NO. 88089-1

SUPREME COURT OF THE STATE OF WASHINGTON

FRIENDS OF THE COLUMBIA GORGE, INC., and
SAVE OUR SCENIC AREA,

Petitioners,

v.

STATE ENERGY FACILITY SITE EVALUATION COUNCIL and
CHRISTINE O. GREGOIRE, Governor of the State of Washington,

Respondents,

and

WHISTLING RIDGE ENERGY LLC, SKAMANIA COUNTY, and
KLICKITAT COUNTY PUBLIC ECONOMIC DEVELOPMENT
AUTHORITY,

Intervenors-Respondents.

REPLY BRIEF OF PETITIONERS

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GLOSSARY OF NAMES

Name	Position
Greg Johnson	Expert witness called by Applicant on wildlife issues
James Luce	Chair, EFSEC
Don McIvor	Expert witness called by CFE on wildlife issues
Dr. K. Shawn Smallwood	Expert witness called by Petitioners on wildlife issues
Jason Spadaro	President, Whistling Ridge Energy LLC President, S.D.S. Co., LLC President, SDS Lumber Company Manager, Broughton Lumber Company
Al Wright	Manager, EFSEC

GLOSSARY OF ACRONYMS

APA	Administrative Procedure Act
AR	Administrative Record
DNR	Washington Department of Natural Resources
EAJA	Equal Access to Justice Act
EFSEC	Energy Facility Site Evaluation Council
EFSLA	Energy Facilities Site Locations Act
FAA	Federal Aviation Administration
FEIS	Final Environmental Impact Statement
FFCL	Findings of Fact and Conclusions of Law
PEA	Planning Enabling Act
RP	Verbatim Report of Proceedings for October 26, 2012
SCA	Site Certification Agreement

SCC	Skamania County Code
SEPA	State Environmental Policy Act
SOSA	Petitioner Save Our Scenic Area
WDFW	Washington Department of Fish and Wildlife
WRE	Whistling Ridge Energy LLC
WREP	Whistling Ridge Energy Project

I. INTRODUCTION

Respondents[1] filed a collective 150 pages of briefing containing numerous overlapping, and at times contradictory, arguments.[2] The Applicant challenges the very foundation of EFSEC's authority, alleging that core statutory and regulatory requirements have no substantive effect. State Respondents raise various procedural obstacles in an attempt to prevent this Court from reaching the merits of Petitioners' claims, despite advising the Superior Court that the case involves numerous important issues that should be addressed by the Supreme Court.

Recognizing the lack of adequate findings and conclusions in EFSEC's Orders, Respondents rely for the first time on documents that were expressly *excluded* from the adjudication below. Respondents also invite this Court to review and resolve numerous factual issues for the first time on appeal. The Court should reject Respondents' invitations to assume the role of fact finder, and instead should remand and direct EFSEC to make the required findings.[3]

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[1] In this Brief, EFSEC and the Governor will be referred to collectively as "State Respondents" and their brief as "State Br." Whistling Ridge Energy LLC will be referred to as "Applicant" or "WRE" and its brief as "WRE Br." Skamania County and Klickitat County Public Economic Development Authority will be referred to as "Counties" and their brief as "Counties Br." All of these parties will be referred to collectively as "Respondents." Petitioners' Opening Brief will be referred to as "Pet'rs Br."

[2] Respondents failed to incorporate any arguments from each other's briefing. *See* RAP 10.1(g) (allowing parties to "adopt by reference any part of the brief of another."). The net result is an unnecessarily complicated presentation of arguments.

[3] *See* RCW 34.05.461(3) (adjudicative "orders shall include a statement of

State Respondents also offer several *post-hoc* rationalizations interpreting applicable statutes and rules that were not EFSEC's actual conclusions. The Court should reject these *post-hoc* arguments, made solely by counsel on appeal.[4]

As requested in Petitioners' Opening Brief, the Court should void and set aside Respondents' decisions to approve the Project, reverse EFSEC's Orders, and remand for further review. Further, the Court should award Petitioners the attorneys' fees and expenses allowed by law.

II. REPLY TO STATEMENTS OF THE CASE

The Applicant argues that it "stipulated that no more than 38 turbines would be constructed" as part of the Project. WRE Br. at 5. This is incorrect, because the Applicant never proposed a 38-turbine project in

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findings and conclusions, and the reasons and basis therefor, on all the material issues of fact, law, or discretion presented on the record."); *Blair v. TA–Seattle E. No. 176*, 171 Wn. 2d 342, 351, 254 P.3d 797 (2011) (Appellate courts should not "consider the facts in the first instance as a substitute for [required] trial court findings."); *State v. Osman*, 168 Wn. 2d 632, 645, 229 P.3d 729 (2010) ("This post hoc rationalization of what the trial court might have found is an impermissible reconstruction of the record."); *State v. Wise*, 176 Wn. 2d 1, 12–13, 288 P.3d 1113 (2012) ("We do not comb through the record or attempt to infer the trial court's balancing of competing interests where it is not apparent in the record."); *Low Income Hous. Inst. v. City of Lakewood*, 119 Wn. App. 110, 118–19, 77 P.3d 653 (2003) (When an agency "presents no basis for its decision," a court "cannot review its analysis" and remands "for more thorough findings and articulation of the basis for the ruling.").

[4] *See* RCW 34.05.461(3); *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 50, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983) ("[C]ourts may not accept appellate counsel's *post hoc* rationalizations for agency action. It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.") (citation omitted); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212–13, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988); *Somer v. Woodhouse*, 28 Wn. App. 262, 272, 623 P.2d 1164 (1981) ("[A]gency action cannot be sustained on post hoc rationalizations supplied during judicial review.").

compliance with EFSEC's mandatory procedures.[5] Instead, the proposal reviewed below was the 50-turbine proposal in the Application.[6]

The Applicant, citing a letter written by its company president, Jason Spadaro, asserts that it "conducted more . . . wildlife surveys than any other previously proposed project." WRE Br. at 4 (citing AR 15791). Mr. Spadaro's self-serving and unsupported statement is patently incorrect. The Applicant did not even comply with the bare minimum requirements of the WDFW Wind Power Guidelines and EFSEC's rules (*see infra* Part III.B)—let alone conduct more surveys than other projects.[7]

The Counties make several statements about the economics of Skamania County. Counties Br. at 1–6, 15, 27. The Supreme Court should disregard these statements, which the Counties do not even attempt to tie to any applicable statute or rule, and which have no bearing on the issues presented in this appeal and no relevance to the applicable law.[8]

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[5] The Applicant never amended the Application to present a 38-turbine alternative proposal (as would have been required by WAC 463-60-116(1), (2), (3), 463-60-085, 463-60-296, and 463-66-050), never disclosed even the most basic details of such an alternative (including the locations, dimensions, and energy capacity of the individual turbines), and never had its expert witnesses review or consider a 38-turbine project (AR 22215–19). Instead, the Applicant argued below that EFSEC and interested parties should try to "imagine" a 38-turbine project and its impacts. AR 17328.

[6] In addition, Respondents make assertions about the amount of land that would be affected by the Project. State Br. at 3; WRE Br. at 3. The numbers provided by Respondents, however, conflict with the numbers in EFSEC's decisions and elsewhere in the record, as will be discussed *infra* Part III.B.5.

[7] *See also* AR 23220–21 (refuting Applicant's claim).

[8] *See* CP 80 & n.3 (EFSEC finding that the Counties' economics arguments were "marginally or not at all relevant to the issues that must be determined").

Finally, State Respondents argue incorrectly that Petitioners "conceded" that they do not seek a reversal of the decisions. State Br. at 9. To clarify, Petitioners seek both *reversal and remand* of the decisions listed at pages 3 and 4 of the Opening Brief. However, Petitioners do not challenge State Respondents' authority to regulate and approve wind energy projects, in contrast to the arguments made in the "*ROKT*" case. *See Residents Opposed to Kittitas Turbines v. State EFSEC*, 165 Wn. 2d 275, 305–11, 197 P.3d 1153 (2008).

III. ARGUMENT IN REPLY

A. The Court should reject Respondents' arguments about the scope of review for the appeal.

1. All issues raised in Petitioners' Opening Brief are properly before this Court.

The Court should reject Respondents' suggestions that several issues raised in Petitioners' Opening Brief are not properly before the Court.[9] Petitioners exhausted the available administrative remedies and have properly raised all issues on appeal.

First, the Court should reject State Respondents' repeated arguments that Petitioners "failed to . . . exhaust their administrative remedies under RCW 34.05.534." State Respondents fail to explain what administrative remedies were available that Petitioners allegedly failed to

[9] *See* State Br. at 19 n.13, 23 n.17, 24 n.18, 29 n.20, 30 n.20, 35 n.26, 41 n.40, 43 n.44, 66 n.65; WRE Br. at 8 n.2, 9 n.3.

exhaust. Petitioners participated fully in all of State Respondents' proceedings. CP 8.[10] State Respondents' exhaustion arguments are meritless and should be rejected.

Second, the Court should reject Respondents' repeated arguments that Petitioners' issues were not sufficiently raised in the Petition for Judicial Review and therefore should be disregarded. Respondents are incorrect. Every issue discussed in the Opening Brief was also raised in the Petition for Judicial Review. In some cases, Petitioners raised an issue generally in the Petition, but without citing a particular applicable WAC section.[11] The absence of a citation to a specific rule provision, however, is of no moment; RCW 34.05.546 does not require that Petitioners list in the Petition every single WAC section that was violated.[12]

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[10] Each time that State Respondents assert Petitioners failed to exhaust remedies, they follow that assertion with a list of citations to the pleadings Petitioners filed below, which demonstrate that Petitioners *did* exhaust available remedies. Each Petitioner even filed a Petition for Reconsideration, AR 28808, 28768, which was optional under RCW 34.05.470 and WAC 463-30-335.

[11] For example, Petitioners stated in the Petition for Review that EFSEC failed to resolve several issues, but without citing WAC 463-30-320(6) (the rule requiring EFSEC to "dispos[e] of all contested issues").

[12] *See also Adams v. King County*, 164 Wn. 2d 640, 657, 192 P.3d 891 (2008) ("We liberally construe pleading requirements in order 'to facilitate proper decision on the merits, not to erect formal and burdensome impediments to the litigation process.'") (quoting *State v. Adams*, 107 Wn. 2d 611, 620, 732 P.2d 149 (1987)); *Dumas v. Gagner*, 137 Wn. 2d 268, 283, 971 P.2d 17 (1999) ("Although Respondent's petition did not cite specific subsections of the statute, sufficient facts and law were stated concerning the nature of the claim to bring the petition under the statute."); *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 557, 958 P.2d 962 (1998) ("We decline to hold that strict compliance with RCW 34.05.546 is a jurisdictional requirement.").

Third, the Court should reject State Respondents' arguments that multiple arguments in the Brief violate RAP 10.3(a)(4)[13] or (a)(6).[14] The Assignments of Error and issues pertaining thereto were sufficiently raised. Further, every issue raised in the argument section of the Brief cites the applicable law that was violated and explains how it was violated. The Court should address and resolve the merits of Petitioners' arguments. *See also* RAP 1.2(a) ("These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands . . . ."); *Green River Cmty. Coll. Dist. No. 10 v. Higher Educ. Pers. Bd.*, 107 Wn. 2d 427, 431, 730 P.2d 653 (1986).[15]

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[13] State Respondents do not explain why they believe RAP 10.3(a)(4) was violated, other than vague statements that Petitioners did not "properly assign error."

