

**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

COUNCIL ORDER NO. 892

ADJUDICATIVE ORDER RESOLVING
CONTESTED ISSUES

OVERVIEW

In this Order, the Energy Facility Site Evaluation Council (EFSEC or Council) resolves contested issues raised during the adjudication of Scout Clean Energy, LLC’s (Scout or Applicant) Application for Site Certification (ASC) for the proposed Horse Heaven Wind Farm Project (Project). This Order informs EFSEC’s recommendation to the Governor of the State of Washington (Recommendation).

EFSEC will forward the adjudicative record and this Order to the Governor. This Order is based on the record developed during proceedings conducted under the Administrative Procedure Act, Revised Code of Washington (RCW) 34.05, as required by RCW 80.50.090(3). The Council will also be sending a Recommendation to the Governor per RCW 80.50.100 that considers the adjudicative record and findings of this Order, the Final Environmental Impact Statement, the public comments, and input received through government-to-government consultation with federally recognized tribes required by RCW 80.50.060(8).

Conclusions. After considering all evidence and arguments of record, this Order makes the following principal conclusions: (1) The project would support the state’s clean energy goals as set forth in RCW 80.50.010. (2) The Horse Heaven Hills are a significant feature of the Tri-Cities area visual landscape. (3) The Project can be approved as a conditional use in Benton County’s Growth Management Act Agricultural District based on the zoning ordinances that were in effect when the Application was filed on February 8, 2021. (4) The scope and scale of the Project as proposed would transform the Horse Heaven Hills. (5) The Horse Heaven Hills are culturally and spiritually significant to the Yakama Nation. Additional mitigation measures should be imposed to reduce impacts on Yakama Nation traditional cultural properties (TCPs). (6) The Project would have a significant visual impact on the region that is impossible to fully mitigate. Wind turbines should be excluded at least from ridgeline portions of the site where they would be prominently visible. (7) The Project requires additional mitigation measures based on the best available wildlife science to reduce potential wildlife impacts. (8) The Project would benefit the local economy by creating new jobs and generating new tax revenues. (9) The Project requires additional mitigation to address concerns associated with impacts to aerial firefighting.

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I. INTRODUCTION

A. PROCEDURAL SETTING

The Energy Facility Site Evaluation Council (EFSEC or Council) is an executive branch agency created by Chapter 80.50 Revised Code of Washington (RCW) to recommend to the Governor whether applications to construct proposed energy facilities on sites located within the state of Washington should be granted. If EFSEC recommends approval, the Council also recommends conditions for the siting, construction and operation of the proposed project. The Council conducted this adjudicative proceeding as part of its application review process pursuant to the Administrative Procedure Act, Chapter 34.05 RCW, as required by RCW 80.50.090(3) and Chapter 463-30 Washington Administrative Code (WAC).

B. THE APPLICANT AND THE PROJECT

The Applicant: Scout Clean Energy, LLC (Scout or Applicant) filed an application for a Site Certification Agreement (SCA) to construct and operate the Horse Heaven Wind Farm (Project or Facility), a renewable energy generation facility including wind and solar energy generation with battery energy storage systems (BESS) and supporting facilities. Scout is a renewable energy company headquartered in Boulder, Colorado.

The Project: The Project's Lease Boundary encompasses approximately 72,428 acres and is bisected by Interstate 82 (I-82) into a western project area and an eastern project area. The turbines and supporting facilities encompass an 11,850-acre Micrositing Corridor within the Project Lease Boundary¹. The Solar Siting Areas supporting facilities encompass 10,755 acres, of which a maximum of 5,447 acres will be occupied by solar arrays totaling up to 800 MWac. The Maximum Extent of the Project is 72,428 acres². The Project will be accessed from I-82, State Route 221, State Route 397, County Well Road, Sellards Road, Webber Canyon Road, Locust Grove Road, and Plymouth Road.

C. THE COUNCIL AND THE EFSEC REVIEW PROCESS

The Council is created in accordance with RCW 80.50.030. Its Chair is appointed by the Governor with the advice and consent of the Senate. The Departments of Commerce, Ecology, Fish and Wildlife, Natural Resources, and the Utilities and Transportation Commission appoint members to the Council, as does the county or city in which the proposed project is to be sited.³

¹ The original Application (filed February 8, 2021) sought authority to operate up to 244 wind turbines and up to two solar arrays. *See* Application, Section 2.3, and Tables 2.1-1 and 2.3-1. Scout filed subsequent updates to and a Final Application (received after the adjudicative hearing on September 25, 2023) that sets out this ultimate requested scope of its proposal.

² For an overview of the Project boundary and its overall layout options *see* Application Figure 2.3-1 (Turbine Layout Option 1 – 244 turbines with maximum height of 499 feet) and Figure 2.3-2 (Turbine Layout Option 2 – 150 turbines with maximum height of 657 feet). The subsequent figures in the ASC illustrate the Micrositing Corridors.

³ RCW 80.50.030 allows the Departments of Agriculture, Health, Military, and Transportation the option to appoint a representative to the Council for any project of specific interest to those agencies. In this matter, the Department of Agriculture initially indicated its interest in the proposed project but withdrew its councilmember following completion of the adjudicative hearings. The Department of Agriculture representative did not participate in any of the Council's deliberations on or votes regarding this application.

The Council for the Horse Heaven Wind Farm adjudication consisted of Council Chair Kathleen Drew and Members Elizabeth Osborne, Department of Commerce; Eli Levitt, Department of Ecology; Lenny Young, Department of Natural Resources; Mike Livingston, Department of Fish and Wildlife; Stacey Brewster, Utilities and Transportation Commission; and Ed Brost, Benton County.

Chapter 80.50 RCW sets out the Council's required procedural steps for reviewing an ASC.⁴ The Council is required to send its report and make its recommendation to the Governor as to approval or rejection of an ASC within twelve months of receipt of a complete application, or such later time as mutually agreed by the Council and the Applicant.⁵

Initial Phase of Review. Scout filed its ASC with EFSEC on February 8, 2021. The Council held a virtual public informational hearing on March 30, 2021, and a land use consistency hearing immediately thereafter on the same night (*see* Section II of this Order). EFSEC then initiated its State Environmental Policy Act (SEPA) review (this environmental phase of the review process is briefly outlined below and fully described in the Final Environmental Impact Statement (EIS)). The Applicant filed updated and supplemental reports on multiple dates in late 2021. Without altering the scope of the proposed Project, Scout filed a consolidated update to its ASC on June 15, 2022. Some Councilmembers, along with interested members of the public, assembled in Benton County on the afternoon of November 1, 2022, for a site visit that included an Applicant-led tour of the proposed site and several key observation points.

Adjudicative Phase of Review (*see* Section III of this Order). On December 15, 2022, the Council's administrative law judge (ALJ) issued an *Order Commencing Agency Adjudication*. That order set a deadline of February 3, 2023, for receipt of petitions for intervention and scheduled a telephonic pre-hearing conference for March 10, 2023. The Applicant and Benton County were considered parties of right to the adjudication per EFSEC rule.⁶ Counsel for the Environment (CFE) was a party by statute.⁷ The Confederated Tribes and Bands of the Yakama Nation (Yakama Nation) and Tri-Cities Community Action for Responsible Environmental Stewardship (Tri-Cities CARES or TCC) were granted party status as intervenors.⁸ Over the course of the next five months, the ALJ presided over a series of telephonic pre-hearing conferences, the parties pre-filed their witness testimony and supporting exhibits, and the ALJ ruled on various motions.⁹

As required by WAC 463-60-116(2), Scout filed its revised Application on December 29, 2022. The Council, assisted by its Administrative Law Judge, presided over 8 days of virtual adjudicative hearings between August 14, 2023, and August 25, 2023.¹⁰ These hearings allowed

⁴ *See* RCW 80.50.071 through RCW 80.50.100; *see also* Chapters 463-26 and 463-30 WAC.

⁵ RCW 80.50.100(1)(a).

⁶ *See* WAC 463-30-060(1) and WAC 463-30-050.

⁷ *See* RCW 80.50.080; *see also* WAC 463-30-060(3).

⁸ *Preliminary Order on Intervention* (March 9, 2023); WAC 463-30-091 and -092; *see also* WAC 463-30-060(4).

⁹ The *Second Prehearing Conference Order* (May 19, 2023) memorialized the approved list of disputed issues to be adjudicated and adopted a procedural schedule discussed at the second prehearing conference held on March 20, 2023.

¹⁰ On occasion, one or more Councilmembers were absent from portions of the adjudicative hearing sessions. In those instances, the absent Councilmember reviewed the transcript and exhibits admitted to the record.

for each party's witnesses to formally adopt pre-filed testimony under oath and then submit to cross-examination. Council members also posed their own questions to various witnesses. During the adjudicative hearings, the Council held a virtual public comment meeting on the evening of Wednesday, August 23, 2023.

The Council received pre- and post-hearing briefs from the Applicant, Benton County, Yakama Nation, and Tri-Cities CARES. As required by WAC 463-60-116(3), Scout filed its Application amendments on September 25, 2023, to include all commitments and stipulations made by the applicant during the adjudicative hearing process. On October 19, 2023, the Council initiated its deliberations on the evidence admitted, arguments presented, and public comments submitted to the adjudicative record. The disputed issues presented during the adjudication are now ready for resolution.

D. COMPLIANCE WITH RCW 80.50 AND STATE ENVIRONMENTAL POLICY ACT;11 RECOMMENDATION TO THE GOVERNOR

In addition to the adjudicative process required by RCW 80.50.090, the Council must also comply with SEPA, RCW 43.21C and WAC 463-47. This order does not consider the contents of the Final EIS or its supporting documents. The Final EIS and its recommended mitigation measures are considered in EFSEC's Recommendation to the Governor.

E. PUBLIC COMMENT

The Council considered written and verbal public comments at each and every stage of its application review process. As relevant to the adjudication, the Council held a public comment hearing on August 23, 2023. This session allowed any person who had previously submitted a written comment on the proposed project to be heard in support of or in opposition to the Application.¹² 19 members of the public addressed the Council that evening. We attempt to capture a sampling of their words, feelings and messages in this section of our order.

The Council heard a variety of views and concerns about the Project's proximity to the urban Tri-Cities area, potential interference of wind turbines with aerial firefighting, dust generation during construction, expected impacts on wildlife migration, and detrimental changes in views from many homes in the area. Karen Brutzman questioned whether a wind farm could be considered "clean energy" when its construction would require extensive amounts of cement and concrete to be transported and poured. Several other local residents indicated their preference for more nuclear energy instead of large wind farms. A number of comments questioned why the Tri-Cities should bear the brunt of living next door to a massive wind farm when the power it generated was not needed locally.

Kennewick resident Pam Minelli, a member of Tri-Cities CARES, spoke to the concerns held by many in the local area. She explained "Tri-Citians support clean energy as shown by Nine

¹¹ The SEPA process is conducted separately from the adjudication and is discussed in this order solely to identify the additional environmental review occurring as part of EFSEC's application review process.

¹² RCW 80.50.090(4); WAC 463-14-030.

Canyon wind project, regional hydropower, and the nuclear power plant managed by Energy Northwest, but there is a strong local opposition to the enormous Horse Heaven wind project. It is too close to our homes, too close to the ferruginous hawk nests, too close to our communities and farms. Homeowners who paid extra for view properties will surely experience a loss when turbines industrialize their views. Less than 50 farmers will experience financial gain from their leases for this project, but their gain will result in the financial loss for thousands of homeowners.”¹³ Samuel Dechter echoed Ms. Minelli’s message that the wind turbine towers are too close, too big and too high.

Benton County resident Rylan Grimes spoke in favor of the project on behalf of the International Brotherhood of Electrical Workers (IBEW) Local Union 112, explaining the importance of the many good family-wage jobs the Project would bring to the community, both during and after construction. Michael Bosse and Jessica Wadsworth reiterated the beneficial impact of the Project on the local economy.

In addition to the members of the public who took the time to appear before the Council on August 23, 2023, Tri-Cities CARES submitted pre-filed testimony from a number of local residents expressing their own opinions and concerns on the Project. Because 23 of TCC’s proposed exhibits set out individual views and did not speak on behalf of the community-at-large,¹⁴ the ALJ designated these submissions as public comment.¹⁵ The Council reviewed and read these items to better understand the concerns of individual homeowners. Most feared a negative impact on their property values if the Project is approved and built. Chris Upchurch, owner and winemaker of Upchurch Vineyard, shared similar concerns and also questioned the impact on tourism and the region’s wine industry.¹⁶

The Council appreciates the time taken by members of the public to ensure their heartfelt thoughts and personal views were taken into consideration in EFSEC’s review of this Project.

II. LAND USE CONSISTENCY¹⁷

RCW 80.50.090(2) requires the Council to “conduct a public hearing to determine whether or not the proposed site is consistent and in compliance with city, county, or regional land use plans or zoning ordinances on the date of the application.”¹⁸ On March 30, 2021, the Council held a

¹³ Transcript, Adjudicative Hearing Day 8 / Public Comment Hearing at 29:5-17. Ms. Minelli also submitted pre-filed testimony (Exhibit 5602) as a TCC witness, focusing there on her concerns regarding the ferruginous hawk.

¹⁴ See limitations on evidence regarding “local concerns, attitudes and opinions” set out in *Second Pre-Hearing Conference Order* (May 19, 2023), at page 2, footnote 1.

¹⁵ See *Order Designating Certain TCC Testimony as Public Comment* (August 14, 2023).

¹⁶ See Exhibit 5630.

¹⁷ This section of the Order considers only land use “consistency.” Section III sets out Benton County’s criteria for and the Council’s discussion regarding whether the Facility qualifies for a conditional use permit.

¹⁸ See also WAC 463-26-050.

virtual¹⁹ public hearing as directed by this statute. The Applicant and Benton County filed legal briefs and presented arguments for the Council’s consideration.²⁰

The Applicant contended its proposed Site must be found consistent and in compliance with Benton County’s land use plans and zoning ordinances because its Facility met the code’s definitions of a “Solar Power Energy Facility, Major” and of a “Wind Turbine Farm”, both of which the zoning code allowed as a conditional use in Benton County’s Growth Management Act Agricultural District (GMAAD). The Applicant also provided analysis of how its Facility would meet the County’s criteria for a conditional use permit (CUP).

Benton County argued that siting the proposed Facility in an agricultural zone was inconsistent with its Comprehensive Plan’s goal to preserve and protect prime agricultural land. The County conceded that the Facility might be allowed as a conditional use in its GMAAD, but only after the permitting authority held a more in-depth hearing.²¹ The County also questioned whether the security fencing around the proposed solar arrays could comply with existing setback rules.

On May 17, 2022, the Council deliberated on the question of land use consistency. EFSEC had previously restated its established test for land use consistency in 2018 while considering the Columbia Solar Project.²² Under that test, if the Council finds the relevant local land use provisions do not “expressly or by operation clearly, convincingly and unequivocally” prohibit the site, the site will be found consistent and in compliance with local land use provisions, even if a CUP might be required.²³

Relying on this test, the Council determined the Horse Heaven Wind Farm was not a prohibited use within Benton County’s agricultural zone. The Council also found the Facility would require a CUP. Therefore, the Council voted unanimously to approve Order No. 883, *Order Finding Proposed Site Consistent With Land Use Regulations (Land Use Consistency Order)*, determining the Project to be consistent and in compliance with Benton County’s comprehensive plan and the County’s zoning ordinances in place at the time of Application. The *Land Use Consistency Order* deferred until the adjudicative hearing the questions of whether the Project could meet the County’s CUP criteria and whether the Project might require a variance from the zoning code’s setback requirements.²⁴

¹⁹ EFSEC conducted this proceeding virtually due to the health risks presented by the ongoing COVID-19 pandemic.

