

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

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

TWIN CREEKS TIMBER, LLC'S AND WHISTLING RIDGE ENERGY, LLC'S RESPONSE TO FRIENDS OF THE COLUMBIA GORGE AND SAVE OUR SCENIC AREA'S APPLICATION FOR AN ADJUDICATIVE PROCEEDING

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I. INTRODUCTION

Twin Creeks Timber, LLC (“TCT”) and Whistling Ridge Energy, LLC (“Whistling Ridge”) (together “Applicant”) respectfully request that the Energy Facility Site Evaluation Council (“EFSEC” or “Council”) deny the Friends of the Columbia Gorge (“Friends”) and Save Our Scenic Area’s (“SOSA”) (together “Movants”) Application for an Adjudicative Proceeding (“Motion”).

On November 18, 2013, after an adjudicative proceeding on the Whistling Ridge Energy Project’s (“Project”) Application for Site Certification (“ASC”), Applicant and the Governor executed a Site Certificate Agreement for the Whistling Ridge Energy Project (“SCA”). On September 13, 2023, pursuant to WAC 463-66-100, Applicant filed with EFSEC an application for transfer of ownership to TCT, the new owner of Whistling Ridge (“Transfer Request”). That same day, Applicant also filed a request to extend the SCA’s term pursuant to WAC 463-68-080 (“Extension Request”). The Extension Request modifies the SCA, and, therefore, the general amendment procedures in WAC Ch. 463-66 apply. After EFSEC granted Friends request for separate

1 public hearings on the Extension Request and Transfer Request (together
2 “Requests”), Friends (and SOSA) is now asking the Council to instead initiate
3 an adjudicative proceeding on the Requests. We respectfully request that the
4 Council deny the request because Movants have identified no grounds for an
5 adjudicative proceeding.

6 II. FACTUAL BACKGROUND

7 Whistling Ridge Energy, LLC filed the ASC on March 10, 2009. After a
8 lengthy proceeding that “set a record for length, volume, and number of issues
9 addressed,” *Friends of Columbia Gorge, Inc. v. State Energy Facility Site*
10 *Evaluation Council*, 178 Wash. 2d 320, 329, 310 P.3d 780 (2013), Governor
11 Gregoire approved the Final Order.

12 Movants appealed Governor Gregoire’s decision to the Washington
13 Supreme Court. The court quickly and unanimously denied the appeal after
14 reviewing several challenges related to EFSEC’s wildlife and habitat, land use
15 consistency, cultural and historic resources, and visual impacts evaluation. The
16 court found that the Council had properly considered all of the evidence,
17 including Movants, before making its recommendation. *Id.* at 335-47.

18 Movants then challenged the NEPA FEIS supporting BPA’s decision to
19 grant an interconnection for the Project on similar grounds. The Ninth Circuit
20 issued a Memorandum Decision denying the appeal because BPA had correctly
21 determined that the Project was not a federal action and, therefore, not subject
22 to NEPA. *Friends of the Columbia Gorge v. Bonneville Power Admin.*, 716 F.
23 App’x 681, 682 (9th Cir. 2018).

24 Here, the Requests propose minor SCA amendments that do not result in
25 additional unevaluated environmental impacts. The Transfer Request proposes
26 to transfer the controlling ownership in Whistling Ridge Energy, LLC from

1 SDS Lumber Co. to TCT. TCT has been making timely payments on the SCA,
2 without the transfer in place. Transfer Request at 1. With the transfer, TCT
3 will become formally responsible for SCA compliance, paying the fees, and
4 general Project management and execution.

5 The Extension Request proposes to extend the deadline to begin
6 construction from November 2023 to November 2026. Extension Request at 1.
7 During the extension period, Applicant plans to update its wildlife, noise, and
8 visual studies and develop a schedule for SCA compliance and State
9 Environmental Policy Act (“SEPA”) review. *Id.* at Att. A. If necessary,
10 Applicant will then file an SCA amendment and undergo any necessary
11 supplemental SEPA review for any proposed Project changes. *Id.* In the
12 meantime, Applicant plans to initiate studies. Applicant is not proposing any
13 imminent efforts to construct develop or construct the Project.

14 III. ARGUMENT

15 **A. EFSEC Is Not Required to Hold an Adjudicative Proceeding Because**
16 **RCW 34.05.413(2) Does Not Apply When a Specific Rule, Like WAC**
463-66-030 or WAC 463-66-100, Applies.

17 While Applicant agrees that the Requests amend a license, the SCA,
18 RCW 34.05.413(2) only requires an adjudicative hearing “[w]hen required by
19 law.” Movants do not point to anything in the Energy Facility Site Locations
20 Act (“EFLSA”) or in the EFSEC rules that requires an adjudicative proceeding
21 on the Requests. That is because there is none. Instead, Movants depend
22 entirely on the Washington Administrative Procedure Act’s (“WAPA”) general
23 rules that only apply when there are no superseding agency rules.

