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

10 In the Matter of Application No. 2009-01:
11 WHISTLING RIDGE ENERGY LLC;
12 WHISTLING RIDGE ENERGY PROJECT
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SKAMANIA COUNTY AND
Klickitat County Public
Economic Development
Authority's Land Use Brief

15 I. INTRODUCTION

16 Skamania County is the host County for the proposed Whistling Ridge Energy Project, a
17 38-turbine, 75 megawatt wind development proposal. Located outside the Columbia River
18 Gorge Scenic Area, the Project would be sited on 1,152 acres, with a permanent footprint of
19 54.25 acres.¹ The vast majority of the land would remain in forestry operation.² EFSEC has
20 requested briefing on the Project's consistency with County land use requirements, because the
21 Council, as part of its siting recommendation, must "make a determination as to whether the
22 proposed site is consistent and in compliance with land use plans and zoning ordinances pursuant
23 to RCW 80.50.090(2)."³ The Project is consistent, but even if it were not, the Council has
24 preemption authority.

25 ¹ ASC (Introduction, p. I-1; Part 2, Table 2.1-1, and p. 2-10.5).

26 ² ASC 2.3-7 and 2.3.9.

³ WAC 463-26-110; *see also* RCW 80.50.090.

1 The Skamania County zoning code permits the Whistling Ridge Energy Project outright,
2 with a small portion subject to conditional use permit approval. Because the Project is permitted
3 outright, comprehensive plan consistency is not required. Even if plan consistency were
4 required, EFSEC has likely never reviewed a project so central to achieving a county's local
5 planning vision.

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

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

17 II. ARGUMENT

18 A. Skamania County Zoning Permits the Project Outright

19 Most of the Project site is unzoned. As such, the vast majority of the Project is permitted
20 outright.⁷ **"In the areas classified as Unmapped (UNM) all uses which have not been**
21 **declared a nuisance by statute, resolution, or court of jurisdiction are allowable."**⁸ The
22 proposed use is not a nuisance, and is authorized. The Project does have to comply with the
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24 ⁴ See p. 6:10-15 of this brief.

25 ⁵ See e.g. Ex. 41.02 (Hovee Economic and Fiscal Benefits Memorandum).

26 ⁶ RCW 80.50.110; WAC 463-28-020.

⁷ Ex. 2.03 (Certificate of Land Use Consistency), pgs. 10-11.

⁸ *Id.*; Skamania County Code 21.64.020, emphasis added.

1 County's critical areas ordinance, building codes, and the State Environmental Policy Act, or
2 SEPA, but it is an allowed use.

3 For the 127 acres located in Resource Production Zone FOR/AG 20, a conditional use
4 permit is required.⁹ Skamania County authorizes conditional uses for a variety of uses in this
5 zone, including sawmills, shake and shingle mills, geothermal energy facilities, aircraft landing
6 fields, and semi-public facilities and utilities.¹⁰ The Project comes within the scope of this list of
7 uses. Public facilities and utilities are defined as those "[f]acilities which are owned, operated,
8 and maintained by public entities which provide a public service required by local governing
9 bodies and state laws."¹¹ While the Project is proposed by a private entity, much the way a
10 private railroad engages in a "semi-public" activity,¹² the electricity will be sold to public
11 utilities and transported on a publicly owned system, so is semi-public in nature. The Skamania
12 County Planning Department has found the use, for purposes of the zoning and comprehensive
13 plan, comes within this category. As the entity charged with implementing and interpreting
14 County land use requirements, its interpretation is entitled to deference,¹³ and under EFSEC
15 requirements, the deference is still higher. The certificate of consistency creates a rebuttable
16 presumption, or "prima facie proof of consistency."¹⁴

17 **B. Comprehensive Plan Consistency is not Required**

18 County zoning authorizes the Project. Under Washington law, it is the zoning which
19 governs the application. If a use is permitted outright, and does not require comprehensive plan
20 consistency for its approval, plan consistency is not required.
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23 ⁹ Ex. 2.03 (Certificate of Land Use Consistency), p. 11; see Skamania County Code, 21.56.030.

¹⁰ SCC 21.56.030.

¹¹ SCC 21.08.010(69).

¹² *Freeman v. City of Centralia*, 67 Wash. 142, 149, 20 P. 886 (1912).

¹³ *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 42 and 44, 202 P.3d 334 (2009).

¹⁴ WAC 463-26-090 ("[S]uch certificates will be regarded as *prima facie* proof of consistency and compliance with such land use plans and zoning ordinances absent contrary demonstration by anyone present at the hearing."), emphasis in text.

1 **A comprehensive plan, without regulatory implementation, does not impose**
2 **restrictions upon property and does not deprive or limit the landowner of the use of**
3 **property. The zoning ordinance is the primary regulatory device under the Act.**¹⁵

4 Because the Comprehensive Plan is not regulatory it is “**not error to issue ... [a permit] even**
5 **though the project appeared to be in conflict with a policy statement contained in the**
6 **plan.**”¹⁶ The Comprehensive Plan itself acknowledges “[i]t does not provide all the details”¹⁷ and
7 “is not a regulatory document.”¹⁸ It is simply a “guiding document.”¹⁹

8 **C. Although not Required, the Project is Consistent with the Comprehensive Plan**

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

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

22 ¹⁶ *Id.* at 480, emphasis added.

23 ¹⁷ Skamania County Comprehensive Plan, pg. 22. The Council has taken judicial notice of the Plan.

24 ¹⁸ Skamania County Comprehensive Plan, pg. 6.

