BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of
Application No. 2009-01

of

WHISTLING RIDGE ENERGY PROJECT LLC

for

WHISTLING RIDGE ENERGY PROJECT

SAVE OUR SCENIC AREA’S RESPONDING BRIEF ON LAND USE CONSISTENCY

(ORAL ARGUMENT REQUESTED)

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I. INTRODUCTION AND BACKGROUND FACTS.

In this brief, SOSA replies to the land use briefs filed by Whistling Ridge Energy LLC (WRE) and Skamania County, collectively "WRE/SK". In these briefs, WRE/SK claims that the WRE project is consistent with Skamania County land use plans and zoning ordinances.

The gaping hole in the WRE/SK argument is evident to even the most casual observer: neither the 2007 Comprehensive Plan nor the 2005 Zoning Ordinance approve, much less mention, large wind turbine projects. In fact, the 2007 Comprehensive Plan designates the majority of the WR site as "Conservancy," as the name implies, a designation to preserve the existing natural resources of the area, principally long term forest use. Coming up empty in the adopted documents for land use consistency, WRE/SK tells this Council to not even consider the County Comprehensive Plan because it is a only a guide and cannot be used to review proposals such as that for the WR wind turbines. Further, WRE/SK asks the Council to ignore the County’s own Hearing Examiner who specifically agreed with SOSA/Friends that the 2007 Comprehensive Plan does not contemplate large wind turbine projects.

Most of the WRE/SK’s claims were anticipated and thoroughly addressed in SOSA’s opening brief and will not be repeated here. However this brief addresses several points, including the statutory responsibilities of EFSEC to review planning documents under the EFSLA and the text of the Comprehensive Plan which specifically sets forth its regulatory effect.

As with its Opening Brief, SOSA incorporates the brief filed by intervenor Friends of the Columbia Gorge, which will address several issues, including the burden

\[1\] The Council is requested to take judicial notice of the 2007 Skamania County Comprehensive Plan and the 2005 Zoning Ordinance, which is codified as Title 21 in the Skamania County Code.
of proof, conversion of forest lands, the continuing moratorium, and other issues.

II. THE SKAMANIA COUNTY COMPREHENSIVE PLAN AND ZONING ORDINANCE DO NOT PERMIT WIND TURBINES.

A. Background

In their land use brief, WRE/SK argues that its wind turbine project is completely consistent with the Skamania County 2007 Comprehensive Plan and its 2005 Zoning Ordinance. WRE/SK also argues that the 2007 Comprehensive Plan cannot be considered by EFSEC because it is only a guidance document.

As will be described herein, no Skamania County Comprehensive Plan or Zoning Ordinance has ever listed wind turbines as an allowable use at any location in the county, even though the land use ordinance has defined "wind turbines" projects since 2005. Accordingly, claims that these huge industrial machines are permitted in the Conservancy designation defies logic and the plain language of the Plan. Further, WRE’s demand that this Council ignore provisions of the Skamania County Comprehensive Plan violates the mandate given to EFSEC to determine consistency with both the local comprehensive plan and the zoning ordinance.

Under the Energy Facilities Site Location Act (EFSLA), RCW ch. 80.50, the final interpretation of county ordinances are questions of law for this Council to determine.

B. Caselaw under the Planning Enabling Acts Regarding the Role of Comprehensive Plan Is Not Applicable to EFSEC’s Required Review.

The principal, and extended, thrust of WRE’s argument is that this Council should ignore the Skamania County Comprehensive Plan. WRE Brief, 7-12. This argument is

2 In that same section of the 2005 zoning, “Wind Turbines” are defined as follows: "Wind turbine" means a machine with turbine apparatus (rotor blades, nacelle and tower) capable of producing electricity by converting the kinetic energy of wind to rotational, mechanical and electrical energy; provided, the term does not include electrical distribution or transmission lines, or electrical substations. SCC 21.08.010.
based on caselaw under the planning enabling acts of the state of Washington, including
RCW chapters 36.70, 35.63 and 36.70A.

