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7 BEFORE THE STATE OF WASHINGTON
8 ENERGY FACILITY SITE EVALUATION COUNCIL

9 In the Matter of

10 Application No. 2004-01

11 WIND RIDGE POWER PARTNERS,
12 L.L.C.

13 WILD HORSE WIND POWER PROJECT

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15 WIND RIDGE POWER PARTNERS’
16 BRIEF IN OPPOSITION TO F. STEVEN
17 LATHROP’S PETITION FOR
18 INTERVENTION

19 WIND RIDGE POWER PARTNERS, LLC (“Wind Ridge” or “Applicant”), by
20 and through its undersigned counsel, submits this brief in response to Mr. Lathrop’s brief
21 in support of his Petition for Intervention.

22 **A. INTRODUCTION**

23 Mr. Lathrop has not shown “with particularity” how he has “legal interest” in the
24 outcome of these proceedings that could be “impaired or impeded” by consideration of
25 the application. Moreover, Mr. Lathrop failed to establish with particularity how the
26 consideration of the Application for Site Certification (ASC) will affect a personal “legal
“injury in fact”. Mr. Lathrop instead simply demands the right to intervene, based upon a

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1 failure to understand the application, and based upon his speculation of impacts that are
2 not connected to any “legal interest” of Lathrop, or which do not exist.

3 As discussed below, the EFSEC intervention rule, WAC 463-30-400, applies to
4 this case. WAC 463-30-400 provides as follows:

5 **WAC 463-30-400 Intervention.** On timely application in writing to the
6 council, intervention shall be allowed to any person upon whom a statute confers
7 a right to intervene and, in the discretion of the council, to any person having an
8 interest in the subject matter and whose ability to protect such interest may be
9 otherwise impaired or impeded. All petitions to intervene shall be verified under
10 oath by the petitioner, shall adequately identify the petitioner, and shall establish
11 with particularity an interest in the subject matter and that the ability to protect
12 such interest may be otherwise impaired or impeded. In exercising discretion
with regard to intervention, the council shall consider whether intervention by the
petitioner would unduly delay the proceeding or prejudice the rights of the
existing parties. The council may establish a date after which petitions to
intervene will not be considered except for good cause shown. When such a date
has been established, the council will assure that adequate public notice is given.

13 WAC 463-30-400 imposes a requirement that an intervener either demonstrate
14 that standing is “conferred by statute” (not the case here), or that an intervener
15 demonstrate that they have an “interest in the subject matter and whose ability to protect
16 such interest may be otherwise impaired or impeded.” *Id.* Further, “[a]ll petitions to
17 intervene shall be verified under oath by the petitioner, shall adequately identify the
18 petitioner, and ***shall establish with particularity an interest in the subject matter and***
19 ***that the ability to protect such interest may be otherwise impaired or impeded.***”

20 [Emphasis added.] *Id.*

21 The Applicant responds specifically to the “interests” alleged by Mr. Lathrop in
22 his Petition to Intervene, and in his brief. The Applicant responds both with sworn
23 testimony and with legal argument. In submitting sworn testimony, the Applicant intends
24 to rebut unsubstantiated and specious allegations by Lathrop, made in his Petition for
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1 Intervention and in his brief. In doing so, the Applicant emphasizes that Lathrop has the
2 burden to prove his right to intervene and his standing to participate. Lathrop must make
3 this showing *with particularity*. The Applicant does not have any burden of proof at this
4 stage in the proceedings.

5 In addition to considering WAC 463-30-400 regarding Lathrop's failure to allege
6 actual "legal interests" that may be "impaired or impeded," it would be instructive for the
7 Council to consider the intervention rule based upon the Administrative Procedure Act
8 (APA) standing test, which measures a party's "interest" under the "injury in fact"
9 standard, requiring a clear demonstration of a perceptible injury. The APA's standing
10 rule, RCW 34.05.530, was adopted after adoption of the APA and EFSEC intervention
11 rules, and has been widely applied by Washington courts to all manner of agency
12 proceedings.

