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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  
PRINCIPAL BRIEF ON LAND USE  
CONSISTENCY

**TABLE OF CONTENTS**

- 1. INTRODUCTION
- 2. STRUCTURE OF WASHINGTON PLANNING LEGISLATION AS APPLIED TO SKAMANIA COUNTY
- 3. STRUCTURE OF SKAMANIA COUNTY PLANNING AND ZONING
- 4. WRE'S WIND TURBINE PROPOSAL IS NOT CONSISTENT WITH THE EXISTING COMPREHENSIVE PLAN
- 5. PROPOSAL INCONSISTENT WITH SKAMANIA COUNTY ZONING ORDINANCE
- 6. THE UNADOPTED DRAFT ORDINANCE CANNOT BE CONSIDERED BY EFSEC.

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TABLE OF AUTHORITIES

*Lejeune v. Clallam County*, 64 Wn. App. 257, 823 P.2d 1144, (1992)

RCW 36.70

RCW ch. 36.70A

RCW 36.70A.170

RCW 36.70A.040

RCW 36.70

RCW 36.70.02

RCW 36.70.320

RCW 36.70.450

RCW 36.70.550

RCW 36.70.570

RCW 43.21.030

Skamania County Ordinance 2005-02

SCC (Skamania County Code) 21.08.010

SCC 21.70.050

RCW 43.21C

**ADD GOALS AND POLICIES???????**

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**1. INTRODUCTION**

In this brief, intervenor Save Our Scenic Area (SOSA) will demonstrate that the proposed industrial wind farm at the Whistling Ridge (WR) site by Whistling Ridge Energy is inconsistent with the applicable comprehensive plan and land use regulations of Skamania County.

This brief should be read in conjunction with the brief filed by intervenor Friends of the Columbia Gorge (Friends) which will address several issues regarding land use consistency, including the legal process and land use moratoria.

**2. STRUCTURE OF WASHINGTON PLANNING LEGISLATION AS APPLIED TO SKAMANIA COUNTY**

Skamania County planning and zoning is governed by RCW 36.70, the County Planning Enabling Act. It is not one of the counties governed by the Growth Management Act RCW ch. 36.70A (GMA) and has not exercised the option to become a GMA county.

Under RCW ch. 36.70 a county is required to prepare and adopt a comprehensive plan:

Each planning agency shall prepare a comprehensive plan for the orderly physical development of the county, or any portion thereof, and may include any land outside its boundaries which, in the judgment of the planning agency, relates to planning for the county. The plan shall be referred to as the comprehensive plan, and, after hearings by the commission and approval by motion of the board, shall be certified as the comprehensive plan.

RCW 36.70.310. The statute goes on to prescribe that the comprehensive plan will be the basic source of reference when the County reviews any proposed project:

After a board has approved by motion and certified all or parts of a comprehensive plan for a county or for any part of a county, the planning agency shall use such plan as the basic source of reference and as a guide in reporting upon or recommending any proposed project, public or private, as to its purpose, location, form, alignment and timing. The report of the

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planning agency on any project shall indicate wherein the proposed project does or does not conform to the purpose of the comprehensive plan and may include proposals which, if effected, would make the project conform.

RCW 36.70.450. The major difference between the GMA and the County Enabling Act is that a zoning ordinance is not required by RCW ch. 36.70:

From time to time, the planning agency may, or if so requested by the board shall, cause to be prepared official controls which, when adopted by ordinance by the board, will further the objectives and goals of the comprehensive plan.

RCW 36.70.550.

Furthermore, when the GMA was adopted in 1992, the legislature carried an important element of the GMA to non-GMA counties. That was the requirement that development regulations and the comprehensive plan not conflict.

**3. STRUCTURE OF SKAMANIA COUNTY PLANNING AND ZONING**

Skamania County first adopted a comprehensive plan in 1977, which was revised in 1991 with the creation of the Columbia River Gorge National Scenic Area (the “Scenic Area”) (the 1977 Plan). See Ex. 2.04c. As will be described below, Skamania County recently (June, 2007) adopted a completely revised Comprehensive Plan, referenced herein as the “2007 Plan.”

