BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITING EVALUATION COUNCIL

In the Matter of the Application of: Scout Clean Energy, LLC, for Horse Heaven Wind Farm, LLC, Applicant.	DOCKET NO. EF-210011 APPLICANT'S RESPONSE IN OPPOSITION TO MOTIONS TO STAY OR CONTINUE ADJUDICATIVE PROCEEDINGS PENDING FEIS ISSUANCE

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On May 18, 2023, Benton County ("County") and Intervenors Yakama Nation and Tri-Cities C.A.R.E.S ("TCC") (together "Movants") filed motions seeking to stay or continue further Energy Facility Site Evaluation Council ("EFSEC" or "Council") adjudicative proceedings in this matter until the Council issues the final environmental impact statement ("FEIS") for the proposed project. For the reasons that follow, those motions are unsupported by law, past Council practice, or any other consideration and should be denied.[1]

Nothing in the plain text of the State Environmental Policy Act ("SEPA"), the Energy Facilities Site Location Act ("EFSLA"), or their implementing regulations requires that the FEIS precede the adjudication. If anything, these authorities emphasize that state agencies like EFSEC have the power to devise their own procedures to incorporate SEPA environmental review into their unique administrative processes. EFSEC has done exactly that, establishing a process whereby preparation of the environmental impact statement ("EIS") and adjudication proceed concurrently, along parallel but independent tracks, until both components inform the Council's ultimate recommendation on the site certificate application to the Governor. This practice has persisted for decades and has been affirmed by multiple administrative law judges ("ALJ"). It is not only legally sound, but also practical, because it maintains the independent integrity of each respective review process,

[1] Applicant believes these motions can be decided on the briefing, without oral argument, to preserve administrative resources and avoid further delay.

reduces duplicative work and risk of internal inconsistencies, and ensures a robust, accurate record to inform EFSEC's recommendation deliberations.

By requesting the FEIS before the adjudication, the Movants seek another venue to litigate SEPA issues, in essence an *additional* internal SEPA appeal beyond what is provided under law. That two-appeal process may mirror the course of environmental review in local land use permitting proceedings under Local Project Review ("LPR"), but it is decidedly *not* the manner in which SEPA is implemented in state agency permitting. Allowing such an approach here would run counter to the existing authorities and practices and set the Council down a dangerous precedent-setting path. Furthermore, as discussed below, the Movants' arguments have been lodged previously, and repeatedly have been denied.

Finally, further delay of the adjudicative proceedings is unwarranted and prejudicial. The Movants and the public at large have had ample notice of this process and opportunity to comment on the project since the application was filed over two years ago. Because there is no requirement that EFSEC issue the FEIS prior to the adjudicative proceeding, Applicant Horse Heaven Wind Farm, LLC ("Applicant")[2] respectfully requests the motions be denied.

I. SEPA and the EFSLA allow EFSEC to conduct the adjudication before an FEIS is prepared.

Under Washington law, EFSEC is authorized to craft and implement its own SEPA procedures to ensure responsible environmental review while carrying out its unique duties under the EFSLA. SEPA requires EFSEC to conduct a comprehensive environmental review and practically integrate that review into its administrative decision-making. Per the EFSLA, EFSEC must evaluate applications for site certificates after completing multiple steps—including both the SEPA environmental review and the adjudication—and ultimately make a recommendation to the Governor on that application. As set forth below, EFSEC has

[2] Scout Clean Energy LLC ("Scout") is the indirect owner of 100 percent of Horse Heaven Wind Farm, LLC.

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successfully implemented these dual directives by marrying the two in its long-standing site application evaluation process.