To place these relationships in proper perspective, it is necessary to understand the
history of land use planning in Washington. From the days of the original adoption of the
planning enabling acts in the sixties, state control over planning and zoning has been
procedural in nature. For example, RCW ch. 36.70, the County Planning Enabling Act
("PEA"), provides for the adoption of comprehensive plans with limited required
elements. However, the job of setting standards and specific criteria is local, with the
state not telling counties what their plans should provide.\(^3\)

The adoption of the original EFSLA in 1970 changed that relationship only for
energy facilities. It was determined that there was a statewide interest in energy facilities
and that the state, through EFSEC and the governor, could streamline procedures and
reduce costs by allowing preemption of local land use plans and zoning ordinances. But
the legislature required EFSEC to first thoroughly consider existing local planning and
zoning documents. Preemption of local regulations was permitted, but only after a
determination was made as to whether the energy project in question was not consistent
or in compliance with land use plans and zoning ordinances.

As is seen, the authority given to EFSEC was entirely separate and independent
from how local jurisdictions regulated and processed land use approvals under organic
legislation. The Washington Supreme Court made this clear in *Residents Opposed to
Kittitas Turbines v. State Energy Facility Site Evaluation Council (EFSEC)*, 165 Wn. 2d
275, 197 P.3d 1153 (2008). There Kittitas County argued that GMA regulations
superseded EFSEC authority. However, the clear ruling of the court was that the specific

\(^3\) This changed with adoption of the Growth Management Act in 1990 when certain statewide
standards were adopted. However, Skamania County is not regulated by the GMA and continues
to operate under RCW ch. 36.70.
authority under the EFSEC statute controlled over the authority conferred under the
general planning enabling statutes:

Applying the general-specific rule to statutes at issue, EFSLA represents
the specific statute and the GMA represents the general one. EFSLA
governs a discrete and specific function of certifying sites for the
construction and operation of energy facilities. On the other hand, the
GMA applies to the comprehensive planning and management of land
within counties and cities. RCW 36.70A.040. Therefore, EFSLA can be
properly read as a specific exception to the general goals and procedures of
the GMA.

165 Wn.2d 275 at 309-10 (emphasis supplied).

The rule also applies equally to RCW ch. 36.70, the Planning Enabling Act. As
with GMA, EFSLA is a specific exception to the rules and procedures that may apply
under RCW ch. 36.70. As will be described below, EFSEC must decide whether the
subject project is consistent with the comprehensive plan and zoning ordinances, without
regard as to how the comprehensive plan or zoning ordinance are used for projects
subject to exclusive county control.

C. The EFSLA Directs the Specific Consideration of Comprehensive
   Plans Such as the 2007 Skamania County Comprehensive Plan.

In adopting the EFSLA, the legislature has specifically required that EFSEC
determine whether a project is consistent and in compliance with local regulations:

(2) Subsequent to the informational public hearing, the council shall
conduct a public hearing to determine whether or not the proposed site is
consistent and in compliance with city, county, or regional land use plans
or zoning ordinances. If it is determined that the proposed site does
conform with existing land use plans or zoning ordinances in effect as of
the date of the application, the city, county, or regional planning authority
shall not thereafter change such land use plans or zoning ordinances so as to
affect the proposed site.

RCW 80.50.090(2) (emphasis supplied). Under WAC 463-26-110:

The council shall 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).

(Emphasis supplied.) Thus the consistency/compliance requirement applies to both “land
use plans” and “zoning ordinances.” The terms are specifically defined by EFSLA:

(14) "Land use plan" means a comprehensive plan or land use element thereof adopted by a unit of local government pursuant to chapter 35.63, 35A.63, 36.70, or 36.70A RCW, or as otherwise designated by chapter 325, Laws of 2007.

22) "Zoning ordinance" means an ordinance of a unit of local government regulating the use of land and adopted pursuant to chapter 35.63, 35A.63, 36.70, or 36.70A RCW or Article XI of the state Constitution, or as otherwise designated by chapter 325, Laws of 2007.

