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4 BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITING EVALUATION COUNCIL

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6 In the Matter of the Application of:

7 Scout Clean Energy, LLC, for
8 Horse Heaven Wind Farm, LLC,
Applicant.

DOCKET NO. EF-210011

INTERVENER TRI-CITIES
C.A.R.E.S MOTION FOR STAY
PENDING SEPA COMPLIANCE

(Oral Argument Requested)

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13 **I. INTRODUCTION.**

14 In the state of Washington, the State Environmental Policy Act,” RCW Chapter
15 43.21 (SEPA) is described as “perhaps the most powerful legal tool for protecting the
16 environment”.¹ The statute, adopted in 1971, expressly directs that “the policies,
17 regulations, and laws of the state of Washington shall be interpreted and administered
18 in accordance with the policies set forth in this chapter,” RCW 43.21C.030(1). A key
19 purpose of the Act is in RCW 43.21C.020(2)(b):

20 Assure for all people of Washington safe, healthful, productive, and
21 aesthetically and culturally pleasing surroundings;

22 In this case, “Judge Torem’s Agenda” for Prehearing Conference #3 (“PHC#3),
23 issued on April 28, 2023, announced that five issues:

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27 ¹ EFSEC 2018 Strategic and Policy Review (“2018 EFSEC Review”), Kathleen Drew, page 2
(displayed on EFSEC website).

1 are NOT expected to be taken up during Adjudication unless a party proponent
2 makes a satisfactory offer of proof demonstrating its relevance under EFSEC's
governing RCWs and WACs.

3 (Capitalization, italics and underlining for “not” are in the original.)² Two of the issues
4 called out as “NOT expected to be taken up” are two significant SEPA issues, as
5 follows.

- 6 • SEPA – Compliance with RCW 43.21C and WAC 197-11 (separate but parallel
7 process)³
- 8 • Proceeding with Adjudication prior to Issuance of FEIS⁴

9 This motion is made as an “offer of proof” in the form of a motion requesting that the
10 issues in question be retained as they are a required part of analysis for any
11 application before EFSEC. TCC believes the Council would commit reversible error if
12 these critical SEPA issues are not taken up during the current adjudication. TCC
13 further requests that the Council stay proceedings until required SEPA compliance is
14 complete.

15 **II. RELIEF REQUESTED.**

16 Tri-Cities C.A.R.E.S (TCC)⁵ requests that the Council enter the following relief:
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19 ² Page 3 of the Agenda says EFSEC ALJ, EFSEC Staff and the Chair “consulted” on the issues list.
20 No analysis of the SEPA issues has been provided.

21 ³ The 2018 EFSEC Review states that: “In making determination on environmental issues, EFSEC's
22 staff relies on the requirements of the State Environmental Policy Act, or SEPA.”

23 ⁴ The parties were peremptorily warned that:

24 Any such arguments should ensure a firm basis in existing law (see CR 11 for guidance) or a
25 good faith argument for extension/modification/reversal of existing law (or the establishment of
26 new law). Submissions of evidence or arguments deemed frivolous will be stricken and
27 reviewed for any available sanction under the APA.

28 The parties' references to the record and argument in these motions are a right firmly established in
Washington law over fifty years of judicial, governmental and administrative interpretation.

⁵ Tri-Cities C.A.R.E.S. (TCC) is a community organization, organized and existing to address
environmental and other issues related to the Horse Heaven Hills project. It was granted intervenor
status in these proceedings by order on March 9, 2023.

1 1) determine and declare that “compliance with RCW 43.21C and WAC 197-11”
2 are required elements during Council adjudication and are not a “separate but parallel
3 process;”

4 2) determine and declare that the FEIS, currently under preparation by EFSEC
5 staff, must be distributed and available to all parties prior to the filing of prefiled direct
6 testimony;

7 3) enter a stay of proceedings of the Adjudication until the Council complies with
8 SEPA as described in the foregoing.

9 **III. STATEMENT OF FACTS.⁶**

10 On February 8, 2021, Horse Heaven Wind Farm, LLC (the Applicant) filed an
11 application for site certification (ASC) with EFSEC.⁷ In fact, the record indicates that the
12 Applicant was originally pursuing an application through Benton County,⁸ but decided
13 in the fall of 2020 that it would file its ASC with EFSEC instead.⁹ See Pre-Application
14 Comments on EFSEC’s Horse Heaven website and communications between chair
15 Kathleen Drew and Sonia Bumpus dated November 9, 2020.

16 The Draft Environmental Impact Statement (DEIS) describes the project as
17 follows:

18 The Project would consist of a renewable energy generation facility that would
19 have a nameplate generating capacity of up to 1,150 megawatts for a
20 combination of wind and solar facilities, battery energy storage systems BESS),
and other Project components, including underground and overhead electrical

21 ⁶ Except as described, this Statement of Facts is based on the files and records maintained by
22 EFSEC on its website.

23 ⁷ Though not disclosed by the current record, TCC believes there were likely communications and
24 coordination between Applicant and EFSEC staff in advance of filing the ASC. Discovery continues on
this issue.

