR 4316, 36700. This is a full-scale attack on the way EFSEC, like other siting entities, sites wind energy facilities. See *ROKT*, 165 Wn.2d at 292 (describing post-approval micro-siting for the Kittitas Valley project).

RCW 34.05.570(3)(i)'s arbitrary and capricious standard is a very high hurdle. An agency action is only arbitrary and capricious if

it is willful and unreasoning and taken without regard to the attending facts or circumstances. “[W]here there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous.”

Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n, 148 Wn.2d 887, 905, 64 P.3d 606 (2003) (citations omitted; brackets in original).

Opponents do not even attempt to explain how EFSEC and the Governor willfully disregarded the attending facts or circumstances, probably

because the record demonstrates the careful scrutiny this Project received.¹¹ Opponents' micro-siting arguments lack merit and provide no basis to remand the Project.

Whistling Ridge sought approval of six identified turbine corridors and the construction of up to 50 turbines with an installed generating capacity of 75 MW within those corridors. AR 4268. Whistling Ridge's application identified the number of turbines (up to 50), the size of the turbines (up to 426 feet tall with an installed generating capacity of between 1.2 to 2.5 MW each), and the area within which turbines would be located (six proposed turbine corridors). AR 4268, 4318, 4327.

Whistling Ridge then submitted evidence fully covering these parameters. For example, Whistling Ridge calculated the permanently and temporarily impacted areas based on constructing 50 turbines within the

¹¹ Opponents' argument that turbines could be sited outside the approved turbine corridors without an amendment to the Site Certification Agreement is patently absurd. Pet. Br. at 65. The Site Certification Agreement requires that "construction and operation authorized in this Agreement shall be located within the areas designated herein" and in Whistling Ridge's revised application. AR 36696. The Adjudicative Order and Recommendation Order are part of the Site Certification Agreement. AR 36694. The Adjudicative Order notes that micro-siting will be used to place turbines "in the corridors." AR 28671. The Recommendation Order recommended "denial of approval for tower construction" in "the C corridor and the southerly (A-1 through A-7) portion of the A corridor" and included a site map of all corridors. AR 28638. Whistling Ridge's application also sought approval of turbine corridors, within which final turbine locations would be determined through micro-siting. AR 4316. Moreover, Whistling Ridge's President testified that turbines must be micro-sited "within those [turbine] corridors where we have the site certificate approval to do so" and that micro-siting could not change the approved turbine corridors in any way. AR 16818. Changing the approved turbine corridors would require an amendment to the Site Certification Agreement and a public review process. *See* WAC 463-66-030.

proposed turbine corridors. AR 4318. Thus, the record contains substantial evidence as to the maximum scope of permanent and temporary impacts. As northern spotted owls have a 1.8-mile provincial home range radius, Whistling Ridge conducted northern spotted owl surveys within all potential suitable habitat within 1.8 miles of all proposed turbine corridors (plus all potential suitable habitat within the two historic spotted owl activity centers north of the Project site) using U.S. Fish and Wildlife survey protocols. AR 11504. Thus, the record contains substantial evidence that the Project will not likely have an adverse effect on northern spotted owls regardless of where individual turbines are located within the approved corridors. To assess potential visual impacts, Whistling Ridge simulated how 50 2.5-MW, 415-foot-tall turbines (*i.e.*, the “worst” case scenario) within the proposed turbine corridors would look from 21 different viewpoints.¹² AR 11412, 16205, 16213. Thus, the record contains substantial evidence about visual impacts from the maximum number and size turbines for which Whistling Ridge sought approval. The Site Certification Agreement allows nothing outside of the parameters studied, and the application, testimony, and FEIS contain substantial evidence supporting EFSEC and the Governor’s decision, which was not arbitrary and capricious. EFSEC’s

¹² For purposes of a visual impact analysis, 415-foot-tall turbines are equivalent to 426-foot-tall turbines. AR 16095.

recommendation resolved the contested issue posed in the application, which was whether up to 50 turbines could be constructed within the proposed turbine corridors. Post-approval micro-siting of final turbine locations within approved turbine corridors is not unlawful.

