

WASHINGTON STATE
ENERGY FACILITY SITE EVALUATION COUNCIL
RESOLUTION NO. 353
AMENDMENT NO. 2 TO THE
DESERT CLAIM WIND POWER PROJECT SITE CERTIFICATION AGREEMENT
EXTENSION OF TERM

Nature of Action

On May 5, 2023, the Washington Energy Facility Site Evaluation Council (EFSEC or Council) received a written request from the certificate holder, Desert Claim Wind Power LLC (Desert Claim), to extend the deadline for substantial completion by five years to November 13, 2028.

According to the certificate holder's request, "The proposed amendment would allow additional time for the company to secure a long-term power purchase commitment, which is necessary to proceed with financing construction of the project."

Background

Governor Gregoire executed the Desert Claim Site Certification Agreement (SCA) in February 2010 based on the Council's recommendation following an adjudicative hearing and an environmental impact statement. The original February 2010 SCA authorized Desert Claim to construct and operate a wind power facility consisting of a maximum of 95 wind turbines on tubular steel towers. The 2010 SCA permitted an output capacity of 190 total megawatts (MW) and a tower height not to exceed a maximum of 410 feet, within an approximately 5,200-acre project site. The project was located north and west of Ellensburg near the intersection of U.S. Route 97 and Smithson Road.

Having not yet started construction, in February 2018 Desert Claim requested that the Council amend its SCA to allow for the reconfiguration of its site boundary and the installation of fewer, but larger turbines than were originally authorized. Following a public hearing in Ellensburg and an addendum to the original SEPA environmental impact statement, the Council granted Desert Claim's request to amend its SCA in Resolution No. 343, dated November 13, 2018.

The resulting SCA Amendment No. 1 reconfigured the project and its boundaries, reducing the project area to approximately 4,400 acres by removing 1,271 acres located east of Reecer Creek and adding approximately 370 acres to the west and south of the original project area. The number of authorized wind turbines was reduced to a maximum of 31 three-bladed turbines on tubular steel towers, not to exceed a maximum height of 150 meters (492 feet), with a capacity ranging from 2.0 to 4.2 megawatts (MW). The total capacity for the reconfigured project is not to exceed 100 MW. Primary site access during construction and operation was changed from Reecer Creek Road to Smithson Road (accessed from U.S. Route 97). All turbines are to be located at least 2,500 feet from all residences to mitigate the possibility of residents experiencing shadow flicker.

SCA Amendment No. 1 also extended the original SCA's deadline for commencement of commercial operations (also referred to as "Substantial Completion") by three years, to November 13, 2023. The original SCA's deadline for beginning construction was eliminated.

Procedural Status

EFSEC's SCA amendment procedure is governed by chapter 80.50 RCW and chapter 463-66 WAC.

Desert Claim and EFSEC have complied with procedural requirements of Chapter 463-66 WAC as follows:

- Pursuant to WAC 463-66-030, Desert Claim submitted its request for amendment of the SCA and a State Environmental Policy Act (SEPA) Environmental Checklist in writing on May 5, 2023.
- At the Council's monthly meeting on May 17, 2023, EFSEC staff announced that a public hearing session had been scheduled for the proposed SCA amendment consistent with WAC 463-66-030.
- Pursuant to WAC 463-66-030, notice of a virtual public special meeting was distributed on July 7, 2023G to the Desert Claim project distribution list. The notice advised that the certificate holder had requested an amendment to the SCA, and that a public hearing session to consider the matter would be conducted on July 13, 2023. The notice stated that public comments would be heard from 5:00pm to 7:00pm or until the last speaker, whichever comes first, and that written comments could also be submitted online or via U.S. mail.
- The public hearing session was held on July 13, 2023, as a virtual public special meeting on the Microsoft Teams meeting platform and via a conference telephone number.
- An online public comment database was open during the July 13, 2023, public hearing session for submission of written comments.
- The certificate holder gave a presentation on the proposed amendment to the SCA at the July 13, 2023, hearing session.
- One written comment was submitted to the record as a result of the public comment opportunity. The comment was from Neil Caulkins, Deputy Prosecuting Attorney representing Kittitas County and was in opposition to the request on the grounds that the failure of the certificate holder to secure a contract for the purchase of the power demonstrates a lack of need for the power.¹
- At the Council's September 20, 2023, monthly meeting Amí Hafkemeyer, Director of Siting and Compliance, proposed that the Council approve the SCA amendment request subject to conditions. The Council considered information in the Desert Claim's SCA amendment request, advice from legal counsel, and the EFSEC staff recommendation and

¹ Mr. Caulkins stated that "If the power is not needed by Washington state, then amending this site certification agreement to keep this apparently failed venture going does not accomplish EFSEC's statutory charge of providing for the state's energy needs - this particular need is simply absent."

directed staff to draft a resolution for Council review consistent with the staff recommendation.