A. Environmental review under SEPA.

SEPA and the Department of Ecology's implementing regulations in WAC chapter 197 encourage state agencies to "[i]nitiate the SEPA process early in conjunction with other agency operations to avoid delay and duplication." WAC 197-11-030(2)(d). But to do so effectively, they are given the latitude to "[i]ntegrate the requirements of SEPA with existing agency planning and licensing procedures and practices, *so that such procedures run concurrently rather than consecutively*." WAC 197-11-030(2)(e) (emphasis added). With respect to EISs, agencies are to prepare the statements "early enough so it can serve practically as an important contribution to the decision making process." WAC 197-11-406. But SEPA and WAC chapter 197 do not require a particular sequence. Indeed, the only specific guidepost is that the ultimate FEIS must be completed in time "to be included in appropriate recommendations or reports on the proposal" being assessed by the agency. *Id*.; *see also* WAC 197-11-402(8) ("Agencies shall prepare EISs *concurrently with and coordinated with environmental studies and related surveys that may be required for the proposal under other laws*, when feasible." (emphasis added)).

B. Site certificate issuance under EFSLA.

The EFSLA authorizes EFSEC to issue site certificates for jurisdictional energy projects after completing a multi-stage permitting process that includes specified public notice and comment requirements, land use analysis, SEPA environmental review, and an adjudication proceeding. *See generally* RCW tit. 80, ch. 50. Once these steps are completed, the Council considers the record before it—including the FEIS, the findings of fact and conclusions of law from the adjudication, and public comments received along the way—and makes a recommendation to the Governor as to the application's approval or rejection and "disposing of all contested issues." RCW 80.50.100; WAC 463-30-320. Only when the

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Council is "fully satisfied that all issues have been adequately reviewed" does the Council issue its recommendation. WAC 463-14-080(7).

C. Under SEPA and the EFSLA, EFSEC has discretion to determine the proper sequence of its concurrent processes.

The Council has significant discretion to determine the sequence of these steps, subject to certain guidelines in its rules.[3] For example, the adjudication proceeding may begin only *after* a formal notice of hearing or prehearing conference. WAC 463-30-080. And the adjudicative hearing must occur *before* the Council's recommendation to the Governor. RCW 80.50.090(4); WAC 463-30.080.

With respect to its SEPA review, the rules empower EFSEC to "initiate" the adjudicative proceeding prior to even "completion of the *draft* EIS." WAC 463-47-060 (emphasis added). Accordingly, for over two decades, the Council has implemented a process under which EIS preparation and the adjudication proceed in tandem, with the adjudicative hearing occurring before issuance of the FEIS. *See* Certification Process, EFSEC, https://www.efsec.wa.gov/about-efsec/certification-process (last visited May 25, 2023) ("At the same time the EIS is developed and related public hearings on the draft EIS are held, adjudicative proceedings may take place. However, **the adjudicative proceedings must be finalized before the Council issues the final EIS."** (emphasis added)).

Multiple ALJs have expressly affirmed this sequence and recognized the rationale behind it. As one judge explained,

> [T]he environmental review and the application review proceed on parallel tracks until the conclusion of the process. Doing so allows the Council, in simultaneously making final decisions on each track, to preserve the integrity of both processes while ensuring consistency in the results. Issuing the [FEIS] prior to the hearing could compromise the result of the adjudicative hearing.

[3] And EFSEC's interpretation of its own rules is owed substantial deference, subject to reversal only if that interpretation conflicts with the statute's underlying policy. *Okamoto v. State of Wash. Emp. Sec. Dep't*, 107 Wn. App. 490, 496, 27 P.3d 1203 (2001).

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In the Matter of Whistling Ridge Energy Project, Application No. 2009-01, Council Order 848 at 3 (June 29, 2010) (attached as Exhibit A); *see Friends of Columbia Gorge, Inc. v. State Energy Facility Site Evaluation Council*, 178 Wn.2d 320, 331 n.5, 349, 310 P.3d 780 (2013) (affirming Governor's approval of Whistling Ridge project and noting that FEIS was issued after the adjudication but "evaluated and approved" before EFSEC's "formal recommendation" to the Governor); *see also* In the Matter of Vancouver Energy Distribution Terminal, Case No. 15-001, Order Denying Motion to Continue Adjudication Until After FEIS is Issued, at 2 (June 21, 2016) (hereafter, "VEDT Order") (attached as Exhibit B) (rejecting argument that FEIS should be issued before adjudication hearing and explaining the two steps proceed concurrently because "EFSEC's adjudication is a separate, distinct process that will produce findings and conclusions based solely on the evidence presented by the adjudication parties, and not on EFSEC's separate environmental studies").