25 ¹⁹ Skamania County Comprehensive Plan, pg. 6.

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

²¹ Skamania County Comprehensive Plan), pg. 25.

²² Skamania County Comprehensive Plan, pg. 26.

²³ The 1977 Comprehensive Plan is no long in effect, and applied to only a limited portion of the County.

1 subdivisions. Because the Project supports existing and contemplated uses, it is generally
2 consistent with the Comprehensive Plan.

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

4 15,000 acres within the County is unzoned and subject to a County-wide moratorium.²⁴
5 The moratorium is in place to ensure development does not occur which would be inconsistent
6 with the zoning controls being developed. The moratorium is not directed at the Project or at
7 EFSEC, and does not apply to the County's certificate of land use consistency, which assessed
8 the County's substantive land use requirements and policies. The moratorium applies only to
9 County "acceptance and processing of" building permits on lots created by deed since 2006,
10 plats, and SEPA Checklists related to forest conversions. The moratorium does not apply to the
11 development of environmental impact statements or permits not listed, including EFSEC review
12 and approval of a wind project.

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

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

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25 ²⁴ Although in existence since the 1800's, the County did not adopt its first zoning code until 1989 and 1991. This is
26 partly because the County is 85% National Forest, so there was less need to do so. See Comprehensive Plan, p. 9;
Ex. 29.03-01 and -02 (1977 Comprehensive Plan), pgs. 3-4; and Ex. 51.00R (Commissioner Pearce testimony), p. 6.

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2 Skamania County is strongly committed to protecting our rural character and natural
3 resource based industries while allowing for planned future development that is balanced
4 with the protection of critical resources and ecologically sensitive areas, while preserving
the community's high quality of life.²⁵

5 Unfortunately, this vision faces enormous challenges, far beyond that of most jurisdictions.
6 Commissioner Pearce, with 28 years service as a police officer in the neighboring county,²⁶
7 explained to the Council:

8 The unemployment and underemployment in the center of the county has a lot of impacts
9 on the county in terms of service levels. We even have a domestic violence shelter in our
10 county, and in November alone we had 77 bed nights in that shelter. So we have a very
severe economic problem, especially in the center of our county.²⁷

11 Q. With regard to the center of the county, and I'm assuming you're referring to the
12 Carson area, can you elaborate a bit on kind of the economic situation within that part of
the county such as the number of children on reduced or subsidized school lunches?²⁸

13 A. Those four school districts are wholly within the county which is Mount Pleasant,
14 Skamania County, Stevenson, Carson, and Mill A average between in the elementary
15 schools between 55 and 65 percent free and reduced lunch which is the number that the
U.S. Department of Education uses to determine poverty level.²⁹

16 77 bed-nights in the County domestic violence shelter in November alone. Over half the
17 children within the four school districts are on free or reduced lunch. This is coupled with the
18 County's extremely limited tax base and dependence on federal life support to avoid shuttering
19 its schools.³⁰

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24 ²⁵ Skamania County Comprehensive Plan, pg. 13.

25 ²⁶ TR (January 11, 2011 hearing), p. 1328:5-6.

26 ²⁷ TR (January 11, 2011 hearing), p. 1357:16-21.

²⁸ TR (January 11, 2011 hearing), p. 1357:23-25 and pg. 1358:1-2.

²⁹ TR (January 11, 2011 hearing), p. 1358:1-8.

³⁰ Ex. 51.00R (Commissioner Pearce's testimony), p.7, see specifically lines 13-15.

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2 Given these conditions, the County did make an initial effort to plan specifically for
3 energy development throughout the County, including wind development.³¹ But, because the
4 zoning was so wide-ranging, and was not accompanied by an environmental impact statement,
5 the County Hearing Examiner remanded for additional review.³² Given the County's limited
6 resources, the County did not believe it could proceed. As Commissioner Pearce explained:

7 [W]e considered it at length and due to the breadth of the Hearing Examiner decision
8 decided that it was nearly impossible for a county of our size with our budget to
9 undertake that review.³³

10 It is not possible to grow a community without gainful employment, and a solid tax base.
11 The County's Comprehensive Plan may not have sophisticated explanatory data. But, the Plan
12 does have a stated vision, and Whistling Ridge is central to its achievement.³⁴

13 III. CONCLUSION

14 It is not an accident that Skamania County referred the applicant to EFSEC. It is not an
15 accident that land use counsel was not retained until the last possible moment, in December,
16 2010, just weeks before this case went to hearing.³⁵ Skamania County has limited resources, and
17 thus limited means for achieving its planning objectives. These limited resources emphasize –
18 far more than a detailed socio-economic plan element could - just how critical Whistling Ridge is
19 to realizing the County Comprehensive Plan's central vision.

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

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24 ³¹ Ex. 29.02 (County Hearing Examiner decision), pgs. 5-6.

³² *Id.*

³³ TR (January 11, 2011 hearing), p. 1342:17-20.

³⁴ Ex. 41.02 (Hovee Economic and Fiscal Benefits Memorandum).

³⁵ Skamania County's Motion for Recognition as Party of Right (December 16, 2010); Notice of Appearance (December 16, 2010).

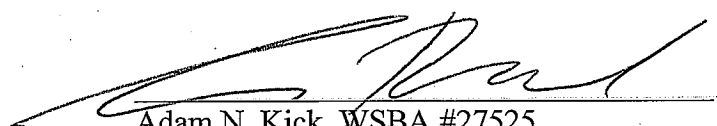
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Skamania County, and the Klickitat County Public Economic Development Authority,
jointly request Project approval.

DATED this 11th day of February, 2011.

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