Discussion

The current SCA for the Desert Claim Wind Facility, as amended by Amendment No. 1 in 2018, states:

This Site Certification Agreement authorizes the Certificate Holder to construct the Project *such that Substantial Completion² is achieved no later than five (5) years from the date that Amendment No. 1 is approved by the Council*; provided, however, that such construction is not delayed by a force majeure event,³ and that the construction schedule that the Certificate Holder submits pursuant to Article IV.K of this Agreement demonstrates its intention and good faith basis to believe that construction shall be completed within eighteen (18) months of beginning Construction.

[Emphasis and footnotes added.] The SCA's terms are clear that Substantial Completion must be achieved no later than five years from the date of Amendment No. 1—i.e., by November 13, 2023. The SCA does not indicate a deadline by which construction must start. However, it appears that the Council simply chose to remove or suspend any deadline for the start of construction, and instead only imposed a deadline for the delivery of energy to the electrical grid (i.e., Substantial Completion).

The certificate holder requests a five year extension of the current deadline for Substantial Completion of the Project.

WAC 463-66-040 outlines the relevant factors that the Council shall consider prior to a decision to amend an SCA. That rule provides that in reviewing any proposed amendment, the Council shall consider whether the proposal is consistent with:

- (1) The intention of the original SCA;
- (2) Applicable laws and rules;
- (3) The public health, safety, and welfare; and
- (4) The provisions of chapter **463-72** WAC.

² Desert Claim SCA Art. II.34 states: "'Substantial Completion' means the Project is generating and delivering energy to the electric power grid."

³ SCA Art II.21 states: "'Force Majeure Event' means any event beyond the control of the Party affected that directly prevents or delays the performance by that Party of any obligation arising under this Agreement, including an event that is within one or more of the following categories: condemnation; expropriation; invasion; plague; drought; landslide; tornado; hurricane; tsunami; flood; lightning; earthquake; fire; explosion; epidemic; quarantine; war (declared or undeclared), terrorism or other armed conflict; material physical damage to the Project caused by third parties; riot or similar civil disturbance or commotion; other acts of God; acts of the public enemy; blockade; insurrection, riot or revolution; sabotage or vandalism; embargoes; and, actions of a governmental authority other than EFSEC."

Because the requested amendment only concerns the SCA’s termination date, it would not affect the intention of the original SCA, except in regard to that narrow issue. In addition, the provisions of 463-72 WAC, which are concerned with site restoration requirements at the end of a project’s useful life and financial assurances for that purpose, is in no way implicated by the request. The certificate holder proposes no changes to the SCA’s requirements on that topic, and because construction has not commenced, the requirement to provide financial assurance for site restoration has not yet been triggered.

Thus, the chief considerations are whether the proposed extension is consistent with applicable laws and rules, and with the public, health, safety, and welfare. A good starting point for analysis of both of these topics is the language added to RCW 80.50.010 by Laws of 2022, ch. 183, § 1, which states:

It is the policy of the state of Washington to reduce dependence on fossil fuels by recognizing the need for clean energy in order to strengthen the state's economy, meet the state's greenhouse gas reduction obligations, and mitigate the significant near-term and long-term impacts from climate change while conducting a public process that is transparent and inclusive to all with particular attention to overburdened communities.

Facilitating the certificate holder’s ability to construct this clean energy facility would align with this policy goal of RCW 80.50.010. However, this is not the only consideration; the Council has indicated previously that an unlimited “build window” is not appropriate,⁴ and this is why EFSEC rules provide a presumptive ten year term for site certification agreements.

The policies behind EFSEC’s adoption of a presumptive ten year term for site certification agreements are not insurmountable in this case.

The Project underwent an EFSEC public comment process and EFSEC prepared an addendum to the Supplemental Environmental Impact Statement for the 2018 SCA amendment that authorized the Project’s redesign.

