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**BEFORE THE STATE OF WASHINGTON  
ENERGY FACILITY SITE EVALUATION COUNCIL**

In the Matter of	)	INTERVENOR
Application No. 2003-01	)	RESIDENTS OPPOSED
	)	TO KITTITAS TURBINES
SAGEBRUSH POWER PARTNERS, LLC,	)	MOTION TO STAY
	)	ADJUDICATIVE HEARING
KITTITAS VALLEY WIND POWER PROJECT	)	UNTIL ISSUANCE OF
	)	FINAL ENVIRONMENTAL
	)	IMPACT STATEMENT
	)	(FEIS)

Requested Relief

Intervenor Residents Opposed to Kittitas Turbines (“Intervenor” or “ROKT”) requests that the Energy Facility Site Evaluation Council (EFSEC) enter an order that stays consideration by EFSEC of the application until EFSEC has issued and circulated in accordance with applicable law the Final Environmental Impact Statement (FEIS) for the proposal.

II. Basis for Motion

Kittitas County requested Energy Facility Site Evaluation Council (EFSEC) to issue a Final Environmental Impact Statement (FEIS) prior to commencement of adjudicatory proceedings. This request was reiterated on July 6, 2004. Without notice or opportunity to comment, EFSEC issued a “Memorandum to Parties in the Matter of EFSEC Application No. 2003-01” on July 9, 2004. EFSEC denied the request and determined that there was “. . . no

1 legal requirement that it grant the County's request. . . . and that ". . . the Council  
2 intends to issue its responses to DEIS comments after the adjudicative  
3 proceeding."

4 The determination is contrary to applicable law and undermines the  
5 fundamental purpose of State Environmental Policy Act (SEPA) and is based  
6 upon internally inconsistent regulatory provisions.

7 III. Discussion

8 Energy Facility Site Evaluation Council (EFSEC) is authorized to act in  
9 accordance with powers set forth in RCW 80.50.040. The statutory regime  
10 extends rule making authority in two (2) respects:  
11

12 (1) To adopt, promulgate, amend, or rescind suitable  
13 rules and regulations, pursuant to Chapter 34.05  
14 RCW, to carry out the provisions of this Chapter, and  
15 the policies and practices of the Council in connection  
16 therewith;

17  
18 (3) To establish rules of practice for the conduct of public  
19 hearings pursuant to the provisions of the  
20 administrative procedure act, as found in Chapter  
21 34.05 RCW; . . . .

22 The statutory authorization does not extend to modification or amendment  
23 of specific laws or regulations established pursuant to the State Environmental  
24 Policy Act (SEPA), RCW 43.21C.010, et seq. SEPA recognizes that agency  
25 policies and procedures shall implement and be consistent with SEPA rules and  
26 regulations. WAC 197-11-906(c) provides:

27  
28 Except as stated in the next subsection, the rules in this  
29 chapter are not exclusive, and agencies may add  
30 procedures and criteria. *However, any additional material  
31 shall not be inconsistent with, contradict, or make  
32 compliance with any provision of these rules a practical  
33 impossibility. Any additional materials shall be consistent  
34 with SEPA.*

34 (Italics added). SEPA is applicable to the review process and its provisions  
35 direct environmental review in the context of adjudicative proceedings.

2 At the heart of the State Environmental Policy Act (SEPA) is the  
3 requirement that a "detailed statement" or "Environmental Impact Statement" be  
4 prepared on proposals for major actions significantly affecting the quality of the  
5 environment. RCW 43.21C.030(c). Directions and applicability of the detailed  
6 statement are outlined as follows:

7 Prior to making any detailed statement, the Responsible  
8 Official shall consult with and obtain the comments of any  
9 public agency which has jurisdiction by law or special  
10 expertise with respect to any environmental impact involved.  
11 Copies of such statement and the comments and views of  
12 the appropriate federal, province, state, and local agencies,  
13 which are authorized to develop and enforce environmental  
14 standards, shall be made available to the governor, the  
15 Department of Ecology, the Ecological Commission, and the  
16 public, and shall accompany the proposal through the  
17 existing agency review processes; . . .