25 ⁸ We believe the Applicant did not pursue permitting with Benton County because it was told that the
26 County would likely require an environmental impact statement for the proposal.

27 ⁹ The EFSEC website acknowledges it was aware that the Applicant was abandoning its Benton
28 County application and filing an application with it as early as November, 2020.

1 collection lines, underground communication lines, new Project substations,
2 access roads, operations and maintenance facilities, and meteorological towers.

3 Page ES-1. As the DEIS states:

4 An Application for Site Certification (ASC) is a formal submittal prepared by an
5 applicant that provides EFSEC with information regarding the Applicant, the
6 proposed project design and features, the natural environment, and the built
7 environment in sufficient detail to enable EFSEC to go forward with its
8 application review.

9 DEIS page ES-1, Fn. 1 (emphasis supplied).

10 On the same date the application was filed, February 8, 2021, the Applicant
11 submitted its Environmental Checklist required by SEPA. At page 2, the Environmental
12 Checklist listed “the environmental studies and technical reports that have been
13 prepared or will be prepared for this Project.” Most of the 40 studies listed were
14 completed in 2019 or 2020, with only 2 incomplete, and those were to be finalized by
15 June, 2021. Accordingly, EFSEC had sufficient information to commence environmental
16 review when the application was filed on February 8, 2021. See WAC 197-11-055(1).

17 On May 11, 2021, EFSEC staff issued the SEPA Determination of Significance
18 and Request for Comments on Scope of Environmental Impact Statement for the Horse
19 Heaven Wind Farm Project (the Scoping Notice). More than 360 scoping comments
20 were received by EFSEC by the scoping deadline of June 10, 2021. Under the SEPA
21 rules, WAC chapter 197-11, preparation of a DEIS may begin before or during scoping.
22 WAC 197-11-408(7).

23 On December 1, 2022, almost 18 months after the close of the scoping comment
24 period, the Applicant filed an Amended ASC, which, as will be described herein, made
25 major changes in the proposal. Other than putting the Amended ASC on its website, no
26 public notice was provided to parties of record, including those that provided scoping
27 comments, of this filing. No opportunity to comment on this document was provided.

28 On December 19, 2022, the EFSEC staff issued the DEIS for the proposal. The
DEIS did not review the Amended ASC and did not even mention it. Not including the

1 Table of Contents and Reference lists, the DEIS was 1,332 pages long. The comment
2 period for the DEIS ended on February 1, 2023.

3 In public communications, EFSEC staff acknowledged that the DEIS did not
4 include consideration or analysis of the Amended ASC, but indicated that such analysis
5 would be undertaken in the FEIS.

6 As described above, when counsel for TCC requested an estimate of when the
7 FEIS would be available, and whether it would be available prior to the deadline for
8 filing of direct testimony by TCC, the following was received from Mr. Thompson, the
9 Attorney General for EFSEC:

10 EFSEC staff working on the FEIS for the proposed Horse Heaven Wind Farm
11 project do not expect that the FEIS will be published prior to deadlines for filing
testimony in the adjudication.

12 For an explanation of the relationship between the EFSEC adjudication and the
13 SEPA process, I recommend the discussion at pp. 2-3 of this order from the
14 Tesoro Savage adjudication. I would also point out that WAC 463-47-060(2) in
EFSEC's SEPA rules states that the Council may initiate an adjudicative
proceeding required by RCW 80.50.090 prior to completion of even a *draft* EIS.

15 (Emphasis in original) Email of April 25, 2023.

16 When TCC's counsel asked about estimated time for preparation of the FEIS,
17 Mr. Thompson replied as follows:

18 EFSEC staff is not yet ready to give an estimate about the date of FEIS
19 publication because the additional transportation impact analysis is still being
developed and scheduled in coordination with the applicant and WSDOT.

20 An extension has not yet been agreed upon by the Council and the applicant.
21 However, the agenda for prehearing conference #3, issued this morning,
includes the selected hearing dates and other schedule deadlines.

22 No additional information regarding the FEIS was provided during PHC#3.

23 **IV. ISSUES PRESENTED**

24 4.1. Is EFSEC required to comply with SEPA during the adjudication for the
25 proposed Horse Heaven Wind Farm project?
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1 4.2. Must the FEIS in this proceeding be a part of this adjudication and be
2 available to the parties a reasonable time prior to the deadline for filing direct
3 testimony?

4 4.3. Should EFSEC stay further proceedings while it complies with SEPA,
5 consistent with the terms of Issues 4.1 and 4.2 above?

6 **V. LEGAL AUTHORITY.**

7 5.1 THE FEIS SHOULD BE ISSUED AND AVAILABLE TO THE PARTIES IN
8 ADVANCE OF THE DEADLINE FOR SUBMITTAL OF TESTIMONY.

9 From its origins, SEPA stated that “policies and goals set forth in this chapter are
10 supplementary to those set forth in existing authorizations of all branches of
11 government of this state, including state agencies, municipal and public corporations,
12 and counties.” RCW 43.21C.060. As stated in WAC 197-11-030(2)(e), “agencies shall
13 to the fullest extent possible: ... (e) Integrate the requirements of SEPA with existing
14 agency planning and licensing procedures and practices, so that such procedures run
15 concurrently rather than consecutively.” Under WAC 197-11-055(2)(e), as confirmed
16 by EFSEC’s chair, SEPA “directs agencies (and developers)” to

17 ! Integrate SEPA with agency activities at the earliest possible time to ensure
18 that planning and decisions reflect environmental values, avoid delays later in
19 the process, and seek to resolve potential problems.

