BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of )
Application No. 2006-02 )
DESERT CLAIM WIND POWER, LLC ) Post-Hearing Conference
DESERT CLAIM WIND POWER PROJECT ) Pages 118 - 169

A Post-Hearing Conference in the above matter was held on
Wednesday, July 22, 2009, at 905 Plum Street, in Olympia,
Washington at 11:00 a.m., before the Energy Facility Site
Evaluation Council members.

* * * * *

DESERT CLAIM WIND POWER, Karen McGaffey, Attorney
at Law; and Kelly Moser, Attorney at Law; Perkins Coie, LLP,
1201 Third Avenue, Suite 4800, Seattle, Washington 98101.

COUNSEL FOR THE ENVIRONMENT, H. Bruce Marvin,
Assistant Attorney General, Office of the Attorney General,
P.O. Box 40100, Olympia, Washington 98504-0100.

ECONOMIC DEVELOPMENT GROUP, Ron Criddlebaugh,
Executive Director, P.O. Box 598, Ellensburg, Washington
98926-0598.

Reported by:

SHAUN LINSE, CCR
CCR NO. 2029
JUDGE WALLIS: This proceeding will please come to order. This is a post-hearing conference in Council matter 2006-02 Application of Desert Claim Wind Power, LLC. This matter is being heard on July 22, 2009 pursuant to notice in Olympia, Washington.

My name is Robert Wallis. I'm the Administrative Law Judge for the proceeding and I acknowledge the presence of the following Council Members: Council Chair Jim Luce. Dick Byers represents Utilities and Transportation Commission; Hedia Adelsman, Department of Ecology; Dick Fryhling, Department of Commerce, Mary McDonald, Department of Natural Resources, Jeff Tayer, Department of Fish and Wildlife; and Ian Elliot, Kittitas County. I also acknowledge the presence of Kyle Crews, Assistant Attorney General, assigned to the Council.

The purpose of today's session is to allow the Council to inquire into two documents. One is Exhibit 30 which is a stipulation between Counsel for the Environment and Desert Claim Wind Power, LLC. The second is a late-filed exhibit which is being offered as an agreement
between Desert Claim Wind Power and the Washington Department of Fish and Wildlife. This latter document marked as Exhibit 20 for identification was delivered to the Council yesterday and issued to Council Members yesterday.

I would like at this time to take the appearances of counsel. Please indicate your name and the name of the party that you represent.

MS. McGAFFEY: For the applicant Desert Claim, Karen McGaffey and Kelly Moser from Perkins Coie. With us today is David Steeb, the project director.

JUDGE WALLIS: Counsel for the Environment.


JUDGE WALLIS: And Department of Commerce now.

MS. BLADO: Alice Blado, Department of Commerce.

Thank you for reminding me.

JUDGE WALLIS: I understand that on the telephone we have Mr. Cridlebaugh, the Economic Development Group of Kittitas County; is that correct?

MR. CRIDLEBAUGH: That's correct, Your Honor.

JUDGE WALLIS: Is Kittitas County represented on the phone?

Let the record show Mr. Caulkins has not entered an appearance.

I would like to begin if I may with Exhibit 30
which has previously been offered and received into
evidence, and I have indications that Council Members may
have questions about this document. To the extent that they
involve factual information I understand Mr. Steeb, David
Steeb of Desert Claim Wind Power is present and available to
offer testimony; is that correct?

MS. McGAFFEY: That's correct.

JUDGE WALLIS: Again, Mr. Steeb has previously
been sworn in this matter and would remain under oath.

So let me ask at this time whether Council Members
have questions related to Exhibit 30, the stipulation
involving Counsel For the Environment or the Applicant.

Mr. Elliot.

MR. ELLIOT: Yeah, I have two questions that came
up through testimony that I'd like to ask Mr. Steeb. One in
regards, if you will, the approach to the minority
community, their involvement of the project, and I'm asking
because I'm not sure whether there's another time in which
to ask the question.

MR. STEEB: Sure.

MR. ELLIOT: And that is that Kittitas County that
represents a minority also that we have very few people in
the valley that have trades that would fall under the union
classification of what you are doing and going to be
building, and so I'm questioning whether or not that in
going out to the minority community that the issue of union
or Davis-Bacon or any of those issues are going to come up
for opportunities of people within the valley to participate
in the construction of this project?

MR. STEEB: Sure. Let me address that. As you're
aware last night there were a couple people that made
testimony relating to minority employment groups that looked
at that. They approached us and we've approached them. It
was sort of a mutual approach to each other, especially
since this last meeting was in the Seattle area on the west
side. What they said was they see the value of renewables
within the context of what it is for Desert Claim both for
the growth that we see in the state and across the United
States and they want to be involved. I said, well, let's
discuss that, and part of that was for them to get
recognition, number one, for showing up last night.

The second part of that is to continue dialogues
with them. There's no commitment to them on hiring practice
or anything of that nature. This is a very, very early
thing, but they saw renewable energy where that was going
and what that meant not only for all citizens of the United
States and Washington State, but they also saw that as a
valuable piece of their future. And so as a starting point
they spoke up last night and we will continue to have
discussions with them, but it's at a very early stage.
MR. ELLIOT: Okay. So at this point there's just no comment essentially with regards to how this is going to play out with respect to any local hiring.

MR. STEEB: As we've always said this is a local project, and as we build the project, as our contractor builds the project he will be hiring in the local area and that depending on the size and the qualifications in that area as always happens it moves from the local to maybe Yakima, other counties, and out from there. But this project still remains a project that is focused on hiring local people.

MR. ELLIOT: The second question I had was somebody had asked the question regarding properties that you had purchased. I was wondering if there was any validity to the allegation that the agreements of purchasing property included a stipulation that the property owner could not testify against the project?

MR. STEEB: Let me clarify. We have three succinct types of property within the project, and it's been laid out in both my testimony and also in our application. The three types of property that's within the 5,200 acres one of it is state DNR land. The second piece of it is leases with private property owners. They continue to own the property, but we would lease from them the rights to build the wind farm. The third piece is the option to
purchase a piece of property in the southwest corner. So that is an option to purchase. If this proceeds on to building a project, Desert Claim and enXco would purchase that property and that would become a part of the project and the property owned by either enXco or an affiliate of it. Under none of those scenarios do we have anything in there that asks anybody to not participate.