Moreover, requiring pre-approval (really pre-application) micro-siting would be entirely impractical and inconsistent with the legislative intent of considering the need for increased renewable energy generation and the public interest. RCW 80.50.010; RCW 19.285.040(2)(a)(ii), (iii) (requiring that each qualifying utility use renewable energy resources to meet at least 9% of its load by 2016 and at least 15% of its load by 2020). In addition to geotechnical and environmental considerations, permit requirements, and other factors, final turbine location depends upon the physical and operational characteristics of the turbine selected for construction. AR 4316, 16756. For example, although there are some general rules regarding turbine spacing within corridors, the exact spacing requirements for each turbine make and model differ. AR 16775. Without the ability to permit turbine corridors and subsequently micro-site turbines within those approved turbine corridors, an applicant would be forced to select the turbine make and model, micro-site, submit its application, and complete the entire EFSEC review process and any judicial review (which for this Project is now at four years) while hoping

that the identified turbine make and model will still be available when it comes time to build the facility.¹³ However, “pricing and availability of turbines are highly variable,” and there is no way to know whether the identified turbine make and model will be available at an economically viable price. AR 4327; *see also* AR 16732 (testimony that 1.5 and 1.8 MW turbines were common in 2009 but were already less common in 2011). In addition, requiring that micro-siting precede application submission would effectively preclude projects from using subsequently-developed turbines that could incorporate technological advances further reducing environmental impacts. *See, e.g.*, AR 17723 (turbine models and blade design affect noise generation). Because the impacts of proposed energy facilities can be comprehensively assessed for purposes of the adjudicative proceeding and SEPA by analyzing turbine construction within the proposed turbine corridors, post-approval micro-siting within the approved corridors helps avoid unnecessary delay, implements the State of Washington’s energy policy, and is not unlawful.

2. A Site Certification Agreement Is Not Legally Deficient If It Does Not Set Out A Process For Additional Public Participation

Notwithstanding their own intense involvement in EFSEC’s review process and this appeal and the multitude of opportunities for

¹³ As EFSEC could modify the facility design or recommend denial, it would be foolish to buy the selected turbines at any point before judicial review is complete.

public involvement in the EFSEC review process, Opponents now argue that a Site Certification Agreement is legally deficient if it does not provide for notice to interested parties, opportunities of public involvement, and appeal rights in connection any subsequent decision-making on the Project, no matter how ministerial. Pet. Br. at 68-69.

Opponents cite RCW 80.50.090, WAC 463-14-030, RCW 34.05.434, and RCW 76.09.205 as the legal authorities supporting their claim. Pet. Br. at 68. However, RCW 80.50.090 and WAC 463-14-030 concern application review and do not require that the Site Certification Agreement include post-approval notice, participation opportunities, and appeal rights. RCW 34.05.434 concerns public notice of administrative hearings under the Administrative Procedures Act; it does not require that the Site Certification Agreement include post-approval notice, participation opportunities, and appeal rights. RCW 76.09.205 concerns appeals of Forest Practices Act (RCW ch. 76.09) approvals, but it is preempted by RCW ch. 80.50, under which Site Certification Agreements can be appealed.¹⁴ RCW 80.50.110,

¹⁴ Opponents' reliance on RCW 76.09.205 is predicated on Opponents' erroneous claim that EFSEC deferred review and resolution of contested Forest Practices Act issues. Pet. Br. at 67-68. In fact, EFSEC definitively resolved the Forest Practices Act issues Opponents raised, and Opponents subsequently dropped the argument. Whistling Ridge's application identified Forest Practices Act compliance as a state requirement that would apply but for EFSEC's preemptive authority and called for EFSEC to oversee substantive compliance in coordination with the Washington Department of Natural Resources. AR 4394, 4399-4400. In the proceedings below

.140. EFSEC’s three-year, multi-track review process afforded Opponents and the public ample opportunity to participate; none of the cited statutes and administrative rules are even relevant to the contents of a Site Certification Agreement.

Opponents cannot credibly argue that the Site Certification Agreement is legally deficient for not specifying how Opponents can avail themselves of second, third, and fourth opportunities to readjudicate the Project. The only impact of such process would be to further delay the Project, and increase the costs to Whistling Ridge and the state. *See, e.g.,* AR 23460 n.3 (briefing cataloging Opponents’ numerous weak procedural arguments designed to cause undue delays, tax state resources, and unnecessarily drive up attorney fees and costs). Opponents fully participated in EFSEC’s review, and they have availed themselves of judicial review.

