BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of Whistling Ridge Energy, LLC's September 13, 2023 Request to Extend the Term of the 2012 Site Certification Agreement for the Whistling Ridge Energy Project	FRIENDS OF THE COLUMBIA GORGE'S REPLY IN SUPPORT OF OBJECTIONS TO HEARINGS PROCESS AND SCHEDULING MOTION
In the Matter of Whistling Ridge Energy, LLC's September 13, 2023 Application to Transfer the 2012 Site Certification Agreement for the Whistling Ridge Energy Project to Twin Creeks Timber, LLC as the New Parent of Whistling Ridge Energy, LLC	

I. INTRODUCTION

On May 6, 2024, Friends of the Columbia Gorge ("Friends") filed with the Council its Objections to the Hearings Process and Scheduling Motion in the above-captioned matters involving the Whistling Ridge Energy Project ("WREP" or "Project").[1] On May 14, 2024, Twin Creeks Timber, LLC ("TCT") and Whistling Ridge Energy, LLC ("WRE") (collectively, "Respondents") filed a Response to Friends' Objections and Scheduling Motion. In their Response, TCT and WRE dispute only one of the objections filed by Friends—namely, that by failing to undertake any environmental review of the Extension Request and Transfer Application under Washington's State Environmental Policy Act ("SEPA"), Chapter 43.21C RCW, EFSEC is out of compliance with SEPA. Friends hereby replies to TCT and WRE's limited Response.

[1] This Reply applies to both of the above-captioned matters, whether or not they are consolidated.

Friends of the Columbia Gorge
123 NE 3rd Ave., Suite 108
Portland, OR 97232
(503) 241-3762

II. ARGUMENT IN REPLY

A. Neither SEPA nor the Council's Rules allow EFSEC to simply "agree" that SEPA compliance has been completed, thus negating the need for an environmental checklist.

In Section III.A of their Response, TCT and WREP argue that no environmental checklist is required for the Extension Request or Transfer Application because "EFSEC rules expressly allow an applicant to forgo submission of an environmental checklist when the Council and Applicant agree that 'SEPA compliance has been completed.'" (Resp. at 3:25–4:2 (citing WAC 463-47-060(1).) Here, TCT and WREP apparently believe that, under the Council's SEPA Rules, the agency has unfettered discretion to simply "agree"—on any basis whatsoever—that "SEPA compliance has been completed," and thereby waive the requirement to produce an environmental checklist. (*Id.*)

This is false. As stated in WAC 463-47-060(1), if a proposal "is an action and is not exempt, the council *will* request the applicant to complete an environmental checklist." WAC 463-47-060(1) (emphasis added). Furthermore, "[t]he applicant should also complete an environmental checklist if the council is unsure whether the proposal is exempt." *Id.*

Moreover, TCT and WRE appear to admit that a supplemental environmental impact statement ("SEIS") will be needed for the revamped Project that they now envision. (*See* Resp. at 6:10–11 ("The Supplemental Environmental Impact Statement ("SEIS") process under WAC 197-11-405(4) and WAC 197-11-620 is what applies here.").) Under the SEPA Rules, an SEIS must be prepared "as close as possible to the time the agency is developing or is presented with a proposal," and also "early enough so that it can serve practically as an important contribution to the decision[-]making process and will not be used to rationalize or justify decisions already made." WAC 197-11-406. Here, with Respondents' acknowledgement that an SEIS is required, it is even more apparent that EFSEC is not in compliance with SEPA. An SEIS must be prepared before EFSEC takes any action on the current proposals.

/ / /

/ / /

Friends of the Columbia Gorge
123 NE 3rd Ave., Suite 108
Portland, OR 97232
(503) 241-3762

B. The Transfer Application is an "action" under SEPA, and the Extension Request is not categorically exempt.

In Section III.B of their Response, TCT and WREP argue that no new threshold determination is required at this time because the Transfer Application is not an "action" within the meaning of SEPA, and because the Extension Request is categorically exempt. (*See* Resp. at 4:5–6:2).) Respondents are incorrect on both points.

