

SUBMITTED VIA EMAIL ONLY

May 16, 2024

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

Re: Request to Confirm Expiration and Termination of the March 5, 2012 Site Certification Agreement for the Whistling Ridge Energy Project

Dear Chair Drew and Members of the Council:

Friends of the Columbia Gorge (“Friends”) submits the following comments regarding the September 13, 2023 request filed by Whistling Ridge Energy LLC (“WRE”) to extend the term of the March 5, 2012 Site Certification Agreement (“SCA”) for the Whistling Ridge Energy Project (“Whistling Ridge” or “WREP” or “Project”) (hereinafter “Extension Request”), as well as the September 13, 2023 Application filed by WRE to transfer the Whistling Ridge SCA to Twin Creeks Timber, LLC (“TCT”) as the new parent of WRE (hereinafter “Transfer Application”). Friends is a nonprofit organization with more than 4,500 members dedicated to protecting and enhancing the resources of the Columbia River Gorge, and with strong interests in responsible energy generation and the proper implementation of state law governing the approval, construction, and modification of large energy facilities in Washington.

Although WRE’s requests involve dozens of complex, disputed issues, one of those issues rises to the forefront as a threshold, dispositive issue. Specifically, **the March 5, 2012 SCA has expired**, both by operation of law and by its own terms.

Furthermore, because the SCA has expired, the Council lacks jurisdiction and authority to modify, reinstate, or extend the term of the expired SCA. The Council should confirm the expiration of the SCA in a Resolution, just as it has done for other projects in the past. All other issues here are moot.

A site certification agreement is both a permit and a contract. In the sense that the Whistling Ridge SCA was a permit, it expired on March 5, 2022, ten years after the “effective date” of the SCA, pursuant to WAC 463-68-030, -080(1),¹ and -080(2). And in the sense that the

¹ “If the certificate holder does not start or restart construction within ten years of the *effective date* of the site certification agreement, or has canceled the project, the site certification agreement shall expire.” WAC 463-68-080(1) (emphasis added).

SCA was a contract, “all rights” under the SCA ceased no later than November 18, 2023, ten years after the SCA’s fully “executed” or “binding” date, pursuant to section I.B of the SCA.²

1. As a state-issued permit, the Whistling Ridge SCA expired on March 5, 2022 by operation of law, ten years after its “effective date.”

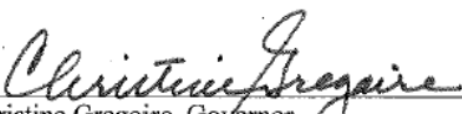
A site certification agreement is both a permit and a contract. In the sense that the Whistling Ridge SCA was a permit, its “effective date” was March 5, 2012, as indicated above the Governor’s signature on the SCA (WREP SCA at 42 (“Dated and *effective* this 5th day of March, 2012.”) (emphasis added)). And pursuant to WAC 463-68-030, -080(1), and -080(2), WRE had ten years from that effective date, until March 5, 2022, to begin construction, or else “the site certification agreement shall expire.” Thus, WRE’s deadline to start construction was more than two years ago. The Whistling Ridge SCA expired on March 5, 2022 by operation of law.

The Governor executed the SCA on March 5, 2012, and also expressly made the SCA “effective” on that same date (WREP SCA at 42), in conformance with RCW 80.50.100(3)(b) (“Within 60 days of receipt of such draft certification agreement, the governor shall either approve the application and execute the certification agreement or reject the application”) and with WAC Chapter 463-64 (“issuance of a site certification agreement”).

As part of the SCA, immediately above her signature, the Governor stated that the SCA was “[d]ated and *effective* this 5th day of March, 2012” (emphasis added):

Dated and **effective** this 5th day of March, 2012.

FOR THE STATE OF WASHINGTON


Christine Gregoire, Governor

March 5, 2012 was thus the “effective date” of the SCA as that term is used in EFSEC’s Rules. *See, e.g.*, WAC 463-68-030 (“[C]onstruction [of a project] may start any time within ten years of the *effective* date of the site certification agreement.”) (emphasis added); WAC 463-68-080(1) (“If the certificate holder does not start or restart construction within ten years of the *effective* date of the site certification agreement, or has canceled the project, the site certification agreement shall expire.”) (emphasis added); WAC 463-68-080(2) (“If commercial operations

² “If the Certificate Holder does not begin construction of the Project within ten (10) years of the *execution* of the SCA, all rights under this SCA will cease.” (WREP SCA at p. 8, § I.B (emphasis added).)

have not commenced within ten years of the *effective* date of the site certification agreement, the site certification agreement expires unless the certificate holder requests, and the council approves, an extension of the term of the site certification agreement.”) (emphasis added).

March 5, 2012 was also the date the SCA was “in effect” and the “date of certification” pursuant to the Energy Facilities Site Locations Act (“EFSLA”), which defines “[c]ertification” in pertinent part to be “*in effect* as of the date of *certification*.” RCW 80.50.020(6) (emphasis added). Here, the “date of certification” was March 5, 2012, the date the Governor approved the application for the Project, issued the SCA, executed the SCA, and made the SCA “effective”—all of which occurred in the context in which the SCA serves as a permit.

March 5, 2012 was also the date of “issuance” consistent with the procedures in WAC Chapter 463-64: the Council submits a “draft site certification agreement” to the Governor pursuant to WAC 463-64-020, and then the Governor decides within sixty days whether to issue the draft certificate agreement pursuant to WAC 463-64-030, in which case (and at which time) it becomes final.

Furthermore, the “effective date” in WAC 463-68-030 and -080 must mean the date the Governor approves a project on behalf of the State of Washington, as indicated by the Governor’s signature. Otherwise, an applicant could control the date for expiration of a duly issued site certification agreement under WAC 463-68-080 by indefinitely refusing to sign a Governor-approved SCA until years after the project is approved.

The context of the Siting Act and the energy siting rules shows that the intent is to make the Governor’s issuance of a signed SCA the effective date for any state-issued permit, rather than the date of the applicant’s signature. For example, RCW 80.50.100(3)(a)(i) authorizes the Governor to “[a]pprove the application and execute the draft certification agreement” (emphasis added). Similarly, WAC 463-68-020 requires a certificate holder to comply with “the terms and conditions of the site certification agreement *approved by the governor*” (emphasis added). The focus of these rules is the approval by the Governor, not the signature of the Applicant.

Accordingly, the same day that Governor Gregoire issued the SCA, she released an approval letter, stating “I have *approved* and executed the enclosed Site Certification Agreement for the Whistling Ridge Wind Energy Project in Skamania County, with the terms and conditions as recommend by the Energy Facility Site Evaluation Council.” (Governor’s Approval Letter, Whistling Ridge Energy Project (Mar. 5, 2012) (attached as Exhibit A) (emphasis added).)

WAC 463-68-030 and -080 impose a ten-year deadline from the “*effective date*” for any Governor-issued SCA for the certificate holder to start construction, or else “the site certification agreement *shall expire*.” WAC 463-68-080(1) (emphasis added). Thus, WRE’s deadline to start construction of the Project was March 5, 2022, ten years after the effective date of the SCA.

From the beginning, WRE was repeatedly warned about this deadline. On October 17, 2012, in a filing in the Thurston County Superior Court served on WRE, Friends reminded WRE of the deadline: “[WRE] has until March 5, 2022 to begin construction. *See* WAC 463-68-030, -

080.” (Pet’rs’ Resp. to Mot. to Certify for Review to Supreme Court Pursuant to RCW 80.50.140 at 8 (Oct. 17, 2012).)

Four years later, Friends reminded WRE of the deadline. On November 16, 2018, Friends and SOSA advised EFSEC in a letter, copied to the full WREP adjudication service list, including WRE, that “the SCA will expire on March 5, 2022 unless WRE seeks and receives an extension of the deadline pursuant to WAC 463-68-080” prior to that date. (Ex. B at 4.)

Thus, well in advance of the deadline to start construction, WRE was repeatedly put on notice about the deadline. Yet WRE continued to do absolutely nothing to proceed with the Project for its entire ten-year term.³ And as of now, more than two years after the SCA’s ten-year term ended, WRE *still* has no plans, intentions, or desires to start construction for the *next* two and a half years.⁴

Because WRE failed to either start construction or obtain an extension of the SCA prior to its March 5, 2022 deadline (ten years after the SCA’s “effective date”), the SCA expired on that date.

2. As a contract between the State of Washington and WRE, “all rights” under the Whistling Ridge SCA ceased no later than November 18, 2023, ten years after its fully “executed” or “binding” date.

As discussed above, a site certification agreement is both a permit and a contract. And in the sense that an SCA is a contract, “all rights” under the Whistling Ridge SCA ceased at the very latest on November 18, 2023, ten years after the SCA’s fully “executed” or “binding” date, pursuant to section I.B of the SCA: “If the Certificate Holder does not begin construction of the Project within ten (10) years of the execution of the SCA, all rights under this SCA will cease.” (WREP SCA at p. 8, § I.B.)

An SCA is not only a permit, but also a contract. *See* RCW 80.50.020(6) (defining “[c]ertification,” in pertinent part, to mean “a binding agreement between an applicant and the state”), 80.50.100(3)(b) (“The certification agreement shall be binding upon execution by the governor and the applicant.”).

In the sense that the Whistling Ridge SCA was a contract, its “binding” or fully “executed” date was at the latest November 18, 2013, the date that WRE finally signed the SCA.⁵ That was the date when WRE agreed to and became bound by the terms of the SCA. But it does not change the fact that the SCA was issued and made “effective” on March 5, 2012, the

³ WRE did not even bother to file its Extension Request until September 13, 2023, more than a year and a half after the SCA expired, and after numerous requests by EFSEC staff for WRE to submit materials for the Council’s consideration.

⁴ *See* Ex. C at 7 (internal EFSEC staff memorandum and discussion indicating that WRE “is not requesting an extension to begin construction; only for time to undertake economic and environmental studies”).

⁵ WRE defiantly withheld its signature from the SCA for more than twenty months, until November 18, 2013. (WREP SCA at 42.)

“date of certification” by the Governor. RCW 80.50.020(6). It just means that WRE did not agree to be bound by the terms and conditions of the SCA until November 18, 2013, the “binding” or fully “executed” date.

WRE’s delay in signing the SCA did not, and could not, change the SCA’s “effective” date. As discussed above, WRE had a deadline of March 5, 2022, ten years after the SCA’s “effective date,” to begin construction of the Project. And “all rights” under the SCA were set to cease no later than November 18, 2023, ten years after its full execution.

Although ignorance is no excuse, WRE was fully aware that all rights under the SCA would cease no later than November 18, 2023, because EFSEC staff repeatedly reminded WRE of this deadline. For well over a year, starting with the April 2022 Council meeting,⁶ EFSEC staff routinely and consistently updated the Council at its meetings that they were still awaiting materials from WRE regarding WRE’s intentions for the Project—materials that were not forthcoming.