20 2018 EFSEC Review, page 3. This proposition is confirmed on page 8 of EFSEC’s
21 2018 Review, stating that: “4. EFSEC’s work is centered on SEPA.”

22 WAC 197-11-050(2) directs the “timing of review of proposals” as follows:

23 (2) Timing of review of proposals. The lead agency shall prepare its threshold
24 determination and environmental impact statement (EIS), if required, at the
25 earliest possible point in the planning and decision-making process, when the
26 principal features of a proposal and its environmental impacts can be reasonably
27 identified.

28 (Emphasis supplied) Once SEPA review is initiated as described above:

The SEPA process shall be combined with the existing planning, review, and
project approval processes being used by each agency with jurisdiction. When
environmental documents are required, they shall accompany a proposal

1 through the existing agency review processes. Any environmental document in
2 compliance with SEPA may be combined with any other agency documents to
reduce duplication and paperwork and improve decision making.

3 WAC 197-11-640 (emphasis supplied). This is repeated in WAC 197-11-655(2):

4 2) Relevant environmental documents, comments, and responses shall
5 accompany proposals through existing agency review processes, as determined
6 by agency practice and procedure, so that agency officials use them in making
7 decisions.

8 EFSEC has specifically adopted these rules in WAC 463-47-020, its SEPA “Adoption
9 by reference.”

10 EFSEC’s “existing agency review processes” specifically include adjudicative
11 proceedings. WAC 463-14-080, “EFSEC Deliberative Process.” This adjudication was
12 commenced by notice on December 15, 2022.¹⁰ As established by the “Agenda”
13 distributed on April 28, 2023, for PHC#3, the “agency review process” established for
14 this proceeding includes the filing of direct, response and reply prehearing briefs and
15 cross-examination exhibits, an additional (final) prehearing conference, hearings before
16 the Council at specified dates in August, 2023, post-hearing briefing by the parties,
17 Council deliberation and a decision. Indeed, the EFSEC “agency review process”
18 began when it received an application on February 8, 2021 and decided in May, 2021
19 to issue a Determination of Significance, requiring draft and final Environmental Impact
20 Statements.

21 Notwithstanding these clear directives, on April 25, 2023, counsel for TCC
22 received email from EFSEC stating:

23 EFSEC staff working on the FEIS for the proposed Horse Heaven Wind Farm
24 project do not expect that the FEIS will be published prior to deadlines for filing
25 testimony in the adjudication.

26 ¹⁰ Order Commencing Agency Adjudication; Setting Deadline for Petitions to Intervene (February 3,
27 2023); and Notice of Telephonic Pre-Hearing Conference (March 10, 2023 at 9:00 A.M.) Issued by ALJ
28 Torem on December 15, 2022.

1 Also as described above, the Agenda for PHC#3 indicated that the Council would not
2 be taking up the question of whether the FEIS was required for adjudication or indeed
3 “compliance with RCW 43.21C and WAC 197-11 (separate but parallel process).”¹¹
4 Intertwined with this analysis is the earlier determination that analysis of the Amended
5 ASC would not be considered in the DEIS, or a supplemental DEIS, but rather in the
6 FEIS, another action fully inconsistent with SEPA.

7 It is unclear why EFSEC has not required the FEIS be available to the parties
8 prior to their filing of direct testimony, but there are two possible reasons. First, that
9 completing the FEIS prior to the filing of direct testimony is not possible under the
10 current schedule due delays in completion of the document. Second, that it is the policy
11 of EFSEC to delay preparation of the FEIS until after the receipt of written testimony,
12 hearings and briefing. Given the lack of clarity, we address the options in order and
13 also discuss the particular issues related to this proceeding.

14 5.1.1 DELAYS IN EIS PREPARATION.

15 The first question is whether the unavailability of the FEIS is due to
16 administrative delays in preparation of the DEIS and now the FEIS. In this regard, as
17 TCC notes above, EFSEC staff had all available and necessary information to initiate
18 preparation of the DEIS when the original ASC was filed on February 8, 2021.
19 Unaccountably, staff took until December 19, 2022, to issue the DEIS, more than 18
20 months. Again, SEPA rules control; the DEIS time is controlled by WAC 197-11-406:

21 The lead agency shall commence preparation of the environmental impact
22 statement as close as possible to the time the agency is developing or is
23 presented with a proposal, so that preparation can be completed in time for the
24 final statement to be included in appropriate recommendations or reports on the
25 proposal (WAC 197-11-055). The statement shall be prepared early enough so it
26 can serve practically as an important contribution to the decision making process
27 and will not be used to rationalize or justify decisions already made.

28 ¹¹ It is not clear whether the Council or staff issued or approved these recent communications.

