

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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
**APPLICANT SCOUT CLEAN
ENERGY'S PETITION FOR
RECONSIDERATION OF THE
COUNCIL'S RECOMMENDATION
TO THE GOVERNOR**

REDACTED
Confidential Information Redacted

TABLE OF CONTENTS

	PAGE
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	

I.	INTRODUCTION	1
II.	BACKGROUND	6
A.	The Project (as proposed in the ASC) was a 1.1 gigawatt hybrid energy center, strategically sited to avoid and minimize impacts.	6
B.	During the adjudication, Council heard extensive testimony about ferruginous hawks, wildlife and habitat mitigation, cultural and Tribal impacts, and fire issues.	7
C.	The FEIS confirmed the Project is responsibly sited and recommended a comprehensive suite of science-based mitigation measures to address impacts.	8
D.	Beginning at its December 2023 meeting, the Council drastically deviated from its precedent and FEIS-recommended measures in several ways, with no new evidentiary support or other justification.	11
E.	The Council declined to read or respond to key technical comments or site-specific data and delayed eight months before publishing its Adjudicative Order on the day of its recommendation.	12
III.	LEGAL FRAMEWORK	14
IV.	ARGUMENT	14
A.	The Council’s recommendation slashes over half the Project’s generation capacity and sets precedent to extinguish Governor Inslee’s ambitions and progress toward Washington’s clean energy future.	15
B.	The recommendation’s ferruginous hawk and wildlife movement exclusion zones are unscientific and untenable.	21
1.	The Council’s recommended exclusion zones in condition Spec-5 are based on subjective, aspirational ideology that actively ignores the best available science.	21
2.	Council’s delegation of final siting determinations to the PTAG through condition Hab-4 is unprecedented, unwarranted, and improper.	25
3.	The Council’s Hab-1 relies on a decade-old transportation planning map to eliminate Project components, ignoring current, site-specific data and the porosity of Project features.	26
C.	None of the Council’s proffered justifications support the recommendation.	27
1.	The so-called “evidence” the Council references generally to support its decision does not exist in the record.	27

1 2. With respect to FEIS Figures 2-5 and 2-6, even if turbines excluded by
2 Spec-5-also pose impacts to other resources, none of those other
3 impacts independently warrant avoidance. 30
4 i. The Project’s impact to aerial firefighting is no different than
5 any other wind project approved and operating in the state
6 under established SCA conditions. 31
7 ii. The evidence surrounding recreational impacts does not
8 support outright avoidance in any area. 32
9 iii. The Council’s visual impact conclusions rely on questionable
10 evidence and subjective, unprecedented concepts propounded
11 by a local opposition group. 33
12 iv. If the Council requires avoidance based on Tribal resource
13 impacts, it must analyze and differentiate between valid, deeply
14 held Tribal beliefs and TCPs that meet established state
15 standards for energy facility siting. 35
16 D. The recommendation violates numerous provisions of Washington law under
17 the EFSLA, APA, and SEPA. 39
18 1. The recommendation violates EFSEC’s own enabling statute in several
19 ways. 39
20 2. The recommendation also defies multiple foundational requirements of
21 the Washington APA. 40
22 3. The recommendation also violates numerous SEPA requirements. ... 42
23 E. Specific changes must be made to the SCA to ensure that the Project approved
24 resembles that proposed and that the best available science is incorporated.. 44
25 V. CONCLUSION..... 45
26

I. INTRODUCTION

Both the Washington legislature and Governor Jay Inslee have tasked the Energy Facility Site Evaluation Council (“EFSEC” or the “Council”) with a critical mission—to ensure “minimal adverse effects” while “streamlin[ing] application review for energy facilities to meet the state’s energy goals.”¹ Those goals are immense, with the demand for renewably sourced electricity growing every day. Meeting them will require forward thinking, and policymaking backed by objective science, and a keen understanding of renewable project development challenges and constraints. The 1,150-MW Horse Heaven Clean Energy Center (the “Project”) was thoughtfully designed as a hybrid utility-scale project, providing 100% clean energy delivered to “load” with wind, solar, and battery storage technologies, at a quantity and flexibility sufficient to displace need for an entire fossil fuel plant. Applicant Scout Clean Energy (“Scout” or “Applicant”) with this Project proves its dedication to being a good steward of the land, through years of engaging with affected stakeholders and communities, by hiring a team of the nation’s best scientists to gather nearly a decade of site-specific data to inform Project planning, and by committing to a suite of industry-leading mitigation far beyond what is required under EFSEC standards. As Scout asked the Council in a post-adjudication brief, *is Washington capable of authorizing an ambitious renewable energy project such as this?*

The Council has answered with a resounding no. In its recommendation to the Governor on the Project, EFSEC imposes novel, unscientific siting restrictions that gut the Project’s generation capacity (by half), likely² rendering the Project nonviable unless it undergoes substantial and costly amendment. These restrictions so change the Project from its original proposal that the version approved does not meet the purpose and need stated from the

¹ RCW 80.50.010.

² “Likely” is the key word because the Council has not in fact issued an actual siting decision. Rather it has deferred the substantive determinations about where the most stringent exclusionary zones (surrounding historical ferruginous hawk nests) will be to a preoperational technical advisory group (“PTAG”) and done so without providing that group any substantive standards about how to apply a dispositive nest site availability assessment.

1 outset, and would not—and did not—even qualify as a “reasonable alternative” reviewed under
2 the State Environmental Policy Act (“SEPA”).

3 The Council’s recommendation on the Project Site Certification Agreement and
4 Conditions must be reconsidered. If it is not, Scout calls on Governor Inslee to stem the
5 damage posed by the Council’s decision.

6 The restrictions imposed in the Council’s recommendation are unprecedented,
7 unsupported by evidence and, specifically with respect to ferruginous hawk nest sites, impose
8 unconditional, blanket setbacks around even nest sites that the Washington Department of Fish
9 and Wildlife (“WDFW”) has documented as “gone.” Those setbacks exceed the requirements
10 established by any other state or federal wildlife agency that regulates the species, and go even
11 beyond WDFW’s own Wind Power Guidelines and unpublished draft guidance for the species,
12 which rightly advocates avoidance, minimization, and mitigation, *not* strictly avoidance, and
13 recommends avoiding only breeding habitat, not developed land. The setbacks reject the
14 carefully crafted recommendations in the Project Final Environmental Impact Statement
15 (“FEIS”), recommendations that were developed after years of engagement and by the third-
16 party consultant EFSEC hired to develop the FEIS and by the SEPA Responsible Official. And
17 the setbacks ignore the best available science on the subject: seven years of site-specific field
18 data proving that **ferruginous hawks no longer nest in the Horse Heaven Hills and, given**
19 **ongoing residential sprawl, are virtually certain never to do so again.**

20 We emphasize: the Council’s decision jeopardizes the entire Project’s feasibility based
21 on nonexistent, historical, or unoccupied nest sites, in the heart of the historically agricultural
22 Horse Heaven Hills that are now being aggressively converted to expanding residential
23 developments encouraged by Benton County. This species will likely *never* return to the area
24 in a meaningful way. And if they do, operational controls such as wind turbine curtailment
25 through adaptive management are an obvious response. But those too were stricken in the
26 Council’s recommendation. All evidence shows that if there would be any impact to the species

1 from the Project, that impact would be “minimal,” as contemplated and authorized under the
2 Siting Act.

3 The Council’s recommendation includes yet another unprecedented, unsupported
4 restriction in SCA Condition Hab-1: an additional exclusion zone, purportedly to further
5 mitigate possible wildlife movement corridor impacts. This restriction has been imposed on
6 no other energy project to date and is premised on a decade-old map developed to inform
7 transportation infrastructure planning, a map that has never been field reviewed or updated
8 since that time.

9 These additional restrictions were announced at the *very last stage* in the EFSEC
10 certification process, after the Applicant engaged with EFSEC staff, consulting agencies,
11 Tribes, and stakeholders to responsibly plan and develop the Project over nearly a decade.
12 Divining these restrictions out of thin air in the 11th hour has the entire renewable energy
13 industry on notice and wary to develop in Washington, as numerous comment letters and
14 editorials from members of the renewable industry, utility community, and energy leaders
15 attest.³ The Council’s newly devised wildlife and habitat-based exclusionary zones set forth
16 in Site Certification Agreement (“SCA”) conditions Spec-5 and Hab-1,⁴ if applied broadly,
17 would preclude renewable energy siting on at least one-fifth of the state’s prime clean power
18 siting area, the Columbia Ecoregion Plateau. Moreover, the uncertainty posed by the 11th-hour
19 requirements that contravene the science pose grave risks for renewable energy siting in the
20 state. As American Clean Power and the Energy and Wildlife Action Coalition jointly

21
22
23

24 _____

³ See discussion in Section IV.A below.

25 ⁴ Named for Species Measure 5 and Habitat Measure 1. These conditions will apply directly to the Project moving
26 forward and will impact final Project design. See the full copy of proposed SCA and conditions at Council’s
Recommendation to Governor, Draft Site Certification Agreement (“Draft SCA”), App. 2 (Apr. 29, 2024),
<https://www.efsec.wa.gov/energy-facilities/horse-heaven-wind-project/horse-heaven-recommendation-and-governors-decision>.