The County originally adopted a zoning code and map in 1985, which has been amended at various times over the years, the most recent of which was by Ordinance 2005-02 in 2005. <sup>1</sup>

After review by the planning commission, Skamania County adopted a new

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<sup>1</sup> The Council is requested to take judicial notice of both the 2007 Plan and the current Skamania County zoning code.

1  
2 comprehensive plan in June, 2007. Ex. 2.04c. In the fall of 2007, Skamania County proposed  
3 a new zoning ordinance to implement its new comprehensive plan.

4 The adoption of the new zoning code requires procedural and substantive compliance  
5 with the terms of the State Environmental Policy Act, RCW 43.21C (SEPA). Skamania  
6 County has also adopted a local SEPA ordinance that governs the County's procedures under  
7 SEPA. Skamania County is required by SEPA and its SEPA ordinance to make a  
8 "threshold determination" as to whether to prepare an EIS for its new zoning ordinance.  
9 This new zoning ordinance, for the first time in the history of planning and zoning in  
10 Skamania County, had specific provisions for large scale wind turbine facilities.

11 Skamania County's responsible SEPA official, Planning Director Karen  
12 Witherspoon, issued a "mitigated determination of nonsignificance" or MDNS for the new  
13 zoning code proposal. Consistent with the terms of the Skamania County SEPA ordinance,  
14 the official's MDNS was appealed to the Skamania County Hearing Examiner by both SOSA  
15 and the Friends of the Gorge. The Hearing Examiner held an open record hearing on January  
16 21 and 22 at which the County vigorously defended its MDNS decision.

17 On February 19, 2009, the Hearing Examiner entered her decision reversing the  
18 MDNS issued by the Responsible Official and requiring the preparation of an environmental  
19 impact statement (EIS) for the zoning code amendments. See Exhibit 1.17c. As may be seen  
20 from the Findings and Decision, the testimony at the hearing focused on the adverse  
21 environmental impacts from large wind turbine facilities. Much of the testimony on the large  
22 scale wind turbine facilities centered on the Saddleback Facility, which is the same project  
23 as is before EFSEC now (before it was renamed as Whistling Ridge).

24 In addition, as the Hearing Examiner notes in her decision, planning for large scale  
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2 wind turbines was ongoing in Klickitat County, the adjacent county to the east. Exhibit  
3 1.17c, Finding 30 at page 12. Klickitat County had even prepared and circulated a Final EIS  
4 on its “Energy Overlay Zone” in 2004. Indeed, the eastern portion of Skamania County was  
5 included in studies prepared for [the Klickitat County] EIS” See Exhibit 1.17c, Finding 20,  
6 page 11.

7 Based on this evidence, the inevitable conclusion is that Skamania County was well  
8 aware of the interest in large scale wind turbine projects in Skamania County and in adjacent  
9 Klickitat County. With this knowledge, the Skamania County Commissioners chose to  
10 delete any reference to wind turbine facilities in its 2007 Comprehensive Plan. With wind  
11 turbines proposals swirling about Skamania County and in the adjacent county, it is clear not  
12 including any type of wind turbine development in the 2007 Comprehensive Plan was a  
13 conscious decision. The decision requiring an EIS was not appealed by the County to  
14 Superior Court and is final. Tr. 1342 (testimony of Commissioner Pearce).

15 As of the date of the hearing, no steps have been taken by Skamania County to  
16 prepare an environmental impact statement on its proposed zoning code and map.  
17 Commissioner Pearce testified that the Skamania County did not have enough money to  
18 prepare the EIS on the zoning code amendment and that the consideration of amendments  
19 as been "shelved). Tr. 1342-43.

20 **4. WRE’S WIND TURBINE PROPOSAL IS NOT CONSISTENT WITH**  
21 **THE EXISTING COMPREHENSIVE PLAN.**

22 As noted above, Skamania County adopted a new comprehensive plan for the County  
23 in June, 2007. That plan replaced a now 30 year old comprehensive plan from 1977.

24 The 2007 Comprehensive Plan does not authorize or permit electrical energy or wind  
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turbines within the County. Policy LU6.1 deals with uses authorized under the comprehensive plan:

Three types of uses should be established for each land use designation under this plan and for any zone established to implement this plan. If any use is not listed as one of the following types of developments, then the use is prohibited within that land use designation.

