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BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of Application No. 2003-01:
SAGEBRUSH POWER PARTNERS, LLC;
KITTTITAS VALLEY WIND POWER
PROJECT

SAGEBRUSH POWER PARTNERS’
OPENING POST-HEARING BRIEF

SAGEBRUSH POWER PARTNERS’ OPENING POST-HEARING BRIEF

TABLE OF CONTENTS

	Page
1	
2	
3 I.	INTRODUCTION 1
4 II.	FACTUAL BACKGROUND 2
5 III.	EFSEC’S AUTHORITY SUPERSEDES AND PREEMPTS LOCALLY
6	ADOPTED COMPREHENSIVE PLANS, ZONING REGULATIONS, AND
7	PERMITTING DECISIONS 6
8	A. HB 2402 (2006) Makes Clear What Has Always Been True During the
9	KV Process – EFSEC Preempts Local Comprehensive plans and
10	Zoning, Including Those Enacted Under the GMA 6
11	B. In These Proceedings, the Court of Appeals Has Confirmed the
12	Preemptive Jurisdiction of EFSEC and the Governor 8
13	C. GMA Regulations Expressly Acknowledge That EFSEC Preempts
14	Energy Facility Siting and Supersedes Local Land Use Planning and
15	Zoning Rules 9
16	1. State Preemption of Energy Facility Siting, Construction, and
17	Operational Conditions Is Firmly Established in RCW Chapter
18	80.50 9
19	2. The GMA and Its Implementing Regulations Do Not Expressly
20	or Implicitly Repeal RCW Chapter 80.50, But in Fact Defer to
21	the State’s Preemptive Authority 11
22	3. The Department Recognized That Other Statutes May Preempt
23	the GMA and that RCW Chapter 80.50 Expressly Supersedes
24	Contrary Local Land Use Plans and Zoning Codes 12
25	D. If the GMA Attempted to Repeal or Amend the Statute Authorizing
26	EFSEC, Such Amendment Would Violate Article II, Section 37 of the
	Washington Constitution 15
	E. The Legislative History of RCW Chapter 80.50 Shows a Clear Intent
	to Supersede and Preempt Locally Adopted Comprehensive plans,
	Regulations, and Permits 17
	F. Rules of Construction of Conflicting Statutes Require Confirmation of
	EFSEC’s Preemptive Authority over GMA, Based Plans and
	Ordinances 23
	G. Washington Courts Have Adopted a Presumption Against Implied
	Repeal 24
	H. Conclusions Regarding Preemption 26

TABLE OF CONTENTS
(Continued)

	Page
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
IV.	HORIZON HAS SATISFIED ITS RESPONSIBILITY TO TAKE ALL REASONABLE STEPS TO RESOLVE LOCAL INCONSISTENCY 28
A.	The Applicant Made Good-Faith Efforts to Resolve the Noncompliance Issues 30
1.	Applicant Has Made All Reasonable, Good-Faith Efforts to Achieve Consistency with the County’s Comprehensive plan and Zoning Code..... 30
2.	The Wind Farm Overlay Ordinance as Implemented in the KV Project Does Not Comply with County GMA-based Planning Policies and Zoning Code, and Does Not Comply with the GMA 39
3.	The Wind Farm Ordinance, as Adopted and as Applied to the KV Project, Violates the Regulatory Reform Act. 45
4.	The Wind Farm Ordinance, as Applied to the KV Project, Violates the Mandatory Requirement of No More Than One Open Record Hearing Conducted by a Single Hearing Body 47
5.	Failure to Decide the Application Under Adopted Comprehensive plan Policies and Zoning Code 48
6.	The County Failed to Establish a Timely and Predictable Process for Wind Energy Facilities..... 53
7.	The County’s Use of Development Agreements in the Wind Farm Ordinance Is Contrary to the Legislature’s Intent in Enabling Local Governments to Use Development Agreements 55
B.	Horizon and the County Were Unable to Resolve the Noncompliance Issues..... 60
1.	EFSEC Has Sole, Preemptive Authority to Address Site-Specific Aesthetic Siting Issues 61
2.	The Record Does Not Support the County’s Determinations Related to Aesthetic Issues 62
3.	Horizon’s Additional Alternative Proposed Mitigation and Avoidance Measures Adequately Address the County’s Aesthetic Concerns, Resolve the Issues of Disagreement with the County, and Are Based on the Record 67
C.	Alternate Locations Within the Same County Have Been Reviewed and Found Unacceptable..... 70

TABLE OF CONTENTS
(Continued)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Page

1.	The KV Site Is a Unique Opportunity with Proven, Robust Winds and Sufficient On-Site Transmission Facilities with Ample Capacity	71
2.	The Wild Horse Expansion Site Is Not an “Alternative” to the KV Site	72
3.	The enXco Desert Claim and Invenergy Sites Have Been “Reviewed” and Are Not Available or “Acceptable” Alternatives to the KV Site.....	72
D.	The Project Serves and Implements Interests of the State.....	75
V.	CONCLUSION.....	82

1 **I. INTRODUCTION**

2 Horizon Wind Energy LLC, through its subsidiary, Sagebrush Power Partners, LLC
3 (“Horizon,” or the “Applicant” or “Sagebrush”) has petitioned the Washington State Energy
4 Facility Site Evaluation Council (“EFSEC” or the “Council”) for preemption pursuant to
5 WAC 463-28-040. This Brief addresses claims by Kittitas County (the “County”) and other
6 intervenors that EFSEC and the Governor lack authority to preempt the County’s decision
7 purporting to deny Horizon’s local land use consistency request for the Kittitas Valley Wind
8 Power Project (the “Project” or “KV Project”). According to the County, the enactment of the
9 Growth Management Act (the “GMA”), RCW chapter 36.70A repealed or amended EFSEC’s
10 power to preempt and supersede locally adopted land use plans and ordinances, conferred by
11 RCW chapter 80.50. The County also contends that EFSEC has no power over County
12 requirements, and that Horizon must not only comply with local land use plans and zoning
13 codes, but also with the County’s uniquely complex wind farm ordinance.

14 This brief and the testimony and record before Kittitas County and the Council show
15 how Horizon met its responsibility for the Governor to preempt the County’s “denial”¹ of the
16 KV Project. Whether Horizon’s efforts to achieve local compliance satisfy the EFSEC statute
17 and rules is in part a factual question for the Council, demonstrated in Horizon’s testimony
18 and the record before the Council. The factual basis for preemption is documented in
19 Horizon’s proposed EFSEC Findings of Fact, submitted with this brief, and in discussion
20 below, Section IV. Horizon must “make all reasonable efforts” to “resolve” noncompliance
21 with the County comprehensive plan and zoning ordinances. The law does not require
22 Horizon to achieve such compliance or consistency. WAC 463-28-030.

23

24 _____
25 ¹ As discussed below, in the context of a pending EFSEC proceeding, the County was never
26 empowered to “deny” the KV Project. The Board of County Commissioners’ (the “BOCC”) findings
and conclusions exceed the County’s authority in relation to EFSEC’s preemptive jurisdiction.

1 To adjudicate the factual question of “all reasonable efforts,” Horizon’s efforts must be
2 considered in the context of the County’s basic opposition to EFSEC’s authority and
3 jurisdiction in these proceedings and the County’s refusal to conduct an expeditious process
4 that does not duplicate EFSEC’s authority and responsibility. Also part of this legal context is
5 the County’s application of a uniquely complex ordinance to the KV Project application—an
6 ordinance that inextricably meshes compliance with the County’s comprehensive plan, zoning
7 ordinance, and site-specific permitting, thereby interfering with EFSEC’s statutory and
8 regulatory scheme for seeking local “consistency” while controlling “siting” through
9 permitting the facility. Therefore, in addition to demonstrating “all reasonable efforts,” this
10 brief responds to the County’s and the intervenors’ arguments that EFSEC does not possess
11 preemptive authority over the County’s comprehensive plan and development regulations.
12 This brief then demonstrates that the County’s process was deeply flawed, and shows how the
13 County’s wind farm regulation, particularly as applied to the KV Project application, makes it
14 impossible for Horizon to resolve noncompliance, violates the County’s own GMA-based
15 comprehensive plan and development regulations, violates the GMA itself, and is inconsistent
16 with the Regulatory Reform Act.

17 Horizon emphasizes that these proceedings are not an appeal of the County’s “denial”
18 of the KV Project. EFSEC is not obligated to judge whether the County’s denial was or was
19 not made in violation of Washington law. The discussion below is instead intended to
20 underscore the impediments Horizon has faced in its well documented commitment to “make
21 all reasonable efforts” to seek compliance with locally adopted plans and zoning regulations.

22 **II. FACTUAL BACKGROUND²**

23 The Applicant filed an Application for Site Certification (“ASC”) with EFSEC on
24 January 13, 2003. The original application proposed 121 turbines in a project area depicted on

25 _____

26 ² The Applicant submits proposed Findings of Fact. This “Factual Background” is provided as an abbreviated summary for the convenience of the reader.

1 ASC Exhibit 1, Project Site Layout. As is described in the Addendum to the Draft
2 Environmental Impact Statement (“DEIS”), the Applicant revised the Project to further
3 minimize visual impacts and to seek a County determination of consistency with local land use
4 plans and zoning ordinances. As discussed in detail below, the Project is *not* “inconsistent”
5 with the comprehensive plan policies or the zoning designations applicable to the Project site.
6 *See Appendix A.* “Inconsistency” relates to the County’s adoption of its wind farm ordinance
7 which was adopted less than a year after the County conducted hearings and amended its
8 zoning code to enable wind energy facilities as a conditional use. Testimony of Chris Taylor
9 (Ex. 20 (CT-T) at 10). As described in the Applicant’s revisions to the ASC and the DEIS
10 Addendum, the redesigned Project proposes up to 80 turbines within the 6,000-acre Project
11 area. During the County hearing process, the Applicant agreed to further reduce the number
12 of turbines to a maximum of 65.

13 EFSEC held a Land Use Consistency Hearing on May 1, 2003 in Ellensburg. It found
14 that the land use was not consistent with local land use ordinances and entered its order on
15 May 7, 2003.

16 Recognizing the EFSEC requirement that the Applicant make the necessary application
17 for change in, or permission under, such land use plans or zoning ordinances, and make all
18 reasonable efforts to resolve noncompliance, the Applicant proposed two different ways to
19 “change” the County’s wind farm ordinance in order to achieve “consistency” by
20 “decoupling” the comprehensive plan and zoning requirement of KCC 17.61A from the site-
21 specific permitting requirements. Ex. 20 (CT-T) at 11-12. The County refused. *Id.* The
22 Applicant then filed its first County application pursuant to KCC 17.61A, on March 27, 2003
23 (“first application”). The Applicant then commenced protracted efforts to seek a County
24 hearing. Among many problems with the County, the Applicant faced significant challenges
25 with the County’s legal position regarding EFSEC’s role as the State Environmental Policy
26

1 Act (“SEPA”), RCW 43.21C, lead agency, in particular the County’s efforts to subvert and
2 preempt EFSEC’s statutory SEPA lead agency role.³

3 After the County filed documents with EFSEC demonstrating its intent to subvert
4 EFSEC’s SEPA authority, the Applicant filed a request for preemption with EFSEC pursuant
5 to WAC 463-28-040 on February 9, 2004, and withdrew the first County application. The
6 Applicant continued to work with the County on the issue. In summer 2005, the Applicant
7 decided to revise the Project size and configuration and to file a new application with the
8 County, in hope of obtaining land use consistency. The Applicant approached both the
9 County and EFSEC on this matter, and it was agreed to suspend the EFSEC process pending
10 the new application with the County. Both the County and EFSEC requested the Applicant to
11 withdraw its request for preemption pending the outcome of the new County application. The
12 Applicant withdrew its first request for preemption on October 19, 2005.

13 The Applicant made a second attempt to achieve local land use consistency, and filed
14 with the County a Development Activities Application pursuant to KCC 17.61A, dated
15 September 30, 2005, and submitted a revised Development Activities Application on County-
16 required application forms, dated October 14, 2005. The County deemed the application
17 complete on October 17, 2005.

18 Under the County’s process, the County purported to hold a single open record public
19 hearing before both the Planning Commission and the BOCC, commencing on January 10,
20 2006, and continued in a serial fashion through numerous public meetings, ending on June 6,
21 2006. The Applicant submitted proposed Findings of Fact and Conclusions of Law,
22 demonstrating that the Project is consistent with applicable County comprehensive plan
23 policies and meets criteria for approval under applicable County zoning ordinances. A

24 ³ As Chris Taylor testified, the County took the position that the County could not review a
25 local permit application until the County had determined “in its own judgment, that the EFSEC DEIS,
26 and response to the DEIS, was adequate.” (Ex. 20 (CT-T)-12). “The County’s position effectively
meant that we faced two permitting processes, with redundant and sometimes conflicting requirements
and expectations.” *Id.* at 14; *see also* Ex. 20R (CT-R) at p. 4.

1 verbatim copy of the Findings and Conclusions related to compliance with the County’s
2 comprehensive plan, zoning code and SEPA requirements, is attached hereto as **Appendix A**.
3 The Applicant presented written and live testimony from expert witnesses regarding visual
4 impacts, shadow flicker effects, property values, health and safety, noise, and wildlife impacts.
5 The Applicant submitted a preliminary draft proposed development agreement, modeled on
6 the County-approved Wild Horse Wind Energy Facility development agreement, anticipating
7 negotiation and discussion of the development agreement with County staff, and aimed at
8 refining the agreement during the approval process. All of these documents are appended to
9 the Applicant’s Second Request for Preemption.

10 Following hearings on January 10, January 11, and January 12, 2006, the Planning
11 Commission held a deliberation on January 30, 2006 and issued a recommendation and
12 findings of fact on February 13, 2006, recommending denial of the application. *See* Exhibit 2
13 attached to Applicant’s Second Request for Preemption. The BOCC commenced “continued”
14 hearings on March 29 and 30, 2006, with additional deliberations on April 12 and 27. As
15 discussed further below, on May 3, 2006, the BOCC issued a verbal decision “preliminarily”
16 denying the application. The denial was fundamentally based on the BOCC’s unsubstantiated,
17 SEPA-based determination that the Project, as proposed, would cause unacceptable visual and
18 shadow flicker impacts on residents residing in the vicinity of the Project. While the BOCC
19 preliminarily denied the Project due to the proximity of turbines to nonparticipating
20 landowners, each County Commissioner offered varying opinions about the needed setbacks.
21 At this stage, the BOCC did not take formal action by way of a motion or otherwise to define
22 this essential Project characteristic. Following the BOCC’s preliminary decision to deny the
23 Project, the Applicant met with the County staff in an effort to determine whether it was
24 possible to change the Project further to accommodate the various setback requirements
25 identified in the verbal deliberations by the BOCC. Letters were exchanged between the
26

1 Applicant and the County regarding these ongoing efforts to satisfy the BOCC’s requests. *See*
2 Exhibit 3, attached to Applicant’s Second Request for Preemption.

3 On May 31, 2006, the BOCC reviewed draft Findings of Fact and Conclusions of Law
4 denying the Project. The BOCC formally identified minimum setbacks from existing non-
5 participating residences (2,500 feet) and nonparticipating owners’ property lines (2,000 feet)
6 that would be required to consider a favorable County decision. The Applicant advised the
7 County that these setbacks would render the Project unviable. On June 6, 2006, by Resolution
8 No. 2006-90, the BOCC denied the Project. A verbatim copy of Resolution No. 2006-90 is
9 attached hereto as **Appendix B**.

10 The Applicant has made all reasonable efforts to resolve “noncompliance” issues with
11 the County as required by WAC 463-28-030. In summary, the Applicant offered two different
12 ways for the County to change its wind farm ordinance to focus solely on consistency with the
13 Comprehensive Plan and zoning ordinance to preserve EFSEC’s exclusive authority to make
14 the site-specific siting decisions. Failing that, the Applicant then made two efforts to seek
15 local consistency, reduced the proposed number of turbines by half to address concerns raised
16 by the County and members of the public, deployed substantial expert witness resources to the
17 County process, and participated in protracted hearings. These efforts were made despite a
18 County process that is uniquely complex and discretionary, that duplicates the EFSEC role and
19 process, and that does not meet EFSEC standards for the expeditious siting of energy facilities.

20 **III. EFSEC’S AUTHORITY SUPERSEDES AND PREEMPTS LOCALLY ADOPTED**
21 **COMPREHENSIVE PLANS, ZONING REGULATIONS, AND PERMITTING**
22 **DECISIONS**

22 **A. HB 2402 (2006) Makes Clear What Has Always Been True During the KV**
23 **Process – EFSEC Preempts Local Comprehensive plans and Zoning, Including**
24 **Those Enacted Under the GMA**

24 Under Washington law, the siting of a renewable energy facility is not automatically
25 subject to the jurisdiction of EFSEC. However, renewable energy facility developers may
26 apply for EFSEC certification under the provisions of RCW 80.50.060(2). Here, Sagebrush

1 filed a site certification application with EFSEC on January 13, 2003. EFSEC found that the
2 proposed site was not consistent with the County Comprehensive Plan and zoning ordinance.
3 Consequently, by order of May 7, 2003, EFSEC directed Sagebrush to seek “consistency”
4 with local land use ordinances. After two unsuccessful efforts to obtain approval from the
5 County, the Applicant has filed with EFSEC a Request for Preemption pursuant to WAC 463-
6 28-040. The County and other intervenors oppose the Request for Preemption, arguing, in
7 part, that RCW 36.70A.103 (part of the GMA) repealed the State of Washington’s authority
8 under RCW chapter 80.50 to preempt local land use plans when the State licenses a large
9 energy facility.

10 As discussed in detail below, EFSEC preempts locally adopted comprehensive plans
11 and zoning, along with all other local and state regulations. The statute is explicit, although
12 the Council’s administrative rules add procedural steps requiring an applicant to make all
13 reasonable efforts to achieve local consistency before seeking an application of EFSEC’s
14 inherent preemptive authority. EFSEC’s statutory preemption authority has existed for 30
15 years. In the 2006 session, as a “housekeeping” exercise, the legislature specifically amended
16 RCW 80.50.020(15) and (16), adding references to comprehensive plans and zoning
17 ordinances adopted under the GMA. H.B. 2402, 59th Leg. (2006). This legislation makes
18 explicit what has been the law before and after the enactment of the GMA, providing that like
19 other state and local plans and regulations, GMA-based plans and zoning are subject to
20 EFSEC’s preemptive authority, as applied through RCW 80.50.090, 80.50.110, and 80.50.120.
21 As discussed below, to the extent any further ambiguity exists about EFSEC’s authority in
22 counties subject to the GMA, the GMA regulations themselves previously acknowledged
23 EFSEC’s preemptive effect, and as a matter of statutory construction, there is no basis to
24 support any result to the contrary.

25

26

1 **B. In These Proceedings, the Court of Appeals Has Confirmed the Preemptive**
2 **Jurisdiction of EFSEC and the Governor.**

3 In this case, in 2004, intervenor F. Steven Lathrop filed a lawsuit in Kittitas County
4 Superior Court seeking judicial interference with EFSEC’s administrative process. The court
5 of appeals affirmed the superior court dismissal of the Lathrop appeal. *Lathrop v. EFSEC*,
6 130 Wn. App. 147, 121 P.3d 774 (2005). The court of appeals also affirmed the importance of
7 energy facilities being expeditiously permitted, and that EFSEC and the Governor possess
8 preemptive authority over local plans and regulations, including those enacted under the
9 GMA. The court stated:

10 In chapter 80.50 RCW, our legislature set out an expedited
11 administrative procedure to consider energy facility site
12 applications. The procedure is designed to “avoid costly
13 duplication in the siting process and ensure that decisions are
14 made timely and without unnecessary delay.” RCW
15 80.50.010(5). EFSEC conducts administrative hearings on
16 proposed energy facility sites and reports to the governor a
17 recommendation on the disposition of applications for site
18 approval and submission of a “draft certification agreement”
19 when the EFSEC recommends approval. RCW 80.50.040(7),
20 (8). While EFSEC may recommend preemption solely the
21 governor has the power to preempt of land use plans under the
22 statutory scheme.

23 130 Wn. App. at 151.⁴ Combined with H.B. 2402, the court of appeals holding should lay to
24 rest any issue relating to EFSEC’s preemptive authority over the County’s local actions,
25 _____

26 ⁴ The issue is whether the court erred in dismissing Mr. Lathrop’s petition for review and
concluding it lacked subject matter jurisdiction and statutory authority under chapter 80.50 RCW to act
on the petition.

When interpreting a statute, our duty is to discern and implement the legislature’s intent. *State*
v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). We give effect to the plain meaning. *McGinnis v.*
State, 152 Wn.2d 639, 645, 99 P.3d 1240 (2004). We construe statutes to avoid strained or absurd
results. *Strain v. W. Travel, Inc.*, 117 Wn. App. 251, 254, 70 P.3d 158 (2003), review denied, 150
Wn.2d 1029 (2004).

In chapter 80.50 RCW, our legislature set out an expedited administrative procedure to
consider energy facility site applications. The procedure is designed to “avoid costly duplication in the
siting process and ensure that decisions are made timely and without unnecessary delay.” RCW
80.50.010(5). EFSEC conducts administrative hearings on proposed energy facility sites and reports to
the governor a recommendation on the disposition of applications for site approval and submission of a
“draft certification agreement” when the EFSEC recommends approval. RCW 80.50.040(7), (8).
While EFSEC may recommend preemption, solely the governor has the power to preempt of land use
plans under the statutory scheme.

1 whether or not ostensibly based on its GMA comprehensive plan and zoning. To the extent
2 there is any further basis for debate regarding EFSEC’s preemptive jurisdiction in this case,
3 Horizon provides the following analysis.

4 **C. GMA Regulations Expressly Acknowledge That EFSEC Preempts Energy
5 Facility Siting and Supersedes Local Land Use Planning and Zoning Rules.**

6 The County’s and intervenors’ assertion that RCW 36.70A.103, a 2002 amendment to
7 the GMA, repealed EFSEC’s authority to preempt local land use plans and zoning codes that
8 would otherwise regulate siting of an energy facility is without foundation in the GMA or its
9 implementing regulations. Those regulations not only expressly acknowledge the preemptive
10 effect of RCW chapter 80.50, but also interpret RCW 36.70A.103 as applicable only to state
11 agencies acting as applicants proposing development.

12 **1. State Preemption of Energy Facility Siting, Construction, and Operational
13 Conditions Is Firmly Established in RCW Chapter 80.50.**

14 In 1970, the Washington legislature passed the Thermal Power Plant Siting Act, Laws
15 of 1970, 1st Ex. Sess., ch. 45, § 11, which was codified at RCW chapter 80.50. In 1976, the
16 act was expanded to encompass the siting of other energy facilities in addition to thermal
17 power plants. Laws of 1975-76, 2d Ex. Sess., ch. 108 (codified at RCW 80.50.010(7), (10),
18 (14)). The original law and its amendments provide for the Governor’s certification of any
19 such facilities after receiving a recommendation from EFSEC. The purpose of the act was to
20 develop a single, streamlined procedure for the selection and use of sites for energy facilities
21 and the identification of the State’s position with respect to each proposed site. RCW
22 80.50.010. The State recognized the need for more energy facilities and intended, by enacting

23 The expedited procedure requires EFSEC to report its recommendations within 12 months of
24 receipt of an application. RCW 80.50.100(1). Within the next 60 days, the governor must make a
25 decision to approve or reject the application or ask EFSEC to reconsider aspects of the draft
26 certification agreement. RCW 80.50.100(2)(a)-(c). “The rejection of an application for certification by
the governor shall be final as to that application.” RCW 80.50.100(3). *Id* at 150-51.

1 the siting law, to “avoid costly duplication in the siting process and ensure that decisions are
2 made timely and without unnecessary delay.” RCW 80.50.010(5). Consequently, under RCW
3 chapter 80.50, the State is granted sole authority to approve—through the certification
4 process—the siting, construction, and operational conditions of energy facilities. Specifically,
5 the statute provides:

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

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

12 RCW 80.50.110.

13 Certification by the State means

14 a binding agreement between an applicant and the state which
15 shall embody compliance to the siting guidelines, in effect as of
16 the date of certification, which have been adopted pursuant to
17 RCW 80.50.040 . . . as conditions to be met prior to or
concurrent with the construction or operation of any energy
facility.

18 RCW 80.50.020(5).

19 RCW 80.50.040 establishes that EFSEC has sole authority to promulgate rules and
20 guidelines for applying for state certification. RCW 80.50.040(1); WAC 463-28-020. No
21 construction of an energy facility may be undertaken without first obtaining state certification.

22 RCW 80.50.060(1). This includes renewable energy facilities that opt in to EFSEC
23 jurisdiction. Thus certification demonstrates compliance with the only siting requirements
24 allowed by Washington law—those established and implemented by the state. The
25 requirement that a proposed energy facility be certified by the state, coupled with the express
26

1 preemption provision set forth in RCW 80.50.110(2), demonstrate that the state intended to
2 fully occupy the field of energy facility siting. WAC 463-28-020. Preemption is a necessary
3 component of accomplishing a statewide energy policy function, because without a single
4 authority for siting energy facilities, the legislature’s goal of avoiding “costly duplication in
5 the siting process” and ensuring that “decisions are made timely and without unnecessary
6 delay,” RCW 80.50.010(5), would be undermined.

7 **2. The GMA and Its Implementing Regulations Do Not Expressly or**
8 **Implicitly Repeal RCW Chapter 80.50, But in Fact Defer to the State’s**
9 **Preemptive Authority.**

9 In 1990, the Washington legislature enacted the GMA, codified at RCW chapter
10 36.70A, in response to its findings that

11 . . . uncoordinated and unplanned growth, together with a lack
12 of common goals expressing the public’s interest in the
13 conservation and the wise use of our lands, pose a threat to the
14 environment, sustainable economic development, and the health,
15 safety, and high quality of life enjoyed by residents of this state.
16 It is in the public interest that citizens, communities, local
17 governments, and the private sector cooperate and coordinate
18 with one another in comprehensive land use planning.

19 RCW 36.70A.010. The GMA requires certain cities and counties to implement
20 comprehensive plans addressing key subject areas related to growth management, such as
21 transportation, utilities, urban growth, sprawl, and rural lands. RCW 36.70A.040(3). In
22 addition, under the GMA, state agencies must “comply with the local comprehensive plans
23 and development regulations and amendments thereto adopted pursuant to this chapter.”

24 RCW 36.70A.103.⁵ Although the County argues, in part, that this provision effectively

25 ⁵ The statute provides, in full:
26 State agencies shall comply with the local comprehensive plans and
development regulations and amendments thereto adopted pursuant to this
chapter except as otherwise provided in RCW 71.09.250 (1) through (3),
71.09.342, and 72.09.333.

The provisions of chapter 12, Laws of 2001 2nd sp. sess. do not affect the
state’s authority to site any other essential public facility under RCW
36.70A.200 in conformance with local comprehensive plans and
development regulations adopted pursuant to chapter 36.70A RCW.

1 repeals state preemption of energy facility siting decisions, the GMA’s implementing
2 regulations make plain that the legislature intended this provision to apply only to those state
3 agencies acting as applicants for proposed development. The broader issue of statutory repeal
4 and amendment is discussed below; however, RCW 36.70A.103 is facially inapplicable
5 because EFSEC and the state are not applicants for the wind energy project at issue.

6 The Washington legislature delegated to the Department of Community Trade and
7 Economic Development (“CTED” or the “Department”) authority to promulgate guiding
8 regulations for implementing the GMA. WAC 365-195-020. The Department’s GMA
9 regulations at WAC chapter 365-195 evidence its acknowledgement of state preemption of
10 energy facility siting decisions and shed light on the requirement in RCW 36.70A.103 that
11 state agencies comply with the GMA.

12 **3. The Department Recognized That Other Statutes May Preempt the GMA**
13 **and that RCW Chapter 80.50 Expressly Supersedes Contrary Local**
14 **Land Use Plans and Zoning Codes.**

15 In an effort to provide guidance regarding construction of the GMA in light of other
16 statutes, the Department established that when the legislature “has spoken expressly on the
17 relationship of the [GMA] to other statutory provisions, the explicit legislative directions shall
18 be carried out.” WAC 365-195-705(1).⁶ In the absence of a clear legislative intent or judicial
19 interpretation to the contrary, “it should be presumed that neither the [GMA] nor other statutes
20 are intended to be preemptive. Rather they should be considered together and, wherever
21 possible, construed as mutually consistent.” WAC 365-195-705(2).

22 With respect to state authority over energy facility siting, the legislature established its
23 intent that the state preempt “the regulation and certification of the location, construction, and
24 operational conditions of certification” (WAC 463-28-020) of the siting of energy facilities
25 and that RCW chapter 80.50 supersedes “any other law of this state, or any rule or regulation”

26 RCW 36.70A.103.

⁶ Examples of such express provisions are set forth in WAC 365-195-750.

1 in conflict with that statute. Nonetheless, RCW chapter 80.50 allows the state to impose
2 conditions on a certification that are “designed to recognize the purpose of laws or ordinances
3 . . . that are preempted or superseded pursuant to RCW 80.50.110.” RCW 80.50.100(1).⁷
4 Thus RCW chapter 80.50 may be read as preempting the GMA to the degree that local laws or
5 regulations would act as a bar to energy facility siting, but also as consistent with the GMA
6 insofar as it reserves to EFSEC the discretionary authority to impose conditions as part of the
7 certification process in an effort to comply with GMA-based ordinances.

8 Notwithstanding the legislature’s effort in RCW chapter 80.50 to harmonize state
9 preemption with local land use plans and zoning codes promulgated pursuant to the GMA,
10 DCTED expressly acknowledged state occupation of the energy facility siting field and that
11 contrary local land use laws barring such siting are superseded. According to DCTED
12 regulations, plans and regulations adopted under the GMA “should accommodate situations
13 *where the state has explicitly preempted all local land use regulations, as for example, in the*
14 *siting of major energy facilities* under RCW 80.50.110.” WAC 365-195-745(1) (emphasis
15 added). This regulation directly acknowledges the state’s primary role in energy facility siting
16 and expressly acknowledges that local land use laws that would otherwise bar such siting are
17 superseded. Thus the County’s argument that the GMA repealed RCW chapter 80.50 is
18 contradicted by regulations promulgated by the very agency charged with drafting guidance
19 for interpreting and complying with the GMA.

20 Further, the Department enumerated each existing statute the legislature amended
21 when it enacted the GMA. WAC 365-195-750. This enumeration does not contain any
22 reference to RCW chapter 80.50 or the state’s energy facility siting authority. WAC 365-195-

23 _____

24 ⁷ In addition, EFSEC regulations require applicants to identify all state, federal, and local
25 statutes and rules that would apply to the proposed project if the Project were not under EFSEC
26 jurisdiction and to explain why any inconsistencies with such laws or regulations are excusable. WAC
463-60-297(1).

1 50. The Department knew that certain statutes were amended or repealed by the GMA, and it
2 listed each such statute and its subject matter. DCTED certainly would have included RCW
3 chapter 80.50 in its enumeration if that statute were among those amended. The omission of
4 RCW chapter 80.50 from the list of amended statutes further demonstrates that the legislature
5 did not implicitly or explicitly repeal RCW chapter 80.50. The GMA unambiguously
6 amended certain statutes, expressing the legislature’s clear intent to do so. It is a violation of
7 the principles of statutory construction to add language to an unambiguous statute. *Am. Cont’l*
8 *Ins. Co. v. Steen*, 151 Wn.2d 512, 518, 91 P.3d 864 (2004). The legislature made clear what it
9 intended to amend; consequently, a court is not free to add language that would include a
10 previously omitted statute.

11 Finally, DCTED has interpreted RCW 36.70A.103, which declares that state agencies
12 must comply with the local comprehensive plans and development regulations adopted
13 pursuant to the GMA. The Department

14 . . . construes the provision for state agency compliance to require that each
15 state agency must meet local siting and building requirements *when it occupies*
16 *the position of an applicant* proposing development Generally this means
17 that *the development of state facilities is subject to local approval* procedures
18 and substantive provisions[.]

19 WAC 365-195-765(2) (emphasis added).

20 In addition, the Department interprets the policy behind the GMA as implicitly
21 requiring “that all programs at the state level accommodate the outcomes of the growth
22 management process *wherever possible*.” WAC 365-195-765(4) (emphasis added).

