

1 BEFORE THE STATE OF WASHINGTON
2 ENERGY FACILITY SITE EVALUATION COUNCIL

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4
5 In the Matter of the Application No. 2009-
6 01:
7 WHISTLING RIDGE ENERGY, LLC:
8 WHISTLING RIDGE ENERGY PROJECT

TWIN CREEKS TIMBER, LLC’S AND
WHISTLING RIDGE ENERGY, LLC’S
RESPONSE TO FRIENDS OF THE
COLUMBIA GORGE’S OBJECTIONS
TO HEARINGS PROCESS AND
SCHEDULING MOTION

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11 **I. INTRODUCTION**

12 Twin Creeks Timber, LLC (“TCT”) and Whistling Ridge Energy, LLC
13 (“Whistling Ridge”) (together, “Applicant”) respectfully request that the Energy
14 Facility Site Evaluation Council (“EFSEC” or “Council”) deny the Friends of
15 the Columbia Gorge’s (“Friends”) Objections to Hearings Process and
16 Scheduling Motion (“Motion”).

17 On November 18, 2013, after an adjudicative proceeding and
18 environmental review of the Whistling Ridge Energy Project’s (“Project”)
19 Application for Site Certification (“ASC”), Applicant and Governor Christine
20 Gregoire executed a Site Certificate Agreement for the Project (“SCA”). On
21 September 13, 2023, pursuant to WAC 463-66-100, Applicant requested a
22 transfer of Whistling Ridge’s ownership (“Transfer Request”). That same day,
23 Applicant requested an extension to the deadline to begin construction under the
24 SCA from November 2023 to November 2026 (“Extension Request”).

25 After EFSEC filed a notice of separate public hearings on the Transfer
26 Request and the Extension Request (together, the “Requests”), Friends filed the
Motion asserting that EFSEC was violating its own rules, the Open Public

1 Meetings Act (“OPMA”), the State Environmental Policy Act (“SEPA”), and
2 the appearance of fairness doctrine. Many of the issues raised by Friends are
3 best left to EFSEC to resolve. However, Applicant files this limited response to
4 the alleged SEPA violations. For the reasons stated below, we respectfully
5 request that EFSEC deny the SEPA objection because EFSEC is not required to
6 receive an environmental checklist and make a threshold determination on the
7 Requests.

8 II. FACTUAL BACKGROUND

9 Whistling Ridge Energy, LLC filed its initial application, with an
10 environmental checklist, on March 10, 2009. After conducting a review,
11 EFSEC made a determination of significance and proceeded to prepare, first a
12 draft, and then a Final Environmental Impact Statement (“FEIS”). The FEIS
13 was one of the most comprehensive in EFSEC history, covering everything
14 from impacts on air quality to biological resources to impacts on the built
15 environment, such as land use, recreation, visual, and noise. The FEIS’
16 comprehensive analysis informed the recommendation to the Governor and the
17 Final Decision. *See* Letter from EFSEC to Governor Christine Gregoire at 1
18 (Jan. 4, 2012); Letter from Governor Chrstine Gregoire to EFSEC at 1 (Mar. 5,
19 2012).

20 Friends appealed Governor Gregoire’s decision to the Washington
21 Supreme Court, raising several constitutional, statutory, and evidentiary
22 challenges. *Friends of Columbia Gorge, Inc. v. State Energy Facility Site*
23 *Evaluation Council*, 178 Wn.2d 320, 344, 310 P.3d 780 (2013). The Supreme
24 Court unanimously upheld the approval of the Project and affirmed the
25 underlying review process. *Id.* at 349. The court found that the opponents’
26 challenge focused on “technical” alleged deficiencies and an “extreme reading”

1 of RCW Ch. 80.50, EFSEC’s administrative rules, and SEPA, ignoring “the
2 broader framework of the application process.” *Id.* at 335, 344. The court ruled
3 that Friends’ argument “fails to meet its burden under the APA,” *id.* at 342, and
4 that there was “no basis” to reverse the EFSEC’s recommendation or the
5 Governor’s approval. *Id.* at 326. Friends also challenged the NEPA FEIS
6 supporting Bonneville Power Administration’s decision to grant Project
7 interconnection, further delaying moving forward with the Project.

