



Washington State Supreme Court Decision on Residents Opposed to Kittitas Turbines,  
et al  
Versus  
State Energy Facility Site Evaluation Council (EFSEC), et al

**Kittitas County and its NIMBY allies lose bid to usurp Washington State's  
authority to permit power plants**

**Overview**

The Washington State Supreme Court's decision to uphold the authority of the Energy Facility Site Evaluation Council (EFSEC) to supersede local government jurisdiction is a landmark action that helps ensure renewable energy's future in Washington State. The Court dismissed Kittitas County government's claims and that of its "Not In My Back Yard" (NIMBY) allies that the county, not the state, holds preeminent authority in reviewing and permitting proposed power plants. The Court's action will allow Horizon Wind Energy to begin constructing the wind farm it first proposed over six years ago -- a project reviewed by EFSEC and approved by Governor Gregoire in September 2007.

Kittitas County's arguments were fundamentally at odds with the aims for which the legislature created EFSEC. EFSEC was created by the legislature in 1970 to streamline the process of permitting new power plants. The council is charged with balancing "demand for new energy facilities with the broad interests of the public." In compliance with this mandate, EFSEC seeks to accommodate local policies within the state's need for "affordable and abundant" electrical power. In view of this goal, EFSEC was vested with the ability to preempt jurisdictions that assert parochial objections to an otherwise well conceived power plant.

As Jim Luce, the Council's chairman, put it, "If EFSEC can't preempt [the county]...it will lose any credibility as a 'State siting Council.' The signal to counties opposed to siting energy projects of any sort will be clear: devise an unworkable process with no rules which duplicates EFSEC's process...and you may not have to site energy projects." Were local governments, persuaded by NIMBY interest groups, allowed to resist state authority, clean energy development in Washington State could have stalled out.

This decision in favor of Horizon Wind Energy will go a long way towards enhancing the state's ability to meet the renewable energy goals mandated by voters in I-937

## **About the Kittitas Valley Wind Power Project**

**Sponsor:** Horizon Wind Energy LLC, a subsidiary of EDP Renováveis, S.A. (“EDPR”

**Location:** either side of U.S. 97, 12 miles northwest of Ellensburg, WA

**Number of Turbines: up to 65**

**Rated “name plate” capacity:** estimated 100 megawatts (MW)

**Estimated number of NW homes served:** approximately 47,000

**Annual CO2 avoided:** approximately 550,000 tons of CO2 per year

**Estimated local tax revenues:** approximately \$600,000 per year in property taxes

**Regional offices:** Portland, OR and Ellensburg, WA

## **Summary of Events**

In Spring 2002, Horizon Wind Energy (then Zilkha Renewable Energy) approached Kittitas County with an initial proposal to site a wind farm in a wind-swept rural area between Cle Elum and Ellensburg that is crisscrossed by three high-voltage transmission lines . Shortly afterward the County rescinded its recently adopted favorable wind farm permit review ordinance and enacted a new process designed to trump state siting authority and bog Horizon down in the bureaucratic version of "Chutes and Ladders." The new ordinance required developers, in order to obtain a development permit, to secure: a “sub-area” comprehensive plan amendment, site-specific rezones, and a development agreement. Wind farms alone would be required to go through this onerous process, but not a coal, natural gas, or even nuclear energy facility. No other county requires such a convoluted process.

The following timeline follows the events from Horizon’s first announcement of its initial plans to the present.

**April 2002** Horizon publicly announces its plans to develop a wind farm in Kittitas County

**December 2002** Kittitas County repeals its favorable wind farm zoning ordinance and replaces it with its Wind Farm Resource Overlay Zone or “WFROZ”

**January 2003** Horizon files with Washington State’s Energy Facility Site Evaluation Council (EFSEC) for its review and meets with Kittitas County officials to establish “land use consistency” as called for in EFSEC’s statute

**March 2003** Kittitas County Board of County Commissioners (BOCC) rejects an amendment of the County land use ordinance to achieve consistency with EFSEC authority and avoid unnecessary duplication of process

**February 2004** Horizon requests EFSEC preempt Kittitas County land use policies

**October 2005** Horizon reduces the number of turbines for the project, and submits a new proposed development agreement to Kittitas County



**February 2006** Kittitas County BOCC rejects Horizon's reconfiguration of its project

**June 2006** EFSEC conducts 3-day adjudication on Horizon's application for preemption and site certification

**March 2007** EFSEC makes recommendation for preemption and site certification by the Governor

**June 2007** Governor remands the project back to EFSEC for further consideration

**August 2007** EFSEC conducts additional public hearing and makes second recommendation of approval to Governor

**September 2007** Governor approves Horizon's site certification

**October 2007** Kittitas County appeals Governor's approval in Thurston County Superior Court

**October 2007 to February 2008** Thurston County Superior Court conducts a review on whether the 16,000-page record is sufficiently complete for referral to the Washington Supreme Court

**February 22, 2008** Thurston County Superior Court rules that the record is complete for review and sends the case to the Washington Supreme Court

**June 26, 2008** Washington Supreme Court hears oral arguments in Washington State Supreme Court Decision on Residents Opposed to Kittitas Turbines, et al. v. State Energy Facility Site Evaluation Council (EFSEC), et al.