²⁰ The Applicant did not present the Council with a certificate from local authorities attesting to the proposal’s consistency and compliance with local land use plans and zoning ordinances. Therefore, the land use hearing was conducted in accordance with WAC 463-26-100 (instead of WAC 463-26-090).

²¹ See Transcript of Land Use Consistency Hearing (March 30, 2021) at 21:11 – 22:2.

²² See *In re Columbia Solar Project*, Docket EF-170823, Council Order – Expedited Processing, paragraph 35 (April 17, 2018). See also *In re Tesoro Savage -- Vancouver Energy Distribution Terminal*, Council Order No. 872, *Order Determining Land Use Consistency* (August 1, 2014) at 12:22-25, citing *In re Transmountain Pipeline*, Council Order No. 616 (May 26, 1981) at 3.

²³ See also *Land Use Consistency Order*, paragraphs 21-23 and 31.

²⁴ See *Land Use Consistency Order*, paragraphs 23, 33 and 36.

III. ADJUDICATIVE PROCEEDING

A. PARTIES

The parties to this adjudication appeared and were represented as follows:

Applicant, Scout Clean Energy: Timothy L. McMahan, Willa Perlmutter, Emily K. Schimelpfenig, and Ariel Stavitsky of Stoel Rives, Portland, Oregon.

Benton County: Kenneth W. Harper and Aziza L. Foster of Menke Jackson Beyer, Yakima, Washington.

Counsel for the Environment: Sarah M. Reyneveld, Office of the Attorney General, Seattle, Washington.

The Confederated Tribes and Bands of the Yakama Nation, Shona Voelckers, Ethan Jones, and Jessica Houston of the Yakama Nation Office of Legal Counsel, Toppenish, Washington.

Tri-Cities Community Action for Responsible Environmental Stewardship: J. Richard Aramburu, Law Offices of J. Richard Aramburu, Seattle, Washington.

B. NEED FOR THE PROJECT AND CONFORMITY WITH LAW

State law establishes EFSEC's priorities and policies for Council review of applications for site certification. RCW 80.50.010 states:

The legislature finds that the present and predicted growth in energy demands in the state of Washington requires a procedure for the selection and use of sites for energy facilities and the identification of a state position with respect to each proposed site. The legislature recognizes that the selection of sites will have a significant impact upon the welfare of the population, the location and growth of industry and the use of the natural resources of the state.

It is the policy of the state of Washington to reduce dependence on fossil fuels by recognizing the need for clean energy in order to strengthen the state's economy, meet the state's greenhouse gas reduction obligations, and mitigate the significant near-term and long-term impacts from climate change while conducting a public process that is transparent and inclusive to all with particular attention to overburdened communities.

The legislature finds that the in-state manufacture of industrial products that enable a clean energy economy is critical to advancing the state's objectives in providing affordable electricity, promoting renewable energy, strengthening the state's economy, and reducing greenhouse gas emissions. Therefore, the legislature intends to provide the council with additional authority regarding the siting of clean energy product manufacturing facilities.

It is the policy of the state of Washington to recognize the pressing need for increased energy facilities, and to ensure through available and reasonable methods that the location and operation of all energy facilities and certain clean energy product manufacturing facilities will produce minimal adverse effects on the environment, ecology of the land and its wildlife, and the ecology of state waters and their aquatic life.

It is the intent to seek courses of action that will balance the increasing demands for energy facility location and operation in conjunction with the broad interests of the public. In addition, it is the intent of the legislature to streamline application review for energy facilities to meet the state's energy goals and to authorize applications for review of certain clean energy product manufacturing facilities to be considered under the provisions of this chapter.

Such action will be based on these premises:

- (1) To assure Washington state citizens that, where applicable, operational safeguards are at least as stringent as the criteria established by the federal government and are technically sufficient for their welfare and protection.
- (2) 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.
- (3) To encourage the development and integration of clean energy sources.
- (4) To provide abundant clean energy at reasonable cost.
- (5) To avoid costs of complete site restoration and demolition of improvements and infrastructure at unfinished nuclear energy sites, and to use unfinished nuclear energy facilities for public uses, including economic development, under the regulatory and management control of local governments and port districts.
- (6) To avoid costly duplication in the siting process and ensure that decisions are made timely and without unnecessary delay while also encouraging meaningful public comment and participation in energy facility decisions.

The statute does not address the economic viability of an applicant's proposal, nor does it address market demand for power. Those aspects of an application, including individual applicants' business decisions, are beyond EFSEC's scope of review.²⁵

Consistent with Washington State law and policy to support development of renewable resources and the integration of clean energy, the Council must balance the legislative directive to

²⁵ *Residents Opposed to Kittitas Turbines (ROKT) v. EFSEC*, 165 Wn.2d 275, 197 P.3d 1153 (2008).

provide for abundant clean energy at reasonable cost with the impact to the environment and the broad interests of the public.²⁶ This is no easy task. This Project's overall scope and scale presented a wide range of disputed issues. The Council's concern for minimizing impacts to Tribal Cultural Properties (TCP) and tribal heritage cannot be overstated. The Council also understands local concerns about visual impacts on aesthetics and recreational opportunities. The need to preserve the endangered ferruginous hawk and minimize impacts to other species found on the Site further complicated the Council's deliberations on the adjudicative record. The findings and conclusions set out in this order resolve the contested issues raised by the adjudicative parties' testimony and evidence and inform our ultimate recommendation.

C. LAND USE DETERMINATIONS – CONDITIONAL USE PERMIT PROVISIONS

The Council's *Land Use Consistency Order* concluded that Benton County's Growth Management Act Agricultural District (GMAAD), while primarily dedicated to agricultural uses, permitted wind turbine farms and major solar power generation facilities as a conditional use.²⁷ The Council found the proposed Project consistent and in compliance with Benton County's Comprehensive Plan and applicable zoning ordinances in effect as of February 8, 2021.²⁸

The disputed land use issues presented during adjudication largely focused on Benton County Code (BCC) §11.50.040(d). That zoning code provision sets out Benton County's five criteria for granting a conditional use permit (CUP). In its entirety, that code states:

Conditional Use-Permit Granted or Denied. A conditional use permit shall be granted only if the Hearings Examiner can make findings of fact based on the evidence presented sufficient to allow the Hearings Examiner to conclude that, as conditioned, the proposed use:

- (1) Is compatible with other uses in the surrounding area or is no more incompatible than are any other outright permitted uses in the applicable zoning district;
- (2) Will not materially endanger the health, safety, and welfare of the surrounding community to an extent greater than that associated with any other permitted uses in the applicable zoning district;
- (3) Would not cause the pedestrian and vehicular traffic associated with the use to conflict with existing and anticipated traffic in the neighborhood to an extent greater than that associated with any other permitted uses in the applicable zoning district;
- (4) Will be supported by adequate service facilities and would not adversely affect public services to the surrounding area; and
- (5) Would not hinder or discourage the development of permitted uses on neighboring properties in the applicable zoning district as a result of the location, size or height of the buildings, structures, walls, or required fences or screening vegetation to a greater extent than other permitted uses in the applicable zoning district.

²⁶ See *Friends of the Columbia Gorge, Inc. v. State Energy Facility Site Evaluation Council*, 178 Wn.2d 320, 340, 310 P.3d 780 (2013).

²⁷ EFSEC Order 883, Finding of Fact 3 and Conclusion of Law 4, at page 8, paragraphs 26 and 30.

²⁸ EFSEC Order 883, Conclusions of Law 5 and 6, at pages 8-9, paragraphs 31 and 32.

It is the applicant's burden to present sufficient evidence to allow the above conclusions to be made. If such evidence is not presented or all necessary reasonable conditions are not identified by the applicant so as to allow the Hearings Examiner to make the conclusions required above, the conditional use application shall be denied.

The parties presented general arguments about the Project's ability to meet these CUP criteria as well as specific arguments focused on each of the five individual criteria. We summarize their positions and then apply each of the County's CUP criteria to the Project.

General Concerns Regarding Benton County's CUP Criteria

Scout Clean Energy believes all potential land use-related conflicts and local concerns could, and should, be mitigated by conditions imposed in an SCA. Scout believes the Council should impose conditions akin to those Benton County would impose in its own local conditional use permitting process and also those conditions typically imposed by the Council and other permitting authorities on existing wind farm projects in the Pacific Northwest. Scout points to the nearby Nine Canyon Wind Project (Nine Canyon) to support its position. Nine Canyon is also located in Benton County's GMAAD and received three CUPs issued by Benton County.²⁹ Scout recognizes Nine Canyon is smaller in geographical area and includes fewer wind turbines (63), but Scout contended its proposed Horse Heaven Project can meet all CUP criteria and conditions Benton County imposed on Nine Canyon.

The County argued Horse Heaven Wind's size alone precludes its ability to qualify for a CUP. The County asserts a facility of this scope and scale would be wholly incompatible with outright permitted uses in the GMAAD and in conflict with all CUP criteria. The County also characterizes the Project as an "industrial" use and therefore improper in the GMAAD.³⁰ Further, the County contended the Project improperly converts Agricultural Lands of Long Term Commercial Significance (ALLTCS) by putting those lands to non-agricultural uses. According to Benton County, this conversion violates the mandates of the Growth Management Act (GMA), Chapter 36.70A RCW, the purpose of the GMAAD, and therefore also runs counter to the County's zoning and CUP requirements.

Tri-Cities CARES argued that Benton County's 2020 amendments to its Comprehensive Plan recognized the unique landscape of the Horse Heaven Hills and its ridgelines by adopting goals and policies intended to preserve and protect them. The Plan's section on Parks, Recreation, Open Space and Historic Preservation includes PL Goal 3 and Policy 5:

- PL Goal 3: Conserve visually prominent naturally vegetated steep slopes and elevated ridges that define the Columbia Basin landscape and are uniquely a product of the ice age floods.

²⁹ See Exhibits 1025 through 1030.

³⁰ See Benton County's Post-Hearing Brief at 11:5-6, 13:23 through 14:2 and 20:3-13; see also Transcript, Adjudicative Hearing Day 1 (Greg Wendt) at 203:24 and 211:8 through 213:22.

- Policy 5: Consider the preservation of the ridges and hillside areas through various development regulations.

TCC contended that Benton County followed its Plan by enacting various development regulations to zone the area for agriculture and prohibit residential subdivisions.

The Council is concerned with the size and scale of the project and its overall impact on the landscape of the Horse Heaven Hills. However, siting major solar power generation facilities and wind turbine farms on ALLTCS, even a project of the size Scout proposes, does not necessarily violate the GMA. Further, as recognized in our *Land Use Consistency Order*, the county plan and code in effect when the application was filed with EFSEC provide no outright basis to deny the application. Characterizing the Project as “industrial” and fundamentally incompatible with the GMAAD zone seeks to incorrectly apply Benton County’s *current* zoning provisions which no longer list “solar power generation facility, major” and “wind turbine farm” as permitted uses subject to the CUP process. Again, this Council is evaluating the Project under the code in effect *at the time Scout filed its application*.

With regard to the County’s contention that the Project violates the GMA, we reference the Department of Commerce’s applicable rule. WAC 365-196-480(h), states, in part:

Counties and cities are encouraged to adopt policies and regulations regarding the appropriate location for siting energy facilities on or adjacent to natural resource lands. Policies and regulations may emphasize dual-use strategies that preserve or improve natural resource lands, provide clarity to developers, and support renewable energy goals.

Benton County’s zoning code in effect when Scout’s application was filed, and as applied for the siting of the adjacent Nine Canyon Wind Farm, essentially reflected “dual-use strategies” for siting renewable energy facilities on natural resource lands “in ways that preserve those natural resource lands.” Commerce’s current GMA rules expressly authorize such an approach. Benton County’s zoning code in effect in February 2021 effectively supported the state’s renewable energy goals and was not inconsistent with the GMA’s directive to preserve such lands.

TCC’s reliance on the above-quoted 2020 amendments to the County’s Comprehensive Plan is misplaced, particularly with regard to the CUP question before us. We note that Benton County did not raise such an argument regarding its own ordinance. We do not interpret the county’s goal of conserving visually prominent naturally vegetated steep slopes or its policy of preserving the Horse Heaven Hills’ ridges and hillside areas to alter the purpose of Benton County’s GMAAD zoning designation. The Plan’s GMAAD chapter includes a twenty-acre minimum lot size, with certain exceptions, to protect agricultural land use.³¹ However, no provision of that chapter regulates the placement of homes, accessory buildings, or agricultural infrastructure from a visual impact standpoint.

³¹ BCC 11.17.090, 100.

Finally, as a matter of law, an SCA executed by the Governor pursuant to RCW 80.50 cannot violate the Growth Management Act.³² The Energy Facility Site Location Act (EFSLA) provides that “[t]he state hereby preempts the regulation and certification of the location, construction, and operational conditions of certification of the energy facilities included under RCW 80.50.060 as now or hereafter amended.”³³ EFSLA further provides that, if the Council recommends approval of an application for certification, it shall include conditions in the draft certification agreement “designed to recognize the purpose of” ordinances “that are preempted or superseded pursuant to RCW 80.50.110.”³⁴ Thus, the Council is not bound to interpret or apply a county’s conditional use criteria as the county would do, but if the Council recommends approval, it must include conditions designed to recognize the purpose of the local ordinances that the site certification agreement supplants.

Benton County CUP Criterion 1 – Compatibility

The County argued the key issue in the CUP analysis is compatibility, the first criterion set out in Benton County’s applicable zoning code.³⁵ That first criterion provides that a CUP shall be granted only if the applicant can provide sufficient evidence to allow a finding that, as conditioned, the proposed use is “compatible with other uses in the surrounding area or is no more incompatible than are any other outright permitted uses in the applicable zoning district.”³⁶ Benton County’s code defines “compatibility” as “the congruent arrangement of land uses and/or project elements to avoid, mitigate, or minimize (to the greatest extent reasonable) conflicts.”³⁷

The Applicant contended the Project is compatible with surrounding uses because it will allow for continued agricultural operations and discourage conversion of farmland to residential use. Leslie McClain, Scout’s land use expert, cited to neighboring Nine Canyon wind facility as an example to demonstrate how dryland wheat farming and wind turbines can and do co-exist.³⁸ She explained that Scout proposed mitigation measures in its ASC to avoid or minimize potential conflicts with surrounding land uses in order to ensure compatibility.³⁹ Chris Wiley, a local landowner participating in the Project, confirmed his intention to continue and actually improve his family’s multigenerational tradition of dryland wheat farming after construction of the Horse Heaven wind turbines.⁴⁰ Mr. Wiley testified to the compatibility of the Project on his agricultural property because it would not only allow continued farming on 99 percent of his acreage but also

³² See *Residents Opposed to Kittitas Turbines*, 165 Wn.2d at 310 (holding that the Energy Facility Site Locations Act “can be properly read as a specific exception to the general goals and procedures of the GMA.”); see also WAC 365-196-560(1) (“Comprehensive plans and development regulations adopted under the [Growth Management Act] should accommodate situations where the state has explicitly preempted all local land use regulations, as for example, in the siting of major energy facilities under RCW 80.50.110.”)

³³ RCW 80.50.110(2).

³⁴ RCW 80.50.100(2).

³⁵ See Benton County Pre-Hearing brief at 4:11-13 & 7:11-15 and Benton County Post-Hearing Brief at 6:10-14.

³⁶ BCC 11.50.040(d)(1).

³⁷ BCC 11.03.010(53).

³⁸ Transcript, Adjudicative Hearing Day 1 (Leslie McClain), at 62:7-20.

³⁹ Exhibit 1023 at 14:10 through 20:4.