1 We are not aware why the DEIS was so long in preparation, but know that it is the clear
2 objective of the Council to “streamline” the Council processes. In this regard we note
3 that when the DEIS was completed, it had some 1,332 pages, whereas the SEPA rules
4 limit the length of the document to 150 pages. WAC 197-11-425(4).¹²

5 SEPA itself in RCW 43.21C.0311(1) provides that an FEIS should be prepared
6 “in as expeditious a manner as possible while not compromising the integrity of the
7 analysis” and that the FEIS should be prepared “within twenty-four months of a
8 threshold determination of a probable significant, adverse environmental impact.”¹³
9 Further, the SEPA rules also make clear that the FEIS should be issued within 60 days
10 of the end of the DEIS comment period, except in unusual circumstances. WAC 197-
11 11-460(6). As of this writing, it has now been more than 90 days since the end of the
12 comment period and it appears that the FEIS will not be available for several more
13 months.

14 To be clear, TCC supports any and all efforts for complete and thorough
15 preparation of all environmental documents and especially environmental impact
16 statements.¹⁴ SEPA is indeed “the most powerful legal tool for protecting the
17 environment of the state,” and the most important part of this tool is the action forcing
18 requirement for detailed environmental impact statements. It is ironic, and contrary to
19 the established authority that the FEIS not be available to participants in this
20 adjudication because it cannot be prepared in a timely fashion.

21 In sum, TCC and other parties should not be denied the most critical
22 environmental document in their hearing preparation, the FEIS, because of
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24 ¹² This regulation is also included in EFSEC’s adoption by reference of SEPA Rules.

25 ¹³ The determination of significance was issued on May 11, 2021, almost exactly 24 months ago.

26 ¹⁴ The record reflects that TCC filed lengthy and thorough comments on the DEIS with the
27 established 45 day time comment period.

1 administrative delays in its issuance.

2 5.1.2 POLICY DECISION TO DELAY FEIS ISSUANCE.

3 Second, it may be that EFSEC has adopted a policy that FEISs will not be
4 available to parties during an adjudication. It is difficult to believe that this is a rational
5 SEPA policy. Public knowledge and participation in the SEPA process and the
6 obligation for integration of SEPA into existing agency processes supports having the
7 FEIS available during preparation of adjudicative testimony. There is no
8 countervailing policy: more information available to interested parties furthers SEPA
9 policies.

10 Mr. Thompson cited WAC 463-47-060(2) in support of the proposition that an
11 adjudicative proceeding may be “initiated . . . prior to completion of the draft EIS.” In
12 ordinary course, that is not an issue. Indeed, EFSEC is obligated to begin drafting the
13 DEIS when the application is received, well before any adjudication is scheduled.
14 However the issue here is not the DEIS, but the FEIS.

15 The legislative history of WAC 463-47-060 is contrary to the proposition
16 announced by Mr. Thompson. As shown on Attachment A to this motion, WAC
17 463-47-060(2) was amended by the Council in 2004 to *remove* the following sentence:
18 “The council shall initiate and conclude an adjudicative proceeding prior to the
19 issuance of a final EIS.” The first sentence of Subsection 2 was also changed by
20 eliminating the option of initiating a “hearing,” and only referencing an “adjudication.”
21 EFSEC rules are clear that an “adjudication” is initiated long before a hearing. It
22 appears that the Council is now citing the terms of a standard that was eliminated
23 almost 19 years ago.

24 The Council’s own regulations make clear that the policy of completing
25 adjudication in advance of the issuance of FEIS’s was repealed almost 20 years ago.
26 Making the FEIS available to the parties in sufficient time to allow it to be integrated
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1 into direct testimony is required by SEPA and its regulations.

2 5.1.3 FEIS REQUIRED FOR SEPA SUBSTANTIVE AUTHORITY.

3 Outside of the procedural requirements for preparation of draft and final EISs,
4 RCW 43.21C.060, as cited above, provides that SEPA is supplementary to existing
5 agency authority. But in addition, this section provides for the authority for an agency
6 to condition or deny a proposal under SEPA, as follows:

7 Any governmental action may be conditioned or denied pursuant to this chapter:
8 PROVIDED, That such conditions or denials shall be based upon policies
9 identified by the appropriate governmental authority and incorporated into
10 regulations, plans, or codes which are formally designated by the agency (or
11 appropriate legislative body, in the case of local government) as possible bases
12 for the exercise of authority pursuant to this chapter. Such designation shall
13 occur at the time specified by RCW 43.21C.120. Such action may be
14 conditioned only to mitigate specific adverse environmental impacts which are
15 identified in the environmental documents prepared under this chapter. These
16 conditions shall be stated in writing by the decision maker. Mitigation measures
17 shall be reasonable and capable of being accomplished. In order to deny a
18 proposal under this chapter, an agency must find that: (1) The proposal would
19 result in significant adverse impacts identified in a final or supplemental
20 environmental impact statement prepared under this chapter; and (2) reasonable
21 mitigation measures are insufficient to mitigate the identified impact.

22 (Emphasis supplied.) The statute is clear that, without the FEIS, the parties – and the
23 public – cannot argue for denial of a project. The opportunity for the parties to make
24 argument concerning possible denial of this proposal is during the filing of their direct
25 testimony. Even if that were not the case, the FEIS can also support mitigating
26 measures short of denial.

