BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of Application No. 2009-01:  
WHISTLING RIDGE ENERGY LLC;  
WHISTLING RIDGE ENERGY PROJECT

SKAMANIA COUNTY AND  
KLICKITAT COUNTY PUBLIC  
ECONOMIC DEVELOPMENT  
AUTHORITY’S LAND USE BRIEF

I. INTRODUCTION

Skamania County is the host County for the proposed Whistling Ridge Energy Project, a  
38-turbine, 75 megawatt wind development proposal. Located outside the Columbia River  
Gorge Scenic Area, the Project would be sited on 1,152 acres, with a permanent footprint of  
54.25 acres.¹ The vast majority of the land would remain in forestry operation.² EFSEC has  
requested briefing on the Project’s consistency with County land use requirements, because the  
Council, as part of its siting recommendation, must “make a determination as to whether the  
proposed site is consistent and in compliance with land use plans and zoning ordinances pursuant  
to RCW 80.50.090(2).”³ The Project is consistent, but even if it were not, the Council has  
preemption authority.

¹ ASC (Introduction, p. 1-1; Part 2, Table 2.1-1, and p. 2-10.5).
² ASC 2.3-7 and 2.3.9.
³ WAC 463-26-110; see also RCW 80.50.090.
The Skamania County zoning code permits the Whistling Ridge Energy Project outright, with a small portion subject to conditional use permit approval. Because the Project is permitted outright, comprehensive plan consistency is not required. Even if plan consistency were required, EFSEC has likely never reviewed a project so central to achieving a county’s local planning vision.

Due to the pull-out of traditional resource-based industries, Skamania County is on federal life-support and faces enormous socio-economic challenges, as exemplified by the more than 50% of children in four school districts on reduced or free school lunches.⁴ The economic development Whistling Ridge brings⁵ is critical for the community revitalization the County Comprehensive Plan calls for. Due to the County’s financial difficulties, and limited resources for reviewing a commercial-scale wind project, the County referred the Project applicant to EFSEC. However, had the Project been submitted to Skamania County, the County would have approved it.

Skamania County and the Klickitat County Public Economic Development Authority respectfully request EFSEC find the Project consistent with County land use requirements. Alternatively, the Council may preempt Skamania County requirements.⁶

II. ARGUMENT

A. Skamania County Zoning Permits the Project Outright

Most of the Project site is unzoned. As such, the vast majority of the Project is permitted outright.⁷ “In the areas classified as Unmapped (UNM) all uses which have not been declared a nuisance by statute, resolution, or court of jurisdiction are allowable.”⁸ The proposed use is not a nuisance, and is authorized. The Project does have to comply with the

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⁴ See p. 6:10-15 of this brief.
⁵ See e.g. Ex. 41.02 (Hovee Economic and Fiscal Benefits Memorandum).
⁶ RCW 80.50.110; WAC 463-28-020.
⁷ Ex. 2.03 (Certificate of Land Use Consistency), pgs. 10-11.
⁸ Id.; Skamania County Code 21.64.020, emphasis added.
County’s critical areas ordinance, building codes, and the State Environmental Policy Act, or SEPA, but it is an allowed use.

For the 127 acres located in Resource Production Zone FOR/AG 20, a conditional use permit is required. Skamania County authorizes conditional uses for a variety of uses in this zone, including sawmills, shake and shingle mills, geothermal energy facilities, aircraft landing fields, and semi-public facilities and utilities. The Project comes within the scope of this list of uses. Public facilities and utilities are defined as those “[f]acilities which are owned, operated, and maintained by public entities which provide a public service required by local governing bodies and state laws.” While the Project is proposed by a private entity, much the way a private railroad engages in a “semi-public” activity, the electricity will be sold to public utilities and transported on a publicly owned system, so is semi-public in nature. The Skamania County Planning Department has found the use, for purposes of the zoning and comprehensive plan, comes within this category. As the entity charged with implementing and interpreting County land use requirements, its interpretation is entitled to deference, and under EFSEC requirements, the deference is still higher. The certificate of consistency creates a rebuttable presumption, or “prima facie proof of consistency.”