(Emphasis supplied.)

The 2007 Plan adopted only three land use designations, Rural I, Rural II and Conservancy. Rural I was intend to “foster the optimum utilization of land within growing areas of the county. . . .” (page 23) and is the only one of the three designations that allows commercial activity and light or heavy industry. The Rural II designation “is intended to provide for rural living without significant encroachment for land used for agricultural and timber.” Page 24. The Conservancy designation is “intended to provide for the conservation and management of existing natural resources” and “logging, timber management, agricultural and mineral extraction are the main use activities that take place in this area.” Page 25. There has been no amendment to the comprehensive plan since its adoption in June 2007.

It is important to note that the state Growth Management Act requires that all counties designate “natural resource land” pursuant to RCW 36.70A.170 which includes forest, agricultural and mineral lands of “long term commercial significance.” The County recognizes its responsibilities under GMA in the comprehensive plan at page 9 of the 2007 Plan. The 2007 Plan essentially provides that designation in the Conservancy designation, which meets the RCW 36.70A.170 criteria: “Conservancy areas are intended to conserve and manage existing natural resources in order to maintain a sustained yield and/or utilization.”



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2007 Plan at page 25.

The WREP is located in the Conservancy designation, with its southern tip in the Rural II land use designation.

Significantly, there is no mention of allowance for wind turbines or only wind energy in the Rural II or Conservancy designations. “Industry” is permitted in the Rural I category, but not in the other two designations. The Conservancy designation includes only the following relating to utilities:

Public facilities and utilities, such as parks, public water access, libraries, schools, utility substations and telecommunication facilities.

See pages 25-26. The 2007 Plan does not allow “private” or “semi-public facilities and utilities.” Once again, the failure to include these uses as “appropriate uses” within the 2007 Plan is significant. These uses were defined in the existing outdated zoning ordinance in the “Definition-Interpretation” section at SCC 21.08.010:

“Semi-public facilities” means facilities intended for public use which may be owned and operated by a private entity.

That this definition from the zoning ordinance was not incorporated into the 2007 Plan is indicative of the intent of the legislative body not to allow such uses. Further, note that the 2007 Plan does not mention electrical energy facilities at all, indicating such facilities are not allowed.

It cannot be that the failure to mention wind energy facilities or wind turbines was a matter of oversight. As the Skamania County Hearing Examiner found in her reversal of the MDNS decision, there was interest expressed by the applicant here in developing a wind farm well before the Comprehensive Plan was adopted:

However, SDS Lumber has approached Skamania County on multiple

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occasions over the past several years to discuss a possible large-scale wind energy project (Saddleback Project) on its property within the County. Ms. Witherspoon (the Skamania County Planning Director) met with representatives of SDS and entities such as the Bonneville Power Administration on two or three occasions for “pre-application meetings” to discuss the permitting requirements for the project. Multiple pre-application meetings have been held because of changes in the development team. The project, if developed, would consist of at least 40 wind turbines. Although the last formal pre-application meeting was approximately two years ago, individuals associated with the project have been involved in the County’s code update process and the president of SDS was present at the subject appeal hearing.

Exhibit 1.17c, Finding 37, page 13. In fact, as the Hearing Examiner found:

The Bonneville Power Administration (BPA) has produced a map entitled “Current and Proposed Wind Energy Interconnections to BPA Transmission Facilities” (Exhibit D.4). This map depicts the SDS Saddleback project as a proposed wind generation facility of 70 megawatts (MW).

FCD, Finding 38, p. 14. Indeed, the project manager on the WR project, applicant Witness Katy Chaney actually prepared an draft application for a conditional use permit for this very project (and SEPA checklist) under the existing code in 2005-2006. Tr. 198. She had a preapplication conference met with the Skamania County Planning director Karen Witherspoon on at least one occasion to discuss the possible application. Tr. 198-99.

As such, uses not described as appropriate under each land use designation are to be prohibited. As applied to the WREP proposal, wind turbines are not mentioned as an allowable, review or conditional use in either the Conservancy or Rural II designations and are thus not allowed.

