

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  
27  
28  
29  
30  
31  
32  
33  
34  
35

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

---

**In the Matter of Application No. 2003-01  
SAGEBRUSH POWER PARTNERS, LLC,  
KITTITAS VALLEY WIND POWER PROJECT**

---

**OPENING STATEMENT  
OF  
RESIDENTS OPPOSED TO KITTITAS TURBINES (ROKT)**

1 Residents Opposed to Kittitas Turbines (ROKT)<sup>1</sup> requests that the Energy  
2 Facility Site Evaluation Council (EFSEC) recommend to the governor that he  
3 deny the Site Certification Application for Kittitas Valley Wind Power Project.  
4

### 5 Introduction

6 Sagebrush Power Partners, LLC (“Sagebrush Partners” or “Zilhka”) has  
7 requested the Energy Facility Site Evaluation Council (EFSEC) to recommend  
8 two (2) actions: (1) the state preempt established land use ordinances,  
9 regulations, rules and procedures; and (2) the approval of a site specific  
10 proposal of the intrusive wind farm proposed in the scenic foothills of Kittitas  
11 County. This process has, however, effectively eliminated the role of the local  
12 community and citizens in the decision-making process. Preemption is not  
13 continenced by sound land use planning; developed land use statutes (Growth  
14 Management Act – RCW 36-70A) or local zoning ordinance and procedures; or  
15 historic EFSEC processes.  
16

17 Residents Opposed to Kittitas Turbines (ROKT) is a citizen-based  
18 organization. Members have participated in securing a local public process that  
19 assures mandated public participation<sup>2</sup>; contributed to the development of local  
20 siting procedures and standards; and commented upon project specific  
21  
22

23  
24 <sup>1</sup> Residents Opposed to Kittitas Turbines (ROKT) is a broad based community organization that  
25 has actively participated in all public processes regarding the review, siting and procedures for  
26 wind power projects in Kittitas County, Washington. The organization is comprised of property  
27 owners and supported by a wide range of community groups and environmental organizations.  
Exhaustive input has been provided by ROKT to Kittitas County, Counsel for the Environment  
and EFSEC.

28 <sup>2</sup> Kittitas County originally adopted Ordinance No. 2001-12, a development regulation amending  
29 provisions of the utilities chapter and authorized a variety of utilities (including wind farms) as  
30 conditional uses in various rural jurisdictions. Residents Opposed to Kittitas Turbines (ROKT)  
31 filed a petition with the Eastern Washington Growth Management Hearings Board (Case No. 02-  
32 1-0015) and challenged the public participation process in the adoption of the ordinance. No  
33 public notification was provided with regard to the ordinance. Zilhka was a primary participant in  
34 the process which has a practical effect of eliminating the public from land use discussions  
35 regarding wind farms. Upon recognition of deficiencies and public notice and participation,  
Kittitas County adopted a moratorium on wind farm developments (Ordinance No. 2002-13) and  
proceeded with a public process to establish a “wind farm resource overlay zone”. Zilhka chose  
not to participate in this public process although other wind farm proponents did participate in the  
process. Ordinance 2002-19 was adopted on December 3, 2002 and established applicable  
procedures. Zilhka did not appeal or challenge the legislative determination.

1 proposals. The public process and opportunity to participate have now been  
2 derailed by Zilhka's reference of the application to EFSEC and refusal to  
3 meaningfully participate in local land use processes. This is an extraordinary  
4 step. In its entire history, EFSEC has not exercised its authority to preempt local  
5 land use decision-making. This is not the case to begin

6 II.

7 Discussion

8 2.1 Public Participation and Representation. The EFSEC process  
9 has evolved to a point controlled by money, huge corporations and special  
10 interests. The people most affected – community members and impacted  
11 property owners – have been effectively precluded from participation because of  
12 the extraordinary complexity and expense of the process. It is virtually  
13 impossible to participate in an Intervenor status. The resources necessary are  
14 not available to the public. Assurances of an opportunity for public comment  
15 ring hollow when EFSEC representatives note that such testimony is of “lesser  
16 value” because it is not under oath. This process could not have been  
17  
18

