

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of the Application of:

Scout Clean Energy, LLC, for
Horse Heaven Wind Farm, LLC,
Applicant

Docket No. EF-210011

YAKAMA NATION'S MOTION FOR
CONTINUANCE OF ADJUDICATION
DEADLINES

Oral Argument Requested

I INTRODUCTION

State law protects cultural resources and critical wildlife habitat that the Horse Heaven Hills Wind and Solar Project (“Project”) will destroy. The Energy Facility Site Evaluation Council (“EFSEC” or “Council”) has a legal duty to understand those environmental impacts before it takes any further action on the Project. EFSEC’s current plan to push this Adjudication forward in the absence of the Final Environmental Impact Statement (“FEIS”) – or even a draft environmental impact statement that addresses the Project as recently amended – will impermissibly limit both the Council and the Parties’ ability to have an informed dialogue about the Project’s impacts or consider reasonable alternatives to the Project. An after-the-fact FEIS will be nothing more than a means for EFSEC to justify a decision that it already made in the course of the Adjudication, rather than a meaningful analytical tool for the Council’s review of the Project.

State law prohibits EFSEC from making this procedural error and requires EFSEC to pause this proceeding to allow for the FEIS to be completed. The State Environmental Policy Act (“SEPA”) requires EFSEC to complete a full environmental analysis of the Project’s impacts before making any decision regarding the Project’s pending application for site certification. The Energy Facilities Site Location Act (“EFSLA”) is consistent with SEPA, and requires EFSEC to

carefully balance developmental and environmental concerns by conducting an adjudication that will consider numerous issues raised by the parties regarding the Project's potential environmental impacts. Together these laws obligate EFSEC to complete its FEIS before this Adjudication proceeds any further.

The Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation") hereby moves EFSEC to continue all proposed Adjudication deadlines in Docket No. EF-210011 – with the exception of ongoing discovery – until EFSEC has published its FEIS for the Project. Yakama Nation respectfully requests that EFSEC set oral argument on its Motion, as well as briefing deadlines for any response(s) and reply.

Yakama Nation's Motion is not based upon an argument that the Adjudication is an administrative appeal of EFSEC's SEPA review, or should otherwise be used to question the sufficiency of the FEIS.¹ Instead, SEPA requires that the FEIS be available to the Council and all parties so that the Adjudication will be fully informed by EFSEC's understanding of the potential environmental impacts of the Project and any alternative Project designs.

II. APPLICABLE LAW

A. *State Environmental Policy Act*

The Washington State Legislature adopted formal policies and procedures under SEPA to ensure that governmental decision making was sufficiently informed regarding potential environmental impacts. RCW 43.21C.010 *et seq.* SEPA requires that “. . . environmental impacts are considered and that decisions to proceed, even those completed with the knowledge of likely

¹ Yakama Nation respectfully submits that this Council's previous decisions on this procedural issue erroneously conflated the question of whether the adjudication is an administrative appeal with the question of how SEPA's procedural requirements limit EFSEC's ability to conduct an adjudication prior to completion of the FEIS. *See* Order Denying Motion to Continue Adjudication Until After Final Environmental Impact Statement is Issued, *In the Matter of: Application No. 2013-01* (June 21, 2016); Order Denying Intervenor Residents Opposed to Kittitas Turbines Motion to Stay Adjudicative Hearing Until Issuance of Final Environmental Impact Statement, *In the Matter of: Application No. 2003-01*, (September 1, 2004).

adverse environmental impacts, be “rational and well-documented.” 24 WASHINGTON PRACTICE: ENVIRONMENTAL LAW AND PRACTICE § 17.1, at 192 & n.8 (2d ed. 2007) (citing *Save Our Rural Env't v. Snohomish County*, 99 Wn.2d 363, 662 P.2d 816 (1983)).

For projects that may have a probable significant adverse environmental impact, the SEPA responsible official must commence preparation of an environmental impacts statement (“EIS”). WAC 197-11-360. “An EIS shall provide impartial discussion of significant environmental impacts and shall inform decision makers and the public of reasonable alternatives, including mitigation measures, that would avoid or minimize adverse impacts or enhance environmental quality.” WAC 197-11-400. This thorough environmental review process “. . . enables government agencies and interested citizens to review and comment on proposed government actions, including government approval of private projects and their environmental effects. WAC 197-11-400.

In order to ensure that permitting agencies consider the environmental impacts of their decision making, SEPA requires the agencies to complete a full environmental analysis before taking action. “Until the responsible official issues a final determination of nonsignificance or final environmental impact statement, no action concerning the proposal shall be taken by a governmental agency that would: (a) Have an adverse environmental impact; or (b) Limit the choice of reasonable alternatives.” WAC 197-11-070(1); WAC 463-47-020 (adopting WAC 197-11-070). “The [FEIS] shall be prepared early enough so 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; WAC 463-47-020 (adopting WAC 197-11-406).