⁴⁰ Exhibit 1035 at 5:1-18; see also Transcript, Adjudicative Hearing Day 6 (Chris Wiley) at 1107:20 – 1110:17.

provide needed income every year making it easier to keep the farm in the family, regardless of the various uncertainties involved in crop production.⁴¹

The County contended that comparing the size, scale, and scope of the proposed Project with the outright permitted uses in the underlying zoning district demonstrates its incompatibility and incongruity with outright permitted uses. TCC presents a similar argument. As proposed, the Project would occupy over 100 square miles of the Horse Heaven Hills and permanently remove 10 square miles of protected farmlands from agricultural production. According to the County, no other permitted use in the zoning district is remotely comparable. In addition to agriculture, permitted uses in the GMAAD are mainly low-intensity in nature and limited to one or only a few parcels: agricultural stands, bakeries, commercial animal raising, community grange halls, commercial and private kennels, schools and churches.⁴² The County argued the Project is significantly more intense than any of these uses because it covers a much larger land area, involves more ground disturbance, and is not “ancillary” to existing agricultural uses.⁴³ Further, the County says the Project cannot be considered complementary to any permitted uses based upon its scale and conflicts caused by its construction and operation.

Benton County acknowledges “wind turbine farms” of “two or more wind turbines on one parcel” were authorized in the GMAAD as a conditional use when Scout filed its application with EFSEC.⁴⁴ Even so, the County claims Nine Canyon’s 63 turbines standing 265 feet tall can’t be compared to Horse Heaven Wind’s (originally) proposed 244 turbines standing 499 feet tall or the Project’s alternative buildout of 150 turbines standing 657 feet tall. As proposed, Scout’s Project would permanently impact 6,689 acres, equivalent to 1% of the County’s GMAAD. Michelle Cooke, Benton County Planning Manager, explained that this footprint would result in the improper conversion of ALLTCS to non-agricultural uses and cause significant impacts to the economy of scale required for agricultural production in the County.⁴⁵ Ms. Cooke believes the Project’s effect of fragmenting farming operations within and beyond its overall area will result in pressure to allow non-agriculture uses to replace what now exists as an intact regional agricultural area, likely creating a patchwork of semi-industrial sites.⁴⁶

The County presented a number of additional arguments regarding the Project’s conflict with the Growth Management Act, including the GMA’s mandate that ALLTCS be preserved. As noted above (in the *General Concerns* discussion), as a matter of law, an SCA issued by EFSEC cannot violate the GMA. We acknowledge that even after decommissioning, the Project will result

⁴¹ Transcript, Adjudicative Hearing Day 6 (Chris Wiley) at 1095:20-25 and 1098:1-13; Exhibit 1035 at 12:19-25.

⁴² See Exhibit 2005 (BCC Chapter 11.17 -- examples taken from BCC 11.17.040 -- Allowable Uses); see also Benton County’s Post-Hearing Brief at 10:10-11:21.

⁴³ See Benton County’s Post-Hearing Brief at 13:7-13; see also BCC 11.03.010(1) for its definition of “ancillary” uses.

⁴⁴ See BCC 11.03.010(191)’s definition of “wind turbine farm;” see also BCC 11.17.070(t) and (cc) (as cited in our *Land Use Consistency Order* at paragraph 19; to prevent any confusion, we note that Benton County’s Exhibit 2005 contains an updated version of BCC Chapter 11.17, one in which solar facilities and wind farms have been deleted from the listed conditional uses for the GMAAD).

⁴⁵ See Exhibit 2003 at 3:9-21.

⁴⁶ See Exhibit 2003 at 4:17 through 5:4, 8:16-27, and 9:26 through 10:13.

in a certain amount of ALLTCS being permanently lost but we do not find that fact alone to dictate a determination of inconsistency with the County's CUP criteria.

We believe the evidence offered by Scout demonstrates the compatibility of wind turbines with existing agricultural and other permitted uses in the GMAAD. The Council finds that agriculture can coexist with wind farms and, as Ms. McClain points out, likely bring benefits to farms and ranches in the area. We recognize and agree with the County's position that the overall size, scale and scope of the Project must be considered. However, BCC 11.50.040(d)(1) requires us to evaluate whether the Project is "compatible *with other uses in the surrounding area* or is no more incompatible than are any other outright permitted uses in the applicable zoning district" (*emphasis added*).

The County's position about the "intensity" of this Project is not supported by the language of its code or its argument that Nine Canyon's smaller size makes it somehow more compatible or a less intense use than Scout's proposed Horse Heaven Wind Farm.⁴⁷ Scout's Project would admittedly be the largest conditionally permitted use in the GMAAD, but when we consider the density of wind turbine infrastructure within the 11,805-acre micrositing corridor, the Project's "intensity" is markedly reduced. Viewed on a parcel-by-parcel basis, we find the Horse Heaven Wind Farm to be compatible with other uses in the surrounding GMAAD area because each individual turbine site would be ancillary to the agricultural uses surrounding it.

Benton County's "intensity" arguments are more persuasive with regard to the Project's solar arrays and associated BESS facilities. Those portions of the Project remove the most acreage from agricultural uses and their respective footprints will span more than one parcel. However, the zoning code, prior to more recent amendments, did not require "wind turbine farms" or "major solar generating facilities" to be limited to one parcel in the GMAAD, as it did in the rural residential zone. That was the case with Nine Canyon. We read that same code provision to allow wind or solar facilities covering more than one parcel.

After considering all evidence presented by Scout regarding compatibility and that presented by parties arguing in the alternative, we find the Project meets the first criterion of BCC 11.50.040(d).

Benton County CUP Criteria 2 & 4 – Impacts on Health, Safety, and Welfare & Public Services

We next address the second and fourth CUP criteria together because they both present overlapping questions regarding fire protection. Criterion 2 requires sufficient evidence to support a finding that, as conditioned, the proposed use will "not materially endanger the health, safety, and welfare of the surrounding community to an extent greater than that associated with any other permitted uses in the applicable zoning district." Criterion 4 requires enough evidence to support

⁴⁷ No party presented evidence comparing Nine Canyon to the proposed Project to demonstrate that one or the other converted more agricultural land to tower footings or access roads on a per acre basis.

a finding that the proposed use, as conditioned, will “be supported by adequate service facilities and would not adversely affect public services to the surrounding area.”

Scout believes that conditions to be imposed in an SCA ensure the Project meets the second CUP criterion. Scout’s ASC evaluates the risk of fire and explosion during construction and operation of the Project in Section 4.1.2, noting the site has “little vegetation cover and few trees, presenting little to no inherent risk of fire or explosion” in the case of personnel error or equipment malfunction. Ms. McClain testified that a fire caused by a wind turbine is an “extremely rare event” and she was “only aware of one occurring in the Northwest,” despite hundreds of turbines operating in the region.⁴⁸ Scout acknowledges that combustible materials, the temporary use of diesel generators, and the BESS facility present some risk, but precautionary measures and appropriate conditions mitigate those risks. As to the BESS facility, Scout’s resident project manager Dave Kobus testified that the National Fire Protection Association (NFPA) recently updated its safety standards because it found using water suppression during a BESS facility fire can actually make things worse. Mr. Kobus explained that the NFPA’s current standard recognizes that modular BESS facilities, like those proposed for this Project, are designed to contain fires and allow them to burn out on their own, without the need for high volumes of water or dangerous personnel involvement.⁴⁹ Ms. McClain explained that emergency response plans and associated fire management plans, including one to address a BESS fire, are routinely required as pre-construction conditions and would also be expected conditions for this Project. Mr. Kobus indicated Scout would continue to update EFSEC on the evolution of NFPA standards for fighting and containing BESS facility fires and update its plans accordingly.

Scout also believes that conditions to be imposed in an SCA demonstrate that its Project meets the fourth CUP criterion. The parties’ pre-filed testimony mainly focused on the potential impact to Benton County Fire District 1 and the question of whether it had sufficient training and equipment to take on the new risk and responsibility created by a large renewable energy project. Scout’s ASC sought to mitigate any such burden on public agencies like Fire District 1 as detailed in its Draft Emergency Response Plan, Appendix P to the ASC. Scout pledged to coordinate with local agencies to finalize that plan before submitting it to EFSEC for approval and then work with local emergency services personnel to ensure they receive all necessary training. Scout was confident that significant new property tax revenue generated by the Project will greatly increase available financial support for essential services in Benton County, avoiding any negative impact and potentially increasing public service provider capacity in the area.

Benton County, again characterizing the Project as a large-scale industrial project, contended that the Horse Heaven Wind Farm will materially endanger the health, safety, and welfare of the area to a greater extent than permitted uses, precluding it from meeting the second CUP criterion. Benton County Director of Community Development Greg Wendt asserts that the area surrounding the site lacks fire and emergency response resources typically found in cities or urban areas. Instead, the Project is served only by Fire District 1, a rural fire district chiefly staffed by volunteers.⁵⁰ Mr. Wendt points to the Draft EIS as evidence that wind turbines create a new fire

⁴⁸ See Transcript, Adjudicative Hearing Day 1 (Leslie McClain) at 107:10-20; *see also* Exhibit 1040 at 2:20-25.

⁴⁹ See Transcript, Adjudicative Hearing Day 8 (Dave Kobus) at 1713:7 through 1715:8, 1718:5 through 1719:2, and 1720:23 through 1732:10 (this last portion encompasses questions posed to Mr. Kobus by Councilmembers); *see also* Transcript, Adjudicative Hearing Day 1 (Leslie McClain) at 97:7 through 103:17.

⁵⁰ Exhibit 2001 at 12:23 through 13:9.

risk, citing its example of a 2019 250-acre fire in Klickitat County. caused by a wind turbine's generator catching fire, melting, and falling to the ground to start a larger conflagration.⁵¹ According to Mr. Wendt, adding the risk associated with this Project would overburden Fire District 1's limited resources and in turn reduce services to all others in the area. The County argued this zero-sum equation means the Project creates a greater impact on public health, safety and welfare than other outright permitted uses in the GMAAD.

Benton County relies on similar testimony from Mr. Wendt that the Project cannot meet the fourth CUP criterion because it will not be supported by adequate service facilities, and it will adversely affect fire and water services in the surrounding area.⁵² Lonnie Click, Fire Chief of Benton County Fire District 1, pre-filed his testimony on behalf of TCC to express his concerns about the Project and, specifically, the potential impact wind turbines would have on aerial firefighting.⁵³ Although Fire District 1 has no aerial firefighting resources of its own, Chief Click questioned whether firefighting aircraft would be able to safely and effectively drop fire retardant if they could not operate and fly low along the Horse Heaven ridgetops due to the presence of the wind farm.

The Council finds the evidence offered by Scout sufficient to demonstrate that the Project will not materially endanger the health, safety and welfare of the surrounding area more than any other permitted use in the GMAAD. Mr. Wendt's assertions that the Project, solely due to its size, creates a greater fire risk than other uses allowed in the zone are overstated. Aside from the singular turbine-caused fire mentioned above, Mr. Wendt provided no further examples of renewable energy facilities causing fires.⁵⁴ The Applicant's Draft Emergency Response Plan, (with any modifications required by the SEPA process), will sufficiently mitigate the fire risks presented by the Project's wind, solar and BESS facilities. In order to protect the health and welfare of residents living or working in proximity to the BESS facilities, we will require Scout to comply with the most current NFPA guidance on combating and containing BESS fires and, to the extent feasible, any potentially hazardous emissions.

We also find the Applicant's evidence sufficient to find the Project will be supported by adequate service facilities and would not adversely affect public services in the GMAAD. Scout's plan to coordinate with local agencies to ensure response personnel receive adequate training regarding any new hazards presented by wind solar and BESS facilities is credible and will be a required condition in any SCA forwarded to the governor. Tax revenues generated by the Project will assist local government agencies to upgrade service facilities as needed.

After considering all evidence presented by Scout regarding health, safety and welfare and public services in the area as well as the concerns raised by Fire District 1, Benton County and TCC, we find the Project meets the second and the fourth CUP criteria set out in BCC 11.50.040(d).

⁵¹ *Id.* at 13:19 through 14:2.

⁵² *See* Exhibit 2001 at 14:5-15 and 16:27 through 17:8.

⁵³ Exhibit 5631. Due to Mr. Click's firefighting obligations during the course of the adjudicative hearing, the fire chief was not able to personally appear before the Council.

⁵⁴ *See* Transcript, Adjudicative Hearing Day 1 (Greg Wendt) at 210:25 through 215:22; *see also* 227:13 through 228:6.

Benton County CUP Criterion 3 – Traffic Impacts

Turning to the third conditional use criterion, the Applicant must present sufficient evidence for us to be able to make findings of fact based on the evidence presented sufficient to conclude that its Project, as conditioned, would “not cause the pedestrian and vehicular traffic associated with the use to conflict with existing and anticipated traffic in the neighborhood to an extent greater than that associated with any other permitted uses in the applicable zoning district.” These concerns bring our focus to construction-related traffic and the new service roads required to operate and maintain the wind turbines, solar arrays, and BESS.

Scout presented a Transportation Management Plan (TMP) in its SCA that included measures to avoid and reduce Project-related delays on local roadways and also ensure public safety. The County acknowledges that Project operations are unlikely to have much impact on local traffic. Understandably, their concern is mainly with regard to traffic impacts during buildout and construction. The number and size of wind turbine components associated with a Project the size of the Horse Heaven Wind Farm will require many slow-moving long flatbed trucks carrying oversize loads. These are likely to cause congestion on interstate highways and local roads. Scout’s TMP addresses these impacts and seeks to allow safe and efficient traffic flow to the extent feasible during construction activities.

Scout’s construction activities will also extend to creating new roadways within the Project’s footprint. These will mainly be gravel roadways to allow access to Project facilities, but evidence in the record shows they may also benefit local participating landowners as well as emergency responders. There is also a possibility the additional roadways may serve as firebreaks in the case of a range fire spreading across dryland wheat farmland.

The Council will require Scout to update the TMP set out in its SCA with input from the Washington State Department of Transportation (WSDOT) and Benton County and submit the plan for Council review and approval before any construction begins. The plan must contain measures to protect public safety and reduce construction-related delays on local roadways in and around Benton County and the affected portions of the Horse Heaven Hills. After considering all evidence presented by Scout regarding vehicle and pedestrian traffic, the concerns raised by Benton County, and the measures to be required in the TMP, we find the Project meets the third criterion of BCC 11.50.040(d).

Benton County CUP Criterion 5 – Hindering of Permitted Use on Neighboring Property

Scout asserts the Project will not hinder permitted uses on surrounding lands. According to both Ms. McClain and Mr. Wiley, the Project would not discourage development of permitted uses on neighboring properties. Ms. McClain testified that renewable energy facilities “actually bring benefits to these ranches and wheat farmers by improving their access roads, reducing erosion and dust issues off their roads, and [providing] lease payments [to help] the farmers . . . reinvest in their

farms and upgrade their equipment.”⁵⁵ Mr. Wiley opined that his neighbors who aren’t participating in the Project would be minimally impacted, mainly by being able to see the wind turbines on his and other participating landowners’ properties and perhaps by some increased traffic on local roads.⁵⁶

The Applicant concedes that the solar arrays and optional BESS may preclude over 6,000 acres from agricultural practices, depending on final design. However, those facilities would not change land uses or preclude access to farm operations on surrounding properties, nor would they necessitate relocating existing farm access routes or farm infrastructure or result in changes to the practices for planting, irrigating, fertilizing, or harvesting on surrounding properties. Finally, Scout’s evidence indicated shadow flicker and glare are not expected to be significant for surrounding properties, observation points and vehicle routes.

