

**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

PROTECTIVE ORDER WITH
PROVISIONS GOVERNING
CONFIDENTIAL INFORMATION AND
INFORMATION EXEMPT FROM PUBLIC
DISCLOSURE UNDER RCW 42.56

Procedural Setting. On May 2, 2023, ALJ Torem conducted a Third Pre-Hearing Conference in this matter. On that date, the parties were given permission to initiate discovery and were also provided a schedule for submitting pre-filed testimony. The Council finds that the parties reasonably anticipate that discovery or evidentiary filings will likely require information to be designated by its owner as “confidential” and/or exempt from public disclosure pursuant to the Public Records Act, Chapter 42.56 RCW.¹ The Council further finds that disclosure of such information to other parties in the absence of a protective Order should not be authorized. Therefore, a protective Order governing disclosure of information designated as confidential and/or exempt from disclosure is necessary to protect all such information while promoting the free exchange of information and development of the evidentiary record. Finally, the Council finds that in accordance with RCW 35.05.449(5), some portions of the adjudicative hearing may be closed to public observation in accordance with applicable law protecting confidential and/or exempt information.

Accordingly, the Council enters this protective Order pursuant to RCW 34.05.446(1) and WAC 463-30-190 to govern discovery and the use of information designated as confidential or exempt from public disclosure in this adjudication.

Confidential Information. “Confidential Information” means information protected from inspection or copying under an exemption from disclosure under Chapter 42.56 RCW or any other provisions of law providing an exemption from public disclosure. All access, review, use and disclosure of any material designated by a party to this adjudication as confidential or exempt from disclosure under the Public Records Act is governed by this Order. Only information that meets the definitions of “Confidential Information” as set out herein may be so designated.

¹ For example, records, maps, or other information identifying the location of archaeological sites are exempt from public disclosure in order to avoid possible looting or depredation (RCW 42.56.300(1)) and information received by a government agency that discusses or references traditional cultural places is also exempt from disclosure (RCW 42.56.300(3)(c)). Additionally, sensitive fish and wildlife data cannot typically be released without a confidentiality agreement (RCW 42.56.430(2)). Similarly, RCW 42.56.645 contemplates protection of information being released as part of a quasi-judicial proceeding, allowing that information to be used solely in that proceeding.

Designating Confidential Information. Parties must designate Confidential Information in all evidentiary filings in writing at the time of submission to the Council. The providing party must also simultaneously state the basis for the claim of confidentiality. Any such documents must be submitted to the Council in both a redacted and unredacted version, using the marking conventions set out in WAC 480-07-160 (4)(c) and WAC 480-07-160(5)(c) ² and in harmony with the filing and naming conventions to be adopted by the Council for this adjudication. The Council may reject any filing that fails to properly designate or mark Confidential Information or that erroneously designates clearly public information as Confidential Information.

Limitation on Use. A party or a party's counsel or expert may review, use, or disclose information designated as Confidential Information by another party only for purposes of this adjudication. The Council may refer to Confidential Information in its Orders or its Recommendation to the Governor in accordance with the terms of this Order.

Persons Permitted Access to Confidential Information. No person bound by this Order may disclose information designated by another party as Confidential Information to anyone other than the Council, Council Staff, the presiding administrative law judge (ALJ), and, subject to the requirements set out below, counsel for each of the parties to the adjudication, each such counsel's administrative staff, and persons designated by the parties as their experts in this adjudication. Any dispute concerning persons entitled to access Confidential Information must be brought before the presiding ALJ for resolution.

Confidential Information Non-Disclosure Agreement. Before being allowed access to any Confidential Information disclosed in this adjudication, each counsel or expert must agree to comply with and be bound by this Order by executing, filing, and serving Exhibit A (for counsel) or Exhibit B (for experts) attached to this Order. A counsel's administrative staff need not execute a separate Non-Disclosure Agreement if counsel agrees to be responsible for any violation of this Order that results from their staff's conduct.

Access to Confidential Information. Parties must comply with the requirements of this Order when providing documents containing Confidential Information to the Council or to persons who have executed a Non-Disclosure Agreement. Persons who have executed a Non-Disclosure Agreement agree that they will exercise all reasonable diligence to protect Confidential Information from disclosure to unauthorized persons.

Reference to Confidential Information. Any public reference to Confidential Information during any part of this adjudication including, but not limited to, in motions, briefs, arguments, direct testimony, cross-examination, rebuttal, and proposed offers of proof, must not disclose the content or substance of that information, directly or indirectly. To the extent not addressed in this Order, the parties must negotiate how best to prevent unauthorized disclosure of Confidential Information with the goal of protecting each party's rights with respect to that information while allowing all parties the latitude to present the evidence necessary to support their respective cases

² EFSEC has not yet adopted its own procedural rules regarding protection of confidential information. Therefore, this protective order is modeled on those used by the Washington Utilities and Transportation Commission and its adopted rules contained in Chapter 480-07 WAC (e.g., WAC 480-07-160).

and to maximize the information available to the public. If the parties cannot reach agreement about how to use or refer to Confidential Information without disclosing it in violation of this Order, they must notify the presiding ALJ, who will determine the arrangements to protect the subject Confidential Information to ensure that all parties are afforded the opportunity to cross-examine witnesses.