19  
20 (a) the Environment. EFSEC legislation  
21 the administrative process. RCW 80.50.080  
22 an assistant attorney general as counsel for  
23 Representation of “ the public and its interest” is the  
24 foundation to counsel's role in the EFSEC process. The statutory mandate  
25 provides, in pertinent part, as follows:  
26

27 The counsel for the environment *shall represent the public and its*  
28 *interest* in protecting the quality of the environment. Costs incurred  
29 by the counsel for the environment in the performance of these  
30 duties shall be charged to the Office of the Attorney General, and  
31 shall not be a charge against the appropriation to the Energy  
32 Facility Site Evaluation Council. He shall be accorded all the  
33 rights, privileges and responsibilities of an attorney representing a  
34 party in a formal action.  
35

1 Counsel for the Environment in *Olympia Pipeline Company Cross*  
2 *Cascade Pipeline Project* (Application No. 96-1) outlined its responsibilities as  
3 follows:

4 In each proceeding before the Council, the attorney general  
5 appoints an assistant attorney general as Counsel for the  
6 Environment (CFE). The charge of CFE is "to represent the public  
7 and its interest in protecting the quality of the environment". RCW  
8 80.50.080. There has been opposition throughout this case that  
9 the primary responsibilities of CFE are (1) to ensure, to the extent  
10 possible, that the Council has the information it needs to make an  
11 informed decision, and (2) to ensure that the Council's siting  
12 analysis adequately balances the need for this project against the  
13 project's potential impacts to the environment. It also has been  
14 CFE's position that Olympic has the burden of proving that it has  
15 complied with EFSEC's statutes and regulations and in  
16 demonstrating that its proposed pipeline should be sited.

17 Counsel for the Environment's Opening Statement in the matter of Application  
18 No. 96-1, *Olympic Pipeline Company Cross Cascade Pipeline Project* – page 2.

19 Counsel for the Environment ("CFP") in the present case has failed to ". . .  
20 represent the public and its interest in protecting the quality of the environment."  
21 ROKT has provided detailed information, study and analysis on virtually every  
22 aspect of the proposed project. Despite assurances from earlier "Counsels for  
23 the Environment", the interests and issues of the public have not been presented  
24 and the Council does not have the information it needs to make an informed  
25 decision.<sup>3</sup> CFP has failed altogether to become involved in the hearings. None  
26 of the information provided by ROKT has been submitted to the Council;  
27 environmental issues and impacts not presented or developed; alternative site  
28 analysis is lacking; and no testimony developed for preemption, need or impacts  
29 to the quality of the environment. The process and public are entitled to more

30  
31 <sup>3</sup> Counsel for the environment provided limited pre-filed direct testimony: Testimony of G.  
32 Thomas Tebb (Department of Ecology – Water Quality Program); and Direct Testimony of  
33 Kenneth R. Bevis (Washington State Department of Fish and Wildlife). No other testimony was  
34 provided despite receipt of literally volumes of information regarding every aspect of the project.  
35 ROKT provided the laboring oar but counsel for the environment failed to take any meaningful  
action to represent the public or address environmental impacts. The failures are even more  
exacerbated by objections submitted by the Applicant to the direct testimony of Kenneth R.  
Bevis. Applicant asserts, through rebuttal testimony, that Kenneth R. Bevis did not have  
authority to address or speak to these issues.

2 under the legislative directive. ROKT and the public should not be placed in the  
3 position of "covering" for CFT's deficiencies. This is the antithesis of a  
4 meaningful public process. See, *Blue Sky Advocates v. State of Washington*,  
5 107 Wn.2d 112, 727 P.2d 644 (1986). The public and process is entitled to  
6 more in this case.

7 **2.2 Creation of Energy Facility Site Evaluation Council.** In 1970,  
8 the Legislature of the State of Washington created the Thermal Power Plant  
9 Evaluation Council and gave it authority to site nuclear power plants. That  
10 statute was based upon the premise that there was a critical public need for  
11 electrical power facilities. It called for a balance of public need against any  
12 adverse impacts to the environment. RCW 80.50.010. The goal was a one-stop  
13 permit process for these controversial projects.