Unless Opponents are “substantially prejudiced” by the lack of post-approval notice, participation opportunities, and appeal rights in the Site Certification Agreement, the Court cannot remand the Site

Opponents argued that the Project was inconsistent with Skamania County’s land use regulations due to alleged non-compliance with the Forest Practices Act. AR 21203-05. EFSEC rejected Opponents’ argument: “opponents challenge various *state* and local provisions *relating to forest practices*, which are also irrelevant here as being neither zoning ordinances nor land use plans within the meaning of RCW 80.50.” AR 28662 (emphases added). This conclusion clearly resolved the substantive issues Opponents raised regarding the Forest Practices Act. Opponents did not request that EFSEC reconsider this conclusion, nor did they appeal it. Opponents had numerous opportunities to raise Forest Practices Act-related issues, and except in the context of land use consistency, they did not do so.

Certification Agreement. RCW 34.05.570(1)(d). In light of the full, fair, and numerous opportunities they had to raise issues before EFSEC, the Site Certification Agreement does not substantially prejudice Opponents. To ensure that the public is assured abundant, affordable power, the legislature created EFSEC to provide timely, comprehensive, or “one-stop” energy facility permitting with finality at its conclusion. RCW 80.50.010, .100(1)(a), .110, .120, .140. The opportunity for redundant and serial litigation of issues large and small sought by Opponents is aimed at destroying the fundamental foundation of the public policy mandates embedded in RCW ch. 80.50.

E. Opponents Have Not Overcome The *Prima Facie* Proof That The Project Is Consistent With Skamania County’s Land Use Regulations

Opponents argue that EFSEC erred in concluding that the Project was consistent and in compliance with Skamania County’s land use provisions. There is no basis for Opponents’ arguments.

1. Skamania County’s Certificate Of Land Use Consistency Is *Prima Facie* Proof That The Project Is Consistent With Skamania County’s Land Use Regulations

RCW 80.50.090(2) provides that EFSEC is to determine “whether or not the proposed site is consistent and in compliance with city, county, or regional land use plans or zoning ordinances.” An applicant may submit “certificates from local authorities attesting to the fact that the

proposal is consistent and in compliance with land use plans and zoning ordinances.” WAC 463-26-090. The “certificates will be regarded as *prima facie* proof of consistency and compliance with such land use plans and zoning ordinances absent [a] contrary demonstration.” *Id.*

To overcome a *prima facie* presumption, this Court has required a demonstration that “actually, factually and substantially preponderate[s] *against*” the evidence upon which the presumption rests. *Gogerty v. Dep’t of Insts.*, 71 Wn.2d 1, 8, 426 P.2d 476 (1967) (describing the import of the presumption in the context of judicial review of a State Personnel Board decision).

[B]efore the superior court could upset the board’s findings it would have to demonstrably appear, from the record as a whole, that the quantum of competent and supportive evidence upon which the personnel board predicated a challenged finding or findings of fact was so meager and lacking in probative worth, and the opposing evidence so overwhelming, as to dictate the conclusion that the pertinent finding or findings did not rest upon any sound or significant evidentiary basis.

Id.

As contemplated by WAC 463-26-090, Whistling Ridge submitted a certificate of land use consistency—Skamania County Resolution No. 2009-54—for the Project. AR 11596-624. It was adopted by the Skamania County Board of Commissioners and concluded that the Project was consistent with Skamania County’s “land use plans and applicable

zoning ordinances.” AR 11597. Under WAC 463-26-090, Skamania County’s certificate is *prima facie* proof the Project is consistent with applicable Skamania County land use regulations.

Opponents ignore the fact that Skamania County’s certificate of land use consistency is *prima facie* proof of consistency.¹⁵ Instead, they argue that the interpretation of Skamania County’s comprehensive plan and land use ordinances is a legal question subject to *de novo* review. Pet. Br. at 51. This argument is foreclosed by WAC 463-26-090, which establishes the certificate of land use consistency as *prima facie* proof.

2. The Project Is Consistent With The Conservancy Designation In Skamania County’s Comprehensive Plan

Opponents argue that EFSEC erred in concluding that the Project “is consistent and in compliance” with the Conservancy designation in Skamania County’s 2007 comprehensive plan. Pet. Br. at 52. Opponents’ arguments are wrong for two reasons.