23 The Department’s interpretation of the state agency compliance statute and the broader
24 GMA policy could not be more clear. The statute does not repeal or modify RCW chapter
25 80.50 for GMA counties, but merely requires that state agencies consider and “accommodate”
26 the GMA, particularly when they are applicants. In addition, the GMA’s state agency
compliance provision does not require that permitting agencies such as EFSEC comply with

1 GMA-based local laws. Instead, it establishes that when an agency itself acts as the applicant
2 proposing development—for example, when the Department of Transportation proposes to
3 construct or expand a road—that agency must comply with local comprehensive plans and
4 development regulations. WAC 365-195-765.⁸

5 Although no Washington court has addressed the Department’s advisory
6 interpretations, the Department is arguably entitled to deference because the GMA itself
7 directed DCTED to develop the regulations. *Id.* at 29 n.4 (citing *Green River Cmty. Coll. v.*
8 *Pers. Bd.*, 107 Wn.2d 427, 438, 730 P.2d 653 (1986) (“[A] heightened degree of deference is
9 appropriate where the agency’s construction of a statute is within the agency’s field of
10 expertise[.]”). In light of the deference owed to the Department’s interpretation and the
11 absence of any case law or legislative history in support of the County’s claim that the GMA
12 repealed RCW chapter 80.50, a court is likely to reject the County’s position a unsupported by
13 the statutes themselves, the regulations of the implementing agencies, and case law.

14 It is also noteworthy that DCTED is an intervenor in this case and supports
15 preemption. Ex. 60 SUP (TU-SUP). As DCTED representative Tony Usibelli testified, the
16 decision to support preemption was made by the DCTED director, and therefore has the full
17 force and support of the agency, including its growth management and energy roles. EFSEC
18 Tr. at 648-49.

19 **D. If the GMA Attempted to Repeal or Amend the Statute Authorizing EFSEC,**
20 **Such Amendment Would Violate Article II, Section 37 of the Washington**
Constitution.

21 Notwithstanding DCTED’s acknowledgment that RCW chapter 80.50 supersedes local
22 land use laws promulgated under the GMA, if the County is correct in its assertion that the

23 _____
24 ⁸ The Department’s interpretation is supported by analogous case law regarding the
25 duty of special districts, such as ports, to comply with the GMA when the special district itself
26 is the applicant proposing development. *See City of Des Moines v. Puget Sound Reg’l*
Council, 98 Wn. App, 23, 29-30, 988 P.2d 27 (1999) (Port of Seattle would be obliged to
comply with terms of city comprehensive plan if city were engaged in cooperative planning
process required by GMA).

1 GMA repealed or amended RCW chapter 80.50, then such legislative action violated the
2 Washington Constitution. Article II, section 37, of the Washington Constitution requires that
3 any act revising or amending another act must set forth the revised or amended section in full.
4 Const. art. 2, § 37. An act that alters the scope and effect of a statute “is clearly amendatory of
5 that section” and must comply with Article II, section 37. *Weyerhaeuser Co. v. King County*,
6 91 Wn.2d 721, 730, 592 P.2d 1108 (1979) (quoting *State ex rel. Arnold v. Mitchell*, 55 Wash.
7 513, 518, 104 P. 791 (1909)). One purpose of Article II, section 37 is to ensure that legislators
8 are aware of the nature of the law being amended and the effect the particular amendment will
9 have. *Id.* at 731. Here, notwithstanding the dearth of evidence that the legislature intended to
10 amend or repeal RCW chapter 80.50, if the legislature actually intended to amend RCW
11 chapter 80.50 through the enactment of the GMA, it failed to set forth the amended sections
12 and thereby violated Article II, section 37, of the Washington Constitution.⁹

13 If the GMA repealed or amended RCW chapter 80.50, the legislature’s failure to set
14 forth the precise sections amended violates Article II, section 37, of the Washington
15 Constitution. RCW chapter 80.50 vests in the state sole authority for decisions related to
16 energy facility siting, through EFSEC and the Governor. Any attempt to amend that grant of
17 authority to the state would have an effect similar to that of the FPA amendments at issue in

18 ⁹ In *Weyerhaeuser*, the court analyzed amendments to the Forest Practices Act (the
19 “FPA”) of 1974 expressly prohibiting the imposition of Shoreline Management Act (the
20 “SMA”) conditions on forest practices. *Id.* at 729-30. The court confirmed the legislature’s
21 power to enact such a restriction on the authority granted by the SMA to local governments,
22 but held that the legislature had not done so in a manner consistent with the requirements of
23 the state constitution. *Id.* at 730. The court found that before the FPA amendments, the
24 section of the FPA at issue expressly reserved to local governments all authority granted by
25 the SMA. *Id.* at 728. The FPA amendments added several paragraphs that deprived local
26 governments of the power to regulate forest practices in shoreline areas, thus contravening the
SMA’s intent that shoreline master programs should control. The FPA amendments thus
effectively repealed the county’s SMA authority. *Id.* at 729-30. However, the amendments
did not set forth the amended sections of the SMA, such that the new FPA regulations could
not be read as consistent with the grant of authority in the SMA, which remained—on the face
of the statute—unchanged. *Id.* at 730. Thus the FPA amendments substantially altered the
SMA’s scope and effect without changing its language, in contravention of the constitutional
requirement that any act revising or amending another act must set forth the revised or
amended section in full. *Id.*

1 *Weyerhaeuser*: Such changes would effectively contravene the legislative intent expressed in
2 RCW chapter 80.50 that the state alone has authority to control the siting of energy facilities.
3 The interpretation of the GMA proposed by the County would invalidate state preemption of
4 energy facility siting without specifically stating so in RCW chapter 80.50. That is, such an
5 amendment, if it occurred, would substantially alter the scope and effect of the energy facility
6 siting statute without changing the language of RCW chapter 80.50 to reflect that alteration.

7 As held in *Arnold*, 55 Wash. at 518, an act that alters the scope and effect of a statute is
8 clearly amendatory and must comply with Article II, section 37, of the Washington
9 Constitution. If the County is correct in asserting that the GMA modified or repealed state
10 authority to preempt energy facility siting decisions, such amendment would violate Article II,
11 section 37 by failing to set forth the amended provisions of RCW chapter 80.50, because
12 readers of that statute, like readers of the SMA in *Weyerhaeuser*, cannot know from the face of
13 RCW chapter 80.50 that its broad grant of authority over energy facility siting activities is
14 severely restricted by county land use plans and zoning codes enacted pursuant to the GMA.
15 This is precisely the problem sought to be avoided by the requirement in Article II, section 37
16 that amended statutes be set forth in full in the amending act.

17 There is no evidence that the legislature intended to repeal or amend RCW chapter
18 80.50 by enacting the GMA. If any such amendments were in fact intended, then they violate
19 Article II, section 37, of the Washington Constitution because the GMA fails to set forth in
20 full the amended statutory provisions. This further amplifies the clear intent of the legislature
21 upon the adoption and amendment of RCW chapter 80.50 and the GMA, including the 2006
22 amendment to the EFSEC statute, that all locally adopted plans and regulations are preempted.

23 **E. The Legislative History of RCW Chapter 80.50 Shows a Clear Intent to**
24 **Supersede and Preempt Locally Adopted Comprehensive plans, Regulations, and**
25 **Permits.**

26 In response to early uncertainty regarding the degree of deference due to local land use
plans and zoning codes in RCW chapter 80.50, the Washington State Attorney General issued

1 an opinion in 1977 expressly affirming state preemption of energy facility siting, construction,
2 and operating conditions. Although the GMA was enacted after the Attorney General’s
3 opinion, the opinion remains a valid interpretation of RCW chapter 80.50 because it is based
4 on direct legislative history regarding the impact of local land use plans and zoning codes on
5 energy facility siting decisions. This legislative history and the Attorney General’s opinion
6 are undisturbed by the subsequent enactment of the GMA, which, as discussed above, is
7 devoid of any evidence that it divested the state of sole authority to site energy facilities.

8 In 1977, in response to an inquiry by the chairman of EFSEC, the Attorney General
9 analyzed the legislative history of RCW chapter 80.50 and determined that the Washington
10 legislature expressly preempted any local land use plan or zoning code that would otherwise
11 bar the siting of a major energy facility, despite provisions within RCW chapter 80.50
12 requiring EFSEC to consider local land use plans and zoning codes in its review of a proposed
13 energy facility. Op. Att’y Gen. No. 1 (Jan. 5, 1977).

14 As codified in 1977, RCW 80.50.020(5) defined “certification” of a proposed energy
15 facility as

16 . . . a binding agreement between an applicant and the state
17 which shall embody compliance to the siting guidelines, in
18 effect as of the date of certification, which have been adopted
19 pursuant to RCW 80.50.040 [former RCW 80.50.050] as now or
hereafter amended as conditions to be met prior to or concurrent
with the construction or operation of any energy facility.

20 Subject to the conditions set forth in a site certification, certification acted to bind the
21 state and its departments, agencies, and divisions “as to the approval of the site and the
22 construction and operation of the proposed energy facility.” RCW 80.50.120(1). Certification
23 signed by the Governor was “in lieu of any permit, certificate or similar document required by
24 any department, agency, [or] division” of the state. RCW 80.50.120(3). Furthermore, the
25 1970 legislature that enacted RCW chapter 80.50 declared that the state “hereby preempts the
26 regulation and certification of thermal power plant sites and thermal power plants as defined in

1 section 2 of this act.” Laws of 1970, 1st Ex. Sess., ch. ch 45, § 11-2 (codified at RCW
2 80.50.110(2)).

3 Despite the original statute’s express declaration of the preemptive and binding effect
4 of state certification, until 1976, RCW chapter 80.50 allowed local zoning codes to override
5 certification of a proposed energy facility. Although such intent was not expressly stated in
6 the statute, legislative history from 1970—wherein the original version of the law was
7 debated—and 1974 (pertaining to its amendments) demonstrated the legislature’s intent that a
8 local land use plan or zoning code could bar the siting of an energy facility. Op. Att’y Gen.
9 No. 1, at 4 (1977). Discussions between Senator McCormack and Senators Gissberg and
10 Mardesich (in 1970 and 1974, respectively) demonstrate that those legislatures intended that
11 when a proposed energy facility site was not consistent with the applicable county land use
12 plan or zoning code, EFSEC was divested of authority to recommend that site to the Governor.
13 *Id.* at 4-5 (*citing* 1970 Senate Journal at 281). In addition, the 1974 legislature disclaimed any
14 intent to preclude a county or city from also “requiring any information it deems appropriate
15 to make a decision approving a particular location.” Laws of 1974, 1st Ex. Sess. ch. 110, §
16 2(7) (codified at RCW 80.50.175(7)). That disclaimer was reiterated in 1974 senate
17 deliberations in which Senator Washington affirmed that a board of local county
18 commissioners must “approve the site before the siting council can take any action.” Op.
19 Att’y Gen. No. 1, at 5 n.2 (*quoting* 1974 Senate Journal at 593).

20 However, in 1976, the Washington legislature adopted an amendment to RCW
21 80.50.110(2) providing:

22 “The state hereby preempts the regulation and certification of . . . the
23 location, construction, and operational conditions of certification of the
24 energy facilities included under RCW 80.50.060 as now or hereafter
25 amended.

26 Laws of 1975-76, 2d Ex. Sess., ch. 108, § 37(2) (codified at RCW 80.50.110(2)).

1 Although the 1976 legislature retained both chapter 45, section 9, of the Laws of 1970,
2 Extraordinary Session (codified at RCW 80.50.090)¹⁰ and chapter 110, section 2(7), of the
3 Laws of 1974, Extraordinary Session (codified RCW 80.50.175(7)),¹¹ the amended version of
4 the preemption statute demonstrated the legislature’s intent to grant the state full authority to
5 certify a proposed energy facility notwithstanding any provision of local law to the contrary.
6 Op. Att’y Gen. No. 1, at 8 (“[T]he single most significant and meaningful indication of
7 legislative intent with regard to the preemption question is . . . the amended version of RCW
8 80.50.110(2), the original preemption statute.” (emphasis omitted)).¹²

9 Because the legislature, in passing the 1976 amendment, may be presumed not to have
10 deliberately engaged in an unnecessary or meaningless act, the Attorney General concluded
11 that the expansion of the scope of the original preemption statute would be rendered
12 meaningless if the legislature’s retention of RCW 80.50.090(2) and RCW 80.50.175(7) were
13 allowed to prevail over its obviously intentional action of amending the statute. Such a result
14 would be contrary to the above-cited principles of statutory construction. *Id.* at 9 (citing
15 *Kelleher v. Ephrata Sch. Dist.*, 56 Wn.2d 866, 873, 355 P.2d 989 (1960)).

16 Thus the Attorney General affirmed that a certification, approved by the Governor
17 under RCW chapter 80.50, “permit[s] the construction and operation of designated energy
18 facilities at whatever location is specified therein even where the otherwise applicable
19 provisions of a county, city or regional zoning code are to the contrary.” *Id.* at 9. EFSEC

20

21

22 ¹⁰ RCW 80.50.090 requires, in part, that EFSEC determine whether a proposed site is
consistent with local land use plans or zoning ordinances.

23 ¹¹ RCW 80.50.175(7) disclaims any intent to preclude a local government from
24 requiring information it deemed necessary to making a decision approving a particular
location..

25 ¹² When a law is amended and a material change is made in the wording, “it is
26 presumed that the legislature intended a change in the law. Op. Att’y Gen. No. 1 at 8 (quoting
Home Indem. Co. v. McClellan Motors, Inc., 77 Wn.2d 1, 3, 459 P.2d 389 (1969)).

1 must still consider and determine whether a proposed site is “consistent and in compliance
2 with city, county, or regional land use plans or zoning ordinances.” RCW 80.50.090(2).
3 However, such consistency is only one factor to be weighed and considered—it is not
4 determinative of the ultimate disposition of a proposed site. Op. Att’y Gen. No. 1, at 9.
5 Because of the 1976 amendment to the preemption statute, a finding of inconsistency does not
6 bar EFSEC from recommending the site to the Governor for certification, or bar the Governor
7 from issuing the certification as recommended. *Id.*

8 The Attorney General’s 1977 opinion applies without exception to the current version
9 of RCW chapter 80.50, which has retained the requirement that EFSEC consider a proposed
10 site’s compliance and consistency with applicable county or regional land use plans and
11 zoning ordinances. The statute, which has been subject to amendment since 1976, retains the
12 express statement that certification by the governor according to a recommendation by EFSEC
13 preempts and supersedes any local land use plan or zoning code that would otherwise regulate
14 or preclude siting of the facility. RCW 80.50.110(2); WAC 463-28-020. The legislature has
15 had myriad opportunities to contradict the Attorney General’s opinion regarding the effect of
16 the preemption statute by declaring that the GMA supersedes RCW chapter 80.50, but it has
17 not done so.¹³ In fact, as discussed above, the legislative acts have confirmed preemption over

18
19 ¹³ The Washington legislature has demonstrated that it knows how to repeal or
20 supersede an existing statute, as demonstrated through the Revised Code of Washington. For
21 example, in 2002, the legislature amended RCW 71.09.342 (related to community transition
22 facilities) to supersede and preempt a provision of the GMA. That statute now reads, in part:

21 1 After October 1, 2002, notwithstanding RCW 36.70A.103 or any
22 other law, this section preempts and supersedes local plans, development
23 regulations, permitting requirements, inspection requirements, and all other
24 laws as necessary to enable the department to site, construct, renovate,
25 occupy, and operate secure community transition facilities

24 RCW 71, 09.342(1).

25 The legislature then ensured that readers of RCW 36.70A.103 were apprised of the
26 amendment by amending RCW 36.70A.103 to read:

1 GMA-based plans and zoning enactments. The Attorney General’s express statement of the
2 preemptive effect of state certification remains the definitive statement of authority over
3 energy facility siting.

4 EFSEC’s regulations acknowledge that “the state preempts the regulation and
5 certification of the location, construction, and operational conditions of certification of energy
6 facilities.” WAC 463-28-020. Although an applicant must “make all reasonable efforts,”
7 WAC 463-28-030(1), to resolve any noncompliance with local land use plans or zoning
8 ordinances, if such efforts are unsuccessful, the applicant is to file “a written request for state
9 preemption as authorized in WAC 463-28-020” showing the applicant has made a good-faith
10 effort to resolve the noncompliance issues. WAC 463-28-040. Thus, under EFSEC’s
11 administrative rule, an effort to resolve noncompliance is a necessary condition precedent to a
12 request for preemption, but resolution of noncompliance is not required because preemptive
13 authority is already expressly vested in the state.

14 In sum, authority over energy facility siting has been vested solely in the state since
15 1970, with total preemption confirmed since 1976. As demonstrated by the Attorney
16 General’s 1977 opinion and the absence of any reference in either the GMA or RCW chapter
17 80.50 that the GMA superseded, amended, or repealed state siting authority, the legislature’s
18 intent to consider local land use plans or zoning codes—while no longer deferring to them—
19 has not wavered in more than 20 years. The Attorney General’s opinion and the regulations

20
21 State agencies shall comply with the local comprehensive plans and
22 development regulations and amendments thereto adopted pursuant to this
chapter except as otherwise provided in RCW 71.09.250 (1) through (3),
71.09.342, and 72.09.333.

23 RCW 36.70A.103.

24 The express cross-references between the statutes demonstrates the legislature’s intent
25 that one statute supersedes the other. The absence of any such cross-references in the GMA
26 and RCW chapter 80.50 is the clearest evidence that the legislature did not intend the GMA to
supersede or repeal RCW 80.50.

1 implementing RCW chapter 80.50 demonstrate that the state compliance with local land use
2 laws is not a necessary condition to site certification.

3 **F. Rules of Construction of Conflicting Statutes Require Confirmation of EFSEC’s**
4 **Preemptive Authority over GMA, Based Plans and Ordinances.**

5 Under Washington’s principles of statutory construction, the statutory provision that
6 appears latest in order of position (*i.e.*, the most recently enacted provision) prevails unless the
7 first provision is more clear and explicit than the last. *State v. J.P.*, 149 Wn.2d 444, 69 P.3d
8 318 (2003). Here, the first provision is more specific: state exclusive control over energy
9 facilities versus local planning control over local land use and development. “A specific
10 statute will supersede a general one when both apply.” *Waste Mgmt. of Seattle, Inc. v. Utils.*
11 *& Transp. Comm’n*, 123 Wn.2d 621, 630, 869 P.2d 1034 (1994) (*citing Gen. Tel. Co. of NW,*
12 *Inc. v. Utils. & Transp. Comm’n*, 104 Wn.2d 460, 464, 706 P.2d 625 (1985)). In *Waste*
13 *Management*, a specific provision of utility law allowed a permanent pass-through of certain
14 costs to consumers, which the court held superseded the Utilities and Transportation
15 Commission’s general authority to conduct substantive review of rates. The situation here is
16 similar. EFSEC has specific authority under RCW 80.50.110 to “preempt[] the regulation and
17 certification of the location, construction, and operational conditions of certification of the
18 energy facilities.” A specific grant of state jurisdiction over energy facility siting overrides a
19 general grant of local land use planning power if the statutes are truly in conflict.

20 Courts will construe conflicting statutes to give effect to both provisions if it can be
21 done without distorting the language of the statute. A court’s primary duty is to “discern and
22 implement the intent of the legislature.” *J.P.*, 149 Wn.2d at 450. Washington courts will not
23 read one statute in such a way as to “render another provision inoperative.” *Waste Mgmt.*, 123
24 Wn.2d at 630. A comparison of the findings of the EFSEC statute and the GMA indicate that
25 the legislature did not intend to repeal the EFSEC provisions in enacting the GMA. The
26 legislature stated that its intent in creating EFSEC was, among other objectives, to ensure that

1 “the location and operation of such facilities will produce minimal adverse effects on the
2 environment,” RCW 80.50.010, and to “avoid costly duplication in the siting process and
3 ensure that decisions are made timely and without unnecessary delay,” RCW 80.50.010(5).

4 Requiring project approval at the county level would frustrate the purpose of the
5 EFSEC statute and would undermine the legislative purpose of establishing EFSEC. The
6 GMA, on the other hand, indicates only disfavor with “uncoordinated and unplanned growth”
7 and a preference that public and private entities “cooperate and coordinate with one another”
8 in planning growth. RCW 36.70A.010. These purposes are fully compatible with EFSEC
9 preemption. EFSEC preemption of the County’s decision in this case will in no way frustrate
10 the spirit or the purposes of the GMA.

11 The GMA, like the EFSEC statute, has an opt-in provision, but these provisions do not
12 convey a lesser brand of jurisdiction. RCW 36.70A.040(2) provides that some counties may
13 choose to plan under the GMA, just as RCW 80.50.060(2) provides that alternative energy
14 facility applicants may choose to undergo EFSEC adjudication. In the GMA context, the
15 Washington Supreme Court noted that those “cities and counties either required to plan or
16 choosing to plan” are “*subject to the requirements of the GMA.*” *Moore v. Whitman County*,
17 143 Wn.2d 96, 103, 18 P.3d 566 (2001) (*quoting* 1992 Op. Att’y Gen. No. 23, at 2-3 (Oct. 13,
18 1992)). Once a county opts in to the GMA, it is treated no differently than if it had been
19 required to plan. Similarly, once a project opts into EFSEC, the authority of EFSEC over the
20 project is no weaker than if the project had been required to be submitted initially to EFSEC.

21 **G. Washington Courts Have Adopted a Presumption Against Implied Repeal.**

22 In addition to the prohibitions in Article II, section 37, Washington courts have
23 adopted a presumption against repeal by implication. Forcing EFSEC to comply with local
24 rules would completely frustrate the purpose of the EFSEC statute and would in effect repeal
25 it. In Washington, “[r]epeal by implication is strongly disfavored. The legislature is
26 presumed to be aware of its own enactments, and the court will presume that the legislature

1 did not intend to repeal a statute impliedly if the legislature has provided an express list of
2 statutes to be repealed.” *ATU Legislative Council of Wash. State v. State*, 145 Wn.2d 544,
3 552, 40 P.3d 656 (2002) (internal quotation marks and citations omitted).

4 The GMA does not meet the stringent requirements for repeal by implication in the
5 face of the adverse presumption: the later legislation must either occupy the field covered by
6 the previous legislation, or the two acts must be “so clearly inconsistent with, and repugnant
7 to, each other that they cannot, by a fair and reasonable construction, be reconciled and both
8 given effect.” *ATU*, 145 Wn.2d at 552. The statutes can easily be reconciled by a
9 construction to the effect that the legislature intended to preserve EFSEC’s preemption
10 authority while requiring general agency compliance with GMA plans. Even in the case that
11 the two statutes are irreconcilable, the EFSEC statute must control under the rules of
12 construction of conflicting statutes. The legislature is presumed to have been aware of EFSEC
13 at the time it was enacting the GMA.

14 Conceptually, the interplay between the EFSEC and GMA statutes is much like the
15 interplay between two portions of Washington workers’ compensation law in *Tollycraft*
16 *Yachts Corp. v. McCoy*, 122 Wn.2d 426, 858 P.2d 503 (1993). There, the Washington
17 Supreme Court read a newly imposed time limitation on processing of certain petitions as not
18 repealing by implication the ability of the Department of Labor & Industries to reconsider or
19 delay its own decisions. The court rejected an interpretation of the provisions that “would
20 have this court construe the 1988 amendment not only as constraining the Department’s
21 obligations to process applications but *also* as truncating the Department’s long-standing
22 authority to reconsider its decisions.” 122 Wn.2d at 439. Similarly, the enactment of RCW
23 36.70A.103 should indeed be viewed as a general constraint on state agency action (for
24 example, EFSEC could not decide to build its headquarters in a location inconsistent with the
25 County’s comprehensive plan and zoning code) but not as truncating or repealing EFSEC’s
26 long-standing exclusive authority over the siting of energy facilities.

1 That the legislature has amended the EFSEC statute since the adoption of the GMA is
2 a clear indication that it intended EFSEC’s power to coexist with the GMA. This is analogous
3 to the long-standing rule that legislative failure to amend constitutes acquiescence to
4 administrative interpretation. *Seattle-King County Council of Camp Fire v. Dep’t of Revenue*,
5 105 Wn.2d 55, 66, 711 P.2d 300 (1985). When, as here, the legislature has made many
6 changes to the statute but has declined to change the preemption provision, legislative inaction
7 lends further support to the inference that the legislature intended the provision to remain
8 active. Indeed, the legislature added RCW 80.50.060(2), which allows alternative energy
9 projects to seek EFSEC certification, some 10 years after the adoption of the GMA, and in
10 2006, the legislature adopted H.B. 2402. These legislative actions make it abundantly clear
11 that the legislature was aware of the provisions of the statute and their implications. The
12 presumption announced in *ATU* controls.

13 **H. Conclusions Regarding Preemption**

14 Absent a repeal, judicial or otherwise, of RCW 80.50.110, it is unclear how any
15 requirement of the GMA, including RCW 36.70A.103, could require or allow EFSEC or the
16 Governor to defer to the County in this case. EFSEC cannot take action contrary to the
17 statute. Among other powers, RCW 80.50.040 authorizes EFSEC to “adopt, promulgate,
18 amend, or rescind suitable rules and regulations, pursuant to chapter 34.05 RCW, to carry out
19 the provisions of this chapter, and the policies and practices of the council in connection
20 therewith; [.]” RCW 80.50.040(1). Similarly, RCW chapter 36.70A requires DCTED to
21 adopt rules to effectuate the requirements of the GMA. Neither statute authorizes agencies to
22 repeal statutes or to adopt rules and regulations that conflict with the enabling legislation.
23 EFSEC lacks authority to issue regulations contrary to law. It is not possible to reconcile with
24 this a generalized assertion that the GMA impliedly stripped EFSEC of its fundamental legal
25 authority, nor have the intervenors ever offered any cogent suggestion of how EFSEC could
26 possibly enact rules or take any other action to weaken or eliminate authority of great

1 significance to the fundamental business of permitting energy facilities—an authority
2 conferred on EFSEC not by itself, but by the legislature. Such a rule would “exceed the
3 statutory authority of the agency” and would be subject to a declaration of invalidity under the
4 Washington Administrative Procedure Act. RCW 34.05.570(2)(c).

5 Thus recent legislative enactments, judicial review in the case, the Washington
6 Attorney General’s opinion affirming state preemption of energy facility siting and operational
7 conditions, the DCTED’s GMA administrative regulations acknowledging the preemptive
8 effect of RCW chapter 80.50, constitutional and judicial prohibitions against the implied
9 repeal of statutes, clear principles of statutory construction, and the dearth of evidence
10 supporting the County’s position all show that the state of Washington retains sole authority
11 over siting major energy facilities and alternative energy facilities that opt for state siting
12 certification without regard to the enactment of the GMA.

13 Moreover, as discussed below, the County’s purported “GMA-based” wind farm
14 ordinance and actions thereunder in this case violate the GMA and related statutes in material
15 ways, and deserve no deference from the Council or the Governor. RCW chapter 80.50
16 expressly supersedes all state and local laws that would otherwise regulate energy facility
17 siting, and DCTED has acknowledged this superseding authority. Also DCTED supports
18 preemption in this case. A court of appeals decision in this very case has clearly
19 acknowledged EFSEC’s and the Governor’s preemptive authority, and the 2006 legislature
20 made explicit EFSEC’s preemptive authority over GMA-based plans and regulations. To
21 accept the County’s and intervenors’ claims would require a court to invalidate the GMA as
22 violating Article II, section 37 of the Washington Constitution, because the GMA does not set
23 forth the statutory sections the County claims it amends. In sum, the County and intervenors
24 cannot prevail on their GMA-based claims. EFSEC preempts and supersedes the County’s
25 actions.

26

1 **IV. HORIZON HAS SATISFIED ITS RESPONSIBILITY TO TAKE ALL**
2 **REASONABLE STEPS TO RESOLVE LOCAL INCONSISTENCY.**

3 As noted above, although RCW chapter 80.50 is clear in EFSEC’s authority to
4 supersede and preempt local plans, regulations, and permits, EFSEC’s administrative rules
5 require that an applicant take the following steps to resolve “inconsistency”:

6 As a condition necessary to continue processing the application, it shall
7 be the responsibility of the applicant to make the necessary application for
8 change in, or permission under, such land use plans or zoning ordinances, and
9 make all reasonable efforts to resolve the noncompliance.

10 WAC 463-28-030(1).

11 The request for preemption must address the following requirements:

12 (1) That the applicant has demonstrated a good faith effort to resolve the
13 noncompliance issues.

14 (2) That the applicant and the local authorities are unable to reach an
15 agreement which will resolve the issues.

16 (3) That alternate locations which are within the same county and city have
17 been reviewed and have been found unacceptable.

18 4) Interests of the state as delineated in RCW 80.50.010.

19 WAC 463-28-040.

20 Horizon has always been dedicated to making all reasonable efforts to ensure that the
21 Project is consistent with the County’s land use plans and regulations. This is true despite
22 being required to seek approvals under an unreasonable local process, unlike any local
23 permitting process anywhere in the Northwest or beyond. As noted, for an applicant to seek
24 preemption, an applicant must “make the necessary application for change in, or permission
25 under, such land use plans or zoning ordinances, and make all reasonable efforts to resolve the
26 noncompliance.” WAC 463-28-030(1). The applicant proposed two different, and wholly
reasonable, means to “change” the wind farm ordinance to preserve EFSEC’s siting role. The
County rejected these and demanded that the Applicant submit to the site-specific permitting
that is within EFSEC’s sole authority. Ex. 20R (CT-R) at 17-21.

1 As further discussed below, during cross-examination, the County’s Planning Director,
2 Darryl Piercy, acknowledged that the County’s wind farm ordinance prohibits the decoupling
3 of the plan amendment and rezoning requirements from the site-specific siting requirements
4 that are explicitly within EFSEC’s exclusive jurisdiction and authority. EFSEC Tr. at 477-78.
5 Consequently, at the very outset, the County’s process invades EFSEC’s authority, and
6 stymies any applicant’s attempt to make “all reasonable efforts” as defined by WAC 463-28-
7 030(1).

8 As stated previously, the County process duplicates the EFSEC process and in no way
9 represents expeditious (or “one-stop”) permit review as contemplated by RCW 80.50.010. As
10 discussed in detail below, the County’s wind farm ordinance, as implemented and applied in
11 this case, violates the GMA and the Regulatory Reform Act, RCW chapter 36.70B, and is
12 fundamentally unfair because it is applied in an arbitrary, inconsistent way to different
13 projects. EFSEC owes no deference to County planning and permitting decisions ostensibly
14 made “under the GMA” when the County’s actions demonstrate antipathy for EFSEC’s role,
15 and conflict with the GMA, the Regulatory Reform Act, and the County’s own GMA-based
16 Comprehensive plan policies and zoning code provisions pertaining to agricultural, rural, and
17 natural resource areas. *Cooper Point Ass’n v. Thurston County*, 108 Wn. App. 429, 31 P.3d
18 28 (2001). The County misapplied its own ordinance and process, completely disregarding its
19 legal obligation to reconcile its actions with the County’s own legal and planning policy
20 framework. As discussed in the Applicant’s proposed EFSEC Findings of Fact and below, the
21 County misunderstood and misapplied the visual analysis contained in EFSEC’s DEIS and
22 DEIS Addendum, based its actions on SEPA substantive authority (despite possessing no such
23 authority), and denied the Project based on standards developed on the fly, with no basis in the
24 record.

25 The KV Project is “consistent,” “compliant,” and “compatible” with County plans and
26 regulations. Wind energy facilities are a compatible land use, under County plans and

1 ordinances, and even under the BOCC’s decision. The remaining issues, *e.g.* visual effects,
2 are issues within EFSEC’s sole, exclusive jurisdiction (under preemption and as SEPA lead
3 agency), and should never have been addressed by the County in its consideration of local land
4 use consistency.