[14] State Respondents also cite RAP 10.3(a)(5), which was ostensibly intended to be a citation to RAP 10.3(a)(6). *See* State Br. at 39 n.35.

[15] The Court should also reject the Applicant's contention that the argument sections of Petitioners' Brief "do not even cite a great number of the" findings of facts and conclusions of law ("FFCLs") for which error was assigned, and therefore "the Court should not consider" Assignment of Error No. 6. WRE Br. at 8 n.2. That Assignment of Error states that Petitioners assign error to the identified FFCLs as "related to the prior Assignments of Error." Pet'rs Br. at 7. In other words, where Assignment of Error No. 6 lists an FFCL that corresponds with an issue raised in another Assignment of Error, Petitioners assigned error to that FFCL. Moreover, the arguments in the Brief *do* cite the challenged findings and conclusions—usually by page number in the Clerk's Papers rather than by FFCL number. Under RAP 10.3(g), findings must be referenced "by number" *only* in the Assignments of Error, not in the argument section of the Brief. Petitioners' Brief complies with this rule.

In fact, many of the challenged FFCLs are not specifically numbered in State Respondents' decisions. In an abundance of caution to comply with RAP 10.3(g), Petitioners identified in Assignment of Error No. 6 many FFCLs by the heading number in their respective decisions. *See* Pet'rs Br. at 7.

2. RCW 80.50.010 and WAC 463-14-020 contain substantive requirements.

The Court should reject the Applicant's argument that RCW 80.50.010 "sets out legislative policy, not substantive requirements" and that WAC 463-14-020 is merely an "interpretative rule" that does "not have the force and effect of law." WRE Br. at 10–13. EFSEC repeatedly and unequivocally determined during the proceedings below that the substantive requirements of RCW 80.50.010, as well as the corresponding provisions at WAC 463-14-020 and other EFSEC rules, apply throughout the review of all proposed energy facilities.[16] The Applicant failed to appeal and assign error to these determinations.[17] The subsections of RCW 80.50.010 are substantive requirements, not statements of policy.[18]

WAC 463-14-020 expressly states that EFSEC's decisions on applications "*will be based on* the policies and premises set forth in RCW 80.50.010" (emphasis added). WAC 463-14-020 does not, as the Applicant argues, interpret RCW 80.50.010, but rather expressly incorporates RCW 80.50.010 and makes its standards binding on all energy siting decisions.

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[16] CP 86, 95, 97–98, 99 & n.11, 102 & n.20, 110, 127, 130 & n.28, 149, 152, 157, 162 n.ix.

[17] In addition, this Court has held that one of the standards in RCW 80.50.010, located at subsection (5), "specifically instructs EFSEC to avoid costly duplication in the siting process." *ROKT*, 165 Wn. 2d at 316. Thus, RCW 80.50.010 provides standards.

[18] The Applicant argues that because the beginning portion of RCW 80.50.010 contains the phrase "[t]he legislature finds," this statutory section contains no enforceable rights or duties. WRE Br. at 11. But only the first paragraph of RCW 80.50.010 contains the phrase "[t]he legislature finds." The remaining paragraphs do *not* contain this phrase, and thus are not constrained by any case law construing this phrase.

3. All applications for energy facilities must demonstrate, during the adjudication, compliance with the requirements and standards of chapters 463-60 and 463-62 WAC.

As explained in the Opening Brief, State Respondents failed to make findings and ensure consistency with a number of EFSEC's rules at WAC 463-60-332 and 463-62-040. *See* Pet'rs Br. at 14–40. Respondents now argue that an application for an energy facility need not demonstrate, during the required adjudication, compliance with any of the rules in chapters 463-60 and 463-62 WAC.[19] The Court should reject Respondents' arguments, which are inconsistent with EFSEC's enabling legislation and rules, and cannot be squared with the record. The requirements and standards of chapters 463-60 and 463-62 WAC not only dictate the contents of applications, they form the basis for EFSEC's adjudications.

Under EFSLA, the application is the subject of the adjudication. Energy facilities are reviewed through a formal agency adjudication, *see* RCW 80.50.090(3), the purpose of which is to take "evidence o*n the application*," WAC 463-14-080(4) (emphasis added). All applicants "must identify *in the application* all information known to the applicant which has a bearing on site certification." WAC 463-60-065 (emphasis added).[20] During EFSEC's adjudicative process, "any person shall be entitled to be

[19] *See, e.g.*, State Br. at 12–13, 18–39; WRE Br. at 13–14, 24–25, 30.

[20] *See also* WAC 463-60-116(1) ("Applications . . . shall be complete and shall reflect the best available current information and intentions of the applicant.").

heard in support of or in opposition to *the application*." RCW 80.50.090(3) (emphasis added). The adjudicative process culminates in a decision by EFSEC to recommend "approval or rejection of [the] *application*." RCW 80.50.100(1)(a) (emphasis added).[21]

Chapters 463-60 and 463-62 WAC, in turn, prescribe a number of items that every application must address. Compliance with these rules is not voluntary; rather, the rules are deemed "application *requirements*." WAC 463-60-115 (emphasis added). All applicants "*must* address *all sections* of [chapter 463-60] and must substantially comply with each section, show it does not apply[,] or secure a waiver from [EFSEC]." WAC 463-60-115 (emphasis added). Further, all "[a]pplications . . . *must* contain information regarding the *standards required* by chapter 463-62 WAC." WAC 463-60-010 (emphasis added).[22]

a. Chapter 463-60 WAC

Virtually every rule in chapter 463-60 WAC sets forth items that an application "shall contain" or "shall include."[23] Respondents now argue, however, that failure to include this information is excusable, and that the entirety of chapter 463-60 WAC is essentially irrelevant to EFSEC's

[21] *See also* RCW 80.50.040(8) (requiring EFSEC to include in its written report to the Governor "[a] statement indicating whether *the application* is in compliance with [EFSEC's] guidelines" and a "recommendation as to the disposition of *the application*.") (emphasis added).

[22] Even when expedited processing is sought, the "application[] . . . must address all sections of chapters 463-60 and 463-62 WAC." WAC 463-60-117(2).

[23] *See, e.g.*, WAC 463-60-332(2), (3).

adjudicative process.[24] Respondents ignore the plain language of WAC 463-14-080(1), which states that EFSEC "shall . . . [e]valuate an application to determine compliance with . . . chapter 463-60 WAC."[25] Respondents also ignore the very purpose of the adjudication: to determine whether an application should be approved or rejected. *See* WAC 463-14-080(4). Further, they ignore that Respondents treated the requirements of chapter 463-60 WAC as adjudicative standards during the proceedings below.[26] The Court should reject Respondents' change of course and newly minted arguments that these requirements are irrelevant.[27]

b. Chapter 463-62 WAC

Chapter 463-62 WAC contains a number of performance standards involving seismicity, noise, fish and wildlife, wetlands, water quality, and

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[24] *See, e.g.*, State Br. at 12–13, 20–25, 29–35; WRE Br. at 13–14.

[25] WAC 463-14-080 sets forth the "deliberative *process*" that EFSEC "*shall* use" in reviewing applications (emphasis added). This rule is not named the "deliberations rule," as State Respondents have characterized it in their brief. *See* State Br. at 29 n.20, 35 n.26; *see also id.* at 13. Further, the Court should reject State Respondents' arguments that the deliberative process rule is not enforceable. *See* State Br. at 29 n.20, 35 n.26. State agencies must follow prescribed procedures. RCW 34.05.570(3)(c).

[26] For example, the Applicant argued that its wildlife surveys complied with the WDFW Guidelines "as required by WAC 463-60-332(4)." AR 22373. In turn, EFSEC's Adjudicative Order contains findings of fact on this issue. CP 136–137, 150.

[27] The Court also should reject the Applicant's odd argument that compliance with chapter 463-60 WAC would somehow "vitiate" the public process. WRE Br. at 14. On the contrary, the *purposes* of agency and public review are to put the required information before the agency and the public, and then to assess the adequacy of the application. *See* RCW 80.50.090; WAC 463-26-025. If the public process reveals deficiencies in the application, EFSEC's rules provide procedures for correcting and updating the application. *See* WAC 463-60-116. Full disclosure in the application—as required by EFSEC's rules—helps, rather than hinders, the process. In fact, the Applicant here amended the Application early in the proceedings, in part to respond to concerns raised at the land use hearing. *See* AR 4262.

air quality. *See* WAC 463-62-020 to -070.[28] The chapter further provides that "[c]ompliance with the standards within [chapter 463-62] shall satisfy, in their respective subject areas, the requirements *for issuance of* a site certificate for construction and operation of energy facilities." WAC 463-62-010(3) (emphasis added).

Respondents now argue that the standards at WAC 463-62-040 apply only *after* a project is approved and a site certificate is issued.[29] Respondents' arguments violate the plain language of the rules, which impose standards for the "issuance of" a certificate, WAC 463-62-010(3), thus placing the burden on applicants to demonstrate compliance *prior to a decision on whether to issue* a site certificate. An applicant must demonstrate compliance within the application itself.[30] Further, the assertions of compliance in the application must be vetted during the adjudication. *See* WAC 463-14-080(4).

Respondents' arguments not only violate the law, they also cannot be squared with the record. For example, while State Respondents now argue that the requirement to perform surveys during all seasons of the

[28] The wildlife standards provide, in pertinent part, that "[a]n applicant must demonstrate no net loss of fish and wildlife habitat function and value" and that "[f]ish and wildlife surveys shall be conducted during all seasons of the year to determine breeding, summer, winter, migratory usage, and habitat condition of the site." WAC 463-62-040(2)(a), (f).

[29] *See, e.g.*, State Br. at 18–20, 39–40; WRE Br. at 24–25, 27–30.

[30] WAC 463-60-010 ("Applications for siting energy facilities must contain information regarding the standards required by chapter 463-62 WAC.").

year applies during the operational life of the facility, State Br. at 18–20, the SCA contains no such requirement.[31] Thus, its new litigation position notwithstanding, EFSEC does not interpret WAC 463-62-040(2)(f) to require compliance *after* a facility is built.

Similarly, EFSEC treated chapter 463-62 WAC as providing adjudicative standards when it made findings of fact on the standards for noise mandated by WAC 463-62-030.[32] If the noise standards in chapter WAC 463-62 provide adjudicative standards, so too must the wildlife standards in the same chapter. The Court should reject Respondents' self-contradictory interpretation of chapter 463-62 WAC. [33]

4. The Final Environmental Impact Statement, issued jointly by EFSEC Staff and the Bonneville Power Administration independent of the adjudication, cannot be used *post hoc* to satisfy EFSEC's obligations to make adjudicative findings under the APA and EFSLA.

In an attempt to deflect this Court's attention from EFSEC's failures to make adequate findings and resolve contested issues as part of

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[31] The SCA requires the Applicant to implement an avian casualty/fatality reporting system, perform raptor nest surveys, and perform "casualty searches, searcher efficacy trials and scavenger removal trials." CP 64. The SCA does not, however, require the Applicant to perform the surveys required by WAC 463-62-040(2)(f).

