

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 REPLY TO MOTION
FOR CONTINUANCE OF ADJUDICATION
DEADLINES

I. INTRODUCTION

The State Environmental Policy Act (“SEPA”) prohibits the Energy Facility Site Evaluation Council (“EFSEC or Council”) from adjudicating Scout Clean Energy, LLC’s (“Applicant”) Application for Site Certification (“ASC”) until EFSEC issues its final environmental impact statement (“FEIS”) for the Horse Heaven Hills Wind and Solar Project (“Project”). This prohibition ensures that all reasonable Project alternatives are adequately considered. It prevents duplicative efforts to determine the environmental impacts of the Project in both the Energy Facilities Site Location Act (“EFSLA”) adjudication, and the development of the FEIS under SEPA. EFSLA was enacted to protect the quality of the environment and promote environmental justice for overburdened communities like the Confederated Tribes and Bands of the Yakama Nation (“Yakama Nation”) when siting energy facilities, which EFSEC cannot accomplish effectively in this adjudication unless it is first informed by the FEIS—and the public feedback supporting it.

Applicant’s Response Brief points to EFSEC’s discretionary authority under SEPA and EFSLA to pursue an adjudication and develop an FEIS simultaneously, but Applicant makes no attempt to square its interpretation with the express intent and purpose of either law.

Environmental considerations are critically important under both processes, albeit in different ways. The FEIS is EFSEC’s statutorily mandated report on the Project’s environmental impacts, which will provide critically important information for both processes. EFSEC may have discretion, but that discretion is still constrained by EFLSA, SEPA, and their consistent implementing regulations. Applicant’s blind reliance on agency discretion without addressing the coextensive environmental requirements limiting EFSEC’s discretion is unconvincing.

Yakama Nation moves EFSEC to continue all proposed adjudication deadlines in Docket No. EF-210011, while allowing ongoing discovery, until EFSEC publishes its FEIS to ensure that the Council and parties can meaningfully address the Project’s potential environmental impacts in this adjudication.

II. LEGAL ARGUMENT

A. EFSEC And The Parties Must Have The Benefit Of EFSEC’s Environmental Review Of The Project During The Adjudication.

SEPA is a procedural statute that obligates governmental decision makers to ensure that environmental impacts and alternatives are properly considered. *Save Our Rural Env’t v. Snohomish Cnty.*, 99 Wn.2d 363, 371 (1983). Where a project is likely to have probable significant adverse environmental impacts, EFSEC—as the SEPA responsible official—must prepare an environmental impact statement. WAC 197-11-360. The EIS details the significant environmental impacts of the proposed project and identifies reasonable alternatives, all in an effort to “avoid or minimize adverse impacts or enhance environmental quality.” WAC 197-11-400. This concept of “environmental quality” is central to EFSLA as well. EFSLA is based on the goal of “preserv[ing] and protect[ing] the quality of the environment” RCW 80.50.010(2). It is therefore unsurprising that EFSLA does not set forth its own framework for accomplishing the

preservation and protection of environmental quality, but instead simply incorporates the SEPA framework into its own regulations. WAC 463-47-020.

The issue here is whether EFSEC can “preserve and protect the quality of the environment” in an adjudication under EFSLA, without first undertaking the SEPA process designed to evaluate project impacts on environmental quality. RCW 80.50.010(2). It cannot, and as a matter of policy should not. EFSLA expressly incorporates WAC 197-11-406 from SEPA, which requires that an FEIS “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 463-47-020 (adopting WAC 197-11-406). Pursuing an adjudication before EFSEC issues its FEIS means a critically important decision making process will be uninformed by the FEIS in violation of WAC 197-11-406. While an adjudication is not the place to challenge an FEIS, the adjudication should absolutely be informed by EFSEC’s impartial analysis of the project’s impacts on environmental quality.

EFSLA and SEPA also prohibit EFSEC from taking any governmental action before issuing its FEIS that would limit the choice of reasonable alternatives for a project proposal. WAC 463-47-020 (adopting WAC 197-11-070). “Reasonable alternatives” are defined as “actions that could feasibly attain or approximate a proposal’s objectives, but at a lower environmental cost or decreased level of environmental degradation.” WAC 197-11-440(5)(b). EFSEC’s adjudication here has the effect of limiting reasonable alternatives, and therefore stands in direct violation of this regulatory prohibition. The only alternatives analyzed by EFSEC and publicly available to date are the full project option and the no project option presented in EFSEC’s draft environmental impact statement. The adjudication record will represent a full year where EFSEC and the adjudication parties focus solely on Applicant’s original Project-design, without any thought

recorded on paper in the ASC proceeding, FEIS process, or otherwise concerning reasonable project alternatives. There will be nothing in the record to reflect any number of other reasonable alternatives—like removing or relocating turbines and/or solar panels—which impermissibly limits the presentation of reasonable alternatives to EFSEC and ultimately the Governor. The adjudication will also be a year of legal and other expenses that Applicant must incur, not to mention covering EFSEC's costs, which diminishes the likelihood that EFSEC and Applicant will consider less financially viable options that would benefit environmental quality. RCW 80.50.071. Issuing an FEIS before taking any further action on this adjudication would remove any doubt that EFSEC is limiting reasonable alternatives by entrenching both the agency and Applicant in a certain project design through the adjudication and resulting record.