5 **A. The Applicant Made Good-Faith Efforts to Resolve the Noncompliance Issues.**

6 That the Applicant was unable to reach an agreement to resolve the issues between it
7 and the County to achieve local land use consistency is apparent. The near Sisyphean efforts
8 made for both the original 2004 County application and the ensuing 2005 and 2006
9 negotiations are detailed at great length in the Prefiled Testimony of Chris Taylor, Ex. 20 (CT-
10 T) and the Supplemental Prefiled Written Direct Testimony of Chris Taylor, Ex. 20 SUP (CT-
11 T SUP) and Dana Peck, Ex. 42 (DRP-T). Chris Taylor’s testimony describes the Applicant’s
12 multiyear efforts to propose changes in the County ordinance, seek clarity in the application
13 review process, and establish an understanding that the County would not independently seek
14 to exercise SEPA authority, as well as the County’s assertion to EFSEC that the County
15 would, itself, ultimately judge whether the EFSEC EIS was “adequate” for Project review.
16 Ex. 20R (CT-R); Ex. 20 SUP (CT-T SUP). Nonetheless, buoyed by its desire to make all
17 reasonable efforts to obtain such land use consistency, the Applicant expended huge efforts, in
18 good faith, to attempt to discern and then satisfy the expectations of the County.

19 **1. Applicant Has Made All Reasonable, Good-Faith Efforts to Achieve**
20 **Consistency with the County’s Comprehensive plan and Zoning Code.**

21 The Applicant’s good faith efforts in 2005 through 2006 began with the Applicant’s
22 decision to withdraw its first request for preemption in summer 2005. Having been through
23 the initial round of hearings conducted by EFSEC in 2004, the Applicant resolved to revise
24 and reduce the Project and resubmit its application to the County. The revisions were a
25 conscious effort to address the concerns it had received from both the County and the public
26 about the initial Project submittal. Ex. 20 SUP (CT-T-SUP) at 7-11. Before submitting its

1 new application, Horizon met with EFSEC and the County and informed them of its
2 intentions. On September 30, 2005, the Applicant submitted a Development Activities
3 Application pursuant to KCC 17.61A, which was followed by a revised application on
4 October 14, 2005 utilizing County-mandated forms. *Id.* at 8. Following an October 17, 2005
5 determination from the County Department of Community Development Services that the
6 Application had been deemed complete, and at the request of both EFSEC and the County, the
7 Applicant withdrew its initial request for preemption on October 19, 2005. *Id.* at 7.

8 To pursue the renewed effort to obtain local land use consistency, the Applicant hired
9 two people to work in the Applicant's Ellensburg office: Joy Potter, who had more than 20
10 years' experience in Kittitas County government, primarily with the County's Public Works
11 Department, and who brought deep local knowledge of permitting processes to the Project, *Id.*
12 at 11; and Dana Peck, a central Washington resident and government employee with more
13 than 30 years' experience in the energy field, most recently as the Klickitat County Economic
14 Development Director. Mr. Peck had led the Klickitat County project, developing a
15 countywide wind farm overlay zone and programmatic EIS to address that county's long-term
16 countywide energy resource concerns. Both were specifically hired because of their expansive
17 experience in local government, and Mr. Peck's unique background in wind energy facility
18 planning and permitting, which the Applicant believe were imperative to working effectively
19 with the BOCC and its staff through the Project application process. *Id.*

20 Taking into consideration that the County's permitting process lacked specific
21 development regulations or criteria that could be used for crafting the requisite Development
22 Agreement, the Applicant's staff anticipated a lengthy series of informal and formal
23 discussions with County staff to determine what kind of criteria Horizon should be addressing
24 and what kinds of materials were expected by the BOCC. Ex. 42 (DRP-T) at 7-8. Horizon
25 anticipated that the County staff would actively participate in the negotiation of material issues
26 and specific elements of the Development Agreement, as had occurred between Horizon and

1 the County in the process leading up to presentation and adoption of a final Development
2 Agreement for the Wild Horse Project, also in Kittitas County. Ex. 20 (CT-T) at 8; see also,
3 Testimony of James Hurson, Kittitas Deputy Prosecutor, Verbatim Transcript of Proceedings
4 of Kittitas County BOCC Special Meeting of May 3, 2006, at 40.

5 Early in the process, it became apparent to Horizon that the BOCC would not follow
6 its prior precedent of delegating to its staff a role in the process to enable them to address site-
7 specific issues. Moreover, the process afforded no ability to directly contact decision-makers
8 on such specific topics, Ex 42 (DRP-T) at 8-9, leaving Horizon no effective means to
9 “negotiate” a development “agreement.” The Applicant did not abandon the process. Instead,
10 it recognized that a public process that did not allow for direct negotiation could lead to
11 miscommunication and misunderstanding, and Horizon staff consistently initiated staff-level
12 meetings in an attempt to ensure it was providing the County with desired, timely information.
13 *Id.* Those meetings were frequently followed up with written summaries from the Applicant
14 to County staff to ensure that the Applicant had fully understood the general points discussed
15 with the staff. *Id.*

16 During this process the Applicant repeatedly tried to anticipate the appropriate
17 response to issues presented to it by the County. However, with no apparent consideration of
18 the materials, proposed Findings of Fact¹⁴, and testimony presented for consideration, and
19 highly motivated with preserving the ability of property owners to subdivide the surrounding
20 lands into sprawling residential developments in violation of the County’s Comprehensive
21 plan and zoning code, on February 13, 2006 the Planning Commission recommended that the

22

23

24 _____
25 ¹⁴ Planning Director Pulrey advised the Planning Commission that Horizon had
26 prepared proposed Findings of Fact that “accurately reflect the elements that you would want
to look at to make a determination as to whether or not this project was consistent with the
Comprehensive Plan.” Special meeting of January 30, 2006, at 34-35. The Planning
Commission utterly disregarded this advice.

1 BOCC deny Horizon’s application. Horizon’s Second Request for Preemption, June 20, 2006,
2 Ex. 2.¹⁵

3 At the BOCC public hearing of March 29, 2006, five months after its application to the
4 County was deemed to be complete, Horizon was finally presented with a list of concerns
5 directly from the BOCC, including each Board member expressing diverse mandatory setback
6 distances, all significantly greater than Horizon had proposed many months before. Although
7 the County overtly acknowledged that it was unable to present these concerns earlier due to
8 the nature of its own process, the Applicant requested (and was given) just five minutes to
9 caucus in order to respond. *See* Verbatim Transcript of Proceedings, Kittitas County BOCC
10 Special Meeting of March 29, 2006, at 20. Despite the County’s months-long delay in openly
11 and directly disclosing these concerns, the Applicant reviewed its materials already in the
12 record, including a previously submitted matrix of information, and resolved that it had
13 created a sufficient record for the BOCC to determine land use consistency with the County’s
14 comprehensive plan and zoning code. *Id.* at 25-26. The BOCC Chairman himself
15 acknowledged that the matrix submitted by Horizon was what the Board had wanted. *Id.* at
16 26.

17 During the many nights of hearings before the Board, the Applicant repeatedly pointed
18 out the changes it had made since its initial proposal in 2004 to address concerns about the
19 Project. Expert reports such as that of the Applicant’s property values expert, P. Barton
20 DeLacy, had been updated. *Id.* Rather than starting from scratch, the Applicant followed the
21 County staff’s advice to use the Wild Horse template for the KV Development Agreement. *Id.*

22 _____
23 ¹⁵ *See, e.g.,* comments of Mark McClain, Planning Commission Member, Verbatim
24 Transcript of Proceedings of Kittitas County Planning Commission Special Meeting of
25 January 30, 2006, at 66, l. 13 (“I feel that there was significant testimony regarding the impact
26 to lands in terms of future development.”), 67, l. 17 “[H]is testimony was that it’s valuable,
more pristine, high-end development . . .”. *See also* Special Meeting of January 10, 2006 at
141-42; Special Meeting of January 11, 2006, at 40, 45; Special Meeting of January 30, 2006
at 66-69; 72-73; 75-79; 91-92.

1 at 30. In response to the public’s concerns about visual impacts, the Applicant voluntarily
2 reduced the projected number of turbines proposed from 121 to between 65 and 80 in an effort
3 to minimize visual impact, *Id.* at pp 31-32, removing turbines in the northern tier of the
4 Project, where there is a greater concentration of homes and developable lots, Ex. 20 SUP
5 (CT-T SUP) at 10.

6 At its April 12, 2006 meeting, when the BOCC expressed dissatisfaction with road
7 restoration measures, the Applicant iterated that it wanted to further discuss the road
8 restoration standards being requested by the BOCC, indicating it was a conversation that the
9 Applicant was willing to have. *See* Verbatim Transcript of Proceedings, Kittitas County
10 BOCC Special Meeting of April 12, 2006 at 40. However, the County never attempted to
11 speak further with the Applicant to clarify its views on restoration requirements.

12 Also on April 12, 2006, despite never having engaged Horizon in a discussion of
13 turbine setbacks from nonparticipating property owners, the BOCC gave Horizon an
14 ultimatum: either agree to accept an unknown, undefined larger setback than proposed in the
15 Development Agreement, or the BOCC would kill the process that night. *Id.* at 55-56.
16 Horizon was given 10 minutes to decide whether the Project, by then four years in the process,
17 would be killed by its failure to agree to an unknown, but larger, setback being demanded by
18 the BOCC. Horizon was asked “to address whether this [BOCC hearing] is a waste of time or
19 not.” *Id.* at 56. Despite the “take it or leave it” ultimatum, Horizon stated that it was confident
20 that “these sorts of—what we would call micrositing issues can be worked through on just a
21 real open conversation on Development Agreement provisions. We think that, you know, both
22 parties negotiating reasonably can find answer to these questions.” *Id.*

23 In response to continuing questioning by the BOCC and County staff about the exact
24 number of turbines, Horizon agreed to limit the Project to a maximum number of 65 turbines.
25 Horizon’s Second Request for Preemption, June 20, 2006, Ex 7, letter dated April 25, 2006.
26 In response to the BOCC’s apparent mistrust of the Applicant’s acknowledged agreement to

1 limit turbine construction to predefined corridors within a larger subarea boundary, the
2 Applicant offered that if other issues could be resolved, Horizon would reduce the subarea
3 boundaries and not seek additional the turbine locations without the County's consent. *Id.* at
4 42-43.

5 Insofar as shadow flicker was a concern to the County and public, the EFSEC DEIS
6 and Addendum thereto indicate that the Project would not present probable significant adverse
7 impacts. DEIS Addendum at 3-11. Notwithstanding this environmental analysis, the issue
8 remained of concern to the public. Consequently, at the very first joint BOCC/Planning
9 Commission public hearing in January 2006, the Applicant submitted an additional technical
10 memorandum addressing shadow flicker for the reduced Project layout, the analysis of which
11 included several conservative assumptions that exaggerate the impacts on any individual
12 residence. The recommended mitigation measures proposed by EFSEC's independent
13 consultant are contained in the DEIS (pages 3.4-9 through 3.4-12, and 3.4.22 through
14 3.4.23).¹⁶ Notwithstanding these recommended mitigation measures, the Applicant offered
15 that if an adverse impact were identified, new technology could be used to curtail the
16 operation times of certain turbines as needed to reduce the shadow flicker to a virtually
17 imperceptible level. This offer to totally eliminate any demonstrated adverse shadow flicker
18 impact was never even acknowledged, nor accepted, by the BOCC. Blind to this offer, the
19 County used shadow flicker as a basis to deny the Project. Horizon's Second Request for
20 Preemption, June 20, 2006, Ex 1 Finding of Facts and Conclusion of Law §§ 19, 23-25,
21 attached as **Appendix B** hereto.

22 The Applicant initially proposed an industry-standard setback of 1,000 feet from
23 existing, nonparticipating residences (March 27, 2003 and October 14, 2005 Development
24 Activities Applications. During the comment period for both the DEIS and DEIS Addendum

25 _____
26 ¹⁶ These include planting trees, installing shades, and placing the installed shades on an
electric timer. The Applicant does not concur with these measures, and has instead proposed
operational controls of turbines to address significant shadow flicker events.

1 (following resubmittal in 2005), the Kittitas County never submitted a comment expressing a
2 belief that the 1,000 feet was inadequately analyzed or that the analysis failed to analyze the
3 perceived “looming” effect on neighboring residents. There is no documentary record
4 whatsoever to substantiate this as an issue for environmental impact analysis under SEPA at
5 the behest of the County.

6 At its April 12, 2006, public hearing, the BOCC simply told the Applicant that a 1,000-
7 foot setback from existing, nonparticipating residences was a “deal-killer.” *See* Verbatim
8 Transcript of Proceedings, Kittitas County BOCC Special Meeting of April 12, 2006, at 51.
9 The BOCC demanded that the Applicant “present additional information to suggest a setback
10 from their perspective, mitigated the impacts.” *Id* at 62. However, the BOCC also berated
11 Horizon for submitting “new information,” totally precluding any reasonable ability to
12 “negotiate” without exchange of information. *See* Verbatim Transcript of Proceedings,
13 Kittitas County BOCC Special Meeting of April 27, 2006, at 30). Notably, this was not a
14 command or motion to require the Applicant to prepare and submit a new Development
15 Agreement. In fact, before the County’s final action denying the Project, the BOCC never
16 adopted any formal motion or took any vote to provide any formal direction to the Applicant
17 regarding the “acceptable” setback distance. EFSEC Tr., at 447. Notwithstanding the fact that
18 the County had failed to timely or appropriately raise this issue as a basis for added
19 environmental review, the Applicant continued to proceed in good faith in the process of
20 review and acquiesced to the ultimatum delivered on April 12 to either offer up a larger
21 setback or the BOCC would kill the Project that night.

22 By letter dated April 25, 2006 to the BOCC, Ex. 7 to Second Request for Preemption,
23 the Applicant agreed to extend the originally proposed setback by 32 percent, up to a distance
24 of one-quarter mile, or 1,320 feet. *Id.*

25 The BOCC refused to discuss this significantly increased setback proposal of 1,320
26 feet at its April 27, 2006 public hearing because the BOCC’s “biggest concern” was not about

1 the distance proposed, but instead about the fact that the increased setback proposal did not
2 come in the form of a newly drafted Development Agreement (*see* Verbatim Transcript of
3 Proceedings, Kittitas County BOCC Special Meeting of April 27, 2006 at 25-26). The
4 Applicant had sought but received no guidance from County staff as to what the BOCC would
5 expect to be presented in order to answer the BOCC's request for information regarding a
6 larger setback. County staff simply suggested that the Applicant read the transcript for itself
7 and try to discern the BOCC's desires. Horizon's Second Request for Preemption, June 20,
8 2006, Ex. 3 Letter dated May 22, 2006. Again, the record contains no citation to a specific
9 motion regarding the acceptable form of document in which to present information on a larger
10 setback, because none was made. Despite this lack of clear instruction, the BOCC refused to
11 discuss, at its April 27, 2006 public hearing, the materials presented in good faith by the
12 Applicant simply because it apparently did not like the form presented by the Applicant in
13 response to confusing and sometimes conflicting suggestions by the various BOCC members
14 on April 12, 2006.

15 On May 3, 2006, the BOCC variously announced desires to establish setbacks of 2,000
16 feet from nonparticipating property lines, 2,500 feet from non-participating landowners'
17 residences; one-half mile; and one-half mile to 3,000 feet. *See* Verbatim Transcript of
18 Proceedings, Kittitas County BOCC Special Meeting of May 3, 2006, at 12, 23, 27. During
19 that hearing, the BOCC appeared to agree that in addition to residential setbacks, a 2,000-foot
20 setback would be required from all nonparticipating property lines. *See* Verbatim Transcript
21 of Proceedings, Kittitas County BOCC Special Meeting of May 31, 2006 at 53. However, in
22 the County's final decision, no mention was made regarding the 2,000-foot setback or any
23 property line setback. Horizon's Second Request for Preemption, June 20, 2006, Ex. 1 ,
24 attached as **Appendix B**. This disparity is extremely disturbing for at least three reasons.
25 First, it demonstrates the impossibility of accurately divining the BOCC's intent and
26 responding accordingly. Second, the 2,000-foot property line setback lacks any support in the

1 record, and should be considered arbitrary, particularly given the size of properties and the
2 ability to orient improvements as desired by the property owners. Ex. 36 (PBD-T) at 11.
3 Third, as shown in Planning Director Piercy’s cross-examination testimony, either the County
4 staff actually *did* confer with the BOCC regarding setback issues outside of the public hearing
5 process (vehemently denied under oath), or the final decision itself does not reflect the
6 BOCC’s actual intent, and departs from the BOCC’s deliberations. EFSEC Tr. at 447-49; *see*
7 *also* Verbatim Transcript of Proceedings, Kittitas County BOCC Special Meeting of May 31,
8 2006, at 41-45.¹⁷

9 This was the first articulation by the BOCC as to what it viewed as an acceptable
10 setback. Upon receiving Horizon’s reply from Mr. Taylor that a 2,500-foot setback would
11 remove so many turbines as to make the Project unviable, the Chairman of the Board, David
12 Bowen, acknowledged the impasse, but also acknowledged that “Mr. Taylor’s comments
13 regarding the time spent on this and the effort that’s gone into this, everybody has taken this
14 quite seriously and I appreciate those comments you [the Applicant] made.” *Id.* at 46-48.

15 The BOCC did not attempt to discuss a smaller setback, but instead voted to
16 preliminarily deny the application “based on the contents of the Development Agreement
17 dated May 1, 2006, which contains fatal flaws and inconsistent language which the applicant
18 has indicated for the record they do not wish to correct.” *Id.* at 54.

19 In this fashion, Horizon’s years of good-faith, reasonable efforts to demonstrate its
20 application’s consistency with the County Comprehensive plan and zoning code came to
21 an abrupt end. As discussed below, it is most notable that the BOCC never discussed how the
22 application was consistent with the County Comprehensive plan and zoning code,
23 notwithstanding the fact the Applicant submitted draft Findings of Fact and Conclusions of
24 Law with its October 2005 Development Activities application to support the application’s

25 ¹⁷ Regardless of the reason the 2,000-foot property line setback was not included, it is not part
26 of the County’s decision related to land use consistency, and there is no record supporting such a
setback for EFSEC consideration.

1 consistency with the same, **Appendix A**, attached hereto. In short, Horizon’s application was
2 denied based on a development regulation—setback distance—that was not existent,
3 announced, or disclosed until after the record was closed.

4 **2. The Wind Farm Overlay Ordinance as Implemented in the KV Project**
5 **Does Not Comply with County GMA-based Planning Policies and Zoning**
6 **Code, and Does Not Comply with the GMA**

7 The GMA requires local governments to adopt comprehensive plans and implement
8 development regulations under the GMA, to meet the 13 statewide planning goals and other
9 requirements. Once development regulations are enacted, the law does nothing to change the
10 circumstances of enforcement of those development regulations. As discussed in Section III
11 herein, the County and other intervenors have not made any cogent argument to show how the
12 enactment of the GMA, and the local adoption of plans and development regulations in any
13 way change the administrative and procedural functions of EFSEC in making its
14 determinations under RCW 80.50.110.

15 Under the GMA, local comprehensive plans are the foundation to all land use
16 regulations and permitting. “A comprehensive plan may include, where appropriate, subarea
17 plans, each of which is consistent with the comprehensive plan.” RCW 36.70A.080(2).
18 Counties must then adopt development regulations. “A development regulation does not
19 include a decision to approve a project permit application, as defined in RCW 36.70B.020 . . .”
20 CW 36.70A.030(7). RCW 36.70B.020(4) defines “project permit” or “project permit
21 application” to mean “any land use or environmental permit or license required from a local
22 government for a project action, including but not limited to building permits, subdivisions, . .
23 . site-specific rezones authorized by a comprehensive plan or subarea plan, but excluding the
24 adoption or amendment of a comprehensive plan, subarea plan, or development regulations.”

25 In the wind farm resource overlay ordinance, KCC 17.61A (the “WFRO”), wind
26 energy facilities are considered eligible for approval as an “overlay” use within the County’s
Forest & Range (“FR”) and Agriculture-20 (“A-20”) zones, where the Project is proposed. As

1 a matter of policy, in enacting KCC 17.61A, the County has fundamentally determined that
2 these rural and natural resource zones are suitable for development of wind energy facilities.
3 Other energy facilities, such as natural gas plants, natural gas pipelines, coal plants, and even
4 nuclear plants, may be developed in these zones, subject only to a conventional conditional
5 use approval. In Kittitas County, only wind energy facilities are singled out for the byzantine
6 process required in the WFRO.

7 In accordance with the WFRO, the County requires that the project site plan be
8 approved as a “subarea plan,” amending the Comprehensive plan. The subarea plan must be
9 reviewed and considered in tandem with a site-specific rezone, a development agreement and
10 wind farm permit. In any other jurisdiction planning under the GMA, a subarea plan would be
11 considered a legislative comprehensive planning action, requiring engagement of the
12 community in a comprehensive planning process to establish broad, objective policies
13 applicable to and affecting a broad community. In his Prefiled Supplemental Direct
14 Testimony, Roger Wagoner described the typical reason jurisdictions use subarea planning:

15 [T]he objective of subarea planning is to fine-tune the
16 comprehensive plan (and possibly the development code) to
17 address specific physical features of the area; engage the
18 stakeholders with specific interests in the area; formulate
19 alternative approaches to resolving the issues or to achieving the
20 vision; and ensure that the preferred alternative is consistent
21 with the overall goals and objectives of the Comprehensive plan.
22 Typically, the resulting adopted subarea plan also provides
23 discrete capital facilities plans for public and private
24 infrastructure phasing and funding that address both current area
25 needs as well as concurrency standards associated with new
26 development. Once a local government has concluded this
process to engage the public in broad community planning
issues, the site-specific, individual objectives of the property
owners or development interests can be addressed through the
development permit application and approval process based on
the subarea plan. Presuming that the development interests have
participated in the subarea planning process, their understanding
of the outcome should inform their internal planning and
therefore enable them to formulate their plans with few
iterations. Consequently, subarea planning typically reduces or
eliminates much of the uncertainty of proceeding with
development proposals, and the permitting agency should be

1 able to expedite the permit process since the decision standards
2 and criteria have been established in direct anticipation of the
type of land use and development proposed.

3 (Ex. 41R Sup (RW-R SUP, at 3-4)).

4 This process must be fundamentally guided by the County’s existing Comprehensive
5 plan policies and fundamental requirements and objectives in the zoning code. However, in
6 the local hearings and review of the KV Project, there is no record whatsoever of the County’s
7 staff, Planning Commission, or BOCC ever applying the comprehensive plan policies to the
8 subarea plan, particularly policies directly on point, regarding agricultural and natural resource
9 land use and visual impacts. As Mr. Wagoner testified:

10 I have carefully reviewed the hearing transcript. As further
11 discussed below, Kittitas County appears to have addressed the
12 inevitable conflicts and confusion in the process by discarding
13 any effort to engage in a meaningful subarea planning process,
14 and simply disregarded important local Comprehensive plan
15 policies, focusing instead on one dominant issue – the “setback”
16 distance between turbines and residences in the vicinity of the
17 project. This focus is primarily through review of the
18 development agreement. In fact, the denial is fundamentally
19 based on failure to come to terms on an “agreed” development
20 agreement. I find no meaningful discussion in the hearing
21 record, showing how the County attempted to apply or reconcile
22 its GMA Comprehensive plan policies or applicable zoning
23 criteria to the review of the KV Project. This failure to
24 appropriately apply the County’s own requirements resulted in a
protracted hearing process without meaningful criteria, and
without any meaningful effort to reconcile the project denial
with the County’s rural and natural resource Comprehensive
plan policies, including policies that support continued
economic resource uses rather than residential development that
tends to create conflict with the goals of the Rural Element. It
appears to me from the record that the County has used the
subarea planning and re-zoning processes to justify
unsubstantiated discretion leading to the long list of findings in
the denial, when in fact, the ultimate decision was no more than
an imposition of project-level setback requirements lacking
objective analysis. This ignored the merits of the other parts of
the mandated approval process.

25 *Id.*, at 5.

26

1 In fact, the Planning Commission’s deliberations demonstrate a County intent on
2 enabling sprawling residential development, protecting the opportunities for land speculators,
3 and undermining the Comprehensive plan policies and zoning provisions adopted under the
4 GMA for the express purpose of discouraging and halting conversion of rural and natural
5 resource lands to housing. *See* Verbatim Transcript of Proceedings, Kittitas County BOCC
6 Special Meeting of January 30, 2006, at 75-77. The Applicant believed that these policies and
7 regulations were extremely relevant to the consideration of a subarea plan and rezone, and
8 prepared proposed findings to document the KV Project’s consistency with the County’s
9 comprehensive plan and applicable zoning districts. **Appendix A.**¹⁸ The County made no
10 effort to address, balance, or distinguish these findings of clear consistency, compatibility, and
11 compliance, and ignored them entirely. Mr. Wagoner highlighted this deficiency in his
12 testimony:

13 Prior to the commencement of the hearings process, Horizon
14 prepared and submitted extensive proposed findings to show
15 how the project is consistent with, and in many instances,
16 implements the County’s GMA Comprehensive plan and
17 development regulations. Given that the applicant was required
18 to apply for a subarea plan amendment and a rezone as part of
the integrated approval process, the applicant appropriately
assumed that these findings would be very important to achieve
approval under the County’s wind farm ordinance, and therefore
would be addressed in the analysis leading up to the final
decision.

19 Ex, 41 R Sup (RW-R SUP) at 9.

20 The extensive hearings and deliberations of the Planning
21 Commission and BOCC indicate the complexity of the process
22 and the difficulty these two bodies had in arriving at their
findings. For example, the Planning Commission debated the

23 ¹⁸ In addition to Horizon’s proposed Findings of Fact, Kittitas County citizens,
24 including many rural landowners, testified regarding the County’s practice of allowing
25 sprawling residential developments in the rural and agricultural-zoned areas of the County,
26 and emphasized the compatibility of wind energy facilities, to enable ongoing rural and
agricultural land uses. *See, e.g.,* Verbatim Transcript of Proceedings, Special Meeting of
January 11 at 95-109; Special Meeting of January 12 at 12-20, 24-27, 29-40, 45-51, 129-133,
140-149, 158-167; Special Meeting of March 29, 2006 at 65-75, 77-90, 94-95, 105-108, 115-
116; 151-156, 162-167; Special Meeting of March 30, 2006 at 34-37, 49-58, 68-70, 86-101.

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Comprehensive plan subarea amendment, with several members asserting that the guidance for subarea plans was inadequate to result in an action that would be a true GMA comprehensive plan element. While the Planning Commission seemed confused about why a subarea plan amendment was required, they made no meaningful effort to apply the adopted planning policies and zoning code provisions which should have been considered in judging whether a subarea plan should be approved. While this was primarily a legislative matter that required review of the applicant’s “Comprehensive plan Amendment Docketing Form” dated September 5, 2005 that included analysis of the proposal’s consistency with the adopted Comprehensive plan goals, policies and objectives (GPOs), the February 13 Planning Commission report to the BOCC does not include any findings or conclusions regarding the subarea plan part of the proposal. Nor did the Planning Commission make any effort to address the applicant’s proposed findings of consistency with County plan policies and zoning code provisions. In fact the Commission’s rationale was that since the development proposal (rezone and development agreement) was incompatible with the Comprehensive plan (even though the Plan amendment was not addressed), the project should be denied.

The BOCC followed the same process, and simply failed to address the subarea plan and rezone request, including the applicant’s proposed findings of consistency. As indicated above, under typical planning models, the subarea plan and zoning issues should be decided as a precursor to making permit-level decisions, and certainly prior to considering a development agreement. That early decision is intended in large part to guide development, and to provide the applicant with appropriate criteria. Instead, the deliberation of the BOCC focused on the development agreement, to the complete exclusion of what should have been the most fundamental elements of the County’s process (the subarea plan and zoning requirements). In so doing, the BOCC kept the applicant guessing until the final nights of the hearing regarding setbacks—an issue having a fundamental bearing on project design and feasibility.

Id at 9-10.

As Mr. Wagoner’s testimony shows, and as applied in the KV Project process, the County made no effort to consider the subarea plan as an element of the Comprehensive plan. Instead, the County has used the artifice of the legislative “subarea” plan process to insulate the arbitrary process and decision making from attack. Aside from the fact that the County’s

1 decision making cannot be reconciled with its own GMA Comprehensive Plan policies and
2 zoning code, this four-tiered process fails because by making the KV Project’s site plan a
3 “subarea plan,” and by combining that legislative process with quasi judicial development
4 permitting, the County creates an irreconcilable inconsistency between the adjudicatory
5 process for quasi judicial development permits and the adoption of comprehensive plan
6 amendments and development regulations. This fails to comply with RCW 36.70A.040(4),
7 requiring development regulations to be consistent with and implement the comprehensive
8 plan; RCW 36.70A.070, requiring the comprehensive plan to be an internally consistent
9 document; and RCW 36.70A.070 and 36.70B.030, requiring that development permits be
10 based on the legislatively adopted planning and zoning documents.¹⁹ The blending of
11 comprehensive plan (legislative) processes and project level (quasi judicial) processes is
12 prohibited, and is incompatible with the fundamental structure of the GMA and the locally
13 adopted enactments required under the GMA.

14 Mr. Wagoner testified that this blending of processes creates major impediments for an
15 Applicant seeking to comply with the process:

16 [W]hen the subarea planning process and the permitting process
17 are combined, it is difficult to see how an applicant could get
18 clear direction from the jurisdiction regarding the required
format and substance of the application and how to address the

19
20 ¹⁹ RCW 36.70B.020(4) explicitly distinguishes between “permits” and legislative
21 processes. As discussed below, this statute affords substantial procedural protection to permit
applications. “Project permits” are defined as

22 any land use or environmental permit or license required from a local
23 government for a project action, including but not limited to building permits,
24 subdivisions, binding site plans, planned unit developments, conditional uses,
25 shoreline substantial development permits, site plan review, permits or
26 approvals required by critical area ordinances, site-specific rezones authorized
by a comprehensive plan or subarea plan, but excluding the adoption or
amendment of a comprehensive plan, subarea plan, or development regulations
except as otherwise specifically included in this subsection.

Id.

1 approval standards and criteria when those standards and criteria
2 have not yet emerged from the planning process. A subarea plan
3 itself should establish fundamental planning concepts, goals and
4 policies which are typically intended to reconcile with existing
5 comprehensive plan goals and policies, and which typically
6 provide legislative or policy guidance for future development
7 permit applicants. As I testified previously, it is antithetical to
8 the purpose of linking project-level implementation with
9 comprehensive planning to combine these processes together.
10 Such a combined process leads to confusion and contradiction.

11 Ex. 41R Sup (RW-R Sup) at 4.

12 In *Wristen-Mooney v. Lewis County*, WWGMHB Case No. 05-2-0020 (Final Order,
13 March 2006), the Western Washington Growth Management Hearings Board recently
14 overturned a similar process, holding that it is impermissible to adopt a process that treats a
15 master or site plan as a subarea plan, considered together with legislative plan and
16 development regulation amendments. The Hearings Board held that if such a combined
17 process is intended, it must include a distinct legislative process to address the legislative
18 functions, distinct from quasi judicial permit review. By binding these processes together,
19 Lewis County violated GMA requirements that such processes be distinct and sequential. The
20 County's process is similarly flawed.

21 This violation of the GMA is significant in the setting of this case. It sets up an
22 irreconcilable conflict with the EFSEC rules, WAC 463-28-030(1), anticipating and requiring
23 that the County enable an applicant to seek an amendment to the comprehensive plan and
24 zoning code, separate from site-specific permit review, as a means of resolving land use
25 inconsistency. EFSEC Tr. at 400, 477-78.

26 **3. The Wind Farm Ordinance, as Adopted and as Applied to the KV Project,
Violates the Regulatory Reform Act.**

The Regulatory Reform Act was enacted in 1996, and mandates important regulatory
and procedural changes for all GMA-regulated counties, such as Kittitas County. It is a
fundamental element of the GMA, intended to ensure implementation of the land use planning

1 conducted in compliance with the GMA. The Regulatory Reform Act includes several
2 fundamental protections for any permit applicant in Kittitas County. The overall policy and
3 intent is compatible with the EFSEC’s policy, as set forth in RCW 80.50.010(5), to avoid
4 duplication and expedite decision making:

5 RCW 36.70B.010 Findings and declaration.

6 The legislature finds and declares the following:

7 (1) As the number of environmental laws and development regulations has
8 increased for land uses and development, so has the number of required local
land use permits, each with its own separate approval process.

9 (2) The increasing number of local and state land use permits and separate
10 environmental review processes required by agencies has generated
continuing potential for conflict, overlap, and duplication between the various
11 permit and review processes.

12 (3) This regulatory burden has significantly added to the cost and time needed
13 to obtain local and state land use permits and has made it difficult for the
public to know how and when to provide timely comments on land use
14 proposals that require multiple permits and have separate environmental
review processes.

