

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12

BEFORE THE STATE OF WASHINGTON  
ENERGY FACILITY SITE EVALUATION COUNCIL

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

SKAMANIA COUNTY AND  
Klickitat County Public  
Economic Development  
Authority's Land Use Response  
Brief

13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**I. INTRODUCTION**

Skamania County and Klickitat County Public Economic Development Authority file this Land Use Response Brief to address Friends of the Columbia Gorge, Inc.'s (Friends) and Save Our Scenic Areas' (SOSA) land use briefing. This brief makes five points.

First, the County issued a Certificate of Land Use Consistency. The County resolution adopting it states it is a "Certification of Land Use Consistency."

Second, the County zoning and Comprehensive Plan must be presumed valid.

Third, the Project is generally consistent with the Comprehensive Plan, although consistency is not required, given the County zoning code allows the Project as a permitted use, with a small portion permitted conditionally.

Fourth, a DNR permit is not required because the Project application is not to conduct forest practices, but to operate a wind farm.

Fifth, the County moratorium does not apply to the Project, as the moratorium does not apply to either EFSEC or wind projects.



1 The County Commissioners unanimously adopted the Certification of Land Use Consistency; the  
2 County Prosecutor approved it as to form; and the Board Clerk attested to the signatures. There  
3 can be no doubt the County issued a Certification of Land Use Consistency.<sup>6</sup>

4 Resolution 2009-54 refers to the Staff Report it adopts as the Community Development  
5 Director's "Certificate of Land Use Consistency." An e-mail from County staff to Friends' legal  
6 counsel explains the attachment to Resolution 2009-54 is properly referred to as "the Staff  
7 Report," as "there is not an additional document called the Certificate of Land Use  
8 Consistency."<sup>7</sup> This is because the County provided EFSEC with a single Skamania County  
9 Certificate of Land Use Consistency, Resolution 2009-54, which adopts the Staff Report (titled  
10 "Staff Report for Land use Consistency Review.")<sup>8</sup> It is not clear how Friends could interpret  
11 the e-mail exchange as meaning the County never issued a consistency certification, particularly  
12 when both the County Commissioners and the Community Development Director found the  
13 Project consistent with County land use plans and regulations.

14 **B. The County Zoning and Comprehensive Plan Comply with State Law**

15 The County's zoning and Comprehensive Plan were not timely appealed so must be  
16 presumed valid.<sup>9</sup> The County did consider adopting zoning to authorize a wide-range of energy  
17 development throughout much of the County. However, the County Hearing Examiner  
18 remanded for further environmental review,<sup>10</sup> which the County lacked the resources to  
19 complete.<sup>11</sup> Consequently, the County did not amend the existing zoning and Plan. These

21 <sup>6</sup> The Resolution states it is to be interpreted as a staff report to EFSEC rather than a decision, to make clear the  
22 Resolution is not an appealable decision. (Friends and SOSA had appealed the earlier Certificate of Land Use  
23 Consistency to the Gorge Commission. The Gorge Commission dismissed for lack of jurisdiction.)

24 <sup>7</sup> Ex. 1.14C. Friends of The Columbia Gorge's Opening Brief on Land Use Consistency at p. 3, misinterprets the e-  
25 mail exchange.

26 <sup>8</sup> Ex. 2.03 (Resolution 2009-54), p. 1 of attached Staff Report.

<sup>9</sup> *Cathcart-Maltby-Clearview Cmty. Council v. Snohomish Cmty.*, 96 Wn.2d 201, 211, 634 P.2d 853 (1981)  
("Comprehensive land use plans and promulgatory zoning regulations are presumed valid and are invalid only for  
manifest abuse of discretion."); *see also* RCW 36.70A.320 and .3201 (applying presumption of validity to GMA  
plans and regulations).

<sup>10</sup> Ex. 29.02 (County Hearing Examiner Decision, No. SEP-08-35).

<sup>11</sup> TR (January 11, 2011 hearing), p. 1342:17-20.

1 regulations include the County's critical areas regulations, which are, like the County's zoning  
2 and plan, presumed compliant with state law.<sup>12</sup>

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

4 County zoning allows the Project, so Comprehensive Plan consistency is not required.<sup>13</sup>  
5 Nevertheless, the Project is generally consistent with the Plan, and is in fact central to achieving  
6 the Plan's guiding vision.<sup>14</sup> The Plan need not specifically provide for wind development, and  
7 the Project is consistent with the Plan's environmental protection policies.

8 *1. Comprehensive Plan Need Not Specifically List Wind Development*

9 The Comprehensive Plan provides a "guide" for developing implementing zoning.<sup>15</sup> The  
10 Plan contemplates that uses specifically listed in the County Plan should not preclude siting of a  
11 range of similar uses. This is because the Plan is not designed to preclude "technical  
12 innovations, new ideas and changing attitudes."<sup>16</sup> Thus, when detailed zoning is developed, it  
13 may provide for uses similar to those the Plan identifies, including wind development.

14 Due to its constrained resources, the County has not yet adopted this more detailed  
15 zoning at the Project site.<sup>17</sup> Instead, the Project is permitted outright.<sup>18</sup> To allow the Plan's  
16 contemplated more detailed zoning to be developed, the County adopted a moratorium to slow  
17 development activity (certain types of building permits, platting activity, and SEPA Checklists  
18 on forest conversions).<sup>19</sup> Thus, while the Plan contemplates that ultimately, more detailed  
19 zoning will be adopted, the Plan need not specifically list wind development for the Project to be  
20

21  
22  
23 <sup>12</sup> See footnote 9.