For example, in May 2022, EFSEC staff scheduled a meeting with WRE representatives for June 6, 2022. Less than three hours before the scheduled meeting, WRE’s attorney, Tim McMahan, emailed EFSEC staff, asking “Hello all – Can we push this out a few weeks? We are not quite ready to move anything forward.” (Ex. D.)

Three months later, on August 22, 2022, EFSEC’s Director of Siting and Compliance, Amí Hafkemeyer, emailed Mr. McMahan, asking “Do we have an updated ETA on when we might be seeing additional amendment materials from the certificate holder?” Mr. McMahan responded, “Sigh..... I’m working on it..... T.” (Ex. E.)

EFSEC staff frequently discussed among themselves the looming November 18, 2023 deadline and WRE’s chronic failures to take the deadline seriously. For example, in July 2023, EFSEC Siting Specialist Lance Caputo indicated to EFSEC Environmental Planner Sean Greene, “I have the feeling [WRE] realized time is running out and they hastily threw together an extension request prior to this November’s expiration date. Everything about these requests is backwards.” (Ex. C at 7.)

WRE’s foot-dragging continued thereafter, even while EFSEC staff dutifully reminded WRE of the fast-approaching deadline. On September 7, 2023, Mr. Caputo informed WRE representatives that a public meeting was being scheduled regarding the status of the Project and

⁶ The April 2022 EFSEC meeting was the first time the Council heard any updates on the Whistling Ridge Project in three years and five months. During the April 2022 update, the Council prudently sensed WRE’s persistent lack of action over many years. For example, Council member Young asked how long the Project had “been mothballed,” “[w]hat’s the actual physical status or a process status of the project?” and “[h]as there been any ground disturbance or construction efforts, or has this thing just been pending for a long time in preconstruction consideration?” (EFSEC April 19, 2022 Meeting Minutes at 23–24.) Chair Drew further noted that “there has not been any . . . activity” with the Project since all litigation ended in 2018. (*Id.* at 25.) Council Member Kelly added, “I recall having another project where construction did not occur in it and it expired kind of on its own by the terms of the SCA, I thought. So I’m just curious what’s different here” (*Id.* at 27).

any requests to amend the SCA. WRE representatives requested a new meeting date. EFSEC then accommodated WRE by choosing a different (later) date, and Mr. Caputo added, “[t]he Council has a full schedule, and they are graciously making time available to review your requests to amend the SCA. If this date is not workable for you, *then there will not be sufficient time* for the Council to conduct its reviews and decide upon the requests in accordance with the applicable statutes, *prior to expiration of the SCA.*” (Ex. F at 1.) (emphasis added).

The deadline for expiration of “all rights” under the SCA was November 18, 2023. That was five months ago. All rights have ceased. And as discussed above, the SCA expired by operation of law on March 5, 2022, more than two years ago, because WRE did not begin construction prior to that deadline.

If WRE had ever actually intended to construct and operate the Project, it should have begun its resource studies and plans for the Project many years ago, and if necessary applied for amendments to the SCA well in advance of these deadlines, in order to give EFSEC sufficient time to review and decide whether to grant any needed extensions before the deadlines took effect. At this point, it is far too late. The SCA is long-since expired, both by operation of law and under its own terms.

3. The Council should adopt a Resolution confirming the expiration of the SCA.

As discussed above, the SCA has expired by operation of law, and “all rights” under the SCA have ceased. An expired SCA cannot be amended or transferred, nor its term extended. The only thing left for the Council to do is to adopt a Resolution confirming that the SCA expired.

It is the Council’s customary practice to adopt such a Resolution following the expiration of an SCA. For example, the SCA for the Cowlitz Cogeneration Project expired on February 7, 2004, ten years after the effective date of the SCA. Ten days thereafter, EFSEC Manager Allen Fiksdal announced the expiration at a Council meeting:

MR. FIKSDAL: Cowlitz. Mike and I were here when the Cowlitz SCA was approved back in 1994 on February 7th and went through several amendments. But in the last amendment it states, “if commencement of this construction has not begun by February 7, 2004”—which back then seemed like way in the future—“rights under this agreement to construct and operate the Cowlitz Cogeneration Project shall cease.” So by terms of the agreement this SCA ceased on February 7th. We have under WAC 463-36-020, Termination of a Site Certification Agreement, except pursuant to its own terms an amendment to the agreement, and then we have a whole bunch of rules about amendments. So this is not just termination. It’s not an amendment. So I think at the next meeting what we propose is that Council have some resolution memorializing that the SCA died of its own accord and officially render it under.”

CHAIR LUCE: I would support that. I’m not sure you even need a resolution.

MS. TOWNE: It is what it is.

MR. FIKSDAL: I would like the Council to go through some sort of formal process.

CHAIR LUCE: That's fine. We'll go on the record recognizing the [expiration]. That would be fine.

EFSEC Meeting Minutes (Feb. 17, 2004) at 5 (attached as Exhibit G).

Accordingly, on March 1, 2004, the Council adopted Resolution No. 308 regarding the Cowlitz Cogeneration Project, which includes the following findings and conclusions:

Approval of this resolution will formally acknowledge that the SCA and the state's authorization for Weyerhaeuser to construct and operate the Project has terminated pursuant to the SCA's terms.

* * *

[B]ecause construction did not start by February 7, 2004, the rights provided to Weyerhaeuser to construct and operate the Project cease and the Agreement is no longer in force, effective that date. . . . Council acknowledgement of the termination of the Project SCA by resolution is the appropriate administrative instrument to recognize that the Agreement and the rights provided under the Agreement ceased effective February 7, 2004.

Resolution. The Council hereby acknowledges that pursuant to the terms of the Agreement, all rights provided to the Weyerhaeuser Company to construct and operate the Project ceased on February 7, 2004, and the Agreement terminated on that date.

EFSEC Resolution No. 308, *Cowlitz Cogeneration Project: Termination of Site Certification Agreement*, at 1–2 (Mar. 1, 2004) (attached as Exhibit H).

The Council should do the same here. Just as the SCA for the Cowlitz Cogeneration Project expired by operation of law and under its own terms, so has the Whistling Ridge SCA. The Council should adopt a Resolution confirming and acknowledging that the Whistling Ridge SCA expired and is terminated.

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4. Conclusion

For the reasons stated above, the Site Certification Agreement for the Whistling Ridge Energy Project has expired, and all rights under the SCA have ceased. The Council should adopt a Resolution confirming the expiration of the SCA. All other issues in these proceedings are moot.

Sincerely,



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nathan@gorgefriends.org

cc (via email): J. Richard Aramburu, Attorney for Save Our Scenic Area
Jonathan C. Thompson, Assistant Attorney General
Yuriy A. Korol, Counsel for the Environment

Exhibits:

- A. Governor's Approval Letter, Whistling Ridge Energy Project (Mar. 5, 2012)
- B. Letter from Friends and Save Our Scenic Area to EFSEC (Nov. 16, 2018)
- C. Email from Lance Caputo to Amí Hafkemeyer (July 13, 2023)
- D. Email from Tim McMahan to EFSEC staff (June 6, 2022)
- E. Email from Tim McMahan to EFSEC staff (Aug. 22, 2022)
- F. Email from Lance Caputo to WRE representatives (Sept. 8, 2023)
- G. EFSEC Meeting Minutes (Feb. 17, 2004)
- H. EFSEC Resolution No. 308, *Cowlitz Cogeneration Project: Termination of Site Certification Agreement* (Mar. 1, 2004).

EXHIBIT A



STATE OF WASHINGTON
OFFICE OF THE GOVERNOR

P.O. Box 40002 • Olympia, Washington 98504-0002 • (360) 753-6780 • www.governor.wa.gov

March 5, 2012

James O. Luce, Chair
Energy Facility Site Evaluation Council
1300 S. Evergreen Way Drive SW
PO Box 43172
Olympia, WA 98504-3172

RE: Whistling Wind Energy Project
EFSEC Recommendation Letter dated January 4, 2012

Dear Chairman Luce:

Pursuant to RCW 80.50.100, I have approved and executed the enclosed Site Certification Agreement for the Whistling Ridge Wind Energy Project in Skamania County, with the terms and conditions as recommended by the Energy Facility Site Evaluation Council (EFSEC).

After review of EFSEC's record, my decision on this project was shaped by the following important considerations.

First, I agree with EFSEC's recommendation to limit the project to 35 wind turbines by removing the proposed turbines along ridge lines that are prominently visible from viewpoints within the Columbia River Gorge. The Columbia River Gorge is a unique and beautiful landscape. The Legislature specifically directed the energy facility siting process to consider the public's opportunity to enjoy the esthetic and recreational benefits of our natural resources. Any proposed project in a central location on the north border of the Columbia River Gorge National Scenic Area would impact scenic viewpoints in a wide geographic sweep and warrants careful consideration of visual impacts.

EFSEC carefully considered and weighed the evidence regarding visual impacts. They considered the testimony of competing experts who used differing methodologies and offered conflicting conclusions on the impact of the wind turbines on the scenic value of the Columbia River Gorge. They also considered the testimony and comments of many individuals who live within or visit the Columbia River Gorge and care deeply about its scenic and cultural values. In conjunction with this evidence, EFSEC considered a Final Environmental Impact Statement (FEIS) that described and evaluated the visual impacts of the proposed project action, along with mitigation measures that would lessen impacts. Finally, the Council was informed by members' own observations from two days of field review from different viewpoints.

In the end, members of EFSEC exercised their collective judgment after weighing the evidence and the FEIS in light of their own general knowledge and observations. This exercise of judgment was appropriate.

While some parties argued that the opinions of experts or the FEIS should control, the legislature entrusted EFSEC and the governor with determining what siting decision best serves the public interest. Visual impacts and esthetics are not solely the province of experts; they are within the knowledge and general experience of all who enjoy the natural beauty of our region.

Those entrusted with the decision-making authority are expected to apply their own observations and experience as they examine and weigh the opinions of experts familiar with the subject of visual impacts. Courts have said expert opinions are not to be blindly received, but are to be intelligently examined by decision-makers in the light of their own general knowledge. This principle applies with special force to the evaluation of visual impacts in a region of unique scenic value.

Secondly, I agree with EFSEC's balance of the visual impacts with the public interest in approval of sites for alternative energy facilities. Even with a reduction to 35 turbines, there would be unavoidable impacts on the unique visual resources of the Columbia River Gorge. But the legislature has instructed that other values also be given consideration in evaluating the public interest. EFSEC gave due consideration to these values: the potential for the wind power project to help meet current and future energy needs, contribute to the availability of abundant energy at a reasonable cost, promote clean air, and meet demand created by voter-approved mandates for renewable energy. EFSEC weighed these public benefits with the mitigated visual impacts of allowing only turbines that are lower with respect to the ridgeline and thus less prominent or not visible from key viewpoints. Balancing the public interests, EFSEC determined to recommend approval of the siting of 35 turbines.