[32] *See, e.g.*, CP 107, 140 & n.36, 150. In addition, the Applicant argued extensively below that the Application satisfied the performance standards in chapter 463-62 WAC. *See* AR 22373–85. Indeed, the Applicant argued that the standards in chapter 463-62 are "most relevant to EFSEC's adjudicative proceeding." AR 22372.

[33] Respondents rely entirely on WAC 463-62-010 to argue that chapter 463-62 WAC is irrelevant to the adjudicative process. *See* State Br. at 19–20; WRE Br. at 25. But that provision applies equally to the noise and wildlife standards. The Court should reject Respondents' promotion of two different interpretations of the same regulatory text. *See Clark v. Martinez*, 543 U.S. 371, 380, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005) (a single statutory provision may not be interpreted to apply in two different ways).

the adjudication, State Respondents now point to the contents of the Final Environmental Impact Statement ("FEIS") as somehow curing these errors.[34] State Respondents cannot rely on the FEIS for the first time on appeal as satisfying Respondents' adjudicative responsibilities. As will be explained below, the FEIS was issued after the adjudicative record closed and was not adopted into the record. In fact, EFSEC *explicitly* foreclosed consideration of the FEIS in the adjudicative process.

The purpose of EFSEC's adjudication was to evaluate the Application under the substantive standards in EFSLA and EFSEC's rules and to reach findings and conclusions on these issues.[35] EFSEC's adjudicative proceedings are governed by the APA.[36] The APA, in turn, requires that "findings of fact shall be based *exclusively* on the evidence of the record in the adjudicative proceeding and on matters officially noticed in that proceeding." RCW 34.05.461(4) (emphasis added).

Here, the FEIS was not part of the adjudicative record. In fact, it *could not have been* part of the record, because it was issued several months *after* the adjudicative record was closed and *after* the adjudicative briefs had been filed.[37] In addition, the EFSEC Manager—not the

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[34] *See, e.g.*, State Br. at 18–19, 21, 23, 27–28, 30, 36–38, 40, 45, 47, 63, 72; *see also* WRE Br. at 23, 26, 33; Counties Br. at 16 & Attach. 2.

[35] *See supra* Parts III.A.2 & III.A.3; *see also* CP 126–53.

[36] RCW 80.50.090(3); WAC 463-30-010.

[37] The opening adjudicative briefs were filed on March 18, 2011 and response briefs on April 1, 2011. *See, e.g.*, AR 22267, 23230. The record was closed on May 20,

Council—was responsible for issuing the FEIS.[38] The EFSEC Manager and the Bonneville Power Administration ("BPA") jointly issued the FEIS pursuant to other laws,[39] independent of the adjudication.[40]

Moreover, in a series of rulings, the Council expressly chose to segregate its adjudication from the SEPA/NEPA process, creating two separate tracks for reviewing the Application.[41] The Council specified that SEPA materials were not part of the evidentiary record, unless formally introduced and accepted into the record.[42] The Council also made it clear that the parties would not be allowed to challenge the contents of the EIS during the adjudication.[43] The Council confirmed its approach in its Adjudicative Order, stating that "[t]his order . . . does not consider the FEIS or its supporting documents." CP 118–19. The Council also reaffirmed its approach in its Recommendation Order, stating that "[t]he Adjudicative Order, *pursuant to RCW 34.05.461(4)*, confined its scope to the matters of record and *did not consider the SEPA process*." CP 96 (emphasis added).

2011. AR 23337, 36663. The FEIS was issued on August 12, 2011. AR 28120, 37226.

[38] WAC 463-47-051, -140; *see also* AR 12075 (EFSEC Order No. 853).

[39] State Environmental Policy Act ("SEPA"), chapter 43.21C WAC, and National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321–4347.

[40] *See* WAC 463-06-050(6) ("The council staff are not parties to adjudicative proceedings conducted under [the APA]").

[41] *See, e.g.*, AR 8628 (EFSEC Order No. 848); AR 11299 (Order No. 851); AR 12074–78 (Order No. 853); AR 15652 n.3 (Order No. 856); AR 15722 (Order No. 859).

[42] *See, e.g.*, AR 11876 (Order No. 852); AR 12075 (Order No. 853); AR 14533–34 (Order No. 854); AR 15658 (Order No. 857); AR 15722 (Order No. 859).

[43] *See, e.g.*, AR 11299 (Order No. 851); AR 12075 (Order No. 853); AR 12075–77 (Order No. 853); AR 15652 n.3 (Order No. 856); AR 15722 (Order No. 859).

Now that Petitioners have challenged the adequacy of EFSEC's adjudicative findings and conclusions, Respondents point to the contents of the staff-adopted FEIS, claiming that they satisfy the requirements for the adjudication. State Respondents, in particular, seem to be arguing that the FEIS contains evidence, as well as findings of fact and conclusions of law, for the adjudication.[44]

State Respondents cannot have it both ways. Having expressly isolated the SEPA process from the adjudicative proceedings and having disclaimed consideration of the FEIS in the adjudication, State Respondents are estopped from now *relying*, on appeal, on the staff-adopted FEIS as evidence that EFSEC's substantive standards were satisfied.[45] The Court should reject State Respondents' attempts to rely on the FEIS as adjudicative evidence for the first time on appeal, which is both inequitable and violates the APA, EFSLA, EFSEC's rules for adjudicative proceedings, and EFSEC's own orders in this case.[46]

In addition, EFSEC's implied arguments that the FEIS *itself* constitutes findings and conclusions of the Council should also be rejected. Pursuant to RCW 34.05.461(3), adjudicative findings are set forth in an

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[44] *See, e.g.*, State Br. at 18–19, 21, 23, 27–28, 30, 36–38, 40, 45, 47, 63, 72; *see also* WRE Br. at 23, 26, 33; Counties Br. at 16 & Attach. 2.

[45] *See Silverstreak, Inc. v. Wash. State Dep't of Labor & Indus.*, 159 Wn. 2d 868, 889–91, 154 P.3d 891 (2007); *Ruland v. State Dep't of Soc. & Health Servs.*, 144 Wn. App. 263, 277, 182 P.3d 470 (2008).

[46] *See generally* RCW 34.05.461(4); RCW 80.50.090(3); WAC 463-14-080(4).

"order," which is defined as "a written statement of particular applicability that finally determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons," RCW 34.05.010(11)(a). The FEIS, issued by the EFSEC Manager[47] and BPA, is not an order of the Council. It cannot be used, after the fact, to satisfy the Council's obligations to make adjudicative findings and conclusions under the APA determining compliance with EFSLA and EFSEC's substantive standards. The Court should reject Respondents' *post-hoc* attempts to cure the defects in the Council's Adjudicative Order.

B. Respondents fail to demonstrate that the Project complies with mandatory requirements for wildlife protection.

1. Respondents fail to demonstrate that the Applicant performed avian surveys during all seasons to determine migratory usage of the Project site, and fail to show that EFSEC resolved this contested issue.

EFSEC made no findings of fact or conclusions of law regarding the wildlife survey standards set forth at WAC 463-62-040(2)(f), which require surveys "during all seasons of the year to determine . . . migratory usage . . . of the site." *See* Pet'rs Br. at 17–19. EFSEC's failure to resolve this contested issue is significant. No surveys were ever conducted during the entire migration period of the olive-sided flycatcher (a species of

[47] Under EFSEC's rules, the EFSEC Manager is not the decision-maker, but rather "is responsible for *implementing the decisions* of the [C]ouncil." WAC 463-06-050(4) (emphasis added); *see also* WAC 463-06-050(6) ("The . . . staff may make recommendations to the [C]ouncil.").

special concern), and the surveys that *were* conducted appear to have missed a key migration period for eagles and buteos. *See id.*

Respondents appear to concede that EFSEC did not resolve this issue.[48] Instead, they attempt to rationalize the Council's failures by pointing to statements in the staff-adopted FEIS, which, they suggest, represent the Council's formal resolution of contested issues.[49] But as discussed *supra* Part III.A.4, the FEIS, adopted by the EFSEC Manager, cannot cure the Council's failures to resolve contested issues in the adjudication. The FEIS is not an order of the Council resolving contested issues, and instead merely reflects the opinions of agency staff.[50] Further, State Respondents are free to disregard the FEIS in making their decisions.[51]

Moreover, *none* of the sections of the FEIS now relied on by Respondents on appeal were *ever* cited in any of the Council's decisional

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[48] *See* State Br. at 19; WRE Br. at 26.

[49] *See, e.g.*, State Br. at 18 n.12 (citing AR 28273 and AR 33202), 19 & n.13 (citing AR 28277); WRE Br. at 26 (citing AR 25146, 25159, and 28277).

[50] In the cited material, the EFSEC Manager opines that the Project site is not conducive to the olive-sided flycatcher or Vaux's swift because only "small" numbers were observed. *See* AR 33201–02. In fact, more flycatchers were observed at Whistling Ridge than at any other wind facility proposed for a western Washington forest, and more Vaux's swifts were observed at Whistling Ridge than at any other wind facility under EFSEC's jurisdiction. AR 28837. Other staff statements cited by Respondents discuss whether surveys were performed during all four seasons, but fail to address whether the surveys accurately captured migratory usage. *See* AR 28277, 25146, 25159.

[51] *See Quality Rock Prods. v. Thurston County*, 139 Wn. App. 125, 141, 159 P.3d 1 (2007) (SEPA documents do not bind the decisionmaker, who may consider other evidence when reaching a decision); *ROKT*, 165 Wn. 2d at 313 (same).

orders.[52] EFSEC may not rely on specific portions of the FEIS for the first time on appeal to rationalize the shortcomings in its adjudicative decision.[53] The Council never evaluated compliance with WAC 463-62-040(2)(f).[54] This Court should remand for resolution of these issues, rather than addressing them in the first instance on appeal.[55]

2. Respondents fail to demonstrate that the Applicant assessed the risk of nighttime avian collision, and fail to show that EFSEC resolved this contested issue.

The Application does not assess the risk of nighttime collisions to avian species, in violation of WAC 463-60-332(2)(g), and EFSEC made no findings or conclusions on this issue. *See* Pet'rs Br. at 20–21. Respondents now point to a preliminary analysis by the Applicant, arguing that it

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[52] EFSEC's Adjudicative Order never once cites the FEIS. EFSEC's Recommendation Order cites only two sections of the FEIS as relevant to wildlife issues: FEIS § 3.4.2.1 (AR 28290–300, cited at CP 102) and § 3.4.4 (AR 28302, cited at CP 106). It cannot be inferred that EFSEC relied on other, unidentified portions of the FEIS to resolve these issues. *See* CP 98 ("This Recommendation draws from both the adjudicative proceeding and the SEPA process. *The Council identifies on the following pages . . . the aspects of each that bear upon its decisions . . . .*") (emphasis added).

[53] *See Weyerhaeuser v. Pierce County*, 124 Wn. 2d 26, 873 P.2d 498 (1994) (The purpose of findings of fact is to allow the parties and the reviewing court to understand the basis of an agency's decision.); WAC 463-30-320(4) ("Every recommendation to the governor shall . . . [c]ontain appropriate[ly] numbered findings of fact.").

[54] For example, does WAC 463-62-040(2)(f) allow an applicant to perform only a single day of surveying in each season, as the Applicant suggests? *See* WRE Br. at 26 n.9. Does the rule require applicants to survey during all major migratory seasons, which the Applicant failed to do here? Or does it require surveys during every consecutive month of the year, as has been done elsewhere? *See, e.g.*, AR 23221. These are interpretive issues that EFSEC, not this Court, should resolve.