15 RCW 36.70B.010.

16 Consistent with the EFSEC scheme, in reviewing the KV Project, the County was
17 obligated, through specific requirements discussed below, to avoid conflict, overlap, and
18 duplication with other permit and review processes, including EFSEC’s review process and
19 jurisdiction. The County was obligated to ensure that Horizon, as well as members of the
20 public, fully understood the process and criteria up front, with fundamental adherence to
21 adopted regulatory requirements and Comprehensive Plan policies. As discussed below, the
22 County process, as adopted and as applied to the KV Project, falls well short of these
23 statewide mandates.
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1 **4. The Wind Farm Ordinance, as Applied to the KV Project, Violates the**
2 **Mandatory Requirement of No More Than One Open Record Hearing**
3 **Conducted by a Single Hearing Body.**

4 While not clear from the WFRO itself, the County convened a “hearing” before two
5 hearing bodies: the Planning Commission and the BOCC. As is clear from the record, the
6 Planning Commission and the BOCC sat together during what the County purported to be a
7 single hearing, continued for nearly six months, over 12 sessions. The “joint” hearing lasted
8 from January 10 to January 12, 2006, with testimony and evidence submitted by the Applicant
9 and members of the public. On January 12, 2006, the Planning Commission “closed” the
10 testimony part of the joint hearing, and the BOCC left the joint hearing, for Planning
11 Commission deliberation. The Planning Commission deliberated on January 30, 2006 and
12 issued its recommendation to deny the Project on February 13, 2006. The BOCC then
13 commenced what purported to be the “same” but “continued” hearing on March 29, 2006.
14 The BOCC then considered the Planning Commission recommendation, and accepted all new
15 testimony and evidence. On March 30, 2006, the BOCC again “closed” the testimony portion
16 of the hearing, and deliberated on April 12, April 27, May 3, and May 31, 2006. On May 31,
17 2006, the BOCC issued a “preliminary” denial of the application, and on June 6, 2006, the
18 BOCC adopted the final order denying the Project **Appendix B**.

19 The County considers these many hearings to be one, single, serial hearing, compliant
20 with Washington law. It is not compliant. The Regulatory Reform Act, RCW chapter 36.70B,
21 mandates no more than one, single consolidated, open record public hearing, conducted by a
22 single hearing body, and defines “open record public hearing” as follows:

23 Open record hearing" means a hearing, conducted by a single
24 hearing body or officer authorized by the local government to
25 conduct such hearings, that creates the local government's record
26 through testimony and submission of evidence and information,
 under procedures prescribed by the local government by
 ordinance or resolution. An open record hearing may be held
 prior to a local government’s decision on a project permit to be
 known as an “open record predecision hearing.” An open record
 hearing may be held on an appeal, to be known as an “open

1 record appeal hearing,” if no open record predecision hearing
2 has been held on the project permit.

3 RCE 36.70B.020(3)(emphasis added).

4 The flaws in the County’s process are clear: (1) there is no adopted procedure to
5 follow, and the Code does not make clear to the applicant or the public that a joint “hearing”
6 before two distinct hearing bodies will occur and be continued month after month after month;
7 (2) dual hearing bodies are explicitly prohibited; (3) although continued hearings are common,
8 the Kittitas County process is deliberately conceived as an end runaround the single-hearing
9 rule, and is unprecedented; and (4) the process breeds tremendous confusion, conflict, and
10 delay, confusing even the decision-makers. Ex. 41 R SUP (RW-R SUP) at 5. As
11 Mr. Wagoner testified:

12 The entire six-month hearing process was antithetical to the
13 GMA and regulatory reform objectives of expediting
14 development approvals through a single fact-finding open record
15 hearing and a subsequent decision-making closed record
16 hearing. The use of the joint Planning Commission and BOCC
17 portion of the hearing further complicated this, leading to the
18 convoluted public testimony and intermixed “deliberations”
19 during the open record hearing, as shown in the transcripts.
20 While I have frequently experienced the continuation of
21 hearings over several sessions, I have never seen anything like
22 this.

23 Ex. 41R Sup (RW-R SUP) at 10. Contrary to the statute, Kittitas County’s process provides
24 no certainty, no criteria, and only confusion.

25 **5. Failure to Decide the Application Under Adopted Comprehensive plan
26 Policies and Zoning Code.**

27 As stated above, the County’s process includes a unique and unlawful blending of
28 legislative and quasi judicial processes. In addition to the GMA violations discussed above,
29 the process, as applied in this KV Project review, violates fundamental requirements of the
30 Regulatory Reform Act, aimed at regulatory certainty and fairness:

31 Project review—Required elements—Limitations.

1 (1) Fundamental land use planning choices made in adopted
2 comprehensive plans and development regulations shall serve as the
3 foundation for project review. The review of a proposed project's consistency
4 with applicable development regulations, or in the absence of applicable
5 regulations the adopted comprehensive plan, under RCW 36.70B.040 shall
6 incorporate the determinations under this section.

7 (2) During project review, a local government or any subsequent
8 reviewing body shall determine whether the items listed in this subsection are
9 defined in the development regulations applicable to the proposed project or,
10 in the absence of applicable regulations, the adopted comprehensive plan. At
11 a minimum, such applicable regulations or plans shall be determinative of the:

12 (a) Type of land use permitted at the site, including uses that may be
13 allowed under certain circumstances, such as planned unit developments and
14 conditional and special uses, if the criteria for their approval have been
15 satisfied.²⁰

16 Determination of consistency. (1) A proposed project's consistency with a
17 local government's development regulations adopted under chapter 36.70A
18 RCW, or, in the absence of applicable development regulations, the
19 appropriate elements of the comprehensive plan adopted under chapter
20 36.70A RCW shall be decided by the local government during project review
21 by consideration of:

22 ²⁰ This legislature's intent in adopting this section of the statute is explained as
23 follows:

24 Intent—Findings—1995 c 347 §§ 404 and 405: “In enacting RCW
25 36.70B.030 and 36.70B.040, the legislature intends to establish a mechanism
26 for implementing the provisions of chapter 36.70A RCW regarding
27 compliance, conformity, and consistency of proposed projects with adopted
28 comprehensive plans and development regulations. In order to achieve this
29 purpose the legislature finds that:

30 (1) Given the extensive investment that public agencies and a
31 broad spectrum of the public are making and will continue to make in
32 comprehensive plans and development regulations for their communities, it
33 is essential that project review start from the fundamental land use planning
34 choices made in these plans and regulations. If the applicable regulations or
35 plans identify the type of land use, specify residential density in urban
36 growth areas, and identify and provide for funding of public facilities needed
37 to serve the proposed development and site, these decisions at a minimum
38 provide the foundation for further project review unless there is a question of
39 code interpretation. The project review process, including the environmental
40 review process under chapter 43.21C RCW and the consideration of
41 consistency, should start from this point and should not reanalyze these land
42 use planning decisions in making a permit decision.

43 RCW 36.70B.030 note (*quoting* Laws of 1995, ch. 347, § 403).

- 1 (a) The type of land use;
 - 2 (b) The level of development, such as units per acre or other measures
3 of density;
 - 4 (c) Infrastructure, including public facilities and services needed to
5 serve the development; and
 - 6 (d) The characteristics of the development, such as development
7 standards.
- 8 (2) In deciding whether a project is consistent, the determinations
9 made pursuant to RCW 36.70B.030(2) shall be controlling.

10 RCW 36.70B.040.

11 The Applicant’s proposed findings show how the Project complies with, is consistent
12 with, and in fact implements Comprehensive plan policies and the County’s zoning code.
13 (Appendix A.) The County requires a four-layer decision, including a “subarea plan”
14 amendment. However, the zoning code contains no meaningful criteria guiding what the
15 BOCC might ultimately consider an “acceptable” location for a wind energy facility.
16 Horizon’s analysis cogently demonstrated consistency with the County’s underlying
17 Comprehensive Plan policies, as well as the intent of the two rural and natural resources
18 zones, and further demonstrated compatibility with the allowed land uses in the applicable
19 planning and zoning districts. **Appendix A.** In violation of the provisions quoted above, the
20 record is devoid of any meaningful discussion or deliberation by the Planning Commission or
21 the BOCC, to show how the County applied the Comprehensive Plan and the zoning code to
22 its decision making. Lacking locally adopted criteria for wind energy facilities, the
23 Comprehensive Plan policies and zoning code statements of intent should have played a
24 controlling role. Yet, they were disregarded in favor of subjective, “seat of the pants”
25 lawmaking occurring in the context of a pending application.

26 Instead of considering the KV Project under the County’s GMA-based Comprehensive
plan policies and zoning code, the BOCC denied the Project due to a perceived lack of

1 “compatibility” with the “neighborhood.” See Resolution 2006-90, Findings 27, 38, 39, and
2 39 [sic: a t 11], Appendix B. First, the BOCC mischaracterized the area, and it was apparent
3 that neither the BOCC nor County staff had any awareness of the character or extremely low-
4 density nature of the area, demonstrating scattered development and substantial topography
5 that would minimize views of the turbines. Ex. 34 SUP (TP-T SUP); Ex. 20 SUP (CT-T SUP)
6 at 17. The Siting Council has visited the site. It is noteworthy that Resolution 2006-90 is
7 based on the proximity of 16 residences to turbines, within a 6,000-acre Project area (without
8 regard to the character of those residences, and the fact that most turbines will be obscured by
9 topography and vegetation, and that nearly all of the residences are oriented away from the
10 turbines). Testimony of Dr. Priestley, Ex. 34 SUP (TP-T-SUP). Suffice it to say, the density
11 and character of the existing development (used by the County to deny the Project) has been
12 grossly exaggerated both by the County and other intervenors. As Mr. Wagoner testified:

13 The record of the County’s review of the Comprehensive plan
14 subarea amendment is replete with the use of the terms
15 “community” and “neighborhood”. These are undefined terms
16 in the Comprehensive plan and KCC as well as in the GMA and
17 other state statutes. Therefore, there is no general consensus
18 about the characteristics that differentiate subareas from
19 communities from neighborhoods. From a planning perspective,
20 the term “neighborhood” implies some form of integrated
21 community, with a common character, design, within a
22 geographic area established by some physical features or other
23 environmental characteristics, not a sparsely populated rural area
24 with homes scattered in an unplanned form over many square
25 miles. In fact, most residents in the area have constructed
26 separate access roads to their properties, even when shared roads
 would appear to have been more cost-effective and
 “neighborly”, resulting in what appears to avoid the semblance
 of a “neighborhood” setting. From my perspective, it is difficult
 to envision a large area such as the 6,000 acre Kittitas Valley
 Wind Farm subarea and the surrounding area as a
 “neighborhood” as it was described by the BOCC in their final
 decision (Finding #27). In comparison, the land area of Cle
 Elum and South Cle Elum is 2,240 acres with a population of
 2,370. While there are residences near the proposed subarea
 boundaries, the proposed “subarea” itself appears to have only
 two residences and a total of 13 property owners, all
 participating with, and supporting the project. Since the
 subarea was defined by the applicant, and the most significant

1 groupings of nearby residences to the north and south are
2 separated by at least 3 miles, based on my experience in how
3 these terms are traditionally applied in the planning and
4 permitting context, I question whether “incompatibility with the
5 neighborhood” is a valid finding of the County’s review.

4 Ex. 41 R Sup (RW-R Sup) at 6. Mr. Wagoner continues, making particular note of the
5 County’s misguided effort to base its denial on SEPA:

6 Finding #27 and a number of other findings assert that the
7 applicant has not shown how the “significant adverse” impacts
8 of the proposed wind farm can be adequately mitigated. KCC
9 17.61A.040 (1) states: “. . . the board of county commissioners
10 must set forth the development standards applicable to the
11 development of the specific wind farm, which may include, but
12 are not limited to: . . . b. Mitigation measures and such other
13 development conditions as deemed to protect the best interests
14 of the surrounding property or neighborhood or the county as a
15 whole . . .” The mitigation that emerged during the review
16 process and is articulated in Finding #40 is “The Board finds
17 that a minimum of 2500 feet separation from wind turbines and
18 non-participating landowners’ residences would be necessary to
19 reduce the significant adverse impact rating of ‘high’ down to
20 moderate visual impacts for those residences”. This latter
21 finding departs from the notion of a “neighborhood impact” to
22 single out the individual visual impacts on the non-participating
23 residents. While I cannot speak to the Board’s conclusion of the
24 implied relationship between “high” and “significant” visual and
25 shadow flicker impacts, the denial appears to paint the project
26 with an overly broad brush in its assumption that impacts on a
few non-participating residents constitute a “neighborhood”
impact, and therefore is an adequate test of significance under
SEPA. Since EFSEC is the responsible official for
environmental review in this case, it seems to me that the Board
should have included an analysis of the EFSEC SEPA record in
reaching this conclusion, and that this determination is more
appropriately one for EFSEC to make.”

21 *Id* at 7. As Mr. Wagoner notes, contrary to the BOCC’s decision, this area of Kittitas County
22 is not planned or zoned for residential development, nor does it have the character of a “rural
23 residential” “neighborhood”:

24 Finding #39 states that “This area of the county has the character
25 of rural residential and agricultural mixed use. The introduction
26 of turbines of this size and number to this area is incompatible in
such close proximity to the current uses.” This area of the
County is not planned or zoned for “rural residential” or

1 “agricultural mixed use.” Moreover, the area is sparsely
2 populated, with the vast majority of acres in the vicinity devoted
3 to rural and natural resource use, not to residential use. Finding
4 #39 is in conflict with the adopted zoning for the area which is
5 divided between A-20 (Agriculture) and F-R (Forest and
6 Range). These two zones have extensive lists of outright
7 permitted uses such as mining, commercial greenhouses, all uses
8 permitted in residential and suburban zones, airports, and gas
9 and oil exploration and construction. It is difficult to understand
10 how the proposed project is subject to a much higher standard of
11 review and can be denied on the basis of visual impact, when
12 many of these allowed uses could have more significant impacts
13 on a much wider spectrum of the environment such as traffic,
14 noise, dust, surface water quality, as well as aesthetics.
15 Moreover, the predominant land use attributes are of a rural
16 agricultural and natural resource area, not a residential area.

17 *Id* at 8. In testimony before the Council, Mr. DeLacy noted that, based on his visits to the
18 site, the Project site is characterized by its rural nature, and very low density housing.

19 **6. The County Failed to Establish a Timely and Predictable Process for Wind
20 Energy Facilities.**

21 The County’s wind farm ordinance provides the County with an opportunity to treat
22 similarly situated projects differently, under different policies, affording varying access to
23 County staff to resolve issues and negotiate a development agreement. The County’s
24 structure—blending highly discretionary legislative decision making with quasi-judicial
25 decision making—enables highly discretionary, subjective decision making, based on arbitrary
26 factors. This lack of a fair process violates RCW 36.70B.080:

Development regulations—Requirements—Report on
implementation costs. (1) Development regulations adopted
pursuant to RCW 36.70A.040 must establish and implement
time periods for local government actions for each type of
project permit application and provide timely and predictable
procedures to determine whether a completed project permit
application meets the requirements of those development
regulations. The time periods for local government actions for
each type of complete project permit application or project type
should not exceed one hundred twenty days, unless the local
government makes written findings that a specified amount of
additional time is needed to process specific complete project
permit applications or project types.

1 The development regulations must, for each type of
2 permit application, specify the contents of a completed project
3 permit application necessary for the complete compliance with
4 the time periods and procedures.

5 (2)(a) Counties subject to the requirements of RCW
6 36.70A.215 and the cities within those counties that have
7 populations of at least twenty thousand must, for each type of
8 permit application, identify the total number of project permit
9 applications for which decisions are issued according to the
10 provisions of this chapter. For each type of project permit
11 application identified, these counties and cities must establish
12 and implement a deadline for issuing a notice of final decision
13 as required by subsection (1) of this section and minimum
14 requirements for applications to be deemed complete under
15 RCW 36.70B.070 as required by subsection (1) of this section.

16 Neither the wind farm ordinance nor the application forms provide “timely and
17 predictable procedures.” The procedures for this four-tier permit process are not set forth in
18 the County’s code. Lacking a clear process, in its initial efforts in 2004 to seek land use
19 consistency, it was impossible for Horizon to understand the requirements for a “complete”
20 application, and the County made an illegal attempt to invade EFSEC’s clear SEPA lead
21 agency authority. Ex. 20 (CT-T), at. 10-14; Ex. 20R (CT-R) at 4-20). In the second attempt to
22 seek local land use consistency, in contrast to the Wild Horse process, Horizon had no success
23 in engaging County staff to work on and negotiate the development agreement. Ex. 20 SUP
24 (CT-T SUP) at 12-13. And although the ordinance purports to establish a single, unified
25 process, the BOCC’s denial finds that Horizon’s application does not meet the redundant
26 requirements of the separately adopted rezone code, KCC 17.98. As Mr. Wagoner testified,
27 this establishes “double jeopardy” and is an undisclosed process requirement, presented as a
28 basis for denial in the County’s denial order.²¹

29 _____
30
31 ²¹ In an exercise of caution, Horizon’s proposed Findings of Fact (**Appendix A**)
32 analyze how the application complies with the separate rezone criteria. However, the
33 proposed findings state that the rezone criteria should not be applied on top of the separate
34 criteria for a wind farm rezone overlay district. Similar to other proposed findings, neither the
35 Planning Commission nor the BOCC addressed the Applicant’s proposed findings. The
36 BOCC simply denied the Project for purportedly failing to satisfy the redundant rezone
37 criteria.

1 The County adopted the wind farm ordinance with the intent of
2 establishing a “unified” decision process. The ordinance
3 purports to establish criteria for consideration of the subarea
4 plan and rezone. In my opinion, it is “double jeopardy” to then
5 also impose the rezone criteria, found in KCC 17.98. It appears
6 to me, from the record, that the County’s use of this process
7 resulted in an impossibly complex set of impediments for the
8 applicant, the staff, and the Planning Commission to navigate
9 successfully.

6 Ex. 41 R SUP (RW-R Sup) at 14.

7 **7. The County’s Use of Development Agreements in the Wind Farm**
8 **Ordinance Is Contrary to the Legislature’s Intent in Enabling Local**
9 **Governments to Use Development Agreements.**

9 The GMA provides clear authority for local governments to negotiate and adopt
10 development agreements governing certain elements of local permits. RCW 36.70B.170
11 provides a list of “development standards that can be included in a development agreement.
12 “A development agreement must set forth the development standards and other provisions that
13 shall apply to and govern and vest the development, use, and mitigation of the development of
14 the real property for the duration specified in the agreement.” RCW 36.70B.170(1). Although
15 the legislation does not establish a specific process for the adoption of development
16 agreements, development agreements are considered voluntary, intended to create
17 predictability in order to enable substantial investments in what would otherwise be
18 unpredictable, highly regulated permit processes. Most fundamentally, development
19 agreements are negotiated, they are “agreements,” implying a fair, balanced, open negotiation
20 process. The County’s wind farm ordinance “requires” a development “agreement.” As the
21 hearing record shows, such required “agreement” is substituted for a permit decision, with the
22 BOCC empowered to impose requirements on an applicant, in a “take it or face denial”
23 posture of “negotiation.” The County turns the legislative authority and intent for
24 development agreements on its head.

25 The legislative intent for development agreements is codified, and included as an
26 endnote to RCW 36.70B.170:

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Findings—Intent—1995 c 347 §§ 502-506: The legislature finds that the lack of certainty in the approval of development projects can result in a waste of public and private resources, escalate housing costs for consumers and discourage the commitment to comprehensive planning which would make maximum efficient use of resources at the least economic cost to the public. Assurance to a development project applicant that upon government approval the project may proceed in accordance with existing policies and regulations, and subject to conditions of approval, all as set forth in a development agreement, will strengthen the public planning process, encourage private participation and comprehensive planning, and reduce the economic costs of development. Further, the lack of public facilities and services is a serious impediment to development of new housing and commercial uses. Project applicants and local governments may include provisions and agreements whereby applicants are reimbursed over time for financing public facilities. It is the intent of the legislature by RCW 36.70B.170 through 36.70B.210 to allow local governments and owners and developers of real property to enter into development agreements. [1995 c 347 § 501.]

Mr. Wagoner testified regarding the flaws in this process:

RCW 36.70B.170 states: “A development agreement shall be consistent with the applicable development regulations adopted by the local government planning under chapter 36.70A RCW.” Finding # 35 states “The development agreement proposed by the applicant is deficient in multiple respects and would require many modifications to (sic) in form and substance before it would be acceptable for approval as a development agreement. (Note that per Finding #35, the application including the proposed development agreement was determined complete). In my experience, development agreements between local governments and project proponents are the last step of the permitting process for good reason. This allows the entire record of review including the complete application, SEPA review, public comment, and official hearings and decision bodies to inform the final outcome of the approval and any necessary conditions such as impact mitigations, fees, bonding, etc. It is very difficult to understand how the BOCC determined that the development agreement was “deficient” when it was supposed to be based on the “applicable adopted development regulations” and when the finding of “deficiency” was not addressed at the time the application was deemed complete.

Ex. 41 R SUP (RW-R SUP) at 12). Clearly, no “negotiation” can occur without professionals working together, with a common end to “negotiate,” compromise, fairly exchange

1 information in a nonthreatening, relatively equal basis, all aimed at a common goal of
2 achieving an agreement. As Mr. Wagoner testified:

3 In this setting, an applicant typically relies on discussions and
4 negotiation with agency staff and government legal counsel to
5 work out the terms of the agreement and mitigation measures,
6 with staff acting with explicitly delegated authority from the
7 governing body. Typically, staff will present the “negotiated
8 draft” development agreement to the decision-maker, with
9 staff’s recommendation of approval. In short, for a development
10 agreement process to be successful, an essential step is for
11 professionals to work together to develop an agreement that can
12 be submitted to the governing body with a recommendation of
13 approval. From the record, it does not appear that the BOCC
14 ever delegated authority to the staff, and County staff clearly did
15 not work with the applicant to craft an agreement meeting
16 BOCC requirements. And, staff certainly did not recommend
17 approval to the BOCC, or offer any findings or conclusions
18 regarding the applicant’s proposal.

12 *Id* at 12.

13 The County abuses the legislative authorization to use development agreements. The
14 County process provides absolutely no assurance that an applicant can proceed in accordance
15 with existing policies and regulations. In fact, the County chooses to *disregard* its existing
16 policies and regulations in considering wind project applications, and provides no meaningful
17 or predictable criteria for approval. Criteria are adopted at the end of a long process, based on
18 entirely subjective factors, with the BOCC demanding that an applicant “agree” to project-
19 killing conditions as part of the development “agreement.” This is not “negotiation,” and in
20 this case, Horizon had no meaningful opportunity to “negotiate” with either the staff or with
21 the BOCC. The staff refused to negotiate fundamental “policy” issues, including setbacks,
22 contending that these were matters for the BOCC. Horizon’s Second Request for Preemption,
23 June 20, 2006, Ex. 7. The BOCC demanded that Horizon “agree” to impossible setbacks, and
24 berated the Applicant for submitting “new information” after the closing of the public
25 testimony. *See* Verbatim Transcript of Proceedings, Kittitas County BOCC Special Meeting
26 of April 12, 2006, at 30. As Mr. Wagoner observed:

1 Therefore, the County’s process was not a true “negotiation”
2 process leading to a development agreement, in my experience.
3 The BOCC, Planning Commission, and staff were supposed to
4 deal with the combined subarea plan, rezone, development
5 agreement, and development permit in one “package”, with the
6 BOCC responsible for being the ultimate legislative and
7 regulatory decision-maker following objective technical staff
8 review and Planning Commission analysis. In this setting, the
9 outcome was a denial based on a finding derived in a previously
10 undisclosed regulatory requirement (“minimum 2500 foot
11 setback”) and the applicant was denied a meaningful opportunity
12 to respond. This appears to me to be inconsistent with the intent
13 of the entire adopted wind farm approval procedure. Any
14 applicant would reasonably expect that this setback constituted a
15 regulatory “requirement,” in contrast to an “opening offer” in a
16 “negotiation” process. Moreover, it would appear that even if
17 the BOCC had agreed to consider some modification of the
18 imposed setback requirement, that “changed” requirement, and
19 the changed development agreement, would require yet more
20 public hearings, with no ability for the applicant to have a true
21 “seat at the table” with a fair expectation of a workable outcome
22 and still facing a very high probability of eventual denial, after
23 potential months of additional hearings. I have never seen such
24 a “negotiation” in a public hearing setting, and it seems to me
25 that an applicant would be placed in serious jeopardy in
26 attempting to freely exchange information (considered “new” in
a public hearing setting), make counter offers, put various ideas
and concessions “on the table” for discussion, and offer
potentially confidential data and information, to persuade the
other “negotiating” party.

17 *Id* at 13-14.

18 The BOCC refused to delegate any authority to professional planning staff to negotiate
19 terms, yet precluded any fair, open exchange of information. The Planning Commission and
20 the BOCC appeared as confused as the staff and Horizon regarding how to engage in
21 “negotiation” over terms of an agreement. Rather than establishing assurances and
22 predictability as anticipated by the legislature, the County’s process creates chaos.

23 At the end of a multimonth serial “hearing,” the County suggested that Horizon should
24 redesign the Project to move turbines to the “middle” of the Project area. Horizon asked the
25 County to clarify what staff and the BOCC meant, and where turbines would be “relocated” to
26 meet the County’s intent. Horizon’s Second Request for Preemption, June 20, 2006, Ex. 7.

1 The County refused to provide this information to Horizon, contending that it was not the
2 County’s responsibility to design the Project. *Id.* Instead, the BOCC made the failure to
3 redesign the Project, at the end of this hearing process, a basis for denial. *See* Resolution
4 2006-90, Findings 30-32, **Appendix B**. As Mr. Wagoner testified, a redesign would have
5 reopened the process to months of new hearings, with no predictable outcome:

6 Typically, when a project is significantly changed prior to
7 approval, the permitting government authority must reopen the
8 public record, re-notice the project and reconvene hearings, to
9 receive public testimony. That is because when the hearing
10 notice is first issued, the public is informed about the
11 characteristics of the proposed project as initially proposed, and
12 is therefore able to provide testimony and information regarding
13 that proposal. Typically, environmental analysis is conducted
14 related to the initially-proposed project layout. While I cannot
15 comment regarding whether additional environmental studies
would have been required, based on the way Kittitas County
conducted this process, the applicant should reasonably expect
that the County would have been obligated to re-notice, and
potentially recommence the hearing process. This may have
required a new hearing before the Planning Commission as well
as the BOCC. Clearly, given the duration and complexity of the
County’s process, the outcome of such a new process would be
uncertain, and the time required to reach the “decision point”
with the BOCC would likely have been many months.

16 *Id.* at 11. Ironically, after refusing to “redesign” the Project, and refusing to assist the
17 Applicant in understanding what the County intended with turbine relocations to the “middle”
18 of the Project, in his rebuttal testimony, Planning Director Piercy did just that: submitted a
19 “redesign” that confirmed the County’s wholesale lack of understanding of fundamental
20 Project elements and constraints. Ex. 51 (DP-T) Ex. 51-3. As Mr. Taylor testified, Ex. 20
21 SUP R (CT-Sup R) at 7-9, the County’s “redesign” mixes different turbine equipment
22 scenarios, with different sizes, different “wake effects, and different rotor diameters. This lack
23 of understanding could have been addressed in a timely fashion if the County had engaged in
24 discussion with Horizon as proposed.

25 In summary, the County’s process appears to be deliberately crafted to make it
26 impossible for an applicant to seek preemption through EFSEC’s statute and applicable rules.

1 The process insulates the decision makers from access to affected landowners and members of
2 the public that is typical in legislative subarea planning processes. The County’s process aims
3 to instill County decisions with maximum discretion, while affording none of the opportunities
4 and rights typically afforded to applicants to engage staff both in legislative and quasi judicial
5 processes. Finally, no applicant can rely on clear criteria established for local decisions. For
6 “favored” applications, such as the Wild Horse Project, an applicant may be treated
7 reasonably, have access to staff to negotiate a development agreement, and have a reasonable
8 opportunity to exchange information with the BOCC.²² For others, such as the Desert Claim
9 Project and the Project, applicants face a different process entirely. This disparity undermines
10 the integrity of any local process.

11 **B. Horizon and the County Were Unable to Resolve the Noncompliance Issues.**

12 As noted above, WAC 463-28-040(2) requires the applicant to show “[t]hat the
13 applicant and the local authorities are unable to reach an agreement which will resolve the
14 issues.” The record is clear. For the reasons discussed above, Horizon and the County were
15 unable to resolve noncompliance issues. A failure to reach agreement is not the same thing as
16 a failure to make all reasonable, good-faith efforts. Neither EFSEC’s statute nor its
17 administrative rules require land use consistency—only reasonable, good-faith efforts.

18 The fundamental substantive reason Horizon was unable to secure a resolution of land
19 use consistency issues was the County’s lack of understanding regarding the aesthetic issues,
20 misapplication of the EFSEC DEIS and Addendum thereto, and a decision regarding setbacks
21 that lacks any basis in the record, and is devoid of any policy rationale. As discussed below,

22 ²² Horizon did not consider the County’s process for the Wild Horse Project to be a
23 reasonable process. Although Horizon did ultimately obtain a determination of consistency
24 with County land use plans and ordinances, in the Wild Horse Project, Horizon was required
25 to submit to the same process, requiring a site-specific permit decision, and was unable to
26 decouple the plan amendment and rezone requirements. Like the KV process, in the case of
the Wild Horse Project, the County insisted on doing EFSEC’s work, and duplicated the
EFSEC siting process and decision. It was not an expeditious process. As the Council is well
aware, the County attempted to invade EFSEC’s SEPA lead agency status for both the KV
Project and the Wild Horse Project.

1 and with additional mitigation and avoidance measures developed through the EFSEC
2 hearings, EFSEC can resolve the aesthetic issues used by the County to deny the Project,
3 based on standards and methods contained in the record.

4 **1. EFSEC Has Sole, Preemptive Authority to Address Site-Specific Aesthetic**
5 **Siting Issues.**

6 The visual/aesthetic and related shadow flicker issues are solely within EFSEC’s
7 authority to resolve. In a typical County process, such issues have little bearing on
8 consistency with County “land use plans or zoning ordinances.” WAC 463-28-030. EFSEC
9 “preempts the regulation and certification of the location, construction, and operational
10 conditions of energy facilities.” WAC 463-28-020; RCW 80.50.110, .120. These issues are
11 not elements in any County land use plan or zoning regulation. They are addressed through
12 SEPA, and have been addressed in EFSEC’s DEIS and Addendum thereto. EFSEC is the only
13 entity that can be the SEPA lead agency on the Project. Determination of lead agency status
14 falls under WAC 197-11-930, which states, “For proposed private projects for which there is
15 only one agency with jurisdiction, the lead agency shall be the agency with jurisdiction.”
16 Moreover, WAC 197-11-938(1) states: “For all government actions relating to energy
17 facilities for which certification is required under chapter 80.50 RCW, the lead agency shall be
18 the energy facility site evaluation council” Once an alternative energy facility opts in to
19 EFSEC jurisdiction, all authority is conferred on EFSEC to process the application. EFSEC is
20 the only agency with jurisdiction, and is thus the only agency with SEPA lead agency status.

21 Despite EFSEC’s explicit SEPA lead agency role, in Resolution No. 2006-90, the
22 BOCC purported to fundamentally base its denial on its own substantive SEPA determination,
23 (see Findings 14-19, 21, 23, 25, 31, 34, and 40) and further made a misguided attempt to rely
24 on the County’s Desert Claim Project EIS (Finding 21), attached as **Appendix B**. This is not
25 surprising, given the County’s previous efforts to assert lead agency authority, and to make its
26 own independent determinations regarding the “adequacy” of the KV EFSEC EIS. The

1 County’s SEPA determinations related to the KV Project reflect the County’s antipathy toward
2 the EFSEC process, are beyond the County’s jurisdiction, and should be disregarded.

3 **2. The Record Does Not Support the County’s Determinations Related to**
4 **Aesthetic Issues.**

5 Aside from the fact that the County’s aesthetic or visual impact determinations were
6 based on determinations beyond the County’s authority, the Applicant hired qualified experts
7 to carry out an extensive visual and aesthetic impact analysis that was based primarily on the
8 widely accepted Federal Highway Administration methodology for determining visual
9 resource change and assessing viewer response to that change. The Applicant’s expert used
10 the photomontage module of the WindPro software program to create “before and after” visual
11 simulation images to show the proposed Project from six simulation viewpoints selected to be
12 representative of views toward the Project from a range of locations, superimposing computer-
13 rendered three-dimensional wind turbines on photographs of existing conditions. Levels of
14 visual impact were classified as high, moderate, and low. The Applicant’s analysis and the
15 Council’s DEIS found that the overall visual impact of the Project would be low to moderate.