I believe EFSEC found an effective balance in its recommendation for the Whistling Ridge Wind Energy Project.

After review of the record, I also conclude that EFSEC appropriately considered and effectively addressed all issues related to the environmental impacts of the project as recommended. I commend EFSEC for its good work.

Sincerely,


Christine O. Gregoire
Governor

Enclosure

EXHIBIT B



FRIENDS OF THE COLUMBIA GORGE

November 16, 2018

Kathleen Drew, Chair
Stephen Posner, EFSEC Manager
Washington Energy Facility Site Evaluation Council
P.O. Box 47250
Olympia, WA 98504-7250

Re: Whistling Ridge Energy Project (Application No. 2009-01)

Dear Ms. Drew and Mr. Posner:

We write on behalf of Friends of the Columbia Gorge (“Friends”) and Save Our Scenic Area (“SOSA”) to respond to the presentation and packet of documents submitted by Jason Spadaro and Timothy McMahan on behalf of Whistling Ridge Energy LLC (“WRE”) at the November 13, 2018 EFSEC meeting, regarding the Whistling Ridge Energy Project (“Project”), proposed by Whistling Ridge Energy LLC (“WRE”).

1. Project Background

First, we will provide some background on the Project. Of all the wind energy projects that EFSEC has reviewed to date, the Whistling Ridge Energy Project is easily the most controversial and problematic, as well as the project most likely to cause significant environmental impacts. This is the first and only EFSEC-reviewed wind project proposed to be located within forested wildlife habitat. This is the first and only EFSEC-reviewed wind project proposed within a designated Special Emphasis Area for the federally listed Northern Spotted Owl. This is the first and only EFSEC-reviewed wind project proposed within three miles of the Lewis and Clark National Historic Trail, the Oregon Pioneer National Historic Trail, the Historic Columbia River Highway (designated as a National Historic District on the National Register of Historic Places, as well as a National Historic Landmark), and the Ice Age Floods National Geological Trail. This is the first and only EFSEC-reviewed wind project surrounded by recreational resources in every direction. This is the first and only EFSEC-reviewed wind project that would cause significant adverse impacts to Native American cultural resources. This is the first and only EFSEC-reviewed wind project for which multiple other agencies, including the United States Forest Service and the National Park Service, recommended that EFSEC and the Governor make substantial modifications to the project (not all of which were made by EFSEC’s recommendation and the Governor’s decision). This is the first and only EFSEC-reviewed wind

project that would cause significant adverse impacts in two states (not just Washington). And last but certainly not least, this is the first and only EFSEC-reviewed wind project that would cause significant adverse impacts to a National Scenic Area.

The Project was proposed along the boundary of the Columbia River Gorge National Scenic Area. The immense turbines would loom over the Gorge horizon and would be visible for many miles in every direction. The Project would permanently alter the scenic landscape within the Columbia River Gorge and Cascade Mountain Range, in an area that is visited by tourists from all over the world for its unique qualities, including dramatic mountain vistas, steep cliffs, pastoral lands, and the Columbia River. By diminishing Gorge scenic resources, the Project would also harm the local tourism economy and negatively affect property values in surrounding communities. It would also cause substantial traffic and road damage along local roads during construction.

The Project would also harm wildlife by permanently removing hundreds of acres of forested habitat, including land within a designated Northern Spotted Owl Special Emphasis Area. The Columbia River Gorge provides habitat for hundreds of bird species, and it is a major stopover for many migratory bird species. The site also provides habitat for multiple species of bats. Several Washington state or federally listed bird species could be affected by the Project, including the Northern spotted owl, Northern Goshawk, bald eagle, pileated woodpecker, and numerous migratory bird species. The site was never surveyed for birds during key migratory periods, and many of the surveys that were performed are now more than a decade old, making them stale and outdated today.

Hundreds of written and oral comments regarding the Project were submitted during EFSEC's review, and eighty-six percent of these public comments opposed or expressed concerns about the Project. Concerns were raised by several public resource management agencies, tourism groups, and environmental organizations, including the National Park Service, the U.S. Forest Service, the Washington Department of Natural Resources, the Washington Counsel for the Environment, the Skamania County Agri-Tourism Association, Sustainable Travel International, Friends of the Historic Columbia River Highway, Seattle Audubon Society, Vancouver Audubon Society, Kittitas Audubon Society, Columbia Gorge Audubon Society, American Bird Conservancy, Conservation Northwest, and the Gifford Pinchot Task Force (now the Cascade Forest Conservancy).

WRE filed the application for the Project on March 10, 2009, and amended the application on October 12, 2009. After a complex and lengthy adjudication, Governor Gregoire approved the Project and issued the Site Certification Agreement on March 5, 2012.

2. Current Project Status

With that background, we wish to respond to several statements made by the WRE representatives at the November 13, 2018 EFSEC meeting, and in WRE's letter dated October 25, 2018. WRE has stated that it could not market the Project or "move the Project forward" for the past several years because the Project was "tied up" in litigation. This is incorrect. Injunctive

relief was never sought in the prior litigation, and thus nothing prevented WRE from proceeding with the Project.

The real reason the Project has been on hold for many years is because, as stated by Mr. Spadaro to EFSEC and to the media, the project is not economically viable. For example, in a statement made to the *The Oregonian* on March 5, 2012, Mr. Spadaro stated that the Project would be placed on hold because it was not currently feasible: “We’re not abandoning the project, but in the current environment of great uncertainty for renewable energy, the project is unlikely to move forward.”

In the more than six years since Mr. Spadaro’s statement to *The Oregonian*, WRE has attempted to market the Project, but has been unsuccessful at finding a buyer. Finally, even now that the prior litigation has been resolved, WRE has taken no steps to secure the remaining necessary permits and approvals, and has declined to announce a desired construction start date. Nor has WRE executed a Large Generator Interconnection Agreement with the Bonneville Power Administration to allow transmission of energy to the Federal Columbia River Power System. In short, the Project remains on hold even after the prior litigation has been resolved.

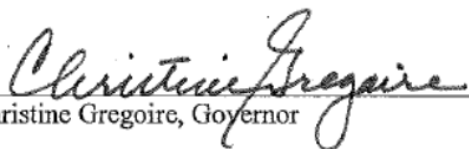
3. Five-Year Status Report Deadline

WRE’s letter to EFSEC, dated October 25, 2018, was not timely filed pursuant to WAC 463-68-060. That rule states that “[i]f construction does not both start within five years of the effective date of the site certification agreement and thereupon continue in a reasonably uninterrupted fashion toward project completion, then at least ninety days prior to the end of the five-year period, the certificate holder shall report to the council its intention to proceed or not to proceed with the project.”

Here, the effective date of the site certification agreement is March 5, 2012, the date Governor Gregoire approved EFSEC’s recommendation to approve up to 35 wind turbines, and signed a Site Certification Agreement for the project. The effective date of the SCA is shown on the face of the SCA itself, which states that it is “[d]ated and *effective this 5th day of March, 2012*” (emphasis added), above the Governor’s signature for the State of Washington (shown below).

Dated and **effective** this 5th day of March, 2012.

FOR THE STATE OF WASHINGTON


Christine Gregoire, Governor

Furthermore, the “effective date” in WAC 463-68-060 must mean the date the Governor approves a project on behalf of the State of Washington, as indicated by the Governor’s signature. Otherwise, an applicant could control the date for expiration of a site certification agreement under WAC 463-68-080 by indefinitely refusing to sign a Governor-approved SCA until years after the project is approved.

Moreover, the context of the Siting Act and the energy siting rules shows that the intent is to make the Governor’s issuance of a signed SCA the effective date, rather than the date of the applicant’s signature. For example, RCW 80.50.100(3)(a)(i) authorizes the Governor to “[a]pprove the application and execute the draft certification agreement.” Similarly, WAC 463-68-020 requires a certificate holder to comply with “the terms and conditions of the site certification agreement *approved by the governor*” (emphasis added). Accordingly, the same day that Governor Gregoire issued the SCA, she released an approval letter stating that she was “approv[ing] and executing the enclosed Site Certification Agreement for the Whistling Ridge Wind Energy Project in Skamania County, with the terms and conditions as recommend by the Energy Facility Site Evaluation Council.” The focus of these rules is the approval by the Governor, not the signature of the Applicant.

In this case, WRE did not sign the SCA for approximately twenty months after the Governor signed it. To extend the effective date of the SCA by this twenty-month period, as proposed by WRE, would reward WRE for its intentional delay in signing the SCA, and could lead to similar delays by other applicants after other projects are approved. It would be absurd and inconsistent with the intent of the law to allow an applicant to take as long as it wants to decide whether to sign a site certification agreement, thus allowing the applicant unilateral control over the expiration deadline of a State-issued SCA.

Here, because the effective date of the SCA for this Project is March 5, 2012, the five-year status report required by WAC 463-68-060 was due by December 5, 2016 (90 days prior to five years after Governor Gregoire issued the SCA). WRE’s October 25, 2018 letter was instead submitted nearly two years after the deadline. WRE failed to provide any explanation as to why it missed this deadline, other than its erroneous statement of the effective date of the Site Certification Agreement.¹

4. Deadline to Commence Construction

WRE’s deadline to commence construction is March 5, 2022. That date will be “ten years [from] the effective date of the site certification agreement,” which is the expiration date pursuant to WAC 463-68-030 and -080. Thus, the SCA will expire on March 5, 2022 unless WRE seeks and receives an extension of the deadline pursuant to WAC 463-68-080. We ask the Council to confirm this deadline to commence construction. It is important that WRE adhere to

¹ Even under WRE’s erroneous interpretation of the effective date of the SCA, WRE submitted its five-year status report more than two months late. Under WRE’s erroneous interpretation of the effective date, the status report would have been due August 20, 2018. WAC 463-68-060 (status report due “at least ninety days prior to the end of the five-year period”).

this deadline, especially given the potential for the environmental impacts posed by this Project to change over time, and given the fact that the wildlife surveys and other baseline data for this Project are already a decade old, and thus stale and outdated.