13 The APA standing rule provides that a party has standing to obtain judicial review
14 of an agency action if that person is "aggrieved or adversely affected" (specifically
15 parallel to "impaired or impeded" under the EFSEC intervention rule) within the meaning
16 of that statute. The basic thrust of both WAC 463-30-400 and RCW 34.05.530 relate to
17 injury and damage to a "legal interest", as opposed to philosophical objections and
18 remote and speculative allegations and concerns. In his attempt to establish a basis for
19 intervention, Mr. Lathrop ignores the applicable standard, and instead relies upon
20 inapplicable cases construing irrelevant Superior Court Rules.

21 This proceeding is particularly suited for seeking context from the APA standing
22 test and applicable judicial authority, because the agency proceeding involves litigation
23 of contested claims inherently related to potential adverse effects specifically connected
24 to the alleged legal interests of the parties. Moreover, in a contested case proceeding
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1 where a party would have no ability to demonstrate standing to appeal an agency order in
2 court, and where that person has not demonstrated any interest “impaired or impeded” or
3 that they are or will be “aggrieved or adversely affected” as a consequence of any
4 possible outcome of the agency action, that person simply cannot meet the intervention
5 standard for participation in the pending EFSEC proceeding.

6 **B. LATHROP’S ALLEGATIONS AND RATIONALE FOR INTERVENTION**

7 In his Petition for Intervention, Mr. Lathrop alleged the following:

- 8 1. Most of the Project area will be visible from his residence.
- 9 2. He and his family own agricultural property within the county, which will be
10 directly affected by the Project.
- 11 3. The Project will be in the view from his residence and could be a precedent for
12 future projects, thereby directly affecting his property values.
- 13 4. He had a direct substantial interest, which is not represented or protected by
14 existing parties.

15 In his brief supporting his Petition for Intervention, Lathrop argues:

16 “Mr. Lathrop is opposed to every element of this application and vigorously
17 disputes the concept that this project provides any positive economic development
18 for Kittitas County and has clearly asserted in his intervention petition more than
19 sufficient interest in the subject matter of this application to justify intervention,
20 and those interests will not all be repeated here. Suffice to say that no party to the
21 proceedings has the authority, duty, inclination or ability to represent the interests
22 of Mr. Lathrop, adequately or otherwise. In particular, however, the mere
23 precedents this project will set in this county for similar projects and the absence
24 of any other petitions opposed to this project alone are sufficient grounds. *Fritz v.*
25 *Gorton*, 8 Wn.App. 658 659 509 P.2d 83 (1973).” (Brief, page 3.)

26 As further grounds for his participation in these proceedings, Lathrop alleges that
the “primary reason for any application to EFSEC” is to ultimately “have the ability to
request preemption,” and wrongly speculates that there is “no doubt” that the Applicant
intends to seek preemption. (Brief, p. 3.) In response to the Council’s request for written

1 argument justifying his standing to participate in these proceedings, Mr. Lathrop declares
2 his antipathy toward the EFSEC process, he speculates regarding the Applicant's
3 purported motives to seek preemption, he expresses his dislike of the application, and he
4 pronounces his dedication to vigorously oppose it. He speculates about "precedents" the
5 Wild Horse Project may set, and he complains that others do not oppose it. As discussed
6 below, Lathrop's petition and brief fall far short of his burden to meet EFSEC's
7 intervention requirements.

8 **C. STANDARDS FOR GRANTING, CONDITIONING, OR DENYING**
9 **INTERVENTION; APPLICANT'S RESPONSE TO LATHROP'S**
10 **ALLEGATIONS**

11 EFSEC construed its own intervention rule and set out what is required to obtain
12 intervention in Prehearing Order No.3, Council Order No. 701 in Application No. 96-1 of
13 the Olympic Pipeline Company, a copy of which is attached hereto as Exhibit 1, and
14 incorporated by reference herein. The analysis in that order is sound, and similar
15 standards should apply to the Wild Horse proceedings.