On the Transfer Application, Respondents argue that because transferring ownership of the Project to TCT would not "directly modify the environment," any such transfer would not qualify as an "action" under SEPA. (*Id*. at 4:18–5:14.) However, SEPA's definition of "action" include the issuance of any "license" to "undertake any activity that will directly modify the environment, whether the activity will be conducted by the agency, an applicant or under contract." WAC 197-11-704(2)(a) (definition of "project action"). In this case, the SCA is a license. *See Friends of the Columbia Gorge, Inc. v. EFSEC*, 178 Wn.2d 320, 333, 310 P.3d 780 (2013). Currently, TCT has no authority to act under the SCA, or to otherwise construct and operate the Project. But if the Transfer Request is granted, then TCT will have gained the authority to do so. Therefore, the proposed Transfer Application clearly constitutes the issuance of a "license" to "undertake any activity that will directly modify the environment"—namely, a license to TCT, a company that currently has no right to construct or operate the Project under the SCA.

Regarding the Extension Request, Respondents argue that it is "categorically exempt" under WAC 197-11-800(17), which provides that "[b]asic data collection, research, resource evaluation, requests for proposals (RFPs), and the conceptual planning of proposals shall be exempt" from SEPA's threshold determination and EIS requirements. In an effort to shoehorn the Project into this categorical exemption, Respondents assert that "[t]he Extension Request falls under this exemption because the Applicant only proposes to gather additional data and potentially develop conceptual planning for an SCA amendment." (Resp. at 5:25–6:2.)

Friends agrees that Respondents do not need to prepare a threshold determination and no EIS is required for Respondents to "gather additional data" or to engage in "conceptual

Friends of the Columbia Gorge
123 NE 3rd Ave., Suite 108
Portland, OR 97232
(503) 241-3762

planning." Indeed, they need no governmental approval whatsoever for those actions, and certainly do not require an extension of the SCA to engage in such activities.

Here, however, Respondents are not simply proposing to gather data and engage in conceptual planning. Rather, they are proposing to extend the term of the SCA and to have the right to construct the Project anytime over the next two and a half years (despite the fact that the SCA expired more than two years ago, on March 5, 2022). The requested extension is likely to result in significant adverse environmental impacts, because without it, the Project cannot occur, but with it, not only can the Project (and all the significant environmental impacts that flow from it) occur—the requested extension is being expressly proposed to facilitate a new variation of the Project that will consist of taller wind turbines, and therefore even *more* significant adverse environmental impacts. (*See* Extension Request at 5.) Neither the statewide SEPA Rules nor the Council's SEPA Rules contain any applicable categorical exemption for the extension of a permit or license for a project that will harm the environment. Nor do Respondents cite to any such categorical exemption. A threshold determination must be prepared.

C. Friends agrees with the need for an SEIS. But that does not eliminate the need for a new threshold determination.

Finally, in Section III.D of its Response, TCT and WREP argue that "even if the requests are subject to SEPA review, a[n] SEIS determination is required, not an environmental checklist and threshold determination." (Resp. at 6:3–4.) With this proposition, Friends partially agrees: EFSEC should, indeed, make a determination that an SEIS is required, and must prepare the SEIS "as close as possible to the time the agency is developing or is presented with a proposal," and also "early enough so that it can serve practically as an important contribution to the decision[-]making process and will not be used to rationalize or justify decisions already made." WAC 197-11-406. Having failed to prepare an SEIS or even a determination that an SEIS will be prepared, EFSEC is not in compliance with SEPA.