MR. ELLIOT: So it was not a valid claim.

MR. STEEB: No, no.

MR. ELLIOT: Thank you very much. I appreciate that.

MR. STEEB: Okay.

MR. TAYER: Your Honor.

JUDGE WALLIS: Other Council Members?

MR. TAYER: Yes, I had a couple things that I wanted to you ask about to try to get something in the record about. One is there's quite a bit of discussion on several of the documents about bald eagles being present, particularly the calving issue within the bald eagle area, attraction issues was well addressed in I believe the Counsel for the Environment's stipulation. But the one thing that I don't see any discussion about is the specific federal law that protects bald eagles, and I would like to see something in here about how the Bald Eagle Protection Act interacts with these agreements and discussions. I
1 don't want to find out after the fact that we didn't know
2 enough about the federal law. So that's one question. The
3 second question --
4 JUDGE WALLIS: Why don't we stop with just one and
5 perhaps counsel can address the concern that was raised.
6 MR. MARVIN: I'd be glad to address that. I did
7 have conversations with the -- unfortunately I don't have
8 his name handy, but I believe he was the district manager of
9 the U.S. Fish and Wildlife Service asking about
10 recommendations and how the federal laws protecting bald
11 eagles would interplay with this project.
12 The U.S. Fish and Wildlife Service, first of all,
13 does not have any authority to enter into agreements or
14 impose restrictions on projects. So in that sense they
15 don't really have a -- they're not really in a position
16 other than to provide guidance to applicants or developers
17 in regard to what would be good practices regarding the
18 protection of the bald eagles. They do have enforcement
19 power once a "take" occurs, and the penalties I believe
20 would be either monetary in nature or they can be working
21 out some kind of agreement with the developer to mitigate
22 the situation that resulted in the take.
23 I think it's also notable that unlike other
24 endangered species issues there is no provision within
25 federal law that allows for a take permit for a bald eagle.
That is not an option that's available. We did discuss these during the course of the stipulation. We indicated that -- I don't know that we specifically discussed the federal law. I believe I suspect that opposing counsel is well aware of the restrictions that are in place, but I'll let Desert Claim speak on its own behalf.

MS. McGAFFEY: Yes. As I'm sure the Council is aware, although the bald eagle has been delisted under the Federal Endangered Species Act, there are other federal statutes, the Migratory Bird Treaty Act and the Golden and Bald Eagle Protection Act, that provide additional protection for eagles.

I think our view as far as the relationship between those statutes and the stipulation is that they are, although substantively related in the sense they both address eagles, they are jurisdictionally separate. The Applicant is aware that they have to comply with federal statutes. They have as a company an ongoing relationship with U.S. Fish and Wildlife to get the latest input from that agency on best management practice and guidance. There would undoubtedly be federal notification requirements should a take occur, and I think from the Applicant's standpoint they understand that there's a federal regime that they would have to comply with. The stipulation is not intended nor could it supersede that federal set of
requirements. It's merely intended to address sort of the bald eagle issues from the standpoint of the Washington State regime set up that guides EFSEC.

So the stipulation I mean as Mr. Marvin has indicated we had extensive discussions with him and his consultant about how best to address all bald eagle issues. That's also an issue that's addressed in the Fish and Wildlife Agreement and we had extensive discussions with the Department of Fish and Wildlife staff on the best way to try and address that potential risk out there. That's what the agreements try to outline.

MR. TAYER: Has there been any discussion with the Federal Fish and Wildlife Service about any additional measures they would like to see in this project to protect the bald eagles?

MS. McGAFFEY: We have not gotten any indication from them of additional measures they would like. We've received their somewhat standard set of information they send out to every wind project. That's something that going forward we will likely have additional discussions with them.

MR. TAYER: The liability for the take is there any sense or understanding of whether that is only on the operator of the facility or would that apply to the department entity as well?
MS. McGAFFEY: I think it's only on the operator. Your attorney could probably address that issue, but I'm not aware of any situation in which a permitting entity is faced.

MR. TAYER: The reason I ask that is because under the Endangered Species Act permitting at least have been held liable for the take and I didn't know.

MS. McGAFFEY: Under the Federal Endangered Species statute there are several obligations placed on federal agencies to consult with the Fish and Wildlife and they're prohibited from taking actions that would jeopardize endangered or threatened species. So that statute outlines a number of specific obligations of agencies so I think you're right. Agencies can get sued under the Federal Endangered Species Act.

There are not those similar kinds of provisions, at least that I'm aware of, under the Bald and Golden Eagle Act or the Migratory Bird Treaty Act. They have the take prohibition that you also see in the Endangered Species Act, but that's written more in terms of if a person takes, meaning kills or harms, a list or covered species they could be subject to liability, and I'm not aware of any situation in which the permitting entity has been accused of, much less found guilty of a take based on issuing a permit for a project.
MR. CREWS: I'd like to add the case law has nothing about the permitting agency. It was like Ms. McGaffey said the operating appropriation person. So I suppose somebody can make the argument, but the statute and the case law to date there hasn't been anything like that.

MR. TAYER: Okay.

MS. McGAFFEY: I guess an additional clarification I would like is although those statutes are written in fairly absolute terms any take is prohibited. The communication that we've received and that I think every wind project receives from U.S. Fish and Wildlife indicates that as a matter of the agency's discretion if they feel that wind projects are using best management practices and taking appropriate precaution they have not prosecuted wind operators for the occasional fatalities in migratory birds that do occur.

MR. TAYER: Ms. McGaffey, that was actually my interest in this because this is a bird that's protected by the federal law and some signal from the service that best management practices have been applied, I really don't have any reason to think they haven't been, but it would be of interest to me to get that signal from the feds that they think what was done is what they think should be done.

MS. McGAFFEY: My guess referring back to what Mr. Marvin said earlier I think the federal agencies have
been reluctant to certainly put anything in writing saying that they are blessing or excusing a particular project. It is not uncommon to have very productive meetings with staff people where you get the clear impression that they are pleased with the way the project is developed and you would not expect them to take enforcement action, but getting some sort of promise or seal of approval from a federal agency is often a challenge.

MR. TAYER: Understood.

JUDGE WALLIS: Other questions from Council Members?