18 RCW 43.21C.031(d). The court in *West Main Associates v. City of Bellevue*, 49  
19 Wn.App. 513, 517-518, 742 P.2d 1266 (1987) confirmed the statutory directive  
20 that the detailed statement be completed prior to public decision-making. The  
21 court stated:

22 A "major purpose" of SEPA is to "combine environmental  
23 considerations with public decisions". RCW 43.21C.075(1).  
24 Consistent with this purpose, "SEPA mandates  
25 governmental bodies to consider the total environmental and  
26 ecological factors to the fullest in deciding major matters.  
27 *Eastlake Comm'ty Coun. v. Roanoke Assocs.*, 82 Wn.2d  
28 475, 490, 513 P.2d 36, 76 A.L.R.P.3d. 360 (1973). These  
29 considerations must be integrated into governmental  
30 decision-making processes so that "presently unquantified  
31 environmental amenities and values will be given  
32 appropriate consideration in decision-making along with  
33 economic and technical consideration". RCW  
34 43.21C.030(2)(b); *Eastlake Comm'ty Coun.*, at 492. The  
35 Environmental Impact Statement (EIS) must "accompany the  
proposal through the existing agency review processes" so  
that officials will use it in making decisions; RCW  
43.21C.030(2)(d), WAC 197-11-655, and "[a]ny  
governmental action may be conditioned or denied" on the  
basis of adverse impacts disclosed by SEPA's  
environmental review process.

1 The Environmental Impact Statement (EIS) must “accompany the  
2 proposal through the existing agency review processes . . .” The statutory  
3 directive does not allow for a deferral or delay in the issuance of a Final  
4 Environmental Impact Statement (FEIS). WAC 197-11-406 deals with EIS timing  
5 and states:

6 The lead agency shall commence preparation of the  
7 Environmental Impact Statement as close as possible to the  
8 time the agency is developing or is presented with a  
9 proposal, so that preparation can be completed in time for  
10 the final statement to be included in appropriate  
11 recommendations or reports on the proposal (WAC 197-11-  
12 055). *The statement shall be prepared early enough so it  
13 can serve practically as an important contribution to the  
14 decision-making process and will not be used to rationalize  
15 or justify decisions already made.* EIS’s may be “phased” in  
16 appropriate situations.

17 EFSEC has adopted rules promulgated under RCW 43.21C.020 (State  
18 Environmental Policy Act) and Chapter 197-11 WAC (SEPA rules). WAC 463-  
19 47-010. The adoption by reference includes specific rules relating to  
20 Environmental Impact Statements – WAC 197-11-400 through 197-11-460.  
21 WAC 197-11-400 sets forth the purpose of the Environmental Impact Statement  
22 (EIS) and provides, in part, as follows:

23 (1) The primary purpose of an Environmental Impact  
24 Statement is to ensure that SEPA’s policies are an  
25 integral part of the ongoing programs and actions of  
26 state and local government.

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28  
29 (4) The EIS process enables government agencies and  
30 interested citizens to review and comment on  
31 proposed government actions, including government  
32 approval of private projects and their environmental  
33 effects. This process is intended to assist the  
34 agencies and applicants to improve their plans and  
35 decisions, and to encourage the resolution of potential  
concerns or problems prior to issuing a final  
statement. An Environmental Impact Statement is

1 more than a disclosure document. It shall be used by  
2 the agency officials in conjunction with other relevant  
3 materials and considerations to plan actions and  
4 make decisions.

5 This rule violates the directive of WAC 197-11-906. It is inconsistent with  
6 and contradicts both SEPA and applicable rules and regulations.

7 The SEPA process recognizes the significance of full and complete  
8 disclosure of environmental impacts, assessments, mitigation and alternatives so  
9 that both the agency and "interested citizens" may participate in the deliberative  
10 process prior to decision-making. SEPA is based upon a policy of full disclosure  
11 and decision-making by deliberation and not default. The court in *City of Des*  
12 *Moines v. Puget Sound Regional Council*, 108 Wn.App. 836, 849, 988 P.2d 27  
13 (1999), *rev. denied*, 140 Wn.2d 1027 (2000), made the following statement as to  
14 SEPA purposes:  
15

16 SEPA is a procedural statute designed to insure that local  
17 governments consider the environmental and ecological  
18 effects of major actions to the fullest extent. SEPA's  
19 purpose is to provide decision-makers with all relevant  
20 information about the potential environmental consequences  
21 of their actions and to provide a basis for a reasoned  
22 judgment that balances the benefits of the proposed project  
23 against the potential adverse affects.

24 By deferring finalization of the Environmental Impact Statement (EIS),  
25 EFSEC is effectively limiting the availability of substantive information and  
26 analysis for consideration by the Council and comment from hearing participants.  
27 This violates the fundamental premise of SEPA.

28 WAC 197-11-460 specifically addresses the issuance of a Final  
29 Environmental Impact Statement (FEIS). The regulation (which was adopted by  
30 EFSEC) provides:

31 (5) Agencies shall not act on a proposal for which an EIS  
32 has been required prior to seven days after the  
33 issuance of the FEIS.

34 In the present case, the action would be the commencement of the  
35 adjudicatory proceeding pursuant to RCW 80.50.090(3). The regulations are

1 clear that the FEIS must be issued prior to commencement of the adjudicative  
2 process. EFSEC is violating this directive.