27 The Council has already adopted a regulation identifying the “policies and
28 procedures for conditioning or denying permits or other approvals” in WAC 463-47-110.
29 This rule provides broad and important authority for Council action. Subsection (2)(c) of
30 that regulation references WAC 197-11-660(1), which in turn mirrors RCW 43.21C.060
31 and says:

- 32 (f) To deny a proposal under SEPA, an agency must find that:
33 (i) The proposal would be likely to result in significant adverse
34 environmental impacts identified in a final or supplemental environmental
35 impact statement prepared under this chapter; and

1 (ii) Reasonable mitigation measures are insufficient to mitigate the
2 identified impact.

3 (Emphasis supplied). In short, the FEIS is required before substantive authority can be
4 invoked. The decision to delay the FEIS results in the Council removing the
5 mechanism for the public and parties to make arguments that the project should be
6 denied, as fully allowed by SEPA.

7 5.1.4. SUMMARY.

8 It makes no difference whether the unavailability of the FEIS for the filing of
9 testimony is due to administrative delays or Council policy, parties to the adjudication
10 are entitled to the FEIS before submission of testimony so they can reference the
11 document in their filings. The preemptive actions to improperly limit SEPA compliance
12 found in the Agenda for PHC#3 will likely create reversible error that will impact the
13 validity of Council decisions¹⁵ and result in delays, or the requirement to redo the
14 adjudication.

15 5.2 THE SEPA PROCESS, ESPECIALLY ISSUANCE OF THIS FEIS, CANNOT BE
16 RELEGATED TO A "SEPARATE BUT PARALLEL" PROCESS.

17 In addition to the circumstances described above, the forthcoming FEIS will be
18 unique. As described above, just 19 days before the DEIS was issued, the Applicant
19 submitted an Amended Application for Site Certification. The DEIS included no
20 analysis or review of this document despite the significant changes that were apparent
21 in the amended ASC.

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25 ¹⁵ As Professor Settle indicates in his book on SEPA (The State Environmental Policy Act: A Legal
26 and Policy Analysis): "The usual remedial result of a judicial determination of SEPA violation is simply
27 invalidation of agency action." See Paragraph 20.19(1). See also *Noel v. Cole*, 98 Wn.2d 375 (1982)
28 (action without complying with SEPA is *ultra vires*.)

1 Under the unusual circumstances, the proper course of action was to issue a
2 supplemental or amended DEIS to consider the changes and this concern was raised
3 by TCC when it filed comments on the DEIS.¹⁶ Once again, the SEPA Rules control:

4 (4) A supplemental EIS (SEIS) shall be prepared as an addition to either a draft
5 or final statement if:

6 (a) There are substantial changes to a proposal so that the proposal is
7 likely to have significant adverse environmental impacts; or

8 (b) There is significant new information indicating, or on, a proposal's
9 probable significant adverse environmental impacts. Preparation of a
10 SEIS shall be carried out as stated in WAC 197-11-620.

11 WAC 197-11-405. Instead, the Council now asserts that analysis of the changes in the
12 ASC will be included within the FEIS, a procedure not authorized by the SEPA Rules.

13 In part, there is no such process because there is no opportunity to comment on the
14 FEIS.

15 The Amended ASC makes numerous, and important changes to the project.
16 Perhaps the most important are found on pages 2-15, 2-16 and 2-49, which are shown
17 on Attachment B to this motion. On these pages there is discussion of the limitation
18 imposed by the "grid injection capacity" when moving the generated power into the
19 transmission system, a requirement of the transmission provider, the Bonneville Power
20 Administration (BPA). This means that no matter how many turbines or solar panels are
21 installed, the most that can be "injected" into the BPA grid is 350 MW at the Bofer
22 Canyon subsection, not the 650 MW identified in the original ASC. See Amended ASC
23 page 2-16. Thus the realistic value or output of the project is 850 MW, not 1150 MW as
24 stated in the original application and carried over into the DEIS at page ES-1. See
25 page 2 of this motion. As such, EFSEC will need to examine whether certain turbines
26 or solar panels can be eliminated from consideration because their power cannot be
27 interjected into the grid for distribution to utilities or other end users.

28 ¹⁶ No response has been received to this concern.

1 This discussion is important because the DEIS is already deficient for failure to
2 consider reasonable and feasible alternatives based on the original ASC.

3 On page 2-31 of the DEIS, prepared before the Amended SCA was submitted,
4 the document severely limits consideration of alternatives:

5 **2.2.2 Alternative Carried Forward for Detailed Analysis**

6 The Solar Only and Wind Only alternatives were eliminated from detailed
7 analysis because they would not generate the designed nameplate
8 generating capacity required by the Applicant.