**October 2008** Washington Supreme Court finds in favor of the State of Washington thereby enabling Horizon Wind Energy to proceed with building its 109 MW wind farm.

### **Summary of Arguments**

There were two main arguments in Kittitas County and its NIMBY allies' arguments against the Energy Facility Site Evaluation Council (EFSEC) and the State of Washington. The first was the assertion that the state lacks the authority to preempt local land use policies. The second was the charge that the EFSEC process was marred by unfair biases, particularly on the part of the Council's chair, Jim Luce. Kittitas County based this argument on highly-selective quotes out of context that it excerpted from over 5 years of project review and public process.

The Court roundly rejected Kittitas County's claims that the state is overstepping its authority in pre-empting the Board of County Commissioners' opposition to the Kittitas Valley Wind Power Project. The Court confirmed that the EFSEC statute is



constitutional and that the state can reserve ultimate authority over siting of proposed power plants. In cases where local jurisdictions' policies duplicate state processes, the state, through EFSEC, has the clear authority to pre-empt. The whole purpose of creating EFSEC over 30 years ago was to assemble a high-level, "one stop" permitting agency that could make decisions with an eye to the greater good of all Washingtonians. The Supreme Court ruling confirms the Legislature's intent.

Allegations that EFSEC, under the leadership of Jim Luce, acted improperly by "prejudging" the application in calling the county's position "very unpersuasive" were central to the Kittitas County's and its allies' case against the state. Despite the unfounded assertions made by Kittitas County, Jim Luce and his EFSEC colleagues were scrupulous in their adherence to the Council's rigorous review process. Thurston County Superior Court judge Richard Hicks, on February 22, 2008, sided against the county and its allies saying, "I don't think there's been a minimum threshold here that substantiates the allegation of impropriety." The Supreme Court agreed.

Equally ludicrous was Kittitas County's assertion that EFSEC erroneously ruled that Horizon had acted in good faith while working with the County. In point of fact, it is entirely in EFSEC's discretion to make determinations of what constitutes "good faith" under its own regulations.

The real issue, however, is that Horizon repeatedly tried to address the county's concerns by making several revisions to their proposal. Originally proposed as a 121-turbine farm, the developer reduced the project to 65 turbines to comply with EFSEC's minimum setback from residences of 1,640 feet. The county insisted on 2,500 feet, which would have made the project economically unviable.

Nothing Horizon did, however, satisfied the county, which continually refused to enumerate what stipulations it would require of Horizon to support its proposed project. For example, Kittitas County cited "shadow flicker" as a reason for rejecting the project despite the indisputable fact that the issue had already been resolved by Horizon's commitment to shut down any turbine that would cause this undesirable effect. It was Kittitas County, not the developer that failed to act in good faith.

The county's underlying hostility to the spirit of the EFSEC statute was most salient in their argument that Jim Luce was overly concerned with "institutional self-preservation." It can only be said that the alternative is immeasurably more chilling. In a society governed by laws, one can only hope that public servants charged with administering legislatively created bodies will be very inclined toward "institutional self-preservation." In this case "institutional self-preservation" is equivalent the preservation of the rule of law.

Governor Gregoire, in her letter of September 18, 2007, wrote that "The benefits of this Project are considerable and will accrue to the citizens across our state.... Projects like these are consistent with Washington's long-standing commitment to clean energy, as expressed by the Legislature and recently by a majority of the state's citizens through l-



937.” With the Supreme Court now confirming Washington State’s authority to site clean energy facilities in a way that makes sense for the state as a whole, we can look forward to many more beneficial projects like the Kittitas Valley Wind Power Project.

### **Editorial Comments on the Kittitas Valley Wind Power Project**

#### **Yakima Herald-Republic Editorial**

**“Governor should OK revised wind farm for Kittitas County.”**

**April 3, 2007**

“The state panel [EFSEC] offered a detached review of the situation, out of the local political tempest the wind farm proposal had generated prior to the local action.”

“Horizon has already made significant changes to soften impact of the project, including cutting the number of wind turbines nearly in half—from 121 to 65. That’s no small concession.”

“...one of the best selling points for the profitability of this wind farm is that it is in close proximity to a major corridor of power transmission lines that already cuts through the area. That can’t be too pleasing to the eyes either.

“Unfortunately, we don’t live in an ideal world and concessions and compromises are going to have to be made as the state embarks on serious energy initiatives.”

#### **The Seattle Times Editorial**

**“An Inconvenient View.”**

**April 10, 2007**

“Washington needs more wind energy—especially after voters approved Initiative 937 requiring utilities to use more non-hydropower renewable energy.”

“But the state’s proposed permit has reasonable limitations, including setbacks and a requirement to turn off the turbines in some conditions to prevent ‘shadow flicker.’”

#### **The News Tribune Editorial**

**“State Energy Battles are Blowing in the Wind.”**

**April 10, 2007**

“In the case of proposed energy facilities, however, local opposition alone cannot be allowed to kill projects that provide a greater good for the state.”

“The council, or EFSEC as it is known, was created years ago to balance the often conflicting environmental and economic interests involved in siting proposed power projects.”