5. Future Permitting Decisions

Prior to commencing construction, WRE will need to apply for multiple additional permits and provide significant information to EFSEC for new permitting decisions. In its decision on the Project, the Washington Supreme Court held that the submission of WRE's application was only "the starting point of a longer process and [that] more specific decisions are addressed throughout the process." The Court also held that EFSEC's decisional standards in WAC 463-62 did not apply to the review of the Project prior to the Governor's decision; rather, the Court held that these standards will apply to future decisions, as construction and operation standards. The Court also endorsed EFSEC's approach of deferring review of and decisions on the Project's forest practices components to a later date. Finally, the Court noted that "the final size and location of the site is not known . . . , making a full discussion of specific mitigation measures" premature until Project details are finalized.

In sum, the Court held that multiple issues—including the final project details and impacts, compliance with the standards in WAC 463-62, forest practices, and appropriate mitigation—remain unresolved and undecided. The Court also held that these issues were not yet "ripe" for judicial review. The Court also acknowledged EFSEC's and the Governor's arguments that the public will be allowed to participate in the decision-making process for unresolved and deferred issues.

After the issuance of the Washington Supreme Court decision, Mr. Posner wrote to us on March 26, 2014 "to reassure you that Friends and SOSA will be afforded the same opportunities as any other interested members of the public, or public interest organizations, as EFSEC carries out its responsibilities with respect to this SCA going forward. You will continue to be apprised of any public process in this regard and we welcome your participation." Friends and SOSA remain interested in participating in EFSEC's future review of and decision-making processes for this Project, and reiterate our request to be included in any announcements or discussions regarding these issues.

6. Visual Simulations

Finally, we wish to comment on the visual simulations of the Project submitted by WRE at the November 13, 2018 EFSEC meeting. These simulations, showing the view of the Project from Viewpoint 13 (Interstate 84 Eastbound), appear to have been cherry-picked by WRE in order to show fewer aesthetic impacts for the approved Project than as viewed from other viewpoints.

In addition, Mr. Spadaro stated at the November 13 meeting that the visual simulations in WRE's packet are "from the EIS." This is inaccurate. The page in WRE's packet showing visual simulations is a new document never previously submitted to EFSEC. It purports to show the Project as permitted by EFSEC. This is the first time WRE has ever released such a simulation.

Previously, WRE refused to release simulations showing less than the 50 turbines proposed in the application, and WRE's counsel instead urged the Council members to "just simply look at the visual simulations if you want and imagine a lot less turbines, and that's sufficient information for consideration of the project."

Moreover, the undated simulations provided at the November 13 meeting do not contain the wirelines, bearings, field of view, distance, turbine dimensions, and numbers of hubs and tips visible, all of which were provided in the simulations in the FEIS. *See Whistling Ridge FEIS, fig. 3.9-10 (Viewpoint 13).*

Finally, it should be noted that the Council rejected the visual simulations in the FEIS because they were not at the correct focal length, and requested that WRE prepare and submit new simulations (*see* EFSEC Order No. 859 at 3), which WRE did in December 2010 (*see* Applicant's Adjudication Exhibit 8.08r). Like the rejected simulations in the FEIS, the undated simulations provided in WRE's packet also appear to be simulated at an incorrect focal length and are neither displayed nor printed on an appropriate paper size. For those and other reasons, the undated simulations provided at the November 13 meeting fail to accurately portray the scale and visual impacts of the Project as viewed from Viewpoint 13.

7. Conclusion

Thank you for your time and consideration. If you have any questions or comments, please do not hesitate to contact us.

Sincerely yours,

Reeves, Kahn, Hennessy & Elkins



Gary K. Kahn
Attorney for Friends of the Columbia Gorge

Friends of the Columbia Gorge



Nathan Baker
Senior Staff Attorney

Aramburu & Eustis, LLP



J. Richard Aramburu
Attorney for SOSA

cc: Ann Essko, EFSEC Senior Counsel
EFSEC Service List, Whistling Ridge Energy Project

EXHIBIT C

From: Caputo, Lance (EFSEC)<lance.caputo@efsec.wa.gov>
Sent on: Thursday, July 13, 2023 9:20:49 PM
To: Hafkemeyer, Ami (EFSEC)<ami.hafkemeyer@efsec.wa.gov>
CC: Greene, Sean (EFSEC)<sean.greene@efsec.wa.gov>
Subject: WRE
Attachments: Daft Staff Memo_SG.docx (46.76 KB)

Good afternoon. Attached is my draft staff report incorporating Sean's comments. I will merge sections II and IV to avoid duplication as Sean suggested.

Lance "Cap" Caputo

Siting Specialist

Energy Facility Site Evaluation Council

Email: lance.caputo@efsec.wa.gov

Office: 360.485.1664 Cell: 360.515.1100

EFSEC

621 Woodlawn Sq Loop SE

Lacey, WA 98503

Memorandum

To: Ami Hafkemeyer, EFSEC Siting and Compliance Manager

From: Lance Caputo, Siting Specialist

Date: July __, 2023

RE: Staff Report on Whistling Ridge Energy LLC's Requests to Amend Site Certification Agreement.

I. Overview

Proposal: Whistling Ridge Energy, LLC (WRE) is requesting two amendments to their Site Certification Agreement (SCA). On April 27, 2023, WRE applied to transfer ownership of the Site Certification Agreement to Twin Creeks Timber, LLC (TCT). In June 2023, WRE submitted a request to extend the term of their SCA by three years. WRE's Application for Site Certification proposed a wind power facility consisting of up to fifty 1.2-to-2.5-megawatt wind turbines with a maximum generating total capacity of 75 MW, to be located on the forested ridges of Whistling Ridge in eastern Skamania County. The project includes an operation and maintenance facility, underground collector lines and systems, other ancillary facilities, and a connection to BPA's nearby transmission line. The proposed project will involve 1,152 acres. In 2012, the project was approved in part and denied in part. The number of windmills was reduced from 50 to 35 and lower corridors A and C were deleted.

TCT is requesting an extension to undertake due diligence work and to update essential natural resource and other studies. The Applicant will utilize this time to consider commercial viability, to review and prepare additional environmental information, and to engage with stakeholders.

A request for extension is governed by WAC ~~463-68-030 to 070~~ WAC 463-68-030 through 080 and their Site Certification Agreement.

The second request is for the Council to approve transfer ownership of WRE from SDS Lumber Company to Twin Creeks Timber, LLC (TCT).

Request for transfer of ownership is governed by WAC 463-66-100; ~~WAC 463-68-080~~ and Article III.K.2 of their Site Certification Agreement.

Commented [SG1]: I couldn't find these WACs. I thought you might mean 463-62-030 to -070, but those are primarily construction and operation standards for EFSEC facilities.

It seems like extension requests are primarily governed by WAC 463-68-030 to -080.

Commented [CL(2R1)]: Thanks for catching this typo.

Commented [SG3]: I don't think this WAC applies to transfers of ownership.

Commented [CL(4R3)]: You're correct.

Project

History:

2009, March 10	ASC officially filed with EFSEC.
2009, October 12	Amended ASC submitted eliminating site access road that traveled through the Columbia Gorge National Scenic Area to a road at the site's western boundary, outside the National Scenic Area.
2012, March 5	Governor signs SCA.
2013, August 13	State Supreme Court issues unanimous decision upholding SCA.
2013, November 18	Whistling Ridge signs SCA

2013-2015	Bonneville Power Administration (BPA) worked on the NEPA FEIS and Supplement.
2015, September 9	Project opponents file appeal with US 9 th Circuit Court of Appeals, challenging BPA's NEPA FEIS and supporting BPA's decision to grant connection to transmission system.
2018, March 27	US 9 th District Court denies opponents' appeal.
2018, July 11	US 9 th District Court denies petition for rehearing <i>en blanc</i> . All litigation concluded.
2018, October 25	SDS Lumber Co. (Certificate Holder) submits status report to Council pursuant to WAC 463-68-060 (5-year limit to report to Council if construction has not begun).
2021, November	SDS Lumber Co. sells Whistling Ridge Energy project to Twin Creeks Timber, LLC.
2022, March 2	TCT submits draft request to EFSEC to extend SCA by an additional three years.
2022, March 24	EFSEC receives notification TCT acquired WRE and asks EFSEC to not act on request for extension and amending SCA for new ownership at this time.
2023, June 21	Council informed of Certificate Holder's requests for extension and transfer of ownership.
2023, July __	EFSEC staff receive revised request for extension and staff responds with comments.
2023, July __	Staff prepares memorandum for Council.
2023, July 19	Council reviews requests for amendment and schedules public hearings.

Commented [SG5]: I'm unclear why work was being performed on the FEIS after the SCA was effective? Is this the NEPA FEIS or SEPA FEIS?

Commented [CL(6R5)]: NEPA

The original owner, SDS Lumber Company submitted its Application for Site Certification in March 2009. The Council approved the Application with modifications, sent its recommendation to Governor Gregoire who signed the SCA in March 2012. Subsequently, the Project became the subject of much litigation. In August 2013, the State Supreme Court decided in favor of the Applicant. SDS Lumber Co. signed the SCA on November 18, 2013, thereby becoming the Certificate Holder and executing the SCA. From 2013 to 2015 BPA drafted an environmental impact statement concerning WRE's connection to BPA's transmission lines. Project opponents filed suit with the US 9th District Court in September 2015. In 2018 the US 9th District Court denied the project opponent's appeals and litigation ends. Since construction has not begun on its energy facility, WRE submitted a 5-year status report to EFSEC notifying the Council of its intention to proceed with the project. SDS Lumber Co. sold WRE to Twin Creeks Timber in November 2021. In March 2022, TCT informed EFSEC that it had acquired WRE and that WRE will be seeking a three-year extension of its SCA. WRE also asked EFSEC not to begin the process to review its amendment requests at that time. WRE submitted a formal petition to amend their SCA and informed Council of its requests in June 2023.

Status: No construction of the facility has begun. The SCA is scheduled to expire November 18, 2023. TCT is asking the Council to begin formal review of its two requests to amend the SCA. TCT is requesting an extension for three years until November 18, 2026. TCT is also asking the Council to approve its new ownership of the Whistling Ridge Energy facility.

II. Applicable Statutes

The following is a list of statutes the Council and the Petitioner must address when reviewing requests for amending SCAs.

WAC 463-66-030 Request for Amendment.

- Requires the Council to determine a schedule for action at the next feasible Council meeting.
- May retain the assistance of a consultant or take other action at the expense of the applicant.
- Shall hold one or more public hearing sessions on the amendment request at times and places determined by the Council.

WAC 463-66-040 Amendment Review

The Council shall consider whether the proposal is consistent with:

- The intent of the original SCA.
- Applicable laws and rules.
- The public health, safety, and welfare.
- The provisions of WAC 463-72 (site restoration).

WAC 463-66-050 Environmental Impacts – Alternatives

In reviewing whether a proposed amendment is consistent with the public health, safety, and welfare, the council shall consider:

- Short-term and long-term environmental impacts
- Reasonable alternative means to achieve the propose of the proposal.
- The availability of funding to implement the proposal.