Proceeding with the adjudication in the absence of an FEIS also has the effect of improperly shifting the burden and cost of the environmental impacts analysis onto the adjudicative parties, and away from EFSEC and Applicant. RCW 80.50.071. The parties struggle under unreasonable administrative timelines and at great expense through discovery, testimony, evidence, and briefing to create some form of environmental review for EFSEC in the ASC adjudication, when it is EFSEC's legal duty as the SEPA responsible official to conduct the FEIS, and Applicant's duty to pay for it. WAC 197-11-360; RCW 80.50.071. EFSLA is specifically intended to avoid such duplication of processes, not compound them. RCW 80.50.010(6). EFSEC must issue its FEIS before taking any further action on this ASC adjudication.

B. EFSEC's Discretionary Authority Over Its Adjudicative Procedures Only Exists Within The Constraints Of SEPA And EFSLA.

Applicant's Response Brief does not meaningfully address the aforementioned arguments, but relies instead on EFSEC's discretionary authority to design its own internal decision-making

processes. Applicant is correct insofar as EFSEC does have discretionary authority over certain elements of its ASC adjudicative process, and how it develops its draft and final environmental impact statements. However, SEPA imposes important sideboards on EFSEC's procedural discretion that are dispositive of the timing issue presented by Yakama Nation's Motion for Continuance.¹ EFSEC is the SEPA responsible official obligated to prepare an EIS. WAC 197-11-360. The FEIS must be completed early in the agency's process, not right before the finish line. WAC 463-47-020 (adopting WAC 197-11-406). EFSEC cannot take any action that would limit the reasonable alternatives for the Project before issuing the FEIS. WAC 463-47-020 (adopting WAC 197-11-070). EFSEC may have certain procedural discretion, but these requirements dictate that EFSEC should have accomplished its FEIS before engaging in the ASC adjudication.

Applicant also argues that the other parties are simply seeking another opportunity to challenge the FEIS, which is a red herring. EFSLA expressly obligates EFSEC to consider environmental quality and environmental justice as it carries out its EFSLA obligations like the present ASC adjudication. By depriving all parties of the FEIS during the adjudication, EFSEC is materially diminishing its own ability, and the parties' ability, to meaningfully develop a record on environmental quality and environmental justice issues as required by EFSLA. There is significant value in the FEIS's impartial environmental analysis of the Project for the purpose of this adjudication, and it is not overly complicated to cabin and exclude SEPA challenges from the ASC adjudication. EFSEC should not accept Applicant's invitation to succumb to the unsubstantiated fear of facing SEPA arguments in the ASC adjudication.

¹ Preemption is not at issue here because EFSLA's implementing regulations do not conflict with these SEPA directives. *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 80, 91 (2017) ("SEPA and EFSLA regulations do not conflict."). SEPA remains binding on EFSEC in this proceeding.

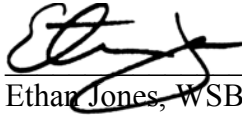
C. This Motion Presents A Matter Of First Impression For Washington State Courts That Deserves A Clear Administrative Decision For Future Review.

After thorough research, it is Yakama Nation's belief that Washington courts have yet to directly address EFSEC's obligation to complete its environmental analysis of a project under SEPA before engaging in the substantive elements of an adjudication under EFLSA. To be clear, the issue is not whether Parties should be able to challenge a SEPA FEIS in the related adjudication. Yakama Nation acknowledges that EFSEC has the discretionary authority to separate the SEPA proceeding from the adjudication, and that EFSEC has exercised that authority to separate the two proceedings. However, EFLSA requires that environmental quality and environmental justice be central considerations in any adjudication, and the FEIS under SEPA is the principal vehicle for analyzing the environmental impacts of the underlying project proposal. Whether EFSEC has to complete its environmental review before adjudicating an ASC is a question that is ripe for appellate review. Clarity is needed on this issue from Washington courts for this and future EFSEC proceedings.

III. 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 Project's 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 31st day of May, 2023.



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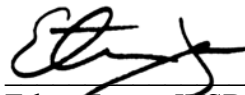
CERTIFICATE OF SERVICE

I, Ethan Jones, certify that on May 31, 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 31, 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 31st day of May, 2023.



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