

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of the Application No. 2009-01:
WHISTLING RIDGE ENERGY LLC:
WHISTLING RIDGE ENERGY PROJECT

WHISTLING RIDGE ENERGY LLC'S
REQUEST TO EXTEND TERM OF SITE
CERTIFICATE AGREEMENT
PURSUANT TO WAC 463-68-080

A. Introduction

The Applicant, Whistling Ridge Energy, LLC (Whistling Ridge or Applicant), requests that the Washington Energy Facility Site Evaluation Council (EFSEC or "Council") grant a three-year extension to the term of the Site Certification Agreement (effective November 18, 2013)¹ to November 2025. This request is based on the Council's discretionary authority to grant an extension pursuant to WAC 463-68-080(3).

If the Council grants this request, the Applicant will first fully review the financial and environmental feasibility of constructing the facility prior to commencing any studies. Only then would the Applicant move forward with studies, some of which are specific to certain times of the year.

As discussed below, EFSEC's rules and the terms of Site Certificate Agreement (SCA) approved by EFSEC set permissive timeframes for the commencement of construction. Whistling Ridge believes that the intent behind the permissive "shelf life" of SCAs acknowledges that EFSEC jurisdictional projects which typically fulfill important statewide policy objectives often face multi-year litigation aimed at delaying applications and undermining the commercial viability of projects through costs and delays. As is the case here, once a Site Certification Application has undergone often multi-year evaluation and scrutiny, including extensive review through Washington's State Environmental Policy Act (SEPA, RCW 43.21C), such appeals are rarely successful, but they exact a significant cost for the Applicant. Here, litigation filed by project opponents commenced with a failed appeal before the Washington Supreme Court, followed by failed litigation and appeals before the Ninth Circuit Court of appeals. The appeals were concluded in July 2018.

¹ WAC 463-64-040(3) provides that the certification agreement "shall be binding upon execution by the governor and the applicant." [Emphasis added].

B. Whistling Ridge Project History and Timeline

- 3/10/09 Application for Site Certification filed; history of adjudication can be found on EFSEC’s Project web page.
- 1/5/12 EFSEC’s Site Certificate Agreement and Recommendation submitted to Governor Gregoire.
- 3/5/12 Governor Gregoire approves the Final Order and signs the Site Certificate Agreement.
- 8/20/13 After appeal by project opponents, the Washington Supreme Court issues a unanimous decision denying appeal.
- 11/18/13 Jason Spadaro, Whistling Ridge Energy, signs the Site Certificate Agreement (“Effective Date” of Site Certificate Agreement)
- 2013-15 During this period, BPA worked on the FEIS and its Supplement to the FEIS, addressing further comments submitted post-FEIS by project opponents.
- 9/9/15 Project opponents file an appeal with the US 9th Circuit Court of Appeals, challenging BPA’s NEPA FEIS, supporting BPA’s decision to grant the Whistling Ridge Energy Project an interconnection to the Federal Columbia River Transmission System.
- 3/27/18 The 9th Circuit Court of Appeals issues a Memorandum Decision denying the appeal.
- 7/11/18 Following a petition by project opponents for a rehearing (*en banc*), the full US 9th Circuit Court of Appeals denied rehearing. This denial concluded all opposition litigation.
- 10/25/18 Whistling Ridge files and presents its “Five Year Report” to EFSEC (WAC 463-68-060), confirming the following:
- Section 1: At this time, the Project is not proposing any changes as described in Section 1 of the statute.*
- Section 2: There is no new information or changed conditions known at this time that might indicate the existence of any probable significant adverse environmental impacts not previously addressed in the EFSEC FEIS.*
- Section 3: Finally, at this time, Whistling Ridge is not proposing any changes, modifications or amendments to the Site Certificate Agreement of any regulatory permits. It is possible that such changes will be proposed in the future.*
- 2018 – 2021 SDS Lumber Co. (parent company to Whistling Ridge Energy LLC) undergoes protracted internal discussions among the owners, ultimately resulting in the

decision to sell SDS Lumber Co. and related entities. A sale process was begun in 2021 and in November of 2021 all company assets were sold to multiple buyers. COVID complicates efforts to proceed with Whistling Ridge Energy construction.

2021 - 2022 Twin Creeks Timber, LLC (TCT) acquired a substantial portion of the SDS timberland assets, including Whistling Ridge Energy LLC and the property on which the project would be built, in November of 2021. The assets of TCT are managed by Green Diamond Management Company, a Washington corporation and subsidiary of Green Diamond Resource Company, a fifth-generation timberland owner in the State of Washington.

C. Effective Date of Site Certificate

Whistling Ridge executed the SCA only after completion of the Supreme Court appeal, where the Court issued a unanimous decision denying the appeal. Whistling Ridge believed that it would be unjust for the Project to lose any time established in the SCA on account of what proved to be a failed appeal filed to stop the project. *Friends of Columbia Gorge, Inc. v. State Energy Facility Site Evaluation Council*, 178 Wn.2d 320, 310 P.3d 780 (2013). RCW 80.50.100 confirms that the SCA is binding upon execution of *both* the Governor and the Applicant:

RCW 80.50.100 Recommendations to governor—Expedited processing—Approval or rejection of certification—Reconsideration.

* * *

(3)(a) Within sixty days of receipt of the council's report the governor shall take one of the following actions:

- (i) Approve the application and execute the draft certification agreement;
- or
- (ii) Reject the application; or
- (iii) Direct the council to reconsider certain aspects of the draft certification agreement.