First, in light of the Planning Enabling Act and the purpose of EFSEC’s local land use review, EFSEC correctly concluded that it needed to assess the Project’s consistency—rather than its compliance—with Skamania County’s comprehensive plan. As a matter of state and county

¹⁵ Opponents have waived any argument that Resolution No. 2009-54 is not a certificate of land use consistency, because their brief makes no argument that it is not a proper certificate of land use consistency. See *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (when error is assigned to a finding but no argument is made, the assignment of error is waived).

law Skamania County's comprehensive plan has no regulatory effect. Skamania County plans under the Planning Enabling Act, RCW ch. 36.70. AR 11601. Planning Enabling Act comprehensive plans "serve as a policy guide" only. RCW 36.70.020(6). They do not regulate development. RCW 36.70.340; *Barrie v. Kitsap Cnty.*, 93 Wn.2d 843, 848, 613 P.2d 1148 (1980). Skamania County's comprehensive plan states that it "is not a regulatory document. Rather it is a guiding document which includes goals and policies that are implemented through development regulations and other official controls." AR 21993. Further, the purpose of EFSEC's land use review is to "recognize and validate local land use control, consistent with the purposes of RCW 80.50." AR 28661. As such, EFSEC properly concluded that here it needed to assess the Project's "consistency" with Skamania County's guide rather than apply a stricter "compliance" standard that applies to "regulatory provisions that mandate performance."¹⁶ AR 28661 n.15. To determine consistency, EFSEC "consider[s] not only the language of the County provisions but also how the County would apply that language." AR 28661.

¹⁶ Although comprehensive plans do not have a regulatory effect under state law, a county could, as a matter of county law, make compliance with its comprehensive plan mandatory. For example, in *West Main Associates v. City of Bellevue*, 49 Wn. App. 513, 525, 742 P.2d 1266 (1987), the court gave regulatory effect to a comprehensive plan because the city "enacted SEPA ordinances which expressly adopt the Comprehensive Plan as a local SEPA policy, [so] the [city] council was entitled to rely on the Comprehensive Plan in denying the proposal under SEPA." If Skamania County had made compliance with its comprehensive plan mandatory, EFSEC would have needed to determine whether the Project complied with the plan.

Second, EFSEC correctly interpreted the comprehensive plan. Opponents' arguments to the contrary ignore that Policy L.U. 1.2 and Policy L.U. 6.1 concern *future* county zoning regulations and overlook EFSEC's conclusion that Conservancy designation support a finding of consistency because "its operation will help to support the continued sustained use of the majority of the site for timber production."

AR 28664. Policy L.U. 1.2 states:

The [comprehensive] plan is created on the premise that the land use areas designated are each best suited for the uses proposed therein. However, it is not the intention of this plan to foreclose on future opportunities that may be made possible by technical innovations, new ideas and changing attitudes. Therefore, other uses that are similar to the uses listed here should be allowable uses, review uses or conditional uses, only if the use is specifically listed in the official controls of Skamania County for that particular land use designation.

AR 22013. In the area Skamania County's zoning ordinance currently classifies as "unmapped," which includes the approved turbine corridors, "all uses which have not been declared a nuisance by statute, resolution, ordinance, or court of jurisdiction are allowable." Skamania County Code 21.64.020. Because allowable, review, and conditional uses are not "specifically listed" for the unmapped area, Opponents contend that the only uses consistent with the Conservancy designation are those uses within the 12 use categories listed under the Conservancy designation.

Pet. Br. at 53-55. However, Policy L.U. 6.1 provides, in relevant part, that allowable, review, and conditional uses are the

[t]hree types of uses [that] *should be established* for each land use designation under this plan and for any zone established to implement this plan. If any use is not listed as [an allowable use, a review use, or a conditional use], *then* the use is prohibited within that land use designation[.]

AR 22017 (emphases added). EFSEC properly read Policy L.U. 1.2 in conjunction with Policy L.U. 6.1, concluding that “unmentioned uses” are not necessarily inconsistent with the 2007 comprehensive plan because Policy L.U. 1.2 and Policy L.U. 6.1 concern the “future zoning regulations” that will be adopted to implement the comprehensive plan. AR 28663-64. EFSEC correctly construed these policy statements.

The future zoning regulations contemplated by the comprehensive plan have not yet been adopted. AR 18825-26. Thus, to determine whether the Project was consistent with the Conservancy designation, EFSEC properly considered whether the Project was consistent with the intent of the Conservancy designation. AR 28664. As stated in the comprehensive plan, the Conservancy designation “is intended to provide for the conservation and management of existing natural resources in order to achieve a sustained yield of these resources, and to conserve wildlife resources and habitats.” AR 22012. EFSEC found that the Project was consistent with this intent for two reasons: (i) wind is a natural resource

and (ii) the Project “will help support the continued use of the majority of the site for timber production.” AR 28664. Opponents’ criticism focuses solely on the first rationale; Opponents entirely ignore the second rationale. Pet. Br. at 55-57. Regardless of the propriety of the first rationale, EFSEC’s second rationale is supported by the Conservancy designation’s express intent and the record.¹⁷ Indeed, Opponents admit that logging and timber management are natural resources properly considered under the Conservancy designation. Pet. Br. at 55-56. EFSEC did not err when it concluded that the Project was consistent with the Conservancy designation.