CHAIR LUCE: I have a couple of questions. Fire suppression there have been some discussion about fire --

MR. STEEB: Yes.

CHAIR LUCE: -- at the close of our hearing, public meeting in Ellensburg. I am curious whether you have executed an agreement with the fire district at this time or would you be in the very near future that will address that issue that was raised?

MR. STEEB: We have not completed an agreement with them. We will and part of that I've seen in the past certifications have said prior to construction, prior to these things it will be in place and we expect that same thing to take place. I am in discussion with the fire district. As I've said in the past, this project is a
little different than some of the other projects out there in that half of that project is already in the fire district, and so expanding that is where we're in discussions with them along those lines.

CHAIR LUCE: But you agree that there will be a fire agreement prior to the start of construction.

MR. STEEB: Right.

CHAIR LUCE: If I recall correctly, there was a question about private roads.

MR. STEEB: Yes. I'm still trying to research that a little bit. As we're all aware I think even over here where we drive down a road and we see a street sign that says, you know, Northeast 45th and know that's a public road, but we've also seen the next one Northeast 56th Place private. This is my interpretation or my understanding at this stage is the county or jurisdiction says, well, that's a private road; i.e., it's not a county or city road, but it gets back to places we've allowed people to live to build their homes, and therefore because of that we want certain standards to be met so that fire can get back there service. So that's where I see the dividing line. I'm still researching that, but that's my understanding in talking and looking at what is in Kittitas County. Still researching that, beyond that.

On the project itself where you're not going to go
to make a whole bunch of parcels down a road for habitation, you know, I consider that a project road, not a private road. But we're still researching that issue.

CHAIR LUCE: You'll be addressing that distinction hopefully in other filings as you make before the Council.

MR. STEEB: Yes.

CHAIR LUCE: Do you have any agreements with Kittitas County that have not been entered into exhibits here? Or I know there was a draft agreement, Mr. Steeb, at the end of your testimony and that's what in turn led to the filings before that. There was an inability to conclude an arrangement with the County that led to your EFSEC filing. So is there anything out there that I don't know about that includes agreements with the County?

MR. STEEB: Not that I'm aware of.

CHAIR LUCE: All right. I have a couple questions about setbacks. Your testimony is that there are seven residences that are within I believe 2,500 feet.

MR. STEEB: Correct.

CHAIR LUCE: And your testimony also is that no turbine is closer to a nonparticipating residence four times the turbine tip height which is 1,640 and then you point out that that's what the Council approved in the Kittitas Valley case; is that right?

MR. STEEB: That's correct.
CHAIR LUCE: You also testified that the turbines that you're proposing are two-megawatt units?

MR. STEEB: That is correct.

CHAIR LUCE: Have you purchased those turbines?

MR. STEEB: EnXco has turbines of that type, that size, that type in their pipeline so the answer is: Are turbines like that purchased? Yes. Are those the exact turbines that will go on that site? Very likely so. But under market conditions there may be turbines that meet that constraint but aren't the same turbines to answer your questions directly.

CHAIR LUCE: I'm told there are larger turbines available on the marketplace now; is that correct?

MR. STEEB: They are.

CHAIR LUCE: If hypothetically you were to use larger turbines and produce the same amount of generation that you're proposing would it be possible to modify your setback in such a way as to need a larger setback say 2,500 feet?

MR. STEEB: Yes. What I see is the beauty of the four times the height is you don't do that once to come up with the 1,640. You do that on the specific unit that's going to be built. So therefore, for instance, if we made them from my simple math a thousand feet tall we would be talking about 4,000 feet distance.
CHAIR LUCE: Not hopefully. I wouldn't say hopefully. I'm having a hard time envisioning a thousand feet tall.

MR. STEEB: I want to overexaggerate just to show how the mechanism. If it was only 100 feet tall, it would be 400 feet.

CHAIR LUCE: That's correct. I guess the question basically is if you were able to acquire turbines larger than two megawatts, two and a half megawatts would you be able to configure the project in such a way as to provide a 2,500-foot setback?

MR. STEEB: So we're no longer talking about four times the height but a 2,500 setback?

CHAIR LUCE: Hypothetically. Your testimony in your direct testimony was to discuss the possibility of 2,500 feet at which I think there were several numbers that were put out by the County at various times, 2,000 feet 2,500 feet. There was never a final action or decision by the County on what the setback was, but you've addressed it here in your testimony about 2,500 feet as being one situation and then you've listed seven residences that are within 2,500 feet.

MR. STEEB: Correct.

CHAIR LUCE: So I guess what I'm asking is if you've got two and a half megawatt turbines would you be
able to reconfigure the project in such a way as to meet the 2,500-foot setback that you addressed in your testimony?

MR. STEEB: Well, since we're talking about those seven, let's talk a little bit about those seven that are in that 2,500 feet. First off, the 2,500 foot is not a county ordinance or anything in the record, but we have provided records from their planning department that succinctly says 2,500 feet in an issue.

CHAIR LUCE: Right.

MR. STEEB: So that's what I'm using as that guideline, if you would.

CHAIR LUCE: Understood.

MR. STEEB: So as we look at it, I think there's two parts to answer your question at the 2,500 feet. I think we can configure some of the project to meet that, but I also put in that we are actively talking to those seven landowners and there may be ways to work and have the ability to maintain closer than the 2,500 feet with those residences. So that's the best way that I can answer it at this time.

CHAIR LUCE: All right. You state in your testimony that a setback to 2,500 feet could eliminate up to 10 turbines or 20 megawatts of capacity. I'll ask the question then. Would that render the project economically unviable?
MR. STEEB: No, it would not render it economically unviable. It would render it probably more expensive for the rate payers of this state for electricity.

CHAIR LUCE: Why would that be true?

MR. STEEB: There are sunk costs. There are a lot of things that are fixed costs, and when you spread it over less megawatts it goes up.

CHAIR LUCE: I do understand that. All right. I think those are my questions on setbacks. I appreciate your answers.

JUDGE WALLIS: Are there any other questions from the Council Members on this particular topic?

Mr. Byers.

MR. BYERS: On the topic of setback?

JUDGE WALLIS: On the topic of the stipulation with the Counsel for the Environment.