16 To meet the burden imposed by WAC 463-30-400, and in order to qualify for
17 intervention, a petitioner must plead and establish, with particularity, a legal interest in
18 the subject matter. An intervenor must prove that the legal interest could be adversely
19 affected by a project in a direct and substantial way, and show that failure to allow
20 intervention could impair this interest. The Council set out what a petitioner was
21 required to show on page 3 of Council Order No. 701. Relevant to the issues being
22 considered regarding Mr. Lathrop, the Order required the following:

- 23 1. The petitioner must establish a personal legal interest, as opposed
24 to a philosophical interest.

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1 2. A petitioner has the burden to establish its legal interest with
2 particularity, clearly and specifically. He must show that this interest could be
3 adversely affected in a direct and substantial way. Intervention should be denied
4 to parties whose asserted interests are indirect or remote, or whose potential
5 damage is speculative.

6 3. Failure to allow intervention could impair a legal interest.

7 The Applicant submits with this brief sworn declarations that address Lathrop's
8 allegations within the context of applicable EFSEC intervention and standing
9 requirements. The Declaration from Chris Taylor rebuts the contentions of Mr. Lathrop.
10 The Applicant researched County Assessor records and determined that the closest
11 boundary line of Lathrop's property is 19 miles from the closest project boundary line of
12 the Project. Proposed turbine locations are at even greater distances. Most of the Project
13 area cannot be seen from his property as alleged by Mr. Lathrop. A site layout attached
14 to the Declaration of Chris Taylor, clearly shows that most of the Project lies north and
15 east of Whiskey Dick Mountain and below the ridgelines. These facts rebut the
16 allegations made by Mr. Lathrop, that he is very familiar with the Project area.

17 The Declaration of Arne Nielsen together with the attached visual simulation
18 showing the view and visual impact to Mr. Lathrop's property shows that on a clear day
19 with excellent visibility, the Project would be barely discernable from Lathrop's property
20 at best. Further, Mr. Lathrop has not shown with particularity how the Project, which
21 will remove only approximately 165 acres from open space and grazing uses for the life
22 of the Project, would directly impair his personal interest as an owner of productive
23 agricultural land. Aside from the de minimus impacts to agricultural production and
24 profitability of the Project discussed below, Lathrop has not met his burden to show, with
25 particularity, how this Project will in any way impair the agricultural use and production
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1 of Lathrop’s own agricultural property. Nor has Lathrop (a lawyer) proved that he
2 operates agricultural land for agricultural purposes, and how those operations are
3 threatened.

4 Even assuming that grazing would be restricted on the remaining 8,400
5 undeveloped acres within the Project area, this would remove from grazing only
6 approximately 1.9% of the grazing land in the entire County. This also does not take into
7 account the incontrovertible benefits to landowners within the Project area. The Project
8 will provide strong economic incentives to continue grazing and to avoid conversion to
9 non-agricultural uses because of the substantial additional revenues produced from the
10 land by the Project. Finally, both Kittitas County and the Economic Development
11 Council are well suited to address potential county-wide agricultural impacts and other
12 issues, within the scope of their Petitions for Intervention.

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14 None of the allegations, arguments, pronouncements in Lathrop’s Petition for
15 Intervention or his brief, his dedication to oppose, or his antipathy with the EFSEC
16 process in any way demonstrate that Lathrop has a “legal interest” or standing to
17 participate in these proceedings. He has not shown with particularity a direct and
18 substantial impact to a “legal interest”, and as discussed below, he has not shown any
19 “injury in fact” within the meaning of the APA to justify his participation in this case.
20 Finally, as further discussed below, wholly hypothetical and speculative allegations and
21 concerns regarding the “precedent” in permitting this project is not a “legal interest” of
22 Mr. Lathrop that may be “impaired or impeded”. This alleged concern does not
23 distinguish him from any other citizen or visitor to Kittitas County.