Aside from Ms. Cooke’s speculative evidence regarding potential fragmentation of farmland in the GMAAD in the future, the Project’s ability to meet this final CUP criterion was not seriously disputed during the adjudication. Therefore, based on the evidence in the record, the Council finds that the Project meets the fifth and final criterion for a CUP under the Benton County Code.

Council Conclusion regarding Eligibility for Conditional Use Permit

In accordance with the entirety of the above discussion, the Council concludes based on the adjudicative record that the Horse Heaven Wind Farm Project meets Benton County’s conditional use permit criteria for siting in Benton County’s Growth Management Act Agricultural District, subject to the conditions noted above and any additional mitigation measures to be set out in the Site Certification Agreement.

D. CULTURAL AND ARCHAEOLOGICAL RESOURCE IMPACTS

In accordance with WAC 463-60-362(5), Scout’s ASC detailed environmental impacts of its Project and efforts to minimize those impacts on “all historical and archaeological sites within the area affected by construction and operation of the facility.”⁵⁷ Scout provided this information to the Washington State Department of Archaeology and Historic Preservation (DAHP) and to interested tribes.⁵⁸ Scout believes that through avoidance strategies and other measures, it has minimized and mitigated the Project’s impacts on historical, cultural and archaeological resources as much as possible.⁵⁹

⁵⁵ Transcript, Adjudicative Hearing Day 1 (Leslie McClain) at 62:12-17; *see also* 79:9-13 and 82:8-16.

⁵⁶ Transcript, Adjudicative Hearing Day 6 (Chris Wiley) at 1104:17 through 1105:25.

⁵⁷ *See* Application for Site Certification, Section 4.2.5 and Appendix R.

⁵⁸ Prior to filing its ASC with EFSEC, Scout communicated and consulted with the following Indian Tribes: the Confederated Tribes and Bands of the Yakama Nation, the Confederated Tribes of the Umatilla Indian Reservation, the Nez Perce Tribe, and the Wanapum Tribe. *See* ASC Section 1.12.2.

⁵⁹ *See* Scout’s Pre-Hearing Brief at 14:5-18 and Scout’s Post-Hearing Brief at 20:11 through 29:20; *see also* Transcript, Adjudicative Hearing Day 4 (Emily Ragsdale), at 613:21 through 617:2.

The Yakama Nation intervened in this adjudication to protect interests in maintaining its People's way of life, customs and traditions, and economic well-being. The Yakama Nation also intervened to preserve its People's sacred cultural resources found in the Horse Heaven Hills, including archaeological resources and a complex and irreplaceable landscape of legendary and monumental traditional cultural properties (TCPs).⁶⁰ The Yakama Nation argued that without substantial modifications to the Project design, the impacts on tribal TCPs will be disastrous.⁶¹

The Council reviewed evidence regarding cultural resource studies and the varying methods each party relied upon to reach their positions. The parties presented the Council differing approaches to define what EFSEC can and cannot consider as a TCP. The Council also heard testimony regarding the deep cultural significance that numerous TCPs and various species of wildlife located and living within the Project's boundaries hold for the Yakama Nation. Finally, the Council heard each party's opinions on the Project's impacts to these cultural resources and engaged in questioning party witnesses regarding the ability to mitigate these impacts. We summarize and, in turn, discuss each of these points below.

The Applicant relied on the testimony of Emily Ragsdale, principal archaeologist with Historical Research Associates, Inc. (HRA). The Yakama Nation presented the testimony of several Yakama Nation Members in tribal government and leadership positions regarding their People's cultural heritage: Jerry Meninick, George Selam, Terry Heemsah, Sr., and Caseymac Wallahee.⁶² The Yakama Nation also presented testimony from Jessica Lally, lead archaeologist for its Cultural Resources Program. Much of the evidence regarding cultural resources and TCPs consisted of sensitive information and, in accordance with a Protective Order issued by the Council's ALJ, is kept confidential.⁶³ This Order discusses the issues presented without disclosing evidence contained in the adjudicative record that includes confidential information.

Cultural Resource Study and Survey Methodologies – Defining TCPs

The Applicant hired HRA to consult and coordinate with DAHP, DNR, the Confederated Tribes of the Umatilla Indian Reservation (Umatilla Tribe or CTUIR), and the Yakama Nation regarding the proposed Project's potential impacts on cultural resources. Over the course of more than 5 years, HRA conducted research, engaged in outreach, and performed archaeological surveys and inventories along the Project's micro-siting corridor. HRA documented multiple archaeological resources within the lease boundary, including several newly identified by its work. Scout worked with DAHP to receive required determinations and with CTUIR to mitigate any impacts to their identified cultural resources. HRA's Cultural Resource Reports were included in Scout's ASC as

⁶⁰ See Petition for Intervention by the Confederated Tribes and Bands of the Yakama Nation (February 3, 2022). The Yakama Nation's Petition also alleged its interests regarding the Project's potential effects on wildlife, wildlife and plant habitat, visual impacts, recreation, and transportation.

⁶¹ See Yakama Nation Post Hearing Brief at 4:19-22.

⁶² Mr. Wallahee submitted pre-filed testimony but was unable to attend the hearings.

⁶³ See Protective Order with Provisions Governing Confidential Information and Information Exempt from Public Disclosure Under RCW 42.56 (May 24, 2022).

Appendix R. Scout plans to entirely avoid all identified archaeological resources during construction, with no ground disturbance, and monitor construction for any unanticipated finds.

The Yakama Nation argued that Scout's cultural resource studies did not include crucial information about Project impacts on Yakama Nation TCPs. During the adjudication, Jessica Lally presented the Yakama Nation's own internal studies based on both western academic archaeological training and inherent tribal knowledge. Ms. Lally characterized different types of TCPs based on their cultural significance to the tribe and explained the concept of a Project's "zone of influence."⁶⁴ Ms. Lally explained that due to interconnectivity among cultural resources, individual TCPs might fall into more than one of those categories, and the zone of influence concept was developed by the Yakama Nation Cultural Resources Program as a means to capture the traditional tribal way of viewing the interrelated nature of these resources.⁶⁵ Through use of a demonstrative exhibit during a confidential closed session of the adjudicative hearing, Ms. Lally described the general locations of Yakama Nation TCPs within the Project's zone of influence, and identified the cultural significance of the TCPs according to the tribal classification system.⁶⁶ This information had not been presented to the Applicant prior to the adjudication.⁶⁷

Scout contended the Yakama Nation's methodology was not based on federal or state guidelines and instead identified TCPs based on "idiosyncratic definitions" inconsistent with EFSEC's legal framework and DAHP administrative guidance.⁶⁸

Scout argued that Yakama Nation's TCP claims must be considered in context and under applicable regulatory criteria.⁶⁹ Scout asserts there is no legal basis to support Ms. Lally's description of the Project having a "zone of influence" that extends well beyond the Project's lease boundary, when much of that land area is privately owned and already significantly developed with agricultural, industrial or residential uses.⁷⁰ Scout argued it cannot be required to mitigate impacts that have already occurred.⁷¹ Scout also contended that the high-level generalized descriptions of TCPs provided by Yakama Nation with no specific geographic locations and vague references to transitory or intangible resources do not fall within EFSEC's rule (WAC 463-60-362(5)) requiring consideration of historical and archaeological sites.⁷² In essence, Scout's position

⁶⁴ Transcript, Adjudicative Hearing Day 4 (Jessica Lally) at 638:18-639:13 and 643:17-25 (confidential).

⁶⁵ *Id.*

⁶⁶ See Exhibit 4003 (confidential) and Transcript, Adjudicative Hearing Day 4 (Jessica Lally) at 644:1-649:13 (confidential).

⁶⁷ Due to the sensitivity of the geographical information contained in Ms. Lally's demonstrative exhibit, the Yakama Nation did not submit a copy of this map to the adjudicative record. See also Applicant's Post-Hearing Brief at 25:10-11 and 15-16 regarding Yakama Nation's decision not to share TCP information with Scout.

⁶⁸ See Applicant's Post-Hearing Brief at 26:6 through 29:9.

⁶⁹ *Id.*, at 27:1.

⁷⁰ Scout acknowledged Yakama Nation's treaty rights to "open and unclaimed land" under the Yakama Treaty of Camp Stevens (June 9, 1855) but relied on Washington court decisions holding that such rights do not extend to private property. See *id.*, at 27:17-21 and 29:1-5.

⁷¹ *Id.*

⁷² *Id.*, at 28:2-11.

boils down to questioning how, under EFSEC rules, it can be held responsible for avoiding impacts to TCPs that can't be described in terms of a specific location or tangible property.

At the hearing, Scout's consulting archeologist Emily Ragsdale explained the difference between archaeological resources and TCPs.⁷³ Archeological resources are essentially physical remnants of people being on the landscape. That can be artifacts, features, midden deposits, faunal remains, or other historic remnants. TCPs, on the other hand, are a place or property that's associated with cultural practices and ideas, rooted in the history of a group of people, integral to their cultural identity today. An individual TCP can include a wide array of features and aspects, which may or may not include archaeological resources.⁷⁴

Ms. Ragsdale explained that HRA's report focused on specific resources within the Project site as required by statute and regulation, meaning that TCPs necessarily fell outside the scope of HRA's studies.⁷⁵ She agreed that Jessica Lally's experience and access to the Yakama Nation "makes her the most qualified archaeologist to provide a professional opinion regarding the project's impacts on Yakama Nation's TCPs."⁷⁶ Ms. Ragsdale readily acknowledged that "only Yakama Nation can say what is important and eligible to Yakama Nation. That's not something that I can do."⁷⁷

The Council's charge includes considering the broad interests of the public and promoting environmental justice for overburdened communities.⁷⁸ The Council also is specifically directed to engage in government-to-government consultation with federally recognized tribes that possess resources, rights, or interests reserved or protected by federal treaty, statute, or executive order in the area where an energy facility is proposed to be located. The purpose of this consultation is to identify tribal resources or rights potentially affected by the proposed energy facility and to seek ways to avoid, minimize, or mitigate any adverse effects on tribal resources or rights. As part of the EFSEC siting process, DAHP is directed to coordinate with the affected federally recognized tribes and the applicant in order to assess potential effects to tribal cultural resources, archaeological sites, and sacred sites. All of the foregoing makes it critical for us to consider the Project's impacts on tribal TCPs.⁷⁹ For some purposes, DAHP defines a TCP as "a property or place that is inventoried, or determined eligible for inclusion on the National Register of Historic Places (NRHP) or the Washington Heritage Register because of its association with cultural

⁷³ Transcript, Adjudicative Hearing Day 4 (Emily Ragsdale) at 604:16-606:6.

⁷⁴ *Id.*

⁷⁵ Transcript, Adjudicative Hearing Day 4 (Emily Ragsdale) at 591:19-23.

⁷⁶ Transcript, Adjudicative Hearing Day 4 (Emily Ragsdale) at 581:6-12.

⁷⁷ *Id.* at 592:12-15.

⁷⁸ See RCW 80.50.010, premise (2). This Council is very mindful of the legislative directive to pay particular attention to the interests of overburdened communities in our application review and siting process.

⁷⁹ Effective June 2022, EFSEC is required to consult with all federally recognized tribes whose interests are protected by federal treaty in the location of a proposed energy facility with the goal of (1) identifying tribal resources that would potentially be affected by the proposed facility and (2) seeking ways to avoid, minimize, or mitigate any adverse effects on tribal resources or rights. RCW 80.50.060(8). DAHP is required to coordinate with the affected tribes and the applicant in order to assess potential effects to tribal cultural resources, archeological sites, and sacred sites. RCW 80.50.060(9).

practices and beliefs that are (1) rooted in the community's history and (2) important to maintaining the continuing cultural identity of the community's traditional beliefs and practices.⁸⁰ However, DAHP has also more broadly defined a TCP as "a distinctive natural site, such as a mountaintop, or a historic environment, such as an ethnic neighborhood, or it may simply be a place with significant historic value to a specific ethnic or cultural group ... based on historic cultural beliefs, customs, or practices which may or may not continue to be present."

The Council recognizes that the cultural resources section of Scout's ASC met all EFSEC informational requirements set out in WAC 463-60. But the information that is required to be included in an application does not limit what the Council may determine to be relevant to fulfilling its statutory charge to consider and attempt to address impacts to the interests of affected tribes. We find it is not up to the Applicant to define what qualifies as a TCP for the Yakama Nation. The Council finds it wholly appropriate to defer to the Yakama Nation's traditional knowledge and classification system in determining what is or is not of culturally significant value to its People.

Cultural Significance of the Horse Heaven Hills to the Yakama Nation

The People of the Yakama Nation hold the Horse Heaven Hills and surrounding geographic features, together with their wildlife and other environmental elements, as immensely precious and culturally significant. The Yakama Nation emphasized that its TCPs cannot be reduced to artifacts of past cultural practices. Although tribal practices prohibit sharing certain information outside their own people, several Yakama Nation Members personally appeared before EFSEC to demonstrate the gravity of the threat they see the Project poses to their TCPs.

George Selam, Yakama Nation Tribal Employment Rights Ordinance Compliance Officer, former General Council Officer, and former Tribal Council Member, explained in a closed hearing session how Yakama Nation culture, traditions, and history have been linked to the sacred land of the Horse Heaven Hills since time immemorial and are still today passed down through generations to keep the culture alive for future generations yet unborn.

The Horse Heaven Hills are tied to Yakama Nation legends and stories that relay the order and rules of the natural and cultural world, including the natural resources necessary to sustain human life on Earth that are of continuing critical importance to Yakama Nation Members' way of life and connection with the Creator.⁸¹ Jerry Meninick, former Chairman and elected leader of the Yakama Nation, current Yakama Elder serving as Deputy Director of Culture, testified to the critical cultural importance of passing down stories from elders to new generations. He explained how those stories and legends depend upon the preservation of sacred landscapes and viewsheds. Mr. Meninick testified that because specific events in Yakama Nation history occurred on this site, this is where ceremonies honoring these events must be held. This location is also an integral aspect of tribal beliefs. Terry Heemsah, Sr., current Member of the Yakama Nation Tribal Council, serving

⁸⁰ DAHP Policy Number 12.1.2017, Traditional Cultural Properties at 1 (December 1, 2017); *see also* Transcript, Adjudicative Hearing Day 4 (Emily Ragsdale) at 604:16 through 606:06.

⁸¹ Yakama Nation Post-Hearing Brief, 30-31.

as Law and Order Secretary, Fish and Wildlife Secretary, and Member of the Cultural Committee, testified as to the Project's impact on areas of deep spiritual meaning, and potential disruption to the ability of Tribal Members to show reverence and respect at these sacred sites.

The Yakama Nation argued that without significant changes to scope and scale, construction of this Project will do irreparable harm to TCPs of critical importance to its People's way of life and spiritual beliefs. The Yakama Nation questions whether conditions or mitigation measures can sufficiently protect their interests.⁸² The Yakama Nation views these TCPs as spiritual resources, part of a living culture that will be forever modified by mile after mile of wind turbines disrupting critical viewsheds.

In addition to the Project impacts on tribal TCPs, the Yakama Nation also provided testimony regarding the cultural and religious significance of local wildlife species. Jerry Meninick explained tribal beliefs on how everything in the natural world has an interconnected purpose and how each contributes to the health and welfare of the land. The key species most relevant to tribal concerns at this site are the Ferruginous Hawk and the Pronghorn Antelope (both are discussed in much more detail elsewhere in this order). In the Yakama Nation's culture, these animals are intrinsically tied to the land. The Yakama Nation has been reintroducing the pronghorn to the Columbia Plateau and the wider region, and working with WDFW to protect, manage, and monitor the species.