WAC 463-66-060 Council Determinations

The Council in acting upon an amendment may:

- Accept the amendment.
- Reject the amendment.
- Reject the amendment and state conditions or terms under which the amendment will be reconsidered.

Commented [SG7]: Added double spacing to make these consistent with subsequent WACs.

Commented [CL(8R7)]: Thanks

Commented [CL(9R7)]: Thanks

WAC 463-66-070 Approval by Council action

An amendment request which does not substantially alter the substance of any provisions of the SCA, or which is determined not to have a significant detrimental effect upon the environment, shall be effective upon approval by the council. Such approval may be in the form of a council resolution.

WAC 463-66-080 Approval by the Governor

An amendment which substantially alters the substance of any provision of the SCA, or which is determined to have a significant detrimental effect upon the environment shall be effective upon the signed approval of the governor.

WAC 463-66-100 Transfer of SCA

No site certification agreement...shall be transferred...without express Council approval... In the event a site certification agreement is to be acquired via a...change in corporate...ownership, the successor in interest must file a formal petition... [with the Council].

- A certification holder seeking to transfer...a site certification agreement must file a formal application with the council including information about the new owner required by WAC [463-60-015](#) and [463-60-075](#) that demonstrates the transferee's organizational, financial, managerial, and technical capability to comply with the terms and conditions of the original site certification.
- After mailing a notice of the pending application for transfer of the site certification agreement to all persons on its mailing list, the council shall hold an informational hearing on the application.

WAC 463-68-060 Review and reporting changes in the project status or site conditions

If construction has not started within five years of the effective date of the SCA, then the Certificate Holder shall report to the Council its intention to proceed or not to proceed. The Applicant will address the following elements:

- Any changes to project design; changes in information in ASC; changes in project-related environmental documents; changes in environmental conditions.
- Any new information or changed conditions indicate the existence of probable significant adverse environmental impacts that were not previously addressed.
- Suggested changes to the SCA or regulatory permits.

WAC 463-68-080 Site Certification Agreement

- If the certificate holder does not start or restart construction within ten years of the effective date of the site certification agreement...the site certification agreement shall expire.
- If commercial operations have not commenced within ten years of the effective date of the site certification agreement, the site certification agreement expires unless the certificate holder requests, and the Council approves, an extension of the term of the site certification agreement.

III. Analysis of Requests for Amendments and Statutes

The Certificate Holder submitted two petitions for amendments: a request for an extension of the SCA and a request for approval of the transfer of ownership. This analysis will examine these requests in the order received.

A. Request for Extension of the SCA

WAC 463-68-060 (Five Year Status Report):

The statute requires the Certificate Holder to file a status report with the Council five years after signing the SCA if construction has not begun. The Project was the subject of litigation in the state and federal courts for five years. In its report to the Council, (submitted October 25, 2018) the Certificate Holder indicated it was desirous of moving the project forward now that all litigation ceased. At the time, the Certificate Holder stated there were no changes to the project, no new information or changed conditions that might indicate the existence of probable, adverse environmental impacts existed nor was WRE proposing any amendments to the SCA. The report was received by the Council with little discussion. No action by the Council was required. The Certificate Holder complied with this statute.

RCW 80.50.100 (Effective Date of SCA):

The statute states: "The certificate agreement shall be binding upon execution by the Governor and the applicant". Governor Gregoire signed the SCA on March 5, 2012. The Certificate Holder signed the SCA on November 18, 2013, 20 months later. There is debate regarding when the SCA became effective. This is an important detail. If the effective date of the SCA is the date signed by the Governor, then the ten-year period stipulated in WA 463-68-080 to begin construction or commercial operations has lapsed and WRE may not request an extension. If the effective date of the SCA is on November 18, 2013, when the document was signed by WRE, then the SCA has not expired, and the Certificate Holder retains the right to request an extension. WRE chose to defer executing the SCA until the State Supreme Court appeal was resolved more than a year and a half after the Governor signed the SCA. The Assistant Attorney General will provide the Council with a legal brief addressing when the SCA is considered executed.

WAC 463-68-080 (Expiration of Site Certification Agreement):

Commented [SG10]:
1f

Commented [CL(11R10):
1f

Commented [CL(12R10):
1f

Neither construction nor commercial operation of the Certificate Holder's energy facility has begun as of yet, as required by this statute. Therefore, the Certificate Holder is requesting an extension of its SCA. The Certificate Holder believes the SCA became effective when it signed the document. If the Council agrees with this determination, then the ten-year period to begin construction has not terminated and the Certificate Holder is within its right to request an extension as stated above. If the Council finds the SCA was executed the date Governor Gregoire signed the SCA (March 5, 2012), then the SCA has expired and WRE has no standing to request an extension. If such is the case, then to proceed with the project, WRE must re-apply and begin the process anew.

Commented [SG13]: This makes it sound as if they have lapsed in their obligations, which I don't believe is the case as of yet. The Certificate Holder provided the 5-year effective date report and has until November 18, 2023 to begin construction (and start commercial operations).

Commented [CL(14R13)]: Does this work better?

At this point, WRE desires to pursue implementation of its energy facility. WRE is requesting an extension, in part, to conduct environmental studies to determine if changes have occurred within the last 11 years (since the project was last reviewed by the Council) that necessitate further environmental review. Additionally, the Petitioner requests time to "review the financial and environmental feasibility of constructing the facility prior to commencing any studies". WRE requests three years to "undertake due diligence work for the facility and to update essential natural resource and other studies". Some natural resource studies are seasonal and require more than a year to complete. Please note, the Petitioner is not requesting an extension to begin construction. It is requesting an extension to examine the economic and environmental feasibility of proceeding with the project.

Commented [SG15]: I'm confused. If they are not requesting an extension for the start of construction, does that mean they intend to start construction before November and then spend 3 years doing environmental studies while construction is ongoing?

Commented [CL(16R15)]: I understand your confusion. No, the Petitioner is not requesting an extension to begin construction; only for time to undertake economic and environmental studies. They have not stated they wish to begin construction prior to November. These studies should have been conducted prior to submitting requests for amending the SCA. I have the feeling the Petitioner realized time is running out and they hastily threw together an extension request prior to this November's expiration date. Everything about these requests is backwards. I

WAC 463-66-040 Amendment Review

Intent of the original SCA:

This statute directs the Council to examine the original intent of the SCA. The SCA was issued for the construction of 35 wind turbine generators capable of producing a maximum of 75 MW. Originally, the Petitioner sought to construct 50 wind turbine generators but due to 15 generators being observable from the Columbia River Gorge National Scenic Area, the Council recommended to the Governor these generators be deleted-excised from the project. The facility is proposed to be constructed on 1,152 acres on the forested ridges of Saddleback Mountain. The Petitioner is not seeking to alter the scope of the project. It does, however, intend to examine the feasibility of installing fewer but taller wind turbine generators and its associated facilities within the designated and approved micro-siting corridors. The location and number of these wind turbine generators have yet to be determined.

Commented [SG17]: Changing the number and height of the turbines seems to very much be an alteration of the scope of the Project.

Commented [CL(18R17)]: It is an alteration of the project scope. I believe such changes will trigger a SEPA review. Why the Petitioner added this, I'm not sure. If these changes prove to be significant, then the Governor must make the final decision. In the petition, the Petitioner mentioned these changes might be "within micro-siting areas". Maybe to avoid a SEPA review?

Applicable laws and rules:

The Petitioner intends to update and conduct additional field surveys and studies to comply with applicable statutes and rules. WRE will confer with EFSEC staff to ensure all necessary studies are conducted. WRE will cooperate with WDFW, local tribes and other appropriate agencies in developing, implementing, and reporting on these studies.

The public, health, safety, and welfare:

RCW 80.50.010 establishes the policy of the state of Washington to reduce dependence upon fossil fuels. It also recognizes the need for clean energy to strengthen the state's economy, meet the state's greenhouse gas reduction obligations and mitigate impacts from climate change. WRE is proposing to produce up to 75 MW of clean energy to assist the state in reaching these goals.

Site restoration:

As stated in the Petitioner's application for site certification, its site certification agreement, and in its petition for this extension, WRE is required to and agrees to abide by all the requirements stipulated in WAC 463-72.

The Petitioner's request for amending the SCA complies with the requirements of this statute.

WAC 463-66-050 Environmental Impacts – Alternatives

Environmental impacts:

When reviewing this proposed amendment to WRE's site certification agreement, the Council must consider the requests' short and long-term environmental impacts. WRE is proposing to conduct studies to evaluate potential impacts. Attachment A to the petition includes a partial list of studies WRE is proposing, namely: visual simulation updates, noise analysis, updates to avian baseline studies, raptor nest surveys, sensitive plants surveys, among others as determined by regulatory agencies. The request for amendment complies with this element of the statute.

Alternative means to achieve purpose of proposal:

The Petitioner will examine the option of installing fewer but taller wind turbine generators as an alternative means to produce 75 MW of clean energy. The request for amendment complies with this element of the statute.

Availability of funding for implementation:

WRE has not addressed this subject in its petition other than to request time to examine the financial feasibility of proceeding with the project. The request for amendment does not comply with this element of the statute.

B. Request for Transfer of the SCA

Description of applicant and financial arrangements to mitigate losses:

WAC 463-66-100 governs the transfer of a SCA. The statute requires the Certificate Holder to demonstrate the transferee has the organizational, financial, managerial, and technical ability to comply with the terms and conditions of the original site certification. TCT has demonstrated it has the requisite abilities and financial resources to construct, operate, and maintain the energy facility in a successful manner to mitigate any losses to the physical or human environments. TCT will be partnering with qualified specialists for various aspects of the project. In its petition, TCT indicates it is entering into a memorandum of understanding with a development firm

(Steelhead Americas) potentially to take a controlling interest in the project and its further development. Please note, the requirement of this statute applies to not only the owners of the certification agreement but also to project sponsors. Should Steel Americas acquire controlling interest in the project, it might have to request prior approval from the Council. The Assistant Attorney General will address the Council on this topic.

Seeking alternative disposition of certified site:

Not applicable. Neither TCT nor WRE proposes an alternative disposition of the certified site.

Written consent from current certificate holder attesting to the person's right to possession of the energy facility:

Not applicable. TCT is making this request together with WRE.

Applicant agrees to abide by all the terms and conditions of the SCA to be transferred:

TCT agrees to abide by all terms and conditions of the SCA.

Article III. K.2 of the SCA states "No change in ownership or control of the Project shall be effective without *prior* Council approval pursuant to EFSEC rules and procedures (emphasis added).