By maintaining the integrity of these distinct but complementary reviews, this approach also "maximizes the amount of information available to the Council during its deliberations." In the Matter of Kittitas Valley Wind Power Project, Application No. 2003-01, Council Order No. 799, Order Denying Intervenor Residents Opposed to Kittitas Turbines Motion to Stay Adjudicative Hearing Until Issuance of FEIS, at 2 (Sept. 1, 2004) (rejecting same argument and affirming that FEIS would be issued after the adjudicative hearing), *aff'd on other grounds, Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wn.2d 275, 197 P.3d 1153 (2008) (attached as Exhibit C). Thus, it makes both legal and practical sense.

II. The Movants' interpretation runs counter to existing authority and past EFSEC practice.

The Movants assert various theories to claim that the FEIS under SEPA must be issued before the adjudication. None of these theories prevail.

First, nothing in the governing statutes or regulations requires or even supports this interpretation. The Movants go to great lengths to divine that such a requirement is somehow implicit under SEPA and its implementing regulations, for example, pointing to WAC 197-11-406's general directive that agencies must prepare EISs "early enough" to serve practically and importantly in the decision-making process. But they point to no specific authority under SEPA or the EFSLA requiring that an FEIS be issued before the adjudication is completed. That is because none exists.

To the contrary, SEPA regulations make clear that an FEIS is *not* a culminative document that must come after all other internal agency processes. *See* WAC 197-11-448(1). Rather, the FEIS "analyzes *environmental* impacts and must be used by agency decision makers, along with other relevant considerations or documents, in making final decisions on a proposal." *Id.* (italics in original; underline added). Consistent with that requirement, the FEIS is but one of several "deliberative process[es]" utilized by EFSEC to make its recommendation to the Governor. WAC 463-14-080.[4]

Second, the Movants' regulatory history arguments are unavailing. In 2007, EFSEC revised WAC 463-47-060(2) to its current iteration:

> The council may initiate an adjudicative proceeding ~~hearing~~ required by RCW 80.50.090 prior to completion of the draft EIS. ~~The council shall initiate and conclude an adjudicative proceeding prior to issuance of the final EIS.~~

The County and TCC argue that these changes somehow "reinforce" that the FEIS must precede the adjudicative hearing. *See* Benton County Motion at 12-13; *accord* TCC Motion at 10-11. But omitting the mandate imposed by the second sentence does not equate to adding a prohibition. And nothing in the revised rule prohibits an FEIS before an

[4] Yakama Nation and TCC also argue a revised or supplemental DEIS on the amended application is required before the adjudication. The changes in the amended application are minor, containing corrections and updates to reflect current conditions (principally reducing environmental impacts) responding to data requests and therefore required under WAC 463-60-116(2). Even so, the adjudication will address the changes in the amended application and therefore reflect the current record. Whether the DEIS requires revision is a SEPA question not properly at issue in this proceeding.

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adjudication. Nor does the omission of "hearing" in the first sentence convey such a bar. Indeed, in its 2007 rulemaking, EFSEC explained that the changes were intended to "[e]xpedite and reduce the costs of siting of energy facilities," Washington State Register 07-21-035 (effective Nov. 9, 2007), that is, to allow EFSEC more flexibility in incorporating SEPA into its application review process.

Nor does WAC 197-11-070 demand that the FEIS come first. WAC 197-11-070(1)(b) prohibits an agency from taking an action on a proposal that could "[l]imit the choice of reasonable alternatives"[5] until an FEIS is issued. Conducting an adjudication under the EFSLA in no way limits the choice of SEPA-defined reasonable alternatives to a proposed EFSEC project. That is because the Council in the FEIS—and in its ultimate recommendation to the Governor—is free to consider and include reasonable alternatives (including mitigation measures) that are not discussed during the adjudicative hearing.