As may be seen above, the 2007 Plan does not permit or allow wind turbine facilities by its terms. This Council must apply the 2007 Plan as the “basic source of reference” in reviewing the SDS proposal and conclude that the present proposal is inconsistent with that plan.

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2 Thus, the proposed development does not satisfy the first hurdle for a finding that the  
3 project would be consistent with local land use rules. More detailed review of the County's  
4 goals and policies only reinforces this finding.

5 The proposed zoning amendments are inconsistent with the specific goals and  
6 policies of the Land Use Element.

- 7
- 8 • *Goal LU.1: To integrate long-range considerations (comprehensive planning) into the determination of short-term action (individual development application).*

9 The proposed project would thwart this goal by permitting one project without a  
10 viable County zoning ordinance in place. The County's recent attempt to push through a  
11 hastily prepared ordinance was remanded by the Hearing Examiner and the County was  
12 required to prepare an Environmental Impact Statement for the proposed zoning ordinance.  
13 Permitting the proposed project in the absence of a revised ordinance that takes into account  
14 long range considerations would undermine the County's planning process.

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- 16 • *Policy LU.1.2: The plan is created on the premise that the land use areas designated are each best suited for the uses proposed therein. However, it is not the intention of this plan to foreclose on future opportunities that may be made possible by technical innovations, new ideas and changing attitudes. Therefore, other uses that are similar to the uses listed here should be allowable uses, review uses or conditional uses, only if the use is specifically listed in the official controls of Skamania County for that particular land use designation.*

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20 The scale of the proposed industrial development is not similar to the uses listed as  
21 appropriate in the Conservancy designation in the Comprehensive Plan. The Skamania  
22 County Hearing Examiner recently confirmed this to be the case by deciding large-scale  
23 industrial energy development was not a use contemplated in the Comprehensive Plan. As  
24 such EFSEC cannot find that the proposed development would be consistent with local land

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use rules.

Moreover, the proposed development is not an opportunity made possible by "technical innovations, new ideas and changing attitudes." Again as described above, the County was fully aware of the potential opportunities for industrial wind energy development when it adopted its Comprehensive Plan in 2007. Before the Comprehensive Plan was adopted the County had already held meetings with the proponents of the Whistling Ridge Energy Facility and was invited to join Klickitat County in the creation of Klickitat County's Energy Overlay Zone, which was finalized in 2004. Therefore, EFSEC cannot find that the proposed project is a new opportunity that is similar to listed uses.

- *Policy LU.1.3: The comprehensive planning policies set out herein and all land use designations and land use regulations undertaken pursuant hereto should provide clear and objective standards to govern future development.*

Without a current zoning code there are no clear and objective standards to govern the proposed development. In this void EFSEC cannot make a finding that the proposed facility would be consistent with local land use rules.

- *Goal LU.2: To provide for orderly future physical development of Skamania County.*
- *Policy LU.2.1: All zoning regulations and other implementing regulations shall be consistent with and guided by the comprehensive plan or specific subarea plan maps and policies.*

Policy LU.2.1 implements the Planning Enabling Act (RCW 36.70) requirement that development regulations "shall not be inconsistent with the county's comprehensive plan." RCW 36.70.545. Development regulations include zoning ordinances, critical areas ordinances, shoreline master programs and all other controls for development and land use. RCW 36.70A.030. The County has not updated the County zoning ordinance or the Critical

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2 Areas Ordinance to be consistent with the Comprehensive Plan.. In absence of development  
3 regulations that are consistent with the Comprehensive Plan, EFSEC cannot make a finding  
4 that the project would be consistent with local land use rules.

- 5 • *Goal LU.3: To coordinate public and private interests in land development.*
- 6 • *Policy LU.3.3: Encourage industry that would have minimal adverse*  
7 *environmental or aesthetic effects*

8 The proposed large-scale wind energy facility would cause significant adverse impacts  
9 to aesthetic resources. Measured by objective methodologies for evaluating aesthetic  
10 resources, such as the USDA Forest Service's *Scenery Management System*, wind facilities  
11 have the potential to cause significant adverse effects to aesthetic resources.