[55] State Respondents also argue that the Applicant complied with WAC 463-62-040(2)(f) by, allegedly, complying with the WDFW Guidelines. *See* State Br. at 19. State Respondents cite no authority that the two requirements are the same. These arguments, made for the first time in an appellate brief, are sheer speculation as to how EFSEC would have interpreted its own standards, had it made findings of fact and conclusions of law regarding compliance with WAC 463-62-040(2)(f).

implicitly assessed the risk of nighttime collision by finding the Project would cause 0.9 to 2.9 "total" avian fatalities per megawatt, per year.[56]

The rule, however, does not require an assessment of "total" fatalities. It requires an assessment of fatalities "during day and night, migration periods, and inclement weather." WAC 463-60-332(2)(g). By enumerating these four requirements, the rule requires each of them to be evaluated. There is also good reason to require a specific risk assessment for nighttime avian collisions—namely, to determine whether any special mitigation measures should be employed at night.

Here, State Respondents admit that "extenuating circumstances such as inclement weather might force songbirds to migrate at abnormally low elevations," thus increasing the risk of night migrants colliding with the turbines. State Br. at 22. State Respondents cite evidence that inclement weather is unlikely at Whistling Ridge, and argue that a specific analysis of nighttime collision is unnecessary.[57] But there is also evidence that the Project site is "in a mountainous and forested environment that is also often enveloped by clouds."[58] EFSEC did not make any findings or conclusions evaluating the conflicting evidence or resolving these issues.

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[56] *See* WRE Br. at 17 (citing AR 862); State Br. at 21 (same).

[57] *See* State Br. at 22 (citing AR 14829, 18283 (testimony of Don McIvor)).

[58] AR 15398 (testimony of Shawn Smallwood); *see also* AR 3006 (testimony of Raymond Perkins), AR 8486 (testimony of Peter Cornelison), AR 11212 (comments of SOSA), AR 35511 (comments of Mary Repar).

Because EFSEC never determined whether an assessment of "total" avian fatalities satisfies WAC 463-60-332(2)(g), this Court should not resolve the issue here. Instead, a remand is necessary for an evaluation of compliance with WAC 463-60-332(2)(g).[59]

3. Respondents fail to demonstrate that the Application satisfies the WDFW Wind Power Guidelines.

The Applicant failed to comply with the WDFW Guidelines, in violation of WAC 463-60-332(4). *See* Pet'rs Br. at 22–29. This rule provides that applications "shall describe how [the Guidelines] are satisfied."[60] In violation of the Guidelines, the Applicant failed to collect data from areas adjacent to the Project site and from facilities proposed for similar habitats. Pet'rs Br. at 24–26. It also failed to conduct one or more full years of avian use surveys. *Id.* at 26–27.

Respondents now stress a conclusory statement in a letter from the WDFW that data in the Application "represent best available science."[61] But to reach that conclusion, the WDFW made a complete about-face at the Applicant's behest.[62] Moreover, neither the WDFW letter, nor any

[59] State Respondents' discussion of whether the WDFW Guidelines require an assessment of nighttime impacts is inapposite. *See* State Br. 22. This particular claim involves compliance with EFSEC's rules, not with the WDFW Guidelines.

[60] State Respondents argue that the requirement to satisfy the WDFW Guidelines is discretionary and inconsequential. *See* State Br. at 24–25. Yet the plain language of the requirement makes it mandatory. WAC 463-60-332(4) ("The application *shall* describe how such guidelines are satisfied.") (emphasis added).

[61] State Br. at 26 (citing AR 20222); *see also* WRE Br. at 20.

[62] Initially, the WDFW raised "concerns . . . with potential impacts to birds and

EFSEC order, addresses any of the issues raised in this appeal: the Applicant's failures to conduct one or more full years of avian use surveys and to collect available species data from areas adjacent to the Project site, from other commercial forest lands, from readily accessible databases,[63] and from proposed wind energy facilities in similar habitats.

Respondents concede that the Applicant failed to ask local resource agencies for data on avian use of areas adjacent to the Project site,[64] but instead speculate that the data could not have been utilized and argue that it would have been pointless to ask for it.[65] But Respondents ignore the testimony of the Applicant's wildlife witness, who had the following to say

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bats" from the Project, and stated that "it is unlikely that . . . additional data . . . will alleviate [these] concerns." AR 17973. The WDFW also warned that impacts could not be predicted from mortality rates at other wind facilities in the shrub-steppe habitat of eastern Washington. *Id*.; *see also* AR 3212. A few months later, the Applicant asked the WDFW to retract its position, asserting that "[i]f left as is, [the WDFW's] statements would basically eliminate . . . the proposed project." AR 4027. The WDFW responded with a letter dated September 22, 2009, in which it retracted its criticisms and stated it would treat *any* information submitted by the Applicant as best available science, essentially cutting the Applicant a blank check. AR 20224 ("We will . . . treat any additional information you may submit in the future as [best available science]."). The WDFW provided no explanation for its complete change of direction.

[63] Contrary to the Applicant's assertions, *see* WRE Br. at 22, Dr. Smallwood did not criticize the reliability of the data available from Partners in Flight, but rather pointed out that this data cannot be used to calculate impacts on entire species populations. *See* AR 15402–03, 15411. The WDFW Guidelines require the Applicant to review species databases to determine whether species may be present at any localized areas. 18005–06. The Applicant failed to consult the Partners in Flight data to make such a determination. *See* Pet'rs Op. Br. at 24–25.

[64] *See* State Br. at 27; WRE Br. at 21. Respondents downplay the Applicant's failure to obtain relevant information by arguing that the Applicant complied for one species, the northern spotted owl. *See* State Br. at 27; WRE Br. at 21. The Guidelines, however, require applicants to obtain information on *all* relevant species. AR 18005.

[65] *See* State Br. at 27; WRE Br. at 21.

about using the data: "I'm saying it would be hard."[66] Just because it might be "hard" to use relevant information does not mean the Applicant may refuse to ask for it, or assume it does not exist, as the Applicant did here.[67]

Similarly, Respondents do not contest that there is little preexisting data on avian use of the Project site. Absent such preexisting data, the Guidelines recommend "[t]wo or more years" of surveys. AR 18006. Here, the Applicant failed to perform two or more years of avian use surveys. Neither State Respondents in their decisions, nor the WDFW in its letters, explained (or even evaluated) the Applicant's failure to do so.

Further, Respondents do not offer a credible justification for the Applicant's failure to perform "one full year" of surveys, the bare minimum requirement. AR 18006. Instead, they argue (without citing relevant authority) that applicants may cobble together bits and pieces of surveys from multiple years. State Br. at 28; WRE Br. at 23. Respondents ignore the context of the "one full year" requirement. Conducting a full year of avian use surveys is only the first step "to guide decisions regarding appropriate survey intensity" later on. AR 18006. It is critical

[66] AR 18156 (testimony of Greg Johnson).

[67] Respondents also argue that Petitioners failed to show that relevant data was available from other wind energy facilities proposed in western Washington forests. *See* State Br. 28; WRE Br. at 22. They ignore that it is the *Applicant's* obligation to determine whether such information exists, and EFSEC's duty to determine whether the Applicant did so. Moreover, relevant data *was* available for the proposed Radar Ridge and Coyote Crest projects, and that data suggests a high rate of use by several species at Whistling Ridge compared to these other sites. *See* AR 28837.

that the first round of surveys be conducted in consecutive seasons. Without doing so, the results can easily underestimate true avian use patterns by masking annual and seasonal variations.[68] Absent a definitive statement by the WDFW that "one full year" means anything less than what it says, the Guidelines' plain language must control. By failing to conduct "one full year" of surveys, the Applicant failed to satisfy the Guidelines as required by WAC 463-60-332(4). EFSEC's failure to resolve this contested issue warrants a remand.

4. Respondents fail to justify the absence of an adequate wildlife mitigation plan in the Application, and fail to show that EFSEC resolved this contested issue.

Petitioners have demonstrated that the wildlife mitigation plan in the Application fails to provide the "detailed discussion" of the items required by WAC 463-60-332(3). *See* Pet'rs Br. at 29–32. Respondents disagree, relying heavily on the FEIS and various portions of the Application dealing with impacts to fish and plants.[69] Respondents ignore that the *Application*, not the FEIS, must contain an adequate mitigation plan. WAC 463-60-332(3).[70]

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[68] *See* AR 15383–85 (testimony of Shawn Smallwood).

[69] *See* State Br. at 30 (citing AR 4453–54, 4456, 28172–83); WRE Br. at 18 (citing AR 4443, 4453–54). Petitioners have not challenged the Applicant's plans for fish and plants, so those plans are irrelevant to the issues before this Court.

[70] In addition, EFSEC failed to make any findings or conclusions on the Applicant's noncompliance with WAC 463-60-332(3), which sets forth the requirements for the mitigation plan. *See* Pet'rs Br. at 30–31. State Respondents contend otherwise, arguing that EFSEC's "recommendation package" addressed what they now dub "the

Where Respondents *do* discuss the wildlife mitigation plan, they fail to demonstrate compliance with WAC 463-60-332(3). For example, the Applicant belatedly argues that its plan "avoids cumulative impacts associated with the energy facility, and [that] it has a 100% probability of success of full and adequate implementation." WRE Br. at 19. The Applicant cites no authority for its allegations, which must be alleged (and supported) *in the Application*.[71] Had the Applicant done so, the parties and EFSEC could have evaluated the allegations during the proceedings below. This Court should not evaluate them here for the first time.[72]

State Respondents provide no rationale as to why the Applicant's mitigation plan should not have been finalized prior to the adjudication and included in the Application, as required by EFSEC's rules. Instead, they argue that the plan should be flexible. But EFSEC's rules specify that the Application must include a mitigation plan that satisfies the requirements

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mitigation planning application rule." State Br. at 30 n.20, ¶ 2. State Respondents fail to cite any portion of the recommendation package where they believe EFSEC resolved this issue. *See id*. State Respondents also argue that WAC 463-60-332(3) is not "mandatory." *Id*. at ¶ 3. The plain language of the rule dictates otherwise. *See* WAC 463-60-332(3) ("The application *shall* . . . . The mitigation plan *shall also* . . . .") (emphasis added).

[71] *See* WAC 463-60-332(3)(c) (requiring every application to "[a]dress how cumulative impacts associated with the energy facility will be avoided or minimized"); *id*. at (3)(f) (requiring applications to "[a]dress how mitigation measures considered have taken into consideration the probability of success of full and adequate implementation of the mitigation plan").

[72] It is also noteworthy that, like its Application, the Applicant's Brief does not discuss whether the mitigation plan "will achieve equivalent or greater habitat quality, value and function for those habitats being impacted," as required by EFSEC's rules. WAC 463-60-332(3)(d).

of WAC 463-60-332(3), including any flexible components.[73] Allowing the Applicant to defer its plan to a later date simply shuts the public out of the review process and allows the Applicant to side-step the adjudication.[74] The Applicant did not comply with WAC 463-60-332(3), nor did EFSEC make any findings on this issue. A remand is necessary so that EFSEC—not this Court—may evaluate the mitigation plan in the first instance.

5. Respondents fail to explain EFSEC's inconsistent findings involving the amount of disturbed or impacted wildlife habitat requiring mitigation.