The Council found the testimony of the Yakama Nation elders compelling. The Council takes seriously EFSEC's need to respect the tribe's spiritual and religious beliefs and to acknowledge the significance the Yakama People place on all aspects of the natural world, particularly the Horse Heaven Hills and its key species. Therefore, the Council finds the Project cannot be approved without seeking ways to avoid, minimize, or mitigate impacts to Yakama Nation TCPs. Further, approval and construction of the Project must not infringe on any existing access rights currently enjoyed by the Yakama Nation.

Mitigation of Cultural Resource Impacts

Scout modified its Project design as it developed its ASC to accommodate concerns raised by the Umatilla Tribe. Further, Scout explains in its Post-Hearing Brief that DAHP reviewed HRA's findings and concurred with Scout's plans to avoid disturbing all archaeological sites within the Project boundary, to retain an archaeologist to further develop its Survey and Avoidance Plan, and to train workers on cultural resource protection and what to do in case of new and unexpected discoveries during construction. Updates to the ASC reduced the Project's footprint, including less fenced area, removal of infrastructure from priority habitats, and elimination of several turbines.⁸³

⁸² Id, at 31:15-20.

⁸³ The Applicant removed several wind turbines from the Project in its Final ASC submitted September 25, 2023 (Turbines 5, 6, 7, 8, 116, 121, 122, 123, 124, 125, 162, and 243). The reduction in turbines was originally captured in Scout's September 9, 2023, response to Data Request No. 9 (as explained in footnote 92, this document was occasionally referred to as the "Moon Memo" when discussed during the adjudicative hearing).

Scout believes that further modifications and conditions can successfully mitigate the Yakama Nation's concerns regarding viewsheds, disruption to wildlife, noise levels, and access restrictions.

The Yakama Nation viewed the original Project proposal as disastrous for its current and future interests. The tribe views the modifications made by Scout during EFSEC's application review process as inadequate. Only complete and total avoidance can prevent direct harm to many of the Yakama Nation's TCPs. Nevertheless, the Yakama Nation concedes that certain impacts could be minimized through a more thorough redesign of the Project.

After considering all of the evidence presented regarding archaeological and cultural resources, the Council more fully understands how and why the Yakama Nation considers the Horse Heaven Hills to be a homeland. Their people cared for and, in turn, relied on these lands to care for them. The Yakama Nation seeks to limit the Project and allow its people to carry on traditions its ancestors practiced freely for thousands of years. The elders of the Yakama Nation know where their people came from. The elders want to pass down traditions to future generations who will be able to experience and know where they came from, too, to know who they were, who they are, and who they always will be.

The Council finds that constructing the Horse Heaven Wind Farm would result in some unavoidable negative impacts to Yakama Nation TCPs. The Council further finds that Scout's Project design does not sufficiently avoid or minimize impacts to Yakama Nation TCPs that could be mitigated by altering Project design. Therefore, we find it necessary to further reduce impacts to Yakama Nation's TCPs beyond what has been proposed by the Applicant.

E. VISUAL IMPACT

The scope and scale of the visual impact of the Horse Heaven Wind Farm raised a high level of attention from the local public, from Tri-Cities CARES and, as noted above, the Yakama Nation. No party disputes that the proposed project will have unavoidable significant visual impacts. The Council received evidence from expert witnesses who offered varying approaches to analyzing visual impacts and recommended strikingly different mitigation measures.

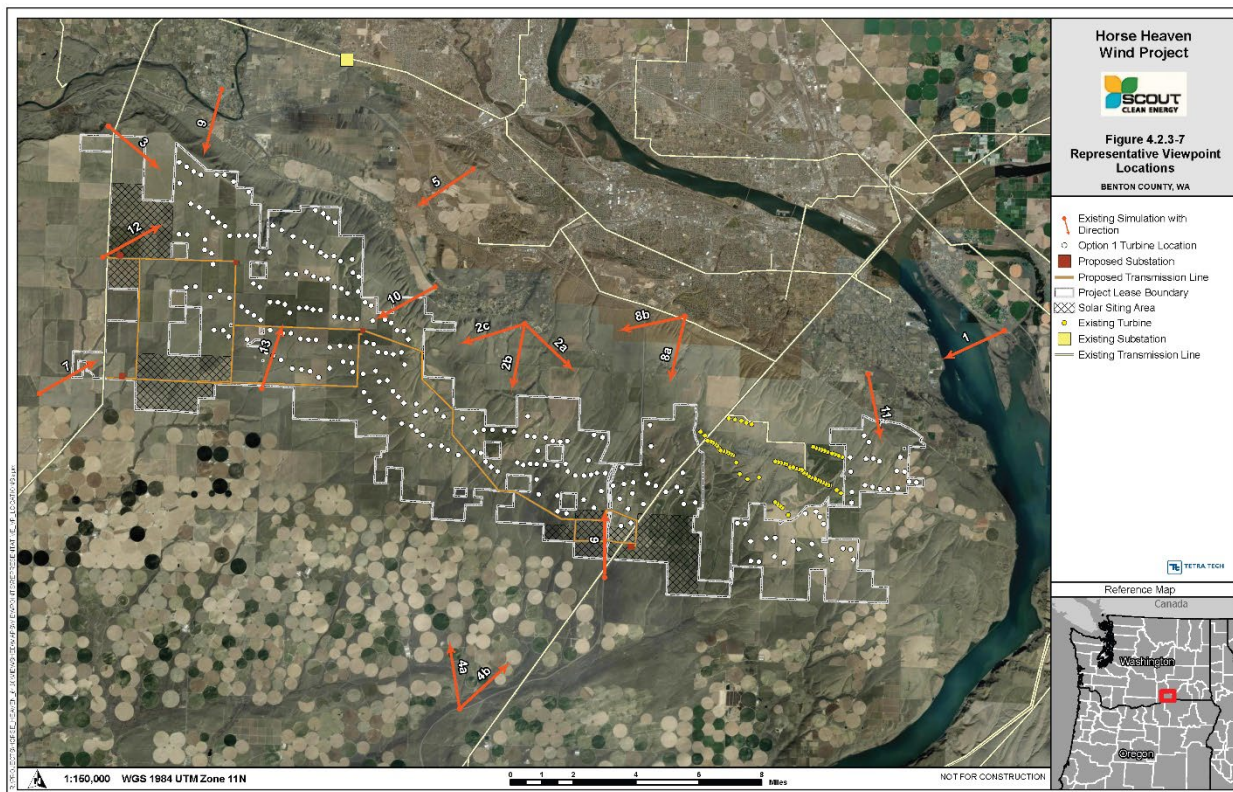
In accordance with WAC 463-60-362(2) and (3), Scout's ASC described the Project's aesthetic impact and any alteration of the surrounding terrain.⁸⁴ The Applicant presented Brynn Guthrie, a visual resources specialist, to answer questions about Scout's visual impact analyses. Scout relied on the Bureau of Land Management's Visual Resource Manual Methodology System and other industry standard approaches to evaluate the Project's aesthetic impacts, including a "worst case scenario" accounting for varying meteorological conditions (*e.g.*, haze).

Scout, after consulting with the Benton County Planning Department, Benton City and the Yakama Nation, selected 13 representative viewpoints (RVs (also referred to by the parties as Key Observation Points or KOPs)) around the Project to evaluate and illustrate views from different directions, elevations and distances. Scout chose observation points with views from residential

⁸⁴ See ASC Section 4.2.3 and Appendix Q.

areas, recreational sites, vehicle travel routes, a commercial zone, and from a local school.⁸⁵ This map from the Revised Application (Figure 4.2.3-7) orients the reader to the Project’s (Option 1) layout, the chosen viewpoints, and identifies the existing Nine Canyon wind turbines on the northeastern reaches of the Proposed Project:

4.2.3-7 – Representative Viewpoint Locations



Brynn Guthrie explained Scout’s viewshed analysis and confirmed that for the Option 1 layout, using only topography (i.e., not accounting for existing structures), approximately 86 percent of the turbines would possibly be visible from land within 5 miles of the Project and, expanding that radius to 10 miles results in approximately 81 percent of the turbines possibly visible.⁸⁶ The ASC’s visual impact assessments acknowledge that the Project will have moderate to high impacts from some viewpoints but will have only low to moderate impacts from other areas.⁸⁷ In accordance with BLM guidance, Scout’s visual analyses indicate the degree of change from existing conditions. They do not attempt to assess whether any impact is positive or negative or the subjective reaction or opinion of any individual viewer.

Tri-Cities CARES contended that the Horse Heaven Wind Farm will impact over 300,000 residents in the region. TCC repeatedly emphasized the size of the Project: multiple overlapping rows of wind turbines strung out over 25 miles along Interstate 82. TCC questions how EFSEC’s

⁸⁵ See Revised Application, Table 4.2.3-1, Selected Representative Viewpoints.

⁸⁶ Transcript, Adjudicative Hearing Day 7 (Brynn Guthrie) at 1356:24 through 1358:17, discussing portions of Section 4.2.3.2 of the Application.

⁸⁷ See Application, Table 4.2.3-2, Summary of Existing Scenic Quality and Proposed Project Visual Impacts. Appendix Q provides Scout’s supporting visual simulations compared with existing views.

legislative direction in RCW 80.50.010(2) to “enhance the public's opportunity to enjoy the esthetic and recreational benefits of the air, water and land resources” can possibly be followed if the Council recommends approval of this Project. Dean Apostol, TCC’s expert, has more than four decades of experience assessing visual impacts, including those caused by renewable energy projects. He questioned Scout’s methodology and results.⁸⁸ TCC not only questions whether Scout’s outreach to local stakeholders was sufficient but also critiques the Applicant’s failure to take into account how and why the degree of change acknowledged in their visual analyses might impact local residents.⁸⁹ Public comment indicates the importance of these existing views to local residents, even from suburban communities located several miles away. TCC presented more than sufficient evidence to make the Council aware that many people not only oppose but also do not like this Project.

Mr. Apostol worked with Tri-Cities CARES member Paul Krupin to develop a “turbine proximity map” illustrating TCC’s own visual impact analysis.⁹⁰ Mr. Apostol told the Council that “[g]enerally speaking, the closer the turbines are, the higher the impact.”⁹¹ In his opinion, the Applicant’s pre-hearing removal of another 13 turbines did little to mitigate the Project’s impact.⁹² Mr. Apostol used the turbine proximity map to divide the rows of wind turbines into layers based on distance away from representative viewpoints (RVs). He explained that eliminating turbines within 2 miles of those RVs (zone 1) resulted in taking out 57 of the proposed 231 turbines, reducing visual impacts by almost 25 percent. Eliminating remaining turbines up to 3 miles from the RVs (zone 2) took out another 56 turbines, reducing visual impact by another 24 percent. Even then the visual impact did not achieve Mr. Apostol’s goal of only a moderate impact because visual impacts remained high from two of the viewpoints.⁹³

TCC also presented testimony from Paul Krupin regarding visual impacts. Mr. Krupin provided census-based information confirming the number of people in the region able to see the Horse Heaven Wind Farm.⁹⁴ Mr. Krupin also provided evidence of community opinion regarding

⁸⁸ Exhibit 5102 at 4:20 through 5:7 and 6:13 through 21:19. Despite the criticisms contained in Mr. Apostol’s pre-filed testimony, at hearing he described the Applicant’s consultant’s visual analysis as “reasonably robust” in assessing impacts. *See* Transcript, Adjudicative Hearing Day 7 (Dean Apostol) at 1425:24 through 1426:7.

⁸⁹ *See* Exhibit 5102 11:8 through 12:14. The subjective visual impacts of the Project cross over into our discussion of socioeconomic impacts are discussed more fully below in a subsequent section of this order.

⁹⁰ Exhibit 5906. *See* Transcript, Adjudicative Hearing Day 7 at 1400:11 through 1402:21 for Mr. Apostol’s full description of how and why TCC’s turbine proximity map was created.

⁹¹ Transcript, Adjudicative Hearing Day 7 (Dean Apostol) at 1403:10-11. Mr. Apostol focused TCC’s visual impact analysis only on the Project’s wind turbines because he found the solar panels had little if any such impact (Transcript at 1423:3-15).

⁹² *Id.* at 1407 8:16 and 1409:12 through 1410:6. The parties referred to the “Moon memo” to show Scout proposed removing 13 more turbines than indicated in its updated application. The referenced document is the Applicant’s response to EFSEC’s Data Request No. 9, part of the SEPA process that was ongoing through release of the Final EIS on October 31, 2023. TCC’s attorney attached the moniker “Moon memo” to the document because it was addressed to Amy Moon, an EFSEC staff member managing development of EFSEC’s EIS.

⁹³ *See* Transcript, Adjudicative Hearing Day 7 (Dean Apostol) at 1412:3 through 1415:21.

⁹⁴ *See* Exhibit 5305, pp. 2-8. The remainder of this exhibit was stricken and not admitted to the record.

the potential visual impact of Scout's proposed development and photographs showing the existing scenic qualities of the area.⁹⁵

The majority of the Yakama Nation's concerns regarding the Project's visual impact on the TCP landscape are summarized and discussed above. We consider that evidence again here because in many instances the tribe's concerns over visual impacts overlap with TCC's issues.

The Council's authority and obligation to consider aesthetic impacts is well established and was thoroughly explained in the Whistling Ridge Energy Project adjudication.⁹⁶ Although the Horse Heaven Hills are not designated as a National Scenic Area like the Columbia Gorge, the Council recognizes the way in which they provide a characteristic visual backdrop for the Tri-Cities area. The established science for evaluating visual impacts presents us with multiple confounders of objective measurements versus subjective reactions to change. That said, we find it easy to conclude that this proposed Project would be visually transformative for the region, particularly for the communities of Benton City and Kennewick. We find the siting of wind turbines on or along ridgelines only magnifies their visual impact, creating an undesirable "skylining" effect. This can be objectively observed in several of Scout's visual simulations, including from RV 3 at Chandler Butte and RV 5 at Badger Mountain.⁹⁷ We acknowledge the subjective impact of these altered views will vary amongst observers and is a deeply personal concern.

The Council recognizes and finds the Applicant followed industry standards for quantitative analysis of visual impacts. Scout also followed EFSEC's established standard to prevent a "looming" effect by ensuring its turbines are set back at least four times the tip height of the turbine blade from residential structures on non-participating properties.⁹⁸ However, the Council finds the Applicant's visual impact analysis was not adequately robust given the scale of the project, particularly with regard to outreach efforts to local communities regarding selection of key observation points and the representative viewpoints illustrated in the ASC. Scout also failed to consistently and effectively engage with underrepresented communities.

The Applicant's voluntary removal of several of the most visually impactful turbines was well received but is only a start toward addressing our concerns regarding the size and scale of this Project. We conclude that further mitigation measures are necessary in order to prevent miles-long strings of turbines from becoming the most prominent features in view from multiple points of observation in the area. A larger buffer between the turbines and the ridgeline could minimize encroachment of large project fixtures and features on views from local communities.

⁹⁵ See Exhibit 5302 at 33:18 through 37:20 and Exhibit 5303 (census data).

⁹⁶ See Council Order No. 868 (Whistling Ridge Energy Project), *Adjudicative Order Resolving Contested Issues*, at 17-19.

⁹⁷ See Appendix Q (Figures 5 and 8) to ASC and updated ASC (Figures 5-1a/b and 8-1a/b).

⁹⁸ Kittitas Valley Wind Power Project, Council Order No. 826 (March 2007) at pp. 30-32. See also Applicant's Post-Hearing Brief at 34:6-11.

F. WILDLIFE

In accordance with WAC 463-60-332, Scout's ASC described existing wildlife that might be affected by construction, operation, decommissioning, or abandonment of its Project.⁹⁹ Scout then developed mitigation measures to minimize the environmental impacts on wildlife and its habitat. Although the majority of the Project's footprint is on agricultural lands, many species live, migrate through, or otherwise depend on habitat within the lease boundary. The adjudicative hearing focused on three key species: the ferruginous hawk, pronghorn antelope, and bats. We discuss them in turn and also considered the Townsend's ground squirrel. Finally, we evaluate Project impacts on migratory corridors and habitat connectivity.