14 A few years later, the United States encountered the Arab oil embargo  
15 and its first real energy crisis. There was a fear that much needed fossil fuels  
16 would run out. Long gas lines created a new sense of urgency. Driven by that  
17 era's crisis mentality, an omnibus energy bill was enacted. (Laws of 1975-76,  
18 Second Executive Sess., Ch. 108). The bill set up the State Energy Office and  
19 granted the Governor special emergency powers to declare a state of energy  
20 supply alert. Part of that bill amended the Thermal Power Plant Evaluation  
21 Council statute, renaming it the Energy Facility Site Evaluation Council (EFSEC)  
22 and extending its jurisdiction to cover all large energy facilities.

23 The statute (RCW 80.50.010) now states:

24  
25 The legislature finds that the present and predicted growth in  
26 energy demands in the state of Washington requires the  
27 development of a procedure for selection and utilization of sites for  
28 energy facilities and identification of a state position with respect to  
29 each proposed site. *The legislature recognizes that the selection  
30 of sites will have a significant impact upon the welfare of the  
31 population, the location and growth of industry and the use of  
32 natural resources of the state.*

33  
34 It is the intent to seek courses of action that will balance the  
35 increasing demands for energy facility location and operation in

1 conjunction with the broad interest of the public. Such action will  
2 be based on these premises:

3 (1) To assure Washington state citizens that, where  
4 applicable, operational safeguards are at least  
5 astringent as established by the federal government  
6 and are technically sufficient for their welfare and  
7 protection.

8 (2) *To preserve and protect the quality of the*  
9 *environment; to enhance the public's opportunity to*  
10 *enjoy the aesthetic and recreational benefits of the*  
11 *air, water and land resources; to promote air*  
12 *cleanliness; and to pursue beneficial changes in the*  
13 *environment.*

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

17 (Italics added)

18 The review process recognizes the applicability and availability of local  
19 land use review processes. RCW 80.50.090(2). KWPP is not inconsistent with  
20 state or county land use plans or zoning ordinances. Processes and guidelines  
21 have been established for wind resource projects in a manner consistent with  
22 the directives of Growth Management Act (GMA).<sup>4</sup> Zilhka has simply elected not  
23 to proceed with local processes established pursuant to Growth Management  
24 Act (GMA) and public hearing processes. Other wind farm proponents  
25 participated in the development of procedures and have submitted local land use  
26 applications. Numerous other wind farm projects have been processed by local  
27 jurisdictions under similar legislative procedures and processes. Zilhka is the  
28 only organization that has chosen to turn its back on a bonafide local process.  
29  
30

31  
32  
33 <sup>4</sup> Growth Management Act (GMA) was adopted to address uncoordinated and unplanned growth  
34 and assure development of comprehensive plans and regulations based upon citizen  
35 participation and coordination. RCW 36.70A.010. Included in the directives, was a legislative  
finding recognizing the ". . . importance of rural lands and rural character to Washington's  
economy, its people and its environment. . . ." RCW 36.70A.011. The project site is located  
within rural lands under the Kittitas County Comprehensive Plan.

EFSEC legislation is subject to the mandates and requirements established by the Growth Management Act (GMA). RCW 36.70A.103 provides:

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 2<sup>nd</sup> sp. in sess. do not effect the state's authority to cite 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.

Growth Management Act (GMA) requirements for compliance with local comprehensive plans and development regulations are not preempted by RCW 80.50.110.

(a) **Balancing of Need and Public Interest.** Although EFSEC's governing statute, Chapter 80.50 RCW, which was passed in 1975, recognized a pressing need for new energy facilities. The Council must go beyond that statement to determine whether there is a need for the proposed wind farm project. The premise as set forth by the legislature in RCW 80.50.010 indicates that the "need" identified by the legislature concerning new energy facilities was a need for "abundant energy at reasonable cost."