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1 **D. EFSEC SHOULD CONSIDER THE APA STANDING RULE AND CASES**
2 **TO HELP GAUGE INTERVENTION IN THIS CASE UNDER WAC 463-**
3 **30-400**

4 As stated above, the EFSEC intervention rules apply to this case. The Superior
5 Court rules (cited by Lathrop) do not apply, nor do the cases construing those rules. It is
6 instructive due to the similarity and same meaning of the words contained in WAC 463-
7 30-400 and RCW 34.05.530, to consider that in interpreting RCW 34.05.530 the
8 Washington Courts have adopted the “injury in fact” test to gauge the “legal interest” and
9 level of “impairment” for participation in appeals of agency proceedings. The APA,
10 RCW 34.05.530, authorizes a party to participate in judicial review at an administrative
11 proceeding, based upon the following requirements:

12 “A person has standing to obtain judicial review of agency action if that person is
13 aggrieved or adversely affected by the agency action. A person is aggrieved or
14 adversely affected within the meaning of this section only when all three of the
15 following conditions are present: (1) the agency has prejudiced or is likely to
16 prejudice that person; (2) that person’s asserted interests are among those that the
17 agency has required to consider when it engaged in the agency action challenged;
18 and (3) a judgment in favor of that person would substantially eliminate or redress
19 the prejudice to that person caused or likely to be caused by the agency action.”

20 The APA standing rule includes the words “aggrieved or adversely affected,”
21 which are parallel and convey the same meaning as the words “impaired or impeded” in
22 the EFSEC intervention rule. All of these words relate to injury, damage or harm.
23 EFSEC, in Council Order No. 701 at page 3, set out what is required for standing, using
24 the words “adversely affected”. These are very the same words used in RCW 34.05.530.
25 The Council also stated that the “adversely affected” interest must be affected in a “direct
26 and substantial way”, and could not be “indirect or remote, or whose potential damage is
speculative”. EFSEC criteria and precedent are consistent with a long line of federal

1 APA cases, and Washington Supreme Court decisions, adopting the “injury in fact” test
2 to measure the legal interest of potential participants in challenging agency orders, and in
3 gauging the level to which a party is “aggrieved” and the “adverse effect”, (or “impeded”
4 and “impaired”) on a party.

5 In 1995 the Washington State Supreme Court first reviewed the APA standing
6 rule quoted above. In *St. Joseph Hospital v. Department of Health*, 125 Wn.2d 733, 877
7 P2d 891 (1995), the court noted that “the statutory conditions [in the APA] are drawn
8 from federal case law.” The court further noted that in enacting this section of the APA,
9 the legislature appeared to have adopted the standards set forth by the United States
10 Supreme Court in *Assoc. of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150,
11 187-89 (1970).¹ In *Trades Council v. Training Council*, 129 Wn.2d 787, 793-94, 920
12 P2d 581 (1996), the Supreme Court amplified the *St. Joseph Hospital* holding,
13 specifically adopting the federal “injury in fact” and “zone of interest” test for APA
14 proceedings.

15 In *St. Joseph Hospital, supra*, at 740, the State Supreme Court cited with approval
16 of the Federal Court rationale behind the two-prong standing requirement. The court set
17 forth the following policy rationale:

18 Legislation and subsequent administrative actions inevitably affect a multitude of
19 groups and individuals in our complex and highly integrated society. This is
20 especially significant where, as here, legislation alters the structure of the market
21 place. A test requiring only injury-in-fact—the constitutional minimum—would
22 necessarily obstruct and undermine legislative control and guidance over
23 essentially political issues by conferring standing to litigate on a host of parties
24 whose interests Congress failed to protect. [Citation omitted.]

25 ¹ In *Data Processing Service, supra*, the court construed the Federal APA, 5
26 U.S.C. § 702 as requiring the courts to question first whether a plaintiff is “injured in
fact,” “economical or otherwise,” and second, whether the “interest sought to be
protected by the complainant is arguably within the zone of interest to be protected or
regulated by the statute or constitutional guarantee in question.” 397 U.S. at 187.