The Applicant presented testimony from Troy Rahmig and Erik Jansen. The Yakama Nation relied on Mark Nuetzmann and Leon Ganuelas. Counsel for the Environment presented Don McIvor. The Council also considered information provided via deposition transcripts from three WDFW biologists: Michael Ritter (contracted to EFSEC to support the agency's SEPA environmental review process) and James Watson, and Jason Fidorra (collaborated with Michael Ritter on his consultations with EFSEC). As was the situation with cultural resources, a good portion of the evidence regarding wildlife consisted of sensitive information and, in accordance with the Protective Order governing the adjudication, is kept confidential. We discuss the issues presented without disclosing evidence contained in the adjudicative record that includes confidential information as identified by law or by the parties offering that evidence.

Ferruginous Hawk

The ferruginous hawk (*Buteo regalis*) is a protected species with a declining population in Washington. As of August 27, 2021, it is listed as a state endangered species.¹⁰⁰ The Project's lease boundary encompasses a portion of this raptor's northwesternmost breeding area in the United States. A migratory species in the region, it arrives in the area each year in February or March, and departs for wintering areas in late summer/fall.¹⁰¹

The Applicant acknowledges that wind and solar farms in eastern Washington could have adverse impacts on ferruginous hawks. However, Scout contended that other man-made threats, unrelated to its Project, present far greater risks to the species' ability to persist in the region. These range from electrocution on power lines and poisoning to loss of shrub-steppe and native grassland habitat affecting both the hawk and its prey.¹⁰² The Applicant also questions whether land within or nearby to the Project boundary is still used by nesting ferruginous hawks. The Applicant's surveys' most recent confirmation of a ferruginous hawk using a nest within 2 miles of the Project was in 2019.¹⁰³ Scout's biologists believe that historic nests, many unused for decades, are not

⁹⁹ See Application for Site Certification, Section 3.4 and Appendices K, L, and M.

¹⁰⁰ Exhibit 3001 at 7:14-23; see also Exhibit 3016 at 2:24-26.

¹⁰¹ Exhibit 3012.

¹⁰² See Applicant's Post-Hearing Brief at 37.9 through 38:13.

¹⁰³ Transcript, Adjudicative Hearing Day 5 (Erik Jansen) at 955:14-21. Counsel for the Environment's expert witness confirmed that there are no documented active ferruginous hawk nests within the Project area. Transcript, Adjudicative Hearing Day 8 (Don McIvor) at 1600:24-25.

likely to be reoccupied. Further, Scout is siting its Project on disturbed habitat that is now agricultural land, a habitat of minimal importance to ferruginous hawks.¹⁰⁴ The Applicant contended that scientific data show the ferruginous hawk is not routinely using the Project site for nesting and that current land uses and future disturbance from other uses preclude any realistic possibility of restoring ferruginous hawk habitat or species recovery in the area.¹⁰⁵

The Applicant proposes a series of mitigation measures based on WDFW ferruginous hawk management recommendations published in 2004, WDFW guidance for wind projects published in 2009, as well as the best available science, including Scout's own studies of the site undertaken since 2017.¹⁰⁶ Scout pledges to protect up to 802 acres of habitat north of the Project, build artificial nest platforms, and plant native grasses under the solar arrays. Scout also committed to perform post-construction mortality studies, to continue surveying the Project area for nesting raptors, and to create "no activity" buffers around ferruginous hawk nest sites. The size of these buffer zones is disputed, as is the timing (during nesting season or year-round). The Applicant, relying on the scientific opinions of Mr. Jansen and Mr. Rahmig as well as published WDFW recommendations and guidance, argued that half-mile buffers are appropriate during nesting season.

Yakama Nation wildlife biologist Mark Nuetzmann expects the Project will deprive ferruginous hawks of important foraging habitat and likely permanently exclude these birds from land under and immediately surrounding solar arrays.¹⁰⁷ The Yakama Nation believes the best available science on potential impacts comes from WDFW biologists currently studying the ferruginous hawk and updating the 2004 WDFW recommendations. Although EFSEC contractual provisions prohibited formally calling Mr. Ritter, Mr. Watson or Mr. Fidorra as witnesses in the adjudicative hearing, the parties stipulated to the Yakama Nation's motion to admit transcripts from their discovery depositions.¹⁰⁸ Mr. Watson recommended a cautious approach to siting wind power projects in territory occupied and used by ferruginous hawks due to the species' sensitivity to disturbance by human activity.¹⁰⁹ In his opinion, to best allow species recovery and revitalization and preserve habitat, the ideal buffer could be as large as 10-kilometer (6.2 mile) core areas around active and historic nest sites. Mr. Watson's compromise recommendation was a 2-mile buffer around active and historic nest sites.¹¹⁰

Counsel for the Environment's expert Don McIvor, a consulting wildlife ecologist, believes Scout's application "accurately quantified the potential impacts on the ferruginous hawk."¹¹¹ Mr.

¹⁰⁴ Exhibit 1022 at 5:6 through 4:17 (*distinguishing the low value habitat of dryland wheat farming terrain used by the Project from higher value foraging habitat found in irrigated agriculture lands elsewhere in the region*).

¹⁰⁵ See Applicant's Post-Hearing Brief at 39:1-4.

¹⁰⁶ The Applicant's proposed mitigation measures are fully explained in its Post-Hearing Brief at 40:1 through 45:20.

¹⁰⁷ Exhibit 4011 at 3 and 7.

¹⁰⁸ The Yakama Nation presented its Motion to Supplement the Record on July 31, 2023. At a pre-hearing conference held on August 4, 2023, the parties stipulated to admission of the discovery deposition transcripts. See *Order Granting Motions to Supplement the Record with Discovery Depositions of Ritter, Watson, Fidorra and Kobus* (August 15, 2023).

¹⁰⁹ Exhibit 4019 at 20:4 through 22:15.

¹¹⁰ Confidential Exhibit 4018 at 88:20-94:2.

¹¹¹ Exhibit 3001 at 7:11-13.

McIvor agreed in principle with Mr. Nuetzmann's concerns but not his position on the importance of agricultural land as a preferred foraging territory for this hawk.¹¹² Mr. McIvor recommended the additional mitigation measure of "curtailment," the practice of stopping or pausing operation of individual turbines shown to have increased impact in particular seasons or other specific times. He also initially testified that 2-mile buffer zones appeared arbitrary when "more nuanced and biologically informed" buffers could be individually tailored by relying on specific knowledge of ferruginous hawk activity on the site.¹¹³ However, after reviewing Mr. Watson's testimony and accompanying exhibits, Mr. McIvor came to agree with recommending a larger buffer around active and historic nest site core areas, rather than the quarter-mile buffer indicated by older WDFW guidelines and relied upon by the Applicant.¹¹⁴

The Council finds that endangered ferruginous hawks currently use and have historically made use of the project site for nesting and foraging. The Applicant is obliged to minimize adverse effects on the land and its wildlife. Scout presented field studies supporting its efforts to do so, but we are persuaded that more can be done to avoid and mitigate Project impacts on the ferruginous hawk. If approved as proposed, we find that Project would threaten the persistence of the ferruginous hawk not only in the Project area but also in Washington State.

The Council acknowledges it is not the Applicant's responsibility to recover the ferruginous hawk from its perilous existence in Washington. We also recognize that even if the Project is not approved, the ferruginous hawk may succumb to the pressures of habitat loss and fragmentation as well as competition and predation from other species. Neither EFSEC nor the Applicant have any control over these types of natural and anthropogenic threats to the species. However, we find the evidence in the record supports more avoidance and mitigation measures than those proposed by the Applicant.

The Council has considered and weighed all of the expert testimony on how to avoid and minimize adverse impacts to the ferruginous hawk. The Council concludes that WDFW guidance from 2004 and 2009 should not be the final word on what is or is not the best available science today. Scout's own studies provide more current information regarding ferruginous hawk use of the Project site, as do the studies available to the Council through the discovery depositions of Mr. Ritter and his colleagues. We conclude that additional mitigation measures to minimize impacts on the ferruginous hawk are needed. We will craft them, including an appropriate buffer zone, based on the adjudicative record and our final EIS. We understand Scout's apprehension about requiring 2-mile buffers around all nest sites as recommended by Mr. Watson and largely endorsed by Mr. McIvor, but if the final EIS validates that size buffer as the best approach to minimizing adverse impacts on an endangered species, the Council will accordingly incorporate that advice in our recommendation to the governor.

¹¹² *Id.* at 8:18 through 9:13.

¹¹³ *Id.* at 11:1-12; *see also* Transcript, Adjudicative Hearing Day 8 (Don McIvor) at 1587:9 through 1590:4.

¹¹⁴ Exhibit 3016 at 3:9-18 as modified and corrected at hearing; *see* Transcript, Adjudicative Hearing Day 8 (Don McIvor) at 1562:14-25 (clarifying USFWS Region 6 recommended buffer zone is 1 mile, not 2 miles) and 1590:5 through 1593:3 (remainder of answer stricken as non-responsive).

Pronghorn Antelope

The Yakama Nation traditionally relied on the pronghorn antelope as a game species and holds the animal as culturally significant. In the early twentieth century, pronghorn populations declined in Washington to a point where reintroduction attempts became necessary. All of these ultimately failed. In recent years, Yakama Nation tried again. Leon Ganuelas, Yakama Nation's Wildlife Resources Program Manager, described the tribe's efforts.¹¹⁵ In 2011, 99 pronghorn were translocated from central Nevada to the Yakama's reservation. 25 of the females were fitted with radio tracking collars, allowing biologists to study their movements on the land. In 2017 and 2019, the Yakama Nation brought in two additional groups of 50 more pronghorn each, fitting more individuals with tracking collars. Those animals have helped establish a tentatively stable population of approximately 250 animals.

Telemetry data, most of which is confidential, confirms that pronghorn antelope now roam the Yakama's reservation and beyond. Pronghorn antelope surveys have documented animals using and traversing the Project site, including portions of areas proposed for solar arrays.¹¹⁶ WDFW jointly manages pronghorn outside the reservation with the Yakama Nation. Together, they are working to monitor, protect, and recover the species to achieve a self-sustaining population. WDFW classifies pronghorn antelope as a game species. However, hunting is not currently permitted in Washington due to the species' low abundance.¹¹⁷

The Applicant contended the Project's potential effects on the off-reservation pronghorn population are likely to be minimal. Scout emphasized the limited existing research on pronghorn movement, use of habitat, and interactions with wind facilities. Scout acknowledges that fenced solar arrays will exclude pronghorn, but Scout's data indicated the animals only rarely use those areas of the Project, most of which is on agricultural land of low habitat value to the species.¹¹⁸ Scout did not have access to telemetry data from the Yakama Nation at the time it evaluated potential pronghorn impacts. But according to the Applicant, measures set out in the ASC, along with those from the Applicant's response to Data Request 9¹¹⁹, will more than sufficiently mitigate impacts to pronghorn that might come to or through the Project site.

The Yakama Nation disagrees. In its view, the Project will not only exclude the pronghorn from over 6,000 acres to be fenced for solar arrays but also exacerbate ongoing habitat destruction and fragmentation.¹²⁰ Don McIvor, testifying for CFE, agreed that Scout's conclusions should be reevaluated with Yakama Nation telemetry data.¹²¹ The Yakama Nation believes further study is

¹¹⁵ See Exhibit 4008 at 2-3 and Exhibit 4009 (PowerPoint presentation).

¹¹⁶ Exhibit 4008 at 3-4; Confidential Exhibit 4009 at slides 15-17; Confidential Exhibit 4010 at 8, 23; *see also* Transcript, Adjudicative Hearing Day 2 (Leon Ganuelas) at 384:1-386:6, 390:8-16, 391:10-17.

¹¹⁷ Exhibit 4020 (Fidorra Deposition) at 124:16 through 125:14; *see also* Transcript, Adjudicative Hearing Day 6 (Troy Rahmig) at 1232:19-20.

¹¹⁸ See Applicant's Post-Hearing Brief at 46:5-18 and Exhibit 1033 at 6:1 through 7:17.

¹¹⁹ Data Request No. 9 was issued as part of the SEPA process, in which Scout responded to EFSEC Site Specialist Amy Moon with a memorandum. This was referred to as the "Moon Memo" during the adjudicative hearing.

¹²⁰ Yakama Nation's Post-Hearing Brief at 41:1 through 44:14.

¹²¹ Exhibit 3001 at 14:2-24.

needed for a fuller understanding of impacts on the pronghorn. In Mr. Ganuelas' opinion, Scout's Habitat Mitigation Plan doesn't do enough to address these impacts. He recommends redesigned fences, increased habitat mitigation ratios, and restoration of disturbed shrub-steppe habitat.¹²² Mr. McIvor also recommended evaluating fencing designs and additional measures aimed at maintaining the integrity of existing native habitat and minimizing habitat fragmentation.¹²³

The Council finds that pronghorn antelope are culturally significant to the Yakama Nation. We find that the Yakama Nation's pronghorn reintroduction program has established a stable population on reservation land and beyond. We further find that telemetry data confirm pronghorn antelope now traverse and forage within the Project boundary, including proposed solar array sites. As noted above, the Applicant is obliged to minimize adverse effects on the land and its wildlife. If approved as proposed, we find the Project will diminish pronghorn grazing habitat. We also find that Project-induced habitat fragmentation could jeopardize the pronghorn's ability to use an important north-south migration corridor.

The Council has reviewed all applicable data admitted to the adjudicative record regarding pronghorn use of the Project area. We find this data insufficient to support Scout's characterization of how pronghorn use the site or how important these lands might be to the species. Further, research to date on the influence of wind turbines on pronghorn use of habitat is limited and has produced mixed results. We do recognize that solar arrays and the surrounding fencing will present obstacles to movement and exclude habitat from use by the pronghorn. Therefore, we conclude that, if the Project is approved, the Applicant must coordinate with WDFW and Yakama Nation to modify its final designs for siting and fencing its solar arrays to minimize impacts to pronghorn. We will also require the Applicant to conduct post-construction monitoring to study whether the addition of wind turbines affects pronghorn use of land in and around the Project.

Bats

Several species of bats use the Project area and no party disputes that operation of wind turbines results in some level of mortality for bats. Scout and Don McIvor agree that it is difficult to quantify impacts on bats, particularly without specific regional studies and data available.¹²⁴ The Applicant concedes it cannot predict with any certainty how many bats might be killed until the Project begins generating energy. In order to craft the best post-construction data-driven mitigation measures, Scout recommends relying on a Technical Advisory Committee (TAC) that can regularly review mortality numbers and sort out an appropriate seasonal curtailment schedule.¹²⁵ Mr. McIvor recommended additional pre-construction studies to analyze whether regional bat populations could sustain projected mortality figures.¹²⁶

The Council is concerned about the lack of data about migrating bat species use of the site. Bat mortality resulting from wind energy projects is reasonably well known and has been observed

¹²² Exhibit 4008 at 10-11; *see also* Yakama Nation's Post-Hearing Brief at 41:1 through 44:14.

¹²³ Exhibit 3001 at 14:25 through 15:19.

¹²⁴ Exhibit 3001 at 3:15 through 4:19. Mr. McIvor noted that Scout "exceeded the usual effort" to quantify these impacts (at 3:19-20) but recommended more study and analysis at a regional population level.

¹²⁵ Applicant's Post-Hearing Brief at 47:2 through 48:6.