Columbia Riverkeeper v. Port of Vancouver USA, 188 Wn.2d 80, 392 P.3d 1025 (2017), on which the County and Yakama Nation rely, makes this point clear. There, an EFSEC project opponent argued the Port of Vancouver violated WAC 197-11-070 and precluded reasonable alternatives by entering into a lease with the project applicant before an FEIS was completed. 188 Wn.2d at 86, 100-02. An en banc Washington Supreme Court disagreed, construing WAC 197-11-07 narrowly when applied in the context of EFSEC site certification based on the two additional layers of governmental review and approval built into the EFSLA process. *Id*. at 100-01. Specifically, the court noted that EFSEC and the Governor are "subject to the reasonable alternatives requirement of WAC 197-11-070(1)(b) themselves," and both had the power to "withhold approval outright, or grant approval contingent on changes to the" project if either "believe[s] that the project does not meet

[5] A "reasonable alternative" is limited to "an action that could feasibly attain or approximate a proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation. Reasonable alternatives may be those over which an agency with jurisdiction has authority to control impacts, either directly, or indirectly through requirement of mitigation measures." WAC 197-11-786.

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EFSEC's overriding goal of avoiding or mitigating adverse impacts, as informed by the reasonable alternative analysis contained within the resulting EIS." *Id*. at 101. Thus, both "EFSEC's recommendation based on its environmental priorities, [and] the governor's discretion to certify the project" served to further ensure that reasonable alternatives remained preserved for purposes of WAC 197-11-070(1). *Id*. at 102.

III. Further delays would prejudice Applicant and provide the Movants with far more than they are entitled under the law.

The Movants and public have had ample notice and opportunity to comment on the project. They should be aware of EFSEC's consistent holdings on the very issue raised here. Since the filing of the initial application over two years ago, in February 2021, EFSEC has provided all statutorily required opportunities for public participation, and then some. In late 2022, at the request of commenters, EFSEC extended the draft EIS comment period to 45 days from 30 days, the maximum allowed under the rules. WAC 197-11-455(7). And even though not statutorily required, EFSEC accepted and considered the DEIS and site certificate application comments received outside of the formal public comment period.

Once EFSEC completes a DEIS's public comment period, SEPA regulations do not provide *another* public comment period or hearing, regardless of reasonable alternatives or proposed mitigation measures discussed in the FEIS. *See* WAC 197-11-460; WAC 197-11-502; WAC 197-11-560; *see also* State Environmental Policy Act Handbook, Washington Department of Ecology, No. 98-114 (Sept. 1998, updated 2003) at 71, https://apps.ecology.wa.gov/publications/documents/98114.pdf ("There is no comment period for a final EIS . . . ." (underline in original)). Moreover, SEPA prohibits orphan appeals, so any challenges to the FEIS must be consolidated, or "linked," with the appeal of the ultimate governmental action, RCW 43.21C.075, here, the Governor's decision on EFSEC's recommendation.

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What the Movants are requesting here is essentially an extra-statutory interim SEPA appeal. *See, e.g.,* VEDT Order at 2 ("EFSEC cannot conduct an adjudication that simply challenges the adequacy of its own FEIS or DEIS as that would constitute an internal SEPA appeal."). As noted in the VEDT Order, by requesting the FEIS before the adjudication, the Movants seek to relitigate the content of the FEIS during the adjudicative hearing, gaining another bite at the apple. This sequence may somewhat reflect the local land use processes under LPR.[6] But it is not the legal process under SEPA for state agencies like EFSEC.[7]

In sum, granting a stay or continuance and further delaying the project at this stage in the site certification process is unwarranted under governing law, would impinge on Scout's rights to have its application decided timely and under established administrative standards, and would provide the Movants with far more than is allowed under SEPA.

DATED: May 25, 2023.

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[6] By its plain language, the LPR applies only to local permitting pursuant to jurisdictions planning under the Growth Management Act. RCW ch. 36.70A. LPR plainly states that RCW 36.70B.060 applies to "[l]ocal governments planning under the growth management act" for the purpose of establishing "integrated and consolidated project permit process" with "[r]equired elements" as set forth by statute. LPR plainly and unambiguously applies only to "local permitting" and is irrelevant to EFSEC proceedings.

[7] We understand, in fact, that state agencies routinely complete SEPA review through an FEIS without holding an adjudicative hearing or other post-EIS process. In any event, this question is one for the state in implementing SEPA, not an issue for Applicant to resolve.

