



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

March 14, 2024

Sent via Electronic Mail

ENERGY FACILITY SITE EVALUATION COUNCIL
efsec@efsec.wa.gov

Re: Horse Heaven Hills Wind & Solar Project
January 19, 2024 Letter from Scout Clean Energy, LLC

Dear Energy Facility Site Evaluation Council,

I write on behalf of the Confederated Tribes and Bands of the Yakama Nation (“Yakama Nation”) regarding the Horse Heaven Hills Wind & Solar Project (“Project”). Yakama Nation had not planned to comment further on the Project until the Energy Facility Site Evaluation Council (“Council”) had concluded its deliberations. However, we have recently received a copy of Scout Clean Energy, LLC’s (“Scout”) strident January 19, 2024 letter that raises a number of inappropriate and factually unsupported arguments that warrant a response.¹

1. Scout’s Comments Regarding the Final Environmental Impact Statement

Scout’s comments regarding the Final Environmental Impact Statement (“FEIS”) should be disregarded because there was no public FEIS comment period or option for the adjudication parties to provide feedback on the FEIS. EFSEC staff affirmed directly to Yakama Nation and at least one other adjudication party that EFSEC would not be taking public comments on the FEIS.

Yakama Nation understands that this Council has discretion under the State Environmental Policy Act (“SEPA”) to not hold a public comment period after issuing a FEIS. Because the Council exercised that discretion here, and did not take public comments on the FEIS, it should apply the same limitation to Scout.

¹ Scout also included new and inaccurate factual and legal assertions in its October 13, 2024 Post Hearing Brief, which counsel for Yakama Nation was denied an ability to respond to by Judge Adam Torem. Yakama Nation reserves the right to object to any reliance upon facts or arguments not supported by the Adjudication Record, the Council’s Final Environmental Impact Statement, or Scout’s Amended Application for Site Certification.

2. Scout's Comments Regarding the Feasibility of a Modified Project

Scout's arguments regarding the Project's ability to move forward as modified by the Council should be disregarded unless and until EFSEC allows for adequate development of a factual record to support such arguments. Not only is Scout's new argument on feasibility unsupported by the record before this Council, but Judge Torem was very clear in his direction to the adjudication parties that the economic feasibility of the Project was not one of the issues to be adjudicated.² Yakama Nation understands this limitation to be consistent with past EFSEC adjudications and deliberations.³ Scout similarly declined to explore substantive Project design alternatives throughout the FEIS process.

What the available information clearly shows is that the Project's massive scale is what allows it to move forward in a modified way. Given the size of the Project, it is not surprising that Scout's own representatives have acknowledged the possibility of moving forward with a variety of significant Project modifications.⁴ Yakama Nation understands well that Scout wishes to, in its own words "build as much capacity . . . as we can possibly do," but the record is clear that the Project can move forward in a more limited way through phase development and removal of significant portions.⁵ The presence of two proximate substations also allows for flexibility in implementation of a modified Project.

The factual record also refutes Scout's claims that the Council's modifications aimed at reducing impacts to the Ferruginous Hawk are "unsupported by scientific or any other evidence in the record."⁶ The 3.2-kilometer Ferruginous Hawk buffer zone recommendations were developed by Washington Department of Fish and Wildlife ("WDFW") experts charged under Washington law with "preserving, protecting, and perpetuating the state's fish, wildlife, and ecosystems while providing sustainable fish and wildlife recreational and *commercial opportunities*."⁷ The adjudicative record indicates that the 3.2-kilometer Ferruginous Hawk buffer zone recommendation is actually a compromise on the part of WDFW expert biologists because Ferruginous Hawk's average core use areas are ten kilometers.⁸ These recommendations were developed using best available science from WDFW's experts, making the Council's responsive Project modifications strongly supported by evidence in the record.

Scout's latest effort to undermine WDFW's expert recommendations with new arguments regarding Project feasibility and Ferruginous Hawk buffer zones have been made outside the scope of SEPA review and adjudication process, and should be disregarded.

² See e.g. EF-210011 Second Prehearing Conference Order (May 29, 2023) at 2; Hearing Transcript Day 7 at 1468.

