SUBMITTED VIA EMAIL ONLY

July 12, 2024

Energy Facility Site Evaluation Council
Via email to comments@efsec.wa.gov

Re: Comments on Draft Proposed Council Order No. 893 (Whistling Ridge Energy Project)

Dear Chair Drew and Members of the Council:

Thank you for the opportunity to comment on Draft Proposed Council Order No. 893 ("Draft Order"), involving the Whistling Ridge Energy Project. To ensure accuracy and lawfulness of the Draft Order, Friends of the Columbia Gorge ("Friends") respectfully requests several minor but important corrections and modifications to the Draft Order before it is finalized and entered as a final order. Friends' requests and their bases will be detailed below.

Request #1

Draft Order, page 1:

> WRE was a subsidiary of ~~**SDS Lumber Company**~~ **S.D.S. Co., LLC**. The president of ~~**SDS Lumber Company**~~ **S.D.S. Co., LLC** and of WRE was Jason ~~**Spadero**~~ **Spadaro**.[1]

Draft Order, page 2:

> Thereafter, according to TCT, from 2018 to 2021 SDS Lumber Co. ~~**(parent company of WRE)**~~ fell into internal conflict and dissolved as a company.

Basis for Request #1:

According to numerous representations made by Whistling Ridge Energy, LLC ("WRE") during the site certification proceedings for the Whistling Ridge Energy Project, WRE was a wholly owned subsidiary of S.D.S. Co., LLC, *not* of SDS Lumber Co.

[1] "Spadaro" is misspelled several times in the Draft Order. That should be corrected throughout.

For example, in WRE's October 12, 2009 Amended Application for Site Certification Agreement, WRE represented that "Whistling Ridge Energy LLC . . . is wholly-owned by S.D.S Co., LLC." (Amended Application at § 1.1.2.) Throughout the site certification proceedings from 2009 to 2012, that same representation was made repeatedly by WRE, and was never modified.

The Council's Order No. 869 reflects that ownership status: "Whistling Ridge Energy, LLC is owned by S.D.[S]. Co., LLC, which is also considered to be a Site Certificate Holder as defined in the Site Certificate Agreement, SCA, Sec. III.A.1." (Order No. 869 at 12.)

These points (distinguishing between SDS Lumber Co. and S.D.S. Co., LLC and clarifying that the parent company of WRE was S.D.S. Co., LLC) were raised and explained several times in the instant proceedings, including in the following places in the record:

- in the email comments of Friends dated May 15, 2024 (Comment #020 at 2),
- in the document attached to those comments (Comment #020 at 4),
- on page 3 of the May 16, 2024 comments of SOSA and Friends (Comment #022 at 5),
- in the testimony of Nathan Baker at the hearing on the Transfer Application (as reflected at timestamps 30:47 to 31:30 in the video recording of the public hearing on the Transfer Application and in the meeting minutes at page 25, lines 13 through 25),
- and were also raised as issues for a potential adjudicative proceeding in Friends and SOSA's Application for an Adjudicative Proceeding (at page 9, footnote 7, and at page 19).

Friends respectfully requests the modifications to the Draft Order shown above, because without the requested modifications, the Draft Order is inaccurate.[2]

Request #2

Draft Order, page 3:

> WAC ~~**463-66-100(1)**~~ **463-66-100** provides that no site certification agreement may be transferred, including indirectly through transfer of control of the site certification agreement owner, without Council approval. If the SCA is acquired by a change in corporate ownership—as was the case here—the successor in interest must apply to the Council for approval to continue activities under the certificate. **Friends and SOSA argue that WAC 463-66-100 requires Council approval prior to**

[2] While the requested modifications may result in a lack of clarity and context given that the Draft Order elsewhere refers to SDS Lumber in a couple of places, any such lack of clarity will have been caused by WRE. WRE itself referenced only SDS Lumber Co. (and not S.D.S. Co., LLC) in its Transfer Application, never explained to the Council how or why the transfer of ownership allegedly came from SDS Lumber Co. (which, according to the record, never owned WRE) rather than from S.D.S. Co., LLC, and never disclosed or established the exact nature of the relationships between the various companies.

transfer of an SCA, a question that we do not decide because TCT is not eligible for a transfer under any circumstances.[3]

Basis for Request #2:

Throughout these proceedings, Friends and SOSA have repeatedly argued and explained that WAC 463-66-100 and -100(1) require express approval from the Council **prior to** any requested transfer, that transfers performed without such approval are unlawful and in violation of the Council's Rules, and that Twin Creeks Timber ("TCT") therefore lacks standing to file an application to transfer the site certificate agreement because WAC 463-66-100(1) requires such an application to be filed by a "certification holder," of which TCT is not one.[4]

Indeed, WAC 463-66-100 says that no SCA "shall be transferred . . . without express council approval" and refers in the second sentence to certain types of transfers in the future tense ("is to be acquired"). Moreover, WAC 463-66-100(1) expressly refers to a "certification holder *seeking to transfer*" an SCA and requires *the holder* seeking such a transfer to submit a formal application to the Council (emphasis added). (Here, TCT is not such a holder.) Finally, the SCA itself mandates that "[n]o change in ownership or control of the Project shall be effective *without prior Council approval* pursuant to EFSEC rules and procedures." (WREP SCA at p. 16, § III.K.2.) (emphasis added).[5]

The sentence in the Draft Order that reads "If the SCA is acquired by a change in corporate ownership—as was the case here—the successor in interest must apply to the Council for approval to continue activities under the certificate" could imply a holding that the Council was rejecting Friends and SOSA's arguments and intending to rule that transfer applications can (or even should) be submitted after a corporate transfer has already occurred (as was the case with this Transfer Application). Friends submits that such a holding would be contrary to the plain language and intent of the Council's Rules, and would also be bad public policy, because it would encourage future certificate holders to unilaterally accomplish transfers and then later seek retroactive approval from the Council, which would lead to a policy of begging for forgiveness, rather than asking for permission.

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[3] This suggested new sentence could also be added via footnote.

[4] *See, e.g.*, pages 8–11 of the May 16, 2024 comments of SOSA and Friends (Comment #022 at 10–13); testimony of Nathan Baker at the hearing on the Transfer Application (timestamps 31:30 to 32:41 in the video recording of the public hearing on the Transfer Application and in the meeting minutes at page 26, lines 1 through 21; testimony of J. Richard Aramburu at the hearing on the Transfer Application (timestamps 34:45 to 37:11 in the video recording of the public hearing on the Transfer Application and in the meeting minutes at page 28, line 11 through page 29, line 16); Friends & SOSA's Application for an Adjudicative Proceeding at 9:4–12, 18–19.

[5] One year ago, EFSEC Staff adeptly flagged WRE's violations of the SCA in an internal memo: "The Petitioner is in violation of the SCA. . . . Ownership of WRE was transferred from SDS Lumber Co. to Twin Creeks Timber in November 2021 without Council approval. The Petitioner [*i.e.*, WRE] has not complied with its SCA. The Assistant Attorney General will provide the Council with a legal brief on this topic." (July 2023 Draft Memorandum from Lance Caputo, EFSEC Site Specialist, to Amí Hafkemeyer, EFSEC Director of Siting and Compliance, at 8) (copy included on flash drives submitted to EFSEC and found at \EFSEC Public Records\ Subject_WRE_Thursday__July_13__2023_92049_PM_Redacted.pdf).

Because the Draft Order would dispose of TCT's Transfer Application on other grounds, it is unnecessary to include any such holding (implied or express) on these issues and arguments. Instead, the Council should add new language to this order, as suggested above, to acknowledge the arguments by Friends and SOSA but clarify expressly that the Council is not deciding these questions of law.

Finally, Friends believes that the reference to WAC 463-66-100(1) at the beginning of the above-quoted passage was a typographical error, and that the intent was to refer to WAC 463-66-100 as a whole. Friends requests that correction as well.

Request #3

Draft Order, page 5, footnote 3:

> Friends argues that "effective date" ~~**and "execution" refer**~~ **refers** to the date of the Governor's signature of the SCA, while WRE argues that "effective date" ~~**and "execution" refer**~~ **refers** to the date the applicant signs the SCA, following the Governor's signature.

Basis for Request #3:

As currently drafted, the above-quoted sentence misunderstands and/or mischaracterizes Friends' arguments. As Friends and others explained,[6] the "effective date" as that term is used in WAC 463-68-080(1) for this SCA was March 5, 2012 (the date the Governor signed the SCA),[7] while the fully "executed" or "binding" date for this SCA was November 18, 2013 (the date Mr. Spadaro signed the SCA). These are two different operative dates as applicable to this SCA and its expiration, and there is a significant difference between them here, but only because Mr. Spadaro chose to withhold his signature from the SCA for approximately twenty months. Importantly, Friends did **not** argue, as the Draft Order suggests, that these two operative dates were the same.