RCW 80.50.020 (emphasis supplied). Thus “land use plan” under EFSLA is a comprehensive plan of a county under RCW 36.70.

It is evident that the legislature required careful review of both comprehensive plans and zoning ordinances. From this standpoint, it makes no difference how the comprehensive plan or zoning ordinances are applied or interpreted by a county in approving projects under its internal land use jurisdiction. Under the EFSLA, it is for EFSEC to decide consistency with the local comprehensive plan and zoning ordinances.

Accordingly, the case law described by WRE in its brief does not apply when the jurisdiction of a project is subject to EFSEC. Generally, while a comprehensive plan has a lesser regulatory effect for internal county decisions, for purposes of EFSLA, consistency and compliance with the comprehensive plan must be reviewed by EFSEC. If the legislature had intended that EFSEC ignore comprehensive plans, or give them second rate status, then it would have said so in the EFSLA statute.

D. **Determination of the Meaning of the Local Ordinances Rests with EFSEC.**

WRE argues that the staff report of the county planning director should be given great deference. Brief at 11. However, the case law is clear that interpreting or reviewing the meaning of an ordinance, in this case the Skamania County Comprehensive Plan, is *de novo:*

We review the interpretation of a city ordinance “*de novo under the error
of law standard.” (Citations omitted) The interpretation rules apply equally to municipal ordinances and statutes. (Citations omitted)


Under EFSLA, the final decision of the meaning of county ordinances is up to this Council as described above. The review of the Council is _de novo_.

E. Skamania County’s 2007 Comprehensive Plan Is Given Regulatory Status by its Own Terms.

Washington caselaw recognizes that the comprehensive plan may become a regulatory tool if a local government adopts it as such. Thus in _West Main Associates v. City of Bellevue_, 49 Wn.App. 513, 524-25, 742 P.2d 1266, 1273 (1987), the court stated:

Furthermore, the statutory language at issue–i.e. “the Comprehensive Plan shall not be construed as a regulation of property rights or land uses”–only speaks to regulatory use of a comprehensive plan which has not been separately enacted, in whole or in part, as a regulation or ordinance. Therefore, since Bellevue has enacted SEPA ordinances which expressly adopt the Comprehensive Plan as a local SEPA policy, the council was entitled to rely on the Comprehensive Plan in denying the proposal under SEPA.

In _West Main_ the decision of the City of Bellevue to deny a proposed high rise apartment project was affirmed, based in part on the application of the comprehensive plan.

In fact, Skamania County has adopted, in the same manner as the City of Bellevue, the County’s comprehensive plan policies as a SEPA policy. Under Skamania County Code (SSC) 16.04.020, SEPA Substantive Authority, the code states:

D. The county hereby adopts the following policies as the basis for the county’s exercise of authority pursuant to this section:

. . .

3. The county adopts by reference the policies in the Skamania County comprehensive plan (including adopted subarea plans) and the Skamania County shorelines management master program.

Similarly, in _Cingular Wireless, LLC v. Thurston County_ 131 Wn. App. 756, 129 P.3d 300 (2006), Thurston County adopted general standards providing that: (1) the proposed use “shall comply with the Thurston County Comprehensive Plan and all applicable federal, state, regional, and Thurston County laws or plans...” Cingular
argued, as does WRE here (Brief at 9), that *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn. 2d 861, 947 P.2d 1208 (1997) prevented Thurston County from using its comprehensive plan as a regulatory enactment. However, the *Cingular* decision rejected the argument because the comprehensive plan could be enacted as a regulation if the County chose to do so. See 131 Wn.App. at 770.

Here the adopted Skamania County Comprehensive Plan (2007) itself states that it will be used to regulate individual projects:

- Page 14: “Each of the chapters (2-5) includes goals and policies that are the essence of the Plan and are intended to be consulted to guide decisions on a wide range of issues, including permitting and resource allocation. It is important to remember that the goals and policies in the Comprehensive Plan are just as important as the maps in making land use and development decisions.”

