

Supreme Court sets calendar for windpower project appeal

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The Enterprise

The Washington Supreme Court has established a briefing schedule for its consideration of a legal challenge to the state's approval of a private windpower project that would be built on commercial forest land in southeastern Skamania County and could generate up to 75 megawatts of electricity.

The case of the Whistling Ridge Energy Project, titled *Friends of the Columbia Gorge, et al. v. State Energy Facility Site Evaluation Council (EFSEC), et al.*, is being heard by the court on a statutorily required expedited basis, meaning parties' motions for time extensions are unlikely to be granted, according to Susan L. Carlson, deputy clerk of and staff attorney for the Supreme Court.

The schedule set by the court at the end of November calls on petitioners Friends of the Columbia Gorge (Friends) and Save Our Scenic Area (SOSA) to serve and file their opening briefs no later than Feb. 13. The state's and intervenor-respondents' briefs should be served and filed by April 2. Intervenor's in the case include project developers Whistling Ridge Energy LLC, Skamania County, and the Klickitat County Public Economic Development Authority.

The deadline for petitioners' reply brief is May 3. Oral argument will be set on a date to be determined, Carlson advised attorneys representing parties to the case.

Nathan Baker, staff attorney for Friends of the Columbia Gorge, said the briefing schedule in the Whistling Ridge case "is fairly typ-

ical as far as Supreme Court cases go."

"The parties were not too far apart in their proposed schedules, which ostensibly helped the court set the schedule," Baker noted, and added, "The parties agreed that argument in late June would work. I'm guessing that the court wants to wait until all the briefs are in before it does schedule oral argument."

Friends and SOSA filed their legal challenge last fall in Thurston County Superior Court, as required whenever the state or one of its agencies is being sued. That court reviewed and certified EFSEC's record of proceedings surrounding the Whistling Ridge permit approval for direct review by the Supreme Court.

Skamania County Prosecuting Attorney Adam Kick said, "The real question is, how long will it take the court to make a decision."

He added, "I can't think of anything that would likely delay us at this point. And I'm not sure there's a lot of interesting aspects to the EFSEC process itself, that is, no new issues that haven't already been discussed by EFSEC at their hearings over the past couple of years."

EFSEC — an agency of the state Utilities and Transportation Commission that's charged with responsibility for reviewing applications for and licensing of large-scale energy facilities in Washington — recommended approval of a site certification agreement for a scaled-down Whistling Ridge Energy Project (35 turbines instead of the 50 proposed) in October 2011, and then Gov. Christine Gregoire approved the agreement, with the terms and conditions recommend-

The issues at bar

Here is a broad summary of the issues involved in *Friends of the Columbia Gorge, et al. vs. Energy Facilities Site Evaluation Council, et al.*, in the order in which they are listed in the Friends' petition for judicial review:

- *Consistency with Skamania County's comprehensive plan and land use ordinances.

- *Consistency with Washington state wildlife laws.

- *Mitigation of the project's impacts on aesthetic, heritage, and recreational resources.

- *Ensuring that the project is sited outside the Columbia River Gorge National Scenic Area.

- *Noise impacts during operation.

- *Transportation impacts during construction phase.

- *Compliance with state forest practice laws.

- *Unresolved aspects of the project, including final site layout, forest practices compliance, wildlife assessment and mitigation, project lifetime, turbine replacement, as well as the public's right to participate in future decisions on these unresolved aspects.

- *Internal inconsistencies in project permit regarding permit duration, enforcement processes, conflicts between state and federal law, conflicts between permit and EFSEC decisions.

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ed by EFSEC, in March 2012.

Under the state's Energy Facilities Site Locations Act (EFSLA), site certification authorizes an applicant to construct and operate an energy facility in lieu of securing any other permit or document required by any other government agency or political subdivision.

Case history suggests the Supreme Court might defer to EFSEC and the governor's office in deciding the *Friends* case in the state's favor.

The last state-authorized site certification agreement to be contested in the courts was the one issued to the Kittitas Valley Wind Power Project in October 2007. Gregoire gave the project proposed by Houston, Texas-based Sagebrush Power Partners LLC, the go-ahead in September 2007, following an EFSEC review that lasted nearly five years and included a reconsideration of property line setback criteria (on remand

from the governor) vis a vis visual impacts to lands not involved in the project.

Opponents, including Kittitas County and a group called Residents Opposed to Kittitas Turbines, filed petitions for judicial review in Thurston County Superior Court in October 2007, and in February 2008, that court certified the case record and transferred it to the Supreme Court for review. The Supreme Court received the case in March, heard arguments in June, and upheld the decision in November 2008. The 100-megawatt wind-power project became fully operational in December 2010.

The consolidated case — because two separate petitions for review were filed — involved the state's authority to permit the construction and operation of wind turbines for energy production in the state without authorization from the county in

which the turbines will be placed.

Petitioners argued that the governing EFSLA does not authorize the governor to pre-empt county land use laws when siting a facility that exclusively uses wind power. Petitioners also alleged the state abused its authority in deciding whether to pre-empt county land use laws, that it violated the appearance of fairness doctrine, and that it failed to adequately consider an environmental impact statement.

In addition, petitioners urged the justices to remand the case to Thurston County Superior Court for further fact-finding on alleged procedural irregularities in the state's siting process. The court rejected all of petitioners' claims and held that the governor properly exercised her authority under EFSLA to approve the site certification agreement for the Kittitas Valley Wind Power Pro-

ject (KVWPP).

Baker pointed out that, though the Supreme Court decided the KVWPP case in eight months, that was a quicker timeline than usual.

"There's not the same sense or urgency as there was in the Kittitas Valley case," he said, because the Whistling Ridge project remains on hold, and explained that it's "common for a case to take at least a year to be resolved at the Supreme Court, depending on the briefing schedule and the court's workload."

"At this point in the Whistling Ridge appeal, the two main factors determining how quickly it's resolved will be, one, the date the court selects for oral argument, and two, how long the court takes to reach a decision after oral argument," Baker said. "The oral argument and the court's decision will also be the two main things for the public to follow."