In contrast with Friends' arguments, WRE appeared to argue[8] that "effective date" and "execution" always have the same meaning and are always the same date for every SCA, which they argued for this SCA was November 18, 2013, the date of Mr. Spadaro's signature.

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[6] Friends' arguments on these issues were repeatedly explained throughout these proceedings, most comprehensively in a May 16, 2024 letter (Comment #015).

[7] March 5, 2012 was also the date of "issuance" of the SCA, the date the SCA was "in effect," and the "date of certification," as those terms are used in the applicable law. (Comment #015 at 3.)

[8] In the Extension Request itself, WRE appeared to argue that the terms "effective date" and "execution" as used in the applicable law always have the same meaning. (*See* Extension Request at 3–4.) With that said, WRE's arguments on these points in these proceedings were not exactly clear, partly because they tended to focus almost exclusively on the date of "execution," downplaying or ignoring the legal significance of the "effective date." *See, e.g.*, testimony of Emily Schimelpfenig, attorney for WRE and TCT, at the hearing on the Extension Request (timestamp 1:34:20 to 1:34:42 in the video recording of the public hearing on the Extension Request and in the meeting minutes at page 68, lines 13 through 18) ("As Tim [McMahan] indicated, several provisions in the Site Certificate Agreement provide that construction must be started ten years *from the effective date—or from the date of execution—I'm sorry—*

While it would be accurate to retain the reference to "execution" in the above-quoted sentence in summarizing WRE's arguments alone, that could be confusing, because neither "execution" nor "executed" are mentioned anywhere else in the Draft Order, other than the quotation from the SCA in footnote 2. Friends respectfully suggests modifying the sentence as shown above, to delete both references to "execution." That would eliminate the inaccuracies and also any possible confusion.

Request #4

Draft Order, page 2:

> ~~**TCT's**~~ **TCT** submitted its preliminary request for an extension of the WRE SCA to EFSEC just before the SCA ~~**would have**~~ expired under Friends' theory.

Basis for Request #4:

Friends requests two modifications to this sentence in the Draft Order. The first is to correct a typographical error ("TCT's" should be "TCT").

The second is to correct the Draft Order's characterization of Friends' theory regarding expiration of the SCA. Friends' theory is not that the SCA *would have* expired on March 5, 2022 (as implied in the sentence above), but rather that the SCA *did* expire on that date. Elsewhere, the Draft Order (twice) accurately summarizes Friends' theory of expiration: "Friends argues that the SCA expired March 5, 2022" (Draft Order at 2) and "under Friends' interpretation, the SCA expired March 5, 2022" (Draft Order at 5). Friends requests the removal of the "would have" language in the sentence identified above, in order to accurately summarize Friends' theory of expiration and ensure consistency with the rest of the Draft Order.

If the "would have" language is not removed from this sentence, then it could be read as either Friends or the Council endorsing a notion that the ten-year deadline was somehow tolled by the filing of the draft extension request (referred to in the Draft Order as the "preliminary request"). But there was no tolling mechanism available to WRE for the filing of an extension request—preliminary, draft, or otherwise. Nothing in EFSEC's rules prescribe any sort of tolling of any of the applicable ten-year deadlines.[9] To avoid uncertainty about whether this Draft Order invokes any tolling concepts, and because the Draft Order correctly decides that the WRE SCA is now expired, the words "would have" should be removed as suggested above.

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which is the date that both parties agreed to bind themselves to the agreement. That date is November 18, 2023.") (emphasis added).

[9] The timelines and rules in Washington are in contrast with EFSEC's counterpart agency in Oregon, the Oregon Energy Facility Siting Council, which allows only three years for certificate holders to commence construction, but subject to up to two, three-year extensions (for a total of nine years), OAR 345-027-0385(1), (3), (4), and upon the filing of a preliminary application for an extension of a deadline, that deadline is tolled by rule until the extension request is acted upon, OAR 345-027-0385(2).

