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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

BENTON COUNTY’S
OBJECTIONS TO SECOND
PRE-HEARING CONFERENCE
ORDER

Pursuant to WAC 463-30-270(3), Benton County (the “County”) submits the following objections to the Second Pre-Hearing Conference Order (the “Order”).

I. OBJECTIONS

A. The Order’s assignment of lead party status to the County is inappropriate.

The County objects to the Order making the County the lead party, and thereby imposing ambiguous obligations on the County, to coordinate the presentation of its own evidence along with the issues and concerns of intervenors Tri-Cities C.A.R.E.S. (Tri-Cities Community Action for Responsible Environmental Stewardship) (“TCC”) and the Confederated Tribes and Bands of the Yakama Nation. The Order requires that the County “take lead party status” on disparate issues of “visual aspects, light and glare” along with “recreation...; transportation; and roadway safety issues” and some kind of catchall identified as “land use topics.” The Order presumes that these categories encompass discrete

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3 issues that are expected to be raised by the Yakama Nation and TCC. The County strongly
4 objects.

5 There is nothing whatsoever in the EFSEC rules that indicates that “lead party” status
6 may be used to force one party to adapt its presentation to the different interests and issues
7 expressed by intervening persons. Nor should the intervenors in this case be dependent or
8 reliant on the County to advance the intervenors’ issues as they would see fit. The EFSEC
9 rule on intervention, WAC 463-30-092, states that “[i]ntervenor status may also be
10 conditioned upon allowance of other parties to act as lead parties, where appropriate.” This
11 makes sense where an intervenor is likely to offer only cumulative evidence, such as “me
12 too” claims that are redundant of those expected to be made by an existing party of record.
13 But in the present context, this is not the case at all.

14
15 Requiring the County to act as lead party for TCC and the Yakama Nation runs
16 contrary to the traditional legal principle that it is “generally the prerogative of the parties to
17 determine their own trial strategy.” *Little v. PPG Indus., Inc.*, 92 Wn.2d 118, 126 (1979). In
18 the absence of a class action, civil litigation must be maintained by or against the actual party
19 in interest. 7A Fed. Prac. & Proc. Civ. § 1751 (Wright & Miller) (4th ed.). In this case, there
20 are five active participating parties—the applicant, Counsel for the Environment, the County,
21 TCC, and the Yakama Nation. The County should not be forced to be, in effect, a class
22 representative for the interests of TCC and the Yakama Nation.
23

24 Practical problems with this approach will be tangible and immediate for the County
25 and the intervenors. For example, does the County have to present all evidence and
26 testimony, including pre-filed testimony, on the issues for which it is deemed a lead party?
27 Does the County have to call TCC and Yakama Nation witnesses? Or does the Order simply
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3 mean that the County is required to delegate some of its presentation time when the issues of
4 the intervenors are considered? How does this apply to pre- and post-hearing briefing?
5 Without any clarification, requiring the County to act as lead party is unduly vague as the
6 County can only guess as to what is required.

7 **B. Benton County is prejudiced by lead party status.**

8 The County recognizes that under WAC 463-30-092 “[i]ntervenor status may also be
9 conditioned upon allowance of other parties to act as lead parties, *where appropriate.*”
10 (emphasis added). But it is not appropriate in this case to condition intervention, months
11 after motions to intervene were filed by TCC and the Yakama Nation, on the County acting
12 as lead party on visual aspects, light, glare, recreation, transportation, roadway safety, and
13 “land use topics.” The issues raised by TCC and the Yakama Nation on these topics have no
14 common nucleus to the issues raised by the County. The County has formulated its issues,
15 located witnesses, and allocated its resources to advance its own issues. At this late date, it
16 cannot suddenly become a proxy advocate for other parties. This new development in the
17 Order is unwelcome and prejudicial to the effective presentation of the County’s own issues,
18 and it is highly likely to also prejudice the interests of the intervenors to force the County to
19 take up additional burdens.

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22 The County has not raised issues with the visual aspects, light, and glare impacts of
23 the project. The County has also not raised issues related to or associated with recreation.
24 The Order is cryptic in its labeling of TCC’s “land use topics” but those topics may have
25 little to do with the issues formulated by the County. The County’s comments and proposed
26 issues relate to the large-scale impacts of the project on agricultural lands of long-term
27 commercial significance, its disruption of area-wide planning for large intact parcels with
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3 minimal fragmentation from roads and other non-agricultural uses, and incompatibility of the
4 project with the County's conditional use permit and variance criteria. These impacts and the
5 failure of mitigation to adequately respond to them directly affect EFSEC's evaluation of the
6 project's compliance with the guidelines of EFSLA. RCW 80.50.040, .060(1).