The Petitioner is in violation of the SCA. A Site Certification Agreement is "a binding agreement between the applicant and the State that conditions approval of an energy facility location on the applicant's assured compliance with certain regulations related to the construction and operation of the facility" (165 Wn.2d 275, Residents Opposed to Kittitas Turbines v. State energy Facility Site Evaluation Council & RCW 80.50.020). Ownership of WRE was transferred from SDS Lumber Co. to Twin Creeks Timber in November 2021 without Council approval. The Petitioner has not complied with its SCA. The Assistant Attorney General will provide the Council with a legal brief on this topic.

IV. Other Applicable Statutes

These statutes provide guidance for the Council with its review of requests for amending SCAs.

WAC 463-66-030 Request for Amendment

- Requires the Council to determine a schedule for action at the next feasible Council meeting.
- May retain the assistance of a consultant or take other action at the expense of the applicant.
- Shall hold one or more public hearing sessions on the amendment request at times and places determined by the Council.

Staff is working with the Council to determine a schedule (a "schedule for action") for public hearings on both requests. Public hearings on these requests may be held virtually to accommodate all interested persons and parties. The Council may hold a public hearing for both

Commented [SG19]: All referenced statutes in this section are already included in Section II (apart from WAC 463-68-070). I would recommend merging Sections II and IV to avoid duplication.

Commented [CL(20R19)]: Good idea. I also thought that might help the report read better but wasn't sure. Thanks

requests at the same hearing. This statute also provides the Council with the authority to retain the services of its own consultant for reviewing impacts arising from the proposed amendments.

WAC 463-66-060 Council Determinations

The Council in acting upon an amendment may:

- Accept the amendment.
- Reject the amendment.
- Reject the amendment and state conditions or terms under which the amendment will be reconsidered.

This statute describes the discretionary authority provided the Council to make determinations.

WAC 463-66-070 Approval by Council Action

An amendment request which does not substantially alter the substance of any provisions of the SCA, or which is determined not to have a significant detrimental effect upon the environment, shall be effective upon approval by the council. Such approval may be in the form of a council resolution.

This statute provides the Council with the authority to decide upon routine amendments to SCAs and decisions may be in the form of Council resolutions.

WAC 463-66-080 Approval by the Governor

An amendment which substantially alters the substance of any provision of the SCA, or which is determined to have a significant detrimental effect upon the environment shall be effective upon the signed approval of the governor.

If the Council determines the amendments substantial alters *any* provision of the SCA, or will have a significant impact to the environment, the Council's decision on the proposed amendment will be forwarded to the Governor as a recommendation. It also states the Governor's decision will be effective upon his/her signature, excluding the Petitioner's signature. At this point, it is too early to determine if any significant changes will be proposed to the SCA. Such a determination will be made after Petitioner submits information.

WAC 463-68-070

Under WAC 463-68-060, construction may start, or restart if construction has been suspended, only upon the council finding that no changes or amendments to the site certification agreement, regulatory permits, or project-related environmental documents are necessary or appropriate, or upon the council's approval of any necessary or appropriate changes or amendments. The council may retain an independent consultant, at the certificate holder's expense, to evaluate and make recommendations about whether changes to the site

certification agreement, regulatory permits, or project-related environmental documents are necessary or appropriate. This work may include, but is not limited to, verification of project-related environmental conditions, regulatory requirements, or appropriate technology.

This statute limits the Petitioner's ability to begin or continue construction activities until the Council has decided upon the amendment requests. It also provides the Council with authority to retain an independent consultant, at the expense of the Petitioner, to assist with reviewing documents and identifying potential impacts.

V. Conclusion

1f, 3

Commented [SG21]: Suggested alternate language:
"Staff recommends that the Council make no decision on the petitions until they have received legal guidance from the Assistant Attorney General and outstanding issues are satisfactorily resolved by the Petitioner."

Commented [CL(22R21)]: Will do. Thanks.

EXHIBIT D

From: [McMahan, Tim](#)
To: [Grantham, Andrea \(UTC\)](#); [Bumpus, Sonia \(UTC\)](#); [Hafkemeyer, Ami \(UTC\)](#); [Thompson, Jonathan C \(ATG\)](#); [Corbin, Greg](#); [Cole, Jon](#); [Wood, Joseph \(UTC\)](#)
Subject: RE: Whistling Ridge touch base
Date: Monday, June 6, 2022 1:10:16 PM
Attachments: [image001.png](#)

External Email

Hello all – Can we push this out a few weeks? We are not quite ready to move anything forward.
Thanks all. T.

Tim McMahan | Partner

STOEL RIVES LLP | 760 SW Ninth Ave, Suite 3000 | Portland, OR 97205

Direct: (503) 294-9517 | Mobile: (503) 504-8693

tim.mcmahan@stoel.com | [Bio](#) | [vCard](#) | www.stoel.com



This email may contain material that is confidential, privileged, and/or attorney work product for the sole use of the intended recipient. Any unauthorized review, use, or distribution is prohibited and may be unlawful.

-----Original Appointment-----

From: Grantham, Andrea (UTC) <andrea.grantham@utc.wa.gov>

Sent: Friday, May 20, 2022 8:50 AM

To: Grantham, Andrea (UTC); Bumpus, Sonia (UTC); Hafkemeyer, Ami (UTC); Thompson, Jonathan C (ATG); McMahan, Tim; Corbin, Greg; Cole, Jon; Wood, Joseph (UTC)

Subject: Whistling Ridge touch base

When: Monday, June 6, 2022 4:00 PM-5:00 PM (UTC-08:00) Pacific Time (US & Canada).

Where: Microsoft Teams Meeting

This is the best time that works for everyone

Please let me know if you need to reschedule.

Microsoft Teams meeting

Join on your computer or mobile app

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EXHIBIT E

From: [McMahan, Tim](#)
To: [Hafkemeyer, Ami \(EFSEC\)](#)
Cc: [Bumpus, Sonia \(EFSEC\)](#)
Subject: RE: WR check in
Date: Monday, August 22, 2022 4:56:22 PM
Attachments: [image001.png](#)
[image002.png](#)

External Email

Sigh..... I'm working on it..... T.

Tim McMahan | Partner

STOEL RIVES LLP | 760 SW Ninth Ave, Suite 3000 | Portland, OR 97205

Direct: (503) 294-9517 | Mobile: (503) 504-8693

tim.mcmahan@stoel.com | [Bio](#) | [vCard](#) | www.stoel.com



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From: Hafkemeyer, Ami (EFSEC) <ami.hafkemeyer@efsec.wa.gov>
Sent: Monday, August 22, 2022 3:09 PM
To: McMahan, Tim <tim.mcmahan@stoel.com>
Cc: Bumpus, Sonia (EFSEC) <sonia.bumpus@efsec.wa.gov>
Subject: WR check in

Tim,

Do we have an updated ETA on when we might be seeing additional amendment materials from the certificate holder?

Best wishes,
Amí Hafkemeyer
Director of Siting and Compliance
ami.hafkemeyer@efsec.wa.gov
Office 360.664.1305
Cell 360.972.5833

NOTE: EFSEC email addresses have changed to @efsec.wa.gov! Please update your EFSEC contacts.

EXHIBIT F

From: [Caputo, Lance \(EFSEC\)](#)
To: [Corbin, Greg](#)
Cc: [McMahan, Tim](#); [Hafkemeyer, Ami \(EFSEC\)](#); [Thompson, Jonathan C \(ATG\)](#); [Grantham, Andrea \(EFSEC\)](#)
Subject: RE: [EXTERNAL] RE: WRE
Date: Friday, September 8, 2023 2:01:44 PM

Good afternoon.

After discussions with Council members, an alternative date of Monday, October 9th, 5 to 8 pm is available. The Council has a full schedule, and they are graciously making time available to review your requests to amend the SCA. If this date is not workable for you, then there will not be sufficient time for the Council to conduct its reviews and decide upon the requests in accordance with the applicable statutes, prior to expiration of the SCA. Please let me know as soon as possible.

Thank you.

Lance

From: Corbin, Greg <greg.corbin@greendiamond.com>
Sent: Thursday, September 7, 2023 11:11 AM
To: Caputo, Lance (EFSEC) <lance.caputo@efsec.wa.gov>
Cc: McMahan, Tim <tim.mcmahan@stoel.com>; Hafkemeyer, Ami (EFSEC) <ami.hafkemeyer@efsec.wa.gov>
Subject: Re: [EXTERNAL] RE: WRE

External Email

Thanks, Lance.

Greg

Sent from my iPhone

On Sep 7, 2023, at 11:09 AM, Caputo, Lance (EFSEC) <lance.caputo@efsec.wa.gov> wrote:

We will figure it out. Thanks
Lance

From: Corbin, Greg <greg.corbin@greendiamond.com>
Sent: Thursday, September 7, 2023 11:08 AM
To: Caputo, Lance (EFSEC) <lance.caputo@efsec.wa.gov>
Cc: McMahan, Tim <tim.mcmahan@stoel.com>; Hafkemeyer, Ami (EFSEC) <ami.hafkemeyer@efsec.wa.gov>
Subject: Re: [EXTERNAL] RE: WRE

External Email

I also have a conflict on Thursday and it can't be resolved.

Greg

Sent from my iPhone

On Sep 7, 2023, at 10:55 AM, Caputo, Lance (EFSEC)
<lance.caputo@efsec.wa.gov> wrote:

Thank you for letting us know. We are reaching out to the Council to determine their availability in October. And yes, I did mean Thursday the 14th.
Lance

From: McMahan, Tim <tim.mcmahan@stoel.com>
Sent: Thursday, September 7, 2023 10:31 AM
To: Corbin, Greg <greg.corbin@greendiamond.com>; Caputo, Lance (EFSEC) <lance.caputo@efsec.wa.gov>
Cc: Hafkemeyer, Ami (EFSEC) <ami.hafkemeyer@efsec.wa.gov>
Subject: RE: WRE

External Email

Coincidentally, we are organizing a meeting with our contractor and Vestas; this process was paused for us to get through the HH adjudication. So, please consider this a request to continue the hearing by 30 days. Thanks. T.

From: Corbin, Greg <greg.corbin@greendiamond.com>
Sent: Thursday, September 7, 2023 10:27 AM
To: McMahan, Tim <tim.mcmahan@stoel.com>; Caputo, Lance (EFSEC) <lance.caputo@efsec.wa.gov>
Cc: Hafkemeyer, Ami (EFSEC) <ami.hafkemeyer@efsec.wa.gov>
Subject: RE: WRE

Echoing Tim's question. I have a conflict at that time.