Nevertheless, preparation of an SEIS does not eliminate the need for a threshold determination. That exact point is explained in the Department of Ecology's *State Environmental*

Friends of the Columbia Gorge
123 NE 3rd Ave., Suite 108
Portland, OR 97232
(503) 241-3762

Policy Act Handbook (herein, "SEPA Handbook"),[2] in which Ecology provides important guidance on its binding SEPA Rules at WAC Chapter 197-11. There, Ecology explains that while agencies have multiple options for relying in whole or in part on prior environmental documents (including adoption, incorporation, preparation of addenda, and SEISs), "in all cases, agencies are required to issue new threshold determinations." SEPA Handbook at 24. Further, "agencies adopting existing environmental documents must independently determine if they meet environmental review standards and a proposal's needs." *Id.*

In an attempt to get around the requirement for a new threshold determination, Respondents cite two cases for the proposition that no checklist or threshold determination is required for an SEIS: *Thornton Creek Legal Def. Fund v. City of Seattle*, 113 Wn. App. 34, 52 P.2d 522 (2002), and *SEAPC v. Cammack II Orchards*, 49 Wn. App. 609, 744 P.2d 1101 (1987).

However, in *Thornton Creek*, the Court merely held that a prior SEPA threshold determination or checklist may be formally adopted or incorporated for a new proposal in lieu of preparing a new environmental document (which, to our knowledge, has not happened here). *See Thornton Creek*, 113 Wn. App. at 50. And in *SEAPC*, the issue was whether a new EIS or SEIS needed to be prepared when the project changed midway through the government review process, in ways that actually reduced its impacts, which is very different from the situation at hand, where the original FEIS (issued nearly thirteen years ago) has become stale and outdated, was never adequate in the first place, and Respondents openly admit that an SEIS is needed to move forward with the Project.

III. CONCLUSION

The Transfer Application is an "action" under SEPA. The Extension Request is not categorically exempt. And most importantly, a SEPA checklist (or checklists) and threshold determination (or determinations) are required. Moreover, EFSEC must follow the mandates of SEPA and its implementing rules and review the proposals, the current environmental

[2] *Available at* https://ecology.wa.gov/getattachment/4c9fec2b-5e6f-44b5-bf13-b253e72a4ea1/2-2018-SEPA-Handbook-Update.pdf.

Friends of the Columbia Gorge
123 NE 3rd Ave., Suite 108
Portland, OR 97232
(503) 241-3762

conditions, and the previous environmental review documents for this Project, in light of any and all changed conditions and advancements in scientific analysis and understanding of those impacts, and ensure that the Project and its impacts are thoroughly reviewed and disclosed to the public. To date, it does not appear that any of this has been done. Until it is, EFSEC is not in compliance with SEPA, and the Council may not act on the proposed Transfer Application and Extension Request.

RESPECTFULLY SUBMITTED this 14th day of May, 2024.

FRIENDS OF THE COLUMBIA GORGE, INC.

Nathan J. Baker, WSBA No. 35195
Senior Staff Attorney
(503) 241-3762 x101
nathan@gorgefriends.org
Attorney for Friends of the Columbia Gorge

TELEGIN LAW PLLC

Bryan Telegin, WSBA No. 46686
(206) 453-2884
bryan@teleginlaw.com
Attorney for Friends of the Columbia Gorge

Friends of the Columbia Gorge
123 NE 3rd Ave., Suite 108
Portland, OR 97232
(503) 241-3762

CERTIFICATE OF SERVICE

I hereby certify that on the date shown below, I served a true and correct copy of the foregoing FRIENDS OF THE COLUMBIA GORGE'S REPLY IN SUPPORT OF OBJECTIONS TO HEARINGS PROCESS AND SCHEDULING MOTION on each of the persons named below via email:

Timothy L. McMahan
Emily Schimelpfenig
Stoel Rives LLP
tim.mcmahan@stoel.com
emily.schimelpfenig@stoel.com
Attorneys for Whistling Ridge Energy, LLC and Twin Creeks Timber, LLC

Greg Corbin, Senior Special Counsel
Green Diamond Management Company
greg.corbin@greendiamond.com

DATED this 14th day of May, 2024.

By: *s/ Nathan J. Baker*
Nathan J. Baker, WSBA No. 35195
Senior Staff Attorney
Friends of the Columbia Gorge

Friends of the Columbia Gorge
123 NE 3rd Ave., Suite 108
Portland, OR 97232
(503) 241-3762