3 EFSEC has developed an internally, inconsistent set of regulations  
4 regarding environmental review of project applications. WAC 463-47-020  
5 specifically adopts SEPA regulations related to Environmental Impact Statements  
6 (EIS), including the issuance directives of WAC 197-11-460. Contrary to the  
7 specific process adopted by SEPA rules and regulations and in the absence of  
8 any applicable authority, EFSEC adopted the following regulation – WAC 463-47-  
9 060(3) – which provides:

10  
11 The Council may initiate an adjudicative proceeding hearing  
12 required by RCW 80.50.100 prior to completion of the draft  
13 EIS. The Council shall initiate and conclude an adjudicative  
14 proceeding hearing required by RCW 80.50.100 prior to  
15 issuance of the final EIS.

16 This procedure is neither authorized nor compliant with the State  
17 Environmental Policy Act (SEPA) and regulations developed thereunder.

18 Professor Settle – *The Washington State Environmental Policy Act*,  
19 §14.01[11] – summarized the regulations and requirement with respect to a Final  
20 Environmental Impact Statement (FEIS):

21 The lead agency must issue a FEIS within sixty days of the  
22 end of the DEIS comment period unless the proposal is  
23 unusually large in scope, the environmental impacts are  
24 especially complex, or extensive modifications of the DEIS  
25 are required. The FEIS must be issued by the Responsible  
26 Official and sent to the Department of Ecology, all agencies  
27 with jurisdiction, all agencies that commented on the DEIS,  
28 and anyone who has requested a copy. *Most importantly,*  
29 *the finalized EIS must accompany the proposal through the*  
30 *existing agency review processes.* In addition, there is the  
31 “requirement” devoid of legal sanctions, that either a copy of  
32 the FEIS or a notice of its availability be sent to anyone who  
33 commented on the DEIS or received but did not comment on  
34 the DEIS. An agency which concludes that the FEIS  
35 response to its written comments is inadequate, may  
prepare a Supplemental EIS (SEIS), at its own expense.  
*When an EIS is required, agencies are barred from acting on  
the proposal until seven days after FEIS issuance.*

(Italics added).

2 The purpose and direction of environmental regulations are clear and  
3 unequivocal. Statements must be prepared early enough to inform and guide  
4 decision-makers rather than rationalize or justify decisions already made. *Barrie*  
5 *v. Kitsap County*, 93 Wn.2d 843, 854, 613 P.2d 1148 (1980); *King County v.*  
6 *Boundary Review Board*, 122 Wn.2d 648, 666, 860 P.2d 1024 (1993); and  
7 *Mentor v. Kitsap County*, 22 Wn.App. 285, 291, 588 P.2d 1226 (1978) (“although  
8 we find no serious inadequacies in the statement submitted here, we feel  
9 compelled to emphasize that an Environmental Impact Statement should not  
10 merely be an ex post facto justification of official action but should serve to inform  
11 law makers of the environmental consequences of the proposal before them.  
12 *Life of the Land v. Brinegar*, 485 F.2d 460 (9<sup>th</sup> Cir. 1973)”). Professor Settle  
13 added:  
14

15 The EIS is to be regarded not as an end, in itself, but as a  
16 means of integrating SEPA's policies into the actions and  
17 agendas of state and local agencies. The EIS, by providing  
18 environmental information for agency decision-makers and  
19 interested citizens, is designed to foster government actions  
20 consonant with SEPA's policies; moreover, review and  
21 comment by interested citizens and agencies during the EIS  
22 preparation process should result in more reliable final  
23 impact statements. *Echoing frequent judicial admonitions,*  
24 *the Green Book emphasizes that the purpose of the EIS is*  
25 *more than mere disclosure, rationalization or justification; it*  
*is to be used by agency officials in making decisions on*  
*proposed actions.*

26 A deferral in issuance of a Final Environmental Impact Statement (FEIS)  
27 fails to provide information, material, mitigation and alternatives to the decision-  
28 makers during the decision-making process. Rather, the development of such  
29 information is delayed until the conclusion of the hearing process and deprives  
30 the participants (as well as decision-makers) of essential information during the  
31 public process. This procedure is directly violative of the purpose and intent of  
32 the State Environmental Policy Act (SEPA).  
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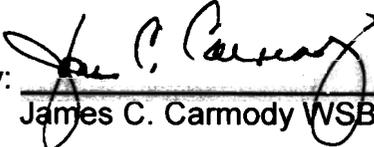
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IV. Conclusion

Residents Opposed to Kittitas Turbines (ROKT) respectfully requests that the adjudicative proceeding be stayed until a Final Environmental Impact Statement (FEIS) is issued in accordance with applicable regulations. The issuance of an FEIS will serve SEPA's purpose to provide decision-makers with all relevant information and allow for meaningful comment and participation by the community in this extraordinary land use application.

Respectfully submitted this 22 day of August, 2004.

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By: 

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