Request #5

Draft Order, page 5:

> An unusual aspect of this SCA is its allowance that ~~***completion of construction***~~ **and** initiation of operations (called "Substantial Completion") need not be achieved until ten years after exhaustion of appeals of necessary state and federal permits. In essence, the SCA ~~**provides**~~ **purports to provide** what amounts to an automatic extension of time for the ~~***completion***~~ **of construction and** commencement of operations following state and federal permit appeals, while nonetheless retaining the ten year expiration date for failure to ~~***start***~~ **start** construction. This provision ~~**about when construction must be completed**~~ is not particularly relevant here, because the certificate holder has not met the ten year deadline for starting construction.

Basis for Request #5:

As noted in the above-quoted passage of the Draft Order, the SCA contains an "unusual" provision regarding "Substantial Completion." That provision is found in Article I, Section B of the SCA:

> This Site Certification Agreement authorizes the Certificate Holder to construct the Project such that Substantial Completion is achieved no later than ten (10) years from the date that all final state and federal permits necessary to construct and operate the Project are obtained and associated appeals have been exhausted[.]

(WREP SCA at p. 8.)

The Draft Order misunderstands the effect of this provision, by describing "Substantial Completion" as that term is used within the SCA as meaning "completion of construction and initiation of operations." (Draft Order at p. 5) But in fact, the SCA itself provides a definition of "Substantial Completion," and that definition says nothing about the completion of construction, but rather refers only to the initiation of operations:

> "Substantial Completion" means the Project is generating and delivering energy to the electric power grid.

(WREP SCA at p. 13, § II.29.)

Because "Substantial Completion" is defined by the SCA itself to only involve the initiation of commercial operations, and not the completion of construction, the references to "completion of construction" in the Draft Order should be removed.

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In fact, there is no reference in the applicable law, and only a single reference in the terms and conditions of the SCA, to the completion of construction, and that single reference implies that there was no real deadline to complete construction:

> The Certificate Holder may begin Commercial Operation of some wind turbine generators *prior to completing construction* of all wind turbine generators and other Project components, provided all necessary Project elements are in place for safe operation of the completed wind turbine generators and their operation will not adversely affect any obligations under this Agreement.

(WREP SCA at p. 8, § I.B (emphasis added).)

Based on all of this, the references to "completion of construction" should be removed from the Draft Order, as discussed above. Otherwise, the above-quoted paragraph will be inaccurate.

Finally, the language of this paragraph in the Draft Order should be modified to hedge somewhat on whether the SCA "provides what amounts to an automatic extension" until the completion of all federal and state permit appeals. (Draft Order at 5.) In reality, the language in this provision of the SCA would never come into effect to give any sort of "extension," because WAC 463-68-080(2) mandates a deadline of ten years from the effective date of the SCA for commercial operations to commence, and this requirement of WAC 463-68-080(2) would supersede any contrary language within the SCA itself, as acknowledged within the "Order of Precedence" section of the SCA. (*See* WREP SCA at p. 17, § III.L (mandating that "[a]pplicable State of Washington statutes and regulations" takes precedence over "[t]he body of this Site Certification Agreement").) Furthermore, the language in the SCA regarding ten years from all permit appeals would not constitute an extension pursuant to WAC 464-68-080(2), because that rule requires the certificate holder to "request" any extension of the ten-year period for commencing commercial operations, and this certificate holder never requested any such extension.

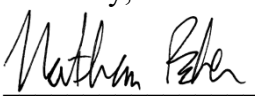
Finally, construing the SCA to authorize a ten-year extension from when all permit appeals have been exhausted would lead to absurd results, because it would mean that the ten-year period for commencing commercial operations will not have even started yet for this Project, given that WRE never obtained all necessary permits (such as forest practice conversion permits (*see* WREP SCA at p. 23, § IV.E.6 & pp. 29–30, § IV.M).)[10] The Council should not endorse any interpretation of its own SCA that would give a certificate holder twenty-two years (and counting) to commence commercial operation of a project after it is approved by the Governor—particularly where the Draft Order acknowledges that the provision in question "is not particularly relevant" to the proposed holding, and therefore it is particularly inappropriate for the Council to construe this provision. Accordingly, the Council should change the wording of the Draft Order as suggested above (change "provides" to "purports to provide").

[10] Friends argued these points at the hearing on the Extension Request, as reflected at timestamps 28:23 to 28:57 in the video recording of the public hearing on the Extension Request and in the meeting minutes at page 22, line 15 through page 23, line 1).

Conclusion

In order to ensure an accurate and legally correct final order in this matter, the Council should modify the Draft Order as requested above. Thank you very much for your time and attention to this important matter.

Sincerely,



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