1 commented, the Council’s recommendation “erode[s] procedural confidence and will have a
2 chilling effect on future renewable energy investment in Washington.”⁵

3 EFSEC fails its foundational mandate at a crucial time within the industry, just when
4 Washington needs clean energy most. Rife with substantive and procedural deficiencies as
5 detailed below, the recommendation violates numerous provisions of Washington law. Scout
6 therefore respectfully requests that the Council reconsider its recommendation. Specific
7 changes needed in the SCA are detailed in Exhibit A.

8 Most critically, the Council—or the Governor—must ensure:

- 9
- 10 • Ferruginous hawk nest site buffers in SCA Condition Spec-5 are based on the best
11 available science and are reasonable based on the minimal, *fully mitigable* risk to
12 the species posed by the Project.

13 Simply put, **if Spec-5 is not revised, it will render the Project nonviable without**
14 **substantial redesign and an amended application.**

- 15 ○ The clearest, simplest way to do so is to **impose a 0.6-mile setback around**
16 **occupied nest sites during nesting season.**⁶
 - 17 ▪ This approach is consistent with the only published WDFW
18 recommendations for the species to date, the standard in place when
19 the application was submitted, and the predominant approach taken
20 by *all* other state and federal wildlife agencies managing the species.
- 21 ○ A more complicated but still feasible alternative is to return Condition Spec-
22 5 to its FEIS-recommended form by including a **science-based viability**
23 **assessment for siting both primary and secondary Project components**
24 **around documented ferruginous hawk nest sites.**
 - The nest viability assessment must be informed by both the nest site
information in the PHS database and the best current data: Applicant’s
up-to-date, site-specific annual raptor nest survey reports.
 - The viability assessment must include a clear standard as to when a
nest site is considered “available” to the species so as to trigger a
setback.
 - If EFSEC continues to rely solely on the PHS data, EFSEC must
require that WDFW update its PHS database to reflect current

25 ⁵ Ex. B, Letter from American Clean Power Association & Energy and Wildlife Coalition to EFSEC, Horse
26 Heaven Clean Energy Center Project – Stakeholder Comments and Concerns on EFSEC Proposed Final Action,
at 1, 2 (Apr. 8, 2024) (hereinafter the “ACP Letter”).

⁶ See Ex. A, Redlined Draft Site Certification Agreement, App. 2, for specific proposed changes to these
conditions.

- 1 conditions by removing “gone” and “remnant” nest sites before the
2 SCA is issued.
- 3 ▪ If no PHS update mechanism is imposed on WDFW, EFSEC must
4 take the reins by **revising Spec-5 to impose setbacks only for nest
5 sites currently documented in good to poor condition**, not “gone”
6 or “remnant” nests.
 - 7 ○ If Spec-5 is not so revised, **a limited exemption must be established to
8 facilitate siting of critical secondary Project components** that provide both
9 internal Project connection and external delivery to the electric grid. Those
10 critical components are:
 - 11 ▪ The secondary components, including the Bofer Canyon HH East
12 Substation, at the eastern point of interconnection, which connect the
13 eastern Project components to the electrical grid; and
 - 14 ▪ A portion of the main underground electrical collection system near
15 Beck Road that internally connects the Project, collecting (or
16 stranding) power from all 40 *allowed* turbines to the east.
 - 17 • **SCA Condition Hab-4’s novel creation of a pre-operational technical advisory
18 group (“PTAG”) must be revised** to keep final Project design and substantive
19 siting decisions with the Council, and to avoid inefficiency, inconsistency,
20 additional uncertainty, and improper delegation. Instead, the Council must employ
21 its established practice of convening a *post*-construction technical advisory
22 committee (“TAC”) to advise on the need for ongoing or adaptive mitigation and
23 oversee post-construction monitoring.
 - 24 • SCA Condition Hab-1 must either be (1) **omitted entirely** based on its reliance on
25 outdated, unverified data; or (2) **returned to its FEIS iteration** requiring that
26 Project components be sited in wildlife movement corridors modeled as low
linkage, “to the extent feasible,” and if infeasible, then sited under a Corridor
Mitigation Plan ensuring appropriate movement accommodation and mitigation.

If the Council declines to make these changes, Scout urges Governor Inslee to right the Council’s wrongs and exercise his RCW 80.50.100(3) authority and plenary power to do so. These changes are essential to uphold precedent, reflect the science, and provide the certainty required to support sustainable renewable energy investment in the state.

1 II. BACKGROUND

2 A. The Project (as proposed in the ASC) was a 1.1 gigawatt hybrid energy center,
3 strategically sited to avoid and minimize impacts.

4 By combining wind and solar energy technologies, the Project was designed to provide
5 a nameplate generating capacity of up to 1,150 MW, with battery energy storage systems
6 (“BESS”) incorporated to provide power when most needed.⁷ The specific scale of the Project
7 is a key component of its utility: “to ensure an efficient, stable power source with capacity to
8 *substantially displace the need for utility-scale fossil fuel generation.*”⁸ The Project is large.
9 That is the point⁹—to be a *meaningful* step forward toward meeting the state’s clean energy
10 goals.¹⁰

11 The Project is strategically located in Benton County, in an agricultural but rapidly
12 urbanizing area, adjacent to an existing, operating wind farm and other existing energy
13 infrastructure.¹¹ The vast majority of the Project is sited on privately owned land, in dryland
14 agricultural use or under the conservation reserve program.¹² The site avoids and minimizes
15 wildlife and habitat impacts by being positioned to access the nearby regional transmission
16 system through two existing high-voltage transmission lines that traverse the Project area,
17 rather than disturbing additional habitat by building new transmission lines.¹³ To avoid and
18 minimize any impacts to cultural or Tribal resources in the area, Scout engaged in a rigorous,

19 ⁷ Scout, Application for Site Certification (“ASC”) at 2-15 (Sept. 2023).

20 ⁸ Ex. C, Scout Clean Energy, Post Hearing Brief (“Scout Post Hearing Brief”) at 3 (emphasis added); *see also*
21 EFSEC, Final Environmental Impact Statement for the Proposed Horse Heaven Wind Farm Project (“FEIS”) at
22 2-37 (Oct. 2023) (identifying the Project purpose and need as generating the specified nameplate generating
23 capacity).

24 ⁹ *See* FEIS at 2-37 (eliminating alternatives “from detailed analysis because *they would not generate the designed*
25 *nameplate generating capacity proposed by the Applicant*” (emphasis added)).

26 ¹⁰ Scout Post Hearing Brief at 2.

27 ¹¹ EXH-1021_R at 3-4 (B. Guthrie) (natural conditions will partially or fully obstruct the views of the turbines);
28 ASC at 2-1 (citizens of Kennewick and the tri-cities urban area are at least four miles south of the Project);
29 Adjudication Transcript, Day 7 Tr. at 1341:13-17 (B. Guthrie) (“[F]or all the viewpoints that we identified and
30 used for our study, there are signs of development.... So it’s just a part of the character of the area that [is]
31 developed and developing[.]”); ASC at 4-42 (transmission lines traverse the Project area and there are several
32 communication towers in the Project area); ASC, App. Q, Fig. 8-1b, Representative Viewpoint 5 (showing
33 residential development on the Horse Heaven Hills).

¹² *See* ASC at 2-7, 3-101, Tbl. 3.4-1.

¹³ *See* ASC at 2-16 (describing the location and capacity of BPA’s existing transmission lines).

1 more than five-year-long coordination effort with potentially affected Tribes. Through that
2 engagement Scout reached a comprehensive mitigation agreement with the Confederated
3 Tribes of the Umatilla Indian Reservation (“CTUIR”), whose treaty-ceded land comprises
4 about 80% of the Project area (the remainder on treaty lands of the Confederated Tribes and
5 Bands of the Yakama Nation (“Yakama Nation”)).¹⁴ Scout also intentionally and meaningfully
6 consulted environmental justice communities.¹⁵

7 Scout and its expert biologists conducted comprehensive wildlife surveys and
8 consulted WDFW and EFSEC staff to discuss potential impacts to wildlife and habitat and
9 how such impacts could be avoided or mitigated.¹⁶ When Scout submitted its initial
10 application, Scout, EFSEC staff, and WDFW discussed and agreed¹⁷ that the appropriate
11 setback from ferruginous hawk nest sites would be that imposed under WDFW’s existing,
12 published management recommendations for Washington Priority Species, a 0.6-mile buffer
13 from active nests during breeding season.¹⁸ Those recommendations remain the only specific
14 setback standard that WDFW has ever finalized and published.

15 **B. During the adjudication, Council heard extensive testimony about ferruginous**
16 **hawks, wildlife and habitat mitigation, cultural and Tribal impacts, and fire**
17 **issues.**

18 In August 2023, Administrative Law Judge Adam Torem presided over an eight-day
19 adjudicative hearing. Scout, Benton County, and Washington’s Counsel for Environment,
20 along with Intervenor Yakama Nation and local opposition group Tri-Cities Community

21 ¹⁴ See EXH-1063_X (Demonstrative Map showing Project area with Tribal lands GIS map); compare EXH-
22 1061_X (ASC Fig. 2.1-1) with EXH-1062_X (Washington Geospatial Open Data Portal Tribal Lands map).