<sup>13</sup> Skamania County and Klickitat County Public Economic Development's Land Use Brief, §§ II(A) and (B).

<sup>14</sup> *Id.* at §§ II(C) and (E).

<sup>15</sup> *Id.* at footnotes 17-19, referencing Skamania County Comprehensive Plan, pgs. 6 and 22.

<sup>16</sup> Skamania County Comprehensive Plan, p. 26, Policy LU.1.2.

<sup>17</sup> TR (January 11, 2011 hearing), p. 1342:17-20.

<sup>18</sup> Skamania County and Klickitat County Public Economic Development's Land Use Brief, § II(A).

<sup>19</sup> Ex. 23-02 (County Ordinance 2010-06).

1 consistent with the Plan. As previously addressed, the Project is consistent with the range of  
2 uses the Plan contemplates.<sup>20</sup> That is sufficient.

3 *2. The Project Is Consistent with the Plan's Environmental Protection Goals*

4 Friends and SOSA downplay as insignificant the fact that the Project has been pulled  
5 entirely from the Scenic Area,<sup>21</sup> and is the only wind project within the County, 35.5 miles from  
6 any other project.<sup>22</sup> Further, neither Friends nor SOSA discuss climate change. Yet, climate  
7 disruption is very likely this century's most challenging environmental issue. It raises the  
8 specter the environment we have adapted so well to may be turned upside down. In response,  
9 the energy the Project produces will be clean and home-grown.<sup>23</sup> The Project, when assessed  
10 against the backdrop of rising sea levels, contorting weather patterns, and a future at odds with  
11 all we know, is environmentally sensitive.<sup>24</sup> Even if the Project had not been pulled from the  
12 Scenic Area, it is consistent with Plan policies on environmental protection.

13 **D. DNR Forest Practices Permitting is Inapplicable**

14 The Forest Practices Act is irrelevant to briefing on whether the Project is consistent with  
15 County land use. But, even if relevant, the Project is for wind development, not logging, so  
16 DNR permitting is inapplicable.<sup>25</sup> And, in any event, EFSEC preempts DNR permitting.<sup>26</sup>

17 **E. The Moratorium Does Not Apply to the Project**

18 The County moratorium does not apply to the Project, but to:

- 19
- 20 • Building/mechanical/plumbing permits on 20+ acre parcels created since 2006;
  - 21 • Platting activity; and
  - 22 • SEPA Checklists related to forest practice conversions.<sup>27</sup>

23 <sup>20</sup> Skamania County and Klickitat County Public Economic Development Authority's Land Use Brief, §§ C and E.

24 <sup>21</sup> Ex. 2.03 (County Resolution 2009-54, Certification of Land Use Consistency), p. 1.

25 <sup>22</sup> Ex. 51.00R (Commissioner Pearce's testimony), p. 6:3-4.

26 <sup>23</sup> ASC, §§ 3.2.1 and 3.2.3 (addressing air emissions); Ex. 51.00R (Commissioner Pearce's testimony), p. 12.

<sup>24</sup> See Ex. 18.00R (Testimony of Cameron Yourkowski); Ex. 16.00R (Testimony of Randall Hardy).

<sup>25</sup> RCW 76.09.050 (permit requirements for "forest practices"); RCW 76.09.020(16) (defining "forest practices").

<sup>26</sup> RCW 80.50.110; also see the applicant's brief addressing this issue.

1 The moratorium does not apply to wind development. It does not apply to EFSEC permitting or  
2 EFSEC SEPA review. The moratorium does not even apply to DNR, except to the extent the  
3 County is lead agency and is using a SEPA Checklist to review a forestry conversion. So, even  
4 if the Project required a DNR permit, the County is not the lead SEPA agency, and an EIS – not  
5 a SEPA Checklist - is being used to review Project impacts.<sup>28</sup> Thus, the moratorium on County  
6 review of SEPA Checklists for forest conversions does not apply.

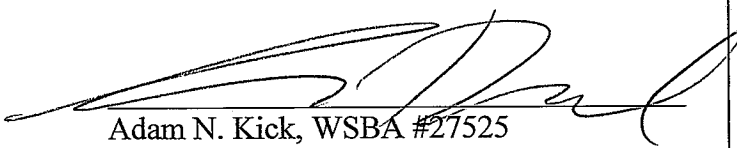
7  
8 **III. CONCLUSION**

9 County zoning allows Whistling Ridge as a permitted use (and conditionally, for a small  
10 portion), and the County has issued a Certificate of Land Use Consistency. The moratorium is  
11 inapplicable, as is DNR permitting, which does not apply to wind development. Under  
12 Washington law, this is sufficient to approve the Project as proposed. Should EFSEC have any  
13 doubt, EFSEC may preempt DNR and the County.

14 DATED this 25<sup>th</sup> day of February, 2011.

15 ADAM NATHANIEL KICK  
16 Prosecuting Attorney for Skamania County

17 LAW OFFICES OF  
18 SUSAN ELIZABETH DRUMMOND, PLLC

19   
20 Adam N. Kick, WSBA #27525  
21 Susan Drummond, WSBA #30689

22  
23  
24  
25 <sup>27</sup> Ex. 23.02 (Ordinance 2010-06), p. 3. The forest practice conversion moratorium applies to unzoned areas and the  
Swift Subarea.

26 <sup>28</sup> WAC 197-11-315(1) (SEPA Checklist not required when applicant agrees to prepare EIS); RCW 80.50.180  
(EFSEC conducts SEPA review).