MR. BYERS: I have a question that actually bridges the two stipulations. Would that be hard?

JUDGE WALLIS: Why don't we talk about the agreement Exhibit 20 for identification.

Ms. McGaffey, do you offer that exhibit into evidence?

MS. McGAFFEY: Yes.

JUDGE WALLIS: Is there objection?

Let the record show that there is no objection and
Exhibit 20 is received. Would it be appropriate to --

(Exhibit No. 20 admitted into evidence.)

MS. ADELSMAN: I'm sorry. Is it 20 or 24?

CHAIR LUCE: Twenty is the Desert Claim Washington DFW I believe. Twenty is DFW. Correct?

JUDGE WALLIS: Yes.

CHAIR LUCE: Exhibit 30 is the CFE.

MR. FRYMIRE: I heard 24 also.

MS. ADELSMAN: I think we are the two oldest people.

CHAIR LUCE: I'm not sure about that, but I'm sitting closer to Judge Wallis.

JUDGE WALLIS: That's what my notes indicate.

Would it be appropriate for the Applicant to indicate the purpose for which this document is being offered?

MS. McGAFFEY: I am happy to do that, if you'd like.

JUDGE WALLIS: Please proceed.

MS. McGAFFEY: Exhibit 20 is the agreement between Desert Claim and the Washington Department of Fish and Wildlife. It's that the agreement that we described we were having anticipating for you when we met a couple weeks ago now in a prehearing conference. As I think I said at that time, from very early on in this project the Applicant has had discussions with Department of Fish and Wildlife
recognizing that the Department has considerable expertise in this area, has developed the Fish and Wildlife Guidelines for wind power development. So it was important to the Applicant to not only work with the agency but benefit from the agency's expertise and experience with wind projects. Although the agency did not intervene in this proceeding, the agency as you're aware filed comments with respect to the Supplemental Environmental Impact Statement, and therefore the Applicant continued to meet with the agency to see whether we could figure out solutions to some of the concerns that they had identified in those comments.

We are pleased to say that we successfully have worked through that list of issues with the agency. Our meetings with them were very productive and very informative on ways that the project could be designed and managed to minimize impacts. We were able to develop and outline those issues in this agreement that you have as Exhibit 20. You will undoubtedly note some similarity and overlap between this agreement and the stipulation with the Counsel for the Environment since the agency and the Counsel for the Environment had many of the same concerns regarding the project.

We are now submitting the Fish and Wildlife Agreement to the Council so that the Council understands what the Applicant has committed to in regard to Fish and
Wildlife and habitat issues. Some of these commitments are really just clarifications or expansion commitments that were already made in the application, but I think the additional explanation that's provided in the agreement is helpful for the Council to understand what is meant by the Applicant's commitment. And I think it also is useful for the Council to have it clearly written on paper that the agency believes that the project is consistent with the agency's Fish and Wildlife Guidelines and that all of the concerns that were reflected in the agency's comments on the SEIS have been resolved with the commitments made in this agreement.

JUDGE WALLIS: Mr. Byers.

MR. BYERS: This is a question that has to do with both Exhibits 20 and 30, and it has to do with the description of the Technical Advisory Committee. I note as you've described that there's a significant amount of overlap in the description of the Technical Advisory Committee; however, the descriptions are not identical. There are some provisions in Exhibit 20 that don't exist in Exhibit 30 having to do with the makeup of the committee, for example.

And my question is since the stipulation in Exhibit 20 is between the Applicant and/or I should say the agreement is between the Applicant and the Department of
Fish and Wildlife and Exhibit 30 is between the Applicant and Counsel For the Environment which of these descriptions is the final position of the Applicant with respect to commitments?

MS. McGAFFEY: I think you're absolutely correct that there is some additional items included certainly in the stipulation that are not in the agreement and it may be true the other way as well. It's the Applicant's expectation that any provision that is included in either the stipulation or the agreement would be included in the site certification agreement and will be included in the proposed draft of that document that we provide to you.

Another way of saying that is to acknowledge that the stipulation and the agreement may include with respect to this issue and frankly other issues as well may include slightly different descriptions, but we do not believe those descriptions are inconsistent. And so if the agreement requires three items and the stipulation requires those three items and a fourth item, our understanding is all four items are required and will be in the proposed site certification agreement we give you.

I'm sure by now Mr. Marvin has had an opportunity to review both these documents, and I don't know whether he has an opinion whether they're consistent with one another, but certainly we provided a copy I believe of the Counsel
for the Environment's stipulation to the folks at Fish and
Wildlife and discussed with them how some issues might be
more thoroughly addressed in one document versus the other.
But I think we were all comfortable that they were
consistent, if not identical.

MR. BYERS: You anticipated my next question. I
was going to turn to Mr. Marvin and ask him if he's had a
chance to look at the Fish and Wildlife Exhibit 20 agreement
since there was some I won't call them discrepancies but
they're overlapping issues and in some cases there are
things that aren't in the stipulation that you've entered
into, and if you are comfortable with the way in which
Counsel has described both and rather than either/or?

MR. MARVIN: Generally I am comfortable with the
way counsel has described the interplay between the two
documents. In our stipulation the understanding that's been
reached between the parties is that the stipulation creates
a floor of minimum standards that must be met in order to
satisfy our expectations. It does not foreclose EFSEC or
any other party from imposing additional mitigation measures
or protections or conditions above and beyond that.

So I think it's important to understand that this
is not -- like I said, it provides a floor and you're
welcome to build on that to the extent that you think it's
appropriate and necessary.
With regard to the actual agreement that's been reached between Fish and Wildlife and the Applicant, I have a couple concerns. First of all, I understand that EFSEC has retained, correct me if I'm wrong, this is just a guess, but I'm wondering is Fish and Wildlife or members of Fish and Wildlife serving as consultants on the EIS review?

MR. FIKSDAL: Correct.

MR. MARVIN: I would have some concerns regarding potential or actual conflicts of interest that may be raised by the fact that I don't know what your agreement is with Fish and Wildlife and I don't know whether there's been cross pollination between the negotiation of this document and your consultants. I am concerned just on a procedural basis that there should be a clear delineation. I understand that we're in a situation where there's a lot of crossover. We have a lot of agencies and a lot of people wearing different hats, but I do think it's important and I suppose I would like some clarification with reassurance regarding how that EIS process evaluation is going to continue moving forward in light of this document.