EFSEC made inconsistent findings on the total number of acres disturbed by the Project, listing it anywhere from 50 acres, to 115 acres, to 384 acres, to 1,152 acres. *See* Pet'rs Br. at 32–34. (citing CP 117, 93, 95, 105). Resolving these conflicts is crucial: the amount of impacted habitat determines the level of mitigation required by EFSEC's rules. Yet EFSEC

[73] *See, e.g.*, WAC 463-60-332(3)(i) (requiring the application to "[d]iscuss ongoing management practices that will protect habitat and species, including proposed monitoring and maintenance programs").

[74] State Respondents provide no binding commitments to hold any future adjudicative proceedings after Project approval. *See* State Br. at 34. They also argue that they should be able to process the Application under an "adaptive management" strategy, rather than abiding by EFSEC's rules. State Br. at 31–35, 42 n.41. But State Respondents fail to cite to any law or rule authorizing, or even defining, "adaptive management"—let alone any authority for why this approach can be pursued in lieu of EFSEC's rules. Furthermore, Petitioners' expert witness specifically criticized the viability of this approach, concluding that "there is no precedent for any wind project successfully using adaptive management measures to mitigate bird and bat impacts caused by wind turbines." AR 16183 (testimony of Shawn Smallwood). Finally, Petitioners are not asking for the "accelerat[ion] to the adjudication [of] all the regulatory decisions that could occur over the thirty-year life span of the Project," as State Respondents suggest. State Br. at 33. Rather, Petitioners seek compliance with the laws and rules that specify the required contents of applications and that require those contents to be reviewed in an adjudication.

failed to resolve the conflicts.[75]

State Respondents now argue that the Council's decisional orders merely repeat figures from the FEIS. *See* State Br. at 36–38. But rather than making any coherent sense of the conflicting figures, these arguments reveal that the figures in EFSEC's orders not only conflict with each other, but also with those in the FEIS.

For example, EFSEC stated in its Recommendation Order that "[a]pproximately 384 acres would be permanently developed for placement of the turbine towers, *access roads*, *substations*, underground and overhead transmission lines, and an *operations and maintenance facility*." CP 117 (emphasis added). Contrary to the State Respondents' argument,[76] this list of project components in the Recommendation Order does not match the "Wind Facility Footprint" in the FEIS.[77] As a result, according to the FEIS, the combined Project features will apparently disturb *more than* the 384 acres stated in the Recommendation Order.

Similarly, EFSEC in its Recommendation Order found that the Project would temporarily impact 100 acres. CP 105 (FFCL 9). In contrast, that is not what the FEIS says. *See* AR 28193 (temporary impacts cover

[75] EFSEC staff acknowledged these conflicts, recommending investigation of the issue. *See* AR 37311 ("Granted, there appears to be some conflicts and those will be investigated."). The conflicts, however, were never resolved.

[76] *See* State Br. at 37 n.31.

[77] In the FEIS, the "Wind Facility Footprint" does not include roads or the operations and maintenance facilities. *See* AR 28193.

52.1 acres). It is unclear how both figures were calculated.[78] To determine appropriate mitigation, EFSEC must resolve the inconsistencies.[79]

Finally, the Council failed to determine which portions of the Project require mitigation. In addition to the forest habitat eliminated by the turbines themselves, the Applicant proposes to clear a series of concentric zones around each turbine to provide wind clearance. AR 11331, 4333–36.[80] Additional mitigation may be required to compensate for this lost habitat, but State Respondents fail to show that this issue was resolved. This Court should not do so here, but should instead remand so that EFSEC may resolve the issue in the first instance.

6. Respondents fail to demonstrate that EFSEC addressed the no-net-loss standard at WAC 463-62-040.

EFSEC failed to address the no-net-loss standard at WAC 463-62-040(2)(a) in its decisional orders. *See* Pet'rs Br. at 34–36. Respondents

[78] For example, under the WDFW Guidelines, construction impacts from building a road are permanent, rather than temporary, if the road continues to be used after the project is complete. *See* AR 18013.

[79] State Respondents also argue that the Council's reference to "115 acres" is an "obvious typographical error" and that the Council meant to say "1,152 acres." State Br. at 36 n.30. They argue that a typo is evidenced by "the omission of a '2' as the last digit." *Id*. But this is not an "obvious" typo—if it were, one would expect EFSEC to write "1,15" rather than "115."

[80] State Respondents argue that trees will be replanted within these clearance zones, without "any artificial limits" on regrowth. State Br. at 38 n.34. But the Applicant testified that trees in these areas may be replaced with grass or shrubs from 50 to 150 feet around each turbine. AR 11331. In other words, trees may be permanently cleared, and habitat permanently eliminated, contrary to State Respondents' assertion. It is also unclear whether this portion of the Project is included in the Applicant's assertion that "[l]ess than 57 acres of the Project site will be used for energy generation." WRE Br. at 3.

concede this fact,[81] but offer conflicting arguments as to why this error should be excused. State Respondents apparently argue that the Applicant's proposed mitigation parcel was approved by EFSEC staff, via the FEIS. *See* State Br. at 40 (citing FEIS, AR 31259). The Applicant contradicts State Respondents, arguing that submission of a mitigation plan in the future substitutes for compliance with WAC 462-62-040(2)(a) prior to project approval. WRE Br. at 27–30.[82]

As discussed *supra* Parts III.A.4 & III.B.1, the FEIS does not constitute EFSEC's formal resolution of contested issues—it is the opinion of agency staff and does not bind the Council. Further, contrary to State Respondents' arguments, the FEIS does not "specifically state[]" that the proposed mitigation parcel satisfies the no-net-loss standard. State Br. at 40. The FEIS merely reports that the Applicant proposed a mitigation parcel. *See* AR 31259.[83] The Court should reject State Respondents' *post-hoc* arguments that the FEIS resolved contested issues in the adjudication, and should remand for resolution of these issues.

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[81] *See* State Br. at 39–40; WRE Br. at 30.

[82] State Respondents' footnote to their argument, State Br. at 40 n.36, is pure misdirection. The Project map included in the Application shows that the Project would, indeed, result in a wall of turbines more than two miles long. Pet'rs Ex. B (AR 4326).

[83] Moreover, were the Council to have formally approved Staff's statement, one would expect a citation to that portion of the FEIS in the Recommendation Order. *See* CP 98 ("The Council identifies on the following pages . . . the aspects of [the SEPA and adjudicative records] that bear upon its decisions . . . ."). But nowhere did the Council cite this section of the FEIS, indicating the Council did not adopt staff's statement.

The Court also should reject the Applicant's arguments that EFSEC was not required to determine compliance with the no-net-loss standard in the adjudication and may defer that decision to a future date, after the Project is approved. *See* WRE Br. at 27. Chapter 463-62 WAC does not merely supply guidelines for drafting site certificates, but rather provides standards that must be met in the adjudication. *See supra* Part III.A.3.b.

Furthermore, the Applicant incorrectly argues that the SCA requires the Applicant to meet the no-net-loss standard via a future mitigation plan. *See* WRE Br. at 27–30. Instead, the SCA requires any future protections to be "calculated using the mitigation ratios specified in the 2009 WDFW Wind Power Guidelines." CP 50. But the WDFW Guidelines *do not contain* mitigation ratios for conversions of commercial forest land, the activity at issue here. *See* AR 18021.[84] This stands in stark contrast to EFSEC's rule, which requires a "greater than 1:1" ratio, regardless of the habitat type being impacted. WAC 463-62-040(2)(d). By requiring compliance with the WDFW's more lenient standard rather than EFSEC's standard, the SCA fails to satisfy the no-net-loss standard in the EFSEC rules. A remand so that EFSEC may resolve this contested issue is necessary.

[84] Instead, the Guidelines call only for "consultation" with the WDFW when mitigating impacts on commercial forest lands. AR 18021. In essence, this leaves it to the WDFW's discretion to determine the appropriate mitigation ratio, if any.

7. Respondents fail to justify EFSEC's prejudicial and inconsistent treatment of the proposed mitigation parcel.

In addition to EFSEC's failure to determine whether the proposed mitigation parcel satisfies the no-net-loss standard, EFSEC erred by failing to allow the parties to present testimony and evidence evaluating the parcel. *See* Pet'rs Br. at 37–38. EFSEC also made inconsistent findings of fact and conclusions of law, thus calling into question whether, in fact, EFSEC reviewed and/or approved the parcel. *Id.* at 39–40.

To distract from these inconsistencies, State Respondents argue that Petitioners should have objected when the Applicant offered the mitigation parcel via rebuttal testimony, or should have sought discovery on how the Applicant intended to satisfy the no-net-loss standard. *See* State Br. at 42–43. These arguments obscure the fact that *EFSEC itself* held that the parcel was not properly offered[85] and that EFSEC would "not address the mitigation parcel in [its] findings of Fact & Law." CP 114 n.2.[86]

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[85] *See* CP 114 n.2 ("While th[e] suggested mitigation parcel was discussed extensively in the Adjudicative proceedings, *it has not yet been offered formally to . . . EFSEC as a stipulated mitigation plan*.") (emphasis added). Applications must be kept up to date by amendment thirty days prior to adjudication, or thirty days after adjudication to reflect "commitments and stipulations made . . . during the adjudicative hearings." WAC 463-60-116(1), (2), (3). The Applicant did neither.

[86] Petitioners fully expected the Applicant to amend its application within thirty days after the adjudication ended, as required by WAC 463-60-116(3). When it became clear the Applicant had no intentions of doing so, Petitioners timely objected. AR 22262–63. Petitioners also had no reason to request discovery. "Applications to the council for site certification shall be complete and shall reflect the best available current information and intentions of the applicant." WAC 463-60-116(1). This rule puts the burden *on the applicant* to timely supply information within the application, not on other parties to

But *did* EFSEC follow through and refrain from considering the mitigation parcel? From the record, it is impossible to tell. *See* Pet'rs Br. at 39–40. EFSEC's inconsistent treatment of the parcel in its Adjudicative Order is echoed by similarly incongruent statements in the State Respondents' Brief. *Compare* State Br. at 44 ("Nowhere did EFSEC state that the parcel actually *satisfied* Whistling Ridge's mitigation obligation.") (emphasis in original) *with id*. at 40 ("In its recommendation package, EFSEC's [*sic*] specifically stated that this parcel complies with the no-net-loss rule."). The proposed mitigation parcel either does or does not comply with the no-net-loss standard. A remand is necessary so that EFSEC, not this Court, can resolve this contested issue.

C. Respondents fail to show that the available and reasonable methods of reducing turbine blade spin-time and using radar-activated safety lighting were evaluated.

State Respondents failed to consider and require available and reasonable methods to ensure minimal adverse effects to wildlife, aesthetic, heritage, and recreational resources. *See* Pet'rs Br. at 40–49. Specifically, Respondents ignored two measures presented by Petitioners during the proceedings below: (1) minimizing blade spin-time by increasing turbine cut-in speed[87] and (2) reducing lighting impacts by

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divine that an applicant is withholding information.

[87] State Respondents argue that Petitioners did not identify in the Opening Brief the measures to reduce blade spin-time. State Br. at 49. To the contrary, Petitioners

using radar-triggered aviation safety lighting. In ignoring these measures, Respondents violated RCW 80.50.010, WAC 463-14-020(1), WAC 463-47-110(1)(a),[88] and WAC 463-60-085(1). *See* Pet'rs Br. at 40–49.