Greg Corbin
Senior Special Counsel
Green Diamond Resource Company

<image001.png>

1301 Fifth Avenue Suite 2700
Seattle, WA 98101
503-349-3578 | greendiamond.com

[<image002.png>](#) [<image003.png>](#) [<image004.png>](#)

From: McMahan, Tim <tim.mcmahan@stoel.com>
Sent: Thursday, September 7, 2023 10:26 AM
To: Caputo, Lance (EFSEC) <lance.caputo@efsec.wa.gov>; Corbin, Greg <greg.corbin@greendiamond.com>
Cc: Hafkemeyer, Ami (EFSEC) <ami.hafkemeyer@efsec.wa.gov>
Subject: [EXTERNAL] RE: WRE

Hi Lance – Do you mean Wed. the 13th? And just asking – can this be continued one month?

From: Caputo, Lance (EFSEC) <lance.caputo@efsec.wa.gov>
Sent: Thursday, September 7, 2023 10:21 AM
To: Greg Corbin (greg.corbin@greendiamond.com) <greg.corbin@greendiamond.com>; McMahan, Tim <tim.mcmahan@stoel.com>
Cc: Hafkemeyer, Ami (EFSEC) <ami.hafkemeyer@efsec.wa.gov>
Subject: WRE

Good morning gentlemen.

I discovered late yesterday the Council scheduled a public informational meeting for next Wednesday, September 14th on your requests for amending WRE's SCA. The meeting will be held virtually beginning at 5 pm. I attached a draft copy of the public announcement. Please provide me with your final, formal amendment requests. The copies I have are missing dates and contain the word "Draft". Your formal requests will be included in the informational packet provided to Council members as well as will be posted on EFSEC's website.

I've reviewed the requests and found them to substantially comply with the statutes and after our meeting on July 26th, no additional information is required, unless you wish to update any sections. I also attached to this email, a copy of our meeting notes in case you wish to review what we

discussed. Please email me the documents by tomorrow. We provide Council members with the information packets at least three days in advance of any meetings.

Thank you for your speedy attention to this request.

Lance "Cap" Caputo

Siting Specialist

Energy Facility Site Evaluation Council

Email: lance.caputo@efsec.wa.gov

Office: 360.485.1664 Cell: 360.515.1100

EFSEC

621 Woodlawn Sq Loop SE

Lacey, WA 98503

EXHIBIT G

MINUTES
ENERGY FACILITY SITE EVALUATION
COUNCIL OF WASHINGTON

February 17, 2004 - Regular Meeting
925 Plum Street S.E., Building 4, Room 308
Olympia, Washington - 1:30 p.m.

ITEM 1: CALL TO ORDER

CHAIR LUCE: The regular meeting of the Washington State Energy Facility Site Evaluation Council meeting for Tuesday, February 17, 2004 will come to order. Clerk, call the roll, please.

ITEM 2: ROLL CALL

EFSEC Council Members

Community, Trade & Economic Development

Richard Fryhling

Department of Fish & Wildlife

Chris Towne

Department of Natural Resources

Tony Ifie

Utilities and Transportation Commission

Tim Sweeney

Kittitas County

(via phone) Patti Johnson

Chair

Jim Luce

MR. MILLS: The Chair is present and there is a quorum.

OTHERS IN ATTENDANCE

EFSEC STAFF AND COUNSEL

Allen Fiksdal

Mariah Laamb

Mike Mills

Ann Essko, AAG

Irina Makarow

Shaun Linse - Court Reporter

Tammy Talburt

EFSEC GUESTS

Bill LaBorde – NW Energy Coalition

David Reich – Ecology

Chuck Lean – Kittitas Valley Wind Project

John Lane – CFE, Kittitas Valley Wind

Mark Anderson – CTED EP

NO. 3: APPROVAL OF MINUTES

CHAIR LUCE: All right. We have as the first item on the agenda the approval of minutes of September 30, 2003, a special meeting; and January 20, 2004, regular Council meeting. Have the Councilmembers had an opportunity to review the minutes?

MS. TOWNE: Yes.

CHAIR LUCE: And have some Councilmembers had an opportunity to –

MS. TOWNE: Yes, some Councilmembers have, and I've given my markup to staff.

CHAIR LUCE: Thank you very much. Were there substantive corrections or additions, Councilmembers?

MR. IFIE: I have my correction on Page 2 -- well, not a correction, a proposed changed on Page two, I would like to forward to Mariah.

CHAIR LUCE: Is it a substantive change?

MR. IFIE: No, it's not substantive.

CHAIR LUCE: Then we'll receive Councilmember Ifie's change to the minutes of January 20.

And with those two changes are there any other changes, additions, corrections, deletions?

Hearing none, is there a motion to accept the minutes of September 30 and January 20?

MR. IFIE: I so move.

MS. TOWNE: Second.

CHAIR LUCE: All in favor say aye.

COUNCILMEMBERS: Aye.

ITEM NO. 4: ADOPTION OF THE PROPOSED AGENDA

CHAIR LUCE: The next issue is the adoption of the proposed agenda. Have Councilmembers had a chance to review that proposed agenda?

MS. TOWNE: Yes.

CHAIR LUCE: Any corrections, additions?

MR. MILLS: I would like to add one item.

CHAIR LUCE: Yes.

MR. MILLS: Under project update following Chehalis, I would like to make a brief report on the Satsop Combustion Turbine Project.

CHAIR LUCE: All right. We'll note that and amend the agenda accordingly. With that amendment, the agenda is adopted as written.

ITEM NO. 5: PROJECT UPDATES

<i>Kittitas Valley Wind Power Project</i>	<i>Irina Makarow, EFSEC Staff</i>
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CHAIR LUCE: Project updates. The first information item, Irina, Kittitas Valley Wind Power Project.

MS. MAKAROW: We received a request for preemption from the Applicant last Monday, and that was distributed to the Councilmembers and all the parties, and this week we do have a prehearing conference this Thursday in Ellensburg. If you have any questions about travel, please contact Mariah. As there's no remote, those of you who are involved in that project, please remain after the meeting today, so we can have a quick deliberative session on that issue.

CHAIR LUCE: All right.

<i>Wild Horse Wind Power Project</i>	<i>Irina Makarow, EFSEC Staff</i>
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MS. MAKAROW: With respect to the Wild Horse Wind Power Project, Zilkha is working on their application, and we understand that they are going to be submitting it to us at the beginning of March. That's all I have to report on that.

<i>BP Cherry Point Project</i>	<i>Irina Makarow, EFSEC Staff</i>
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MS. MAKAROW: For BP Cherry Point Project, subsequent to the last Council meeting where the Applicant and Counsel for Whatcom County came in and made their joint request, reiterating their joint request for extending the post-hearing briefing schedule, a Council order was issued last week that set up the schedule with a report coming into the Council in the middle of March where the County and the Applicant would state if they had come to any conceptual agreements on settlement. And then out into June if the settlement agreement -- if there is a conceptual agreement, the actual settlement agreement would come in during June, and that is all I have to report.

CHAIR LUCE: All right. Patti, do you have any questions or does any other Councilmembers have any questions of Irina with respect to Kittitas Valley Wind Power Project?

MS. JOHNSON: No, I have no questions at this time.

CHAIR LUCE: All right, Patti, you're more than welcome to stick around for the rest of this discussion.

MS. JOHNSON: No, I'll call back in later or have someone call me later.

MS. MAKAROW: We'll call you later, Patti.

MS. JOHNSON: Thank you.

<i>Air Permits</i>	<i>Irina Makarow, EFSEC Staff</i>
---------------------------	--

CHAIR LUCE: Air permits.

MS. MAKAROW: I just wanted to begin briefing the Council on the fact that we're going to be getting into a number of air permitting actions with some of the permitted projects. For example, both Wallula and Sumas are going to be up for extensions of their PSD and Notice of Construction permits, and the Chehalis Generation Facility is going to be submitting an application for a Title 5 Permit. So that means the typical development of the draft permit by our contractor and Ecology or the clean air agency for Chehalis and, of course, the public comment process and hearings will also occur. So in the next couple of months, probably the second half of the summer, you will be busy on those items.

CHAIR LUCE: Thank you for the heads up.

MS. TOWNE: Could you quickly tell us what Title 5 is.

MS. MAKAROW: Title 5 is a federal program that EFSEC has been delegated to implement, and the purpose of Title 5 is to regroup all of the air permitting conditions into a single document, so that citizens can find them easily. So basically what is going to happen is that our air permit writer is going to look at all of the permits that we issued for the Chehalis Generation Facility and put them all together in a document, so that a citizen could go in there and look and see exactly what the conditions are.

MS. TOWNE: Is that applicable to other emitters, Sumas, for instance?

MS. MAKAROW: Yes, all of our facilities except for the wind generation facilities are major facilities, and they will all be required to get Title 5 permits, and it kicks in one year after they have begun operation that they have to submit the application.

<i>Columbia Generating Station</i>	<i>Mike Mills, EFSEC Staff</i>
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CHAIR LUCE: Any other questions from Councilmembers? Mike, what do you have to tell us about the Columbia Generating Station?

MR. MILLS: Columbia Generating Station, they're operating at 100 percent power, and they've been on line for 229 consecutive days. And that's all I have to report on Columbia.

CHAIR LUCE: I was going to say Energy Northwest has provided us with a copy of their annual report.

MR. MILLS: Yes. The annual report is a good reference document about Energy Northwest and their projects and reports on many initiatives that the company is undertaking.

<i>WNP-1/4 Site Restoration</i>	<i>Mike Mills, EFSEC Staff</i>
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CHAIR LUCE: WNP-1/4 Site restoration.

MR. MILLS: I would just report on February 3, 3.5 million dollars was wire transferred to the State of Washington. So we have received the off-site mitigation monies, and they're in the State Treasurer under CTED and EFSEC control.

MS. TOWNE: Have we heard anything from Fish and Wildlife as to the McWhorter property?

MR. MILLS: No, we haven't, and I intend to follow up on that. I need to talk to Jim on that.

<i>Chehalis Generation Facility</i>	<i>Mike Mills, EFSEC Staff</i>
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CHAIR LUCE: Chehalis.

MR. MILLS: Chehalis. For the past two weeks the plant has been running steadily at between 500 and 520 megawatts. They expect to run all the rest of this week. I think I reported before that they've almost completed all of the noise silencer kind of activities in fabricating the last two of the silencers and expect to have those installed in the next several weeks. And they're doing ongoing maintenance work at the plant in addition to being in operation. I've asked that company representatives come either to the March 15 or April 5 meeting to report on noise and operational history. It's been not quite six months they've been in operation, so we will have more from the company on that.

<i>Satsop CT Project</i>	<i>Mike Mills, EFSEC Staff</i>
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CHAIR LUCE: Okay. Cowlitz Generating Project.

MR. MILLS: I wanted to add, Jim, the Satsop.

CHAIR LUCE: Yes, I'm sorry. I apologize.