My second concern is again in some ways it's addressed by my understanding that our document provides a floor as opposed to a conflicting document. I've only had this in my possession for probably less than 24 hours and haven't really done a thorough evaluation, but again with
the understanding that our document is the floor I've taken
some comfort in that and that it's not going to undermine
our position. There are some instances in which these
documents are not on all fours with one another, for
example, on avian mortality issues. Our document provides
that, our stipulation provides that there will be two years
of avian mortality monitoring. The agreement between Fish
and Wildlife says that there will be two years with the
option of converting one of those years into some kind of an
additional research project.

And interestingly as an issue we applaud the idea
of getting additional research and expanding the knowledge
of how these projects will interact with the natural
environment; however, we do believe that two years of
mortality study is important and necessary for this project
in that as we can tell just by the fact that this summer
there are variations in weather patterns and how things play
out so just getting mortality ratings on one year is
probably not sufficient, and that second year was
intentionally negotiated. And, in fact, we had considered
putting an option of doing additional research for that
second year and rejected that idea because we felt that
having that second year of data was critical to ensuring
that there was good information being generated that would
be useful not only to this project but for evaluating the
cumulative impacts for the projects throughout the state. So I think there's other similar issues with regard to bat studies. I don't know that there's any specific commitment with regard to doing mortality studies for bats. That may be taken for granted in the Fish and Wildlife document, but I don't believe it specifically referenced our document. It does contain that provision and my understanding in interpreting the two documents together that our document would take precedent; that we would be anticipating that two years of study would be done. So that would be an example of how the two documents would be read in conjunction with one another and the document with more stringent additional requirements would prevail in those circumstances.

MR. BYERS: Thank you. One more question regarding the TAC specifically. Again, there's not been a whole lot of time to focus a great deal on Exhibit 20. We just received it yesterday, but it appeared to me that the way the TAC is described in Exhibit 20, this is the Fish and Wildlife Agreement, it applies primarily if not exclusively to avian issues. Was that the intent? Because it appears to me in the stipulation with the Counsel For the Environment that the TAC scope which reads to me to be broad.

MS. McGAFFEY: I think that I guess I would start
by saying that I agree with Mr. Marvin's previous characterization of these two documents as them each setting a floor, and if one asks for something in addition that's part of what the Applicant has agreed to.

    With respect to the TAC specifically, I think it's fair to say that in our discussions with Fish and Wildlife they were primarily focused on avian and eagle related issues whereas in our discussions with Counsel For the Environment some additional issues had more prominence: the squirrel, the bats, some other things. I think the description of the TAC's scope of responsibility, if you will, there's some I think in both documents some fairly broad language and then there are some specific tasks assigned if you will. And so while it is true that in the Fish and Wildlife document probably most of those specific tasks are bird related, that is not meant to say that the TAC would not be involved in other issues.

    And in particular the Counsel For the Environment's stipulation identifies some other issues that the TAC, identifies a specific role for the TAC with those. So again it's our understanding that the TAC would cover all the things in those documents.

    MR. BYERS: The point of the question it's not the Applicant's intention that there be two TACs.

    MS. McGAFFEY: No.
MR. BYERS: One TAC perhaps a broader scope than what's in the agreement.

MR. STEEB: If I may address. The Counsel for the Environment in their role in this is really to protect the environment for all of us as citizens of the state and looked at it from that standpoint. Therefore, they were looking at specific instances of bat mortality, things like that. That was important feedback, and that's why we incorporated that in that stipulation. With Fish and Wildlife since they weren't an intervenor because they did comment we were working off their comment letter to the SEIS and wanting to address and because they have some experience in another couple other wind projects, one of them already being built, I thought it was very worthwhile for us to spend the time and so did they, the local people in that area to spend the time and try to address that in not only look at the guidelines, look at what the Counsel for the Environment, look at other comments, but also take some of their practical experience and say how do we address this more as a working document and clarify as much as we can up front.

As you're probably aware there were probably times in the Wild Horse Project that you had things come to you that nobody thought of. Well, we were trying to incorporate some of those in here and understand that in more of a
working relationship. So if I classify the Fish and Wildlife one, it's more of a working. We would try to come up with some working agreement to address some of these things that we didn't see in the guidelines, beyond the guidelines, we didn't see in the Counsel for the Environment, and so they were really just specific for that. They weren't far reaching, but they were tuned in more of trying to get some of the working pieces so that when we talk about this in the future we've already talked about how we're going to handle that.

MR. BYERS: I just have one more question.

JUDGE WALLIS: For the record, there may be some people who pick up the record that don't know what a TAC is. Could you identify that.

MS. McGAFFEY: Yes. The TAC is an acronym used for a Technical Advisory Committee which will be a committee made up of representatives of various organizations and government entities that will gather together to review some of the technical information concerning the issues we've discussed, avian mortality, bats, etc.

JUDGE WALLIS: It is a T-A-C instead of a T-A-C-K.

MS. McGAFFEY: Yes, I'm sorry. Correct.

CHAIR LUCE: And that was very tactful.

MR. BYERS: On another tact, I have a question on a slightly different subject on Exhibit 20. On page 11,
Point No. 12, there's discussion of initial decommissioning and site restoration plan, and I apologize I guess if you've heard something that I've forgotten from the application or from the prefiled record. What I don't see in the discussion of initial decommissioning site restoration plan is any commitment on the part of the Applicant to provide for some kind of surety, some kind of either a bond or letter to something for insurance that in fact site restoration can be executed down the road. Is that omission intentional or is there an intent on the part of the Applicant to provide for that kind of financial assurance?

MS. McGAFFEY: There is a discussion in the revised application and we can dig out the specific reference for you of site restoration, and there's a description of the plan and there is a reference to financial security there. I believe there's also a brief discussion or summary of that in Mr. Steeb's testimony which is Exhibit 11, but I would have to check that to make sure.

The purpose of Section 12 of Exhibit 20 of the agreement of Fish and Wildlife was primarily to be clear that Fish and Wildlife wanted, the Department wanted to be involved in the development of that plan and so we wanted clear in the agreement that we intended to consult with the Department in developing that plan. It's our intention as explained in the revised application that the site
certification agreement as the Council commonly provides will require that a site restoration be submitted prior to beginning construction; that it include all of the elements required by the Council's regulations, including providing financial assurances.