B. Comprehensive Plan Consistency is not Required

County zoning authorizes the Project. Under Washington law, it is the zoning which governs the application. If a use is permitted outright, and does not require comprehensive plan consistency for its approval, plan consistency is not required.

9 Ex. 2.03 (Certificate of Land Use Consistency), p. 11; see Skamania County Code, 21.56.030.
10 SCC 21.56.030.
11 SCC 21.08.010(69).
12 Freeman v. City of Centralia, 67 Wash. 142, 149, 20 P. 886 (1912).
14 WAC 463-26-090 (“[S]uch certificates will be regarded as prima facie proof of consistency and compliance with such land use plans and zoning ordinances absent contrary demonstration by anyone present at the hearing.”), emphasis in text.
A comprehensive plan, without regulatory implementation, does not impose restrictions upon property and does not deprive or limit the landowner of the use of property. The zoning ordinance is the primary regulatory device under the Act.\textsuperscript{15} Because the Comprehensive Plan is not regulatory it is "\textit{not error to issue} ... \textit{[a permit] even though the project appeared to be in conflict with a policy statement contained in the plan.}"\textsuperscript{16} The Comprehensive Plan itself acknowledges "[i]t does not provide all the details"\textsuperscript{17} and "is not a regulatory document."\textsuperscript{18} It is simply a "guiding document."\textsuperscript{19}

\textbf{C. Although not Required, the Project is Consistent with the Comprehensive Plan}

The Project is permitted by County zoning so Plan consistency is not required. Nevertheless, the Project is consistent with the development the Plan contemplates. The Plan designates the site primarily as Conservancy,\textsuperscript{20} and contemplates "[l]ogging, timber management, agricultural and mineral extraction" as the "main use activities."\textsuperscript{21} Appropriate uses include "[p]ublic facilities and utilities, such as parks, public water access, libraries, schools, utility substations, and telecommunication facilities," along with "logging and mining camps" and "surface mining" via conditional use permit.\textsuperscript{22} Wind development is no more intensive than some of these uses, and is a resource-based use, compatible with maintaining existing, resource based forestry uses.\textsuperscript{23} Because wind development only takes a limited amount of land out of forestry, it supports maintenance of those lands as forest lands, as opposed to other uses which are generally less compatible with maintenance of forestry operations, such as

\textsuperscript{15} Toandos Peninsula Ass'n v. Jefferson County, 32 Wn.App. 473, 479-80, 648 P.2d 448 (1982), emphasis added. The Court's reference to "The Act" is to the Planning Enabling Act, Ch. 36.70, which governs county planning.

\textsuperscript{16} Id. at 480, emphasis added.

\textsuperscript{17} Skamania County Comprehensive Plan, pg. 22. The Council has taken judicial notice of the Plan.

\textsuperscript{18} Skamania County Comprehensive Plan, pg. 6.

\textsuperscript{19} Skamania County Comprehensive Plan, pg. 6.

\textsuperscript{20} Ex. 2.03 (Certificate of Land Use Consistency), pg. 5 (Comprehensive Plan designates the alternative location for the operation and maintenance building as Rural Lands II). See Comprehensive Plan, pgs. 25-26.

\textsuperscript{21} Skamania County Comprehensive Plan), pg. 25.

\textsuperscript{22} Skamania County Comprehensive Plan, pg. 26.

\textsuperscript{23} The 1977 Comprehensive Plan is no longer in effect, and applied to only a limited portion of the County.
subdivisions. Because the Project supports existing and contemplated uses, it is generally consistent with the Comprehensive Plan.

D. **The Moratorium Does Not Apply to the Project**

15,000 acres within the County is unzoned and subject to a County-wide moratorium.\(^{24}\) The moratorium is in place to ensure development does not occur which would be inconsistent with the zoning controls being developed. The moratorium is not directed at the Project or at EFSEC, and does not apply to the County’s certificate of land use consistency, which assessed the County’s substantive land use requirements and policies. The moratorium applies only to County “acceptance and processing of” building permits on lots created by deed since 2006, plats, and SEPA Checklists related to forest conversions. The moratorium does not apply to the development of environmental impact statements or permits not listed, including EFSEC review and approval of a wind project.