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1 **1. RCW 34.05.422(1) does not require EFSEC to conduct an**
2 **adjudicative proceeding for the Requests because EFSEC has**
3 **provided an alternative procedure by law.**

4 WAC 463-66-030 and -100 (“SCA Amendment Rules”) are an exception
5 to RCW 34.05.422(1) because they are legal provisions that establish an
6 alternative procedure for the Requests. RCW 34.05.422(1) states, “*Unless*
7 *otherwise provided by law* ... an agency may not ... modify a license unless the
8 agency gives notice of an opportunity for an appropriate adjudicative
9 proceeding.” RCW 34.05.422(1) (emphasis added). The phrase “unless
10 otherwise provided by law” creates an exception to RCW 34.05.422(1)’s
11 requirements when other legal provisions apply. Here, EFSEC rules provide
12 that only a public hearing on the Requests is required by law. *See* WAC 463-
13 66-030 (requiring “one or more public hearing sessions upon the request for
14 amendment”); WAC 463-66-100(4) (requiring an “informational hearing” on a
15 transfer request). Friends itself has recognized that a public hearing is “required
16 by law for each of these matters,” not a “full-blown adjudicative proceeding.”
17 Friends of the Columbia Gorge Scheduling Motion at 5 (Sept. 18, 2023). RCW
18 34.05.422(1) does not apply because “EFSEC must schedule ... when it will
19 hold *the public hearings required by law* for each of these matters.” *See id.* at
20 4-5 (emphasis added).

21 **2. EFSEC’s Specific Rules Supersede the WAPA’s General**
22 **Procedural Requirements for License Modification.**

23 The SCA Amendment Rules supersede RCW 34.05.422(1). WAPA is a
24 general statute that “must yield to a more specific statutory provision,” like
25 EFSLA. *See Lakeside Indus., Inc. v. Wash. State Dep’t of Revenue*, 1 Wash. 3d
26 150, 156, 524 P.3d 639 (2023). Under the EFSLA, EFSEC operates within a
“unique statutory framework” where the legislature gave significant discretion

1 to EFSEC. *Friends of Columbia Gorge*, 178 Wash. 2d at 334. EFSLA
2 authorizes EFSEC “[t]o adopt, promulgate, amend, or rescind suitable rules and
3 regulations, pursuant to chapter 34.05 RCW, to carry out the provisions of this
4 chapter.” RCW 80.50.040(1); *see also* RCW 80.50.040(3) (authorizing EFSEC
5 to “establish rules of practice for the conduct of public hearings pursuant [to the
6 WAPA]”). WAPA recognizes that EFSEC can adopt rules “governing the ...
7 procedures prescribed or authorized by this chapter and rules of practice before
8 the agency.” RCW 34.05.220(1)(a).

9 Pursuant to this authority, EFSEC “set forth procedures by which
10 adjudicative proceedings are to be conducted before the council under Chapter
11 34.05 RCW” that supersede the WAPA’s general rules. WAC 463-30-010. In
12 particular, SCA amendments only require a public hearing. *See* SCA
13 Amendment Rules. EFSEC’s decision to only require a public hearing
14 supersedes WAPA’s general rule that a license modification requires an
15 adjudicative proceeding. Because EFSEC has adopted specific rules that
16 supersede WAPA, RCW 34.05.422(1) does not provide a basis for requiring an
17 adjudicative proceeding pursuant to RCW 34.05.422(1).

18 **B. There Are No Complicated Evidentiary, Legal, or Policy Issues That**
19 **Warrant EFSEC Exercising Its Discretion Under RCW 34.05.413(1).**

20 An adjudicative proceeding is unnecessary and unduly burdensome
21 because there are no complicated evidentiary, legal, or policy issues related to
22 the Requests. RCW 34.05.413(1) allows EFSEC, “[w]ithin the scope of its
23 authority[,] ... [to] commence an adjudicative proceeding at any time with
24 respect to a matter within the agency’s jurisdiction.” RCW 34.05.413(1).

25 Movants provide a list of 46 issues that they believe warrant an
26 adjudicative proceeding. None of them do. The Council has already resolved

1 some issues, like consolidation and separate hearings. *See* EFSEC, Notice of
2 Public Hearings and Opportunities for Public Comment 1 (Apr. 26, 2024)
3 (proposing two separate hearings “to receive comments pertinent to each of the
4 two requests”). Several issues (at least) are entirely within EFSEC’s decision-
5 making discretion. *See* Motion at 17-18 (status of and compliance with the
6 SCA). Others dispute information clearly provided in the Requests, such as the
7 proposed deadline for the extension. *See* Extension Request at 1. Several
8 issues are premature because the Requests do not propose amending the SCA to
9 allow for a redesign or construction. *See* Extension Request at 1. Other issues
10 have already been litigated and fully resolved, like the Project’s impacts. *See*
11 Letter from Governor Chrstine Gregoire to EFSEC Chairman James Luce
12 Approving the Project (Mar. 5, 2012); *Friends of Columbia Gorge*, 178 Wash.
13 2d at 335-47; *Friends of the Columbia Gorge v. Bonneville Power Admin.*, 716
14 F. App’x 681, 682 (9th Cir. 2018). In short, none of the issues identified by
15 Movants warrant an adjudicative proceeding.

16 IV. CONCLUSION

17 Applicant recognizes the importance of conducting a public process. To
18 the extent required by law, Applicant supports EFSEC’s duty to hold a public
19 hearing. For the foregoing reasons, Applicant respectfully requests that the
20 Council deny the Application for an Adjudicative Proceeding.

21
22 DATED: May 8, 2024.

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1 **CERTIFICATE OF FILING AND SERVICE**

2 I hereby certify that on May 8, 2024, I filed the foregoing TWIN CREEKS TIMBER,
3 LLC’S AND WHISTLING RIDGE ENERGY, LLC’S RESPONSE TO FRIENDS OF THE
4 COLUMBIA GORGE AND SAVE OUR SCENIC AREA’S APPLICATION FOR AN
5 ADJUDICATIVE PROCEEDING, dated May 8, 2024, with the Washington Energy Facility
6 Site Evaluation Council through electronic filing via email to comment@efsec.wa.gov.

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

- 9 Nathan J. Baker
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18 DATED: May 8, 2024.

19

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