9 The No Action Alternative was carried forward for analysis in the Draft
10 EIS.

11 (Emphasis supplied). As indicated, environmental review has apparently not been
12 guided by environmental considerations, but by the *“nameplate generating capacity*
13 *required by the applicant.”* But how did this capacity become the defining element of the
14 project? Is the specific nameplate capacity required by project economics? Does the
15 Applicant have a contract (a power purchase agreement or PPA) with a utility or
16 customer requiring this project capability? Does the source of project financing, private
17 or institutional, require this output? Nowhere in the ASC, the Amended SCA or the
18 DEIS is there any explanation of why this particular “nameplate capacity” of the project
19 is “required” by this Applicant.

20 One expects that this discussion would be found in the Amended Application,
21 since making application obligates an EFSEC Applicant to disclose: “analysis of
22 alternatives for site, route, and other major elements of the proposal.” See WAC
23 463-60-296. But the discussion of alternatives at pages 2-118 to 2-121 does not
24 address why the particular nameplate capacity is “required” by the applicant.

25 Nowhere in SEPA or the SEPA Rules is the applicant entitled to control the
26 environmental review process; this is confirmed in the SEPA Rules:

27 "Reasonable alternative" means an action that could feasibly attain or
28 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,

1 either directly, or indirectly through requirement of mitigation measures. (See
2 WAC 197-11-440(5) and 197-11-660.)

3 WAC 197-11-786. If the adherence to the “capacity required by the Applicant” as the
4 limitation on alternatives carries through to the FEIS¹⁷, the Council will be committing
5 reversible error.¹⁸

6 But even the applicant now admits in the Amended ASC that “grid injection
7 capacity” limits “designed nameplate generating capacity required by the Applicant.”
8 See Attachment B, and page 2-16. This limitation is substantial; the possible loss of
9 300 MW because of limits to “grid injection capacity” removes more than 25% of this
10 project’s nameplate capacity. Undeterred, the Applicant states, even in spite of limits
11 imposed by “grid injection capacity,” that: *“These changes to generating capacity do not
12 alter the facilities proposed under the original ASC.”* Amended SCA at 2-16.

13 The Applicant’s concession confirms that the project has flexible parameters. As
14 such, EFSEC will need to examine whether certain turbines of this merchant plant can
15 be eliminated from consideration, especially because their power cannot be interjected
16 into the grid for sale.

17 VI. CONCLUSION

18 In summary, the position taken by the staff that the adjudication, including the
19 filing of direct testimony can be conducted prior to issuance of the FEIS should be
20 rejected by the Council. Moreover, the Council should reject staff’s contention that
21 “compliance with RCW 43.21C and WAC 197-11” are not appropriate matters to be
22 taken up in the forthcoming adjudication. The foregoing is further supported by the

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25 ¹⁷ WAC 197-11-560(1)(b) makes clear that, based on comments, an agency may:
“Develop and evaluate alternatives not previously given detailed consideration by the agency”

26 ¹⁸ Professor’s Settle’s widely cited SEPA treatise, in the alternative section says:
27 Proposals are to be described in ways that encourage even-handed consideration and
28 comparison of alternatives . . .

1 unique circumstances of a tardy amendment to the ASC, resulting in the issued DEIS
2 not considering that amendment's material changes in the project.

3 To assure full compliance with SEPA for this substantial project, the Council
4 should order that the FEIS be completed as soon as reasonably possible and that the
5 filing of direct testimony be stayed until the parties have a reasonable time to review
6 the FEIS and incorporate its content into their testimony.

7 Respectfully submitted this 18TH day of May, 2023.

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9 /s/
10 J. Richard Aramburu, WSBA #466
11 Attorney for Tri-Cities C.A.R.E.S.
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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

DECLARATION OF SERVICE

I hereby certify that I have this day served by email INTERVENER TRI-CITIES
C.A.R.E.S MOTION FOR STAY PENDING SEPA COMPLIANCE upon all parties of
record in this proceeding listed on the following page(s), by authorized method of
service pursuant to WAC 463-30-120(3), simultaneous with electronic filing to
adjudication@efsec.wa.gov and to email for parties as provided.

Dated at Seattle, Washington this 18TH day of May, 2023.

 /s/
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Law Offices of J. Richard Aramburu, PLLC

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Attachment A

1991 Amendment of WAC 463-47-060

Source: <https://lawfilesexxt.leg.wa.gov/law/wsr/2004/21/04-21-013.htm>

AMENDATORY SECTION(Amending WSR 91-03-090, filed 1/18/91, effective 2/18/91)

WAC 463-47-060 Additional timing considerations. (1) The council will determine when it receives an application whether the proposal is an "action" and, if so, whether it is "categorically exempt" from SEPA. If the proposal is an action and is not exempt, the council will request the applicant to complete an environmental checklist. A checklist is not needed if the council and applicant agree an EIS is required, SEPA compliance has been completed, SEPA compliance has been initiated by another agency, or a checklist is included with the application. The applicant should also complete an environmental checklist if the council is unsure whether the proposal is exempt.