The three (3) separate premises set forth in RCW 80.50.010 indicate that the Legislature did not find that *any* additional increase in the state's ability to create energy was necessarily a public benefit or that *any* decrease in energy costs was necessarily a public benefit. The Legislature was looking to ensure an abundant supply of energy at a reasonable cost while at the same time ensuring the protection and enhancement of our environment and the protection of the public welfare.

In its *Northern Tier* pipeline decision in 1982, EFSEC construed RCW 80.50.010 to evidence a legislative intent to balance the generalized demand for energy with other public interest concerns:

It is apparent from the language of this provision that the legislature intended the council to consider the issue of

2 demand for the facility not as an issue apart from  
3 substantive concerns, but only insofar as a balance need be  
4 struck between the project's ability to satisfy the generalized  
5 demand for energy facilities on the one hand and, on the  
6 other, public interest which might be effected by the  
7 proposal.

8 *Northern Tier*, Findings, Conclusion and Order at 8 (emphasis added).

9 Kittitas Valley Wind Power Project is one (1) of three (3) current  
10 project proposals within the county. In addition to the specific project proposals,  
11 large areas of available alternative sites are open for consideration as well as a  
12 plethora of sites in adjoining counties. Projects have already been developed  
13 and approved in Benton, Walla Walla and Klickitat Counties. The proliferation of  
14 wind farms is extraordinary within this state. Despite this fact, no meaningful  
15 information has been provided to EFSEC regarding alternative sites. The  
16 consideration of alternative sites is a mandatory element of environmental  
17 review under SEPA. In the presence of available alternative sites, there is no  
18 need for the particular project.

19 In *Northern Tier*, EFSEC also recognized that while the legislature  
20 found a need for energy generally, the legislature has expressed no opinion on  
21 whether the demand for a particular facility is sufficient to outweigh the facility's  
22 negative impacts on the public interest:

23 Implicit in the charge by the Legislature to the Council to  
24 balance demand against public interest, and the legislative  
25 grant of power to the Council to recommend a position of  
26 acceptance or rejection of an application, is the recognition  
27 that the demand for a particular facility, while it exists, may  
28 not be great enough to outweigh the facility's net detrimental  
29 affects on the broad interest of the public.

30 *Northern Tier*, at 477 (Conclusion of Law 9). The council then went on to  
31 conclude that it was not possible ". . . to determine that the projected benefits of  
32 the proposed [Northern Tier] facility will outweigh the projected risks to the  
33 environment, health, welfare, and safety of the people of this state." *Id.* at 478  
34 (Conclusion 10). The council recommended denial of the project. By requiring  
35 that the need for abundant and reasonably priced energy be balanced against

2 the need to protect and enhance the environment and the public's use of the  
3 environment, the legislature is clearly saying that simply providing more and/or  
4 cheaper energy is not enough to demonstrate a public need for a project.

5 EFSEC and the Counsel for the Environment are both charged  
6 with preserving and protecting the quality of the environment. With this goal in  
7 mind, we believe that the major issues to be addressed prior to recommendation  
8 to the governor are as follows: (1) preemption or compliance with local land use  
9 review processes; (2) need for the specific project; (3) preservation and  
10 protection of the quality of the environment and the public's opportunity to enjoy  
11 aesthetic and recreational benefits of the air, water and land resources; and (4)  
12 comparative risk to the environment from the proposed project  
13 consideration of alternative sites and locations

14 (b) **Preemption of GMA/Local Land Use Planning.** At the  
15 heart of this case is the issue of state preemption. The combination of  
16 ineffective counsel and elimination of local processes marginalizes and virtually  
17 eliminate public input. EFSEC legislation sought to guard against these  
18 potential abuses by authorizing the Counsel for the Environment and  
19 recognizing compliance with local land use rules and regulations. Zilhka has  
20 fought throughout this process to eliminate public participation. Other wind farm  
21 proponents have chosen to follow local procedures and processes. Zilhka has  
22 fought local involvement from the inception of its project and made no  
23 meaningful effort to comply with local processes. Applicant makes the  
24 extraordinary request that the Council preempt local land use and zoning  
25 processes and regulations. The purported authority derives from RCW  
26 80.50.110 which provides:  
27  
28

- 29 (1) If any provision of this chapter is in conflict with any  
30 other provision, limitation, or restriction *which is now*  
31 *in effect under any other law of this state*, or any rule  
32 or regulation promulgated thereunder, this chapter  
33 shall govern and control and such other law or rule or  
34 regulation promulgated thereunder shall be deemed  
35 superceded for the purposes of this chapter.