MR. MILLS: I believe in your packet's there's a copy of a February 12, 2004, letter from Perkins Coie entitled Satsop CT Project Request for Technical Amendment of SCA. For today's meeting, I just wanted that to be noted in the record that we've received this request and staff will begin processing this and working with Karen for the Councilmembers on agreeing on a process that they are going to use in proceeding with that review. And this involves a number of water issues that were associated with the project after it was approved, and there were some discrepancies noted between the project design and some of the site certification agreement conditions regarding water use. Duke Energy and Energy Northwest met with Department of Ecology and Fish and Wildlife representatives and have discussed and reached agreement on some proposed changes, and that's what we'll be reviewing.

MS. TOWNE: The letter from Ms. McGaffey makes reference to certificate holders DFW and DOE - MOU's copy of which is enclosed, but I didn't get it. Should we review that?

MR. MILLS: I deliberately did not include that with your information today, just the letter, but I will give Councilmembers the entire package next week.

MS. TOWNE: Good.

CHAIR LUCE: For Councilmember background, this issue percolated for the better part of a year in various manifestations and involved discussions at length about such issues as quench water and NPDES permits and other issues and finally was resolved in an amicable way to everybody's satisfaction. So I think what this is a culmination of those long, long -- a memorialization of long negotiations between the parties.

MR. FIKSDAL: You probably want to get it finalized and memorialized in the Site Certification Agreement, so that Duke Energy can do something with the project.

CHAIR LUCE: So they can move the project along.

MS. TOWNE: Just for my information because I haven't seen one of these before, does this go back to the governor for a checkoff?

MR. FIKSDAL: According to our rules, if an amendment to a Site Certification Agreement (SCA) has changed the project significantly or it has significant environmental impacts, then it needs to go back to the Governor.

MS. TOWNE: So not in this case, I'm assuming.

MR. FIKSDAL: Correct.

MR. MILLS: The company is proposing that.

MR. FIKSDAL: A technical amendment under our rules would just be something that would be issued by the Council, not having to go to the Governor.

MR. MILLS: It speaks about a Council issue approving it by Council resolution.

CHAIR LUCE: All right.

<i>Cowlitz Cogeneration Project</i>	<i>Allen Fiksdal, EFSEC Manager</i>
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MR. FIKSDAL: Cowlitz. Mike and I were here when the Cowlitz SCA was approved back in 1994 on February 7th and went through several amendments. But in the last amendment it states, "if commencement of this construction has not begun by February 7, 2004" -- which back then seemed like way in the future -- "rights under this agreement to construct and operate the Cowlitz Cogeneration Project shall cease." So by terms of the agreement this SCA ceased on February 7th. We have under WAC 463-36-020, Termination of a Site Certification Agreement, except pursuant to its own terms an amendment to the agreement, and then we have a whole bunch of rules about amendments. So this is not just termination. It's not an amendment. So I think at the next meeting what we propose is that Council have some resolution memorializing that the SCA died of its own accord and officially render it under.

CHAIR LUCE: I would support that. I'm not sure you even need a resolution.

MS. TOWNE: It is what it is.

MR. FIKSDAL: I would like the Council to go through some sort of formal process.

CHAIR LUCE: That's fine. We'll go on the record recognizing the agreement. That would be fine. Any questions about the demise of the Cowlitz Cogeneration Project, which I believe was the only one that we ever did an expedited process on?

MR. FIKSDAL: It was an expedited process. We did it in six months, and it was pretty unusual.

CHAIR LUCE: It was a cogen.

MR. FIKSDAL: It was sponsored by Weyerhaeuser. Originally it was sponsored by Weyerhaeuser and Mission Energy. They went into partnership to build a cogeneration facility at the Weyerhaeuser Longview mill down near the river. After the SCA was issued, there was a falling out between Mission Energy and Weyerhaeuser, and we amended the SCA to delete Mission Energy and Weyerhaeuser would just hold the SCA. They were going to do something similar to what the BP plant is proposing. They were going to take a bunch of boilers off-line at the mill and use the cogeneration for the steam load. It was a good project. It was going to

reduce the air emissions. Everybody wanted it. But essentially Weyerhaeuser used it as a bargaining chip with Cowlitz PUD to get cheaper power, which is what ended up happening in the long run. Just some historical facts there.

CHAIR LUCE: In the long run because then Cowlitz PUD rates could have gone with the cogen project, but that's the long run.

MR. FIKSDAL: I guess I'll add we did talk to some representatives at Weyerhaeuser, so they're aware that it had died, and we had offered them the opportunity to attend the meeting, and they declined to do so.

ITEM NO. 6: EFSEC RULES

<i>Rules Review Discussion</i>	<i>Chris Towne, WDFW</i>
CHAIR LUCE: The next issue on the agenda is EFSEC Rules, rules review discussion. Myself and Chris Towne are noted as leading this discussion. It's an information item, but I think I'm going to ask Chris to lead the discussion. She and Hedia have been undertaking a reorganization of the proposed rules in Chapter 463 which I believe is now complete. Chris.	
MS. TOWNE: I have not seen Hedia's final work product, but she was going to hand it in.	
CHAIR LUCE: It has been turned in, so I'm going to ask you to discuss that, and then I'm going to ask Allen to talk in turn about how he and staff intend to proceed with the work product that has been turned in both by yourself and Hedia. Allen has some comments with respect to the schedule as it will be modified going forward and some comments with respect to the SEPA Determination of Non-Significance (DNS), so why don't you start.	
MS. TOWNE: Basically our undertaking was to reorganize the rules. If you're familiar with the SEPA Guidelines, 197-11 WAC, they're organized in chapters. And we have done a similar thing. The first section is how does EFSEC organize itself, agency procedures? Secondly, performance standards and mitigation where there are separable discrete pieces like noise or seismicity. The third is how do you apply for an SCA with all its component parts? And the fourth one is site certification. When you have a SCA, what does that mean? How do you change it? Specifics on site preservation and restoration. And then the last is other permits, and that's NPDES, the PSDs where we have jurisdiction and have rules on that jurisdiction. Then within each of these sections we have tried to sort out what is appropriate to be in an EFSEC rule and what should be incorporated by reference or cited to in somebody else's rules, like Ecology or Fish and Wildlife. There are a lot of things that drifted into, say, the wetland section. It purported to be a proposed regulation, but in fact it was a lot of narrative; a lot of "you should," "you ought to," "here's our preference," "here's our priorities." Are these rules? No, because we couldn't cite any rule foundation or statutory foundation for those. So that's the sort of internal editing that we undertook, and it's simply in the form of a proposal.	
I would like some buy-in on the organization. This is an effort to make it easier for either an applicant or a citizen or a member of the Council to figure out what the rules are because they'll all be grouped according to their purpose. So anything, for instance, that has to do with how do you get copies from EFSEC, you know that's an agency procedure thing. Specific petitions for rule making, if you want to know where that would be found, it's going to be up here in this agency procedure thing. We have not yet gotten into the question of renumbering, and we will leave that to the discretion of the code reviser. So hopefully they will be numbered sequentially	

EXHIBIT H

**WASHINGTON STATE
ENERGY FACILITY SITE EVALUATION COUNCIL**

RESOLUTION NO. 308

**COWLITZ COGENERATION PROJECT
TERMINATION OF SITE CERTIFICATION AGREEMENT**

Nature of Action. The Energy Facility Site Evaluation Council (Council) is considering whether the Site Certification Agreement (SCA or Agreement) issued to the Weyerhaeuser Company (Weyerhaeuser) to construct and operate the Cowlitz Cogeneration Project has terminated. The terms of the SCA specify that if construction did not begin by February 7, 2004, Weyerhaeuser's rights to construct and operate the Cowlitz Cogeneration Project (Project or CCP) would cease. Weyerhaeuser has notified the Council that it will not be constructing the Project. Approval of this resolution will formally acknowledge that the SCA and the state's authorization for Weyerhaeuser to construct and operate the Project has terminated pursuant to the SCA's terms.

Background. On February 7, 1994, the State of Washington issued an Agreement to Weyerhaeuser and Mission Energy Company to construct and operate the Project, a natural gas-fired steam and electric cogeneration facility at Weyerhaeuser's Longview Mill site in Cowlitz County. Article II, Paragraph 3, of the SCA specified that, "If construction on the project's major components has not commenced within three (3) years of the signing of this Agreement, rights under this Agreement to construct and operate the CCP shall cease."

In 1996, Amendment No. 1 to the SCA revised paragraphs 2 and 3 of Article II to extend the terms of the Agreement to July 14, 1997, with construction to commence by that date or the rights to construct and operate the CCP would cease. Amendment No. 1 also deleted Mission Energy Company from the SCA and transferred all rights and responsibilities held by Mission Energy Company to Weyerhaeuser.

In 1997, the Agreement was amended again. The time to begin construction was extended to February 7, 2004 and authorization to construct and operate the Project would cease if construction had not started by that date.

Throughout the life of the SCA, Weyerhaeuser has maintained the Agreement and its ability to begin construction of the Project, subject to the terms of the SCA. In late 2003, Weyerhaeuser notified Council staff that it would not be constructing the Project. It intended to let the SCA terminate in February 2004. The Council contacted Weyerhaeuser in early 2004, and confirmed that the company did not wish to extend the SCA to maintain its right to construct the Project. Weyerhaeuser understood that the SCA would terminate on February 7, 2004, pursuant to the terms of the Agreement.

Procedural Status. The procedure for terminating an SCA is set out in the Council's rules. WAC 463-36-020 states: "Termination of a site certification agreement (SCA) except pursuant to its own terms, is an amendment of the agreement." Because the Project SCA contains specific terms under which the Agreement and the rights provided in the Agreement cease, and because Weyerhaeuser has notified the Council that it intends to let the SCA lapse, the Council has initiated this action to formally acknowledge SCA termination effective February 7, 2004.

Conclusion. The Council concludes that Weyerhaeuser has decided to abandon its efforts to construct the Project. Therefore, subject to the terms of the Agreement, because construction did not start by February 7, 2004, the rights provided to Weyerhaeuser to construct and operate the Project cease and the Agreement is no longer in force, effective that date. In accordance with the Council's rules, Weyerhaeuser's decision to not proceed with the Project does not require an amendment to the SCA. Council acknowledgement of the termination of the Project SCA by resolution is the appropriate administrative instrument to recognize that the Agreement and the rights provided under the Agreement ceased effective February 7, 2004.

Resolution. The Council hereby acknowledges that pursuant to the terms of the Agreement, all rights provided to the Weyerhaeuser Company to construct and operate the Project ceased on February 7, 2004, and the Agreement terminated on that date.

Dated and effective this 1st day of March, 2004.

Washington State Energy Facility Site Evaluation Council

By: _____
Jim Luce, EFSEC Chair

Attest: _____
Allen Fiksdal, EFSEC Manager