(2) ~~((The council when it receives an application and environmental checklist will determine whether the council or another agency is SEPA lead agency (see WAC 197-11-050 and 197-11-922 through 197-11-940) within five working days. If the council is not the lead agency, the council shall send the completed environmental checklist, a copy of the permit application, to the lead agency, and an explanation of the determination to the identified lead agency.~~

~~—(3)) The council may initiate an adjudicative proceeding hearing required by RCW ~~((80.50.100))~~ 80.50.090 prior to completion of the draft EIS. The council shall initiate and conclude an adjudicative proceeding ~~((hearing required by RCW 80.50.100))~~ prior to issuance of the final EIS.~~

[Statutory Authority: RCW 80.50.040. 91-03-090, § 463-47-060, filed 1/18/91, effective 2/18/91. Statutory Authority: RCW 80.50.040(1). 84-19-031 (Order 84-2), § 463-47-060, filed 9/14/84.]

2004 Amendment of WAC 463-47-060

Source: <https://lawfilesexxt.leg.wa.gov/law/wsr/2007/21/07-21-035.htm>

AMENDATORY SECTION(Amending WSR 04-21-013, filed 10/11/04, effective 11/11/04)

WAC 463-47-060 Additional timing considerations. (1) The council will determine when it receives an application whether the proposal is an "action" and, if so, whether it is "categorically exempt" from SEPA. If the proposal is an action and is not exempt, the council will request the applicant to complete an environmental checklist. A checklist is not needed if the council and applicant agree an EIS is required, SEPA compliance has been completed, SEPA compliance has been initiated by another agency, or a checklist is included with the application. The applicant should also complete an environmental checklist if the council is unsure whether the proposal is exempt.

(2) 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:))~~

[Statutory Authority: RCW 80.50.040 (1) and (12). 04-21-013, § 463-47-060, filed 10/11/04, effective 11/11/04. Statutory Authority: RCW 80.50.040. 91-03-090, § 463-47-060, filed 1/18/91, effective 2/18/91. Statutory Authority: RCW 80.50.040(1). 84-19-031 (Order 84-2), § 463-47-060, filed 9/14/84.]

Attachment B



Horse Heaven Wind Farm

Washington Energy Facility Site Evaluation Council

UPDATED APPLICATION FOR SITE CERTIFICATION

EFSEC Docket Number: EF-210011

Submitted by:

Horse Heaven Wind Farm, LLC
5775 Flatiron Parkway, Suite 120
Boulder, CO 80301

February 2021

Revised December 2022

2.2 LEGAL DESCRIPTIONS AND OWNERSHIP INTERESTS

WAC 463-60-135:

- (1) *Principal facility. The application shall contain a legal description of the site to be certified and shall identify the applicants and all nonprivate ownership interests in such land.*
- (2) *Associated and transmission facilities. For those facilities described in RCW 80.50.020 (6) and (7) the application shall contain the legal metes and bounds description of the preferred centerline of the corridor necessary to construct and operate the facility contained therein, the width of the corridor, or variations in width between survey stations if appropriate, and shall identify the applicant's and others' ownership interests in lands over which the preferred centerline is described and of those lands lying equidistant for 1/4 mile either side of such center line.*

The list of landowners within the Project Lease Boundary, including parcel numbers, parcel acres, and legal descriptions of the overall properties and affected portions of the properties, is provided as Appendix F of this ASC.

2.3 CONSTRUCTION ON SITE

WAC 463-60-145: *The applicant shall describe the characteristics of the construction to occur at the proposed site including the type, size, and cost of the facility; description of major components and such information as will acquaint the council with the significant features of the proposed project.*

The Project is a renewable energy generation facility that, **at the time of the application**, would have a nameplate energy generating capacity of up to 1,150 MW for a combination of wind and solar facilities as well as **alternating current (AC)-coupled BESS**. **The nameplate generating capacity, which is the aggregate nameplate capacity in MW for the Project based on the nameplate rating of each generator at its rated power factor multiplied by the total number of generators installed, was being limited to the aggregate nameplate capacity requested (generation interconnection request) consistent with Bonneville Power Administration (BPA) business practices. BPA has since allowed interconnection requests that facilitate greater installed aggregate nameplate generating capacity, provided the instantaneous generation is controlled to not exceed the grid injection capacity, which is the maximum energy in MW that can be injected into the transmission grid at any instant in time without exceeding the allowable authorized grid injection capacity set by BPA (the transmission provider). Consequently, a generation facility may have a greater nameplate generating capacity than grid injection capacity by installing more Turbines or solar modules. This change by BPA does not alter the facility components proposed for the Project.**

The number of Turbines and extent of solar arrays that would be used for the Project to generate this energy would depend on the final Turbine models and/or solar modules selected as well as the final array layout options selected (see further discussion below in Sections 2.3.1 and 2.3.2). The ASC is seeking permitting authorization for up to 244 Turbine locations and the maximum extent of solar arrays **in terms of total land area** described in this ASC (see Table 2.3-1), with all possible Turbine locations and solar array extent cumulatively reviewed in the analysis of potential resource impacts, although fewer Turbines and solar arrays may be constructed for this Project. The final layout of Turbines and solar arrays would be determined prior to construction. The Applicant has

evaluated impacts for the proposed solar arrays considering different technology options, while limiting the total area to be occupied by the solar arrays to no more than approximately 6,570 acres with a nameplate generating capacity **at the time of initial application** for the solar arrays of up to 800 MW.