¹²⁶ Exhibit 3001.

at the nearby Nine Canyon Wind Project. Nevertheless, due to widely varying bat population estimates, the adjudicative record is not clear on whether regional bat populations can sustain the possible levels of mortality caused by this Project.

The Council finds the Applicant should be required to conduct additional studies of bat activity at the site to better inform pre-construction micro-siting decisions as well as operational concerns regarding migration activity. We also find that post-construction mortality monitoring should be required and utilized by a TAC to recommend adaptive management strategies, including seasonal curtailment, to minimize adverse impacts to bats.

Townsend's ground squirrels

The revised ASC identified a Townsend's ground squirrel colony that lies partially within the footprint of a temporary disturbance area. Mr. McIvor recommended the proposed construction site should be carefully evaluated before construction and, if possible, relocated if the squirrels are present. The Council concurs. The SCA would require the Applicant to conduct additional surveys and take measures to avoid disturbing the colony.

Habitat Mitigation Plan

Appendix L of Scout's ASC sets out a draft Habitat Mitigation Plan (HMP) to address permanently and temporarily disturbed habitat within the Project boundaries. In addition to the species-specific measures already discussed in this section of the order, Scout's HMP includes compensatory mitigation to account for unavoidable impacts to habitat. Scout calculated the number of compensatory acres necessary to offset those impacts relying on WDFW policies and proposed several implementation options, to include a conservation easement on habitat within or adjacent to the Project boundary or various payments (a fee to WDFW or a contribution to a local land trust or conservation organization).¹²⁷ The Yakama Nation questioned the way Scout classified land to be disturbed by solar arrays as modified habitat as opposed to treating it as habitat permanently unavailable to the ferruginous hawk. Mr. Nuetzmann contended this would be a more realistic way to evaluate how the Project actually impacts available habitat. He also recommended the HMP emphasize restoration of disturbed shrub-steppe habitat over preservation of existing native habitat.¹²⁸ Erik Jansen countered Mr. Nuetzmann's criticism by reiterating the Applicant's consultations with WDFW to ensure the proposed in-kind habitat mitigation measures for land disturbed by the solar arrays were appropriate.¹²⁹

The Council concurs with the Applicant's approach and adherence to WDFW policy. We find that restoration of shrub-steppe habitat has merit, but requiring permanent land conservation of existing functioning shrub-steppe habitat is preferred over attempting to convert agricultural land and restore it to functioning shrub-steppe habitat. Protecting what currently exists reduces the uncertainty of attempting to create new habitat, a practice that has resulted in mixed success.

¹²⁷ Application for Site Certification, Appendix L, Section 7.3 (pp. 13-16).

¹²⁸ Exhibit 4011 at 6 to 8.

¹²⁹ Exhibit 1022 at 15:17 through 16:13.

Cumulative Impacts on Wildlife – Scope and Scale of Project

The parties disagree on how the Council should weigh the cumulative and overall wildlife impacts in light of the project’s scope and scale. The Applicant argued that the scale of its Project supports State policy to rapidly replace carbon-emitting generating resource with clean energy resources in Washington.¹³⁰ Erik Jansen explained that issuing a series of permits for smaller wind farms co-adjacent results in piecemeal and less effective analysis of their overall impacts.¹³¹ The Yakama Nation labels a Project of this size “devastating” to the natural environment.¹³² Similarly, TCC strongly objects to the “vast size” of the Project for many reasons, including concerns for wildlife.¹³³

The Council understands the Applicant’s logic in designing a project of this size, but we agree with TCC and Yakama Nation that the scale and scope of the Horse Heaven Wind Farm should and does amplify our concerns regarding wildlife impacts. As proposed, the scope and scale of the Project will reduce the function and value of important landscape-level habitat features needed by wildlife. The sheer number of turbines proposed would contribute to bird and bat mortalities of an unknown but likely substantial magnitude. The length and width of the Project area would impede important wildlife habitat connectivity for shrub-steppe species. The proposed number and placement of turbines would pose significant threats to breeding and wintering raptors in the area.

G. SOCIOECONOMICS

In accordance with WAC 463-60-535, Scout’s ASC detailed the socioeconomic impacts of its Project, to include its expected effect on population, work force, property values, housing, health facilities and services, education facilities, governmental services (*i.e.*, fire, police, utilities, etc.), and the overall local economy.¹³⁴ Scout believes the Project will have beneficial impacts on the region by creating additional jobs, increased economic activity, and increased tax revenue.¹³⁵

The Applicant describes its project as outside any urban growth area and no closer to a city (Kennewick) than 4 miles away at its closest point. TCC, focusing its opposition on the size and scope of the “massive” proposed development, called into question the proximity of the Project to suburban areas because its size is “hard to grasp,” “overwhelming,” and substantially “overbuilt.” TCC argued there are no structures in the Tri-Cities area that approach the height of any of the wind turbines expected to be deployed in the nearby hills. At the adjudicative hearing, the parties focused on socioeconomic impacts to real estate values, local agricultural values, roads, firefighting services, recreational resources, and economic impacts. We briefly explore each subtopic in turn.

Real Estate Values

¹³⁰ Applicant’s Post-Hearing Brief at 6:8 through 7:19.

¹³¹ Exhibit 1022 at 5:8 through 8:25.

¹³² Yakama Nation Post-Hearing Brief at 4.

¹³³ TCC Post-Hearing Brief at 22.

¹³⁴ See Application for Site Certification, Section 4.4 and Appendix S.

¹³⁵ ASC Section 1.10.1 and 4.4.2; see also Scout’s Post-Hearing Brief (generally) at 11:11 through 20:10.

The Applicant contended property values are proven to be unaffected by nearby development of wind or solar projects. Scout's experts included economist Morgan Shook and real estate appraiser Andrew Lines. Mr. Shook specializes in real estate analyses and presented industry standard hedonic pricing model studies, including those of Ben Hoen.¹³⁶ These studies demonstrate there is no statistical evidence that homes sell for less when they are in close proximity to wind turbines or solar arrays.¹³⁷ Mr. Lines confirmed that the closest residential homes to the Project are more than 2 miles away. His site-specific research into impacts on valuation of properties adjacent to wind farms,¹³⁸ including interviews with numerous county assessors, found no measurable negative impact on home prices following construction of renewable energy projects.¹³⁹ Scout argued that EFSEC should rely on its objective evidence rather than the personal feelings and unsupported fears expressed by local homeowners.

TCC characterized Scout's evidence as unreliable due to its failures to appraise local homes that would be in view of the Project. Kurt Kielisch, a forensic property appraiser, criticized the Hoen studies and provided a study he conducted in Colorado predicting negative property impacts from a proposed wind farm.¹⁴⁰ Richard Hagar, another property appraiser, also questioned the Applicant's methodology and conclusions.¹⁴¹ TCC also presented a number of local residents to voice negative opinions about the Project and concerns over how changed views from their homes would diminish the value of their property¹⁴² as well as letters from the local Chamber of Commerce, Visitors' Bureau, and Board of Realtors in opposition to the Project.¹⁴³

The Council recognizes the vocal community concern regarding the Project's possible impact on real estate values. The real estate studies presented by both the Applicant and TCC were very high-level and general in nature and failed to specifically address wind energy development in close proximity to urban or developed areas. While we do not doubt the Hoen studies are correct in the abstract, Mr. Shook's assurances are of little comfort to homeowners whose views might change.¹⁴⁴ We find that the record contains no persuasive individualized data demonstrating a discernible impact on property values in Benton City and the region's suburban areas. Any conclusion regarding local real estate markets would be speculative. The Council finds that the

¹³⁶ See Exhibits 1010, 1011, 1012, 1013, 1017 and 1020.

¹³⁷ Exhibit 1008 at 6:15 through 7:19.

¹³⁸ See Exhibits 1038 and 1039.

¹³⁹ Exhibit 1037 at 3:9 through 4:2. Mr. Lines made minor corrections to his testimony and supporting exhibits, but neither the parties nor the Council posed any cross-examination questions to him. See Transcript, Adjudicative Hearing Day 5 (Andrew Lines) at 793:22 through 800:5.

¹⁴⁰ Exhibits 5810, 5811, and 5812. Neither the parties nor the Council posed any questions in cross-examination to Mr. Kielisch. See Transcript, Adjudicative Hearing Day 5 (Kurt Kielisch) at 800:9 through 802:16.

¹⁴¹ Exhibits 5900, 5901 and 5902. See also Transcript, Adjudicative Hearing Day 5 (Richard Hagar) at 821:5 through 824:19.

¹⁴² A sampling of these statements can be found above in Section I-E, Public Comment.

¹⁴³ See Exhibit 5303, pages 17, 19, and 22; see also Exhibit 5633. None of these letters specifically address any basis for TCC's stated concerns with potential reduction to property values.

¹⁴⁴ The Council recognizes that objective measures on property values may not be available until and unless the Project is approved and built. In other words, until an actual market listing finds a willing buyer, we won't know the answer to this question.

evidence provided by the parties did not reliably demonstrate impacts on individual real estate values in the Tri-Cities area.

Local Agricultural Practices

The Applicant contended established farming practices in the region will continue unaffected. Chris Wiley, a participating property owner, testified that his family's dryland wheat farming operations will be able to stay the same on 99% of their land and will benefit financially and from any new road infrastructure. Benton County is concerned that allowing a renewable energy project to be placed on important agricultural lands will lead to loss of more farmland in the region.

Our review of the record convinces us that the Project would promote and benefit farming within the Project boundaries for participating landowners. Although solar arrays will exclude other agricultural activities within their fenced areas, wind turbines do not preclude ongoing dryland wheat farming practices. Participating landowners benefit financially, likely allowing existing agricultural practices to persist on Project lands into the foreseeable future. As noted above, we acknowledge that even after decommissioning, the Project will result in a certain amount of ALLTCS being permanently lost, but we are not convinced this will disrupt the future of agricultural practices in Benton County.

Roadways / Firefighting

Wildland fires are a regular occurrence in the Horse Heaven Hills. As previously discussed in the land use context regarding criteria for granting a conditional use permit, the Applicant takes the position that its project will not meaningfully increase fire risk for the Horse Heaven Hills region. We have already agreed with this position and found no evidence in the adjudicative record that public services will be negatively impacted. Based on the record, we find the Project's roadways would improve access within the Project boundaries for firefighting activities. The Project's roadways could also be utilized as anchor points for firefighters to conduct backburns and other tactics in creating firebreaks. Given these potential impacts, the Applicant must coordinate with local fire districts to ensure they can access newly built roadways within the Project boundary for firefighting purposes. This may be addressed in the required emergency response and fire protection plans to be required as part of an SCA.

Although the Project will not increase fire risk in the Horse Heaven Hills, it will likely impact how fires are fought in the area. Members of the public and TCC raised concerns regarding the ability of planes to effectively drop retardants if wind turbines prevent them from flying low or in areas of limited visibility due to smoke. These concerns were not adequately addressed by evidence presented during the adjudication. Therefore, the Council also finds that aerial firefighting concerns, particularly on the northern facing slopes of the Horse Heaven Hills, must also be addressed in the required emergency response and fire protection plans to be required as part of an SCA.

The Project's battery energy storage system (BESS) may present new challenges to first responders. Fire suppression standards for BESS technology are evolving. The Applicant identified the best currently available approaches for handling and extinguishing a fire at its BESS facilities. If the Project is approved, the Applicant must implement those best practices in its fire control plan and regularly update the Council on advances or any changes in approach to fire suppression at its BESS sites. The Applicant must also develop a disposal plan for any hazardous or toxic material resulting from a fire at a BESS site.

Recreation

TCC believes the visual and aesthetic impacts of this large-scale wind farm will discourage local tourism, and recreational opportunities (hiking, paragliding, birding, and general sightseeing). We do agree that the Project as proposed would negatively impact local hang gliders and paragliders. We find the Project will not directly impact access to established trails, all of which are outside the Project boundary on BLM land, but turbines placed as proposed on and along ridgelines would substantially alter views currently enjoyed by hikers and bikers. Residents and tourists who come to this part of Eastern Washington would see wind turbines in areas that today have unobstructed views.

Economic Development

The Applicant presented testimony from Jessica Wadsworth, a local union representative, about the Project creating additional employment opportunities for local citizens.¹⁴⁵ We agree that the Project will likely generate economic benefits for the region. We find the Project will result in increased employment in Benton County during its construction and, to a lesser extent, during its operation. There is no conclusive evidence in the record of negative impact on the region's wine tourism industry. The project will provide substantial tax benefits to local taxing districts that can be used to improve services to the community.

H. ENVIRONMENTAL JUSTICE / OUTREACH TO TRIBES & OVERBURDENED COMMUNITIES

EFSEC requires applicants to communicate and coordinate with tribes regarding potential archaeological and cultural resource impacts. EFSEC is also required to promote environmental justice for overburdened communities and, if recommending approval of a project, must include conditions to protect overburdened communities in its report to the Governor.¹⁴⁶

Scout initiated tribal outreach many years before submitting its application to EFSEC. As noted above in the Cultural Resources section, Scout met their statutory and regulatory burden as to archaeological resources as evidenced by DAHP's endorsement of their site inventory and proposed avoidance plan but did not adequately consider or mitigate impacts to TCPs. In this

¹⁴⁵ Exhibit 1034. Ms. Wadsworth serves on the city council for Benton City but provided her testimony only as a private citizen, not as a government official or spokesperson.

¹⁴⁶ RCW 80.50.010(2) and RCW 80.50.100(2). *See also* RCW 70A.02.010(11) for the definition of "overburdened community" which includes "highly impacted communities" as defined in RCW 19.405.020(23) (includes communities located fully or partially on "Indian country" as defined in 18 U.S.C. Sec. 1151).

section of our order, we focus our attention on Scout's overall outreach efforts to traditionally underrepresented and overburdened communities.

Scout emphasized its successful cooperation with the Umatilla tribe on Project design modifications intended to mitigate impacts. Representatives of the Umatilla actively engaged with Scout since early 2020, participating in HRA's field surveys and sharing concerns identified in the tribe's own studies. Scout affirmed that Umatilla tribal members would continue to enjoy the same existing access to the site and made additional promises to respect the traditions, legends, and stories of the Umatilla tribe. These two parties executed a mutual agreement to facilitate resolution of any potential issues regarding cultural resources discovered if the Project was built.

Scout contrasted its coordination with the Umatilla tribe with a perceived lack of engagement from the Yakama Nation. Scout stated it attempted outreach to the Yakama Nation for over 5 years, including coordination with DAHP but received only "limited responses and information." Scout stated the Yakama Nation declined Scout's invitations to conduct a traditional cultural properties study. Scout stated Yakama Nation provided some limited comments to HRA, but withheld information about most Yakama Nation TCPs in the project area and did not provide specific geographic description or boundaries. At hearing, the Yakama Nation presented a TCP study that Scout and HRA saw for the first time.

Scout contended its project does not disproportionately affect overburdened communities and in fact promotes environmental justice. Scout highlights its outreach to Hispanic communities in the area. Scout asserts it pursued media strategies to ensure information about the Project was available to local minority communities, including people with Spanish as their primary language and people of color and that this included using bilingual radio networks and newspapers. Scout concluded the Project does not appear to pose a risk of disproportionate impact to overburdened communities based on Scout's research using the Washington Environmental Health Disparities Map and the U.S. Environmental Protection Agency's online EJScreen tool, looking at factors like high unemployment, poverty and unaffordable housing rates in the area. Scout argued the Project will bring a net benefit to the local communities by providing well-paying jobs. Additionally, the Project will combat climate change, the effects of which often fall disproportionately on overburdened communities, and therefore represents an important component of the state's environmental justice goals.