E. **Whistling Ridge is Critical to Achieving the Comprehensive Plan’s Guiding Vision**

Skamania County’s planning resources are limited, making Whistling Ridge that much more critical to implementing Plan economic development objectives. The County Comprehensive Plan is short, at 77 pages. This is not a County which can afford lengthy, costly planning exercises. So, unlike most counties, there is not detailed analysis on the County’s socio-economic conditions. However, much like any other local jurisdiction, Skamania County’s guiding vision is to preserve its economic base: here, its natural resource based industries, while being protective of the environment and supporting the local community.

\(^{24}\) Although in existence since the 1800’s, the County did not adopt its first zoning code until 1989 and 1991. This is partly because the County is 85% National Forest, so there was less need to do so. See Comprehensive Plan, p. 9; Ex. 29.03-01 and -02 (1977 Comprehensive Plan), pgs. 3-4; and Ex. 51.00R (Commissioner Pearce testimony), p. 6.
Skamania County is strongly committed to protecting our rural character and natural resource based industries while allowing for planned future development that is balanced with the protection of critical resources and ecologically sensitive areas, while preserving the community’s high quality of life.  

Unfortunately, this vision faces enormous challenges, far beyond that of most jurisdictions. Commissioner Pearce, with 28 years service as a police officer in the neighboring county, explained to the Council:

The unemployment and underemployment in the center of the county has a lot of impacts on the county in terms of service levels. We even have a domestic violence shelter in our county, and in November alone we had 77 bed nights in that shelter. So we have a very severe economic problem, especially in the center of our county. 

Q. With regard to the center of the county, and I'm assuming you're referring to the Carson area, can you elaborate a bit on kind of the economic situation within that part of the county such as the number of children on reduced or subsidized school lunches?  

A. Those four school districts are wholly within the county which is Mount Pleasant, Skamania County, Stevenson, Carson, and Mill A average between in the elementary schools between 55 and 65 percent free and reduced lunch which is the number that the U.S. Department of Education uses to determine poverty level.  

77 bed-nights in the County domestic violence shelter in November alone. Over half the children within the four school districts are on free or reduced lunch. This is coupled with the County’s extremely limited tax base and dependence on federal life support to avoid shuttering its schools. 

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25 Skamania County Comprehensive Plan, pg. 13.  
30 Ex. 51.00R (Commissioner Pearce's testimony), p.7, see specifically lines 13-15.
Given these conditions, the County did make an initial effort to plan specifically for energy development throughout the County, including wind development. But, because the zoning was so wide-ranging, and was not accompanied by an environmental impact statement, the County Hearing Examiner remanded for additional review. Given the County’s limited resources, the County did not believe it could proceed. As Commissioner Pearce explained:

[W]e considered it at length and due to the breadth of the Hearing Examiner decision decided that it was nearly impossible for a county of our size with our budget to undertake that review.

It is not possible to grow a community without gainful employment, and a solid tax base. The County’s Comprehensive Plan may not have sophisticated explanatory data. But, the Plan does have a stated vision, and Whistling Ridge is central to its achievement.

III. CONCLUSION

It is not an accident that Skamania County referred the applicant to EFSEC. It is not an accident that land use counsel was not retained until the last possible moment, in December, 2010, just weeks before this case went to hearing. Skamania County has limited resources, and thus limited means for achieving its planning objectives. These limited resources emphasize far more than a detailed socio-economic plan element could - just how critical Whistling Ridge is to realizing the County Comprehensive Plan’s central vision.

But, regardless, the Plan need not be parsed. The zoning permits Whistling Ridge outright, and the County has issued a certificate of consistency. Under Washington law, that is sufficient. And, in any case, EFSEC may preempt.

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31 Ex. 29.02 (County Hearing Examiner decision), pgs. 5-6.
32 Id.
34 Ex. 41.02 (Hovee Economic and Fiscal Benefits Memorandum).
35 Skamania County’s Motion for Recognition as Party of Right (December 16, 2010); Notice of Appearance (December 16, 2010).
Skamania County, and the Klickitat County Public Economic Development Authority, jointly request Project approval.

DATED this ___ day of February, 2011.

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