3. Skamania County’s Moratorium On Processing SEPA Checklists Is Not A “Zoning Ordinance” Under RCW Ch. 80.50

Skamania County Ordinance No. 2010-10 imposed a moratorium on, among other things, the “acceptance and processing of State Environmental Policy Act (SEPA) checklists related to forest practice conversions for any parcel located within unincorporated Skamania County that is not currently located within a zoning classification[.]”

¹⁷ EFSEC’s conclusion is further supported by the fact that Skamania County, after adopting the comprehensive plan in 2007, sought to adopt a new section of zoning regulations that would have zoned all land and allowed wind energy facilities as a conditional use in zones consistent with the Conservancy designation. AR 16870, 18825, 22010. Further, the Project is more consistent with the Conservancy designation’s express intent than certain uses, such as recreational vehicle parks, private schools, religious facilities, meeting halls, and aircraft landing strips, that the comprehensive plan identifies as “appropriate” uses in the Conservancy designation. AR 22012-13.

AR 16856. Opponents argue that EFSEC erred in concluding that this moratorium is not a “zoning ordinance.” Pet. Br. at 63. The Court should reject this argument for two reasons.

First, EFSEC correctly concluded that the moratorium was “neither [a] zoning ordinance[] nor [a] land use plan[] within the meaning of RCW 80.50.” AR 28662. RCW 80.50.090(2) calls for EFSEC to determine whether the Project is consistent with Skamania County’s “land use plan[] or zoning ordinance[.]” Land use plan means a local government’s comprehensive plan. RCW 80.50.020(14). In contrast, a “zoning ordinance” is “an ordinance of a unit of local government *regulating the use of land* and adopted pursuant to,” among other statutes, the Planning Enabling Act, RCW ch. 36.70. RCW 80.50.020(22) (emphasis added). Consistent with RCW 80.50.020(22), the Planning Enabling Act provides that zoning ordinances “[*r*]egulate the use of buildings, structures, and land as between agriculture, industry, business, residence, and other purposes[.]” RCW 36.70.750(1) (emphasis added). Similarly, interim zoning ordinances temporarily “classify or *regulate uses* and related matters.” RCW 36.70.790 (emphasis added).

Skamania County’s moratorium ordinance, though, was neither a zoning ordinance nor an interim zoning ordinance under the Planning Enabling Act. It was a moratorium. RCW 36.70.795 authorizes counties

to adopt “a moratorium, interim zoning map, interim zoning ordinance, or interim official control without holding a public hearing.” By listing different types of controls in RCW 36.70.795, the legislature clearly distinguished moratoria from interim zoning ordinances and by extension zoning ordinances.¹⁸ Skamania County’s moratorium does not regulate the use of land; it regulates Skamania County’s own “acceptance and processing” of SEPA checklists. This distinction is reflected in the fact that the adoption of ordinances “relating solely to governmental procedures, and containing no substantive standards respecting use or modification of the environment shall be exempt” from SEPA compliance, including threshold determinations. WAC 197-11-800(19). Skamania County’s moratorium was not reviewed under SEPA. *See* AR 16854-57. Thus, it cannot be deemed to regulate the use of land. EFSEC correctly concluded that the moratorium ordinance did not constitute a zoning ordinance under RCW 80.50.020(22).

Second, Opponents’ argument fails because the moratorium does not apply to the Project. Under RCW 36.70.795 when a county adopts a

¹⁸ Further, the definition of zoning ordinances now codified at RCW 80.50.020(22) was enacted in 1977. Laws of 1977, Ex. Sess., ch. 371, § 2. At that time, the Planning Enabling Act contemplated the adoption of zoning ordinances, but did not address moratoria. RCW 36.70.795 was not enacted until 1992. Laws of 1992, ch. 207, § 4. Although the legislature has since amended RCW 80.50.020(22) to include zoning ordinances adopted under other laws, such as the Growth Management Act, it never expanded this definition to include moratoria.

moratorium, it is required to “adopt findings of fact justifying its action.” In this case the findings adopted by the Skamania County Commissioners focused on a narrow problem. Skamania County was concerned that “continued unplanned and uncontrolled residential growth in the areas of commercial forest lands and the Gifford Pinchot National Forest could potentially increase the risk of forest fires and other emergency events[.]” AR 16855. During the visioning process for the comprehensive plan, “information was gathered to help determine where the best locations are for future residential development, taking into considerations the terrain, access roads, location of critical area resources, location of commercial forest lands, future service needs of residents, and future water usage for residential development[.]” *Id.* Thus, the moratorium was not directed at all conversions of forest land to a non-forest purpose.