Assessing the widest range of possible locations and buildouts will aid in siting flexibility during the final design process while allowing consideration of the full range of potential Project impacts. This approach will allow the Applicant to select the most appropriate system for generating and storing energy available at the time all of the equipment is acquired, so long as the system selected does not result in greater impact than allowed for in the Site Certification Agreement and satisfies all pre-construction conditions of the Site Certification Agreement.

Power generated by the Project would be transmitted to existing BPA transmission lines via two interconnections. Up to 650 MW of **nameplate generating capacity, limited to a 350 MW grid injection capacity,**~~power~~ could interconnect to the planned BPA 230- ~~kilovolt~~-(kV) Bofer Canyon substation. Up to 500 MW of **nameplate generating capacity/grid injection capacity**~~power~~ could interconnect to the planned BPA 500- kV Webber Canyon substation. Other Project components would include up to two **AC-coupled** BESS, underground and limited overhead electrical collection lines, underground communication lines, new Project substations, access roads, O&M facilities, meteorological towers, control houses, and temporary construction yards. The following describes the various components of the Project. **These changes to generating capacity do not alter the facilities proposed under the original ASC.**

2.3.1 Turbines and Towers

To allow flexibility in the choice of Turbines at the time of construction, the Applicant has analyzed impacts using four different Turbine models across two different Turbine layouts. This approach will allow the Applicant to select the most appropriate Turbine model available at the time the Turbines are acquired, so long as the Turbines selected result in no greater impact than allowed for in the Site Certification Agreement. This flexibility is required because Turbine manufacturers regularly offer new Turbine models with improved technology and retire older models, and because Turbine selection would not occur until nearer the time of construction. Due to the time required to obtain a Site Certification Agreement and other necessary permits, a specific model identified for analysis may not be available at the time of construction. The final Turbine model that would be used for the Project would be a commercial choice based on Turbine availability and other factors present at the time of construction, and is not known at this time. However, any Turbine model used for the Project would be certified to international standards and would be compatible with state-of-the-art grid technology. The impacts resulting from the final selected Turbine model would not exceed those presented in this ASC. The following describes the various Turbine options that will be analyzed to depict the range of potential resource impacts from the Project.

For the purposes of analyzing the potential impacts of the Project, this assessment considers impacts as they would occur based four different Turbine models available at this time (General Electric [GE] 2.82- MW Turbine; GE 3.03- MW Turbine; GE 5.5- MW Turbine; and Siemens Gamesa 6.0 -MW Turbine). Table 2.3-1 summarizes the characteristics of these four Turbine models. These models represent a reasonable range of Turbine options and subsequent

2.3.2 Solar Array

The major components of the proposed solar energy generation systems consist of the solar modules, tracking systems, posts, and related electrical equipment (e.g., inverters and transformers). These components are combined to form a solar array. The layout of the solar arrays can vary depending on project size, technology, topography, and other constraints. Therefore, as noted earlier, the Applicant seeks to permit a range of technologies to preserve design flexibility. The Applicant is currently studying multiple potential solar array sites: one site on the east side of the Project Lease Boundary (consisting of a 4,450-acre area) and up to two potential sites on the west side (one site 3,347 acres in size and one site 3,045 acres). A determination of which of these potential solar array sites will be chosen has not yet been made. Therefore, the Applicant is submitting all potential solar array sites for review (see Figure 2.3-1 and Figure 2.3-2 for the location of these potential solar array sites). The solar arrays would be enclosed by a 6-foot-tall security fence. For the purpose of impact calculations, it is assumed that all areas within the fenced area would be permanently impacted by construction and operation of the solar arrays (see Table 2.1-1).

During final design, the Applicant would consider all micro-siting factors and solar technology available at that time to design the most efficient and effective solar array layouts. **The nameplate generation capacity of the solar arrays may be greater than the maximum grid injection capacity, but will be limited to the maximum grid injection capacity as a function of the AC rating of the inverters associated with current interconnection requests. Accordingly, there may be greater direct current (DC) nameplate generation capacity as a function of the optimization in the number of solar modules installed per inverter.** However, the actual solar array equipment and layouts selected would not exceed the footprint acreage or impacts described in this ASC. Therefore, the following description of major components is based on the best available design information at this time, and largest anticipated footprint, but may not reflect the final design.

2.3.2.1 Solar Modules

Solar modules use mono-, ~~or~~ poly-crystalline **or CadTe** cells to generate electricity by converting sunlight into ~~direct current (DC)~~ electrical energy. The electrical generation from a single module varies by module size and the number of cells per module. The ~~crystalline~~ cells are contained within antireflective glass panels and a metal frame, and are linked together with factory-installed wire connectors. The modules would be connected in series to form ~~long rows spaced approximately 15 to 20 feet apart (from the edge of the solar modules)~~ strings. The ~~rows~~ strings of modules are then connected **in parallel** via ~~cables to DC combiners, cables, and~~ **switchboards**. The final configuration of multiple rows, and the strings of electrical cable connecting them, can vary depending on the equipment type and topography. The actual number of modules would vary depending on the module technology, energy output, spacing, mounting equipment (tracker systems), and other design criteria, which are subject to change during final design. Figure 2.3-6 provides an example solar module.