MR. BYERS: Thank you.

MS. ADELSMAN: I have a question. Exhibit 20 in the beginning of I think page 7 it talks about construction, talks about the preconstruction, during construction. And as you know Ecology will have at least EFSEC has in the past worked with Ecology to deal with storm water spill response, the erosion, all of that stuff, and also to even monitor the compliance under the Wild Horse is one. If you get into the consultation with Fish and Wildlife on some stuff, then it may conflict with what Ecology wants to see happening, we think should that happen. Ecology is the agency with expertise on at least the stuff that I named. There's nothing in the agreement that would say what would happen.

And I have some concerns because also later on in the TAC it talks about it's numbered as No. 10. It's like almost a section on its own. It talks about the monitoring and so on. Are they going to get into monitoring beyond what's happening with the eagle, the big game, and so on and getting to some of the storm water spill responses and so on? Or I mean so I'm kind of trying to understand what does
this means in the future?

MS. McGAFFEY: The agreement with the Department of Fish and Wildlife and I believe the stipulation with the Counsel for the Environment as well identifies a number of plans that the Applicant will have to develop the plans that the Council has required other certificate holders to develop. It's our anticipation that the ultimate decision with respect to approval of all those plans will reside with EFSEC.

It is given past experience with EFSEC projects the suggestions or your comments about Ecology's involvement in the review of those plans and providing advice is not a surprise to us. We anticipate that in areas where the Department of Ecology has expertise it would not be surprising for EFSEC to look to that expertise, and for that matter it would not surprise me if the Applicant in developing those plans went directly to the Department of Ecology to learn from that expertise from the beginning. That's not outlined in this agreement because it's not an agreement with the Department of Ecology.

MS. ADELSMAN: Yes, I know.

MS. McGAFFEY: I imagine that is conceivable that with respect to some plans the Council might find itself in a position where the Department of Fish and Wildlife would like something to be done a particular way and the
Department of Ecology would like something to be done another way, and I guess that's both the benefit and the downside of being the decision makers. We by this agreement the Applicant is merely committing to consult with the Department of Fish and Wildlife in developing those plans so that we do get that input. At the end of the day plan approval is going to be the Council's job.

With respect to the second question about the scope of the TAC, it's not my expectation that the TAC would be getting involved in storm water monitoring or things like that that are traditionally kind of within Ecology's zone of enforcement, and I don't think that's been the practice of TACs on other projects such as the Wild Horse project.

MS. ADELSMAN: When it's open ended, it's more likely there would be other related monitoring data that could be maybe broad, and I don't know whether there's a way to limit it to the wildlife, you know. And Ecology's role really it's during the construction period when you're having storm water, you're having all this stuff. The TAC is really looking at the long-term operation of the plant, and the monitoring that's happening.

So it's I just wanted to make sure it's on the record and also that there's some clarification about it because I don't want the Council to end up feeling that this stipulation with Fish and Wildlife carries more weight than
say Ecology or something.

CHAIR LUCE: One stop shopping, Hedia. That's what it's all about.

MS. McMAGAFFEY: Right.

MS. ADELMAN: No, but at the same time when I look at all of this and I'm saying the expertise is in one agency and other the agency there's different expertise. We're trying to draw the best.

MR. FRYHLING: The SCA will spell all that out. It will be very specific to these activities of the agency.

MS. McMAGAFFEY: One of the challenges that we have in front of us over the next week or so is to synthesize all this material into a proposed site certification agreement for you and the other parties to review. Because the Applicant has made these commitments you're going to see a proposed site certification agreement that includes these commitments and there may be some instances where we have to figure how slightly different wording fits together along the lines that I've described and Mr. Marvin's described. You may find when you see what we give you that some of the issues that you've just identified were not something that we talked about and require further clarification or would benefit from further clarification and once again that's why you guys have the job of decision makers.

MR. MARVIN: At least from Counsel for the
Environment's position there was no intent or concept of what kind of assigning duties to different agencies in terms of how to do this work. We were looking primarily at Fish and Wildlife and so Fish and Wildlife became the agency that we referred to most. But we assumed that when best management practices or plans were developed that the lead agency in those areas in the state would be assigned responsibility for regulating them.

MS. ADELSMAN: I have no concern in Exhibit 30. The only thing is the agreement with Fish and Wildlife and we did not have in the other places, and it gets into an area like construction which kind of gets into some of the issues that goes beyond just the TAC and all the other work.

MR. STEEB: I think it was a subject for please read the Fish and Wildlife agreement as a working agreement or the guidelines are in place, Fish and Wildlife Guidelines. For instance, the TAC is spelled out very well in the Fish and Wildlife. But to take it the next step and to be pragmatic and look at trying to answer questions now, especially based on the experience of Wild Horse and KV, we took this approach to try to address that with Fish and Wildlife, and so it's sort of to expand where we were and get that clarified up front so that when Karen and Company put together the certificate we can roll that into what -- we can look very clearly at what this Council has presented.
on Wild Horse. We did. I mean I've got copies of it and marked them up. We've also looked at KV. So you also have to put this in light that we're doing this as we've also read and looked at the certifications for two other projects that this Council has done. So this isn't an avoid. It's parallel with.

MS. ADELSMAN: That's fine.

CHAIR LUCE: I just want to go back quickly over this setback issue.

MR. STEEB: Okay.

MS. ADELSMAN: Jeff has a quick question.

CHAIR LUCE: Oh, I'm sorry, Jeff.

MR. TAYER: I had just a clarification for the record. Mr. Marvin raised the concern about the consulting role of the agency and this agreement, but I'm not sure whether that concern really extended to whether I was involved in that agreement as a Council Member so I want to clarify.

MR. MARVIN: No, no. That was not what I was alluding to. I was just concerned that, and again I would just like to express that as a concern, and I would like to make sure that we retain the independence of the consultants that have been retained and just noting that there is an issue there, and we should progress with appropriate sensitivity now that this document is in the record.
MR. TAYER: And I have a question. Well, a third of the project is public lands and I wasn't clear as I don't think I've read in the record any baseline in terms of public access or sort of an oblique reference landowners are in charge of their own thing in terms of access. But there's not a lot on the record in terms of whether there is public access to those lands now, do people use the land now for recreation, and what would happen.