16 Before seeking a determination of land use consistency from the County, in fall 2005
17 the Applicant carried out an additional visual and aesthetic impact analysis of the reconfigured
18 Project using the same method of analysis and techniques. The analysis of the revised Project
19 layout with a reduced number of turbines, which was included in the Addendum to the DEIS,
20 included most of the viewpoints evaluated in the original Project DEIS. The analysis
21 concluded that the Project’s reconfigured layout reduced the impacts at many of these
22 viewpoints from “substantial” to “moderate.” When given an opportunity to provide
23 comments to the DEIS Addendum, the County’s “SEPA official” did not provide written or
24 verbal comments taking issue with EFSEC methodology of analysis or determination. See
25 transcript of the EFSEC February 2, 2006 Supplemental DEIS Public Meeting, at 4-5 (EFSEC
26 Tr. 439–40).

1 In early June 2006, the County made its final decision regarding County approval of
2 the Project. Generally the County concurred with the analysis and conclusions that the Project
3 will not have significant adverse visual impacts to the overall landscaped (“viewshed”), and
4 that the County did not support regulating such impacts. Special Meeting of April 12, 2006 at
5 23-24. However, as discussed above, the County disagreed with this analysis regarding
6 aesthetic impacts to nonparticipating residences within 2,500 feet of turbines. This issue was
7 raised toward the end of the County’s land use consistency process, and after the public record
8 had closed. The County did not raise this issue during the environmental review process.
9 EFSEC Tr. at 439-40.

10 The County’s analysis was not based on the use of accepted visual assessment
11 protocols that are commonly used by state and federal agencies. The County misconstrued the
12 treatment of the issue of visual sensitivity as it was presented in the original visual assessment
13 in the ASC, and as it was repeated in the DEIS and Addendum thereto, based in part on the
14 County’s analysis of visual impacts at the Desert Claim site, a project area dissimilar in
15 topography to the KV Project site. EFSEC Tr. at 322-24.²³ As a part of the process of
16 assessing the aesthetic impacts of potential change to the landscape, as detailed in the DEIS
17 and Addendum thereto as well as in testimony, the standard professional approach is to
18 document the existing visual character and quality of the landscape and its sensitivity to
19 potential visual change. Sensitivity to visual change is usually evaluated in terms of the
20 numbers and types of viewers in the area. Residential and certain kinds of recreational
21 viewers are usually assumed to be the most potentially sensitive to visual alterations of the

22 ²³ The County’s reliance on the Desert Claim Project EIS was misguided for at least
23 four reasons: (1) it reflects a lack of agreement that EFSEC, not the County, is the SEPA lead
24 agency; (2) as noted, the description of the levels of “impact” in the Desert Claim Project EIS
25 versus the KV Project EIS are largely semantic, not quantitative (EFSEC Tr. at 322-24); (3)
26 the project areas and topography are different, requiring a different approach, including a
different consideration of appropriate viewpoints and mitigation; and (4) the County’s critique
of EFSEC’s DEIS and Addendum thereto reflects deep hypocrisy; as Darryl Piercy admitted
in cross-examination, in the Desert Claim EIS, the County did not include any visual
simulations from residences (EFSEC Tr. at 509).

1 landscape. In the case of the Project, a high degree of sensitivity was assigned to residences
2 located within the foreground zone (up to one-half mile) of the proposed turbines. Visual
3 sensitivity is not the same as visual impact, but instead is only one of the considerations that
4 go into the final determination of impact. In determining potential impacts of proposed
5 projects, professionally accepted assessment techniques take into account a range of factors,
6 including the degree of visibility of the new feature, the degree and nature of the visual change
7 created, the effects on the visual character and quality of the view, and the sensitivity of the
8 viewers. The County was incorrect to assume that the level of viewer sensitivity translated
9 directly to the level of visual impact. Ex.34 SUP (TP-SUP) at 4-5.

10 The County mischaracterized aesthetic analyses used in the EIS process. The County
11 took the findings that those analyses described as “moderate to high” and has misrepresented
12 those findings as findings of “high” impacts. The County then asserted that a “high” impact is
13 a “significant adverse environmental impact.” This assertion was made without detailed
14 analysis or any reference to the criteria used to establish the significance of impacts under
15 SEPA. That assertion is not based on the analysis of the EFSEC DEIS and Addendum thereto.
16 Ex. 34 SUP (TP-SUP) at 5-6. The County further criticized the Applicant and EFSEC’s DEIS
17 and Addendum thereto for not preparing visual simulations from every residence near the
18 Project. Although such analysis is not routine or generally considered acceptable, the
19 County’s SEPA official did not provide this comment or critique to EFSEC during the EIS
20 comment period. EFSEC Tr. at 439-40. Further, while alleging that the visual simulation
21 methodology was superior in the County’s EIS for the enXco Desert Claim Project, in cross
22 examination, the County’s SEPA official (Mr. Piercy) admitted that the County itself did not
23 require or prepare such visual simulations for the Desert Claim Project. EFSEC Tr. at 509.

24 Because of its confusion between level of viewer sensitivity and level of visual impact,
25 the County concluded that all turbines must be set back 2,500 feet from residences. The
26 Applicant believed its prior analysis and that of the DEIS and Addendum thereto, about which

1 the County made no comment, were adequate. This was primarily because of the rural nature
2 of the area and the small numbers of residences in proximity to the Project, especially in light
3 of the terrain, which restricts the views of the proposed turbines from many locations.
4 However, in response to the County’s 2,500-foot setback from nonparticipating residences
5 raised at the end of their process and used to deny the Project, the Applicant conducted a
6 thorough investigation of the residences located within 2,500 feet of proposed turbines.²⁴ This
7 investigation included a close review of maps created using a geographic information system,
8 and both on-the-ground and helicopter-based field reconnaissance. This study was based on
9 the maximum 410-foot turbine tip height used in the DEIS. Ex. 34 Sup (TP-Sup) at 6.

10 By insisting, without an objective basis, that all turbines be set back 2,500 feet from
11 houses to mitigate for a perceived “looming” visual impact, the County placed arbitrary
12 restrictions on turbines sited in areas where they would have relatively little impact on
13 residential views. The effect on the views to houses with turbines within 2,500 feet was not as
14 stated by the County. Instead of the 20-plus houses the County assumed to be affected and
15 within a half-mile from proposed turbines (*see* County Resolution No. 2006-90, Finding
16 No. 20; May 3, 2006 County Hearing, TR at 10, line 24) only 16 homes are within 2,500 feet
17 of proposed turbines. Ex. 34 CUP (TP-T-SUP) at 19. Eleven residences would actually have
18 other than an insignificant view at the most, due to topography and screening. Of these 11
19 houses, the primary viewshed of all but one is not toward the turbines within 2,500 feet.

20 Testimony from Horizon’s visual resources expert made it clear that there is no
21 significant adverse visual effect on existing nonparticipating residences with a 1,320-foot

22 ²⁴ This analysis was conducted late in the process, after the County denied land use
23 consistency. Horizon did not consider this analysis previously, as there was no previous
24 comment from the County taking issue with the visual analysis, as it relates to the individual
25 residences. Particularly given the characteristics of the project area, including the topography
26 and low density of housing, and given the Applicant’s decision to remove turbines in the
northern tier, having the greatest territorial (regional) visual impact (versus impact on a
handful of individual residences), there was no reason to believe that any analysis other than
that generally accepted in the industry, and based on accepted methodologies, would be
needed.

1 setback. As stated in the DEIS and the Addendum thereto, the degree to which visual impacts
2 are considered adverse significantly depends on the viewer’s location, individual sensitivity,
3 and the impact on view quality. Because of the fact that the primary viewsheds of houses that
4 can actually see the turbines within 2,500 feet are overwhelmingly away from or not directly
5 toward the turbines, as described in Dr. Priestley’s supplemental testimony, the “looming”
6 visual impact with a setback of 1,320 feet from existing nonparticipating residences is not
7 significant. Further, as stated in both the technical analysis and related testimony presented by
8 the Applicant, the view of structures ceases to dominate the view at a distance from the
9 observer of about four-times the height of the structure. For a project such as the KV Project,
10 whose siting and design have shaped and minimized its overall visual impacts, any visual
11 impact that might be identified as affecting small numbers of viewers must be evaluated in the
12 context of the fact that, on the whole, the Project’s visual impacts are relatively low. Ex. 34
13 SUP (TP-SUP) at 6-11.

14 The Applicant’s analysis and the DEIS and the DEIS Addendum concluded that the
15 visual impact of the Project would not constitute a significant impact because of the low to
16 moderate levels of sensitivity of the affected views. Moreover, it is appropriate and necessary
17 for EFSEC, as the SEPA lead agency, to balance the moderate impact to a handful of
18 nonparticipating residences against the overwhelming statewide public benefit of the KV
19 Project.

20 At the County hearings the Applicant offered a 1,320-foot turbine setback from
21 existing nonparticipating landowner residences. The County ultimately denied the Project,
22 demanding a 2,500-foot setback to avoid a perceived visual effect. The BOCC imposed this
23 new 2,500-foot standard without providing any objective basis for the setback, except for
24 personal impressions gained during one brief site visit by the Commissioners to an operating
25 wind farm, without any understanding of whether the topography and site characteristics are at
26 all comparable to the KV Project site. The County has not provided any references to, support

1 for, or policy basis for this so-called “looming” effect in the SEPA analysis for this Project or
2 any other relevant literature or studies. The County’s denial was also arbitrarily based on
3 shadow flicker impacts, despite the Applicant’s statement to the County that Horizon was
4 prepared to eliminate significant shadow flicker impacts by shutting down individual turbines
5 within 2,500 feet of nonparticipating landowner residences during significant shadow flicker
6 events.

7 The BOCC’s concern regarding a perceived visual effect on individual residences
8 should have been raised by the County during the EFSEC SEPA process where it could have
9 been the subject of objective analysis or other material evidence, as well as public input, prior
10 to becoming the basis for denial. In short, Horizon does not believe the County’s perceived
11 visual effect on individual nonparticipating residences has any objective basis for further
12 conditioning or denying the approval of this Project.

13 **3. Horizon’s Additional Alternative Proposed Mitigation and Avoidance**
14 **Measures Adequately Address the County’s Aesthetic Concerns, Resolve**
15 **the Issues of Disagreement with the County, and Are Based on the Record.**

16 Although the Applicant remains firmly convinced that the visual impact with a turbine
17 setback of 1,320 feet from existing nonparticipating residences is not significant, there is a
18 basis in the record for the Council to modify the setback distance. In the EFSEC hearing,
19 objective evidence was submitted establishing distance of four-times the height of tower
20 structures under certain circumstances unique to this Project site, as a setback to avoid the
21 subjective perceived “looming” visual effect for which the County denied the Project. The
22 topography of the KV Project area is steep and hilly and tends to limit clear views of turbine
23 structure. However, the Project is in the western edge of the Central Arid Steppe zone. While
24 topography limits views, vegetation communities in the immediate area of the site consist
25 primarily of sagebrush and grasslands, and there are few trees that would limit views. Ex. 30
26 (RK-T).

1 Therefore, to address the visual impact concern, and based on the analysis presented to
2 EFSEC (Ex. 34 SUP (TP-T SUP)), the Council could propose a setback of four-times the
3 height of turbine structures to all existing residences of nonparticipating landowners that have
4 a line-of-sight view (*i.e.* a view of a turbine not blocked by topography and/or vegetation) to
5 minimize any perceived “looming” visual effect. Unlike a stationary structure such as a
6 building, wind turbine blades rotate slowly, creating a variable tip height (and therefore a
7 variable structure height). With a blade in the 12 o'clock position, the tallest height to the
8 blade tip contemplated for the Project is 410 feet, although for visual analysis purposes, a
9 blade only passes into the 12 o'clock position for a fraction of a second during operations. For
10 most of the time, the effective visual turbine blade tip height is significantly less than that (*i.e.*
11 with the blades in the “Y” or 6 o'clock position). Because the turbine blades are not stationary
12 and are rarely in the twelve o'clock position, logical application of a four-times structure
13 height would be measured to the top of the nacelle. Alternatively, EFSEC may consider the
14 appropriate structure height to be a height with the blades in the “Y” position. In the event the
15 Council decides to impose a four-times turbine structure height setback, the Applicant would
16 suggest the following language:

17 At the County hearings the Applicant offered a 1,320 foot turbine setback from
18 existing residences of nonparticipating landowners. The County denied siting of
19 the Project, demanding a 2,500 foot setback to avoid a potentially perceived
20 visual “looming” effect, without providing any objective basis for the setback. In
the EFSEC hearing, objective evidence was submitted stating that the “looming”
effect of an object in a viewshed ceases at a distance of approximately four-times
the height of that structure.

21 The topography of the Project area is steep and hilly and tends to limit clear
22 views of turbines. However, the project is in the western edge of the Central
23 Arid Steppe zone. Vegetation communities in the immediate area of the site
24 consist primarily of sagebrush and grasslands and there are few trees which
25 would limit views. Therefore to address the County’s visual impact concern,
26 and based on the analysis presented to EFSEC (Ex. 34 SUP (TP-T SUP)), and
based on the unique attributes of the KV Project site, the Council establishes a
setback of four-times the height from turbine structures to all existing
residences of nonparticipating landowners that have a line-of-sight view (*i.e.* a
view of a turbine not blocked by topography and/or vegetation) to minimize
any perceived “looming” visual effect on individual residences. Unlike a

1 stationary structure such as a building, wind turbine blades slowly rotate,
2 creating a variable tip height (and therefore a variable structure height). For
3 most of the time, the effective visual turbine blade tip height is significantly
4 less than the full tip height as described in the ASC. Therefore, for purposes of
5 establishing a setback from turbine tower structures to existing nonparticipating
6 residences, since the turbine blades are not stationary and are rarely in the
7 twelve o'clock position, a four-times structure height will be measured from the
8 height with the turbine blades in the "Y" position.

9 Additionally, as stated at the September 21, 2006 EFSEC hearing (TR at 782-85), and
10 as described in Horizon's proposed EFSEC Findings of Fact and Conclusions of Law, Horizon
11 agrees to implement operational controls (turbine shutdowns) on individual turbines within
12 2,500 feet of nonparticipating existing residences during significant shadow flicker events,
13 based on complaints by existing surrounding non-participating residential landowners. The
14 turbine shutdown measure will avoid any impact that could be considered significant under
15 SEPA.

16 Regarding potential impacts from light and glare, the Project is located in a rural area
17 of Kittitas County. Given the distances from major concentrations of residences, neither glare
18 nor "shadow flicker" poses hazards with the Project (*see* Applicant's proposed EFSEC
19 Findings of Fact). Further, the turbine towers will not add significant ambient light to their
20 immediate surroundings; however, they will be marked with flashing nighttime aviation
21 warning lights required by the Federal Aviation Administration ("FAA") to alert aircraft to
22 their presence. In accordance with the FAA's "Development of Obstruction Lighting
23 Standards for Wind Turbine Farms," November 2005, page 25, item no. 7 (DOT/FAA/AR-
24 TN05/50), attached hereto as Appendix C,²⁵ "Daytime lighting of wind turbine farms is not
25 required, as long as the turbine structures themselves are painted in a bright white color." *See*
26 *also* Executive Summary. As all parties to these proceedings will acknowledge, turbine colors

²⁵ At the September 21, 2006 EFSEC hearing, Judge Torem identified Council questions about the trade-off between turbine colors and the number of FAA lights, and asked the Applicant to address these questions, including submitting a copy of the FAA Guidelines. TR at 825-28.

1 are intended to blend in to the surrounding sky and landscape, and will be more or less
2 noticeable depending on the quality and intensity of light, weather, and atmospheric
3 conditions. The Applicant submits that if it is possible to reduce the number and density of
4 FAA lights, that is an appropriate tradeoff for light-colored turbine towers and equipment.

5 **C. Alternate Locations Within the Same County Have Been Reviewed and Found**
6 **Unacceptable.**

7 To seek preemption, an applicant must show that “alternate locations which are within
8 the same county and city have been reviewed and have been found unacceptable.” WAC 463-
9 28-040(3). An analysis of alternative sites in Kittitas County for the Valley Wind Power
10 Project was included in Chapter 2.7 of EFSEC DEIS, the EFSEC Supplemental DEIS, Chapter
11 2.4.1 of the Kittitas County DEIS for the enXco Desert Claim Project, and Chapter 3.16 of the
12 Wild Horse Project DEIS.

13 The analysis in the EFSEC DEIS was the same used by Kittitas County for its DEIS
14 for the enXco Desert Claim Project site and the Wild Horse Project DEIS. The County denied
15 the enXco Desert Claim Project, while approving the Wild Horse Project. These DEIS
16 established criteria for the analysis of alternatives, and then reviewed potential sites in Kittitas
17 County. The criteria are as follows: (1) sufficient wind resource (the most important);
18 (2) proximate/adequate transmission facilities; (3) large land area; (4) absence of significant
19 environmental constraints; and (5) property owner interest/property availability/control of
20 property. The DEIS’s concluded that although other sites for wind power generation may
21 exist in Kittitas County, none would satisfy the test for availability or practicability for the KV
22 Project. Furthermore, given that other companies are developing these alternate sites, these
23 locations are not available to the Applicant.

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1 **1. The KV Site Is a Unique Opportunity with Proven, Robust Winds and**
2 **Sufficient On-Site Transmission Facilities with Ample Capacity.**

3 The Applicant has considered other locations in the County, but has not found any that
4 are acceptable alternatives to the proposed site. The issue of alternative sites has also been
5 addressed in detail in EFSEC’s Supplemental DEIS. There are many factors that make this
6 proposed site unique. First of all, there is a robust and extremely well documented wind
7 resource that has been measured carefully during a period of more than six years. EFSEC Tr.
8 at 698-702. The Applicant is not aware of any alternative sites that are equally well
9 documented that are available. The fact that predictive modes and “wind maps” indicate
10 potential in other areas of the County is no substitute for high-quality, long-term, on-site data.
11 This type of data dramatically reduces the financial risk of the Project from an investment
12 perspective. Ex. 20 SUP R (CT-SUP R).

13 The Project benefits from the presence of multiple transmission lines of appropriate
14 voltage and with adequate capacity to carry the entire output of the Project. The lines
15 proposed to interconnect to are overhead and require no new construction of feeder lines.
16 Such feeder lines are costly and entail additional environmental impacts. A System Impact
17 Study has been completed by both Bonneville Power Administration (“BPA”) and Puget
18 Sound Energy (“PSE”) and these utilities have confirmed the viability of interconnecting the
19 Project to the adjacent 230kv lines. In addition, these proposed interconnections can be
20 achieved without substantial network upgrades, which further enhances the Project’s
21 economic viability. The Applicant has secured advantageous transmission queue positions
22 with both BPA and PSE because its requests were originally filed several years ago and are
23 senior to others in the queue. Ex. 20 SUP (CT-T SUP) at 20.

24 Horizon has existing land agreements with participating landowners and continues
25 negotiations with neighboring property landowners. It is not self-evident that owners of other
26

1 potential sites would be willing to enter into such agreements with Horizon. Without land
2 agreements, other project sites are not available to Horizon.

3 An exhaustive environmental analysis has demonstrated that the impacts of the Project
4 on the environment, and in particular wildlife and habitat at the proposed site, are minimal.

5 **2. The Wild Horse Expansion Site Is Not an “Alternative” to the KV Site.**

6 Horizon currently has an option to purchase a small amount of land (about 1,400 acres)
7 from the same private landowner from whom they acquired rights to the Wild Horse site.
8 With regard to any development interests Horizon may have in the vicinity of the Wild Horse
9 Project, Horizon does not at this time have a formal proposal for an additional wind project in
10 that area and has not applied for any permits. Horizon has two temporary meteorological
11 towers on that property that are currently collecting wind data. The preliminary assessment is
12 that the property under option could accommodate perhaps 20 wind turbines. This is only an
13 initial estimate, but clearly this site is in no way comparable to the Kittitas Valley site in terms
14 of the magnitude of wind energy potential, as it is roughly one-fifth the size of the Kittitas
15 Valley site in terms of acreage. Without the presence of existing infrastructure (roads, step-up
16 substation, feeder lines, etc.) at the adjacent Wild Horse Project site, a project of this size (20
17 turbines) would not be economically viable under current market conditions. Such a project
18 would best be characterized as an expansion of the Wild Horse Project, rather than a new
19 project, which would require the current owner of Wild Horse Project to submit an application
20 for an expansion of the current Project. Ex. 20 SUP (CT-T SUP) at 21).

21 **3. The enXco Desert Claim and Invenergy Sites Have Been “Reviewed” and**
22 **Are Not Available or “Acceptable” Alternatives to the KV Site.**

23 The Applicant is aware of only one other formally proposed project in Kittitas County;
24 the enXco Desert Claim Project. As is abundantly clear from the record, the County denied
25 this project, and if enXco goes forward, enXco will seek EFSEC preemption. The County
26 alleges that another wind power firm is considering a potential site south and east of the Wild

1 Horse Project site. The details are unknown for the proposed site, but it appears that the site is
2 under consideration by Invenergy Wind, LLC (“Invenergy”), a Chicago-based wind power
3 developer. The County admitted that no formal pre-application conference has occurred with
4 the County, and that Invenergy has submitted nothing to the County in writing. What is clear
5 from the record is that regardless of where any hypothetical Invenergy site is proposed in the
6 County, wind energy is not a permitted use, and the project is explicitly prohibited unless and
7 until Invenergy successfully navigates the County’s uniquely byzantine requirements for siting
8 wind energy facilities.

9 Notwithstanding the fact that any Invenergy site is prohibited by the County, the
10 Applicant believes that the Wild Horse Project site occupies the most desirable ridges for wind
11 turbine placement in that general area. This is also the opinion of the professional
12 meteorologist consulted in developing the Wild Horse Project, who testified that due to poor
13 wind resources, the Invenergy site is capable of a maximum 50 MW site—a project size that is
14 not an acceptable alternative to the robust generation capacity of the KV Project site. EFSEC
15 Tr. at 706.²⁶ Furthermore, it is Horizon’s understanding that the remaining land belonging to
16 the private landowner from whom Horizon acquired the rights to the Wild Horse site is under
17 option for conservation acquisition, and that some of that land has, in fact, already been
18 purchased for habitat and wildlife conservation purposes. Ex. 20 SUP (CT-T SUP) at 22).
19 Therefore, it appears that no parcels would be available for wind power development in this
20 location. In addition, Horizon believes that the Wild Horse Project will consume most of the
21 remaining available capacity on PSE’s intermountain power transmission line to which it will
22 interconnect, leaving little if any availability for future projects in that immediate area. *Id.*
23 BPA transmission lines to the west of the Wild Horse site are 500 kV lines, and therefore
24 _____
25 ²⁶ Ron Nierenberg testified: “. . . [I]t depends on a lot of variables that are outside the
26 realm of meteorology, but it’s possible it could be viable; but it may not exceed say a 50-
megawatt threshold and developers typically are not developing anything under about 100
megawatts. It puts it into a sort of gray area in terms of viability.” *Id.*

1 interconnecting to them would likely cost somewhere on the order of \$10 million to \$20
2 million, which would likely be cost-prohibitive. *Id.*

3 As discussed above, KCC chapter 17.61A does not allow wind farms as a permitted
4 use anywhere in the County; they are a prohibited use. The County chose, after considerable
5 debate on the issue, not to go through a zoning process that would designate areas in which
6 wind farms would be permitted. The BOCC instead adopted a project-specific siting/permit
7 process to consider proposed wind power projects on a case-by-case basis. This wind farm
8 siting process is more complex and contains more regulatory hurdles than are required for
9 siting fossil-fuel fired power plants, nuclear plants, pipelines, or any other type of energy-
10 related facility in the County, without policy rationale for treating renewable energy more
11 strictly than conventional greenhouse gas-producing energy facilities. In effect, under the
12 County’s ordinance, there are no alternative areas of the County that are “zoned” for wind
13 energy facilities. There is no site or area in the County that an applicant can identify that
14 allows a wind farm as a permitted use. In other words, without going through the entire
15 County process for each individual proposed site, there is no zoning district or area where a
16 wind farm can be sited. In essence, an applicant is unable to find any place in the County in
17 which a wind farm is permitted without submitting multiple applications through the County
18 siting/permit process.

19 The smaller Applicant projects cited by the County in Mr. Piercy’s rebuttal testimony
20 (Ex. 51 (DT-T) Exhibit 51-4) are not priority projects for the Applicant, due in part to their
21 small size. It is important to note, however, that these projects are proposed to interconnect at
22 lower voltages (North Collins Project at 34.5 kV and Sardinia Project at 115 kV) than the
23 Project (230 kV); thus the associated interconnection costs are substantially lower than for the
24 Project. Higher priorities have been placed on larger projects in the New York vicinity,
25 including the Clinton County Project with 200 MW, Dairy Hills Project with 120 to 132 MW,
26 Machias Project with 90 MW, and Batavia Project at 80 MW. These projects are currently

1 established in the interconnection queue. Interconnection requests for the Sardinia and North
2 Collins project have not been made, partially because economics of scale continue to make
3 them uncompetitive relative to larger projects in the state. Ex. 20 SUP R (CT-SUP R) at 10.

4 **D. The Project Serves and Implements Interests of the State.**

5 Finally, WAC 463-28-040(4) requires a request for preemption to address “[i]nterests
6 of the state as delineated in RCW 80.50.010.” These interests are set forth in RCW 80.50.010
7 as follows:

8 The legislature finds that the present and predicted
9 growth in energy demands in the state of Washington requires
10 the development of a procedure for the selection and utilization
11 of sites for energy facilities and the identification of a state
12 position with respect to each proposed site. The legislature
13 recognizes that the selection of sites will have a significant
14 impact upon the welfare of the population, the location and
15 growth of industry and the use of the natural resources of the
16 state.

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

23 It is the intent to seek courses of action that will
24 balance the increasing demands for energy facility location and
25 operation in conjunction with the broad interests of the public.
26 Such action will be based on these premises:

(1) To assure Washington state citizens that, where
applicable, operational safeguards are at least as stringent as the
criteria established by the federal government and are
technically sufficient for their welfare and protection.

(2) 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.

(3) To provide abundant energy at reasonable cost.

(4) To avoid costs of complete site restoration and
demolition of improvements and infrastructure at unfinished

1 nuclear energy sites, and to use unfinished nuclear energy
2 facilities for public uses, including economic development,
3 under the regulatory and management control of local
4 governments and port districts.

5 (5) To avoid costly duplication in the siting process
6 and ensure that decisions are made timely and without
7 unnecessary delay.

8 To address the “interests of the state,” it is first and foremost essential to understand
9 that the regulation of the siting, construction, and operation of energy facilities is a statewide
10 concern, and that the very existence of EFSEC reflects the Legislature’s recognition that the
11 siting, construction, and operation of energy facilities cannot be impeded by the inevitable
12 parochial concerns raised at the local level, and cannot be impaired by the opposition of a
13 small handful of property owners voicing subjective complaints. The statutory language in
14 this regard is clear: “It is the intent to seek courses of action that will *balance the increasing*
15 *demands for energy facility location and operation in conjunction with the broad interests of*
16 *the public.*” RCW 80.50.010 (emphasis added). In all issues of “public interest” set forth in
17 the statute, the frame of reference is “balance” and “broad interests of the public,” not the
18 interests or complaints of individuals. This includes the following: “To preserve and protect
19 the quality of the environment; to enhance the public's opportunity to enjoy the esthetic and
20 recreational benefits of the air, water and land resources; to promote air cleanliness; and to
21 pursue beneficial changes in the environment.” RCW 80.50.010(2).

22 Sections 1.2 and 3.5 of the DEIS describe the purpose and need for the Project and
23 electrical energy demand in the region. Section 1.2 states in part:

24 The purpose of the KVVWPP is to construct and operate a new
25 electrical generation resource using wind energy that will meet a
26 portion of the projected growing regional demands for electricity
27 produced from non-renewable and renewable resources.

28 DEIS section 2.1 states that recent national and regional forecasts predict increasing
29 consumption of electrical energy that will continue into the foreseeable future, requiring

1 development of new generation resources to satisfy the increasing demand. It points out that
2 there is a growing market for electricity powered by “green resources” in the Pacific
3 Northwest. As a result of RCW 19.29A signed into law in 2001, 16 of Washington’s electric
4 utilities were directed to offer a voluntary alternative energy product (essentially an electricity
5 product powered by green resources) starting in January 2002. Local and regional markets for
6 green power have been increasing. These are the largest utilities in the state, representing over
7 80 percent of the total load in the state. Thus there is an additional sub-market demand for
8 alternative electricity for Washington utilities. Further the majority of the other utilities within
9 the state are looking at alternative resources and conservation. Testimony of Tony Usibelli,
10 EFSEC Hearing Transcript at 662.

11 Wind resources, particularly in the Pacific Northwest, have several unique attributes
12 that make them especially valuable when compared to more conventional electricity-
13 generating resources. Among these characteristics are price stability (because the fuel is free),
14 easy integration into the Northwest’s hydro-based electric system, avoidance of greenhouse
15 gases and risk minimization for purchasing utilities. Ex. 43 (RH-T Sup) at 2.

16 Several regional electric utilities have recently issued requests for proposals to acquire
17 wind power, including PSE, Pacific Power, Avista Corporation, and Portland General Electric.
18 This trend will accelerate if the proposed ballot initiative, I-937, passes in November 2006,
19 and implements requirements for all the state’s electric utilities to increase their use of
20 renewable energy by 15 percent by 2020.

21 The energy crisis of 2001 and the volatility of the price of natural gas have also created
22 increased demand for wind power to meet the region’s future power needs. PSE’s 2005 Least
23 Cost Plan has a section entitled “Gas Projects are Losing Favor” which states:

24 Typically, natural gas-fired projects are easier to site and permit in
25 western Washington than other fossil-fueled plants, and due to the proximity to
26 natural gas pipelines and transmission to the major load centers, natural gas
projects had been the default choice in new generation. Today, with high
natural gas prices, these projects are becoming less economical to own. They

1 typically operate on the margin, and require sophisticated and expensive
2 hedging strategies to manage fuel price risk and related volatility.

3 Development of sufficient wind resources in the Northwest will directly address this
4 price volatility. Wind is cost competitive with existing and projected prices of combined cycle
5 combustion turbines, and, because the fuel is free, wind is not subject to the wild price
6 fluctuations associated with gas and oil-fired resources. Wind power's short construction time
7 and ability to capture varying wind currents (because of strategic turbine positioning) within a
8 single site also create built in hedges against the seasonal, and even daily, price fluctuations
9 inherent in gas-fired resources. Ex. 43 (RH-T Sup) at 4.

10 Wind power offers utilities more predictability regarding their future energy costs,
11 because once a wind farm is constructed, there are no fuel costs and very few maintenance
12 costs. Wind power developers, unlike developers of natural gas plants, routinely offer utility
13 customers long-term (e.g. 20 year) fixed-price contracts. Increasing customer demand for
14 green energy, the environmental attributes of wind power, and its fixed price have led the
15 region's utilities to include significant percentages of wind power in their latest integrated
16 resource plans. PacifiCorp's 2004 Integrated Resource Plan's "Planned Resources" section
17 states: "PacifiCorp concludes that since the Company is committed to continuing the pursuit
18 of renewable generation as a viable solution to meeting customer demand, it is reasonable and
19 prudent to assume that 1,400 MW of renewable resources should be included as a Planned
20 Resource." Avista's 2005 Electric Integrated Resource Plan reinforces that message in the
21 following table:

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1 **TABLE 7.1: NORTHWEST IOU LOADS AND ESTIMATED WIND ACQUISITION**
 2 **PLANS THROUGH 2016 (FROM AVISTA 2005 INTEGRATED RESOURCE PLAN)**

3 Utility	4 IRP Wind Capacity (MW)	5 2016 Load (aMW)	6 IRP Wind Energy (aMW)	7 Wind Contribution to Load (percent)
8 Avista	9 400	10 1,424	11 132	12 9.3
13 Idaho Power	14 350	15 2,187	16 116	17 5.3
18 PacifiCorp West	19 600	20 2,678	21 198	22 7.4
23 Portland General Electric	24 200	25 3,075	26 66	27 2.1
28 Puget Sound Energy	29 845	30 2,790	31 279	32 10.0
33 Total	34 2,395	35 12,154	36 790	37 6.5

10 Energy prices have continued to rise, in part due to significant volatility of natural gas prices
 11 and supply. The risk to national security resulting from dependence on foreign supplies of
 12 natural gas and oil has become notorious. Nationally, regionally and in Washington State,
 13 there is a growing recognition of the need to develop a significant portfolio of renewable
 14 energy resources. The development of the limited number of suitable wind energy sites is now
 15 a priority at the state, regional, and national levels. Supplying 10 to 20 percent of a utility's
 16 energy from wind (the range of most state renewable portfolio standards) will diversify away
 17 from the risks associated with reliance on traditional resources. These historical and/or
 18 emerging risks are well known: for hydro, they involve annual changes in precipitation and
 19 mandated fish protection measures; for coal, price escalation due to transportation costs and
 20 regulatory risks of greenhouse gas mitigation measures; and, for natural gas, the
 21 aforementioned price volatility. Ex. 43 (RH-T Sup) at 4-5.