Although the Council’s statutory directive does not include evaluating the financial viability of the specific energy facility proposals that are presented to it for review, the certificate holder represents that it has actively been competing in requests for proposals for power purchase contracts. It also represents that it expects more such requests in the near term, and that it is ready and able to proceed with construction as soon as it is able to secure a power purchase contract.

Whether or not the project ultimately proves financially viable will be demonstrated during the requested extension. If it is not viable, it will not be built. The Council’s charge is “to recognize the pressing need for increased energy facilities, and to ensure through available and reasonable

⁴ Although “there is a benefit to the public to have permitted facilities ready to be constructed whenever it becomes known that more generation capacity is needed . . . an unlimited ‘build window’ for a proposed project is not appropriate as, over time, technology or mitigation measures presented in an application may no longer be protective of environmental standards and conditions at the time the facility is constructed.” Council Order No. 860, Order Recommending Approval of Amendment No. 5 of Site Certification Agreement of the Satsop CT Project (Grays Harbor Energy Center) p. 13. (Dec. 21, 2010).

methods that the location and operation of all energy facilities and certain clean energy product manufacturing facilities will produce minimal adverse effects on the environment, ecology of the land and its wildlife, and the ecology of state waters and their aquatic life.” RCW 80.50.010.

Neither staff’s review, nor any public comment indicates the likelihood of any substantial changes in technology or in the site’s environmental conditions since the 2018 SCA amendment that would necessitate a significant new review of the project’s impacts. Since the SCA was last amended, there have been some changes in requirements applicable to wind energy projects, as well as in the requirements imposed on similar projects sited through the EFSEC process, but these changes can be incorporated as conditions of the requested extension.

Under these circumstances, granting the extension subject to protective conditions would be more appropriate than to let the SCA expire by its present terms and thereby require the certificate holder to submit a new application for site certification.

EFSEC staff recommended that the request extension be granted subject to the limitation that no further extension requests be allowed unless construction is reasonably underway, although not yet to point of “Substantial Completion.”

EFSEC staff also recommended that the following changes be included in the SCA:

- Given the new state law requirement, in RCW 70A.550.020, Laws of 2023, ch. 334, § 2, that the project apply to the Federal Aviation Administration (FAA) for approval to install an aircraft detection lighting system (ADLS), there is the potential for additional impacts or permitting considerations associated with this installation. If approved by the FAA, EFSEC shall review the proposed ADLS system prior to installation to determine whether any additional permits and conditions are required.
- The SCA should be amended to require the certificate holder to include in its waste management plan a commitment to recycle project components, both during operation and maintenance and at decommissioning, when recycling opportunities are reasonably available.⁵
- The certificate holder’s most recent site layout included turbines located less than 0.5 miles from seven (7) non-participating residences. The certificate holder should be required to submit, for the Council’s review prior to micrositing, an analysis of the feasibility of placing all turbines more than 0.5 miles from non-participating residences to avoid dominating views from these sensitive viewing locations.

The Council finds the conditions recommended by EFSEC Staff to appropriate under the circumstances of this extension request, and the certificate holder has indicated that the conditions are acceptable.

⁵ See Laws of 2023, ch. 324, § 1, directed Washington State University extension energy program to “conduct a study on the feasibility of recycling wind turbine blades installed at facilities in Washington that generate electricity for distribution to customers in Washington.”

RESOLUTIONS

For the foregoing reasons, the Council:

Grants Desert Claim's request to amend the SCA's expiration date subject to the following conditions:

- Given the new state law requirement, in RCW 70A.550.020, Laws of 2023, ch. 334, § 2, that the project apply to the Federal Aviation Administration (FAA) for approval to install an aircraft detection lighting system (ADLS), there is the potential for additional impacts or permitting considerations associated with this installation. If approved by the FAA, EFSEC shall review the proposed ADLS system prior to installation to determine whether any additional permits and conditions are required.
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The Council's approval is memorialized in the attached SCA Amendment.

The approved SCA changes are shown in the SCA Amendment 2.

Appeals:

A request for judicial review of the SCA amendment is subject to the requirements of the Administrative Procedures Act, Chapter 34.05 RCW.

DATED at Lacey, Washington and effective on October ___, 2023

WASHINGTON ENERGY FACILITY SITE EVALUATION COUNCIL

Kathleen Drew, EFSEC Chair

Sonia E. Bumpus, EFSEC Director

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