Consistent with these findings, the moratorium does not apply to the Project. The moratorium prohibits Skamania County from “accept[ing] and processing of State Environmental Policy Act (SEPA) checklists related to forest practice conversions[.]” AR 16856. But as a matter of county law, the Project was not required to submit a SEPA checklist to Skamania County. Skamania County Code 16.04.070(A) provides that a SEPA checklist is “not needed if . . . SEPA compliance has been initiated by another agency.” Here, EFSEC was the agency

responsible for the SEPA process. The moratorium was intended to apply to projects where the SEPA checklist was filed with Skamania County. For these reasons, the Court should reject Opponents' argument concerning the moratorium.

F. Whistling Ridge's Refusal To Stipulate To A Shortened Record Was Reasonable

The Court should deny Opponents' request for an order requiring that Whistling Ridge pay Opponents \$4,000 under RCW 34.05.566(5)(a), under which this Court has discretion to make such an order if a party "unreasonably refuse[d] to stipulate to shorten . . . the record." Opponents' own argument, though, demonstrates that Whistling Ridge's refusal was reasonable.

Opponents identify "[e]xamples of the many issues and documents not relevant on appeal" that they apparently believe could have readily been excluded, notwithstanding the fact that their Petition For Judicial Review alleged errors pertaining to, and their brief now cites, these very same "not relevant" documents. Pet. Br. at 73 n.120. For example, Opponents now claim that EFSEC's "orders on procedural issues and related pleadings" are not relevant to their appeal. Yet their own Petition For Judicial Review alleged error with a procedural order. CP 6. Moreover, other orders on procedural issues and related pleadings help put

Opponents' current arguments—particularly those demanding that the Site Certification Agreement set out public notice, participation opportunities, and appeal rights—in context.¹⁹ Similarly, Opponents claim that documents related to “cultural resources” are not relevant, yet Opponents' Petition For Judicial Review and their brief allege errors concerning “[a]esthetic, [h]eritage, and [r]ecreational [r]esources.” CP 20-22. “Heritage” is synonymous with cultural resources. *See* WAC 463-60-362 (providing that an application should address aesthetics, historic and cultural preservation, and recreation). In fact, cultural resources evidence must be relevant because Opponents' own brief describes cultural heritage around the Project site and cites to various public comments concerning potential impacts to cultural resources. *See* Pet. Br. at 8 n.13.

Opponents' argument is particularly lacking in merit when one considers they successfully asked Thurston County Superior Court to include in the administrative record the over 500 pages of transcripts, summaries, and wind speed maps appearing at AR 36735-37317 that Opponents claimed at the time were relevant or essential to their appeal. *See* CP 365-68. These additional documents proved to be so relevant that Opponents did not cite or rely on them in their brief. Unlike Opponents,

¹⁹ *See, e.g.*, AR 2431 (Order No. 865: “Particularly troubling is Friends' acknowledgment that its incorporations by reference are made expressly to avoid the Council's briefing limitations, to which it had agreed at the January 20 post-hearing conference.”).

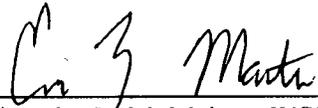
Whistling Ridge desired to expedite the superior court proceedings consistent with RCW 80.50.140 rather than engage in costly and unnecessary negotiations and judicial hearings regarding the “relevancy” of documents in the record, which would only serve to further Opponents’ goals of increasing delays and costs. For all these reasons, Whistling Ridge’s refusal to stipulate to a shortened record is reasonable and the Court should not order Whistling Ridge to pay Opponents \$4,000.

CONCLUSION

For the reasons set forth above, Whistling Ridge asks the Court to affirm the Governor’s decision.

RESPECTFULLY SUBMITTED this 12th day of April, 2013.

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PROOF OF SERVICE

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 12th day of April, 2013, in Portland, Oregon.



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