CERTIFICIATE OF FILING AND SERVICE

I hereby certify that on May 25, 2023, I filed an original and one copy of the foregoing **APPLICANT'S RESPONSE IN OPPOSITION TO MOTIONS TO STAY ADJUDICATIVE PROCEEDINGS PENDING FEIS ISSUANCE** with the Washington Energy Facility Site Evaluation Council, through electronic filing via email to adjudication@efsec.wa.gov.

I further certify that on May 25, 2023, I served a true and correct copy of the foregoing **APPLICANT'S RESPONSE IN OPPOSITION TO MOTIONS TO STAY ADJUDICATIVE PROCEEDINGS PENDING FEIS ISSUANCE** by electronic mail on the following parties to the adjudicative proceeding at the addresses listed below.

Service List Attached

DATED: May 25, 2023.

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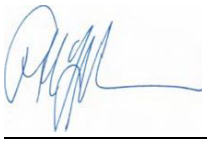

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BEFORE THE STATE OF WASHINGTON

ENERGY FACILITY SITE EVALUATION COUNCIL In the Matter of Application No. 2009-01 of WHISTLING RIDGE ENERGY PROJECT LLC for WHISTLING RIDGE ENERGY PROJECT	COUNCIL ORDER NO. 848 PREHEARING ORDER NO. 4 PREHEARING ORDER SETTING ADJUDICATION SCHEDULE; RULING ON MATTERS PRESENTED FOR DETERMINATION

The Washington State Energy Facility Site Evaluation Council ("Council") convened a prehearing conference in this matter at Stevenson, Washington on June 17, 2010, before Council members Jim Luce, Richard Fryhling, Jeff Tayer, Mary McDonald, Dennis Moss and Judy Wilson, and Administrative Law Judge C. Robert Wallis.

The following parties appeared:

Whistling Ridge Energy Project LLC, Applicant, by Tim McMahan, attorney, Vancouver, Washington, and Darrell Peeples, attorney, Olympia; Counsel for the Environment, H. Bruce Marvin, Asst. Attorney General, Olympia; Department of Commerce, by Dorothy H. Jaffe, Assistant Attorney General, Olympia; Friends of the Columbia Gorge, by Gary K. Kahn and Nathan Baker, attorneys, Portland; Save Our Scenic Areas and Skamania County Agri-Tourism Association, by Mr. Kahn; Skamania Public Utility District No. 1, by Humaria Falkenberg, Project Manager, Carson, WA; Seattle Audubon Society, by Shawn Cantrell and Matt Mega, Seattle; Culture Committee of Cultural Resources Program of the Confederated Tribes and Bands of the Yakama Nation ("Yakama Culture Committee" in this order) by Warren Spencer, Tribal Council Member, and Jessica Lally, Archeologist, Toppenish.

The following topics were addressed and resolved at the conference:

EXHIBIT NUMBERING: The parties agreed to a numbering format for prefiled exhibits and asked that an example be provided; see Appendix 1 to this order for the example.

SCHEDULE: The parties engaged in considerable discussion regarding scheduling. Applicant presented a proposal prior to the conference, based on schedules in prior Council proceedings.

Other parties noted that the prior proceedings had neither the number of parties nor the degree of potential differences among parties that appear to characterize this proceeding. In particular, concern was expressed that the Applicant proposed to make its initial prefiling before the close of the period for comments to the draft Environmental Impact Statement

(DEIS) and that time should be allowed for discovery. Mr. Kahn suggested a schedule beginning after the close of the DEIS comment period and allowing time for discovery.

The parties agreed at the conference that Applicant's prefiling should not be scheduled prior to the close of the environmental comment period. The Council strongly agrees. In particular, counsel acknowledged public comments at the June 16 public comment session that identified potentially serious errors in, or omissions from, the draft EIS. The Council expects that the Applicant will incorporate into its direct presentation any information needed to address asserted significant flaws in the DEIS. The applicant may consult with Council Staff if it has questions regarding matters that may warrant attention in this manner. It will be unacceptable for the Applicant to place the burden on other parties to identify such matters and then to respond in its rebuttal to the concerns; that could require a delay for the opportunity for surrebuttal, an extension of the hearing schedule, and significant additional burdens on the parties. The schedule proposed below would therefore not be disrupted if a supplemental DEIS is needed.