12 **5. PROPOSAL INCONSISTENT WITH SKAMANIA COUNTY ZONING**  
13 **ORDINANCE.**

14 As described above, the proposal is inconsistent with the recently adopted (June  
15 2007) Skamania County Comprehensive Plan. Notwithstanding this defect, the applicant  
16 urges that the proposal is consistent with the existing zoning code. However, the existing  
17 zoning ordinance was adopted before the adoption of the 2007 Comprehensive Plan and  
18 accordingly cannot be consistent with it. The Commissioners have not readopted or  
19 amended the existing zoning code to make it consistent with the 2007 Plan. Accordingly, the  
20 policies of the 2007 Comprehensive Plan cannot be applied to that code. Moreover, it is  
21 clear that the existing zoning ordinance does not permit the subject proposal.

22 Under Washington state law, development regulations or the zoning code must be  
23 consistent with the adopted Comprehensive Plan:

24 Beginning July 1, 1992, the development regulations of each county  
25 that does not plan under RCW 36.70A.040 shall not be inconsistent with the

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county's comprehensive plan.

Emphasis supplied. Accordingly, the preexisting zoning ordinance cannot be consistent with the 2007 comprehensive plan because that plan did not exist when that zoning ordinance was adopted. Thus the current zoning ordinance is outdated and ineffective to be applied to the current project. Undeterred, the applicant makes two attempts to demonstrate that its wind turbine proposal is consistent with the existing code, neither of which is persuasive.

This analysis begins with the important fact that the existing zoning code does not make wind turbines, wind energy or wind farms an allowable, review or conditional use in any zone. It is significant that “geothermal energy facilities” are listed as a conditional use in the FOR/AG10 and 20, Rural Estate zones. This indicates that the county was aware of types of alternate energy facilities, but only chose to allow only “geothermal energy” as a conditional use, whereas “wind turbines,” are not permitted anywhere. Once again, this is not an oversight as “wind turbines” are specifically mentioned in the current code as exempt from height limitations in SCC 21.70.050. However, wind turbines, wind farms or a use related thereto is not listed as a permitted, review or conditional use in the zoning code. The only conclusion to be reached is that wind turbines are not authorized or permitted under the existing code.

The applicant also argues that Table 2-1 in the 2007 Plan at page 23 declares that certain uses are permissible in certain zones. The applicant states at page 4.2-6 of its application to EFSEC that:

There are three land use designations outside of the specific subarea plans: Rural I, Rural II, and Conservancy. The project area is designated as “Conservancy.” Table 2-1 of the Comprehensive Plan identifies zones that are consistent with the Conservancy designation, including: Residential 10 (R-10), Rural Estates 20 (RES-20), Forest Land 20 (FL 20), Commercial

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Resource Land 40 (CRL 40), Natural (NAT) and Unmapped (UNM). The project site is located in the FL 20, R-10, and UNM zones, all of which are consistent with the Conservancy designation.

However, Table 2-1 refers not to the current code, but to a zoning code that might be adopted after the 2007 Plan was adopted. This is clear from the explanation of the table at page 22:

Table 2-1 shows the comprehensive plan designations and consistency of each potential zoning classification. . . . This information is necessary to determine when, where and under what circumstances these designations should be applied in the future.

(Emphasis supplied). Thus the table references “potential” and “future” zoning classifications, not ones under the existing code. This is further demonstrated by the fact that the zoning classifications in Table 2-1 do not refer to the existing code, but to future code classifications. Thus, the “Commercial Resource Land 40” zone is a potential new zone as referenced in the draft zoning ordinance at Appendix F to the application. Under the existing code, the like zone is the Resource Production Zone or (FOR/AG20) zone, which is not mentioned in Table 2.1.

Thus Table 2-1 does not establish consistency with the existing code, but serves as a guide to an unadopted zoning code, which cannot be adopted until an environmental impact statement is prepared under the Hearing Examiner’s ruling.