Counsel or other representative(s) of any party that intends to disclose Confidential Information during oral testimony, cross-examination, or argument must give such prior notice as is feasible to the provider of that information and to the presiding ALJ. That notice, at a minimum, must permit the presiding ALJ an opportunity to schedule a closed session of the adjudicative hearing in accordance with RCW 34.05.449(5) and/or to clear the virtual hearing room of persons not bound by the non-applicable Non-Disclosure Agreement or to take other action as is appropriate under the circumstances. Transcripts from any hearing session closed per RCW 34.05.449(5) shall be redacted in accordance with this Protective Order.

Right to Challenge Admissibility. Nothing in this Order may be construed to restrict any party's right to challenge the admissibility or use of any Confidential Information on any ground other than confidentiality, including but not limited to competence, relevance, or privilege.

Right to Challenge Confidential Designation. Any party by motion or the Council or presiding ALJ on their own initiative may challenge a party's designation of information as Confidential under this Order. The presiding ALJ will conduct an *in-camera* hearing to determine the propriety of the designation. The burden of proof to show that such information is properly designated as confidential is on the party that made that designation. Pending a determination, the challenged Confidential Information shall be treated in all aspects as protected under the terms of this Order. The presiding ALJ will make their determination orally on the record or in a written Order.

If the presiding ALJ determines the challenged information is not entitled to any protection under this Order or the Public Records Act, Chapter 42.56 RCW, or any other applicable statute, the information will continue to be protected under this Order for ten days from the date of the presiding ALJ's determination in order to allow the providing party an opportunity to seek judicial review to protect the information. If no reviewing court enters an Order protecting the challenged information from disclosure within ten days, the Council and presiding ALJ will require the challenged information to be refiled without any confidential designation or otherwise treated as public information.

Admission of Confidential Information Under Seal. The portions of the record of this adjudication containing Confidential Information will be sealed for all purposes, including judicial review, unless such Confidential Information is released from the restrictions of this Order, either through the agreement of the parties or pursuant to a lawful Order of the Council or of a court having jurisdiction to do so.

Return of Confidential Information. Within 30 days following the conclusion of this adjudication, including any judicial review of the Governor's ultimate action, every person who has executed a Non-Disclosure Agreement and possesses or controls any Confidential

Information disclosed by another party (including personal notes that make substantive reference to that Confidential Information), either must return all such protected information to the party that provided it or must certify in writing that all copies and substantive references to that information in notes have been destroyed, including electronic copies; PROVIDED, that counsel may retain exhibits that contain Confidential Information as counsel records subject to the terms and conditions of this Order.

Modification. The Council may modify this Order on motion of a party or on its own motion upon reasonable prior notice to the parties and an opportunity for hearing.

Enforcement and Violation of this Order. This Order shall be enforced by EFSEC pursuant to RCW 34.05.578. Other parties to this adjudication or others with sufficient standing to obtain judicial review may seek to enforce this Order pursuant to RCW 34.05.582. Violation of this Order by any party to this adjudication or by any other person bound by this Order via unauthorized use or unauthorized disclosure of Confidential Information may subject such party or person to liability for damages and shall subject such party to penalties as generally provided by law.

DATED and effective at Olympia, Washington, on the 24th day of May, 2023.

WASHINGTON ENERGY FACILITY
SITE EVALUATION COUNCIL

A handwritten signature in black ink, appearing to read 'Adam E. Torem', written over a horizontal line.

Adam E. Torem, Administrative Law Judge

ATTORNEY AGREEMENT

**AGREEMENT CONCERNING CONFIDENTIAL INFORMATION
IN DOCKET EF-210011 – HORSE HEAVEN WIND FARM
BEFORE THE
ENERGY FACILITY SITE EVALUATION COUNCIL**

I, _____, as attorney in this adjudication for _____ (a party to this adjudication) agree to comply with and be bound by the Protective Order entered by the Washington Energy Facility Site Evaluation Council in Docket EF-210011, and acknowledge that I have reviewed the Protective Order and fully understand its terms and conditions. I further agree to be responsible for any violations of the Protective Order that result from the conduct of administrative staff whom I allow to have access to Confidential Information.

Signature

Date

Address

EXPERT AGREEMENT

**AGREEMENT CONCERNING CONFIDENTIAL INFORMATION
IN DOCKET EF-210011 – HORSE HEAVEN WIND FARM
BEFORE THE
ENERGY FACILITY SITE EVALUATION COUNCIL**

I, _____, as an expert witness in this adjudication for _____ (a party to this adjudication) agree to comply with and be bound by the Protective Order entered by the Washington Energy Facility Site Evaluation Council in Docket EF-210011, and acknowledge that I have reviewed the Protective Order and fully understand its terms and conditions.

Signature

Date

Employer

Address

Position and Responsibilities

* * *

The following portion is to be completed by the responding party and filed with the Council within 10 days of receipt; failure to do so will constitute a waiver and the above-named person will be deemed an expert having access to Confidential Information under the terms and conditions of the Protective Order.

_____ No objection

_____ Objection. The responding party objects to the above-named expert having access to Confidential Information. The objecting party shall file a motion setting forth the basis for objection and asking for exclusion of the expert from access to the Confidential Information.

Signature

Date