Parties agreed that periodic status conferences could be helpful to keep the proceeding on track. The schedule adopted provides for such conferences and additional conferences may be held if needed.

The Council establishes the following schedule for the proceeding. Status conferences will be convened to monitor progress and discuss issues that may arise during preparatory phases of the proceeding.

First status conference:	September 1, 2010
Applicant's prefiling deadline:	September 15, 2010
Second status conference:	September 22, 2010
Other parties prefiling deadline:	October 27, 2010
Third status conference:	November 5, 2010
Rebuttal and cross-rebuttal[1] deadline:	November 24, 2010
Prehearing Conference in Olympia to mark exhibits for the record and discuss any other procedural matters	December 2, 2010
Hearing, in or near Stevenson, Washington, not exceeding 10 hearing days, beginning	December 8, 2010
Briefing schedule	To be determined at hearing

[1] "Cross-rebuttal" is the opportunity for parties other than the applicant to respond to each others' evidence.

DISCOVERY: The parties agreed that an informal discovery processes would be appropriate. This order sets out guidelines for informal discovery procedures in Appendix II.

TRIBAL PARTICIPATION: Concerns have been raised by tribal participants that other tribal participants might not have full authority to represent the interests of the Yakama Nation. The Council addressed this concern in part when it responded to the petition for intervention of the Yakama Cultural Committee. Mr. Slockish and Mr. Jackson represent their own interests and those of any members of the two Tribes they have identified who agree with the positions the two named persons are taking. They have not contended, and we do not rule, that they represent any legal or formal entities of the named tribes. Similarly, the Cultural Committee represents the interests of the Committee; it has not shown by official action of the Yakama Nation that its positions or representations are those of the legal entity comprising the Nation. EFSEC seeks to be inclusive and to encourage participation exploring diverse, authentic cultural viewpoints.

The Cultural Committee expressed a desire to work collaboratively with the Council in the preservation of culturally significant sites. Washington's RCW 34.04 precludes Council members from working with one party outside of the hearing process. The Council suggests that the Committee work with the Applicant, with participation as appropriate from Council Staff, to identify and suggest preservation or remediation for such resources. Agreements with the Applicant should be presented to the Council for approval. The agreements may be subject to confidentiality under law to the extent necessary for protection of sites. To the extent the issues are not resolved, they may be presented to the Council for action, again subject to such procedural and confidentiality measures as required or allowed by law.

TIMING OF FINAL EIS: Mr. Kahn suggested that the Council complete and issue the Final EIS prior to the adjudicative hearing session. The Council declines to proceed in that manner. The environmental review and the application review proceed on parallel tracks until the conclusion of the process. Doing so allows the Council, in simultaneously making final decisions on each track, to preserve the integrity of both processes while ensuring consistency in the results. Issuing the final EIS prior to hearing could compromise the result of the adjudicative hearing.

ECONOMIC VIABILITY: Parties also engaged in a discussion during the conference about the relevance and admissibility of information relating to the applicant's costs and potential revenues and their relationship with what might be called the "economic viability" of the project. The Council has ruled, and the Washington State Supreme Court affirmed, that such economic issues are not matters that the Council is empowered to consider.[2] Absent some demonstration that the current proceeding presents a matter to which the prior rulings would not apply, any such evidence from any party would presumably be rejected in the adjudication.

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[2] *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council,* 165 Wn.2d. 255 (2008)

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of: Application No. 2003-01 SAGEBRUSH POWER PARTNERS, L.L.C. KITTITAS VALLEY WIND POWER PROJECT	PREHEARING ORDER NO. 14 COUNCIL ORDER NO. 799 ORDER DENYING INTERVENOR RESIDENTS OPPOSED TO KITTITAS TURBINES MOTION TO STAY ADJUDICATIVE HEARING UNTIL ISSUANCE OF FINAL ENVIRONMENTAL IMPACT STATEMENT