- Page 14: “Policies are decision-oriented statements that guide the legislative or administrative body while evaluation (sic) a new project or proposed changes in the County ordinances.”

- Page 14: “Policies will be carried out through the adoption and revision of development regulations and ongoing decisions on future development proposals.”

- Page 27: “Policy L.U.2.6: Building permits, septic tank permits, or other development permits issued by the County for any project shall be in conformance with this Comprehensive Plan.

As is made clear by the foregoing, the Comprehensive Plan itself makes clear that it is to be applied in permit and development decisions. As to Policy L.U.2.6, note that the plan document has changed from the identical provision in the 1977 Comprehensive Plan:

*Building permits, septic tank permits, or other development permits issued by the County for any project not in conformance with this comprehensive plan should be subjected to strict review.*

Exhibit 2.04c (1977 Plan), page 17. The change in comprehensive plan language demonstrates that the 2007 Comprehensive Plan is intended to control regulatory decisions.

The County’s comprehensive plan makes clear that individual permit decisions...
must be in conformance with the comprehensive plan, not just the zoning ordinance.

Accordingly, the 2007 Comprehensive Plan became a regulatory document, under the
authority of West Main and Cingular.

F. EFSEC Must Give Precedence to the 2007 Comprehensive Plan over
the 2005 Zoning Ordinance.

Because EFSLA requires review of both the comprehensive plan and the zoning
ordinance, without fixing a priority between the two, EFSEC will need to determine the
hierarchy between the two. This is resolved in favor of the comprehensive plan for
several reasons.

First, the 2007 Comprehensive Plan was the most recently adopted and thus must
be given priority over the 2005 Zoning Ordinance. *Tunstall v. Bergeson*, 141 Wn.2d 201,
211, 5 P.3d 691 (2000) (“[T]o resolve apparent conflicts between statutes, courts
generally give preference to the more specific and more recently enacted statute.”). This
rule is especially true where the 2007 Comprehensive Plan replaced a very old (30 years)
and outdated comprehensive plan (1977).

Second, the Local Project Review Statute (RCW ch. 36.70B) makes the
comprehensive plan the controlling document in decision making. RCW ch. 36.70B.030
states:

(1) Fundamental land use planning choices made in adopted
comprehensive plans and development regulations shall serve as the
foundation for project review. The review of a proposed project’s
consistency with applicable development regulations, or in the absence of
applicable regulations the adopted comprehensive plan, under RCW
36.70B.040 shall incorporate the determinations under this section.
(2) During project review, a local government or any subsequent
reviewing body shall determine whether the items listed in this subsection
are defined in the development regulations applicable to the proposed
project or, in the absence of applicable regulations the adopted
comprehensive plan. At a minimum, such applicable regulations or plans
shall be determinative of the:
(a) Type of land use permitted at the site, including uses that may
be allowed under certain circumstances, such as planned unit
developments and conditional and special uses, if the criteria for their
approval have been satisfied;

(Emphasis supplied). As noted, the comprehensive plan is used to determine the “type of
land use permitted at the site” in the “absence of applicable regulations.” Id.

Except for a portion of the south end of the project, the proposed project site is in
the “Unmapped” area not regulated by the zoning ordinance, as SCC 21.64.020 states:

The standards, provisions, and conditions of this title shall not apply to
unmapped areas.

The County, in its brief, admits that: “15,000 acres within the County is unzoned and
subject to a County-wide moratorium.” Brief at 5 (emphasis supplied). This language is
taken verbatim from the County-wide moratorium, which states: “there are over 15,000
acres of private land within unincorporated Skamania County that do not have zoning
classifications.” Exhibit 1.15c, p. 1. Thus most of the WR project is within this unzoned
land. Skamania County effectively recognized that it would not tolerate the absence of
any zoning on the “unzoned lands ” when it adopted the moratorium on these lands the
very day (July 10, 2007) it enacted the 2007 Comprehensive Plan. See Exhibit 1.15c.