23 ¹⁵ The Council wrongly concludes that Scout inadequately engaged with the “Hispanic or other minority
24 communities in the local area.” Order at 40. To the contrary, evidence recounted in the Order at 39 proves Scout
25 undertook targeted outreach to engage meaningfully with Hispanic communities in particular, including through
26 media campaigns on bilingual radio networks and newspapers. See ASC Sec. 1.12.3, Scout Post Hearing Brief at
19. No party rebutted that evidence or argued Scout should have made any other specific effort, nor did the
Council specify any way Scout should have better engaged.

¹⁶ ASC at 1-65 to 1-94 (describing consultation with EFSEC and WDFW, among others).

¹⁷ See Adjudication Transcript, Day 5 Tr. at 954:2-4 (E. Jansen testifying the initial proposed quarter-mile distance
[setback] came from personal communication from WDFW).

¹⁸ WDFW, Management Recommendations for Washington’s Priority Species – Volume IV: Birds at 7-3 (May
2004); see ASC Sec. 1.12.2 (communication dated Jan. 28, 2020).

1 Action for Responsible Environmental Stewardship (“TCC”), actively participated.¹⁹ Scout’s
2 expert land use planner, biologists, and visual impact technician testified that siting the Project
3 on sub-prime agricultural lands in a rapidly urbanizing area makes the land use compatible,
4 avoids prime habitat for ferruginous hawk and other species, and avoids the visual impacts
5 typically associated with pristine, undeveloped viewsheds.²⁰ Other key testimony, including
6 that related to cultural resources, visual, recreational, and fire impacts are detailed below.²¹
7 Eight months after the adjudication ended, the Council finally issued its Adjudicative Order
8 summarizing its post-hoc interpretation of the testimony and issuing its findings and
9 conclusions from the proceeding.²²

10 **C. The FEIS confirmed the Project is responsibly sited and recommended a**
11 **comprehensive suite of science-based mitigation measures to address impacts.**

12 After nearly two years of careful development, the FEIS fully assessed the Project’s
13 expected impacts on wildlife and habitat, historic and cultural, viewshed, and fire safety,
14 among other resources. It recommended a cogent, correlated, and comprehensive mitigation
15 scheme that, with a few exceptions, completely mitigates the impacts identified.²³ Importantly,
16 the FEIS identified no significant direct or indirect impacts on vegetation, wildlife (including
17 ferruginous hawks), or habitat,²⁴ taking into account a suite of recommended wildlife and
18 habitat mitigation measures, including monitoring,²⁵ adaptive management,²⁶ avoidance of

19 _____
20 ¹⁹ EFSEC Order No. 892, Adjudicative Order Resolving Contested Issues (Apr. 17, 2024) (“Adjudicative Order”).

21 ²⁰ Adjudication Transcript, Day 1 Tr. at 62:18-20 (L. McClain) (“[D]ryland wheat farming is compatible with
22 wind projects”); Adjudication Transcript, Day 6 Tr. at 1251:1-3 (T. Rahmig) (siting the Project on agricultural
23 lands is one of the best ways to avoid attracting ferruginous hawks to spots where they might be susceptible to
24 turbine strikes); Adjudication Transcript, Day 5 Tr. at 964:12-20 (E. Jansen) (describing how Scout strategically
25 sited the Project avoided impacts to sensitive areas to reduce the need for mitigation). Even the Councilmembers
26 recognized that “most [of] these turbines are getting placed in altered habitat. So there isn’t this direct impact on
quality shrubsteppe habitat.” Adjudication Transcript, Day 5 Tr. at 980:18-20 (WDFW representative and
Councilmember Livingston).

²¹ See Adjudication Transcripts, Days 1-8, <https://www.efsec.wa.gov/energy-facilities/horse-heaven-wind-project/horse-heaven-adjudication> (EFSEC, Horse Heaven Adjudication).

²² See Adjudicative Order.

²³ See FEIS ES-21 to ES-50.

²⁴ FEIS ES-10.

²⁵ See, e.g., FEIS ES-26 (Wild-1 proposes a post-construction bird and bat fatality monitoring program).

²⁶ See, e.g., FEIS ES-30 (Hab-4).

1 sensitive areas,²⁷ and direct offset ratios for any core habitat directly or indirectly disturbed,
2 per WDFW standards under the operative Wind Power Guidelines. Though the FEIS found the
3 Project would significantly directly impact the viewshed by changing the existing landscape,²⁸
4 that impact could be mitigated with a half-mile buffer from nonparticipating residences,²⁹
5 reducing contrast by maintaining vegetation, cleaning towers, and opaque fencing.³⁰ The FEIS
6 identified potential impacts to paragliders and other recreational activities, but recommended
7 as mitigation only that the Applicant coordinate with DNR, Benton County, and local and
8 regional recreation groups to identify and develop plans to continue access to existing and new
9 recreational activities.³¹ The FEIS concluded the Project’s BESS would not result in any direct
10 impacts but could increase the risk of a wildfire.³² Even so, the FEIS concluded Scout’s
11 proposed measures (including fire safety plans, coordination with local fire departments, and
12 providing firefighting resources) were sufficient to mitigate any risk.³³

13 Between Scout’s initial application and the FEIS, WDFW uplisted ferruginous hawk
14 to state endangered status. Accordingly, the FEIS recommended a revised setback of two
15 miles³⁴—larger than the 0.6-mile setback previously recommended under the applicable
16 existing WDFW policy. But importantly, that setback would be triggered only by active or
17 “available” nests because the FEIS measure Spec-5 included a built-in viability assessment to
18 determine which nest sites were indeed still available to the species and thus needing
19 protection.³⁵

20

21 ²⁷ See, e.g., FEIS ES-28 (Wild-5 proposes to limit construction by identifying, mapping, and avoiding sensitive
22 areas, including wildlife features); FEIS ES-34 (FEIS Spec-5 recommends avoidance of core ferruginous hawk
23 habitat after applying viability assessment to determine which nest sites are “available” to the species, and plan
24 to offset habitat loss when siting must occur within core habitat areas).

25 ²⁸ FEIS at 4-378.

26 ²⁹ FEIS ES-45 (Vis-1 proposes a half-mile setback of turbines from non-participating residences to avoid
dominating views).

³⁰ *Id.* (Vis-3 and Vis-4).

³¹ FEIS ES-48 (recreational conditions).

³² FEIS at 4-507.

³³ FEIS at 4-509.

³⁴ FEIS, Spec-5.

³⁵ *Id.*

1 The FEIS was thorough, taking into account the comprehensive mitigation framework.
2 But it was not perfect. *First*, the FEIS relied heavily on a misappropriated wildlife movement
3 model to support large Project exclusion zones set forth in measure Hab-1.³⁶

4 *Second*, the FEIS employed a novel and opaque approach of creating Figures 2-5 and
5 2-6, intended to denote areas impacted by multiple resources, what it termed “areas of high
6 impact.”³⁷ Color coding classified specific wind turbines said to pose the “highest impact”
7 (class 3), impact 2 resources (class 2), or impact 1 resource (class 1).³⁸ The executive summary
8 hinted that these classes were intended to denote turbines that would “cause impacts on
9 multiple resources such as cultural, visual, and/or wildlife resources.”³⁹ But many of those
10 resources were elsewhere noted as sufficiently mitigated.⁴⁰ Based on this system, it is clear
11 “class 2” turbines have overlapping impacts that affect two different resources. But it is unclear
12 whether class 3 turbines also share that characteristic, or whether they have been deemed “high
13 impact” for some other reason. Figures 2-5 and 2-6 provided no further information, including
14 about what particular resources were impacted by any specific turbine or class, or why those
15 impacts contributed to these classifications despite already being mitigated by targeted
16 mitigation measures.

17 *Third*, the FEIS introduced the new requirement of a *pre-operational* technical advisory
18 group, a PTAG, which would make substantive Project design and siting decisions after the
19 SCA was issued but before construction.⁴¹

20
21
22

23 _____

24 ³⁶ FEIS at 4-152 to -53.
25 ³⁷ FEIS Figs. 2-5 & 2-6; Ex. D, Letter from Scout Clean Energy, Horse Heaven Wind Project, to EFSEC –
26 Applicant Comments on Practical and Policy Problems with EFSEC Proposed Recommendation to the Governor
27 (“Apr. Comment Letter”) at 20 (Apr. 10, 2024).
³⁸ FEIS Figs. 2-5 & 2-6.
³⁹ FEIS ES-4.3.1.
⁴⁰ See discussion *supra* at 8-10.
⁴¹ FEIS, Hab-4.

1 **D. Beginning at its December 2023 meeting, the Council drastically deviated from**
2 **its precedent and FEIS-recommended measures in several ways, with no new**
3 **evidentiary support or other justification.**

4 At its December 2023 and January 2024 meetings, the Council backtracked on its own
5 precedent and years of careful coordination, Project design, and engagement with staff. During
6 these meetings, the Council engaged in what appeared to be off-the-cuff discussions that
7 culminated in directing its staff to materially change key aspects of the FEIS-recommended
8 mitigation measures to suit the Council’s whims.⁴² Despite detailed comment letters from
9 Scout and other members of the utility and renewable energy community, the Council
10 ultimately incorporated those revisions into its recommendation to the Governor.