The Counties argue that the scenic qualities of the affected landscape are at most "moderately high" and that the Project's scenic impacts would at most be "moderate." Counties Br. at 16 & Attach. 2 (AR 28399).[89] State Respondents' duty, however, is to *minimize* the impacts. RCW 80.50.010; WAC 463-14-020(1), 463-47-110(1)(a), 463-60-085(1). State Respondents have not yet met that obligation.[90]

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identified the measure of increasing turbine cut-in speed, which reduces blade spin-time by employing the turbines' speed controls. Pet'rs Br. at 42–43 & n.79; *id.* at 49.

[88] The Applicant argues that because WAC 463-47-110 is part of EFSEC's SEPA rules, and "[b]ecause [Petitioners] have not assigned error to the FEIS, [Petitioners] have no argument that EFSEC violated WAC 463-47-110." WRE Br. at 12 n.4. Petitioners, however, assign error based on the plain language of WAC 463-47-110(1)(a) that EFSEC's "overriding policy . . . is to avoid or mitigate adverse environmental impacts which may result from the council's decisions." Moreover, EFSEC, expressly citing WAC 463-47-110, "affirm[ed] the applicability of the rule to [its] processes." AR 12077 n.8 (EFSEC Order No. 853). EFSEC's Recommendation Order (CP 93–112) is a Council decision subject to this rule. The Applicant cites no authority that error must be assigned to the FEIS in order to challenge noncompliance with WAC 463-47-110(1)(a).

[89] The Counties rely on the FEIS for these arguments. Counties Br. at 16–17 & Attach. 2. However, as explained above, *supra* Part III.A.4, the FEIS was not part of the adjudicative proceeding, which is where EFSEC determined that the Project would cause significant adverse impacts to aesthetic and heritage resources. CP 136, 149. Further, the Council explained in its Recommendation Order that it disagreed with the FEIS's conclusions on scenic impacts and chose not to rely on them. CP 96, 99–100, 105–6. The Counties failed to appeal EFSEC's decisions and cannot now claim that the FEIS supersedes EFSEC's findings and conclusions.

[90] The Counties also present various arguments regarding the Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§ 544–544p. Counties Br. at 9–16. Petitioners have never invoked the Scenic Area Act as legal authority for preventing or minimizing adverse impacts to aesthetic and heritage resources. Moreover, EFSEC already disposed of the Counties' arguments, determining that "[t]otally independent of its [National Scenic Area] designation, the Gorge remains a part of the heritage of Washington, Oregon, and the native and resident peoples of the entire United States." CP

Respondents trivialize the impacts of the proposed constantly flashing lights and spinning blades (even though these are among the most controversial aspects of the Project) and present numerous arguments that the identified measures for minimizing impacts are not necessary, not available, or not reasonable. State Br. at 45–49; Counties Br. at 8–11, 16–17. Respondents are asking this Court to determine in the first instance whether these methods are available and reasonable, when the State Respondents themselves never decided this question. The Court should remand for a determination of these issues.[91]

D. Respondents fail to show that EFSEC properly evaluated consistency with the Skamania County Comprehensive Plan and land use ordinances.

1. The Skamania County Staff Report does not affect the land use issues in this appeal.

Respondents argue that Skamania County presented a certificate of land use consistency to EFSEC in accordance with WAC 463-26-090, which provides that such certificates are "*prima facie* proof of consistency

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129; *see also* CP 113, 128–36 (*citing Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468 (9th Cir. 1994)). Because Petitioners do not raise any claims based on the Scenic Area Act in this appeal, the Court need not address the Counties' arguments.

[91] If the Court does wish to decide these issues, there is sufficient evidence in the record documenting that radar-activated aviation safety lighting and controlling turbine blade spin-time are reasonable and available measures to minimize impacts. *See* AR 4327, 4503, 15408, 22286, 14609, 28831–32, 28869–73. In addition, there has been no explanation why the State Respondents could not have included a condition of approval requiring the Applicant to pursue these measures, including seeking approval from the FAA for the use of radar-activated lighting, as has occurred in other jurisdictions. *See* AR 28831–32, 28869–73. EFSEC staff apparently recommended such a condition, *see* AR 37310, but the Council never adopted any findings or conclusions on these measures.

and compliance with . . . land use plans and zoning ordinances."[92] Respondents are incorrect. Skamania County submitted a staff report to EFSEC—not a certificate of consistency—and the staff report does not affect the land use issues in this appeal.

Initially, the County prepared a "Certificate of Land Use Consistency" (AR 1369–70), which was adopted by the Skamania County Commissioners (AR 1444) and presented to EFSEC at the land use hearing (AR 1705). Several months later, the County Commissioners "repeal[ed] . . . in its entirety" the resolution adopting the Certificate of Land Use Consistency. AR 11596. To replace the Certificate, the County Commissioners adopted "as a *staff report* to EFSEC" a new document prepared by the Planning Department. AR 11596–7 (emphasis added).[93]

Because Skamania County repealed its Certificate of Land Use Consistency and replaced it with a staff report, there was no "certificate" submitted "at the land use hearing" in compliance with WAC 463-26-090. Instead, there was a "staff report to EFSEC." AR 11597. The Staff Report should be treated as comments of the County under WAC 463-26-100, rather than a certificate of consistency under WAC 463-26-090.

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[92] *See* Counties Br. at 18–19; State Br. at 50–51; WRE Br. at 38–40.

[93] The adopted Staff Report is, itself, entitled a "Staff Report." AR 11598. County staff subsequently explained that "there is not [a] Certificate of Land Use Consistency." AR 16853.

Assuming *arguendo* that the Staff Report is a valid certificate of consistency, it would only have been *prima facie* proof of consistency and compliance "absent contrary demonstration by anyone present at the hearing." WAC 463-26-090. Here, because the Staff Report was contested by Petitioners and other interested persons,[94] its assertions of consistency could not be accepted at face value. *See id.* In addition, EFSEC is required to make an independent determination of whether a Project is consistent and in compliance with local land use authorities, regardless of whether or not the local government submits a certificate of consistency.[95]

Moreover, the Staff Report is completely silent on several of the central land use issues in this appeal: consistency with Policy LU.6.1 of the Skamania County Comprehensive Plan, whether wind is a "natural resource" under the Comprehensive Plan, and consistency with the County's moratorium ordinances. The Staff Report says nothing on these issues, s*ee* AR 11598–624, and is thus irrelevant on appeal for these issues.

Finally, because interpretation of local land use plans and ordinances is a question of law, the appellate standard of review is *de novo*.[96] Neither the EFSEC procedures in WAC 463-26-090, nor the existence of the Staff Report, change that appellate standard of review.[97]

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[94] *See, e.g.*, AR 1722–53, 1767–71, 1780–84, 1788–802, 1910–33, 1935–40.
[95] *See* RCW 80.50.090(2); WAC 463-26-110.
[96] The Court interprets local ordinances "using the same rules as state statutes."

2. The proposed Project is neither consistent nor in compliance with the Conservancy designation of the Skamania County Comprehensive Plan.

a. The Skamania County Comprehensive Plan is a regulatory document under EFSLA and the Plan itself.

Respondents argue that the Skamania County Comprehensive Plan cannot be used to regulate land uses.[98] Respondents' arguments ignore the legislature's direction in EFSLA, as well as the specific terms of the Skamania County Comprehensive Plan itself.

EFSLA requires EFSEC to specifically determine "'whether or not the proposed [project] is consistent and in compliance with city, county, or regional land use plans or zoning ordinances.'" *ROKT*, 165 Wn.2d at 311, n.13 (quoting RCW 80.50.090(2)).[99] In an ordinary land use proceeding, a comprehensive plan is not given regulatory effect. But the EFSLA process is a special proceeding, involving review of a single type of development (energy projects) by a single state agency (EFSEC). Given that EFSEC

Kitsap County v. Mattress Outlet, 153 Wn. 2d 506, 509, 104 P.3d 1280 (2005).

[97] Unlike the findings and order of the Washington State Personnel Board involved in *Gogerty v. Department of Institutions*, 71 Wn. 2d 1, 8, 426 P.2d 476 (1967) (cited in WRE Br. at 39), the County's Staff Report in the instant case is an advisory document interpreting local land use authorities—not findings based on contested evidence. Skamania even declared that its Staff Report is "not a decision." AR 11597; *see also* AR 11598 ("This is not a land use decision. It is a review to provide guidance to EFSEC as to the proposed project's consistency with Skamania County land use plans and zoning ordinances."). Thus, *Gogerty* is inapposite here.

[98] *See* State Brief at 52; Counties Br. at 20–21; WRE Br. at 40–41.

[99] The Applicant argues there is a difference between determining "consistency" and determining "compliance." WRE Br. at 41. If there is a distinction, it has no effect here, because the statute requires *both* criteria to be applied. *See* RCW 80.50.090(2).

may preempt local land use authorities,[100] the Legislature logically and carefully required full assessment with local land use plans.

In addition, Skamania County has chosen to give its own Comprehensive Plan regulatory effect. The 2007 Plan describes its "Policies" as follows:

> Policies are *decision-oriented* statements that guide the legislative or administrative body *while evaluat[ing] a new project* . . . .

Pet'rs App. E-2 (AR 22001) (emphasis added). In implementing the Plan, "Policies will be carried out through . . . *ongoing decisions on future development proposals*." *Id.* (emphasis added).

Policy LU.2.6 further elaborates on the Plan's regulatory effect:

> Building permits, septic tank permits or other *development permits issued by the County for any project will be in conformance with this Comprehensive Plan*.

Pet'rs App. C-5 (AR 22001) (emphasis added). And Policy LU.6.2 explains that land uses are not allowed if they are not listed "*under a land use designation made in this plan* or in an ordinance implementing this plan . . . without proof of a substantial change in circumstances sufficient to justify *amendment of this plan* or implementing ordinance." Pet'rs App. C-9 (AR 22018) (emphasis added).

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[100] *See* RCW 80.50.110; ch. 463-28 WAC; *ROKT*, 165 Wn. 2d at 285–86.

Thus, Skamania County has made a conscious choice to employ its Plan to regulate development, especially where its zoning code is out of date.[101] The County's approach is consistent with *West Main Associates v. City of Bellevue*, 49 Wn. App. 513, 525, 742 P.2d 1266 (1987).[102]

b. Privately owned and operated wind energy projects are neither consistent nor in compliance with the Conservancy designation.

The 2007 Plan states that the purpose of the Conservancy designation is "to conserve and manage existing natural resources" and lists twelve uses as appropriate in this designation, but excludes any mention of wind energy projects. Pet'rs App. C-3–C-4 (AR 22012–13). Yet Skamania County was well aware of wind power as a potential use in 2007, when it considered and adopted the current Plan. As found by the Skamania County Hearing Examiner in her February 2009 decision, "SDS Lumber has approached Skamania County on multiple occasions over the past several years to discuss [the WREP]." AR 16876.

Furthermore, in 2005, the County amended its zoning ordinance to include a very precise and technical definition of "wind turbine":

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[101] Here, the Project site remains "Unmapped," *i.e.*, unzoned, under the zoning ordinance. AR 4403; CP 105 (FFCL 10). For several years, Skamania has stated that it intends to update its zoning code for the Unmapped lands—in particular, to protect commercial forest lands—but has not yet done so. *See, e.g.*, Pet'rs App. D-2 (Skamania Ordinance No. 2010-10) (AR 16855); *see also* AR 1709–10 (testimony of Jason Spadaro).