SEPA’s procedural requirements do not dictate particular outcomes or limit the permitting authority of individual permitting agencies, including EFSEC. Instead, SEPA requires use of

particular decision-making tools like environmental impacts statements. The central purpose of SEPA is to “. . . combine environmental considerations with public decisions. . .” RCW 43.21C.075(1). A FEIS’s purpose is to document those environmental considerations for permitting agencies, i.e. the decision makers, but not to dictate the decisions of any agency.

B. Energy Facilities Site Location Act

The Washington State Legislature has empowered EFSEC to review new proposed energy facilities on a “streamlined” basis in order to “. . . meet the state’s energy goals . . .” RCW 80.50.010. Under EFSLA, EFSEC’s review must be based upon clearly enumerated premises, including a policy to “. . . preserve and protect the quality of the environment; to enhance the public's opportunity to enjoy the esthetic and recreational benefits of the air, water and land resources; to promote air cleanliness; to pursue beneficial changes in the environment; and to promote environmental justice for overburdened communities.” RCW 80.50.010(2).

EFSEC must conduct a public hearing, or adjudication, pursuant to the Administrative Procedure Act (“APA”) when reviewing proposed energy facility applications that do not qualify for expedited processing. RCW 80.50.090(4). This adjudication must occur prior to the issuance of the Council’s recommendation to the Governor under RCW 80.50.100. *Id.* EFSEC has adopted rules that allow it to commence the adjudication prior to completing its environmental analysis review under SEPA. WAC 463-47-060(2). The general subject areas for an adjudication include, *inter alia*, “. . . [o]n-site and local impacts (physical): [s]uch as aquatic, terrestrial and atmospheric . . . [and a]dverse impacts minimization and consideration of conditions of certification.” WAC 463-30-300. Prior to the adjudication’s public hearing, EFSEC sets forth a schedule for written witness testimony and discovery conducted in accordance with RCW 34.05.446. *See* WAC 463-30-190; 463-30-270.

After completing its review of a proposed energy facility, the Council “. . . shall report to the governor its recommendations as to the approval or rejection of an application for certification . . .” RCW 80.50.100. When considering whether to condition or deny an application, “[t]he overriding policy of the [C]ouncil is to avoid or mitigate adverse environmental impacts which may result from the [C]ouncil’s decision.” WAC 463-47-110. As part of a recommendation for approval, the Council shall include conditions in the accompanying draft certification agreement that, *inter alia*, “. . . protect state, local governmental, or community interests, or overburdened communities as defined in RCW 70A.02.010 affected by the construction or operation of the facility. . .” RCW 80.50.100(2); *see* RCW 70A.02.010 *and* 19.405.020 (definition of overburdened communities includes communities located fully or partially in Indian County).

Washington State’s Supreme Court recently confirmed the application of SEPA and its regulations, including WAC 197-11-070, to EFSEC as a SEPA responsible official. *Columbia Riverkeeper v. Port of Vancouver*, 188 Wn.2d 80 (2017). In *Columbia Riverkeeper*, the Court expressly looked at the question of conflict between EFSLA and SEPA before concluding that the two acts overlapped – but did not conflict. The Court held that “SEPA and EFSLA reflect the legislature’s desire to carefully balance developmental and environmental concerns.” *Id.* at 95. Because the two acts overlap, provisions like WAC 197-11-070 must be construed harmoniously when possible. *Id.* (citing *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wn.2d 275, 308 (2008)). Although *Columbia Riverkeeper* was a challenge to the Port of Vancouver’s SEPA compliance under WAC 197-11-070 for a Project going through EFSEC’s application process, the Court confirmed that both EFSEC and the Governor “. . . remain subject to the reasonable alternatives requirement of WAC 197-11-070(1)(b) themselves [and] must consider whether the proposed certification is the most likely

alternative to feasibly attain or approximate the Port's lease objectives at the lowest environmental cost or level of environmental degradation.” *Id.* at 101.

C. Administrative Procedures Act

EFSEC’s adjudicative proceedings are conducted as public hearings under the APA. RCW 80.50.040(3); WAC 463-30-010; WAC 463-30-020. The APA requires that the presiding officer of an adjudication “give all parties *full opportunity* to submit and respond to pleadings, motions, objections, and offers of settlement.” RCW 34.05.437(1) (emphasis added). Likewise, the presiding officer must afford all parties the “opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence[.]” RCW 34.05.449.