³ *In the Matter of Application No. 2009-1: Whistling Ridge Energy Project, LLC*, Order 870 at 12 (December 27, 2011).

⁴ See e.g. EF-210011, Dave Kobus Oral Deposition at 106, 154; <https://www.seattletimes.com/seattle-news/climate-lab/how-an-endangered-hawk-could-topple-plans-for-was-largest-wind-farm/>.

⁵ Compare EF-210011, Dave Kobus Oral Deposition at 106 with *id.* at 154.

⁶ January 19, 2024 Letter from Michael Ricker to Chair Drew and Councilmembers ("Letter") at 1.

⁷ <https://wdfw.wa.gov/about>, (March 7, 2024) (emphasis added).

⁸ EF-210011, EXH-4020_Dep-Motion to Supplement the Record at 50.

3. Scout's Comments Regarding Modification of the Project to Reduce Traditional Cultural Property Impacts

As it did in its Post-Hearing Brief, Scout makes spurious and legally-ungrounded arguments against Yakama Nation's ability to advocate for protection of its sacred cultural resources.⁹ Yakama Nation's Treaty-reserved resources within the Horse Heaven Hills area, including but not limited to Traditional Cultural Properties ("TCPs"), was well documented throughout the adjudication, beginning with Judge Torem's order granting Yakama Nation intervenor status – an order to which Scout declined to object.¹⁰

It is very discouraging to witness Scout's callous treatment of Yakama Nation's TCP concerns after the adjudication testimony that our members brought forth. Yakama Nation has been very clear that the Project is of great concern due to its proposed location within a highly sensitive cultural area as well as the lasting impact it will have upon Yakama Nation's Treaty-reserved resources. As proposed, the Project is an industrial-scale development that is incompatible with – i.e. will irrevocably damage – multiple TCPs that can never be mitigated or replaced.

Scout's continued dismissal of sensitive testimony shared by Yakama Nation's members and professional Archaeologist suggests either an unwillingness to listen or intentional misunderstanding of federal Treaty-reserved rights. Scout's objection to Councilmember Young's motion to eliminate Project elements east of Straub Canyon – a motion with irrefutable support in the adjudication and SEPA record before this Council – shows that Scout's failure to understand and meaningfully respond to Yakama Nation TCP impacts at this point in the proceedings is willful.

EFSEC Councilmember Young's proposal to eliminate a portion of the Project east of Straub Canyon did meaningfully address some (not all) of Yakama Nation's concerns with TCP impacts. In fact, this proposed mitigation measure was reasoned enough that other Councilmembers have voted in support. So, for Scout to use the January 19th comment letter to demand that EFSEC turn over even more highly sensitive and confidential cultural resource information to justify the proposed solution, is astonishing. Not only does the Protective Order which Scout alleges makes EFSEC "able and obligated" to turn over sensitive cultural resource information not have the requirement that they claim,¹¹ but Scout stands alone as the only party to these proceedings that has shared sensitive confidential data with media outlets.

We see, in the Council's thoughtful deliberations regarding impacts of the northern turbine strings on the endangered Ferruginous Hawks, that you are willing to provide buffers to safeguard certain natural resources. We ask that this same care and consideration be given to the protection of cultural resources that we have brought to your attention. This Council should go further than the currently-proposed Project modifications in order to address TCP impacts.

⁹ Letter at 7-8.

¹⁰ EF-210011, Preliminary Order on Intervention at 1.

¹¹ Letter at fn. 17.

4. Conclusion

Yakama Nation strongly objects to any reliance by this Council on the January 19, 2024 letter from Scout as it deliberates on a final recommendation to Governor Inslee. Scout's Letter, submitted after the conclusion of the full adjudication and SEPA processes – both processes that were uniquely favorable to Scout at nearly every turn – cannot be used to supplement the record before this Council.

Respectfully,



Gerald Lewis, Chairman
YAKAMA NATION TRIBAL COUNCIL

cc: Jonathan Thompson, Attorney General for EFSEC
Sonia Bumpus, EFSEC Director
Amí Hafkemeyer, EFSEC Director of Siting and Compliance
Amy Moon, EFSEC Siting and Compliance Lead