1 *Id.* at 740. *See also, Trades Council, supra*, at 797 (“ . . . the ‘zone of interest’ test serves
2 as a filter to limit review to those for whom it is most appropriate”).

3 It should be noted that, like the Washington APA, the Federal APA does not
4 contain specific injury-in-fact standards. However, federal courts, as well as Washington
5 courts, have long recognized the disruptive impact of litigants subverting administrative
6 decision making: (a) where they are truly not affected by the outcome; (b) where the
7 “interests” they seek to advance are not true “legal interests” and are clearly not those
8 protected by the statutory scheme; and (c) where such litigants, like Mr. Lathrop, have
9 not suffered, and will not suffer, clear, adverse affect or demonstrable injury-in-fact.²

10 **1. Lathrop has not Alleged and Shown With Particularity a Specific**
11 **Impairment of a Legal Interest or “Injury in Fact”**

12 In *Trepanier v. Everett*, 64 Wn. App. 380, 382-83, 824 P.2d 524 (1992), *review*
13 *denied*, 119 Wn.2d 1012 (1992), the Court of Appeals very succinctly summarized a long
14 line of Washington standing cases, setting forth the burden and standards a party seeking
15 standing must carry in order to obtain review of an agency action. In this case the court
16 held that the Petitioner bore the burden to prove that they could satisfy both the zone of
17 interests and the injury in fact tests. To satisfy the “zone of interests” prong (which is set
18 forth in RCW 34.05.530(2)), a party must demonstrate that the interest the petitioner is
19 seeking to protect is “arguably within the zone of interests to be protected or regulated by

20 ² In enacting the APA in 1988, the Washington legislature quite clearly stated its
21 intent that Washington courts should rely upon similar federal legislative enactments as
22 well as federal judicial interpretations thereof, to interpret and apply the Washington
23 APA. RCW 34.05.001 states the following legislative intent: “. . . The legislature also
24 intends that the courts should interpret provisions of this chapter consistently with
25 decisions of other courts interpreting similar provisions of other states, the federal
26 government, and model acts.” In *Trades Council, supra* at 793, the Washington Supreme
Court expressly instructed Washington courts to “look to the federal cases addressing
standing.”

1 the statute or constitutional guarantee in question.” *Id.* at 382. More germane to the
2 Lathrop intervention petition, Lathrop must demonstrate that he will suffer an “injury in
3 fact.” *Id.* at 383.

4 In order to demonstrate that he will suffer an “injury in fact,” Lathrop must
5 “present facts to show that he will be adversely affected.” *Id.* at 382. “When a person
6 alleges a threatened injury, as opposed to an existing injury, he or she must show an
7 immediate, concrete, and specific injury to him or herself. [Citation omitted.] If the
8 injury is merely conjectural or hypothetical, there can be no standing. [Citation
9 omitted.]” *Id.* at 383. Finally, the court noted that arguments based on “unsupported
10 assumptions,” “bare assertions” and “mere speculation of injury” cannot support
11 standing. The person seeking standing must show “factual support in the record” to
12 demonstrate that they will suffer an “injury in fact.” *Id.* at 384.

13 In summary, based upon WAC 463-30-400, and as in explained in Order 701, Mr.
14 Lathrop has not met his burden. Additionally Mr. Lathrop has not shown standing under
15 EFSEC’s rule or under the context for this rule found in Washington Supreme Court
16 decisions, construing the Washington APA. He has shown no legal interest, or how it is
17 impaired and adversely affected. Mr. Lathrop has not met the applicable legal standards.