22
 23 By November 2006, we will know if the Washington State I-937 will be state law. If
 24 this occurs, then Washington State public and investor-owned utilities will need to acquire
 25 roughly 1,500 to 1,700 average megawatts (or 4,500 to 5,000 megawatts of wind *capacity*) to
 26 meet the 15 percent RPS requirement by 2020. Although I-937 applies to all renewable

1 resources (e.g. biomass and geothermal), the vast majority of resources acquired to meet the
2 standard will be wind powered. Ex. 43 (RH-T Sup) at 8.

3 As demand for wind energy has been increasing in the region, wind resources in the
4 state of Washington are finite and limited. As stated in Section 3.5-6 of the EFSEC Project
5 DEIS, “Estimates of the wind resource are expressed in wind power classes ranging from
6 Class 1 to Class 7, with each class representing a range of mean wind power density or
7 equivalent mean speed at specified heights above the ground. Areas designated Class 4 or
8 greater are suitable with advanced wind turbine technology under development today.” The
9 DEIS further states that the state of Washington compared to other states, is “ranked in the
10 bottom tier in terms of wind energy potential.” This point is echoed in Avista’s 2005
11 Integrated Resource Plan Executive Summary: “The wind limitation reflects Company
12 agreement with the Northwest Power and Conservation Council (NPCC) that a limited amount
13 of economically viable wind potential exists in the Northwest.”

14 The DEIS also states in Section 3.5 that the Ellensburg corridor in Central Washington,
15 where the KV Project and the Wild Horse Project are located and proposed, sustains one of the
16 strongest wind energy resources in the state. Data from several sites throughout the central
17 Washington corridor indicate that exposed areas have a Class 4 to 5 annual average wind
18 resource, with a Class 6 resource during the spring and summer seasons. Wind resources of
19 this class near transmission lines and load centers (such as the KV Project site) are finite and
20 are critical to meeting state and regional energy needs with abundant energy at reasonable
21 cost, a point that is particularly important when serving the westside market for renewables is
22 considered. Puget Sound Energy’s 2005 Least Cost Plan’s “Wind is an Emerging Resource”
23 section states: “Wind projects are becoming much more attractive due to the maturity of wind
24 turbine technology, the adequacy of wind resources in the Northwest, trends toward portfolio
25 renewable standards [sic], and current tax incentives. Transmission system constraints that
26

1 hinder the ability of projects to serve major load centers in the Puget Sound area make projects
2 outside PSE’s service territory less attractive.”

3 Some of the larger utilities that are short in supply and that have gone with the least
4 cost integrated resource planning approach, determined that in many instances renewable
5 resources such as wind represent the least cost from an environmental and economic cost
6 resource. Utilities are acquiring wind resources, and several wind farms have been developed
7 or purchased by Washington-based utilities. Testimony of Tony Usibelli, EFSEC Hearing
8 Transcript at 663.

9 The state of Washington is part of an integrated electrical system that incorporates
10 most of the western portion of both the United States and Canada. During the winter heating
11 season, the state of Washington is a net importer of electricity. This state is dependent on
12 other portions of the United States and Canada to operate its electrical utility systems, as they
13 are dependent on us. In July 2006, the state nearly had to curtail its system due to extreme hot
14 weather conditions in California. As a result it was necessary draw additional water through
15 the hydro system. These situations have negative effects on the region’s ability to meet
16 federal mandates to provide certain levels of stream flow to protect fish. Additional energy
17 sources, such as wind power or other renewable resources, will help take pressure off the
18 hydro system and better allow the State and region to meet our other environmental needs for
19 fish. Testimony of Tony Usibelli, EFSEC Hearing Transcript at 664-65.

20 Roughly 50 percent of all Pacific Northwest power is generated by hydroelectricity.
21 This predominance of hydro is unique in the United States, and it provides the ideal
22 mechanism through which to cost-effectively integrate wind resources into the Northwest
23 electrical system. This integration capability exists because hydro dams can temporarily ramp
24 up their output, either within the hour or for one or two hours in advance, to meet temporary
25 variations in wind energy production. This capability allows wind to be easily “firmed up” for
26 serving retail loads, without having to build backup resources or use more expensive CCCTs

1 for real-time load following. Therefore, because Northwest integration costs are low, it is to
2 the region’s economic advantage to maximize its available wind potential for electricity
3 generation. Ex. 43 (RH-T Sup) at 6.

4 It is one of the best proposed projects both in the county and the state, Testimony of
5 Ron Neirenberg, EFSEC Hearing Transcript, at.710, and is capable of interconnecting to either
6 the BPA’s or PSE’s transmission system in a cost-effective manner. It is also located closer to
7 major load centers (*e.g.* the Puget Sound region) than most other proposed wind project sites.
8 Finally, it is located in a completely different area than the vast majority of likely Northwest
9 wind projects (*i.e.* the Columbia Gorge), and therefore can provide utilities with some resource
10 diversity relative to their likely purchases from other wind projects.

11 **V. CONCLUSION**

12 Under the County’s land use ordinances, it is far easier to permit, construct and operate
13 coal power plants and nuclear power facilities than it is to site wind energy facilities. The KV
14 Project is proposed in a sparsely populated location, planned and zoned for rural, agricultural,
15 and natural resource extraction and development uses. The County’s plan, policies and zoning
16 code purport to discourage residential development, and encourage uses that will conserve
17 large land areas for rural, agricultural, and natural resource uses, and encourage industries that
18 discourage the conversion to sprawling housing developments. The three-plus-year history of
19 Horizon seeking a land use consistency determination reflects an inability to reconcile what
20 the County says as a matter of adopted policy and law, and what it does in reviewing a
21 renewable energy facility proposed in a sparsely populated area with supportive, compatible
22 underlying Comprehensive plan policies and zoning code provisions. For more than three
23 years, Horizon has made all reasonable, good-faith efforts to secure a favorable decision from
24 the County, with a fair application of County policy and regulations to a project site that is
25 uniquely suited for wind energy development, and is appropriately located for the proposed
26

1 use. Even at this stage, Horizon continues to make all reasonable efforts, proposing further
2 Project refinements to minimize and avoid impacts of concern to the County’s BOCC.

3 We ask EFSEC to make a finding that Horizon has complied with WAC 463-28-40(4),
4 and to recommend that the Governor confirm EFSEC’s and the Governor’s statutory authority
5 to preempt and supersede the County’s Wind Farm Ordinance, KCC chapter 17.61A, and
6 approve Horizon’s Application for Site Certificate Agreement.

7 Respectfully submitted this 30th day of October, 2006.

8 STOEL RIVES LLP

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APPENDIX A

***APPLICANT’S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW,
DEMONSTRATING CONSISTENCY WITH KITTITAS COUNTY’S
COMPREHENSIVE PLAN AND ZONING PROVISIONS, AND CONSISTENCY WITH
SEPA REQUIREMENTS***

***VERBATIM COPY OF THE PROPOSED FINDINGS OF FACT AND CONCLUSIONS
OF LAW SUBMITTED TO PLANNING COMMISSION AND BOCC DURING COUNTY
HEARINGS***

(Exhibit 4 to Horizon’s Second Request for Preemption, June 20, 2006)



KITTITAS VALLEY WIND POWER PROJECT

1. EXECUTIVE SUMMARY

December 29, 2006

Sagebrush Power Partners, LLC (“Applicant”), is requesting the Kittitas County Planning Commission and the Board of County Commissioners approve the Kittitas Valley Wind Power Project Development Activities Application. This application, in response to comments made by the Board of County Commissioners, the Planning Commission, and the general public, has undergone extensive modification from the original proposal as discussed below and as documented in the related materials.

The Kittitas Valley Wind Power Project (KV) is a utility-scale wind energy facility proposed to be located on open ridge tops between Ellensburg and Cle Elum at a site approximately 12 miles northwest of the City of Ellensburg. The Project area consists of approximately 6,000 acres of contiguous, adjoining parcels of open range land located in areas that are zoned as Forest and Range and Ag-20.

Approximately 3,800 acres within the Project area is privately owned property and the remainder is state owned land administered by the Department of Natural Resources (DNR). The Project area will contain up to 80 wind turbine generators, an electrical collection system, up to two substations, a Project access road system, permanent meteorological towers, communications systems and operation and maintenance facilities to serve long-term Project needs. A total of only approximately 90 acres within the 6,000 acre Project area will be permanently occupied by the aforementioned Project facilities.

The Development Activities Application submitted to Kittitas County Community Development Services on October 14, 2005 and accepted as complete by Community Development Services on December 2, 2005 requests the following related actions, as provided for in the County Code, be approved by Kittitas County:

Amendment of the Kittitas County Comprehensive plan to designate the 6,000 acre Project Area as a Wind Farm Resource Overlay District “sub-area” pursuant to KCC 15B.03 and 17.61A, which can be accomplished by adoption of a sub-area plan for the wind farm site.

1 Zoning reclassification of the Project Area as a Wind Farm Resource Overlay Zoning District
2 in conformance with the provisions of the Kittitas County Zoning Code, Section 17.61A and
3 17.98.

4 Approval of a Wind Farm Resource Development Permit for the proposal (providing
5 approval of the Development Agreement and a certification that the Project is consistent with
6 the County Comprehensive plan and all development regulations).

7 Adoption of a Development Agreement, pursuant to RCW 36.70B.170 and Chapter 15A.11
8 of the Kittitas County Code, setting forth the standards and conditions of development of the
9 Project, including measures required to mitigate significant adverse environmental impacts
10 identified in the Draft EIS for the Project.

11 The Project area consists of 13 property owners. The property owners have been
12 personally contacted and the Project discussed in full detail. All property owners
13 have agreed that the KV Project is desirable and will provide tangible, long term
14 economic benefits, and have signed agreements with the Applicant to allow
15 construction of the Project on their property. In addition to maintaining their current
16 rural life style, the KV Project will provide additional income to enhance their quality
17 of life.

18 In an effort to further mitigate and minimize potential impacts, the KV Project has
19 been modified to address concerns expressed by the Board of County
20 Commissioners, the Planning Commission, and the general public, including
21 neighboring property owners. The number of turbine generators has been
22 significantly reduced (from 150 to 80) to minimize visual impacts in sensitive areas.
23 Daytime lights have been eliminated and a significant reduction in nighttime lighting
24 has been incorporated, keeping within the FAA guidelines. The layout of the wind
25 turbines within the Project area has been revised to increase property line set backs
26 from 50 feet to 541 feet, beyond the tip of the blade at its closest point to the
property line. EFSEC, in its December 2005 Addendum to Draft EIS, performed an
extensive review of the proposed changes and generally found that the revised
Project "...does not cause significant adverse environmental impacts, nor does it
change the significance of any environmental impacts that have been identified in
the Draft EIS." More specifically, the EFSEC addendum states that the revised
Project "...will have less of an impact on visual resources particularly for viewpoints
located near the north and northwestern portions of the project area."

19 During the Joint Public Hearing before the Board of County Commissioners and the
20 Planning Commission, the Applicant will present experts on wind power projects.

21 The topics these experts will cover in detail include:

21	Dave Baker	Noise Analysis
	Michael Bernay	Wind Project Risks from an Insurance perspective
22	Barton DeLacy	Property Values
	Wally Erickson	Wildlife Analysis
23	Daniel Kammen	Public Safety/Risk Analysis
	Tom Priestley	Aesthetics Analysis
24	Andrew Young	Shadow Flicker Analysis

25 Kittitas County is currently experiencing a tremendous amount of residential growth.
26 With this type of growth, additional public and private services and utilities are
required. Wind power projects are one of the few kinds of developments that

1 preserve traditional ranching and agriculture practices rather than displace them, a
2 recurring goal in the County's Comprehensive plan. In Kittitas County, as well as the
3 broader region, the need for energy is growing. The Kittitas Valley Wind Power
4 Project provides the opportunity to generate clean renewable energy necessary to
5 support this growth, generate revenue for the various taxing districts within the
6 county, while preserving traditional ranching and agriculture practices at the Project
7 site.

8 The Public Hearing presentation will provide confirmation that the Kittitas Valley
9 Wind Power Project conforms to the Kittitas County Code and all laws regulating
10 such operations. On behalf of the Project area property owners and for the benefit of
11 consumers of electricity both within the County and across the region, we at
12 Sagebrush Power Partners respectfully request that you approve this application to
13 generate clean renewable energy within Kittitas County.
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1 **2. Consistency with Comprehensive plan Policies**

2 In order to obtain a Subarea Plan Amendment and Wind Farm Resource Overlay Rezone, the
3 Applicant is required to demonstrate general consistency with the County’s Comprehensive
4 plan policies. To the extent the Applicant must also demonstrate “changed circumstances,”
5 that requirement is addressed in Section 3 of these Findings of Compliance and Conclusions,
6 “Compliance with Zoning Code Provisions”.

6 **Findings of Consistency with Comprehensive plan Policies**

7 Four of the County’s six comprehensive plan elements – Land Use, Housing, Utilities, and
8 Rural Lands are relevant to and in concert with the Kittitas Valley Wind Power Project
9 proposal and are fully discussed below. It is worth noting that of the County’s approximately
10 1.5 million acres, 30% -- or 446,000 acres – is identified as pasture and unimproved grazing.
11 The Kittitas Valley Wind Power Project is proposed on 6,000 of those acres, representing 1%
12 of the pasture and unimproved grazing area and 0.4% of the total County. The actual area
13 used for construction of project improvements, approximately 90 acres, is much smaller than
14 the total project site. Specifically, within the 6,000 acre project site and subarea plan
15 boundary, only 90 acres will be removed from agricultural use (and will be devoted to natural
16 resource (wind energy) development), leaving over 5900 acres available for agricultural and
17 natural resource management and development use. The Project will enable preservation of a
18 6,000 acre area of rural Kittitas County where the Project will provide financial incentives
19 for rural landowners to maintain sustainable agricultural and natural resource management
20 practices, uses and traditions, in accordance with Comprehensive plan policies, discussed
21 below.

16 **2.2 Land Use Element**

17 **2.2.1 General Planning Goals and Policies**

18 The Project conforms to the General Planning Goals, Objectives and Policies defined in
19 2.2(A) in the following ways:

20 *GPO 2.1 The maintenance and enhancement of Kittitas County's natural resource*
21 *industry base including but not limited to productive timber, agriculture,*
22 *mineral and energy resources.*

22 Finding of Consistency: Windpower development as seen in the Kittitas Valley Wind Power
23 Project is clearly an enhancement of the energy portion of the County’s natural resource
24 industry, a status it achieves while also assisting to maintain the agriculture sector in the
25 Project’s vicinity which is planned for rural uses, and zoned Agriculture-20 (A-20) and
26 Forest & Range (FR).

1 GPO 2.2 *Diversified economic development providing broader employment*
2 *opportunities.*

3 Finding of Consistency: Windpower in general and the Kittitas Valley Wind Power Project
4 in particular represent economic diversification. Construction of the project is expected to
5 create up to 253 temporary jobs during construction and 12-20 permanent, family wage new
6 jobs (DEIS page 3.7-8).. The Project would also lower the effective property tax rates on
7 landowners, a further benefit to the agriculture community. Windpower development of
8 agricultural lands will greatly aid agricultural landowners, helping to sustain long-term
9 agricultural use of the properties, helping to insulate rural landowners from economic cycles
10 typical in the rural economy.

11 GPO 2.3 *The encouragement of urban growth and development to those areas where*
12 *land capability, public roads and services can support such growth.*

13 Finding of Consistency: The Project area and vicinity are planned and zoned for forest and
14 range and agricultural uses, not residential development. Plan policies and the zoning code
15 specifically prohibit sprawling residential development in this area of the County, confirming
16 that it is the County's GMA-based policy to avoid extension of urban services in the area.
17 The Project will provide economic development without imposing demands on public
18 utilities and services.

19 GPO 2.5 *Kittitas County should encourage residential and economic growth that will*
20 *minimize the costs of providing public utilities and services.*

21 Finding of Consistency: As referenced in the Findings related to GPO 2.3, the Kittitas
22 Valley Wind Power Project will not impose infrastructure costs on the County, while tax
23 benefits will be significant, unlike residential development in the project area that would
24 create substantial infrastructure costs for the County. (See Exhibit 9a and 9b).

25 GPO 2.6 *Kittitas County will maintain a flexible balance of land uses.*

26 Finding of Consistency: With only 0.4% of the County's total acreage affected by the 6,000
27 acre Project area, and fraction of that (90 acres) occupied by Project improvements, ample
28 opportunity remains for flexibly balancing land use countywide. Moreover, by providing
29 economic incentives for rural landowners within 6,000 acres of the A-20 and FR zones to
30 sustain rural agricultural and natural resource management and development land uses, the
31 Project will help reinforce the County's rural land use policies and help to maintain the
32 Comprehensive plan's flexible balancing of uses.

33 GPO 2.7 *Kittitas County will cooperate with the private sector and local communities*
34 *in actively improving conditions for economic growth and development.*

35

1 Finding of Consistency: The Project is a rural-friendly, agriculture-friendly private sector
2 development, enabling sustainable agricultural and natural resource management uses in the
3 vicinity. The Project provides a unique opportunity for economic growth and development in
4 a rural area, without compromising the County’s GMA-based Comprehensive plan and
zoning code policies and requirements for the protection and preservation of agricultural and
natural resource-based land uses, practices and traditions.

5 *GPO 2.11A Much of Kittitas County receives little natural precipitation and is highly*
6 *susceptible to fire hazard during much of the year. Meanwhile, more people*
7 *are moving to previously uninhabited forest and rural areas. As this number*
8 *increases, the need to provide adequate and efficient fire services to these*
9 *areas also increases.*

10 Finding of Consistency: The Project’s design provides many benefits to fire districts
11 concerned about wildland fire management, including development of access roads that serve
12 as fire breaks; providing on-site equipment that supplements the fire district’s own resources;
13 and controlling site access and reducing the chance of fire. The Applicant has already
14 entered into a fire services agreement with FD #1 that will provide fire protection for the life
15 of the Project, including areas which currently have no fire protection whatsoever. In
16 addition, under the terms of the Fire Services Agreement, the Applicant will purchase a new
17 brush rig to allow the fire district to better fight fires in the area.

18 Private Property and Water Rights

19 The Project conforms to the Private Property and Water Rights Planning Goals, Objectives
20 and Policies defined in 2.2(B) in the following ways:

21 GPO 2.12 – 2.14

22 *GPO 2.12 Kittitas County will administer this Chapter in accordance with the United*
23 *States and State of Washington constitutional provisions for the protection of*
24 *private property rights and provision of due process. As set forth in WAC 365-*
25 *195-720 [Procedural Criteria], the county in administering this ordinance,*
26 *“should refer to all sources at all levels of government, including federal and*
state constitutions, federal and state statutes, and judicial interpretations
thereof.”

27 *GPO 2.13 Should any provisions of this ordinance be in violation of constitutional*
28 *requirements or of recent court decisions, the Planning Director will advise*
29 *the Board of the provisions in violation, and whether the violation is a*
30 *requirement of the State of Washington or a regulation or policy of the county.*
31 *If the violation is a requirement of the state, the Washington State Attorney*
32 *General’s Office will be advised. If the violation is a county requirement, the*

1 Board of County Commissioners will schedule a public meeting to consider
2 removing or amending such section or policy.

3 GPO 2.14 Kittitas County will place a high priority in the Kittitas County
4 Comprehensive plan the following state goal:

5 RCW 36.70A.020(6) Property Rights. Private property shall not be taken for
6 public use without just compensation having been made. The property rights
of landowners shall be protected from arbitrary and discriminatory actions.

7 Finding of Consistency: The Project is proposed in an area that the County has zoned and
8 planned for rural land uses. The Applicant is in partnership, through its land agreements, with
9 private and public property owners comprising the underlying landowners. The Project will
not negatively affect either property values or land sales adjacent to the site. (See Report of
DeLacy, Exhibit 10).

10 The County places a high priority on private property rights. This includes the rights of rural
11 landowners to continue agricultural and natural resource management and development of
12 lands planned and zoned for rural land uses. Wind energy development is a key strategy to
13 enable and encourage ongoing rural land uses, and to provide incentives for rural landowners
14 not to convert their lands to sprawling residential uses. Property rights considerations are a
15 strong argument for approving this Project. The Project's landowners – including long-time
residents interested in continuing family ranching and other agricultural and natural resource
management and development uses – have partnered with the proposed Project to enable
sustainable rural land uses in a large rural area of Kittitas County.

16 As with other infrastructure costs, all of which are borne by the Applicant, the proposed
17 project is one of the few economic development activities that has negligible water use
requirements.

18 2.2.3 Shoreline Land Use

19 2.3(D) Shoreline Land Use

20 Finding of Consistency: The Project has no shoreline issues under 2.3(D).

22 2.2.4 Critical Areas

23 The Project conforms to the Critical Areas Planning Goals, Objectives and Policies defined
24 in 2.2(E) in the following ways:

25 GPO 2.54 – 2.66 Wetlands

26 Finding of Consistency: The Project will not impact wetlands.

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GPO 2.67 – 2.70 Aquifers

Finding of Consistency: The Project will not impact aquifers.

GPO 2.71 – 2.75 Frequently Flooded Areas

Finding of Consistency: The Project will not cause or exacerbate flooding.

GPO 2.76 – 2.85 Geologically Hazardous Areas

Finding of Consistency: As confirmed in the Addendum to the DEIS, the Project is engineered to take into account all geological issues.

GPO 2.86 – 2.91 Fish and Wildlife Habitat Conservation Areas

Finding of Consistency: The Washington Department of Fish and Wildlife (WDFW) position on the Project reflects the Project’s compliance with WDFW’s wind power guidelines and its mitigation of habitat concerns.

2.2.5 Ground Water

2.2F Ground Water

Finding of Consistency: The Project will not have ground water impacts.

Kittitas County Airport

The Project conforms to the Kittitas County Airport Planning Goals, Objectives and Policies defined in 2.2(G) in the following ways:

Finding of Consistency: The project has been thoroughly reviewed for compliance with FAA Part 77 by the FAA.

GPO 2.118 Encourage development projects whose outcome will benefit the significant conservation of farmlands.

Finding of Consistency: The Project will promote both economic development and agricultural land conservation. It will enable the conservation of a 6,000 acre area of Kittitas County, providing incentives for ongoing, sustainable agricultural and natural resource management uses.

GPO 2.122 Look into additional tax incentives to retain productive agricultural lands.

1 Finding of Consistency: Royalty payments from the Project to the landowners are a non-tax
2 incentive to retain productive agriculture use. This Plan policy is met without burden to the
3 taxpayers of Kittitas County – in fact, taxpayers and the County as a whole will significantly

4 **2.2.7 Land Use Plan**

5 The Project conforms to the Resource Lands Goals, Objectives and Policies defined in 2.3(C)
6 in the following ways:

7 *GPO 2.110 Oppose laws and regulations which restrict agriculture, and support laws and
8 regulations which enhance agriculture.*

9 Finding of Consistency: The Project’s royalty and other payments to landowners and the
10 property tax payments to the County and other taxing districts which reduce the tax burden
11 on landowners will greatly enhance the economic viability of ranching and other agriculture
12 operations. Implementation of the Wind Farm Overlay Ordinance within the proposed
13 Kittitas Valley Wind Power Project Subarea Plan boundary would signal the County’s
14 support for laws and regulations which enhance agriculture and other rural uses, in
15 accordance with Comprehensive plan policies. The Project area is planned for and zoned for
16 agricultural, ranching and natural resource management and development activities.
17 Approval of the Project will reinforce the County’s commitment to its GMA-based land use
18 planning goals and policies, will enable landowners within a 6,000-acre rural area to
19 maintain and preserve rural land uses, and will implement policies and regulations intended
20 to protect rural land uses, and to discourage residential sprawl.

21 *GPO 2.114 Look at solutions to the problems of needing to sell house lots without selling
22 farm ground.*

23 Finding of Consistency: The Project turns the decision to sell farm ground for housing into a
24 discretionary act on the part of the landowner, rather than an act of economic necessity,
25 because of the combined benefits of Project payments to landowners and the reduced
26 property tax burden. The Project will provide critical support to the agricultural community,
reinforcing agricultural and natural resource management land uses and rural traditions.

27 *GPO 2.114B Economically productive farming should be promoted and protected.
28 Commercial agricultural lands includes those lands that have the high
29 probability of an adequate and dependable water supply, are economically
30 productive, and meet the definition of “Prime Farmland” as defined under 7
31 CFR Chapter VI Part 657.5.*

32 Finding of Consistency: The Project would be developed on non-irrigated land, most of
33 which is used for cattle grazing. While this land does not meet the definition of Prime
34 Farmland, its ongoing use for cattle operations will constitute a continuation of a productive

1 agricultural or farming use. Removal of only approximately 90 acres of rangeland required
2 for the overall Project footprint would not significantly affect the productivity of cattle
3 grazing operations on this land, and the Project will enable sustained cattle operations within
the Project boundaries. Therefore, the Project is consistent with this land use policy.

4 *GPO 2.118 Encourage development projects whose outcome will be the significant
5 conservation of farmlands.*

6 Finding of Consistency: The Project will encourage both economic development
opportunities and agricultural/farmland and natural resource management land conservation.

7 *GPO 2.122 Look into additional tax incentives to retain productive agricultural lands.*

8 Finding of Consistency: Royalty payments from the Project to the landowner are a non-tax
9 incentive to retain productive agriculture use.

10 **2.3 Housing Element**

11 Many of the County's housing goals seem to seek a balance between preserving the County's
12 rural character; minimizing infrastructure costs borne by the County; and supporting
13 economic opportunities. Approving the Kittitas Valley Wind Power Project would advance
14 many of those housing goals. The Project conforms to the Housing Goals, Objectives and
Policies defined in 2.3(C) in the following ways:

15 *GPO 3.5 Encourage residential development close to employment opportunities and
16 needed services to reduce vehicular traffic and related air quality problems.*

17 Encouraging residential development close to employment opportunities suggests that the
18 Project site should not be a focus for residential development given its relatively remote
location.

19 *GPO 3.6 Provide for future populations while protecting individual property rights.*

20 As discussed above, the rural landowners who are partnering with the Applicant seek the
21 protection of their rights to use their lands as planned for and zoned by the County in
compliance with the GMA, without infringement by incompatible residential development.

22 **2.4 Capital Facilities Element**

23 As a utility facility, the Kittitas Valley Wind Power Project is in conformance with
24 this aspect of the Capital Facilities element:

25 *GPO 5.110B Electric and natural gas transmission and distribution facilities may be sited
26 within and through areas of Kittitas County both inside and outside of*

1 *municipal boundaries, UGAs, UGNs, Master Planned Resorts, and Fully*
2 *Contained Communities, including to and through rural areas of Kittitas*
3 *County.*

4 Finding of Consistency: To the extent that the underground electrical lines and
5 overhead electrical collection lines, which are essential elements of the Project, are
6 considered electric transmission and/or distribution facilities under the Comprehensive plan,
7 this Policy allows their placement in rural areas of the County.

6 **2.5 Utilities Element**

7 Finding of Consistency: Since wind farms and other electrical generation facilities are
8 considered to be utility facilities, not industrial uses, the relationship of the Project to
9 industrial land use policies in the Comprehensive plan is not addressed.

10 The Washington Utilities and Transportation Commission defines electricity, along with
11 standard telephone, as a critical service which utilities must extend or add to as needed.
12 While the WUTC provides the principal regulatory role, the Growth Management Act
13 promotes coordination and cooperation between jurisdictions and utility providers. As stated
14 in the Comprehensive plan, power used by Kittitas County residents is currently imported
15 from other areas. It is the County's relatively unique combination of existing transmission
16 and strong, predictable winds that attract wind project investment and offers the potential to
17 turn the County into a net exporter of electricity to the region.

18 The Utilities section of the Comprehensive plan identifies the general location and capacity
19 of all existing and proposed utilities, including but not limited to, electrical lines,
20 telecommunication lines, and natural gas lines. Generally, the goals, policies, and objectives
21 seek to promote the maintenance of current information on existing and proposed facilities;
22 plan for expansion or improvement of utility systems; encourage coordination between
23 jurisdictions and utility providers; and ensure the proper placement and appropriateness of
24 utility siting.

25 The Project would be located within the Rural Area, which is consistent with the Plan's
26 policies, and would produce electricity to meet regional energy demands. A number of
27 utilities in the region, including Puget Sound Energy, Inc. ("PSE"), Avista, and PacifiCorp,
28 have issued requests for proposals for renewable energy resources ("RFPs") to which the
29 Applicant has responded or intends to respond with proposals for the Project. Chapter 1 of
30 the Draft EIS also discusses the plans of these utility companies for meeting the region's
31 projected energy demand.

32 The proposed Project would connect to existing electric transmission lines; proximity to a
33 transmission line is a key criterion for siting wind energy facilities (see the discussion of
34 alternative sites in Chapter 2 of the Draft EIS). Electricity generated by wind turbines would
35 be collected through cables that run above ground and underground and feed all of the power

1 to the step-up substation(s) in the main Project area. The Project will require only 2 miles of
2 overhead 34.5kV electrical collection lines to collect all of the power from the turbines which
3 will terminate at the main substation(s) as shown in Exhibit 2. The underground collector
4 cables that connect each wind turbine and strings of turbines will run within the Project area
5 at 34.5 kilovolts or lower. The Project plans are consistent with the policies that promote
6 coordination with utility providers, and the location of electric transmission lines in rural
7 areas away from developed urban areas.

8 *GPO 6.7 Decisions made by Kittitas County regarding utility facilities will be made in
9 a manner consistent with and complementary to regional demands and
10 resources.*

11 Finding of Consistency: The proposed Project would draw upon a natural renewable county
12 resource (wind) to provide energy to meet the regional renewable power demands. Therefore,
13 development of the Project would be consistent with, and complementary to, regional utility
14 demands and local resources.

15 *GPO 6.8 Additions to and improvements of utilities facilities will be allowed to occur at
16 a time and in a manner sufficient to serve growth.*

17 Finding of Consistency: As discussed above, the Project is desirable to the public
18 convenience to serve electrical power load growth of a number of regional utilities.

19 *GPO 6.9 Process permits and approvals for all utility facilities in a fair and timely
20 manner, and in accordance with development regulations that ensure
21 predictability and project concurrency.*

22 Finding of Consistency: The proposed Project would be developed in accordance with all
23 local, regional, and state wind power development regulations and would therefore be
24 consistent with this policy.

25 *GPO 6.10 Community input should be solicited prior to county approval of utility
26 facilities which may significantly impact the surrounding community.*

Finding of Consistency: The County, EFSEC and the Project developer have solicited
extensive community input on the proposed Project over a period of three years.

*GPO 6.18 Decisions made regarding utilities facilities should be consistent with and
complementary to regional demand and resources and should reinforce an
interconnected regional distribution network.*

Finding of Consistency: This policy is similar to GPO 6.7. The proposed Project would
significantly reinforce an interconnected regional power transmission and distribution
network by connecting to Puget Sound Energy's (PSE) and/or Bonneville Power

1 Administration's (BPA) electric power grid. Therefore, the Project is consistent with this
2 policy.

3 *GPO 6.21 Avoid, where possible, routing major electric transmission lines above 55 kV
4 through urban areas.*

4 Finding of Consistency: The Project will require only 2 miles of overhead 34.5kV electrical
5 collection lines to collect all of the power from the turbines which will terminate at the main
6 substation(s) as shown in Exhibit 2. The underground collector cables that connect each
7 wind turbine and strings of turbines will run within the Project area at 34.5 kilovolts or lower.
8 Since the overhead electrical collection lines and underground collector cables will be less
9 than 55 kilovolts and will not run through urban areas, the Project is consistent with this
10 policy.