11 Chief among its problems, the Council’s recommendation:

- 12 • Vastly increases the previously recommended 0.6-mile setback from only occupied
13 nests during breeding season by imposing an absolute prohibition on siting wind
14 turbines within two miles, and solar or BESS components within 0.5 mile, around
15 even *historical and nonviable* ferruginous hawk nest locations in measure Spec-5;
 - 16 ○ And eliminates the FEIS-recommended science-based viability assessment to
17 determine when nest sites remain “available” to the species to trigger a
18 setback around wind turbines (within two miles) or solar and BESS (within
19 0.5 mile);
- 20 • Relies solely on WDFW-administered ferruginous hawk nest site data that are
21 outdated and unreliable to determine the nest site exclusion zones, which are
22 outdated and unreliable, with no mechanism to update the zones based on future
23 site-specific data;
- 24 • Retains the FEIS-recommended nest site viability assessment process for siting
25 secondary components, and solar and BESS beyond 0.5 mile of documented
26 historical nest sites, but provides no meaningful standard to determine viability;
and

24 ⁴² See Apr. Comment Letter, Att. A, Scout Clean Energy, Horse Heaven Wind Project – Applicant Comments
25 and Concerns on EFSEC Proposed Final Action (Jan. 19, 2024) (“Jan. Comment Letter”) at 4, 7-9; Apr. Comment
26 Letter at 1, 2, 17-19; see also EFSEC Meeting Minutes, Transcript of Proceedings, at 19-61 (Dec. 20, 2023),
https://www.efsec.wa.gov/sites/default/files/181034/023/20231220_MeetingMinutes_CORRECTED.pdf;
EFSEC Meeting Minutes, Transcript of Proceedings, at 24-105 (Jan. 31, 2024),
[https://www.efsec.wa.gov/sites/default/files/181034/00200/20240131_MonthlyMeetingMinutes_CORRECTED](https://www.efsec.wa.gov/sites/default/files/181034/00200/20240131_MonthlyMeetingMinutes_CORRECTED.pdf)
[.pdf](https://www.efsec.wa.gov/sites/default/files/181034/00200/20240131_MonthlyMeetingMinutes_CORRECTED.pdf).

- 1 • Imposes novel wildlife movement-based exclusionary zones in measure Hab-1
2 based solely on a decade-old map developed to inform transportation infrastructure
3 planning that has never been field reviewed, updated, or utilized in siting energy
4 projects.⁴³

4 EFSEC made these revisions to the FEIS-recommended mitigation measures without
5 any additional science or other evidence, and without formal revision of the FEIS by the SEPA
6 Responsible Official.

7 In an attempt to defend the obvious vulnerabilities of that decision, the Council now
8 invokes FEIS Figures 2-5 and 2-6 and their purported “multiple resource” impacts to suggest
9 the wind turbines eliminated by SCA Condition Spec-5 may also be some of the “class 3”
10 turbines.⁴⁴ But no information is available to confirm that contention or to determine which,
11 if any, other resources are impacted within the Spec-5 buffers.

12 **E. The Council declined to read or respond to key technical comments or site-**
13 **specific data and delayed eight months before publishing its Adjudicative Order**
14 **on the day of its recommendation.**

15 Nothing about this siting process or the Council’s deliberations here have been typical.
16 Councilmembers’ comments throughout the public deliberation show they are unfamiliar with
17 basic technical and foundational tenets of energy facility siting, and unfamiliar with key Project
18 documents. During the December and January meetings, Councilmembers admitted that they
19 had not read relevant portions of the FEIS on which they were opining and voting. Others
20 asked questions that had already been squarely and repeatedly answered in multiple record
21 documents, questions that would have been obviated had the most basic research been done.
22 Nor did the Council explain why it was departing from the FEIS-recommended ferruginous
23 hawk setbacks in light of the substantial record evidence supporting them.

25 _____
26 ⁴³ See Draft SCA, Apps. 2, 7, 12-13 (Spec-5, Hab-1); Apr. Comment Letter at 2, 3, Att. A (detailed discussion of
Spec-5 and Hab-1 problems); Jan. Comment Letter at 2.

⁴⁴ EFSEC, Report to the Governor on Application Docket No. EF-220011 (“Report to the Governor”) at 12-13
(Apr. 29, 2024).

1 To be sure, the Council in its report to the Governor purports to have reviewed the
2 submitted public comments.⁴⁵ But the only substantive acknowledgment of the nearly 1,000
3 comments on the Council’s recommendation was one single PowerPoint slide presented during
4 the Council’s April meeting.⁴⁶ And whether or which comments actually reached the Council
5 is unclear. For example, most comments—including Scout’s⁴⁷ and the renewable energy
6 community letters in support—were not posted in full to the Council website. Rather, they
7 were published showing only a single cover sheet with a *hyperlink* to each comment letter.
8 Finding any specific comment letter in the haystack of cover sheets was virtually impossible.
9 Some hyperlinks were broken, making those comment letters completely unavailable. Other
10 comments, including multiple letters from Project opponents, were published in full, without
11 any hyperlinking.⁴⁸ Finally, the Adjudicative Order Resolving Contested Issues (“Order”)
12 following the adjudication hearing was not issued for Applicant or public review until the day
13 the Council issued its recommendation to the Governor, *eight months* after the adjudication
14 hearing.⁴⁹

15 Ultimately, the Council’s recommendation—which is both substantively and
16 procedurally unsound—rejects key, science-based elements of the FEIS-recommended
17 mitigation measures and fundamentally changes the Project and guts its renewable energy
18 generation capacity, reducing it by more than half.

19
20

⁴⁵ See, e.g., *id.* at 12.

⁴⁶ See EFSEC, Monthly Council Meeting at 21:41, YouTube (Apr. 17, 2024), <https://www.youtube.com/watch?v=67aJDJ1NdGc>.

⁴⁷ See EFSEC, Horse Heaven SCA Comments 901-973, at 169 (Apr. 11, 2024), https://www.efsec.wa.gov/sites/default/files/210011/draftscacomments/0901%20-%200973_r_0.pdf (submission of Counsel Ariel Stavitsky on behalf of Scout).

⁴⁸ See, e.g., *id.* at 4-41, 47-87 (comment letters of Paul Krupin, Tri-Cities CARES).

⁴⁹ EFSEC, Horse Heaven Recommendation and Governor’s Decision, <https://www.efsec.wa.gov/energy-facilities/horse-heaven-wind-project/horse-heaven-recommendation-and-governors-decision> (last visited May 16, 2024). This delay was far from harmless—Applicant and the public has had to review the order concurrently while preparing this petition. And neither Applicant nor any member of the public had an opportunity to comment on the order or correct its errors (discussed below); its content appeared to have been retroactively framed in a way calculated to contemporaneously support the Council’s later recommendation, when in reality it demonstrates the Council’s *ex post facto* review and justification for its decisions.

1 EFSEC issued its final recommendation to the Governor on April 29, 2024. Scout
2 timely filed this petition on May 20, 2024.

3 III. LEGAL FRAMEWORK

4 A party to the adjudication may petition the Council to reconsider its recommendation
5 to the Governor. WAC 463-30-335.

6 The Energy Facility Site Locations Act’s (“EFSLA” or “Siting Act”) *primary* directives
7 are to “reduce dependence on fossil fuels by recognizing the need for clean energy in order to
8 strengthen the state’s economy, meet the state’s greenhouse gas reduction obligations, and
9 mitigate the significant near-term and long-term impacts from climate change while
10 conducting a public process that is transparent and inclusive to all with particular attention to
11 overburdened communities.”⁵⁰ To accomplish that goal, EFSEC must base its
12 recommendations on six criteria, *one* of which focuses, among other things, on protection of
13 the environment and “esthetic and recreational benefits of the air, water and land resources.”⁵¹

14 Site certification decisions are subject to the Washington Administrative Procedures
15 Act (“APA”)⁵² and the SEPA.⁵³ The SEPA Responsible Official is the Council manager,⁵⁴
16 tasked with preparing the EIS to assess environmental impacts that may result from granting a
17 site certificate.⁵⁵

18 IV. ARGUMENT

19 The Council’s recommendation suffers numerous policy, logical, and legal flaws,
20 detailed below. *First*, the decision guts the Project’s generating infrastructure and sets
21 precedent that will extinguish the state’s climate progress. *Second*, the ferruginous hawk and
22 wildlife movement exclusion zones in Spec-5 and Hab-1 are particularly untenable because

23
24 ⁵⁰ RCW 80.50.010.

⁵¹ RCW 80.50.010(2).

25 ⁵² *Residents Opposed to Kittitas Turbines v. EFSEC*, 165 Wn.2d 275, 304-05, 197 P.3d 1153 (2008); RCW
34.05.570.

26 ⁵³ RCW Ch. 43.21C; *see* WAC Ch. 463-47.

⁵⁴ WAC 463-47-051.

⁵⁵ WAC 463-47-090, -110, -140.