MR. STEEB. As I said before, there's three sections or two and a half sections of DNR land out there. Of course, DNR land are public lands which means the public can walk on them, get on them. That's number one. The second part of that is can they get to them. A couple of those sections are accessible by public means. One of those sections is what I would call an island or land locked by private land around there; therefore, you would be trespassing before you got to the public land so that's that.

If you're talking about access pre and post project, we don't see changing the way DNR handled those lands in the past for this project. Granted whether it's this or they put some other facility there's the issues of safety, things like that, especially if we're talking about hunting season that you have to look at that from a pragmatic standpoint. But the way we try to state it is
whether it's a private land or public lands our whole intent in our contracts with each of those groups is that they can continue doing it except for if there are safety issues or those types of issues. Does that answer your question?

MR. TAYER: In large part it does. Is there a sense of I mean one thing -- I assume. I'm making an assumption and this is something that's always dangerous to do that. Since there wasn't testimony with the access issues that there's not a lot but I was curious.

MR. STEEB: Let me address that if I can. If everybody's aware of Wild Horse, that is a very different type of project that has a lot of project lands, both Fish and Wildlife land and DNR, historically has been a hunting area, has had access through it.

These parcels that are in this project none of them are contiguous first off so therefore you have three parcels, two full sections and half sections. None of them are contiguous so therefore if you got on one you couldn't get to the other without either taking a public road or crossing somebody's private property.

So that is a difference between this and other projects, and then again that gets down to the hunting from a pragmatic standpoint, and I'll make an assumption here too. It's hard for me to see somebody, I could see somebody walking across it because it's a public land and having the
right to do so if they can get there legally, but I have a
hard time conceiving anybody doing high powered rifle
hunting on a square mile that has even a few residences
around it, etc., whereas up at Wild Horse you have that
contiguous nature between different public lands.

MR. TAYER: Thank you.

CHAIR LUCE: I just wanted to go back over my
notes on the setback issues. Your testimony reflected that
in May 2007 Darrel Piercy who was Kittitas County's Director
of Community Development Services said that he believed,
although he didn't know, that the county commissioners would
require a 2,500-foot setback.

MR. STEEB: Correct.

CHAIR LUCE: The testimony further lays out that
there are seven residences within 2,500 feet that have so
far, and I emphasize so far, have failed to reach agreement
with you, but you're having some discussions with some of
them.

MR. STEEB: I would say so far there's at least
one that I know we have agreement with and there's others
that we're working with.

CHAIR LUCE: That you're working with.

MR. STEEB: Putting it concisely, we're working
with all seven. Each one's a different individual;
therefore, one size doesn't fit all.
CHAIR LUCE: Right.

MR. STEEB: And that increases the time frame to make it happen.

CHAIR LUCE: You have agreement with one of those.

MR. STEEB: Correct.

CHAIR LUCE: And you're currently planning on two megawatt units for your capacity, but there are larger ones out there on the market that would be accessible to enXco.

MR. STEEB: There are larger ones accessible, correct.

CHAIR LUCE: And if the two megawatt units were increased to say two and a half hypothetically you could provide larger setbacks.

MR. STEEB: Well, based on the setback criteria of four times the height the setback would increase.

CHAIR LUCE: I understand that.

MR. STEEB: Yes.

CHAIR LUCE: But you could provide setbacks perhaps up to 2,500.

MR. STEEB: Correct.

CHAIR LUCE: That would not render the project uneconomical but would increase your fixed costs.

MR. STEEB: That is correct.

CHAIR LUCE: I guess the last question I had is do you have any visual sims of those seven or six now that
you've reached agreement with one? What do they see when
they look out? I'm in the market for a car so I go on this
Toyota site and it gives me a 360 view and I can look
around. Are there visual simulations I guess of those
residences?

MR. STEEB: You mean farmers what they would see?

CHAIR LUCE: If they're in the record, I'll find
them.

MR. STEEB: The residences if referring to our
revised application for site certification under Tab 2 which
is the visual simulations.

CHAIR LUCE: Okay.

MR. STEEB: Looking at that the closest
approximations for I think -- first off, each of you
individually can go look at I believe it's Figure 4 that
shows the seven residences, and if you overlay that with the
first figure in the simulations, you can see where Residence
No. 1 is in this area; therefore, these would give you an
idea of what that residence has in their view scape. There
are three residences up and down Pheasant Lane. We have a
point there. I think there's one or two down in this area
so I think you can do that and do that type of visualization
back and forth.

We've also set out in here, we give you the
approximate distances that each of them are. So you cannot
only even if we don't have one there you could probably look
at one of these simulation points and look at that distance
and get the same idea if it's 2,400 feet, along those lines.
I also believe within the testimony that was received
from -- I need counsel's help there.

What was the testimony on the visual?

MS. McGAFFEY: David Blau.

MR. STEEB: If you review that he talks about some
of these distances and there may be additional information
there. There is additional information there that you can
look at.

CHAIR LUCE: Just to be perfectly clear what I'm
struggling with, when I got this job my mandate was clear,
quantifiable standards because applicants need to know when
they come before the Energy Siting Council what the rules
are.

MR. STEEB: Right.

CHAIR LUCE: And I am still in that space. Then
we embark on about a two-year process with Ms. McGaffey in
which we had discussions about clear, quantifiable standards
and we got some. We got seismicity and we got noise. Then
we turned to Fish and Wildlife and I heard from my friends
at Fish and Wildlife, well, Fish and Wildlife Guidelines.
The standards, well --

So what I'm struggling with here quite frankly is
visual may or may not be capable of being in all cases clear and quantifiable. Would I prefer that it were? Yes, absolutely because I want to give as much certainty not just to the Applicant but the Counsel for the Environment and everybody else's involvement in these processes. So that's the reason for my line of questioning and I just wanted to make that clear for the record.

MR. STEEB: As a developer I appreciate hat because that's the same struggle that I have is tell me what you want and let's get on from there.

CHAIR LUCE: Absolutely.