The applicant argues that wind turbines are allowed as a use under the terms of the “Unmapped” area of the code. However, as described above, the terms of the 2007 Comprehensive Plan specifically provide that if a use is not listed as a conditional or allowable use within the land use designation under the plan then it will be prohibited. See discussion above and 2007 Plan at pages 30-31. The 2007 Comprehensive Plan also specifically provides under Policy LU2.6 that: “Building permits, septic tank permits, or

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2 other development permits issued by the County for any project will be in conformance with  
3 this Comprehensive Plan.” (Emphasis supplied.) Since the “Unmapped” areas do not have  
4 a specific zone designation they must be regulated by the designation given by the 2007 Plan.

5 In addition, to determine the meaning of language within the 2007 comprehensive  
6 plan, it is useful to review the 1977 comprehensive plan it replaced. See Ex. 204c. That  
7 plan had identical land use designations, Rural 1, Rural 2 and Conservancy. See pages 91-  
8 92. Importantly, the 1977 comprehensive plan “Conservancy” designation provided:

9 The following inappropriate uses may be allowed on a conditional or  
10 temporary basis:

- 11 a. Industrial
- 12 b. Commercial

13 See page 92. The “NOTE” at the bottom of page 92 states:

14 Land uses which are considered by this plan to be inappropriate, may be  
15 established in Rural 2 and Conservancy land use areas, subject to public  
16 review and approval by the Board of County Commissioners. Such uses  
17 might include light industrial facilities, small commercial businesses,  
18 airstrips, portable sawmills, and other wood processing equipment.

19 (Emphasis in original). When the 2007 comprehensive plan was adopted, it retained  
20 verbatim the sentence setting the purpose and objective:

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

23 Compare page 25 of the 2007 comprehensive plan with page 92 of the 1977 comprehensive  
24 plan. However, the 2007 comprehensive plan removed any allowance for “Industrial” or  
25 “Commercial” uses either as permitted, review or conditional uses in the Conservancy  
26 designation.

27 The inclusion in the 1977 Plan of the “inappropriate” industrial and commercial uses



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also explains why the “Unmapped” zone (guided by the 1977 Plan) allowed uses which were “not nuisances,” to take account of their characterization as “inappropriate.” However, with the adoption of the 2007 comprehensive plan, and the elimination of any possibility of any “inappropriate uses,” allowance of uses that were not nuisances became inconsistent with the comprehensive plan, and thus illegal.

In addition, the applicant contends that its private wind turbine proposal should be considered “semi-public facilities and utilities” and thus an allowable conditional use in the existing FOR/AG10 and 20 zones. However, the 2007 Comprehensive Plan says that only “Public Facilities and Utilities” (emphasis supplied) are allowed in the Conservancy and Rural II Land Use Designations, not “Semi-public Facilities and Utilities.” Since both of these uses are defined terms in the existing code, it is very clear that when the Commissioners chose to include only one in the comprehensive plan, it was a deliberate decision. In addition, the 1977 plan made specific provisions in the Rural 2 zone for “Semi-public” uses. See page 91. “Semi-public” uses were specifically eliminated from the 2007 comprehensive plan in all land use designations, including “Conservancy.” See 2007 Plan, p. 24-26. Further, the provision in the comprehensive plan gives examples of the kinds of “public facilities and utilities” which are appropriate in the zone “such as parks, public water access, libraries, schools, utility substations and telecommunication facilities.” It cannot be said up to 50, 425 foot tall wind turbines( as the WREP would intend), with an extensive road network, can be equated to such modest and common place uses as parks, public accesses and schools. If these were intended to include wind turbines, wind farms and other alternative energy facilities, the comprehensive plan would have said so by simply adding a definition of such uses. Of course if there was a proposal to include large wind turbine

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2 farms within the 2007 Plan, it would have likely ignited significant controversy.

3 In addition to the foregoing, the issue of consistency between the existing zoning  
4 code and the 2007 Comprehensive Plan arose in the hearing before the Skamania County on  
5 the appeal of SOSA and Friends challenging the County MDNS for the new zoning code.  
6 SOSA in particular asserted that the 2007 Comprehensive Plan was inconsistent with the  
7 proposed zoning ordinance. In response, the County argued that the allowance of wind  
8 turbines in the proposed zoning ordinance did not have a significant impact because wind  
9 turbines were already allowed. This issue was resolved against the County in favor of SOSA  
10 when the Hearing Examiner found:

11 The 2007 Comprehensive Plan does not contemplate the type of energy  
12 facilities described in the Planning Commission Recommended Draft.