1 they are unprecedented and lack any policy or substantial evidentiary support. *Third*, none of
2 the Council’s proffered justifications support those measures, based on the record evidence
3 and the fact that the other impacts cited are already mitigated by other measures. *Fourth*, the
4 decision violates the Siting Act, APA, and SEPA. *Finally*, in Exhibit A, Scout provides
5 specific suggestions as to how the Project can be saved, with detailed proposed language to be
6 included in the SCA.

7 **A. The Council’s recommendation slashes over half the Project’s generation**
8 **capacity and sets precedent to extinguish Governor Inslee’s ambitions and**
9 **progress toward Washington’s clean energy future.**

9 EFSEC’s mandate is clear—to “meet the state’s greenhouse gas reduction obligations,
10 and mitigate the significant near-term and long-term impacts from climate change while
11 conducting a public process that is transparent and inclusive to all,” balancing “the increasing
12 demands for energy facility location and operation in conjunction with the broad interests of
13 the public.”⁵⁶

14 The need for new, utility-scale renewable energy projects is dire, driven by the state’s
15 aggressive climate goals. As the Council should be aware, the Clean Energy Transition Act
16 (“CETA”) sets binding energy targets toward a 100% clean energy grid.⁵⁷ The Washington
17 Department of Commerce’s energy policy director recently estimated that to meet CETA’s
18 requirements, Washington will need a staggering additional 22 gigawatts of renewable energy
19 by 2035.⁵⁸ The Project as proposed would represent about 5% of that need. Under the Council’s
20 recommendation, the exact output allowed is unclear but likely would supply around just 2%
21 of the overall need. It will also create uncertainty for other project developers in the region.

22 _____

23 ⁵⁶ RCW 80.50.010; WAC 463-60-021 (Council to “recognize the pressing need for increased energy facilities”);
24 *see also Friends of Columbia Gorge, Inc. v. EFSEC*, 178 Wn.2d 320, 340, 310 P.3d 780 (2013) (policy of EFSLA
is to “balance the need for new energy production with environmental and societal considerations”).

25 ⁵⁷ S.B. 5116, 66th Leg., Reg. Sess. (Wash. 2019) (enacted).

26 ⁵⁸ Amanda Zhou, *How Clean Is WA’s Electricity? We Lead the Country in One Way*, The Seattle Times (Feb. 13,
2024), <https://www.seattletimes.com/seattle-news/environment/how-clean-is-was-electricity-we-lead-the-country-in-one-way/>. The content of this article, as well as that of sources referenced in notes 59, 61, 66, 68, 91
and 94 are judicially noticeable under Washington Rule of Evidence 201 because they are not subject to
reasonable dispute and capable of accurate and ready determination based on the cited publicly available sources
whose accuracy cannot reasonably be questioned.

1 And the demand will not stop in 2035. Washington’s demand for electricity is expected to
2 roughly double by 2050,⁵⁹ due to electrification of the transportation, industrial, and building
3 sectors.⁶⁰ Poor snowpack and ongoing drought have compromised hydropower’s ability to
4 serve the load reliably.⁶¹ Meanwhile, the “region’s electrical grid is more complex than it’s
5 ever been before.”⁶² Based on current trajectory, winter and summer spikes in demand will
6 lead to a gap in supply in as early as six years, in 2030.⁶³ Creating 100% clean fuels like
7 hydrogen and fertilizer like that proposed by the Atlas Agro Pacific Green Fertilizer Plant in
8 Benton County, within several circuit miles of the Project, will require 100% renewable power
9 sources. Thus, generating and storage facilities like the Project are the catalyst to set in motion
10 the virtuous cycle CETA demands. Moreover, as a technical matter, the nearby power
11 generation to the connected load provides the greatest instantaneous supply,⁶⁴ and thus the
12 local generation from the Project will support reliability of the local grid in times of stressed
13 load.

14 In 2022, the legislature honed EFSEC’s mission “to reduce dependence on fossil fuels
15 by recognizing the need for clean energy” to achieve the state’s goals.⁶⁵ Governor Inslee rightly
16 recognizes the imperative to site new utility-scale projects, emphasizing in his 2023 State of
17 the State address that “*our focus must shift to implementation and investment. We need more*
18 *capacity to site and permit clean energy projects in a timely manner.*”⁶⁶

19 Meeting the state’s climate goals will spur economic growth and resiliency for all
20 Washingtonians, but it will require immense investment to do so. CETA promises “family-

21 _____
22 ⁵⁹ Wash. State Dep’t of Com., 2021 State Energy Strategy (2021), https://www.commerce.wa.gov/wp-content/uploads/2021/01/WA_2021SES_Chapter-F-Electricity.pdf.

23 ⁶⁰ RCW 19.405.010.

24 ⁶¹ Conrad Swanson, *Surge in Electricity Demand Poses Tricky Path Ahead for PNW Utilities, Report Shows*, Seattle Times (May 2, 2024), <https://www.seattletimes.com/seattle-news/climate-lab/surge-in-electricity-demand-spells-trouble-for-pnw-forecasts-show/>.

25 ⁶² *Id.*

26 ⁶³ *Id.*

⁶⁴ This electrical principle applies regardless of contracted power destination.

⁶⁵ H.B. 1812, Sec. 1, 67th Leg., Reg. Sess. (Wash. 2022) (enacted); *see also* RCW 80.50.010.

⁶⁶ Gov. Jay Inslee. 2023 State of the State Address (Jan. 10, 2023) (emphasis added), <https://governor.wa.gov/news/speeches/2023-state-state-address-bold-actions-building-stronger-washington-0>.

1 wage job creation,” recognizing that “[c]lean energy creates more jobs per unit of energy
2 produced than fossil fuel sources.”⁶⁷ Governor Inslee has specifically urged development of
3 renewable energy to drive economic growth, for example, through support of the Regional
4 Clean Hydrogen Hub.⁶⁸ Indeed, Washington’s current renewable energy industry represents
5 at least an \$8 billion investment in wind, solar, and energy storage projects in the state, with
6 future projects currently in the state pipeline representing \$1 billion more.⁶⁹ The Council’s
7 recommendation here will undo the legislature’s and Governor Inslee’s significant climate
8 progress and jeopardize the future of renewable energy investment in the state.⁷⁰ The entire
9 industry is watching with more than a billion dollars in projects—and dozens of *gigawatts* of
10 clean energy—at risk.⁷¹

11 The Council’s recommendation poses both substantive and procedural problems for
12 siting renewable projects in the state. As a practical matter, if the Council were to impose the
13 ferruginous hawk nest site and movement corridor exclusion zones in conditions Spec-5 and
14 Hab-1 without any viability assessment or mitigation planning offramp, **those decisions will**
15 **block clean energy siting on nearly a fifth of the Washington Columbia Plateau Ecoregion**
16 **and over 5,200 square miles of the state, respectively.**⁷² Process-wise, the substantial
17 investment and long-range planning to develop utility-scale renewable projects requires, at the
18 very least, reasonable certainty as to what the siting criteria are. Here, the Council is not only
19 imposing unprecedented, unpublished requirements, but it announced those requirements at
20 the very last step in the process, after Scout has spent nearly a decade surveying the site,

21

22 ⁶⁷ See RCW 19.405.010(2), (4).

23 ⁶⁸ Gov. Jay Inslee, Letter to Hydrogen Stakeholders (Feb. 24, 2022). <https://pnwh2.com/wp-content/uploads/2022/05/Governor-Inslee-Hydrogen-Hub-Letter-2-24-22.pdf>.

24 ⁶⁹ ACP Letter at 2.

25 ⁷⁰ *Id.* at 3-4; *see also* Ex. K, Letter from PGE to EFSEC, Horse Heaven Clean Energy Center Project – Comments on EFSEC Proposed Final Action (“PGE Letter”), at 1 (Apr. 10, 2024); Ex. H, Letter from Brookfield Renewable to EFSEC, Comment on Horse Heaven Wind Farm – Docket 210011, at 1 (Mar. 13, 2024).

26 ⁷¹ *See, e.g.*, ACP Letter at 3-4; Ex. E, Letter from Renewable Northwest, Horse Heaven Clean Energy Center Project – Stakeholder Comments and Concerns on EFSEC Proposed Final Action (“Renewable Northwest Letter”), at 1 (Apr. 10, 2024).

⁷² Jan. Comment Letter at 25; Apr. Comment Letter at 18.