That moratorium referenced GMA requirements to “provide protections for commercial
forest land. . . .” and continues to this day. See Id. (Skamania County Ordinance 2010-10,
adopted November 10, 2010 and effective for six months). Thus there is effectively no
zoning on these unzoned lands until the moratorium ends and a compliant zoning
ordinance is adopted.

Because of the absence of zoning regulations under RCW 36.70B.030, the 2007
Comprehensive Plan becomes the regulatory document.

Third, under the terms of the PEA, the zoning ordinance cannot be inconsistent
with the comprehensive plan. See RCW 36.70.545 (a county zoning ordinance or
development regulations “shall not be inconsistent with the county’s comprehensive
plan”). The inconsistencies between the plan and ordinance were described on pages 4-
11 of SOSA's opening brief and will not be repeated here.

Fourth, the comprehensive plan fulfills the only GMA provision applicable to non GMA counties by designating the natural resource lands, as is explained in the next section of this brief.⁴

III. THE PROPOSAL IS INCONSISTENT WITH THE COMPREHENSIVE PLAN AND ZONING ORDINANCE.

As noted in SOSA's opening brief, the 2007 Skamania County Comprehensive Plan places the property in question in the "Conservancy" zone. Under the Conservancy Zone, no large-scale industrial activities with impacts even close to those of huge wind turbines are permitted in any manner.

Further, the 2007 Comprehensive Plan states (at page 9) that it is intended to comply with the terms of those limited GMA requirements that apply to Skamania County. The GMA, RCW 36.70A.060, requires all counties "to assure the conservation of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170."

This requirement was reflected in the Conservancy designation in the 2007 Comprehensive Plan:

Conservancy areas are intended to conserve and manage existing natural resources in order to maintain a sustained resource yield and/or utilization.

See page 25. The continuous moratoria approved after the adoption of the 2007

⁴In fact, even if the 2005 zoning ordinance is applied in the "Unmapped Area" the applicant's proposal would not be permitted. That section only allows uses "which have not been declared a nuisance by...a court of jurisdiction." SCC 21.64.020. This means a proposed large-scale energy facility on unzoned lands could be prohibited as an unreasonable interference with public or private rights. This is a very real possibility, because courts in other jurisdictions have ruled that energy facilities—including wind energy facilities—can be nuisances, considering their noise; unsightliness; and effects on human health, safety, and property values. See, e.g., Burch v. Nedpower Mt. Storm, LLC, 220 W. Va. 443, 647 S.E.2d 879, 893 (2007) (landowners' allegations regarding approved wind energy facility were legally sufficient to state claims that the facility constituted a private nuisance and should be prospectively enjoined); Rose v. Chaikin, 187 N.J. Super. 210, 453 A.2d 1378 (1982) (60-foot-tall wind turbine constructed in residential neighborhood constituted a nuisance).
Comprehensive Plan acknowledge the county’s forest protection responsibility:

the Growth Management Act requires all counties in the state of
Washington to provide protections for commercial forest land from the
encroachment of residential uses.

Exhibit 1.15c. Thus the Conservancy designation under the 2007 Comprehensive Plan
fulfilled a statutory mandate to conserve forest lands, which would be violated by the
WRE huge wind turbines, electrical substation, roads and other activities.

Next WRE attempts to say that its industrial wind turbine project is a use that is
permitted in the existing “Forest/Agricultural-20" zone as a conditional use. This is so,
WRE claims, because the wind turbine project should be considered a “semi-public
facility and utility” which are listed as conditional uses in this zone, though they are not
defined in the 2005 zoning ordinance. Similarly, Skamania County argues in its brief that
there are a “variety of uses” that are authorized as conditional uses, such as geothermal
energy facilities and sawmills and thus: “The Project comes within the scope of this list
of uses.” County brief at 3. This strained interpretation fails for the simple reason that
“wind turbines” are a defined use in the 2005 Zoning Ordinance. See 21.08.010. This
definition (set forth in full at page 6 of SOSA’s Opening Brief) was added to the zoning
ordinance in the 2005 amendments. If “wind turbines’ were intended by the code to be a
permitted or conditional use in the “Forest/Agricultural-20" zone, or any other zone, they
would be specifically listed as such, much as another renewable energy use, “geothermal
energy facilities,” is listed.