(b) The council shall reconsider such aspects of the draft certification agreement by reviewing the existing record of the application or, as necessary, by reopening the adjudicative proceeding for the purposes of receiving additional evidence. Such reconsideration shall be conducted expeditiously. The council shall resubmit the draft certification to the governor incorporating any amendments deemed necessary upon reconsideration. Within sixty days of receipt of such draft certification agreement, the governor shall either approve the application and execute the certification agreement or reject the application. The certification agreement shall be binding upon execution by the governor and the applicant. * * *

Whistling Ridge chose to defer executing the Site Certificate Agreement until the Supreme Court appeal was resolved. The “effective date” of the Site Certification Agreement occurred at the time the two parties (the Governor and the Applicant) had executed the Site

Certificate Agreement. The “term” for start of construction commences within ten years of the “effective date” of the Site Certificate Agreement:

WAC 463-68-030 Term for start of construction. Subject to conditions in the site certification agreement and this chapter, construction may start any time within ten years of the effective date of the site certification agreement.

Furthermore, the Site Certificate Agreement allows construction deadlines to be extended to such time as when “all final state and federal permits necessary to construct an operate the Project are obtained and associated appeals have been exhausted:

Site Certification Agreement, Article I.B: “This Site Certification agreement authorizes the Certificate Holder to construct the Project such that Substantial Completion is achieved no later than ten (10) years from the date that all final state and federal permits necessary to construct and operation the Project are obtained and associated appeals have been exhausted.” (Page 8 of 42).

As noted in the Project History summary above, opposition appeals to the Bonneville Power Administration interconnection and related NEPA process were not concluded until July 2018. In summary, it was not until 2018 that appeals of all state and federal permits were “exhausted.”

The essential reason for this latitude for construction is that *no project facing fierce, multi-year litigation can secure financing or otherwise proceed if pending appeals jeopardize construction.* No prudent developer proceeds with construction and operation of an energy facility during litigation, where there is a risk of an appeal outcome that would require the dismantling of an operating facility and cause monumental contract breaches and power disruptions. In fact, it is unlikely that any utility or private purchaser of energy resources would even consider commitments to purchase a facility or power from an energy facility facing staunch appeal risks. It is that fundamental risk that stops projects during appeals, including appeals that have little or no merit.

D. Request to Extend Term of Site Certificate Agreement; Authority and Process

Whistling Ridge requests that the Council extend the term of the Site Certificate for a reasonable period (three years) to undertake due diligence work for the facility, and to update essential natural resource and other studies. WAC 463-68-080 confers discretion for the Council to grant this request. Whistling Ridge understands that the Council would need to conduct review of this request as an amendment to the Site Certificate Agreement, including one or more “public hearing sessions.” In seeking this request, the Applicant will utilize this time to consider commercial viability and to update environmental information and engage with stakeholders. The extension and amendment process are subject to the following Council Rules:

WAC 463-68-080 Site certification agreement expiration.

(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.

(2) 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.

(3) Upon a request to extend the term of the site certification agreement, the council may conduct a review consistent with the requirements of WAC 463-68-060 and 463-68-070, and other applicable legal requirements.

WAC 463-66-030 Request for amendment.

A request for amendment of a site certification agreement shall be made in writing by a certificate holder to the council. The council will consider the request and determine a schedule for action at the next feasible council meeting. The council may, if appropriate and required for full understanding and review of the proposal, secure the assistance of a consultant or take other action at the expense of the certificate holder. The council shall hold one or more public hearing sessions upon the request for amendment at times and places determined by the council.

WAC 463-66-040 Amendment review.

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. [Concerns site restoration]

E. Matters to be Addressed in the Amendment to the ASC

The extension will allow Whistling Ridge Energy, through its new owner TCT, to review and if feasible to propose the installation of fewer but taller wind turbine generators and associated facilities within the designated and approved micrositing corridors. Additionally, **Attachment A** outlines what the Applicant considers to be related and necessary actions, including studies and reports needed to complete the amendment request. The Applicant would confer with EFSEC staff to ensure that all necessary information is developed. Most importantly, Whistling Ridge proposes to update natural resource studies including season-specific data (*e.g.* avian nesting surveys) and new visual simulations from key viewing areas (KVAs) within the Columbia River Gorge Scenic Area. Commencing these studies, including consultation with WDFW, local Tribes, and other agencies concerning sufficiency of information needed for updated wildlife and other surveys, will be essential.

DATED: March 2, 2022.

STOEL RIVES LLP

A handwritten signature in blue ink, appearing to read 'T. McMahan', with a long horizontal flourish extending to the right.

By: Timothy L. McMahan, WSBA #16377
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Attachment A

Likely (Tentative) Permitting Tasks and Actions Anticipated to Amend WREP Site Certificate

Action	Likely Timing (<i>tbd</i>)
Contact wildlife consultants; develop scopes of work; identify seasonally imperative work and schedule same: <ul style="list-style-type: none"> • Avian baseline updates (including passerines and bats) • Bald and Golden Eagle and other raptor nest surveys • Northern Spotted Owl survey update for confirmation • Sensitive plants. 	
Visual simulation updates; develop scope of work for modified WTGs and locations.	
Updated noise analysis.	
Develop schedule to complete all study work needed for Site Certificate Amendment Application and SEPA action.	
Agency meetings: <ul style="list-style-type: none"> • ODFW -- Confirm wildlife update work • EFSEC staff -- Discuss timing, cost, needs, process; outline amendment process, including SEPA process. Discuss and confirm mitigation parcel or alternative mitigation approaches. • USFWS -- BGEPA; NSO • DNR – Consultation as needed. • Consult with Tribal governments and representatives. 	
BPA contacts and confirmations.	
Complete all studies.	
Draft ASC Amendment; filing timing discussion with EFSEC, including evaluation of expected hearing proceedings.	
File amendment (public process begins).	
Complete all work on mitigation parcel, including agency (WDFW) concurrence; identify and address any other mitigation plans.	