18 **2. Speculative Allegations of Potential “Precedent” do not Justify**
19 **Intervention**

20 Council Order 701 at page 3, states that: “Intervention should be denied to parties
21 who asserted interests are indirect or remote, or whose potential damage is remote and
22 speculative.” This sets forth essentially the same principles followed by the courts of the
23 State of Washington in similar cases applying the “injury in fact” standard. Mr.
24 Lathrop’s allegations supporting intervention are remarkably similar to those of the
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1 petitioner in *Coughlin v. Seattle School Dist.*, 27 Wn. App. 888, 893 (1980). While
2 *Coughlin* was not an APA case, the Court applied the “injury in fact” standing
3 requirement in the SEPA context. In *Coughlin*, the petitioner challenged the closure of
4 five elementary schools under the State Environmental Policy Act, 43.21C, *et seq.*,
5 appealing a SEPA Environmental Impact Statement. Among her claims offered to justify
6 standing, the petitioner alleged diminished value of her property, impaired enjoyment of
7 her property, environment and quality of life, illegal amendment of the city’s
8 comprehensive plan, *etc.* (*Id.* at 890).

9 Noting Washington’s adoption of the federal “injury in fact” standing test³, the
10 court held that Coughlin’s capacity as a concerned citizen, taxpayer, and resident of the
11 school district was “too remote” to establish standing in a SEPA appeal. Also too remote
12 is the direct harm she claimed will occur “when the Board takes future action based upon
13 the precedents she perceives in the closure of these five schools.” (*Id.* at 894.)
14 Responding to Coughlin’s claims of adverse effect to her neighborhood, property values,
15 and environmental health, the court held that because the plaintiff did not reside in or
16 adjacent to any of the affected geographical areas, there is no “direct and perceptible
17 adverse effect on Coughlin’s neighborhood, property value or environmental health.” *Id.*
18 at 894.

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20 ³ In *Coughlin*, the Court of Appeals noted that the Washington Supreme Court
21 “has expressly adopted the federal approach to standing in environmental cases and has
22 required the allegations of proof to include ‘injury-in-fact,’ *i.e.*, a perceptible present or
23 future harm caused by the challenged action. *Save a Valuable Environment v. Bothell*, 89
24 Wn.2d 862, 576 P.2d 301 (1978); *see also, Moran v. State*, 88 Wn.2d 867, 568 P.2d 758
25 (1977).” *Id.* at 893-94. The *Coughlin* court noted that these requirements preclude
26 standing when the harm claimed by a litigation is “too remote to establish standing in a
SEPA case.”

1 The facts in *Trepanier, supra*, are also similar. In that case the petitioner, who
2 was a civil engineer and operated a land use consulting firm located in Snohomish
3 County, opposed a land use ordinance arguing that it reduced densities in the City of
4 Everett, and thus would create significant adverse environmental impacts by transferring
5 development outside the City’s boundaries into the County. The Court held that the
6 injury alleged was conjectural and hypothetical. The Court held that Mr. Trepanier had
7 merely made a bald assertion and argument, that the reduction of densities in the city
8 would chase growth to the county, without an adequate presentation of evidentiary facts
9 to show how the plaintiff or the plaintiff’s property would be specially and perceptibly
10 harmed.

11 Similar to *Coughlin* and *Trepanier*, Lathrop alleges an injury from a project 19
12 miles from his nearest property ownership and home. His property value impact
13 allegations are not credible. Based upon visual simulations, the Wild Horse Project will
14 be barely perceptible from his home on a clear day with excellent visibility. His
15 allegations of “precedent” are completely speculative, and contrary to the analysis
16 performed in the Supplemental DEIS prepared for the Kittitas Valley Wind Power
17 Project. It is utterly impossible that the Project, if approved, would impair his property
18 rights, affect his viewshed, impair his purported agricultural operations on his lands, or in
19 any way whatsoever cause any “perceptible adverse effect” on him, much less cause an
20 “immediate, concrete, and specific injury to himself.” (*Trepanier, supra*, at 383.)

21 **E. CONCLUSION.**

22 The Applicant submits that the petitioner, Mr. Lathrop has failed to meet the
23 burden required by WAC 463-30-400. He has shown no personal legal interest, or how it
24 is impaired and adversely affected. Mr. Lathrop has not met the applicable legal
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1 standards. The Applicant respectfully requests that Lathrop's Petition for Intervention be
2 denied.

3 DATED: October 15, 2004.

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