MR. STEEB: So I can appreciate that. I would add one thing more, Chair Luce, for you is to go and read the Dave Blau, David Blau's discussion there. I think in light of what the Council did on previous projects with this four times the height and read in light of the decisions and the thought patterns that you had then, I don't know what they are for each of you, but read that in light in what he did. Part of our goal was to try to get to that quantifiable with some science in an area that is not sound or two plus two equals four but is somewhere in there. And I think in light of your questions and my first set of answers I'd also ask each of you to read that because I think those together I feel comfortable in what we've presented here.
CHAIR LUCE: I definitely will do that, and I just wanted to make clear what my perspective was I guess.

MR. FRYHLING: Can I add to that? This is a gray area. We're looking at a changing piece of equipment out there. We started this process in EFSEC we were looking at 400-foot towers to the top so this has changed dramatically, and a 300-foot thing out there is something different from a 400 and the visuals start changing. And so it is a very kind of gray area of knowing how far that setback should be, and it's just something we have to deal with. But it's a moving target. I don't know how much higher or the taller these things are going to get. Who knows? But they've changed in the short time we've been over this the last four or five years.

MR. STEEB: Yes, I appreciate it. Again, please read that over because I think that at least helps part of the quandary that you find yourselves in.

MR. FRYHLING: We've read this stuff and the experts say a thousand feet that's great. Well, that's not the use of the equipment we're talking about out there. That's a thousand feet from residences and so forth. So that's been changing, and these are whatever you call experts that is some of the testimony we've got.

CHAIR LUCE: Thank you very much, Mr. Steeb. I appreciate it.
MR. ELLIOT: I think Mr. Steeb has been beat up enough on this already so I won't do that one anymore. For the Counsel for the Environment I do have question. I notice that there is a no mention in the Counsel for the Environment's testimony or request for testimony on views, vistas, scenic flyway impacts, and is the Counsel for the Environment satisfied with the Applicant's testimony response given the issues of the cumulative effects and other testimony and what's all been said here? Because it is environmental issues that is being the Counsel for the Environment's issues, but it's not really been brought up.

MR. MARVIN: Right. I think that based on the application and the evidence that we've read in the record that we are comfortable that the issue with regard to aesthetic view scape is adequately addressed, and again it is I would agree with you that it is kind of a gray area and one that is probably more subjective than just about any other issues that's in front of you. And our assessment is based on what's happened in the past again, and based on what we saw in the record we felt comfortable it was acceptable to the Counsel for the Environment.

And again just so you know we're looking at this from a somewhat broader perspective than individual homeowners, and so there's a balancing of interest that's in
play there as well; that is, what aesthetically may impact
an individual homeowner may on a micro level is obviously
very important to that individual, but in terms of this
state-wide policy and what benefits the project from an
environmental standpoint that there's that kind of a
balancing going on.

MR. ELLIOT: You guys had the discussion and
that's always important. Thank you.

JUDGE WALLIS: Is there anything further?

Let the record show that the Council has no
further questions.

Do counsel have anything to add?

MS. McGAFFEY: Your Honor, could I ask a few
questions on redirect in light of the Council's to clarify a
few items?

JUDGE WALLIS: Yes.

DAVID STEEB,

having previously been sworn on oath,

testified as follows:

REDIRECT EXAMINATION

BY MS. McGAFFEY:

Q. Mr. Steeb, Chairman Luce has asked you several
questions about the possibility of larger turbines being
used. Are you sure that larger turbines are available in the
market today to use on the schedule the Applicant's proposing to proceed?

A. No. As of this stage as I mentioned before we have turbines in our pipeline and that has gone into all our discussions in talking about this project. If it successfully moves through the state to break ground either late this year or early next year that wouldn't change under that from a business standpoint.

Q. If the Council required you to use a larger turbine on the ones you proposed are there any other business complications that would present for the project?

A. I'd have to reflect on that because when we talked about visual only, there are other considerations. This whole process that we've gone through has specifically looked at these turbines, the size of the blades, the height, and that relates to sound issues, maintaining sound setbacks, a lot of other things. And so just focusing on that alone it's one thing to say a larger turbine or more megawatts, but there are other -- I just don't know what the other ramifications are until we look at a specific unit and that would take time to evaluate them and understand them.

Q. Would there be business costs associated with not being able to place the turbines that the company has ordered at this project?

A. As everybody's well aware we've been in this
process, we've all been in this process in various forms for a long period of time, and we've expended a lot of money to get to this point to where we are today to continue on for a longer period of time with turbines in the pipeline. All those things add up to additional costs to this company.

Q. Finally there's been some questions about the seven residences that are located closer than 2,500 feet to a turbine under the current project configuration. Have any of the residents of those residences testified at the public hearings, the EFSEC public hearings expressing concern about the impact on their views?

A. None of the seven residences that we've designated spoke at any of the public meetings.

MS. McGAFFEY: Nothing further, Your Honor.

MR. BYERS: I have another clarifying question.

JUDGE WALLIS: Mr. Byers.

MR. BYERS: On that last point have any of the seven residents submitted written comments to the public record?

MR. STEEB: To my knowledge of that I've seen so far one has provided written.

MR. ELLIOT: Have you been in active negotiations with all seven during this whole period?

MR. STEEB: Yes, I have.

MR. ELLIOT: Thank you.
JUDGE WALLIS: Is there anything further? Let the record show there is no response, and this hearing is concluded. I will thank you all.

* * * * *

(Whereupon, the post-hearing conference was adjourned at 12:22 p.m.)
# Index

<table>
<thead>
<tr>
<th>WITNESS</th>
<th>EXAMINATION</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>DAVID STEEB</td>
<td>Redirect by Ms. McGaffey</td>
<td>164</td>
</tr>
</tbody>
</table>

## Exhibits

<table>
<thead>
<tr>
<th>NO.</th>
<th>DESCRIPTION</th>
<th>ID</th>
<th>AD</th>
<th>REJ</th>
</tr>
</thead>
<tbody>
<tr>
<td>20</td>
<td>Fish and Wildlife Stipulation</td>
<td>137</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
In re: Desert Claim Wind Power Project

AFFIDAVIT

I, Shaun Linse, CCR, do hereby certify that the foregoing transcript prepared under my direction is a full and complete transcript of proceedings held on July 22, 2009, in Olympia, Washington.

______________________________
Shaun Linse, CCR 2029