1 identifying and engaging with stakeholders, and designing the Project to optimize output while
2 minimizing impacts.⁷³ Imposition of these unstated, unscientific restrictions at the 11th hour
3 will be a death knell for developers looking to site in the state (developers who have been
4 appropriately following the WDFW Wind Power Guideline mitigation standards), killing the
5 Governor’s key legacy policy directive.⁷⁴

6 It is not just Scout sounding the alarm. Detailed comments from other regional and
7 national renewable stakeholders make clear the devastating effect the Council’s
8 recommendation will have on future renewable development in the state:

- 9 • **Nonprofit advocacy group Renewable Northwest warns of “the dangerous precedent that EFSEC’s current trajectory sets for the development of renewable energy in Washington state,”**⁷⁵ citing EFSEC’s lack of “careful, scientific review” given that “[a]fter the release of the Final EIS for the Horse Heaven Project, the Council proposed ad-hoc project changes that go beyond the Final EIS’s proposed environmental mitigation measures.”⁷⁶ Specifically, the “decision to remove site-level exceptions and granularity from project siting [in Spec-5 and Hab-1] is ... a misuse of tools not designed to directly regulate clean energy projects.”⁷⁷
- 10
11
12
13
14
15 • **The national voice of the renewable community, American Clean Power, and the Energy and Wildlife Action Coalition assert similar concerns,** criticizing EFSEC’s “major changes to infrastructure siting requirements” that are “not based on sound science or other rational basis and will work against CETA by unnecessarily restricting responsible renewable energy development.”⁷⁸ The groups warn that these “[a]rbitrary changes late in the permitting process erode procedural confidence and will have a chilling effect on future renewable energy investment in Washington.”⁷⁹
- 16
17
18
19
20 • **Northwest Electric Utility PGE anticipates needing 3,500-4,500 MW of new, non-emitting resources and storage in the next six years** and is “concern[ed] with the process experienced by this project” and the “**unfavorable impact these proceedings could have not only on Washington’s renewable energy industry, but on the broader region’s ability to procure clean energy resources and meet**
- 21
22
23

24 ⁷³ See ASC Sec. 1.12.2, at 1-60 to -94.

⁷⁴ ACP Letter at 2.

25 ⁷⁵ Renewable Northwest Letter at 1.

⁷⁶ *Id.* at 4.

26 ⁷⁷ *Id.* at 5.

⁷⁸ ACP Letter at 2.

⁷⁹ *Id.* at 3.

1 shared climate goals.”⁸⁰ Specifically, the Council’s “significant changes proposed
2 late in the siting process” pose “increased uncertainty about siting in Washington
3 state,” which will compromise PGE’s ability to evaluate “timing and capability to
bring projects online” in its procurement process.⁸¹

- 4 • **GE Vernova, the nation’s leading energy and technology innovation company,**
5 **notes that EFSEC’s recommended Spec-5 ferruginous hawk nest buffer “is the**
6 **most restrictive setback for the species in North America** and provides for no
7 allowance to confirm whether a formally identified nest even exists.”⁸² It posits
8 “the adoption of draft non-peer reviewed unprecedented policy for mitigation
9 measure represents arbitrary and capricious requirements that are scientifically
10 unjustifiable.”⁸³ As a result, “[e]quity investors and lenders will not invest time
11 and capital in a renewable energy project if there is uncertainty in the size and
12 scope of the project that will ultimately be approved by the governmental
13 regulatory agencies.”⁸⁴
- 14 • The Northwest & Intermountain Power Producers Coalition (“NIPPC”) contends
15 that the Council (1) “**establishing a continuous 2-mile setback zone around all**
16 **active and historic ferruginous hawk nests, and (2) prohibiting infrastructure**
17 **within a broad set of wildlife movement corridors mapped as part of an agency**
18 **working group for transportation planning” both “diverge from other**
19 **standards ... including past EFSEC practice,” and were “weakly vetted at a**
20 **late stage in the application process.”**⁸⁵ NIPPC observes “the measures proposed
... differ dramatically from other states and the federal government,”⁸⁶ and “limit[]
late-stage shifts in recommendations to those justified by scientific or other
relevant, publicly available evidence in the record.”⁸⁷
- 21 • Brookfield Renewable, Scout's parent company, also urges **the Council**
22 **return to a “data-driven certification process for renewable energy**
23 **development”** and warns that the “dramatic reduction of the [P]roject presents
24 a danger to not only the viability of the [P]roject itself, but also to broader
25 renewable resource development in the state.”⁸⁸

21 ⁸⁰ PGE Letter at 1.
22 ⁸¹ *Id.* at 1-2.
23 ⁸² Ex. F, Letter from GE Vernova to EFSEC, Horse Heaven Clean Energy Center Project – Stakeholder Comments
and Concerns on EFSEC Proposed Final Action, at 1 (Apr. 9, 2024).
24 ⁸³ *Id.* at 5.
⁸⁴ *Id.* at 6.
25 ⁸⁵ Ex. G, Letter from NIPPC to EFSEC, Horse Heaven Clean Energy Center Project – Stakeholder Comments
and Concerns on EFSEC Proposed Final Action, at 2 (Apr. 10, 2024).
26 ⁸⁶ *Id.*
⁸⁷ *Id.*
⁸⁸ Ex. H, Letter from Brookfield Renewable to EFSEC, Comment on Horse Heaven Wind Farm – Docket 210011,
at 1 (Mar. 13, 2024).

- 1 • Renewable developer wpd USA Inc. echoes that EFSEC’s “proposed late-stage
2 alterations” to the Project “erode[] industry-wide trust and confidence and will
3 establish a precedent that could pose a significant risk to Washington’s clean energy
4 transition.”⁸⁹
- 5 • A member of Richland chapter of Citizens Climate Lobby describes the Project as
6 a “much-needed” source of renewable energy to supply local decarbonization
7 projects like the proposed zero-carbon fertilizer plant in Benton County, and that
8 “views would be no more severely affected than the current presence of radio and
9 television antenna placements and existing wind turbines.”⁹⁰

10 The Council’s recommendation also draws sharp criticism of former Congressman and
11 environmental and wildlife advocate Norm Dicks, who in a recent *Seattle Times* Op-Ed urges
12 that “EFSEC is making poor decisions that will jeopardize project viability and set dangerous
13 precedent for additional clean energy projects that our future depends upon.”⁹¹ He is:

14 “particularly shocked by the [C]ouncil’s mitigation that requires a two-mile
15 buffer around hawk nests, with many inactive for years, and banning activity
16 year-round, rather than using the best available science for a workable
17 solution...[N]o state (including ours) or federal regulation mandates such
18 protections...My concerns are not just about this project, but the impact on our
19 ability to meet [CETA] requirements and the chilling signal to other clean energy
20 investments in Washington. Beyond EFSEC’s flawed process for this vital
21 project, I am alarmed by the [C]ouncil’s seeming inaction toward the imminent
22 impact of climate change.”⁹²

23 Mr. Dicks “call[s] upon EFSEC to provide strong leadership, reconsider many of its
24 preliminary decisions and use the environmental impact statement and science to develop a
25 viable Horse Heaven project.”⁹³

26 ⁸⁹ Ex. I, Letter from wpd USA Inc. to EFSEC, at 2 (Apr. 10, 2024).

⁹⁰ Ex. J, EFSEC, Horse Heaven SCA Comments 0801-0900, at 76 (Apr. 11, 2024),
<https://www.efsec.wa.gov/energy-facilities/horse-heaven-wind-project/horse-heaven-sca> (comment from Roger
Ovink).

⁹¹ Norm Dicks, *Reevaluate Decisions that Hamper WA’s Clean Energy Future*, The Seattle Times (Mar. 18,
2024), <https://www.seattletimes.com/opinion/reevaluate-decisions-that-hamper-was-clean-energy-future/>.

⁹² *Id.*

⁹³ *Id.*

1 The editorial board of the *Seattle Times* agrees, having recently described the vital
2 importance of this Project, which “will set the tone for whether Washington can build bold
3 renewable energy projects.”⁹⁴ The editorial board stated:

4 “A fully built-out Horse Heaven [without the Council’s restrictions] still
5 would add less than 5% of the total clean-energy capacity Washington needs
6 in about a decade...Energy demands are rising fast. State policies are
7 reducing supply for goals, and new generation sources aren’t built fast
8 enough. This paradox threatens a nightmare for the grid, its operators and
9 power users,...State leaders...must act urgently to approve clean energy
10 projects that meet the needs of surging load growth. The choices those
11 leaders make today will determine whether Washington leads in green
12 energy, or if its efforts on climate change are merely virtue signaling at a
13 great cost to the state’s residents.”⁹⁵

14 Reconsideration of the Council’s recommendation and a return to precedent and
15 science-backed policy are the only ways to uphold order in clean energy siting and protect and
16 further the legislature’s and Governor Inslee’s climate progress.

17 **B. The recommendation’s ferruginous hawk and wildlife movement exclusion zones
18 are unscientific and untenable.**

19 **1. The Council’s recommended exclusion zones in condition Spec-5 are
20 based on subjective, aspirational ideology that actively ignores the best
21 available science.**

22 A 0.6-mile setback from active nest sites during breeding season is consistent with the
23 only WDFW policy on ferruginous hawk published to date.⁹⁶ That policy was in effect when
24 the application was submitted and vested.⁹⁷ WDFW has since issued revised recommendations
25 for the species (discussed below), but that document has never been finalized, peer reviewed,
26

27 ⁹⁴ Editorial Board, *Forecast Is Clear: State Must Boldly Pursue New Green Energy Sources*, The Seattle Times
(May 3, 2024), https://replica.seattletimes.com/popovers/dynamic_article_popover.aspx?artguid=4a4b7fe6-11ca-4ea1-af4d-e85b45a68f09&appcode=SEATTL&guid=12c58cb2-66fc-48e6-b3ba-9ab6033cb062&pnum=89.

28 ⁹⁵ *Id.*

29 ⁹⁶ See WDFW, *supra* note 18 (Ferruginous Hawk).