III. RELEVANT FACTS

Scout Clean Energy (“SCE”) submitted an application for site certification for the Project on February 8, 2021.² Although SCE originally requested expedited processing of the Project’s application, that request was withdrawn March 29, 2021.³ In withdrawing its request for expedited processing, SCE acknowledged that an EIS would likely need to be prepared to assess the Project’s environmental impacts. *Id.* Sometime in December of 2022, SCE amended its original application for site certification.⁴

EFSEC Administrative Law Judge Adam Torem (“ALJ”) issued an Order commencing the Project’s Adjudication process on December 15, 2023. Shortly after commencing the Adjudication, EFSEC published a draft environmental impact statement (“DEIS”) for the Project

² Letter from Michael Rucker, Manager, Horse Heaven Wind Farm, to Kathleen Drew, Chair, Washington Energy Facility Site Evaluation Council (Feb. 8, 2021), *available online at* https://www.efsec.wa.gov/sites/default/files/210011/00001/20210208_AppCvrLtr.pdf (last visited May 16, 2023).

³ Letter from Darin Huseby, Director of Western U.S. Development, Scout Clean Energy, to Sonia Bumpus, Siting Manager, Washington Energy Facility Site Evaluation Council (March 29, 2021), *available online at* <https://www.efsec.wa.gov/sites/default/files/210011/00018/Scout%20Notice%20of%20Withdrawal%20of%20expedited%20processing%20request.pdf> (last visited May 16, 2023).

⁴ Horse Heaven Application, “Updated ASC,” *available online at* <https://www.efsec.wa.gov/energy-facilities/horse-heaven-wind-project/horse-heaven-application> (last visited May 16, 2023).

on December 19, 2023.⁵ The DEIS does not include any analysis of the changes made in the amended application for site certification submitted the same month that the DEIS was published.⁶ EFSEC has also not issued a supplemental DEIS to reflect the amended application for site certification. The parties to the Adjudication have not yet been provided with an estimated date of completion for the Project's FEIS, nor is an estimated date of completion available online. *Id.* Therefore, the Adjudication is moving forward without even a draft environmental analysis of the most-recently proposed structure of the Project.

The ALJ has conducted three prehearing conferences since commencing the Adjudication, with different proposed Adjudication schedules discussed at each prehearing conference. The agenda for the third prehearing conference includes a draft schedule that i) requires the submission of witness testimony by all parties within less than a month of the filing of this Motion, ii) sets the Adjudication hearing in August of 2023, and iii) sets substantive briefing schedules based upon an August hearing.⁷ Although the ALJ verbally confirmed the availability of discovery to all parties to the Adjudication, the proposed schedule does not set a discovery period ahead of the submission of witness testimony. In sum, the latest proposed schedule requires the entire Adjudication – including witness testimony, discovery, legal briefing, and the hearing – to conclude within less than four months regardless of when the FEIS is ultimately published. The parties have not received a prehearing order confirming the proposed Adjudication schedule.

⁵ Dear Reader Letter from Sonia Bumpus, Director, Washington Energy Facility Site Evaluation Council, *available online at* <https://www.efsec.wa.gov/sites/default/files/210011/Cover%20Letter.pdf> (last visited May 16, 2023).

⁶ Horse Heaven Application, "Draft EIS documents," *available online at* <https://www.efsec.wa.gov/energy-facilities/horse-heaven-wind-project/horse-heaven-sepa> (last visited May 16, 2023).

⁷ See Prehearing Conference #3 (May 2, 2023) Judge Torem's Agenda, *In the Matter of the Application of: Scout Clean Energy, LLC, for Horse Heaven Wind Farm, LLC, Applicant* (April 28, 2023).

IV. LEGAL ARGUMENT

A. The Council Must Publish a Final Environmental Impact Statement For The Project Prior To Moving Forward With The Adjudication.

Compliance with SEPA, and fulfillment of the purposes of EFSLA, require EFSEC to publish the Project's FEIS before the Adjudication moves forward. Once the SEPA responsible official determines that a Project may have a probable significant adverse environmental impact – as EFSEC did in this case – SEPA requires completion of a thorough environmental review that shall include an “. . . impartial discussion of significant environmental impacts and shall inform decision makers and the public of reasonable alternatives, including mitigation measures, that would avoid or minimize adverse impacts or enhance environmental quality.” WAC 197-11-400. While SEPA's requirements are procedural, and do not dictate a particular outcome regarding approval of the Project, they are not merely perfunctory.

SEPA explicitly requires EFSEC to refrain from taking any action that would “(a) [h]ave an adverse environmental impact; or (b) [l]imit the choice of reasonable alternatives” prior to completion of the FEIS. WAC 197-11-070(1). EFSEC adopted this rule via WAC 463-47-020, as well as the SEPA requirement that “[t]he [FEIS] shall be prepared early enough so 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. In order to comply with these procedural mandates, EFSEC must allow the Council and parties to the Adjudication to review and refer back to the FEIS during the Adjudication. Such incorporation of the FEIS into the Adjudication, i.e. decision making process, cannot happen if the parties are required to submit witness testimony or brief legal arguments ahead of the FEIS's publication.