The Yakama Nation stated they attempted to engage with Scout both prior to and after submission of the application to EFSEC, but their concern about impacts to TCPs were not taken into account. The Yakama Nation believed Scout was working to redesign the Project layout after Yakama Nation provided feedback on the TCPs, but Yakama Nation's archeologist Jessica Lally was then informed in 2022 that Scout was not considering further redesign of the Project, disregarding Yakama Nation's concerns. Jessica Lally testified at hearing that Yakama Nation did not accept Scout's offer to fund their TCP study because of issues regarding confidentiality and disclosure of sensitive information. The TCP study Yakama Nation did then conduct was not funded by Scout, and therefore Scout did not previously see the TCP Study before the adjudication.

Yakama Nation also argued that under Washington law EFSEC is required to promote environmental justice for overburdened communities, and tribal communities are by statute considered an “overburdened community.”¹⁴⁷ Yakama Nation claims Scout has disregarded their concerns about cultural impacts and remained focused on its goal of building the Project as large as possible to satisfy market need and promote their own commercial success.¹⁴⁸ Yakama Nation argued the Project will create new environmental injustices on top of those already endured by the tribe by permanently damaging lands that are sacred to the tribe.

The Council finds Scout did not consistently and effectively engage with underrepresented communities in the Tri-Cities region. The Council considers the Yakama Nation to be an overburdened community as defined by state law. We understand the Yakama Nation is not obligated to talk or exchange information with private entities such as Scout. Although Scout corresponded with local tribes and attempted to communicate with the Yakama Nation, we are not convinced Scout made sufficient efforts in terms of tribal outreach and engagement. We also find it apparent Scout did not engage with the Hispanic or other minority communities in the local area and failed to offer them meaningful opportunities to provide input on the proposed project.

Project Benefits

The environmental benefits of the Project include generation of a substantial amount of clean and renewable energy from sources that do not produce carbon dioxide emissions.¹⁴⁹ Economic benefits also result, as the Project would provide construction jobs and employment during its operation. The Project would generate additional tax revenues to support local government taxing districts, including fire districts, school districts, and ports. The Project would also provide lease payments to local landowners.

IV. FINDINGS OF FACT and CONCLUSIONS OF LAW

Note: The Council intersperses conclusions of law with its findings of fact to enhance the readability of this Order. Any finding in the nature of a conclusion of law should be interpreted as such, and any conclusion in the nature of a finding should be interpreted as intended.

The Council has evaluated the evidence and arguments contained in the adjudicative record. The Council has also considered concerns expressed through the public comment portion of the adjudicative hearing. Our below findings and conclusions are based only on the adjudicative record. Our Recommendation to the Governor will also take into account not only these findings and conclusions but also the Final EIS, public comment received outside of the adjudication, and government-to-government consultation with the Confederated Tribes and Bands of the Yakama Nation in compliance with RCW 80.50.060(8).

¹⁴⁷ RCW 70A.02.010(11) and RCW 19.405.020(23).

¹⁴⁸ Yakama Nation Post-Hearing Brief, at 32-33.

¹⁴⁹ See RCW 19.285.

Nature of the Proceeding

1. This proceeding involves an application before the Washington State Energy Facility Site Evaluation Council (EFSEC or Council) for certification to construct and operate the Horse Heaven Wind Farm (Project). The Project is a renewable energy generation facility including wind and solar energy generation with battery energy storage systems (BESS) and supporting facilities. The Project includes up to 231 wind turbines and two solar arrays that would generate up to 1,150 megawatts (MW). The Project is situated in the Horse Heaven Hills area of unincorporated Benton County, Washington.

The Applicant and the Application

2. The Applicant is Horse Heaven Wind Farm, LLC, and its indirect owner Scout Clean Energy, LLC (Scout). Scout is a renewable energy development company headquartered in Boulder, Colorado. Scout Clean Energy would be defined as a Site Certificate Holder as defined in the Site Certificate Agreement.
3. On February 8, 2021, Scout submitted to EFSEC an Application for a Site Certification Agreement seeking authority to construct and operate the Project. Scout submitted a Revised Application on December 29, 2022.

Compliance with the State Environmental Policy Act (SEPA)

4. EFSEC is the lead agency for environmental review of project proposals within its jurisdiction under terms of the State Environmental Policy Act, RCW 43.21C. The Council Director is the SEPA Responsible Official. WAC 463-47-051.
5. EFSEC published and circulated a draft environmental impact statement (EIS) for public review on December 19, 2022. The Council received and reviewed numerous comments, all of which were made publicly available on February 13, 2023. The Responsible Official issued the Final EIS on October 31, 2023. This order does not consider the results of the Final EIS. The SEPA results are considered in conjunction with this order to inform the Council's Recommendation to the Governor and any proposed Site Certification Agreement.

Compliance with Procedural Requirements

6. The Council published and, where required by law or rule, served notices of events in the application process, including receipt of the Application, public meetings, commencement of the Adjudicative Proceeding and opportunity to file petitions for intervention, land use consistency hearing, prehearing conferences, and the adjudicative hearing sessions.
7. EFSEC's SEPA process need not be complete before the Council commences its adjudication. WAC 463-47-060. The Council's adjudication of disputed issues does not limit the Council's options in making its ultimate Recommendation to the Governor. The

Council will incorporate information from the Final EIS in determining whether to recommend approval of the application and if so, what appropriate conditions or mitigation measures should be included in its proposed Site Certification Agreement.

8. The Council afforded the parties to the adjudication the opportunity to present written and oral evidence, object to evidence, and fully brief disputed issues. The Council resolved procedural issues prior to hearing through orders based on prehearing conferences and motion practice wherein all parties had the opportunity to participate and present objections.
9. *The Council concludes* that it complied with all applicable procedural law and regulation, including RCW 80.50, RCW 34.05, WAC 463-26, and WAC 463-30, in conducting the Adjudication.

Land Use Consistency

10. In Order No. 883, the Council previously determined the Project to be consistent and in compliance with Benton County's land use plans and zoning ordinances in effect at the time the Application was filed with EFSEC. RCW 80.50.090.
11. Scout Clean Energy presented sufficient evidence to demonstrate the Project, with conditions that can be included in a proposed Site Certification Agreement if the Council recommends approval of the application, meets all five conditional use criteria contained in Benton County Code Section 11.50.040(d).
 - a. *The Council concludes* the Project is compatible with other uses in the surrounding area and is no more incompatible than are any other outright permitted uses in Benton County's Growth Management Act Agricultural District (GMAAD).
 - b. *The Council concludes* that with a condition requiring an Emergency Response Plan and a Fire Management Plan, the Project will not materially endanger the health, safety, and welfare of the surrounding community to an extent greater than that associated with any other permitted uses in Benton County's GMAAD.
 - c. *The Council concludes* that with a condition requiring a Transportation Management Plan coordinated with WSDOT and local authorities, the Project will not cause the pedestrian and vehicular traffic associated with the use to conflict with existing and anticipated traffic in the area to an extent greater than that associated with any other permitted uses in Benton County's GMAAD.
 - d. *The Council concludes* that with a condition requiring the Applicant to ensure local fire and first responders receive appropriate training, the Project will be supported

by adequate service facilities and will not adversely affect public services, including fire protection services, to the surrounding area.

- e. *The Council concludes* that the Project will not hinder or discourage the development of permitted uses on neighboring properties in the Growth Management Act Agricultural District as a result of the location, size or height of the buildings, structures, walls, or required fences or screening vegetation to a greater extent than other permitted uses in Benton County's GMAAD.

The Adjudicative Proceeding – Process

- 12. The Council duly noticed and conducted prehearing conferences and the administrative law judge, or Council as appropriate, entered Prehearing Orders. Statutory parties appeared and participated. The Council received petitions for intervention which were granted as indicated in the body of this order.
- 13. The Council served and published notice of the hearing on the merits. Hearings were held virtually on August 14-16 and August 21-25, 2023. The Council conducted a virtual public comment hearing on August 23, 2023.
- 14. The Applicant and a majority of other parties submitted post-hearing briefs.
- 15. *The Council concludes* that its adjudication of disputed issues in this matter complied with applicable provisions of law, including RCW 80.50 and RCW 34.05.

Archaeological and Cultural Resource Impacts

- 16. The Council finds the Applicant's cultural resources studies complied with the requirements set forth in WAC 463-60-362(5), including coordination with and concurrence from the Department of Archaeological and Historical Preservation.
- 17. *The Council concludes* that a Survey and Avoidance Plan should be required as part of a Site Certification Agreement.
- 18. The Council finds that the Applicant should be required to maintain access to all areas where tribal members currently enjoy and exercise their traditional practices.
- 19. The Council finds that constructing the Horse Heaven Wind Farm would result in some unavoidable negative impacts to Yakama Nation Traditional Cultural Properties (TCPs).
- 20. The Council finds Scout's Project design does not sufficiently avoid or minimize impacts to Yakama Nation TCPs that could be mitigated by altering Project design.

21. *The Council concludes* that it is necessary to further reduce impacts to Yakama Nation's TCPs beyond what has been proposed by the Applicant.

Visual Impacts

22. The Council finds that the Project, as proposed, would visually transform the region and, due to the location of wind turbines along ridgelines, be especially impactful on the communities of Benton City and the City of Kennewick due to an undesirable "skylining" effect.
23. The Council finds the Applicant followed industry standards for quantitatively analyzing the Project's visual impacts. The Council further finds that the Applicant complied with EFSEC's established standard to prevent wind turbines from looming over residential structures neighboring the Project. However, the Council also finds the Applicant failed to conduct sufficient outreach to local communities in selecting key observation points for visual analysis and determining the more qualitative impacts on local residents.
24. *The Council concludes* that further mitigation measures, to include elimination and removal of multiple turbines, must be required in order to minimize the visual impact of the Project on the Tri-Cities region and on Yakama Nation TCPs.

Wildlife Impacts

25. The Council finds that ferruginous hawks, a state endangered species, have historically used the Project site and continue to do so.
26. The Council recognizes that numerous environmental stressors, including loss of shrub-steppe habitat, are negatively influencing the ability of ferruginous hawks to persist in Washington State. The Council finds that the Project, as proposed and presented on this adjudicative record, would pose a new and significant threat to the ferruginous hawk.
27. The Council finds the Applicant has not offered sufficient assurance or identified sufficient mitigation measures to demonstrate the Project would produce only minimal adverse effects on the ferruginous hawk.
28. *The Council concludes* that additional avoidance and mitigation measures must be imposed on the Project to protect existing ferruginous hawk nests and habitat and also to minimize impacts on the ability of ferruginous hawks to return to certain areas of historic usage.
29. The Council finds that pronghorn antelope travel through and forage within the Project boundary and that the Project's solar arrays will diminish and fragment pronghorn grazing habitat.

30. The Council finds there is insufficient research or data available to fully understand the potential impact of wind turbines on pronghorn antelope and their ability to make use of habitat in and around wind farms.
31. *The Council concludes* the Applicant must consult and coordinate with WDFW and Yakama Nation to modify its final designs for siting and fencing its solar arrays to minimize impacts to pronghorn. *The Council further concludes* the Applicant must conduct post-construction monitoring to study whether the addition of wind turbines affects pronghorn use of land in and around the Project.
32. The Council finds the adjudicative record is not clear whether regional bat populations can sustain the possible levels of mortality caused by this Project. Therefore, *the Council concludes* additional pre-construction surveys and post-construction mortality monitoring should be required in order to best inform micro-siting considerations and adaptive management strategies for bats.
33. *The Council concludes* that pre-construction surveys to develop an estimate of seasonal and regional bat populations should be required as a condition of certification.

Socioeconomic Impacts

34. The Council finds that constructing the Horse Heaven Wind Farm as proposed would transform the Tri-Cities region by altering the landscape from Benton City all the way to Finley. The Council further finds that twenty-five miles of turbines, particularly those sky-lined atop the ridgelines, would irreversibly alter the visual landscape of the region.
35. *The Council concludes* that tourists who come to Benton County to enjoy Eastern Washington's wide-open spaces and unobstructed views would no longer be able to do so within sight of wind turbines or solar arrays.
36. The Council finds the Project has no measurable impacts on individual real estate values in the Tri-Cities area. *The Council concludes* that personal reactions to and opinions about the Project are highly subjective.
37. The Council finds the Project's wind turbines would promote and benefit farming within the Project boundaries for participating landowners. The Council further finds the Project will generate additional taxes to support all local government taxing districts, including fire districts, school districts, and ports.
38. The Council finds the Project's roadways would improve access within the Project boundaries for ground firefighting activities. The Council also finds that wind turbines located along the northern Project boundary would present challenges to aerial firefighting techniques historically used in the area.

39. The Council finds that fire suppression standards for BESS technology is evolving. Therefore, *the Council concludes* that it is the Applicant's responsibility to ensure industry standard fire safety controls are implemented at all of the Project's BESS installations.
40. The Council finds the Project, as proposed, would negatively impact recreational opportunities currently enjoyed by local hang gliders and paragliders. The Council further finds the Project would alter views previously enjoyed by hikers, bikers, and tourists visiting the region.
41. *The Council concludes* the Project would generate economic benefits for the region, including increased employment during construction and operation, as well as additional tax revenues that will support local government taxing districts.

Environmental Justice

42. The Council finds the Yakama Nation to be an overburdened community as defined by state law. RCW 70A.02.010(11) and RCW 19.405.020(23).
43. The Council finds the Applicant failed to demonstrate effective outreach and engagement to all underrepresented communities in the Tri-Cities region.

Project Benefits


44. The Council finds the Project's environmental benefits include generation of clean energy from renewable sources with no new emissions of carbon dioxide or other greenhouse gases.
45. The Council finds the Project would provide economic benefits to Benton County and Washington State in the form of jobs during both its construction and operation, tax revenues, and the clean energy produced and stored.

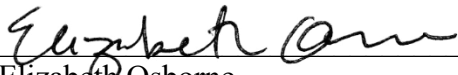
V. ORDER

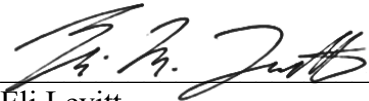
The Council hereby resolves the contested assertions raised by the parties in support of and opposition to the Project. The Council’s findings of fact and conclusions of law on the adjudicative record will be considered by the Council, along with the Final Environmental Impact Statement, public comments, and government-to-government consultations, in developing a recommendation to the governor.

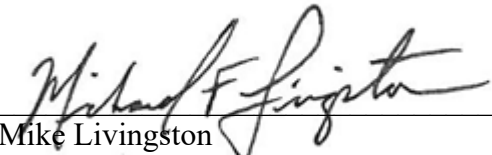
DATED and effective at Olympia, Washington, on the 17th day of April 2024

WASHINGTON ENERGY FACILITY
SITE EVALUATION COUNCIL



Kathleen Drew
Chair

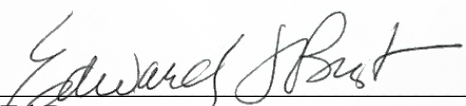

Elizabeth Osborne
Department of Commerce


Eli Levitt
Department of Ecology


Mike Livingston
Department of Fish and Wildlife


Lenny Young
Department of Natural Resources


Stacey Brewster
Utilities and Transportation Commission


Ed Brost
Benton County

NOTICE TO PARTIES: In accordance with WAC 463-30-335, administrative relief may be available through a petition for reconsideration of the Recommendation Package to the Governor. The Council requires requests for reconsideration to address all of the filing party’s concerns raised by the Recommendation Package in a single petition. Petitions for reconsideration must be filed within 20 days of the service of this Order and the Recommendation Package to the Governor. If any such petition for reconsideration is timely filed, the deadline for answers is fourteen days after the date of service of each such petition. The formatting of petitions for reconsideration shall be governed by WAC 463-30-120 and shall be limited to 50 pages.