9 *GPO 6.32 Electric and natural gas transmission and distribution facilities may be sited
10 within and through areas of Kittitas County both inside and outside of
11 municipal boundaries, UGAs, UGNs, Master Planned Resorts, and Fully
12 Contained Communities, including to and through rural areas of Kittitas
13 County.*

12 Finding of Consistency: This policy is identical to Policy GPO 5.11B and has been
13 addressed previously.

14 The Comprehensive plan was amended in December 2002 to include a provision specifically
15 for wind farms, as follows:

16 *GPO 6.34 Wind farms may only be located in areas designated as Wind Farm Resource overlay districts
17 in the Comprehensive plan. Such Wind Farm Resource overlay districts need not be
18 designated as Major Industrial Developments under Chapter 2.5 of the Comprehensive plan.*

17 Finding of Consistency: This policy requires that as a precondition of approval, the
18 area where the Project is proposed must be designated a Wind Farm Resource overlay
19 district. Such a designation requires the Applicant to seek a subarea comprehensive plan
20 amendment. A docketing application for a comprehensive plan amendment has been
21 submitted along with a request for rezone in the Development Activities Application
22 submitted to the County and deemed complete on October 17, 2005 by the County staff. It is
23 anticipated that the County will process both requests concurrently, pursuant to the
24 requirements of Kittitas County Code Chapter 17.61A.040.

23 **2.6 Rural Lands Element**

24 Chapter 8, Section 8.5, of the Comprehensive plan states, "Rural lands in Kittitas County are
25 now, and have historically been, a mix of resource lands, rural neighborhoods, and varied
26 developments scattered throughout the county." The Plan's goals, policies, and objectives
(GPOs) for land uses on rural lands are "established in an attempt to prevent sprawl, direct
growth toward the Urban Growth Areas and Nodes, provide for a variety of densities and

1 uses, respect private property rights, provide for residences, recreation, and economic
2 development opportunities, support farming, forestry and mining activities, show concern for
3 shorelines, critical areas, habitat, scenic areas, and open space while keeping with good
4 governance and the wishes of the people of Kittitas County and to comply with the GMA and
5 other planning mandates.” As documented below, by showing consistency with the specific
6 GPOs implementing this general policy statement, the Project meets these policy objectives.

7 The following GPOs apply to the development of wind resource farms:

8 **2.6.1 General Finding of Consistency with Rural Lands Policies**

9 The proposed Project would be consistent with rural lands policies that promote continued
10 diversity in rural uses and densities, conservation of rural lands, and development of
11 resource-based industries and processing.

12 *GPO 8.5 Kittitas County recognizes and agrees with the need for continued diversity in
13 densities and uses on Rural Lands.*

14 Finding of Consistency: The Project will not change densities on Rural Lands. It will not
15 change or preclude the existing open space, agricultural uses or natural resource
16 management, development, extraction and production uses. It will, however, introduce a
17 clean, natural resource-based land use in a rural location. By the introduction of this use in
18 this area of the County, the Kittitas Valley Project will help to diversify the County’s rural
19 economy, and strengthen and enable sustained rural land uses within the 6,000 acre Project
20 area.

21 *GPO 8.7 Private owners should not be expected to provide public benefits without just
22 compensation. If the citizens desire open space, or habitat or scenic vistas
23 that would require a sacrifice by the landowner or homeowner, all citizens
24 should be prepared to shoulder their share of the sacrifice.*

25 Finding of Consistency: The Project will be located primarily on private open
26 rangeland to be leased or purchased by the Applicant. Parts of the Project are proposed on
land owned by the Washington Department of Natural Resources (DNR). Exhibits 3b and 3c
of the Development Activities Application of October 14, 2004 contain Landowner “Consent
to Application” forms signed and executed by all landowners involved with proposed Project
facilities on their property. This comprehensive plan policy suggests that landowners should
not be expected to forgo the opportunity to develop their properties because of potential
subjective visual effects within a limited area of the County. Under this Plan Policy, such
preservation of “scenic vistas” would be considered for “public benefit.” The applicability of
this Policy is particularly pronounced in this area of the County, where the rural landowners
have a right to rely on the County’s GMA-based planning and zoning, and have a right to
expect that the County will enable and encourage ongoing, sustained rural land uses, without
infringement by incompatible residential sprawl.

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GPO 8.9 Projects or developments, which result in the significant conservation of rural lands or rural character, will be encouraged.

Finding of Consistency: The Project is compatible with traditional rural land uses and is an alternative to the development of residential subdivisions or other uses which do not preserve open space or encourage rural land conservation. The Project will provide significant economic incentives for ongoing rural/agricultural land uses. Through economic incentives to participating landowners, the KV Project will effectively preserve a 6,000 acre area for rural uses and rural character, fulfilling the promise of this Plan Policy.

GPO 8.11 Existing and traditional uses should be protected and supported while allowing as much as possible for diversity, progress, experimentation, development, and choice in keeping with the retention of Rural Lands.

Finding of Consistency: Traditionally, the Project area and surrounding lands have been used for cattle grazing, recreation, hunting and natural resource development, extraction and production, all of which are compatible with the Project. Land uses of the area surrounding the Project are illustrated on a map contained in Exhibit 4. Generation of electricity using wind power is a relatively new, rural land use which generates revenues to landowners and the public through taxes and royalty payments to state agencies (WDNR). In an area such as the Project site, this use is compatible with the traditional land uses, enabling the lands to retain their rural character, as opposed to residential development. The development of the Property fulfills the Plan Goal of “allowing as much as possible for diversity, progress, experimentation, development, and choice in keeping with the retention of Rural Land.” In the Northwest, wind energy development is a relatively new rural, natural resource-based land use. Throughout the Northwest, wind energy generation has proved itself as a highly successful, progressive means of diversifying and developing rural natural resource industries and economies, fully compatible with ongoing cattle and other agricultural operations. It is a key choice in retaining rural land uses and traditions.

GPO 8.24 Resource activities performed in accordance with county, state and federal laws should not be subject to actions as public nuisances.

Finding of Consistency: The proposed Project, to the extent it is a “resource activity” because it uses the area’s wind resource, would be constructed and operated in accordance with all county, state, and federal laws, and thus is consistent with this policy.

GPO 8.42 The development of resource based industries and processing should be encouraged.

Finding of Consistency: Wind energy production is a type of resource-based industry in that it uses a natural renewable resource, the wind. As stated above, the proposed Project is consistent with this policy encouraging such industries.

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2 GPO 8.62 *Habitat and scenic areas are public benefits that must be provided and*
3 *financed by the public at large, not at the expense of individual landowners*
4 *and homeowners.*

4 Finding of Consistency: This policy is similar to GPO 8.7, and implies that
5 landowners should not be expected to forgo the opportunity to develop wind generation on
6 their properties due to potential, subjective visual effects.

6 *“Other Business Uses” or Rural Lands*

7 The Comprehensive plan, page 183, Paragraph 8.5(D), “Other Business Uses,” states that
8 supplemental income from “outside sources” and other natural resource operation uses are
9 necessary in rural areas for the support and continuation of natural resource activities and
10 operations:

10 *“The economy of our rural community has traditionally been based on natural*
11 *resource activities and Kittitas County encourages and supports their continuation in*
12 *Rural Lands.... Economically viable farming and logging may occur with or beyond*
13 *the state designated areas but more and more it is necessary to supplement income*
14 *from outside sources in order to support natural resource operations. Other*
15 *businesses and economic growth can be realized without sacrificing our rural*
16 *character.”*

15 Finding of Consistency: This Policy is precisely on point in establishing a fundamental
16 planning foundation for the approval of the KV Project. The proposed Project is an
17 economically viable facility which converts a renewable natural resource, the wind, into
18 much needed and desired electrical power while preserving the rural character of a large land
19 area consisting of approximately 6,000 acres. Within this Rural Lands area of the County,
20 rural landowners who have struggled to maintain their rural traditions and uses, will be
21 provided with a substantial incentive for ongoing, sustainable natural resource use of their
22 lands. The County’s support for the KV Project will enable “continuation” of natural
23 resource activities on Rural Lands designated for natural resource management and
24 development. For this reason, the Project is consistent with, and implements these provisions
25 in the County Comprehensive plan.

22 **2.7 Conclusions of Law Regarding Consistency with Comprehensive**
23 **plan Policies**

24 A. Based upon the Findings of Consistency, the BOCC concludes that the Wind Farm
25 Resource Sub Area Plan will be consistent with the overall policies of the County’s
26 Comprehensive plan, as well as the specifically applicable GPOs, including the Land Use,
Capital Facilities, Utility, and Rural Lands Policies. In particular, at the proposed Project
site, located within an area planned, zoned and used for cattle operations, agricultural, natural

1 resource management, development, extraction and production, and forest/range uses, the
2 Project will provide tangible benefits to the rural community, including economic
3 diversification and a significant addition to the property tax base and creation of new jobs.

4 B. Based upon the Project’s consistency with the GPOs, the BOCC concludes that the
5 Project is appropriately proposed in an area of the County that is suitable for designation of a
6 Wind Farm Overlay, and that the Comprehensive plan should be amended to reflect this
7 designation.

8 C. Due to the Project’s consistency with the County’s GPOs, the BOCC concludes that
9 criteria requiring that the conditional use permits, the sub-area plan amendment and rezone
10 be consistent with the Comprehensive plan are satisfied.
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1 **3. Compliance with Zoning Code Provisions**

2 The Zoning Code implements the Comprehensive plan and regulates the use and
3 development of all property within the unincorporated area of Kittitas County. The KV
4 Project site is located within Kittitas County’s designated Rural Area, in areas zoned
5 Agriculture-20 (“A-20”) and Forest & Range (“FR”). Wind farms are an allowed use within
6 these rural zones through application of the County’s Wind Farm Resource Overlay Zone,
7 modification of the Comprehensive plan Land Use map, and execution of a development
8 agreement (KCC Chapter 17.61A). Because Chapter 17.61A technically requires a “rezone”
9 to implement the overlay zone, it is possible that an Applicant must also satisfy the criteria in
10 KCC Chapter 17.98.020E.²⁷

11 The overlay zone permits wind energy facilities in addition to all uses permitted in the
12 underlying zoning classification; it does not change the underlying land use or zoning. The
13 underlying zoning designations are explicitly intended to protect the rights of landowners
14 engaged in agriculture and natural resource development and production activities, and to
15 prohibit the encroachment of nonagricultural land uses such as sprawling residential uses,
16 that impair farming, ranching and other natural resource management, development and
17 production uses.

18 Coupled with the agricultural and natural resource management zoning designations, the
19 intent of the Kittitas County Code’s wind farm provisions is to provide for the recognition
20 and designation of properties located in rural areas that are, as a matter of County legislative
21 policy and enactment, suitable for wind energy production, while protecting the health,
22 welfare, safety and quality of life of the general public and ensure that the Project is
23 compatible with land uses in the vicinity. As a matter of policy, the County has determined
24 that the A-20 and FR zones are generally suitable for wind energy facilities. The Kittitas
25 County zoning code defines the purpose and intent of the underlying zoning districts as
26 follows:

18 **Chapter 17.29**

19 **A-20 - AGRICULTURAL ZONE**

20 **17.29.010 Purpose and intent.**

21 The agricultural (A-20) zone is an area wherein farming, ranching and rural life styles
22 are dominant characteristics. *The intent of this zoning classification is to preserve
fertile farmland from encroachment by nonagricultural land uses; and protect the*

23 ²⁷ In the Applicant’s view, the implementation of an “overlay” zone is legally akin to
24 approval of a planned unit development within a zoning district where planned unit developments are
25 allowed. The criteria are typically those relevant to the particular overlay, *not* traditional rezone
26 criteria. This is particularly true in situations such as here, where the use does not, harm or impair
underlying permitted rural land uses. As discussed below, wind farms provide important economic
incentives and supplemental income sources to facilitate and enable ongoing agricultural and natural
resource management uses within agricultural and forest and range zones.

1 *rights and traditions of those engaged in agriculture.* (Ord. 83-Z-2 (part), 1983; Res.
2 83-10, 1983). [Emphasis added].

3 **Chapter 17.56**
4 **FOREST AND RANGE ZONE**

5 **17.56.010 Purpose and intent.**

6 The purpose and intent of this zone is to provide for areas of Kittitas County wherein
7 *natural resource management is the highest priority and where the subdivision and
8 development of lands for uses and activities incompatible with resource
9 management are discouraged.* (Ord. 92-6 (part), 1992). [Emphasis added].

10 The County’s Growth Management Act (GMA) planning effort and policies define the entire
11 Project area and most surrounding areas as protected for agricultural and natural resource
12 management, development, extraction and production activities. County GMA-based policy,
13 as defined by County plans and zoning code, is to prohibit sprawling suburban housing
14 developments and to encourage rural activities within the vicinity of the KV Project site. The
15 minimum lot sizes in both the A-20 and FR zones are 20 acres. Land uses that are
16 incompatible with agricultural uses, including cattle operations, natural resource
17 management, development and production, by definition, do not comply with the County’s
18 plan and zoning, nor do they comply with the mandates of the GMA.

19 A key legal and policy requirement in the County’s rural zones and associated
20 Comprehensive plan policies is the protection of the rights and traditions of those engaged in
21 agricultural uses and practices. In developing this Project, the Applicant has partnered with
22 agricultural and forest and range landowners in pursuit of their rights to use their lands in
23 accordance with this vision and policy. The Code explicitly protects these landowners
24 against infringement of these rights by incompatible sprawling residential development.
25 While the preservation of the rights of agricultural landowners is paramount, to achieve
26 compatibility with scattered low-density residential development in the vicinity, and to better
27 satisfy “compatibility” criteria addressed below, the Applicant has significantly down-sized
28 and modified the Project design and layout to further minimize and mitigate potential
29 impacts below those identified in the DEIS. This includes reducing the number of wind
30 turbine generators from 150 to a maximum of 80, increasing turbine setbacks, eliminating
31 turbines in the areas with greatest potential for visual impacts, minimizing “shadow flicker”
32 impacts, further reducing noise impacts, and significantly reducing the number of required
33 FAA nighttime safety lights and elimination of daytime FAA lights.

34 **3.1 Findings of Compliance with Zoning Code Provisions**

35 **KCC CH. 17.61A – WIND FARM RESOURCE OVERLAY ORDINANCE**

36

1 **3.1.1 Definition of a “Wind Farm”**

2 As provided in KCC 17.61A.020, a “wind farm” is defined to mean “a single wind turbine
3 exceeding 120 feet in height” above grade or more than one wind turbine of any proposed
4 size” “and/or constructed by the same person or group of persons on the same or adjoining
5 parcels.” The code does not prohibit irregular boundaries.

6 Finding of Compliance: The Kittitas Valley Project proposes a maximum of 80 wind
7 turbines on one single, consolidated, contiguous site or Project Area comprised entirely of
8 adjoining parcels as illustrated in Exhibit 2. Therefore, the Project, as proposed, is consistent
9 with this provision. The proposed sub-area plan and zoning overlay boundaries are depicted
10 in Exhibit 6.

11 **3.1.2 Inclusion of Support Structures and Related Improvements:**

12 KCC 17.61A.020 provides that a "wind turbine" consists of "turbine apparatus and any other
13 buildings, support structures or other related improvements necessary for the generation of
14 electric power." KCC 17.61A.030 provides that Wind Farms are a permitted use in the Wind
15 Farm Overlay so long as they meet the approval criteria of KCC 17.61A.040. The Project
16 contains essential, related support facilities and improvements as follows:

- 17 1. underground and overhead electrical collection cables;
- 18 2. two electrical substations (the Project proposes up to two step-up/interconnection
19 substations within the boundaries of the requested subarea and overlay zone – one
20 enabling an interconnect into the BPA transmission system, and the other enabling
21 interconnection into the Puget Sound Energy (PSE) transmission system); and
- 22 3. an operations and maintenance facility, proposed within the subarea planning
23 boundary.

24 These essential, related and supporting facilities for the Wind Farm Project are shown in their
25 respective locations in Exhibit 2.

26 Finding of Compliance: At the January 25, 2005 public hearing, the BOCC ruled that the
27 provisions of KCC 17.61A.020, 030 and .040 together such that all necessary Wind Farm
28 improvements and support structures, in this case including the substations and electrical
29 collection lines, whether located within or outside the boundaries of the wind farm subarea
30 and overlay zone, shall be permitted as components of the Wind Farm, so long as they meet
31 the criteria of KCC 17.61A.040. In this case, these facilities are proposed within the subarea
32 plan boundary. As further confirmed in the Wild Horse Wind Power Project decision, the
33 BOCC's intent in enacting KCC 17.61A was to create one consolidated review and
34 decisionmaking process for Wind Farms and their support structures and improvements to
35 replace the prior system of conditional use permits. Accordingly, all components of Wind
36 Farms, including the Kittitas Valley Project, are to be reviewed by the BOCC subject to the

1 approval requirements and restrictions set forth in KCC 17.61A.040. Separate conditional
2 use permits are not required.

3 **3.1.3 Approvals Required for Wind Farm Resource Overlay (WFRO) Zone:**

4 KCC 17.61A.040 requires concurrent approval of the following by the Board of
5 County Commissioners in order to authorize construction of a wind farm;

- 6 Development Agreement
- 7 Site Specific Subarea Comp Plan Amendment to WFRO
- 8 Site Specific Rezone to WFRO
- 9 Wind Farm Resource Development Permit

10 Finding of Compliance: The Applicant has included requests for all of these above listed
11 elements under one consolidated Development Activities Application accepted as a complete
12 application by Kittitas County on October 17, 2005 and is therefore consistent with this
13 provision.

14 As provided in KCC 17.61A.040, these County's approvals shall only be made if the BOCC
15 determines that:

- 16 The proposal is essential or desirable to the public convenience;
- 17 The proposal is not detrimental or injurious to the public health, peace or safety or to the
18 character of the surrounding neighborhood; and
- 19 The proposed use at the proposed location(s) will not be unreasonably detrimental to the
20 economic welfare of the county and it will not create excessive cost for facilities and service.

21 ***"The proposal is essential or desirable to the public convenience"***

22 Finding of Compliance: A number of utilities in the region, including Puget Sound Energy,
23 Inc. ("PSE"), Avista, PGE and PacifiCorp, have issued requests for proposals ("RFPs") for
24 renewable energy resources to which the Applicant has responded with proposals for the
25 Project. PSE, as a regulated utility in the State of Washington, prepared a Least Cost Plan
26 ("LCP") in response to state requirements that, among other things, examines PSE's electric
27 resource needs over the next twenty years and reviews the mix of conservation and supply
28 resources to best meet those needs. The LCP was submitted to the Washington Utilities and
29 Transportation Commission ("WUTC") on April 30, 2003, an update was submitted in
30 August 2003 and the WUTC formally accepted PSE's LCP on October 3, 2003. Following
31 the resource acquisition strategy set forth in its LCP, PSE conducted a resource acquisition
32 process which included a RFP for Wind Power Resources and a RFP from All Generation
33 Sources.

34 The Applicant submitted proposals to PSE in response to both RFPs and after extensive
35 evaluation, PSE concluded that the Wild Horse Project and the Hopkins Ridge Project in
36 Columbia County were "least cost" resources, compared to other generation sources. This

1 determination was made by comparing wind generation with other generation sources.
2 Exhibit 9d illustrates the cost of wind power compared to other generation resources based
3 on the results of project proposals submitted to PSE through its open and formal public RFP
4 process. Based upon this “least cost” determination, PSE purchased all of the Wild Horse
5 Wind Power Project, and a portion of the Hopkins Ridge Project. These Projects will help
6 PSE meet its obligations to the public and its customers in accordance with its “Least Cost
7 Plan,” adopted by the Washington Utility and Transportation Commission (UTC). Like the
8 Wild Horse and Hopkins Ridge Projects, the KV Project is anticipated to provide significant
9 local and regional benefits, including helping the region meet long-term energy generation
10 needs, through non-polluting, renewable energy. Wind energy projects are particularly
11 important to the public in the Northwest, by discouraging and offsetting coal and other fossil
12 fuel generation, and by helping to offset the growing demand on the hydroelectric generation
13 system, which is threatened by environmental restrictions related to fish habitat protection.
14 The KV Project is expected to provide additional benefits that are desirable to the public
15 convenience, discussed below. Based on these Findings, the Project is desirable for the
16 public convenience.

11 The Applicant’s proposal locates approximately 2 miles of 34.5kV overhead electrical
12 collector lines and two electric substations on private property which has been secured under
13 option by the Applicant illustrated on a the tax parcel map contained in Exhibit 2. The
14 substations and overhead collection lines are essential supporting facilities for the Project.
15 As a means of enabling operation of the Project and delivery of electric power to the grid,
16 these facilities are desirable to the public convenience, as described in Section 2.5 of this
17 document under Findings of Consistency with Utility Policies under the Comprehensive plan.
18 The collector lines and electrical substations are necessary components of a Wind Farm
19 Project which is desirable for the public convenience.

16 *“The proposal is not detrimental or injurious to the public health, peace or safety or to the
17 character of the surrounding neighborhood”*

18 **FINDINGS OF COMPLIANCE:** The Project is proposed in an area of the County
19 dominated by agricultural and natural resource management, production and extraction land
20 uses, but also under pressure to convert land uses to sprawling residential uses discouraged
21 by Comprehensive plan policies and zoning code requirements. The Project would be
22 situated within a “utility corridor” located on agricultural and forest/range lands. The
23 “viewscape” is dominated by large electrical transmission corridor facilities. The Project is
24 expected to provide rural landowners with much-needed financial support and incentives to
25 maintain rural/agricultural uses, practices and traditions. By providing this support, the KV
26 Project is expected to facilitate and help the County implement zoning code requirements and
27 Comprehensive plan policies to discourage rural sprawl. With rural landowners “buffered”
28 from cyclical market conditions through the underpinning of a steady stream of income
29 derived from the compatible “wind farming” alongside rural agricultural and natural resource
30 management uses, the County will be under significantly less pressure to allow sprawling

1 residential development that conflicts with GMA requirements, local Plan policies, and
2 zoning code requirements.

3 Density, number, and size: The Project is designed to economically maximize wind
4 energy capture within the area available for development secured under lease and
5 options for lease by the Applicant. In this agricultural-zoned, rural area of the County,
6 away from urban populated areas, the density, number and size of the Project and its
7 components (including turbines) will not be detrimental or injurious to the public
8 health, peace or safety or to the character of the surrounding neighborhood. Through
9 Project redesign, the Applicant has further reduced the number of turbines, pulled away
10 from low-density populated areas to the north of the Project boundary, and significantly
11 reduced the number of FAA lights, and eliminated daytime FAA lighting. As described
12 in the December, 2005 Addendum to DEIS, the Project redesign has resulted in a
13 further minimization and mitigation of environmental impacts. (See Report of
14 Priestley, Exhibit 11).

15 Setbacks: The maximum required construction set-back distance, under current County
16 zoning for the Project area, is 25 feet from property lines.

17 The Kittitas Valley Project is proposed within a large, single, consolidated land area.
18 The Development Activities Application was proposed with the knowledge and written
19 consent of all landowners involved with turbines or other facilities proposed on their
20 property. The Applicant has proposed to incorporate setbacks from property lines and
21 houses which are well in excess of the setback requirements set out under current
22 County zoning for any other type of land use. The wind turbines are proposed in
23 locations providing a minimum of 1,000 feet from residences of non-participating
24 landowners and 541 feet from all property lines, except where the Applicant has
25 entered into an easement agreement with the affected property owner. In the event the
26 Applicant wished to install wind turbines closer than 541 feet to the Project boundary,
the Applicant would be required to obtain an easement or covenant that restricts the
construction of any new residence within 541 feet of any turbine as measured from the
nearest turbine tower center point to any such new residence. Exhibit 2 illustrates
landownership of participating and non-participating landowners.

All turbines will be set back from publicly traveled roadways (public and private) by
the distance from the ground elevation to turbine tip. This setback greatly exceeds
setbacks required in Kittitas County for cellular towers, telephone poles, utility poles,
transmission towers, or any other facilities. This setback would address any imaginable
safety-related issues raised by Project opponents.

Location: As explained above, the Project is designed to be compatible with
surrounding land uses, particularly agricultural land uses. The land surrounding the
Project Area is not planned or zoned for urban residential use, and residential sprawl is
explicitly prohibited by the zoning code. It is zoned Forest & Range and A-20. In

1 accordance with Comprehensive plan policies and zoning code requirements, the
2 Applicant anticipates that adjacent and surrounding lands will continue to be used
3 principally for rural/agricultural uses, including natural resource extraction,
development and production.

4 Exhibit 2 contains a map illustrating the location of the Project and related facilities
5 with respect to the nearest existing residences.

- 6 • Noise Impacts: As documented in the DEIS and Addendum, noise levels will
7 be well within the state noise regulation requirements and will not create
8 probable, significant adverse impacts. (See Report of Baker/Bastasch, Exhibit
9 12).
- 10 • “Ice Throw” and “Blade Throw”: Due to the Project and equipment design,
11 and due to the fact that the Application is proposing setbacks of at least 1000
12 feet from any non-participating residences and at least tip-height from any
13 public roads, private roads, and property lines, the risk that “ice throw” from
14 turbine blades or the “throwing” of blades themselves endangering any
15 members of the public is very remote. (See Reports of Kammen and Bernay,
16 Exhibits 13 and 14).
- 17 • Shadow Flicker: The Applicant has provided a comprehensive analysis of
18 “shadow flicker” impacts associated with the Project. This analysis has been
19 included within the December 2005 Addendum to the DEIS, Section 3.4.
20 That analysis demonstrates that shadow flicker will occur mostly in the dawn
21 and twilight hours, and that due to the revised layout, the duration for most
22 “receptors” will be reduced. Due to the nature of shadow flicker, and the
23 duration associated with the KV Project, the DEIS and the Addendum to the
24 DEIS conclude that shadow flicker is not a significant impact. (See Report of
25 Nielson, Exhibit 15).
- 26 • “Tower Collapse”: Tower collapse is a very remote risk. However, due to the
project and equipment design, and due to the fact that the Applicant is
proposing setbacks of at least the height of the tower plus the blade (overall
tip-height) from any public roads, private roads, and non-participating
residences, and the fact that no such injury has ever been reported from any
other operating wind farm anywhere in the world, there is no real risk that
members of the public would be injured by “tower collapse.” (See Reports of
Kammen and Bernay, Exhibits 13 and 14.)

Support Facilities: The electrical collection lines and substations are not detrimental
or otherwise injurious to the public health, peace or safety. Appropriate security measures
will be implemented to prevent injury to the health, peace or safety of the public. The
proposed support facilities and improvements are not injurious to the character of the
surrounding neighborhood. The general pattern of land use in the area is rural in nature, with

1 scattered homes and some low-density residential development. The area is already
2 dominated by multiple rows of large steel and wood transmission towers. Exhibit 4 contains
3 a map illustrating the land uses of areas surrounding the Project and Exhibit 2 illustrates the
4 location of residences with respect to the Project. The proposed support facilities are
5 compatible with this rural character, and are situated to avoid urban areas. Additional
6 information regarding the lack of detrimental impacts for each of the support facilities is as
7 follows:

8 Electrical Collection Lines and Substations:

9 **THE APPLICANT'S PROPOSAL LOCATES A 2 MILE STRETCH OF 34.5KV**
10 **OVERHEAD ELECTRICAL COLLECTION LINES AND UP TO TWO ELECTRIC**
11 **SUBSTATIONS ON PRIVATE PROPERTY WHICH HAS SECURED UNDER**
12 **OPTION BY THE APPLICANT ILLUSTRATED ON THE TAX PARCEL MAP**
13 **CONTAINED IN EXHIBIT 2. THE SUBSTATIONS FACILITIES ARE NOT**
14 **DETRIMENTAL OR INJURIOUS TO THE PUBLIC HEALTH, PEACE OF SAFETY**
15 **BECAUSE THEY WILL BE FENCED AND SECURED. THE ELECTRIC**
16 **SUBSTATIONS WILL BE LOCATED WITHIN THE OVERLAY ZONE**
17 **BOUNDARY, AND WILL NOT HAVE ANY NEGATIVE IMPACT ON THE**
18 **PUBLIC. THEY WILL BE IN THE IMMEDIATE VICINITY OF A SIGNIFICANT**
19 **EXISTING UTILITY CORRIDOR. THE 34.5KV OVERHEAD COLLECTION**
20 **LINES WILL BE CONSTRUCTED DIRECTLY ADJACENT TO THE EXISTING**
21 **PUGET SOUND ENERGY (PSE) TRANSMISSION LINES (230KV) ON 60 FOOT**
22 **TALL H-FRAME WOOD POLES AS ILLUSTRATED IN THE PROJECT**
23 **DESCRIPTION CONTAINED EXHIBIT 3 AND WILL BE SIMILAR TO THE**
24 **EXISTING PSE LINES THAT CURRENTLY RUN WEST TO EAST THROUGH**
25 **THE MIDDLE OF THE PROJECT SITE AREA. THESE ESSENTIAL FACILITIES**
26 **ARE PROPOSED IN AN AREA OF THE COUNTY WHERE POWER POLES AND**
TRANSMISSION FACILITIES ALREADY EXIST.

18 **ADDITIONALLY, ELECTRICAL SUBSTATIONS ARE DEFINED AS "SPECIAL**
19 **UTILITIES." IN ACCORDANCE WITH THE STANDARDS FOR "SPECIAL**
20 **UTILITIES," THE SUBSTATIONS PROPOSED BY THE APPLICANT UTILIZE**
21 **INDUSTRY STANDARDS FOR THE DELIVERY OF WIND-POWERED**
22 **ELECTRICITY AND DO SO IN A MANNER THAT DOES NOT INTRODUCE**
23 **HAZARDOUS MATERIALS AND MINIMIZES THE RISKS OF ACCIDENT OR**
24 **DAMAGE FROM SUCH MATERIALS. ALL SUBSTATION TRANSFORMERS**
25 **WILL CONTAIN NON-HAZARDOUS MINERAL OIL. ADDITIONALLY,**
26 **SUBSTATION TRANSFORMERS WILL BE DESIGNED WITH A SPILL**
CONTAINMENT SYSTEM INCLUDING A NON-PERMEABLE MEMBRANE
BURIED BELOW GRADE AND/OR A CONCRETE PERIMETER TROUGH OR
SURROUNDING BERM AND AN OIL LEVEL DETECTION SYSTEM TO
PREVENT RELEASE OF OIL IN THE UNLIKELY EVENT OF A SPILL. DURING
CONSTRUCTION, A DETAILED SPILL PREVENTION PLAN IN ACCORDANCE

1 WITH STANDARD BMPS, AS REQUIRED BY THE DEPARTMENT OF ECOLOGY
2 (DOE), WILL BE IMPLEMENTED TO MINIMIZE SPILL RISKS AS SET FORTH
3 AGREEMENT.

4 ALL PROJECT ELECTRICAL FACILITIES INCLUDING THE 34.5KV
5 OVERHEAD COLLECTOR LINE AND SUBSTATIONS WILL BE DESIGNED AND
6 STAMPED BY EXPERIENCED AND CERTIFIED WASHINGTON STATE
7 REGISTERED PROFESSIONAL ENGINEERS IN COMPLIANCE WITH
8 NATIONAL ELECTRIC AND SAFETY CODE (NEC), INSTITUTE FOR
9 ELECTRICAL AND ELECTRONIC ENGINEERS (IEEE), NATIONAL FIRE
10 PROTECTION AGENCY (NFPA) STANDARDS IN ACCORDANCE WITH GOOD
11 UTILITY PRACTICE. THE DESIGN AND CONSTRUCTION SPECIFICATIONS
12 WILL BE CUSTOM TAILORED FOR SITE-SPECIFIC CONDITIONS BY
13 TECHNICAL STAFF AND ENGINEERS. THE PROJECT ENGINEERING TEAM
14 WILL ALSO ENSURE THAT ALL ASPECTS OF THE SPECIFICATIONS AS
15 WELL AS THE ACTUAL ON-SITE CONSTRUCTION COMPLY WITH ALL OF
16 THE APPLICABLE FEDERAL, STATE AND LOCAL CODES AND GOOD
17 INDUSTRY PRACTICE.