13 Ex. \_\_\_, Finding 18, page 8. As an issue regarding the comprehensive plan, which was  
14 actually litigated between the County, SOSA and Friends, the County is now prevented from  
15 contesting this conclusion under the doctrine of claim preclusion or *res judicata* .  
16 Washington law is clear that *res judicata* applies to administrative proceedings:

17 *Res judicata* , modernly called claim preclusion, P. Trautman, Claim and  
18 Issue Preclusion in Civil Litigation in Washington, 60 Wash.L.Rev. 805  
(1985), applies to quasi-judicial decisions by administrative tribunals as well  
as to judicial decisions by courts.

19 *Lejeune v. Clallam County*, 64 Wn. App. 257, 264-265, 823 P.2d 1144, (1992).

20 The finding by the Hearing Examiner that the 2007 Comprehensive Plan does not  
21 contemplate the wind energy facilities described in the zoning ordinance is binding on the  
22 County. Further, the existing zoning code, even if adopted by the County to implement the  
23 2007 Plan (which it was not), does not permit large scale wind turbine facilities.

24 **6. THE UNADOPTED DRAFT ORDINANCE CANNOT BE**

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**CONSIDERED BY EFSEC.**

The applicant has attached, as Exhibit F to its application a copy of the unadopted draft zoning code. SDS argues that the EFSEC should consider this unadopted code and map to show that the WR project is consistent with local Skamania County zoning. EFSEC will commit error if it considers the proposed code for two reasons.

First, zoning codes do not become effective until they are adopted by the local legislative body. Zoning codes and maps are considered “official controls” under RCW 36.70.020(11):

(11) “Official controls” means legislatively defined and enacted policies, standards, precise detailed maps and other criteria, all of which control the physical development of a county or any part thereof or any detail thereof, and are the means of translating into regulations and ordinances all or any part of the general objectives of the comprehensive plan.

(Emphasis supplied.) RCW 36.70.570 specifically requires that:

Official controls shall be adopted by ordinance and shall further the purpose and objectives of a comprehensive plan and parts thereof.

(Emphasis supplied). Zoning ordinances and zoning maps may only be adopted after a public hearing and recommendations by the Planning Commission under RCW 36.70.320 and .420. There is no provision in EFSEC legislation to consider unadopted codes, or ones under consideration.

Second, the Skamania County Hearing Examiner has ruled the MDNS issued by the responsible official in Skamania County was issued in error. The ruling of the Examiner is as follows:

The Determination of Nonsignificance is reversed, and remanded to the County for preparation of an Environmental Impact Statement for the zoning code map and text amendments.

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FCD, p. 29.

Third, this draft code has been essentially abandoned by the County as even Paul Pearce, one of the County Commissioners, state the code was “shelved” with no date for its reprise. Under the terms of SEPA, the EIS when completed “shall accompany the proposal through the agency review processes; . . .” RCW 43.21.030(2)(d).

For SEPA purposes, the “existing agency review process” involves, at a minimum, public hearings before the Planning Commission, a recommendation by the Planning Commission and action by the County Commissioners. Each of these processes will require that a final EIS be prepared and available for those bodies. Thus any action previously taken, or recommendations made, must be reconsidered in light of Hearing Examiner’s requirement that an EIS be prepared. Since the County has not yet prepared an EIS on its zoning ordinance, any existing drafts of a proposed ordinance may not be considered by EFSEC.

**7. CONCLUSION**

The WR larger wind turbine project is inconsistent with the Skamania County Comprehensive Plan, which neither mentioned or permitted such facilities. Consistency with the Skamania County Zoning code is largely a moot issue because that code was adopted prior (2005) to the most recent comprehensive plan (2007), but the proposal is also inconsistent with the code. Accordingly, the Council is requested to determine the project is inconsistent with the land use plans and codes of Skamania County and schedule a hearing to determine whether preemption should be considered.

Dated this \_\_\_\_\_ day of February 2011.

Respectfully submitted,

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ARAMBURU & EUSTIS LLP

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Attorney for SAVE OUR SCENIC AREA