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

6 Preemption is considered in the context of consistency and  
7 compliance with county or regional land use plans or zoning ordinances. RCW  
8 80.50.090. This statutory directive recognizes that an application will be vested  
9 with regard to consistent and compliant ordinances and regulations. It does not  
10 authorize, however, the elimination of a local review process. It is impossible to  
11 determine consistency or compliance in the absence of completion of the local  
12 proceeding.

13 The issue of preemption is also significant in the context of  
14 "subsequently adopted" state legislation. State of Washington enacted the most  
15 pervasive changes in history to its land use processes with the adoption of the  
16 Growth Management Act (GMA). Statutory directives require that ". . . state  
17 agencies shall comply with local comprehensive plans and development  
18 regulations and amendments thereto. . . ." RCW 36.70A.103. Applicant has not  
19 complied with local comprehensive plans and development regulations.  
20

21 Department of Community, Trade and Economic Development  
22 include the following statement in submissions:

23 Both the EFSEC statute and the GMA statute must be  
24 complied with in permitting of energy facilities. The EFSEC  
25 statute does not give the Council authority to run roughshod  
26 over the GMA or local land use regulations. But neither  
27 does the GMA, nor do the local regulations, have the  
28 authority to thwart the statutory EFSEC process.

29 CTED's Response to F. Steven Lathrop's Motion to Stay Adjudicative Hearing –  
30 2. If this statement is correct, the only way to reconcile the competing statutory  
31 regimes is to stay the EFSEC proceeding and allow the local land use process  
32 to proceed in accordance with "local comprehensive plans and development  
33  
34  
35

1 regulations.”<sup>5</sup> CTED seems to suggest that EFSEC has a responsibility for  
2 applying Growth Management Act (GMA) in its decision-making process. The  
3 application of GMA to the review process would require compliance with  
4 established planning goals (RCW 36.70A.020); recognition of resource lands  
5 (agriculture, forest, mineral lands and critical areas – RCW 36.70A.050); siting of  
6 essential public facilities (RCW 36.70A.200) and rules regarding “major industrial  
7 developments” (RCW 36.70A.365 and .367). None of these items are included  
8 in the current process.  
9

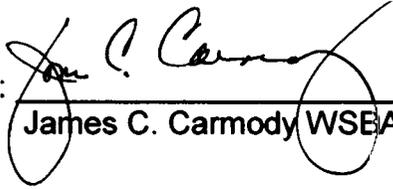
10 **III.**

11 **Conclusion**

12 Sagebrush Power Partners has the burden of establishing the following:  
13 (1) preemption of local land use planning processes as mandated under the  
14 circumstances; (2) demonstrating a public need for the wind energy project; (3)  
15 preserving and protecting the quality of the environment and the public’s  
16 opportunity to enjoy air, water and land resources; and (4) complying with  
17 directives of the Growth Management Act (GMA). The evidence will show that  
18 Sagebrush Power Partners has not met this burden of proof.

19 DATED this 6<sup>th</sup> day of August, 2004.

20  
21 VELIKANJE, MOORE & SHORE, P.S.  
22 Attorneys for Residents Opposed to  
23 Kittitas Turbines (ROKT)

24  
25  
26 By: 

27 James C. Carmody WSEA 5205  
28  
29  
30  
31  
32  
33

34 <sup>5</sup> A second possible reconciliation would be that the EFSEC process adopt the local  
35 comprehensive plan directives and proceed with a process utilizing the wind resource overlay  
district. This option is, however, an illogical application of GMA and EFSEC.