30 ⁹⁷ See *Lauer v. Pierce County*, 173 Wn.2d 242, 258, 267 P.3d 988 (2011) (“Developers are entitled to the benefit
31 of ‘the regulations in effect at the time a complete ... application is filed[.]’” (citation omitted)); *Weyerhaeuser
32 v. Pierce County*, 95 Wn. App. 883, 895, 976 P.2d 1279 (1999) (development applicants have a “due process right
33 to expect that its project would be subject to fixed rules, as opposed to fluctuating legislative policy, so it could
34 plan its project with reasonable certainty”).

1 or published for public or other use.⁹⁸ Moreover, a 0.6-mile setback from active nest sites
 2 during breeding season is consistent with the ferruginous hawk policies implemented by other
 3 state and federal wildlife jurisdictions regulating the species.⁹⁹

4 **Summary Table of Ferruginous Hawk Nest Site Setback Standards by Jurisdiction**

Jurisdiction	Source of Setback Standard	Publish Date	Nest Setback miles/feet	Considers Nest Condition/Viability? <i>Activity, time of year, habitat, other</i>
Washington	Horse Heaven draft SCA	2024	2.0/10,560 For wind turbines	No consideration of nest activity, viability, or habitat assessment
Washington	Draft Management recommendations for Washington’s Priority Species – Ferruginous Hawk	Released 2023 (unpublished)	2.0/10,560	Yes. Habitat based analysis, site assessment, and mitigation.
USFWS Region 6	U.S. Fish and Wildlife Service (USFWS), Region 6 Wildlife Buffer Recommendations for Wind Energy Projects Version 3.0	2021	1.0/5,280	Yes. Setback is from active nests, with seasonal considerations.
Colorado	Recommended buffer zones and seasonal restrictions for Colorado raptors	2020	0.5/2,640	Yes. Setback is from active nests, with seasonal considerations.
Utah	Utah field office guidelines for raptor protection from human and land use disturbances	2002	0.5/2,640	Yes. Setback from active/occupied nests. Seasonal buffer.
Alberta, Canada	Recommended Land Use Guidelines for Protection of Selected Wildlife Species and Habitat within Grassland and Parkland Natural Regions of Alberta	2011	0.62/3,274	Yes. Setback is from active nests, with seasonal considerations.
Manitoba, Canada	Recommended Development Setback Distances and Restricted Activity Periods for Birds by Wildlife Feature Type	2021	0.62/3,274	Yes. Setback is from active nests, with seasonal considerations.

18 The Council’s setbacks here are also even more restrictive than those established for
 19 the federally endangered northern spotted owl and marbled murrelet in the State Trust Lands
 20 Habitat Conservation Plan and Forest Practices Habitat Conservation Plan.¹⁰⁰

21 Even the increased two-mile buffer recommended by the FEIS included an important
 22 qualification—a viability assessment whereby the buffer would be triggered *only* by nest sites
 23 that are “available” to the species.¹⁰¹ The Council’s recommendation not only imposes the

24 ⁹⁸See EXH-4015_X, Draft Management Recommendations for Washington’s Priority Species: Ferruginous
 25 Hawk (July 5, 2023).

⁹⁹ See Jan. Comment Letter at 2-3; Apr. Comment Letter at 3.

26 ¹⁰⁰ See Wash. Dep’t of State Lands, Washington Forest Practices Habitat Conservation Plan and State Trust Lands
 Habitat Conservation Plan.

¹⁰¹ FEIS ES-34 to -36.

1 larger two-mile buffer, it also *rejects* the FEIS-recommended viability assessment for primary
2 components: wind turbines (within two miles of active and historical documented nest sites)
3 and solar arrays and BESS (within half-mile of the same).¹⁰²

4 As detailed in Scout’s comment letters to the Council, and proven by substantial
5 evidence in the record,¹⁰³ that decision:

- 6 • Ignores the best available science from the past seven years of site-specific field
7 surveys and the SEPA Responsible Official’s recommendations in FEIS;
- 8 • Requires setbacks from historical nests that no longer even exist;
- 9 • Defers to the WDFW-administered PHS database that is unquestionably outdated
10 and inaccurate;
- 11 • Omits any standard to determine nest viability for siting secondary Project
12 components; and
- 13 • Far exceeds the policies of *all* other state and federal wildlife jurisdictions
14 regulating the species.¹⁰⁴

15 The Council’s condition Spec-5 triggers mandatory setbacks for primary components
16 around 23 nest sites WDFW has classified, and site-specific data confirm, as “remnant” or
17 “gone” from the landscape, including some where *not one single stick* from the nest remains.¹⁰⁵
18 These historical sites are in areas surrounded by sprawling residential development that has
19 been permitted by Benton County, with one “gone” nest literally in a residential backyard.¹⁰⁶

20 The Council’s setback is *four times* the size of buffers required by other wildlife
21 agencies for *active* nests and only during the breeding season.¹⁰⁷ It exceeds WDFW’s
22 recommendations in the Department’s Wind Power Guidelines and goes beyond even
23 WDFW’s approach in its recent unpublished, draft management recommendations for the
24 species by requiring avoidance of not just habitat valuable to the species, but *any* land type

¹⁰² Draft SCA, Apps. 2, 12-13.

¹⁰³ See Post Hearing Brief at 37-44.

¹⁰⁴ Jan. Comment Letter at 2-3; Apr. Comment Letter at 3.

¹⁰⁵ Apr. Comment Letter at 11-12, Tbl. 3.

¹⁰⁶ Apr. Comment Letter at 6-7 (showing representative photos of gone and remnant nests).

¹⁰⁷ *Id.* at 8, Tbl. 2.

1 within the two-mile buffer.¹⁰⁸ The Council’s setback also ignores all the expert witnesses who
2 testified in the adjudication, who disagreed about the appropriate size of the buffer but never
3 proposed one without a viability assessment.¹⁰⁹ Moreover, it ignores the comprehensive suite
4 of existing mitigation recommended in the FEIS, which the SEPA Responsible Official
5 determined would *fully* mitigate wildlife and habitat impacts.

6 Further, the Council’s Spec-5 relies solely on the WDFW-administered PHS database,
7 a poorly controlled and misapplied resource. The serious problems with these data are detailed
8 in Scout’s April comment letter, including that they are neither regularly updated nor field
9 reviewed, and that published nest site locations are incorrect.¹¹⁰ Worse still, the Council’s
10 Spec-5 freezes the setbacks based on the PHS data as they will appear on the date of SCA
11 execution, providing no opportunity to revisit or update the exclusion zones based on evolving
12 biological conditions.¹¹¹

13 Finally, EFSEC’s Spec-5 provides no clear standards for the viability assessment that
14 applies for secondary components and solar and BESS beyond a half-mile.¹¹² For one, it fails
15 to explain when a ferruginous hawk nest site is “no longer available.”¹¹³ Nor does it specify
16 when associated “foraging habitat” is “no longer available.”¹¹⁴ Scout’s biologists have
17 proposed detailed, objective criteria that should be used, as detailed in the record.¹¹⁵

18
19
20
21

¹⁰⁸ Jan. Comment Letter at 5; Apr. Comment Letter at 9.

¹⁰⁹ See Ex. L, Excerpted Adjudication Transcript, Day 8 Tr. at 1592:23-1593:4 (D. McIvor) (agreeing there must be a “nuanced and biologically informed approach to an offset”); EXH-4015, Tbl. 3; Adjudication Transcript, Day 5 Tr. at 926:15-20 (E. Jansen) (advocating for a nuanced approach with viability assessment for buffers in the Horse Heaven Hills because “[a] blanket application of a two-mile radius ... doesn’t include ... context or consideration.”).

¹¹⁰ See Apr. Comment Letter at 10-13.

¹¹¹ *Id.* at 12.

¹¹² See *id.* at 13-16.

¹¹³ *Id.* at 13-14.

¹¹⁴ *Id.* at 14.

¹¹⁵ *Id.* at 14-15.

1 **2. Council’s delegation of final siting determinations to the PTAG through**
2 **condition Hab-4 is unprecedented, unwarranted, and improper.**

3 Traditionally, the Council convenes a TAC to oversee post-construction monitoring of
4 impacts from project operations and advise on whether any additional, adaptive mitigation is
5 needed as a result.¹¹⁶ The Council’s recommendation, however, introduces the unprecedented
6 approach that such a group, now termed a pre-operational technical advisory group, or PTAG,
7 would be convened *before* construction—at a time when no operational monitoring is
8 needed—and empowered to participate in pre-construction and construction-phase regulatory
9 review,¹¹⁷ a role that goes far beyond “advisory.” Scout submitted comments citing the many
10 problems with this plan,¹¹⁸ none of which were addressed or resolved.

11 Under the Council’s new approach, the PTAG would not just advise or provide
12 technical guidance on wildlife management plans; it would review and make conclusions
13 dictating “final Project design” and on “additional mitigation measures” even *before* the
14 Project is built.¹¹⁹ EFSEC delegates numerous additional siting tasks, including developing the
15 “final Project layout and design” based on PTAG findings related to survey results for many
16 different species.¹²⁰ The PTAG would comprise representatives of WDFW, DNR, “interested
17 tribes, Benton County, and the USFWS,” and perhaps “local interest groups, not-for-profit
18 groups, and landowners.”¹²¹ Adding to the uncertainty, the Council leaves open the final PTAG
19 membership list, to be based on “the relevance and/or availability of proposed members.”¹²²

20 Delegating substantive siting decisions to a PTAG is improper, unnecessary, and
21 unprecedented. *First*, it is wholly inappropriate, and illegal, to delegate substantive siting

22 _____
23 ¹¹⁶ See, e.g., SCAs for Columbia Solar, Wild Horse Wind, Kittitas Valley Wind projects.