Nature of the Proceeding: On Monday, August 2, 2004, Intervenor Residents Opposed to Kittitas Turbines (ROKT), by and through its counsel James Carmody, filed a *Motion to Stay Adjudicative Hearing* arguing that pursuant to the State Environmental Policy Act (SEPA), the Energy Facility Site Evaluation Council (EFSEC or Council) has no authority under Chapter 43.21C Revised Code of Washington (RCW) to conduct an adjudicative hearing prior to release of a Final Environmental Impact Statement (FEIS). On August 6, 2004, the Applicant, Sagebrush Power Partners, LLC, filed its *Response* to Intervenor ROKT's *Motion to Stay*. An adjudicative hearing on this matter was scheduled to commence on August 16, 2004, in Ellensburg [*since the time of these filings, this date has changed to September 27, 2004*].

Summary of Ruling: The Council DENIES Intervenor ROKT's request that EFSEC stay the scheduled adjudicative hearings [previously] scheduled to commence in less than a week's time because EFSEC's rules implementing SEPA require that an FEIS be issued after EFSEC has held adjudicative hearings, but prior to EFSEC's making any final decision on the Application (i.e. the Council's *Recommendation to the Governor*).

Issue Presented

Should the Adjudicative Hearings previously scheduled for August 16-27, 2004, be stayed until EFSEC issues and circulates to the public an FEIS on the Application?

Analysis

Washington's State Environmental Policy Act (SEPA) requires state agencies responsible for making decisions on certain proposed projects to create a "detailed statement," known as an "environmental impact

statement," which analyzes probable significant adverse impacts of the proposal. *See* RCW 43.21C.030(2)(c) and RCW 43.21C.031. SEPA requires this EIS to be included in any recommendation or report regarding the proposed action or to be a separate document that accompanies the agency's decisional action. *See* RCW 43.21C.030(2)(c) and RCW 43.21C.031(1). The SEPA statute does not otherwise specify the required timing of release of a Final EIS, but the SEPA Rules, Chapter 197-11 Washington Administrative Code (WAC), offer further guidance on this matter.

The SEPA Rules require that "appropriate consideration of environmental information shall be completed before an agency commits to a particular course of action." WAC 197-11-055(2)(c); *see also* WAC 197-11-070(1). Additionally, the SEPA Rules dictate that "agencies shall not act on a proposal for which an EIS has been required prior to seven days after issuance of the FEIS." WAC 197-11-460(5). Thus, it is clear that an FEIS must be issued before a state agency can take action to approve or disapprove any proposed project.

Local governments typically issue a Draft EIS, allow commenting, and then issue their FEIS prior to holding an "open record hearing" and announcing a decision on a proposed project. *See* WAC 197-11-775. EFSEC however, is required by statute to conduct an adjudicative hearing, rather than the open record hearing more commonly found before local governments and their planning commissions. *See* RCW 80.50.090. As with local governments, EFSEC usually holds separate public comment hearings when issuing a DEIS. However, pursuant to EFSEC rules implementing SEPA, EFSEC does *not* issue an FEIS prior to the adjudicative hearing on an application. *See* WAC 463-47-060(3).

Intervenor ROKT's *Motion to Stay* construes the EFSEC process as violative of SEPA's requirement in RCW 43.21C.020(2)(d) that an EIS "accompany the proposal through the existing agency review processes." This is unquestionably incorrect. EFSEC issued a Draft EIS on this Project in December 2003, is circulating a Draft Supplemental EIS at this time, and will issue a Final EIS *after* the adjudicative hearing process in completed. This process maximizes the amount of information available to the Council during its deliberations. Further, in accordance with SEPA Rules, the Council will not take any final action and issue its *Recommendation to the Governor* until at least one week after issuing the FEIS on the proposed project.

Decision

After full consideration of the issues presented by Intervenor ROKT's *Motion to Stay* and the Applicant's *Response*, EFSEC hereby ORDERS the *Motion* DENIED. The adjudicative hearing scheduled to commence on August 16, 2004, shall not be stayed for any reason raised in Intervenor ROKT's *Motion*.

DATED and effective at Olympia, Washington, the 1st day of September, 2004.

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Adam E. Torem, Administrative Law Judge