8 After years of delays, the Applicant now proposes minor SCA
9 amendments that would have no direct or indirect impact on the environment.
10 The Transfer Request proposes to transfer the controlling ownership in
11 Whistling Ridge from SDS Lumber Co. to TCT. Transfer Request at 1. The
12 Extension Request proposes to extend the construction start deadline from
13 November 2023 to November 2026. Extension Request at 1. During the
14 extension period, Applicant plans to update its wildlife, noise, and visual
15 studies and develop a schedule for SCA compliance and SEPA review. *Id.* at
16 Attachment A. Applicant does not propose any other changes to the SCA and
17 acknowledges that an additional SCA amendment, including any supplemental
18 environmental review, may be necessary prior to any other Project changes. *Id.*
19 Applicant is not proposing any imminent efforts to develop or construct the
20 Project.

21 III. ARGUMENT

22 A. **EFSEC Has Not Violated SEPA Rules by Forgoing an 23 Environmental Checklist Because SEPA Compliance Was Completed When a FEIS Was Developed for the Project.**

24 Generally, an environmental checklist is required for a proposal. *See*
25 WAC 197-11-315(1). However, EFSEC rules expressly allow an applicant to
26 forgo submission of an environmental checklist when the Council and

1 Applicant agree that “SEPA compliance has been completed.” WAC 463-47-
2 060(1). Here, SEPA compliance was completed during the SEPA review of the
3 ASC. *See* EFSEC, Whistling Ridge Energy Project: Final Environmental
4 Impact Statement, s. 1.3 (Aug. 2011).

5 **B. EFSEC Is Not Required to Issue a Threshold Determination for the**
6 **Transfer Request Because EFSEC Is Not Taking “Action,” and the**
7 **Extension Request Is Categorically Exempt.**

8 A threshold determination is not required because the Requests are not an
9 action or are categorically exempt. A threshold determination is required for
10 “any proposal which meets the definition of action and is not categorically
11 exempt, subject to the limitations in WAC 197-11-600(3).” WAC 197-11-
12 310(1). Under this rule a threshold determination is only required when the
13 proposal is an “action” as defined by WAC 197-11-704 *and* the proposal is not
14 categorically exempt as provided under WAC 197-11-800 to -890. *Id.* Here,
15 the Transfer Request is not an “action” while the Extension Request is
16 categorically exempt.

17 **1. The Decision on the Transfer Request Is Not an Action**
18 **Because It Will Not Directly Modify the Environment.**

19 Friends incorrectly asserts that the Transfer Request would result in
20 “action” as defined in WAC 197-11-704. The SEPA rules broadly define
21 “action” as “as further specified below: [n]ew and continuing activities
22 (including projects and programs) entirely or partly financed, assisted,
23 conducted, regulated, licensed, or approved by agencies.” WAC 197-11-
24 704(1)(a) (*italics omitted*). “Action” is further broken into to two categories:
25 “project actions” and “nonproject actions.” A project action is “a decision on a
26 specific project, [including] ... decisions to ... [l]icense...any activity that will
directly modify the environment.” WAC 197-11-704(2)(a)(i). A “nonproject

1 action” is an action that is “different or broader than a single site specific
2 project, such as plans, policies, and programs.” WAC 197-11-774; *see* WAC
3 197-11-704(2)(b).

4 The Transfer Request is not an “action” because it does not fall into one
5 of the categories that further define “action.” The Transfer Request is not a
6 nonproject action because it is “a decision on a specific project,” the Project.
7 The Transfer Request is not a “project action” because it does not propose to
8 “directly modify the environment.” WAC 191-11-704(2)(a)(i); *see* WAC 197-
9 11-704(1)(a) (stating that the definition of “action” includes activities “as
10 further specified below”). The Transfer Request proposes to change who owns
11 the Project, not to directly modify the Project or begin any work that leads to
12 modification. Since the Council will not be deciding to “directly modify” the
13 environment, the decision is not an “action,” and a threshold determination is
14 not required.

15 **2. The Extension Request Is Categorically Exempt Because It**
16 **Only Proposes Surveys During the Extension Period.**

17 The decision on the Extension Request does not require a threshold
18 determination because it falls under the categorical exemption for surveys and
19 reports. A “categorical exemption” is “a type of action, specified in these rules,
20 which does not significantly affect the environment.” WAC 197-11-720. One
21 type of categorical exemption is for activities that involve “Basic data
22 collection, research, resource evaluation ... and the conceptual planning of
23 proposals.” WAC 197-11-800(17). Under this exemption, when an action
24 would only involve surveys or data collection, it is exempt from the SEPA
25 process. The Extension Request falls under this exemption because the

1 Applicant only proposes to gather additional data and potentially develop
2 conceptual planning for an SCA amendment. Extension Request at 1.