7
8 This is not to say that there are no other issues of merit for EFSEC's consideration.
9 But rather, as the parties that have consistently been leading the charge on those issues, TCC
10 and the Yakama Nation are in a much better position than the County to present the relevant
11 testimony and evidence on the visual aspects, light, glare, recreation, transportation, and
12 roadway safety impacts of the project, as well as other land use topics of concern. TCC and
13 the Yakama Nation have likely already spent substantial amounts of time and money on
14 preparing their testimony on these issues. Not only would requiring the County to be the
15 lead party prejudice the County, but also it would prejudice the other parties and render much
16 of their work superfluous.

17
18 **C. The current schedule does not provide the parties with enough time to properly
19 prepare for adjudication.**

20 The County objects to the adjudication schedule in the Order on the basis that the
21 final environmental impact statement ("FEIS") for the project will not be available prior to
22 adjudication. As stated in the County's Motion to Stay, the arguments of which are
23 incorporated herein by this reference, the County believes that adjudication cannot proceed
24 without an FEIS. Second, the current timeline particularly prejudices the County if the
25 County is now saddled with ambiguous but nearly unlimited lead party status over the issues
26 of the intervenors.

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3 Assuming the County is in fact required to be the lead party in any significant sense
4 on visual aspects, light, glare, recreation, transportation, road safety, and land use topics, it
5 only has a 24-day period from the time the Order was issued, and considerably less than that
6 by the time of a ruling on this objection, until direct testimony is due. This Order was the
7 first time it was communicated to any of the parties that there may be a “lead party” on
8 certain issues. In fact, previous communication from EFSEC has requested that the parties
9 present *their own* list of disputed issues. This indicated to the County that each party would
10 be presenting the evidence and testimony it saw fit on the issues it raised. The County
11 certainly had no indication it was expected to be the lead party on other persons’ issues.
12

13 The Order now requires the County to coordinate with multiple parties and present
14 testimony on issues for which the County was not intending to present testimony or evidence.
15 As noted above, due to the vague status of “lead party” the County does not know what this
16 “coordination” might even mean. Attorneys for the County may now need to prepare
17 witnesses and associated testimony, potentially including exhibits, for TCC and the Yakama
18 Nation, while also managing their own materials. This is an unexpected burden imposed on
19 the County with almost no warning.
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21 Perhaps most concerning, EFSEC is essentially forcing the parties to risk waiving
22 their attorney-client privilege. In general, a waiver of attorney-client privilege or work
23 product occurs when a party voluntarily discloses said information to a third party. *Kittitas*
24 *Cnty. v. Allphin*, 195 Wn. App. 355, 367-68 (2016).
25

26 In order to properly present its case, and now TCC's and the Yakama Nation’s cases,
27 the County will likely need to disclose privileged and work product information and request
28 the same from TCC and the Yakama Nation. The County does not see how it can present
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3 any testimony and supporting exhibits without inquiring into topics and conversations TCC
4 and the Yakama Nation have had with their respective attorneys. Nor does the County see a
5 path that does not involve reviewing and sharing draft documents that constitute work
6 product.

7
8 The County should not be required to be the lead party on any issue and EFSEC
9 should allow TCC and the Yakama Nation to continue participating as intervenors.

10 **II. CONCLUSION**

11 For the foregoing reasons, the County objects to the Second Pre-Hearing Conference
12 Order and respectfully requests that EFSEC rescind the requirement that the County act as a
13 lead party on any issue other than its own. The County renews its request that EFSEC
14 postpone further proceedings herein to allow issuance of the FEIS and meaningful
15 presentation of evidence based thereon prior to the adjudication.

16 DATED this 30th day of May, 2023.

17
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19
20 */s/ Kenneth W. Harper*

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

<p>Energy Facility Site Evaluation Council PO Box 43172 Olympia, WA 98504-3172</p>	<p><input type="checkbox"/> By United States Mail <input checked="" type="checkbox"/> By Email: adjudication@efsec.wa.gov adamtorem@write.me jonathan.thompson@atg.wa.gov lisa.masengale@efsec.wa.gov sonia.bumpus@efsec.wa.gov andrea.grantham@efsec.wa.gov alex.shiley@efsec.wa.gov</p>
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<p>Sarah Reyneveld Office of the Attorney General 800 Fifth Avenue, Suite 2000 Seattle, WA 98104-3188 <i>Counsel for the Environment</i></p>	<p><input type="checkbox"/> By United States Mail <input checked="" type="checkbox"/> By Email: Sarah.Reyneveld@atg.wa.gov CEPSeaEF@atg.wa.gov Julie.Dolloff@atg.wa.gov</p>
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DATED THIS 30th day of May, 2023, at Yakima, Washington.

/s/Julie Kihn
JULIE KIHN