[102] Even the Applicant agrees, consistent with *West Main*, that where "a county . . . as a matter of county law, make[s] compliance with its comprehensive plan mandatory[,] . . . EFSEC would have needed to determine whether the Project complied with the plan." WRE Brief at 41, n.16 (citing *West Main*, 49 Wn. App. at 525).

> "Wind turbine" means a machine with turbine apparatus (rotor blades, nacelle and tower) capable of producing electricity by converting the kinetic energy of wind to rotational, mechanical and electrical energy; provided, the term does not include electrical distribution or transmission lines, or electrical substations.

Skamania County Code ("SCC") § 21.08.010(91) (AR 21866, 22074).

Thus, wind turbines, including the very Project now before this Court, were front and center before Skamania County when it considered and adopted the 2007 Plan, but the County chose not to list them in the 2007 Plan as a use allowed under the Conservancy designation.

Further, the 2007 Plan on its face explains the impact of a specific use being excluded. Policy LU.6.1 states that if a use is "not listed," both "for each land use designation under this plan and for any zone established to implement this plan . . . , then the use is prohibited within that land use designation." App. C-8 (AR 22017). Under this provision, the omission of any references in the Conservancy provisions of the 2007 Plan to either wind turbines or wind energy projects must be viewed as a deliberate choice, in light of the earlier, specific identification of "wind turbines" in the zoning ordinance.[103]

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[103] *See also Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n*, 141 Wn. 2d 245, 280, 4 P.3d 808 (2000) ("Where a statute specifically lists the things upon which it operates, there is a presumption that the legislating body intended all omissions, *i.e.*, the rule of *expressio unius est exclusio alterius* applies.").

The Respondents ask the Court to stretch the Plan's language beyond its ordinary limits to shoehorn wind projects into the Conservancy designation.[104] The State Respondents, for instance, argue that a wind energy facility is "similar" to the listed uses and that wind should be regarded as a "natural resource." State Br. at 57, 59. The gaping holes in these arguments, however, are that wind energy projects are not listed as a use "appropriate within the Conservancy designation," and that wind is not listed in the Plan as a "natural resource." Pet'rs App. C-3 (AR 22012).[105]

The only fair reading of the plain language of the 2007 Comprehensive Plan is that wind energy projects were not included as a use within the Conservancy designation, and thus the Project is inconsistent with the Plan. The Court should reverse EFSEC's determination that the Project is consistent with the 2007 Plan.

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[104] *See* State Br. at 53–55; WRE Br. at 40–44; Counties Br. at 21–25.

[105] Respondents also argue that the Project is a "semi-public" use and is therefore allowed as a "public utility" under the Comprehensive Plan. State Br. at 54, 57–58; Counties Br. at 21–23. To the contrary, WRE is a private, for-profit corporation seeking to develop a private business on private property, for private commercial gain. The Applicant (which is not a utility) would be the owner, operator, and manager of the Project. AR 4282 (Application at § 1.1.2). State Respondents did not require the Project's power to be sold to a public or semi-public utility. Also, the Applicant has chosen not to "commit the project in one form or another as to the destination for the power." AR 16819. Instead, power would be sold "to the highest bidder" in an effort to "maximize [the Applicant's] investment." AR 16781. As EFSEC determined, the Project would be a "merchant" plant, AR 15653 (EFSEC Order No. 856), meaning it would be "'built on speculation for competing aggressively in wholesale power markets,'" AR 12050 (quoting EFSEC Order No. 753). In short, there is nothing public about the proposed facility.

3. Respondents fail to demonstrate that Skamania County's land use moratorium ordinances are not "zoning ordinances" as defined by RCW 80.50.020(22).

ESFEC erroneously concluded that Skamania County's land use moratorium ordinances are not "zoning ordinances" under EFSLA's definition at RCW 80.50.020(22). *See* Pet'rs Br. at 58–63 (citing CP 123). That definition reads as follows:

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

RCW 80.50.020(22).

Under this assignment of error, the only question before this Court is whether Skamania's moratorium ordinances fit within that statutory definition. If so, then EFSEC erred (at CP 123), and the appeal should be remanded for an evaluation of consistency under the moratorium ordinances pursuant to RCW 80.50.090(2) and chapter 463-26 WAC.

Skamania County does not even address that question in its Brief. *See* Counties Br. at 25–26. Instead, Skamania's only arguments invite the Court to apply the moratorium ordinances to the Project and reach the conclusion that the Project is not prohibited. *See* Counties Br. at 25–26.[106] But EFSEC never made findings on any such arguments, instead

[106] The other Respondents make similar arguments. *See* State Br. at 60–61; WRE Br. at 46–48.

summarily concluding that the moratorium ordinances are not zoning ordinances under RCW 80.50.020(22) and are "irrelevant" for EFSEC's mandatory land use consistency review. CP 123.[107] The Court should reject Skamania's request to evaluate on first impression the Project's consistency with the moratorium ordinances.[108]

The other Respondents now argue that the moratorium ordinances are not zoning ordinances under RCW 80.50.020(22), in part because, Respondents allege, the ordinances do not "regulate" the use of land. State Br. at 61–62; WRE Br. at 44–46. But EFSEC itself determined that the ordinances established "a moratorium . . . on certain types of development of forest areas." CP 123. In other words, EFSEC already has determined that the ordinances regulate the use of land. No party has assigned error to this finding, which should be treated as binding in this appeal.

Finally, the Applicant argues that development moratorium ordinances can *never* be zoning ordinances under EFSLA. WRE Br. at 45–

[107] Nor does the Skamania County Staff Report (AR 11598–11624) even *mention* the moratorium ordinances, notwithstanding the Counties' erroneous arguments to the contrary. *See* Counties Br. at 26 ("EFSEC properly deferred to the County's land use consistency determination and found the moratorium inapplicable.").

[108] If the Court does wish to consider these arguments, it should conclude that the moratorium ordinances prohibit conversions of forest lands to non-forest use by barring the acceptance of SEPA checklists for such conversions. *See* AR 21205–08, 21867–69; Pet'rs App. D (Skamania Ordinance No. 2010-10) (AR 16854–57). SEPA checklists are prerequisites for all forest conversions. WAC 222-20-010(7)(b), 222-20-040(4)(g). Because the Project requires a forest conversion to non-forest use, which the moratorium ordinances prohibit, the Project is inconsistent with the moratorium ordinances.

46.[109] The Applicant relies on provisions of the Planning Enabling Act, while skirting the plain language of EFSLA, which defines "zoning ordinances" as any local ordinance "regulating the use of land." RCW 80.50.020(22). But the unchallenged determination by EFSEC is that Skamania's moratorium ordinances regulate the use of land. *See* CP 123. Thus, the ordinances are zoning ordinances under EFSLA, and EFSEC erred in failing to review consistency and compliance with them.

E. State Respondents erred by deferring consideration and resolution of important aspects of the Project and by failing to specify the procedures that will apply to such future reviews.

1. In light of the Applicant's concessions, the Court should hold that any future proposal to move a turbine outside of its respective corridor or to modify a corridor requires an amendment to the SCA and a public hearing.

Under the plain language of the SCA, the final Project layout and its resulting impacts have not yet been determined. *See* Pet'rs Br. at 65–67. Respondents now argue that the turbine corridors proposed in the Application cannot be changed and that each turbine will be located within its respective corridor. *See* State Br. at 63; WRE Br. at 32.[110] The

[109] The Applicant also notes that Skamania did not review its moratorium under SEPA and argues that moratoria are "procedural actions" exempt from SEPA review. *See* WRE Br. at 46 (citing WAC 197-11-800(19)). These arguments were not made below, were not addressed by EFSEC in its Orders, and are outside the scope of this appeal. The County's failure to review its moratorium under SEPA is currently being litigated in *Save Our Scenic Area v. Skamania County*, No. 44269-8-II (Wn. App., Div. II).

[110] The corridors are shown in Petitioners' Appendix B (AR 4326). The turbine sites are shown at AR 21295 and 21296, which are maps prepared by the Applicant.

Applicant goes further, conceding that "[c]hanging the approved turbine corridors would require an amendment to the [SCA] and a public review process." WRE Br. at 32 n.11 (citing WAC 463-66-030).

In light of the Applicant's concessions, the Court should hold that, pursuant to WAC 463-66-030, any future proposal to move a turbine outside of its respective corridor or to modify a corridor requires an amendment to the SCA and a public hearing. In the alternative, the Court should remand for EFSEC to resolve this issue.[111] Petitioners withdraw the remainder of the errors discussed in Part IV.E.1 of the Opening Brief.

2. State Respondents fail to demonstrate that they properly deferred resolution of the forest practices aspects of the Project.

State Respondents failed to evaluate and resolve the forest practices aspects of the Project. *See* Pet'rs Br. at 67–69. In response to this Assignment of Error, Respondents' positions diverge completely. State Respondents argue that Petitioners will have "multiple meaningful opportunities for public participation in future decision making" regarding forest practices, but without explaining what those opportunities will be. *See* State Br. at 65–66.[112] The Applicant argues a diametrically opposed

[111] WRE argues at length about a purported "micro-siting process." WRE Br. at 31–35. EFSEC's rules neither authorize nor explain such a process. Nor does the record define the parameters for such a process. EFSEC's decisions should not be upheld on the basis of "micro-siting" unless and until it adopts rules governing such a process.

[112] At page 65 of their Brief, State Respondents claim that the applicable public participation opportunities for forest practices are "described above." This may be a

position, claiming *there will be no* opportunities for public participation on forest practices and that such opportunities are not legally required. *See* WRE Br. at 35–38.[113] Similarly, the Applicant argues that EFSLA completely trumps the Forest Practices Act ("FPA"), ch. 76.09 RCW, while State Respondents appear to argue that *only* the FPA will apply to future review of forest practices. *See* WRE Br. at 36–37; State Br. at 64.

These divergent positions, raised for the first time on appeal, highlight the problems with State Respondents' approach. State Respondents erred by approving the Project, while neither evaluating nor disposing of the forest practices aspects of the Project, nor adopting a binding process, with public participation rights, for resolving these issues in the future. A remand is necessary for resolution of these issues.

F. State Respondents fail to show that the Site Certification Agreement is internally consistent regarding forest practices compliance and enforcement.

As discussed in the Opening Brief at 69–71, the SCA contains two sections addressing forest practices that conflict with each other. *See* CP

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reference to page 34 of the Brief, but State Respondents fail to explain exactly how the procedures discussed on page 34 would apply to forest practices. Nor does the SCA spell out the public participation opportunities for forest practices. *See* CP 58–59, 66.

[113] The Applicant also makes confusing arguments that EFSEC "definitively resolved" forest practices issues below, and that Petitioners "subsequently dropped the argument." WRE Br. at 36 n.14. To the contrary, after Petitioners raised issues involving forest practices below (AR 2525, 21203–05, 21869–70, 26553, 26585, 26622, 26632–33, 28060, 28823–25), EFSEC acknowledged there were contested issues involving forest practices (CP 123, 142; *see also* AR 28721, 37309), but rather than resolving the issues, chose to defer consideration until a later date (CP 58–59, 66, 142).