The arguments of Skamania County and WRE fail for a very basic reason: neither
the 2005 Zoning Ordinance nor the 2007 Comprehensive Plan make wind turbines a
permitted, conditional, and/or review use.
IV. THE PRIOR RULING OF THE SKAMANIA COUNTY HEARING EXAMINER THAT LARGE WIND TURBINE FACILITIES ARE NOT CONTEMPLATED BY THE 2007 COMPREHENSIVE PLAN BINDS THE COUNTY.

In our opening brief, SOSA demonstrated that the 2009 decision of the Skamania County Hearing Examiner resolved the issue of whether the 2007 Comprehensive Plan actually contemplated the large scale wind turbine facilities. As noted at page 16-17 of SOSA's brief, the Hearing Examiner held that wind turbines were "not contemplated" in the 2007 Comprehensive Plan. The Hearing Examiner also concluded that:

Some of the alternative energy uses are not identified in the Comprehensive Plan or the existing zoning code.

Conclusion 2.A, page 27, Exhibit 1.17c. The Hearing Examiner was correct: the Comprehensive Plan did not mention wind turbines or wind energy at all. In the 2005 Zoning Ordinance, though "wind turbines" were a defined use (SCC 21.08.010; see page 6 of SOSA's principal brief on Land Use Consistency), they were not listed as a use of any kind in any zone.

WRE claims that res judicata or other claim preclusion does not apply here; they are incorrect. The issue of consistency of large wind turbines with the Comprehensive Plan was litigated between SOSA and the County before the Hearing Examiner. Now the same county planning director who lost the issue before the Hearing Examiner reprises the same issue in the county's land use consistency claim.

The whole purpose of res judicata doctrine is to prevent inconsistent rulings by preventing a party to a final judgment from raising the same claim in a subsequent dispute. It is well established in Washington state law that res judicata applies to quasi-judicial land use decisions. DeTray v. City of Olympia, 121 Wn. App. 777, 785, 90 P.3d 1116 (2004) ("To prevent repetitious litigation and to provide binding answers, the res judicata doctrine bars reasserting the same claim in a subsequent land use dispute.

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application” and “[t]he most purely public purpose served by res judicata lies in the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results.”) (citing Hilltop Homeowner’s Ass’n v. Island County, 126 Wn.2d 22, 31, 891 P.2d 29 (1995).

SOSA and the County litigated the question of consistency of the 2007 Comprehensive Plan with large wind turbine facilities, even with reference to the very project now presented to this Council. Exhibit 1.15c, page 13, Finding 8 (“SDS has approached Skamania County on multiple occasions over the past several years to discuss a possible large-scale wind energy project (Saddleback Project) on its property within the County.”) The issue has been decided and resolved.

Finally, through the adjudicative principle stare decisis, EFSEC is bound by the precedent set by the Hearing Examiner’s decision. Stare decisis requires that tribunals interpret laws consistently across cases and adhere to legal precedent set in prior cases. As explained above, the legal question of what uses are allowed under the Comprehensive Plan has been conclusively resolved. EFSEC should not deviate from the legal precedent set by the Hearing Examiner’s decision.

V. CONCLUSION

The large wind turbine project proposed by WRE is neither consistent with nor in compliance with the 2007 Comprehensive Plan and the 2005 Zoning Ordinance. Neither document even hints that industrial scale wind turbines are allowed at the project site. Rather the Comprehensive Plan makes clear that the site is to be preserved, as required by the GMA, for long term forest production.
The Council should enter a determination that the WRE proposal is inconsistent with the Comprehensive Plan and Zoning Ordinance and set a hearing to determine whether to preempt these regulations.

Dated this 25th day of February, 2011.

Respectfully submitted,

ARAMBURU & EUSTIS LLP

[Signature]

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