18 THE APPLICANT PROPOSES AN OPERATIONS AND MAINTENANCE (O&M)
19 FACILITY WITHIN THE PROJECT BOUNDARIES. THIS FACILITY WILL NOT
20 DIFFER MATERIALLY IN APPEARANCE FROM OTHER BUILDINGS IN THE
21 VICINITY, SERVING RURAL LAND USES.

22 Mitigation: A wide range of mitigation measures and other development conditions,
23 including those described above, have been proposed by the Applicant for the Project in
24 order to ensure land use compatibility, as well as avoidance, minimization and
25 mitigation of probable, significant adverse environmental impacts. These measures are
26 included in the proposed Development Agreement submitted to the County, and are
detailed in the DEIS, and the December 2005 Addendum thereto. With these
mitigation measures, the County will ensure the public health, peace and safety and
ensured preservation of the character of the surrounding neighborhood, including
preservation of the character described in relevant Comprehensive plan policies and
zoning code requirements for rural land uses.

27 *"The proposed use at the proposed location(s) will not be unreasonably detrimental to the
28 economic welfare of the county and it will not create excessive cost for facilities and
29 service"*

30 Findings of Compliance:

31 Economic Impacts and Benefits: As described in detail below, the Project will provide
32 significant long term tax revenues to the County far in excess of any increased costs

1 resulting from project-induced demand for local public services, such as public safety,
2 schools and infrastructure. Tax revenues generated by the Project can be used to
3 finance public services that improve public, health, safety and welfare and/or to reduce
4 the current tax burden on existing taxpayers. New jobs will be created during both
5 construction and operation of the Project and local purchases of supplies and services
6 will provide a further boost to the local economy. An analysis of these economic
7 impacts is presented in Exhibit 9b, “Economic Impacts of Wind Power in Kittitas
8 County” prepared by ECONorthwest for the Economic Development Group of Kittitas
9 County.

7 The long term property tax revenues the Project will generate are the single largest
8 source of direct economic benefits to the local community. It is expected that the
9 Project will contribute approximately \$1.8 million in property taxes in its first year of
10 operation, and a total of approximately \$20 million over a 20 year period, assuming the
11 local property tax rates remain roughly constant (the annual payments are expected to
12 decline over time due to depreciation.)

11 Another major economic benefit of the Project are royalties to landowners hosting wind
12 turbines and other Project facilities on their land, which are expected to generate
13 average payments of approximately \$675,000 per year over the life of the Project.
14 Wind turbines on state DNR lands will contribute a lease royalty payment of
15 approximately \$215,000 annually, the majority of which is dedicated to the state
16 schools trust fund. Royalties to private landowners with wind turbines located on their
17 land are expected to generate an average of approximately \$460,000 per year in
18 payments to area landowners, a significant portion of which is likely to be invested or
19 spent in the local area. The Project would be the second largest tax contributing entity
20 in the County, after the Wild Horse Wind Power Project. Against this backdrop of
21 economic benefit to the County and its citizens at large, there is no reasonable evidence
22 that any private property values within or beyond the Project vicinity will be negatively
23 impacted by the Project. (See Report of DeLacy, Exhibit 10).

19 Exhibit 9c contains a report published by Ohio State University discussing the costs of
20 community services for various land uses including residential, commercial/industrial
21 and farmland/open space. The key results are that for residential uses, for every \$1.00
22 of tax contribution, the Costs of Community Services (COCS) are \$1.15 to \$1.50 and
23 for commercial/industrial, the COCS are \$0.35 to \$0.65. For agriculture/open space,
24 the COCS is the lowest at \$0.30 to \$0.50 for every tax dollar of contribution. Since the
25 Project land would remain similar to an agriculture/open space use in terms of demand
26 for community services, it will also have a very low COCS compared to other uses and
as such remains as a large net contributor to local tax revenues without the introduction
of additional cost burdens to the County for services.

25 Decommissioning Plan: In the Development Agreement, the Applicant proposes
26 extensive measures to ensure the successful decommissioning of the Project. The

1 proposed Development Agreement sets forth mandatory requirements of a detailed
2 decommissioning plan as well as the expected cost of decommissioning. The
3 Development Agreement establishes requirements for providing adequate financial
4 surety for performance of the decommissioning, and provides for the timing and
5 sequencing of complete decommissioning of the Project. Based upon the terms of the
6 Development Agreement, the proposed use at the proposed location will not be
7 unreasonably detrimental to the economic welfare of the County and it will not create
8 excessive costs for facilities and services.

9 Assignment or Transfer of Facility to Another Entity: The Development Agreement
10 includes measures for the County to address assignment or transfer of ownership of the
11 Project. The Development Agreement provides that the Applicant shall have the right
12 to assign or transfer all or any portion of its interest in the Project at any time, to third
13 parties, provided that such assignments or transfers are made in accordance with the
14 terms of the Development Agreement which ensure that the assignment is to a party
15 with sufficient financial strength to perform under the obligations of the Development
16 Agreement. Based upon these terms of the Development Agreement, and in terms of
17 the potential assignment of the Project, the proposed use at the proposed location will
18 not be unreasonably detrimental to the economic welfare of the County and it will not
19 create excessive cost for facilities and service.

20 Support Facilities and Improvements: The proposed support facilities will not be
21 detrimental to the economic welfare of the County nor create excessive costs for
22 facilities and services. The proposed 34.5kV overhead collector line will be located
23 within a 150-foot wide right-of-way easement secured by the Applicant and at
24 Applicant's sole expense with private landowner(s), as illustrated by the map contained
25 in Exhibit 2. The proposed overhead collector line and substations will be constructed
26 at the Applicant's sole expense. All necessary services for the construction and
maintenance of said collector line and substations will be privately procured or paid for
by the Applicant, including without limit, fire protection, emergency response, drainage
structures, water and refuse disposal. As a non-residential project, the Project will not
require significant community services, as discussed in a detailed report on the cost of
community services for various land uses contained in Exhibit 9c prepared by Ohio
State University as well as the economic impact report performed by ECONorthwest
contained in Exhibit 9b.

22 **Compatibility with Properties Within Other Zoning Districts in the Vicinity**

23 Typically, land use permit applicants are asked to comply with the zoning code designations
24 and criteria applicable to the lands where the project is proposed. The Applicant anticipates
25 that the KV Project will be treated like other land use applications and considered under
26 Comprehensive plan policies and zoning code provisions applicable to the FR and A-20
zoning districts.

1 To the north of the Project area, a rural area is zoned A-3. Since the filing of the KV Project
2 applications, in 2005 the County rezoned an area to the north of the Project boundary to A-5.
3 Also in 2005, the County adopted an ordinance codified at KCC Chapter 16.09, allowing
4 clustering and density bonuses for residential development of properties within these and
5 other zones. As stated in KCC Chapter 16.09, rural clustered developments must satisfy
6 strict public benefit requirements in order to obtain density bonuses. Chapter 16.09 confirms
7 the “recognition of rural densities in rural lands” and states that rural cluster developments
8 shall be “developed at densities to preserve rural character.” The zoning within the proposed
9 subarea plan boundary has not changed since the Applicant first filed the ASC or the original
10 Development Activities Application.

11 The A-3 zone predates the County’s GMA planning and zoning work. As shown below, the
12 A-3 and A-5 zones are intended to provide for predominantly agricultural-oriented land uses,
13 while allowing low density residential developments that will “co-exist compatibly” with
14 agricultural land uses. The Applicant is in partnership with rural landowners who view this
15 Project as an important strategy to enable sustainable, ongoing agricultural and other natural
16 resource-based land uses, in accordance with the County’s Rural Area Comprehensive plan
17 policies and zoning code provisions applicable to the FR and A-20 zoning districts.

12 **Chapter 17.28A**
13 **A-5 - AGRICULTURAL ZONE**

14 **17.28A.010 Purpose and intent.**

15 The purpose and intent of the agricultural (A-5) zone is to provide for an area where
16 various agricultural activities and low density residential developments co-exist
17 compatibly. A-5 zones are predominately agricultural-oriented lands and it is not the
18 intent of this section to impose further restrictions on continued agricultural activities
19 therein. (Ord. 2005-05, 2005).

18 **Chapter 17.28**
19 **A-3 - AGRICULTURAL ZONE**

20 **17.28.010 Purpose and intent.**

21 The purpose and intent of the agricultural (A-3) zone is to provide for an area where
22 various agricultural activities and low density residential developments co-exist
23 compatibly. A-3 zones are predominately agricultural-oriented lands and it is not the
24 intent of this section to impose further restrictions on continued agricultural activities
25 therein. (Ord. 83-Z-2 (part), 1983).

26 Finding of Compliance: As noted previously, the Applicant has eliminated the northern
portions of turbine strings previously proposed near the areas zoned A-3 and A-5, in order to
further avoid, minimize and mitigate potential visual impacts. For the reasons stated in the
Findings of Compliance under both the rezone criteria (KCC Chapter 17.98.020E) and

1 approval under the Wind Farm Overlay Ordinance, the Project is compatible with, and will
2 not impair or negatively impact uses existing or likely to be proposed within the A-3 and A-5
zoned areas.

3 The Project is at a sufficient distance from these areas, with no probable significant visual,
4 noise or other land use or environmental impacts. The Applicant is unaware of any pending
5 applications for rural cluster developments north of the Project area. Such potential
6 developments would be hypothetical, and if pending, there is no evidence to show that the
7 Project, as mitigated, would be incompatible with such developments. (See Report of
8 DeLacy, Exhibit 10). Moreover, the enactment of the rural cluster ordinance does not alter
9 the underlying Comprehensive plan policies or the zoning code requirements discussed
10 elsewhere in these Findings. As stated in the Report of DeLacy, Exhibit 10, property values
11 will not be negatively impacted by the Project. The Project will not impose any health or
safety impacts upon any of the surrounding lands, including existing or potential land uses
within the A-3 an A-5 zones. (See also Report of Kammen, Exhibit 13 (safety), Report of
Bernay, Exhibit 14 (safety/probability of public safety incidents), Report of Baker/Bastasch,
Exhibit 12, (noise) Report of Priestley, Exhibit 11 (visual impacts), and Report of Neilsen,
Exhibit 15 (shadow flicker impacts)).

12 **3.1.4 Wind Farm Resource Overlay Development Permit:**

13 Finding of Compliance: A Wind Farm Resource Overlay (WFRO) Development Permit may
14 be issued upon meeting the requirements for the sub-area plan amendment, rezone, and
15 development agreement. By satisfying the criteria for issuance of these approvals, the
16 Project satisfies all requirements for issuance of the WFRO Development Permit. The
Development Agreement will function as the instrument for addressing conditions of
approval. (See Proposed Findings and Conclusions, Section 4).

17 **3.1.5 REQUEST FOR REZONE:**

18 The County’s Wind Farm Resource Overlay Zone requires a rezone to a “Wind Farm
19 Resource Overlay.” While the Applicant believes that the criteria in KCC 17.61A govern
20 review and approval of the overlay zone, in order to fully comply with all potential
21 requirements, the Applicant also demonstrates compliance with the County’s general rezone
criteria, KCC Chapter 17.98.

22 KCC Chapter 17.98.020E provides that, in order for the Project to obtain a rezone, the
County’s zoning code requires the following:

23 “A petition requesting a change on the zoning map from one zone to another must
24 demonstrate that the following criteria are met:

25 The proposed amendment is compatible with the comprehensive plan; and
26 The proposed amendment bears a substantial relation to the public health, safety or welfare;
and

1 The proposed amendment has merit and value for Kittitas County or a sub-area of the county;
and
2 The proposed amendment is appropriate because of changed circumstances or because of a
need for additional property in the proposed zone or because the proposed zone is appropriate
3 for reasonable development of the subject property; and
The subject property is suitable for development in general conformance with zoning
4 standards for the proposed zone; and
The proposed amendment will not be materially detrimental to the use of properties in the
5 immediate vicinity of the subject property; and
The proposed changes in use of the subject property shall not adversely impact irrigation
6 water deliveries to other properties.”
Implementation of the Wind Farm Resource Overlay zone does not require a “change on the
7 zoning map from one zone to another.” The underlying zoning will remain A-20 and FR.
No uses within these zones will be displaced, and in fact, as described above, agricultural and
8 natural resource management and development uses and activities will be strengthened by
approval of the proposal. Nevertheless, given the uncertainties involved in interpreting the
9 County’s zoning criteria, the Applicant demonstrates compliance with KCC Chapter
10 17.98.020E as follows.

11 Findings of Compliance:

12 Present zoning district: The Property Area is zoned Forest & Range (FR) and A-20 as
13 illustrated in Exhibit 6.

14 Zoning district requested: Wind Farm Resource Overlay.

15 a) The proposed amendment is compatible with the Comprehensive plan:

16 The Applicant has submitted Findings of Consistency related to the Kittitas
17 County Comprehensive plan in Section 2 of this document, analyzing all applicable
Plan Goals and Policies, demonstrating that the proposed subarea plan amendment
18 and rezone for the Project are compatible with the Comprehensive plan. The
Applicant has shown that the Project will establish financial underpinnings to enable
19 ongoing, sustainable agricultural and natural resource management and development
land uses within 6,000 acres planned and zoned for rural land uses, thereby helping
20 meet the County’s planning goals to protect rural land uses, activities, and traditions.

21 b) The proposed amendment bears a substantial relation to the public health, safety
22 or welfare:

23 This criteria is similar to the criteria #2 discussed above under the heading
24 “17.61A.040 Approvals Required for Wind Farm Resource Overlay Zone.” For the
reasons discussed therein, the Project bears a substantial relation to the public health,
25 safety, and welfare. The Project will develop one of Kittitas County's abundant
renewable resources – wind – in an area highly suited to this use and activity. The
26 Project will provide a clean source of power while helping to reduce the region's

1 dependence on polluting, non-renewable energy sources subject to great price
2 volatility. The Project will also help the region to address the risks and effects of
3 declining electricity generation and price volatility of hydroelectric power, caused by
4 fishery habitat concerns. Additionally, the Project will provide significant added tax
5 revenue while not significantly increasing the demand for local public services, such
6 as public safety, schools and infrastructure as described above. It will do so without
7 imposing burdens on the urban portions of the County as it is located in a rural area,
8 and it will not detrimentally impact the rural uses of the area. The Project is proposed
9 in an area zoned for agricultural and natural resource management, extraction and
10 production uses. It will not impose public health or safety impacts on the scattered
11 residential uses in the vicinity. (See Report of Kammen, Exhibit 13 (safety), Report
12 of Bernay, Exhibit 14 (safety/probability of public safety incidents), Report of
13 Baker/Bastach, Exhibit 12, (noise) Report of Priestley, Exhibit 11 (visual impacts),
14 and Report of Nielsen, Exhibit 15 (shadow flicker impacts)).

10 c) The proposed amendment has merit and value for Kittitas County or a subarea of the
11 County:

12 Findings of Compliance:

13 The Project has merit and value for Kittitas County (the Project site is not located in a
14 currently designated subarea). As stated above, the Project will provide significant
15 long term local tax revenues without increasing demand on local services and will
16 create new family wage jobs in the County. It will enable ongoing, sustainable rural
17 agricultural and natural resource management practices, providing rural landowners
18 with much-needed revenues, thereby discouraging incompatible conversions of A-2-
19 and FR-zoned lands to sprawling residential development. The Project will also help
20 diversify the regional energy portfolio and reduce the region's dependence on non-
21 renewable energy sources that are subject to price volatility and generate significant
22 pollution. Development of wind energy facilities in the Project area will result in far
23 less demand for public services than would be the case for residential development on
24 the private lands within the Project Area. Therefore, the Project is consistent with
25 this criterion.

21 d) The proposed amendment is appropriate because of changed circumstances or
22 because of a need for additional property in the proposed zone or because the
23 proposed zone is appropriate for reasonable development of the subject property.

24 Findings of Compliance:

25 In Chapter 17.61A (establishing new wind farm development rules), the County
26 established that wind farms "are a permitted use in a Wind Farm Resource Overlay
Zoning District." (Section 17.61A.030). However, under Ch. 17.61A, subarea plan

1 and zoning amendments are required, as well as a development agreement and
2 development permit. Consequently, under the relevant code provisions, the “changed
3 circumstances” test is not readily applicable to the proposed plan and zoning
4 amendments. The Applicant does not propose to change the underlying land uses
5 allowed within the applicable zoning districts, and in fact, the Project will facilitate
6 the continuation of sustainable agricultural and natural resource management
7 practices and traditions. These are new circumstances that weigh in favor of the
8 subarea plan and rezone. There is a “need for additional property” in Kittitas County
9 having the Wind Farm Resource overlay designation, in that while the County has
10 determined that wind farm uses are a permitted use within the overlay district, only
11 one area with this designation currently exists in Kittitas County. The electrical
12 power needs of the County and the region are increasing. Additionally, and in the
13 alternative, for the reasons described below, the proposed subarea district and zoning
14 overlay designations are “appropriate for reasonable development of the subject
15 property.”

16 Fundamentally, properties are suitable for wind farm development (and consequently
17 are generally suitable for the subarea plan and zoning overlay designations) if they
18 are situated within the appropriate underlying zoning district (A-20, Forest & Range,
19 Commercial Agriculture, and Commercial Forest), AND because they have
20 substantial, reliable, commercially-viable winds, AND because they are situated in
21 close proximity to high voltage electric transmission facilities. Only a limited
22 number of properties could be eligible for such development. This is true both in
23 Kittitas County, and regionally. Because of the very limited range of properties
24 suitable in Kittitas County for this property use, the proposed Project site is an
25 appropriate area to be assigned the subarea plan and zoning overlay designation due
26 to need for additional property, and because wind energy facility use is appropriate
for the reasonable development of the property. The purpose and intent of Chapter
17.61A.010 of the Zoning Code is to “establish a process for recognition and
designation of properties located in areas of Kittitas County suitable for the location
of wind farms...”

19 The proposed subarea plan designation and rezone are appropriate because the Project
20 area is suitable for Wind Farm development. The KV Project area is particularly
21 appropriate for Wind Farm development for several key reasons:

22 The wind resource in the Project area is vigorous, well-documented and
23 commercially viable;

24 The development of a Wind Farm in the Project area is consistent with current land
25 uses in the area (grazing, natural resource management, open space, scattered rural
26 homesites);

1 Extensive environmental, cultural resource, noise and visual studies have shown the
2 impacts from the Project will be minimal and can be mitigated successfully through the
3 Development Agreement and mitigation measures proposed through the EIS, which includes
4 development regulations and environmental mitigation measures; and

5 • The Project has been redesigned and significantly downsized, to meet and satisfy the
6 comments from the County Planning Commission, the BOCC, and members of the
7 public, made in previous wind farm applications. The downsized project, and its
8 associated impacts, is comprehensively described in the December 2005 Addendum to
9 the DEIS.

8 e) The subject property is suitable for development in general conformance with zoning
9 standards for the proposed zone.

10 Findings of Compliance:

11 The Wind Farm Resource overlay district, as defined in Ch. 17.61A, does not contain
12 zoning standards, but instead relies upon the site-specific development agreement to
13 implement appropriate development standards. The subject property will be
14 developed in compliance with a Wind Resource Overlay zone and in conformance
15 with the zoning standards contained within the A-20 and FR zones, as well as any
16 additional standards or conditions imposed by all applicable permits and approvals.

15 f) The proposed amendment will not be materially detrimental to the use of properties in
16 the immediate vicinity of the subject property.

17 The Project will not be materially detrimental to the use of properties in the
18 immediate vicinity of the Project area because all existing land uses within the Project
19 Area - including grazing, natural resource management and development, open space,
20 and rural residential - would continue, with no limitations or restrictions on the use of
21 properties in the immediate vicinity as a consequence of the proposed Project. The
22 suitability of the Project area is further analyzed above, under Findings of
23 Compliance with the Wind Farm Resource Overlay ordinance.

21 g) The proposed changes in use of the subject property shall not adversely impact
22 irrigation water deliveries to other properties.

23 There will be no impact to irrigation water deliveries. The area requested for
24 rezoning and adjacent parcels is not currently irrigated.

25 **3.2 Conclusions of Law Regarding Zoning Compliance**

26 **3.2.1 The Project Complies with Wind Farm Resource Overlay Ordinance:** Based upon the

1 Findings of Compliance, the BOCC concludes that the Project complies with the Wind Farm
2 Resource Overlay ordinance, KCC Ch. 17.61A. Specifically, the Project is proposed on one
3 single, consolidated, contiguous site or Project area as shown on the proposed Project and
4 Site Layout map in Exhibit 2. The proposed Project is essential or desirable to the public
5 convenience. The Project is not detrimental or injurious to the public health, peace or safety
6 or to the character of the surrounding neighborhood. The proposed use at the proposed
7 location(s) will not be unreasonably detrimental to the economic welfare of the County and it
8 will not create excessive cost for facilities and service.

6 **3.2.2 All Related or Supporting Facilities and Uses are Approved:** The BOCC confirms its
7 January 25, 2005 ruling and concludes that all related or supporting facilities, activities and
8 uses described in the Development Activities Application, including the electrical collection
9 lines, operations and maintenance building and substations, are approved as part of the
10 Project in compliance with the Wind Farm Resource Overlay ordinance, KCC Ch. 17.61A.
11 Therefore, based upon these Findings, and based further on the record and deliberations at
12 the January 25, hearing (incorporated herein by this reference), the BOCC concludes that
13 separate conditional use permits are not required for these Project components.

11 **3.2.3 The Project Meets all Requirements for a WFRO Development Permit:** Based upon
12 the Findings of Compliance set forth above, the Project satisfies all criteria for issuance of
13 the WFRO Development Permit. The Project shall be conditioned upon the Applicant
14 complying with all terms of the Development Agreement, and all terms and conditions
15 imposed by EFSEC in the Site Certificate Agreement.

15 **3.2.4 The Project Meets all Requirements for a Rezone:** While the criteria for approval of a
16 rezone are similar to the criteria for approving the Project under the Wind Farm Resource
17 Overlay ordinance, KCC Ch. 17.61A, the Applicant has separately addressed these
18 requirements. Based upon the Findings of Compliance, the BOCC concludes that the
19 Applicant has demonstrated that the Project complies with all criteria and requirements for a
20 site-specific rezone to Wind Farm Overlay.

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1 Compliance with Development Agreement Ordinance

2 Findings of Compliance

3 State law permits counties to enter into development agreements with project applicants
(RCW 36.70B.170-.210). Consistent with state statutes, Kittitas County has adopted
4 provisions for entering development agreement with private landowners (KCC Chapter
15A.11).

5 KCC 17.61A.040 requires a development agreement as part of the approval for a Wind Farm
Resource Overlay zone. Development agreements must be adopted by the Board of county
Commissioners (BOCC) after a public hearing.

6 Applicant applied for a Development Agreement as part of its Development Activities
Application for a Wind Farm Resource Overlay, which was submitted to the County on
7 December 22, 2005.

8 Applicant consulted with the County staff regarding the proposed Development Agreement,
including the proposed development standards, mitigation measures and other provisions of
the Development Agreement.

9 KCC 17.61A.040(1) provides that a development agreement must set forth the development
standards applicable to the development of a specific wind farm, which may include, but is
10 not limited to:

Densities, number, size, setbacks and location of turbines;

11 Mitigation measures and such other development conditions as deemed appropriate by the
Board of County Commissioners to be necessary including measures to protect the best
12 interest of the surrounding property or neighborhood or the county as a whole; and

13 Other development standards including those identified in KCC 15A.11.020(E) and RC
36.70B.170(3).

14 Conclusions of Law Regarding Compliance

15 The BOCC concludes that the Project as set forth in the Development Agreement attached
hereto sets forth the densities, number, size, setbacks and locations of turbines, that it
contains mitigation measures and other development conditions adequate to protect the best
16 interests of the surrounding property, neighborhood and the county as a whole, and that it
meets the other substantive and procedural requisites of KCC Chapter 15A.11 and RCW
17 36.70B for development agreements.

18 The BOCC concludes that the Project as set forth in the Development Agreement meets the
standards in KCC 17.61040(3) because it is essential or desirable for the public convenience;
is not detrimental or injurious to the public health, peace, or safety or to the character of the
19 surrounding neighborhood; and the Project will not be unreasonably detrimental to the
economic welfare of the county and will not create excessive public cost for facilities. The
20 basis for these findings is set forth in detail in Section 2 and 3 of these Findings, which are
incorporated here by reference.

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5. State Environmental Policy Act (SEPA) Review

1. Scoping and Public Notification: Prior to submitting the Development Activities Application to Kittitas County, on January 13, 2003 the Applicant submitted an application for site certification for the Kittitas Valley Project (“Project”) to Washington Energy Facility Site Evaluation Council (EFSEC). EFSEC (as SEPA “lead agency”) determined that the proposal would have a probable significant adverse effect on the environment, that a determination of significance (DS) would be issued, and that an environmental impact statement (EIS) was required pursuant to the State Environmental Policy Act (SEPA). The lead agency issued a determination of significance and scoping notice for the proposal on February 4, 2003. EFSEC issued notice of the DS to local and regional newspapers and radio stations, and published the notice in the State SEPA Register. EFSEC held informational and scoping meetings in Ellensburg on March 12, 2003 to facilitate public input from agencies and interested citizens. The meeting was advertised through newspaper notice and through mailing of individual notices to individuals and organizations on the EFSEC mailing list. Based on public and agency input received through March 14, 2003, EFSEC identified the scope of the EIS to be prepared on the proposed action.

2. Public Comment Process: EFSEC published a Draft EIS for the Project on December 12, 2003. A 39-day written comment period, extending through January 20, 2004 was provided to allow public and agency review of the Draft EIS. EFSEC held a public meeting on the Draft EIS in Ellensburg on January 13, 2004 to facilitate the review process. Speakers provided verbal testimony at the meeting concerning the Draft EIS. A written transcript of testimony at the meeting was prepared for EFSEC. EFSEC also received written comment input on the Draft EIS; these are also documented in the EFSEC files.

EFSEC published a Supplemental Draft EIS for the Project on August 11, 2004. A 33-day written comment period, extending through September 13, 2004 was provided to allow public and agency review of the Supplemental Draft EIS. EFSEC held a public meeting on the Supplemental Draft EIS in Ellensburg on August 24, 2004 to facilitate the review process. Speakers provided verbal testimony at the meeting concerning the Supplemental Draft EIS. A written transcript of testimony at the meeting was prepared for EFSEC. EFSEC also received written comment input on the Draft EIS; these are also documented in the EFSEC files.

As a consequence of the Applicant’s revised project layout, EFSEC issued an Addendum to the Draft EIS on December 16, 2005. The Addendum is attached to these Findings as Exhibit 19. The Addendum reviews the Applicant’s revised layout, which downsized the Project from a maximum 150 turbines to a maximum of 80 turbines. Particularly relevant to SEPA review for the Project, the Addendum documents that in developing the revised project layout, “the Applicant attempted to reduce the visual impact of the KVVPP.” (Addendum, p. 3-17). The measures taken to minimize, mitigate and further avoid impacts were the outcome of the Applicant listening to and responding to public concerns and comments by

1 the Planning Commission and BOCC, in the several wind power projects reviewed by the
2 County under the Wind Farm Overlay Ordinance. Addendum Page 1.3 includes a summary
3 of revisions to the turbine string layout, including the reduction in turbines, reorienting
4 strings, and the elimination of the southern portion of string D and the northern portion of
5 string H. Additionally, the revised layout increases the setback from property lines of
6 neighboring landowners without project agreements from 50 feet to 541 feet beyond the tip
7 of the blade at its closest point to the property line.

8 The Addendum confirms that visual impacts from FAA-required lights will be further
9 minimized, with elimination of daytime lights and a significant reduction in nighttime lights.
10 The Addendum confirms that the revised layout further avoids, minimizes and mitigates
11 impacts associated with shadow flicker, and avoids, minimizes and mitigates visual impacts,
12 as analyzed from a number of key viewpoints. The Addendum confirms that, reviewed under
13 “the most stringent state noise regulations,” the Project further reduces impacts and will
14 comply with state regulations. New project access roads are reduced from 19 miles to 13
15 miles. Potential impacts to cultural resources are addressed, demonstrating no unmitigated
16 adverse impacts.

17 The Addendum includes a thorough discussion documenting the fact that the revised Project
18 layout further avoids, minimizes and mitigates environmental impacts, and concludes that the
19 Project will not pose any probable significant unmitigated adverse impacts. Particularly
20 relevant to the County’s review process under the Wind Farm Overlay Ordinance are the
21 following:

22 No additional unavoidable adverse impacts on health and safety are expected as a result of
23 the KVVPP layout revisions. Project design, implementation of the mitigation measures
24 described in the Draft EIS, and the greater setback from property lines of neighboring
25 landowners would continue to minimize health and safety impacts.

26 The revised KVVPP layout will not create additional significant adverse impacts to visual
resources. With the proposed layout changes, the KVVPP will have less of an impact on
visual resources particularly for viewpoints located at the north and northwestern portions of
the project area. In addition, impacts from FAA required lighting of the turbines will be
significantly reduced.

3. Kittitas County’s SEPA Participation: Kittitas County has reviewed the Draft EIS and
comments to the Draft EIS as well as clarifying information contained in technical reports
from the Applicant's experts. The County has also reviewed the Supplemental Draft EIS and
the Addendum to the Draft EIS together with the related comments. On November 23, 2005,
the Applicant provided with County with advance copies of all technical reports forming the
foundation of the Addendum, including reports regarding noise impacts, shadow flicker
issues, and visual impacts. The Applicant met with the County staff thereafter. The County
did not provide any comments or suggest any changes to the reports, and confirmed that the
Applicant had addressed the County’s prior comments regarding the DEIS. The County staff
has reviewed the proposed SEPA mitigation measures to address environmental impacts of

1 the Project and has verified that the Applicant has addressed County concerns. The SEPA
2 mitigation measures are attached to the Development Agreement, and are thereby made a
part of the Applicant's agreement with the County.

3 4. Publication of the Final EIS; Compliance with Mitigation Measures: EFSEC intends to
4 publish a Final EIS following its adjudicative hearings on the Kittitas Valley Project. The
5 Final EIS will contain supplemental environmental analysis prepared in response to
6 comments received on the Draft EIS, will address additional mitigation measures (if any),
7 and will include responses to the review comments on the Draft EIS. Publication of a Final
8 EIS will complete the SEPA process for the EFSEC Site Certificate. In the Development
9 Agreement with the County, the Applicant has committed to comply with the SEPA
mitigation measures and other conditions of development as stated in the proposed
Development Agreement. As provided in the Development Agreement, the Applicant will
also be obligated to comply with any additional conditions imposed by the EFSEC FEIS and
Site Certificate Agreement.

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APPENDIX B

***KITTITAS COUNTY BOARD OF COUNTY COMMISSIONER'S RESOLUTION NO.
2006-90, DATED JUNE 6, 2006, WITH ATTACHED FINDINGS OF FACT AND
CONCLUSIONS OF LAW***

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APPENDIX C

FAA/INSERT

**Kittitas Valley Wind Power Project Application No. 2003-01
 Service List**

Unless otherwise indicated, copies must be served on all persons on this list.

Energy Facility Site Evaluation Council:	
Mr. Allen J. Fiksdal (<u>original and 15 copies</u>) EFSEC Manager Energy Facility Site Evaluation Council 925 Plum Street SE, Building 4 PO Box 43172 Olympia, WA 98504-3172 Phone: (360) 956-2152 Fax: (360) 956-2158 allenf@cted.wa.gov	Adam Torem Administrative Law Judge c/o EFSEC P.O. Box 43172 Olympia WA 98504-3172
Serve an electronic version of all documents to both: <u>NOTE NEW E-MAIL</u> <u>allenf@cted.wa.gov</u> <u>irinam@cted.wa.gov</u>	
Counsel for the Environment:	
Michael Tribble Assistant Attorney General Counsel for the Environment Office of the Attorney General 1125 Washington St. S.E. P.O. Box 40100 Olympia, WA 98504-0100 Phone: (360) 753-2711 Fax:(360) 664-0229 <u>michaelt1@atg.wa.gov</u>	

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Applicant - Sagebrush Power Partners L.L.C.:		
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Residents Opposed To Kittitas Turbines (Rokt):	
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