58–59 (§ IV.M), 66 (§ VII.E). State Respondents' attempts to defend these sections only highlights their inconsistencies. They claim that section IV.M applies to the "construction phase of the Project" and that section VII.E applies during "Project operations." State Br. at 66–67. Yet, as State Respondents acknowledge, section IV.M also applies "for the duration of the [P]roject," CP 58, which includes the time the Project is in operation. Thus, both sections apply during the same time period, and yet their provisions conflict with each other.[114]

State Respondents' decisions are internally inconsistent regarding the treatment of forest practices and related activities. On remand, State Respondents should be required to prepare a clear and consistent approach for the review of these activities.

G. The Court should award attorneys' fees and costs to Petitioners.

The Court should award attorneys' fees and costs to Petitioners. *See* Pet'rs Br. at 71–74. EAJA states that a party is entitled to recover attorneys' fees if the party "obtained relief on a significant issue that achieves some benefit that the qualified party sought." RCW 4.84.350(1).

[114] If that interpretation is wrong, and section IV.M applies only to the construction phase of the Project, then what about the "other activities" listed in section IV.M (*e.g.*, gravel and rock removal and slash disposal)? CP 58–59. State Respondents allege that these activities are "most likely to be needed during Project construction," State Br. at 69 n.67, but what if the Applicant seeks to burn slash during the operation of the Project? Section VII.E does not indicate whether a special burn permit would be required for such activities, nor from which agency a permit should be sought. *See* CP 66.

The Court should reject EFSEC's[115] statement that Petitioners are only seeking a "remand . . . for additional proceedings." State Br. at 70.[116] Petitioners are not just seeking a remand, but rather, on all claims, are seeking *reversal* and remand of the challenged decisions. With regard to every claim, the Project was approved in violation of the applicable law, and the approval of the Project should be set aside and remanded.

The Court also should reject EFSEC's implication that this appeal involves "minor issues." State Br. at 70. None of the issues in the Opening Brief are minor; every issue is important. Indeed, EFSEC advised the Superior Court that this appeal involves a number of "important" issues, CP 777,[117] and also explained that EFSEC rarely seeks direct review by the Supreme Court, but did so here because this appeal "likely involves fundamental and urgent interests affecting the public interest and development of energy facilities," CP 768–71. EFSEC further explained

[115] Petitioners agree with State Respondents that for purposes of an attorneys' fees award, EAJA applies only to EFSEC and not the Governor. *See* State Br. at 69 n.69.

[116] EFSEC cites a recent Court of Appeals decision for the proposition that obtaining a remand alone does not make the petitioner a prevailing party. State Br. at 70–71 (citing *Ryan v. State Dep't of Soc. & Health Servs.*, 171 Wn. App. 454, 287 P.3d 629 (2012)). The *Ryan* decision, however, does not establish such a broad rule. In addition, *Ryan* was limited to a procedural issue involving defective notice of an administrative order, and unlike the instant case, did not involve the *substance* of the order. Finally, *Ryan* cites a case that provides an appropriate standard to use here: "'[A] plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *Parmelee v. O'Neel*, 168 Wn. 2d 515, 522, 229 P.3d 723 (2010) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111–12, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992)). Here, granting the requested relief on any or all of Petitioners' claims will satisfy this standard.

[117] EFSEC identified as "important" the claims that became all or part of Parts IV.B.2, IV.B.4, IV.B.7, IV.E.1, IV.E.2, and IV.F in the Opening Brief. CP 777.

that Petitioners' claims "raise questions regarding the public interest in how EFSEC conducts its energy facilities adjudication process [that,] if sustained, will impact on how EFSEC adjudicates applications in the future." CP 857 (testimony of Chair Luce). After making these representations to the Superior Court, EFSEC cannot legitimately claim that only "minor" issues are involved.

EFSEC also argues that its "position[s]" were substantially justified. State Br. at 71–72. Whether that is correct or not will, of course, depend on the specific claims and their outcomes. In general, however, Petitioners' claims involve failures by EFSEC to review the Project under applicable law, failures to resolve and dispose of contested and/or required issues, and failures to make findings and conclusions on specific issues. Such failures, by their very nature, do not involve a "position" that could be regarded as substantially justified, but rather involve the lack of any position. In short, EFSEC did not take positions on many of these issues, but rather disregarded or failed to resolve issues, in violation of the applicable law. Fees should be awarded under RCW 4.84.350(1).

As for the costs associated with the administrative record, the Court should tax one-half of these costs against the Applicant under RCW 34.05.566(5)(a), which allows the taxing of costs "[a]gainst a party who unreasonably refuses to stipulate to shorten . . . the record." The Applicant

improperly attempts to shift the analysis onto Petitioners' actions, for instance, discussing whether Petitioners cited material from the record that could have been omitted. WRE Br. at 48–50.[118] The statute's focus, however, is not on whether Petitioners were unreasonable, but rather whether *the party who refused to shorten the record* was unreasonable.

In its Brief, the Applicant cites a grand total of 304 pages from the administrative record, less than one percent of its contents.[119] This helps illustrate that thousands of pages could have been omitted from the record. The Applicant, however, refused to even discuss doing so.

Finally, the Applicant alleges that shortening the record would have caused delays. WRE Br. at 50. However, as EFSEC explained, it was the massive size of the record that caused delays at the Superior Court. CP 276–77.[120] Shortening the record would have *sped up* the process, not delayed it. And it is evident from the record that time has never been of the essence for this Project, which now is on hold and which—regardless of

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[118] The Applicant singles out approximately five hundred pages that were added as corrections to the record by agreement of the parties. WRE Br. at 49. However, EFSEC did not charge Petitioners for adding these pages. Petitioners agree with the Applicant that no costs associated with these pages should be taxed against the Applicant.

[119] Many of the cited pages were also available in the Clerk's Papers.

[120] It took EFSEC several months to compile and organize the thousands of documents. The Petition for Judicial Review was filed on April 3, 2012. CP 26. The administrative record was filed almost four months later, on July 30, 2012.

the outcome of this review or further proceedings before the Council—may never be built.[121]

The Applicant's refusal to discuss shortening the record was unreasonable. The Court should tax one-half of Petitioners' costs for the production of the record against the Applicant.

IV. CONCLUSION

Because EFSEC failed to resolve numerous important issues that were contested below, and also violated and ignored multiple statutory and regulatory requirements in the course of its review, the Project's true impacts were never evaluated and the decision to approve the Project was uninformed. The Court should reverse and remand for further review.

RESPECTFULLY SUBMITTED this 13th day of May, 2013.

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[121] According to the Council, there is currently a "surplus" of energy in Washington State. CP 156, 161 n.i (Concurrence of Chair Luce) (citing AR 14879, 18523–24, 18542). For a variety of reasons, wind energy projects throughout the state are currently on hold. *See* CP 883–91. As stated by the Superior Court, the Whistling Ridge Project "may never get off the ground[,] . . . [a]nd even if it does, it might not happen until 2022." RP 35. Indeed, the Applicant has not even signed the SCA (CP 71; RP 37, 48–49), and has repeatedly stated that the Project is "not currently feasible" and has been placed indefinitely on hold. CP 877; *see also* CP 878–82.

APPENDIX E

Excerpts from the Skamania County Comprehensive Plan (July 10, 2007)

(Pages 14–15)

(AR 21988–22060)

SKAMANIA COUNTY
2007 COMPREHENSIVE PLAN

FINAL
July 10, 2007

Contents of the Plan

This Comprehensive Plan contains several "elements" or "chapters" each addressing important concerns in Skamania County:

Chapter 1: Introduction
Chapter 2: Land Use Element
Chapter 3: Environmental Element
Chapter 4: Transportation Element
Chapter 5: Archaeology and Historic Preservation Element

Each of the chapters (2-5) includes goals and policies that are the essence of the Plan and are intended to be consulted to guide decisions on a wide range of issues, including permitting and resource allocation. It is important to remember that the goals and policies in this Comprehensive Plan are just as important as the maps in making land use and development decisions. To be consistent with the Comprehensive Plan, a project must also meet the intent of the Comprehensive Plan's policies, not just the land use designation and zoning classification.

As used in this plan, goals and policies are defined as follows:

- **Goal:** Goals are broad, general statements of the desired long-term future state toward which the Comprehensive Plan aims. They indicate what should exist in a community or what is desired to be achieved in the future. Goals are often considered to be the cornerstone of the planning process. A goal is an expression of an ideal and a desirable end. Over a period of time the goal remains constant yet it may never be completely attained.

- **Policy:** Policies describe a particular course or method of action to accomplish the purposes of the Comprehensive Plan. Policies are decision-oriented statements that guide the legislative or administrative body while evaluation a new project or proposed changes in the County ordinances.

Implementing the Plan

The Comprehensive Plan will be implemented through the actions of County staff, the Planning Commission, County Commissioners, Hearings Examiner, and other Boards or Commissions. Policies will be carried out through the adoption and revision of development regulations and ongoing decisions on future development proposals.

Amending the Comprehensive Plan

Long-range planning in Skamania County does not end with the adoption of this update. The Comprehensive Plan is a living document. In order to respond to changing conditions between Comprehensive Plan updates, the County allows periodic Comprehensive Plan Amendments. Property owners may apply for site-specific requests to amend the plan (quasi-judicial) or the Board of County Commissioners may initiate a plan amendment process (legislative). All amendments require public notice, a public hearing, and an evaluation of the environmental impacts in accordance with the State Environmental Policy Act (SEPA). Because the County is required to make its regulations consistent with the Comprehensive Plan, some Comprehensive Plan Amendments will require corresponding applications for zoning map amendments or zoning text amendments. Comprehensive Plan policies are intended to assist the County in determining whether to approve a Comprehensive Plan map and zoning map amendments consistent with the County Vision.

Only through continuing use, evaluation, and when necessary, amendment to the Comprehensive Plan can the County move toward the Vision.

Legislative Amendments to this Comprehensive Plan (reassessment or update)

Comprehensive Plans and subarea plans are not written for all time. They are living documents designed to be at once rigid enough to hold a chosen course over an extended period of new growth and development, yet flexible enough to accommodate a wide variety of anticipated and unforeseen conditions. A fundamentally good plan can do this for a relatively short period of time (20 years), during which monitoring, data gathering and analysis for the purposes of "fine tuning" and improving the plan by amendment should be an ongoing process. At the end of this period Skamania County should conduct a major reassessment of the plan. Typically, at least every seven years the county is required to review the Critical Areas portion of the Comprehensive Plan to determine the need for a legislative update.

Procedures for accomplishing individual Comprehensive Plan Amendments (quasi-judicial)

The comprehensive land use plan (or subarea plan) and all development regulations (official controls) shall be subject to continuing review and evaluation by Skamania County (County) and its citizens. The conclusion of a plan amendment cycle shall occur annually unless no amendments are proposed. A plan amendment cycle means the timeframe when plan amendments are submitted by the applicant (generally the property owners) to the Planning Department, scheduled for public hearing, reviewed and decided upon by the Hearing Examiner (See timeframe below). The applicant can resubmit plan amendments that have been denied by the Hearing Examiner no sooner

PROOF OF SERVICE

I certify that I served a copy of this document via First Class Mail postage prepaid and email on all parties or their counsel of record on the date below to the addresses and emails listed:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated: May 13, 2013.

Beverly L. Bunker, Legal Assistant