3 **C. Even if the Requests Are Subject to SEPA Review, a SEIS**
4 **Determination Is Required, Not an Environmental Checklist and**
5 **Threshold Determination.**

6 EFSEC is not violating WAC Ch. 197 (“SEPA Rules”) or its own rules
7 by proceeding without an environmental checklist and a threshold
8 determination because the Requests propose modification to an approved
9 Project. In its Motion, Friends fails to recognize that there is an alternative
10 process for amendments to projects that have already undergone environmental
11 review. The Supplemental Environmental Impact Statement (“SEIS”) process
12 under WAC 197-11-405(4) and WAC 197-11-620 is what applies here.

13 SEPA rules recognize that even after a FEIS has been completed and a
14 proposal approved, there may still be additional actions that an agency must
15 take. *See Thornton Creek Legal Def. Fund v. City of Seattle*, 113 Wn. App. 34,
16 49, 52 P.3d 522 (2002) (holding that it was appropriate to rely on a FEIS
17 prepared for a comprehensive plan to apply to general development plans for
18 the same area). EFSEC analyzes these additional actions or proposed changes
19 under the SEIS process, which does not require an environmental checklist.
20 WAC 197-11-405(4); WAC 197-11-620; *Thornton Creek Legal Def. Fund*, 113
21 Wn. App. at 49 (concluding that actions that do not have an environmental
22 impact substantially different from an earlier proposed action “do not require
23 a[n] [environmental] checklist”). The determination of whether a SEIS is
24 required is also not a threshold determination. *SEAPC v. Cammack II*
25 *Orchards*, 49 Wn. App. 609, 613, 744 P.2d 1101 (1987) (“[a]n action which
26 does not have an environmental impact substantially different from an earlier
proposed action does not require...a new threshold determination”). Even if the

1 agency decides that a SEIS is required, it is prepared pursuant to WAC 197-11-
2 400 to 197-11-600, so an environmental checklist (WAC 197-11-315) and
3 threshold determination (WAC 197-11-330) are not required. *See* WAC 197-
4 11-620(1).

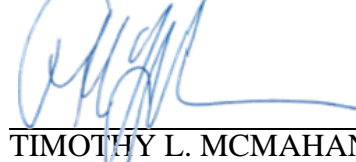
5 Here, EFSEC completed a full environmental review, including
6 environmental checklist and threshold determination, during the Project’s SEPA
7 review. The Requests propose Project amendments, so the SEIS process
8 applies. That process appropriately does not require an environmental checklist
9 and threshold determination because *that has already been done* for this
10 Project, resulting in a FEIS. *See* EFSEC, Whistling Ridge Energy Project: Final
11 Environmental Impact Statement (Aug. 2011).

12 IV. CONCLUSION

13 Applicant recognizes that conducting an open and fair public process is
14 important and hopes that the Council can resolve Friend’s notice, OPMA, and
15 appearance of fairness objections. However, EFSEC is not required to request
16 an environmental checklist or make a threshold determination to proceed with
17 the Requests. For the reasons stated above, Applicant respectfully requests that
18 the Council deny the SEPA objection outlined in the Objections to Hearings
19 Process and Scheduling Motion.

20 DATED: May 14, 2024.

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1 **CERTIFICIATE OF FILING AND SERVICE**

2 I hereby certify that on May 14, 2024, I filed the forgoing TWIN CREEKS TIMBER,
3 LLC’S AND WHISTLING RIDGE ENERGY, LLC’S RESPONSE TO FRIENDS OF THE
4 COLUMBIA GORGE’S OBJECTIONS TO HEARINGS PROCESS AND SCHEDULING
5 MOTION, dated May 14, 2024, with the Washington Energy Facility Site Evaluation
6 Council through electronic filing via email to comment@efsec.wa.gov.

7 I hereby certify that I have this day served the forgoing document upon the person
8 named below via email:

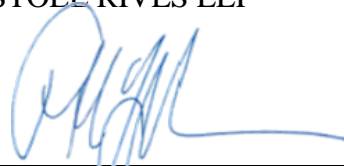
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