Without a continuance, the Adjudication and resulting recommendation to the Governor regarding the ASC will move forward on an incomplete record. In the absence of a FEIS that considers all impacts of the Project, as well as any reasonable alternatives, the dialogue between the parties and Council will not be grounded in a complete and impartial analysis of the potential impacts. Instead, the parties will be forced to present evidence that is duplicative of the FEIS. Multiple parties have raised issues in the Adjudication regarding the sufficiency of proposed mitigation measures for environmental impacts. Without a FEIS in the record to cite, the parties must bring their own witnesses, when possible, to articulate the potential impacts of the Project and the sufficiency of mitigation proposed by SCE in the ASC. This is not only a significant burden on the parties but it is duplicative of the work that EFSEC is required to do under SEPA. WAC 197-11-400; 197-11-406.

Compliance with SEPA's procedural requirements is also necessary to meet the directives of EFSLA. As the Court recognized in *Columbia Riverkeeper*, the two laws overlap to "... reflect the legislature's desire to carefully balance developmental and environmental concerns." 188 Wn.2d at 95. EFSLA does not empower EFSEC to streamline permitting of industrial renewable energy projects at the expense of a deliberate analysis regarding the projects' potential environmental impacts. Rather, EFSLA requires EFSEC to act in accordance with express policies to "... preserve and protect the quality of the environment; to enhance the public's opportunity to enjoy the esthetic and recreational benefits of the air, water and land resources; to promote air cleanliness; to pursue beneficial changes in the environment; and to promote environmental justice for overburdened communities." RCW 80.50.010(2). In order to fulfill those policies, EFSEC's regulatory decisions must be informed by a sufficient environmental analysis under SEPA.

Progressing with the Adjudication in the absence of a FEIS, and any accompanying analysis of alternative designs, also requires the parties to put forth evidence and legal arguments on what is essentially a moving target. The DEIS published December 19, 2023 did not include any design alternatives. *See* FN 6, *supra* pg. 7. However, that omission does not limit SCE in negotiating alternative designs with parties to the Adjudication. The parties may also advocate for certain design alterations or additional mitigation measures in the course of the Adjudication. SEPA's procedural sequence requirements are in place to curtail this type of circular dialogue, which does not serve the purposes of SEPA or EFSLA. All alternative Project designs or mitigation measures should be analyzed in the FEIS ahead of the Adjudication and Council's deliberation.

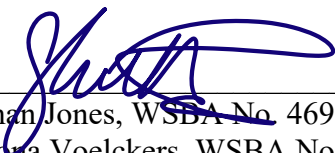
B. Continuing The Adjudication Deadlines Will Allow Sufficient Time For All Parties To Engage In Discovery Consistent With the Administrative Procedure Act.

The proposed case schedule does not allow sufficient time for discovery and due process. During the third Prehearing Conference, the ALJ confirmed that discovery was available to all parties under RCW 34.05.446. Discovery deadlines are not built into the proposed schedule, which suggests that the parties will be conducting discovery simultaneous with – or after – the submissions of their witness and documentary evidence. Such a process falls far short of the due process guarantees in the APA. *See* RCW 34.05.499; RCW 34.05.437. By continuing the proposed deadlines for testimony and documentary evidence until it publishes the FEIS, the Council will also allow the parties time to properly conduct discovery under RCW 34.05.446.

V. CONCLUSION

For the forgoing reasons, the Council should continue all proposed Adjudication deadlines contained in the agenda for the third prehearing conference until it has issued a FEIS that fully evaluates the Projects potential environmental impacts and any reasonable alternatives. In the meantime, the Council should allow the parties to continue to engage in discovery to ensure that the Adjudication contains a full record that will properly inform the Council's ultimate decision and recommendation to the Governor.

Dated this 18th day of May, 2023.



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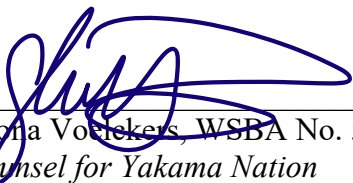
CERTIFICATE OF SERVICE

On May 18, 2023 I electronically filed the foregoing document with the Energy Facility Site Evaluation Council (“EFSEC”) at Adjudication@efsec.wa.gov.

I further certify that on May 18, 2023 I served the foregoing document upon all parties of record and identified EFSEC staff in this proceeding by electronic mail consistent with the following electronic service list:

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Dated this 18th day of May, 2023.



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