24 ¹¹⁷ FEIS, Hab-4, ES-29.

25 ¹¹⁸ See Ex. M, Excerpts of EFSEC, Horse Heaven SEPA Draft EIS Comments Received – General, Comment No.
26 528, at 30 Appendix 1b, at 3 (Feb. 13, 2023), <https://www.efsec.wa.gov/energy-facilities/horse-heaven-wind-project/horse-heaven-sepa> (Comments of Scout on Horse Heaven Wind Farm Draft Environmental Impact Statement (“Scout Jan. 2023 DEIS Comments”)).

¹¹⁹ Draft SCA, Art VI.G; see also App. 2, Hab-4.

¹²⁰ See Draft SCA, Art VI.L.

¹²¹ Draft SCA, Art VI.G; see also App. 2, Hab-4.

¹²² *Id.*

1 authority over final Project design to non-Councilmembers. The Washington Supreme Court
2 has made clear that an agency may delegate ministerial functions but it cannot delegate its
3 discretionary or quasi-judicial authority.¹²³ Here, the Council has delegated to the PTAG
4 substantive decisions over where exactly the exclusionary zones will be.¹²⁴ That delegation
5 poses a double jeopardy problem that scraps any certainty over final Project siting. *Second*,
6 deferring substantive siting decisions about where Project components can be built to the
7 PTAG review phase makes it impossible for Scout (or other project developers) to determine
8 whether the Project remains viable or what SCA amendments will be needed. This uncertainty
9 will have a real and immediate chilling effect on development in the state. *Third*, the Council
10 has provided no justification for *why* the PTAG is needed, when no such group has been
11 convened before. Indeed, as evidenced by *every other project approved by the Council to date*,
12 the Council, with its staff and in reliance on its sister agencies and applicants' site-specific
13 data, has the necessary information and experience to develop the final site boundaries without
14 a PTAG. Using a post-construction TAC, like that in all other EFSEC projects as well as non-
15 EFSEC jurisdictional projects, is the sound approach here too.

16 **3. The Council's Hab-1 relies on a decade-old transportation planning map**
17 **to eliminate Project components, ignoring current, site-specific data and**
18 **the porosity of Project features.**

19 The Council's recommended measure Hab-1 restricts siting key wind turbines and
20 transmission components based on purported wildlife movement corridor impacts.¹²⁵ That
21 decision was based not on current science but *on a single map* created in a desktop exercise in
22 the early 2010s, by a WDFW-Washington Department of Transportation working group
23 intended to inform where to site large, linear transportation infrastructure projects (like

24 ¹²³ See *Application of Puget Sound Pilots Ass'n*, 63 Wn.2d 142, 145, 385 P.2d 711 (1963) ("It is a general principle
25 of law ... that a delegated power may not be further delegated by the person to whom such power is delegated."
26 (quoting 42 Am. Jur. *Public Administrative Law* § 73)); *Wash. Fed'n of State Emps. v. State Dep't of Gen. Admin.*,
152 Wn. App. 368, 385, 216 P.3d 1061 (2009) (General Administration Department engaged in "improper
delegation" by delegating to other agencies its task to regulate governmental bidding process).

¹²⁴ See, e.g., Draft SCA, Art. IV.L, Ferruginous Hawk ("Any Project infrastructure to be sited within two miles
of a ferruginous hawk nest will require prior consultation with the PTAG.").

¹²⁵ Draft SCA, App. 2, at 8 (Hab-1).

1 freeways) that completely block a landscape.¹²⁶ Even back when the working group created
2 the modeled map, it expressly warned that “field review” would be needed to “ensure the
3 linkages are viable.”¹²⁷ Neither field review nor an update ever occurred,¹²⁸ though Scout’s
4 habitat surveys provide the exact data necessary to do so, and inform the comprehensive suite
5 of mitigation already in place. In short, the existing mitigation scheme already addresses the
6 impacts purportedly identified in the movement corridor map.

7 The Council’s reliance on this map to justify no-go siting areas is inappropriate for
8 several obvious reasons, as detailed in Scout’s comment letters.¹²⁹ Like the Council’s Spec-5,
9 Hab-1 is a novel, unpublished requirement never before imposed on any energy (or other
10 development) project in the state.¹³⁰ If applied broadly, it would preclude renewable energy
11 siting on more than 5,200 square miles of the state’s prime renewable energy generation
12 area.¹³¹ It has no relevance or value when applied to porous project features like wind turbines
13 and overhead collection lines. And again, this measure is wholly unwarranted given the exiting
14 suite of wildlife and habitat mitigation already proposed for the Project.

15 **C. None of the Council’s proffered justifications support the recommendation.**

16 **1. The so-called “evidence” the Council references generally to support its**
17 **decision does not exist in the record.**

18 The Council justifies its Spec-5 recommendation with generalized, conclusory
19 statements claiming to be supported by evidence. But the record shows that evidence has been
20 cherry picked or mischaracterized to support the Council’s later proposals.
21
22

23 ¹²⁶ Jan. Comment Letter at 6-7; Apr. Comment Letter at 18.
24 ¹²⁷ Washington Wildlife Habitat Connectivity Working Group, Washington Connected Landscapes Project:
25 Analyses of the Columbia Plateau Ecoregion, Columbia Plateau Ecoregion Addendum: Habitat Connectivity
26 Centrality Ch. 13, Fig. 13.7 (2013), https://waconnected.org/wp-content/uploads/2013/07/ColumbiaPlateauAddendum_Chapter_13_CompositeMaps.pdf
¹²⁸ See *id.*; see also Jan. Comment Letter at 6-7.
¹²⁹ See Jan. Comment Letter at 6-7; Apr. Comment Letter at 17-19.
¹³⁰ See Apr. Comment Letter at 18.
¹³¹ See *id.*; Jan. Comment Letter at 25.

1 Most egregious, the Council’s key finding that “ferruginous hawks currently use ... the
2 Project site for nesting and foraging”¹³² is uncited and unsupported in the record. Scout
3 conducted raptor nests surveys for seven of the last eight years.¹³³ The last time ferruginous
4 hawk were documented nesting in the Project area—in fact, *anywhere* in the Horse Heaven
5 Hills—was 2019.¹³⁴ That particular nest was later, and most recently, occupied by a common
6 raven.¹³⁵ That occupancy is emblematic of the fact that the “raptor community has already
7 changed” in the Project area, even “absent a wind project.”¹³⁶ The hawks are virtually certain
8 never to return to the Project area given that, as *all* biologist experts agreed, renewable energy
9 development is but one of myriad ferruginous hawk threats in the area, and the greatest was
10 habitat loss due to existing agricultural use and residential sprawl.¹³⁷ Because there is no end
11 to that sprawl in sight, the species is highly unlikely to ever return to the Horse Heaven Hills.¹³⁸
12 Despite a contrary narrative from certain WDFW staff, the data prove that Horse Heaven Hills

13
14 _____
15 ¹³² Adjudicative Order at 31.

16 ¹³³ See ASC, App. K, Erik W. Jansen, Report 23, Patterns of Ferruginous Hawk (*Buteo regalis*) Nesting in the
17 Horse Heaven Hills, Benton County, Washington, 2017-2019, 2022 (June 5, 2022) (“2022 Ferruginous Hawk
18 Survey”).

19 ¹³⁴ EXH-3019_X_REDACTED, Erik W. Jansen, 2023 Raptor Nest Surveys for the Horse Heaven Clean Energy
20 Center, Benton County, Washington, at 11, 18, Tbl. 6 (Aug. 3, 2023) (“2023 Raptor Survey”); Adjudication
21 Transcript, Day 5 Tr. at 991:21-992:2 (E. Jansen) (“[M]ajority of historical nests in the WDFW PHS database are
22 considered gone, so no longer on the landscape, or in remnant condition, which is essentially defined as a
23 scattering of sticks on the ground.”).

24 ¹³⁵ See Apr. Comment Letter at 16 (citing 2022 Ferruginous Hawk Survey at 9, Tbl. 3).

25 ¹³⁶ See Adjudication Transcript, Day 5 Tr. at 922:19-24 (E. Jansen) (“Based on five years of survey data in the
26 Horse Heaven Hills, that the raptor community has already changed absent of a wind project and that the majority
of the nests that we see some years are occupied by common raven.”).

¹³⁷ See Adjudication Transcript, Day 8 Tr. at 1568:16 (D. McIvor); see also Adjudication EXH-4109_Dep.,
Watson Deposition, at 109:18-112:14 (July 14, 2023) (describing the various threats to ferruginous hawk
including climate change, vehicle collisions, and wildfires); Exh-4108_Dep., Michael Ritter Deposition, at
159:17-160:22 (May 31, 2023) (urban sprawl and agricultural use have the greatest impact on ferruginous hawk
populations in Benton and Franklin Counties); Adjudication Transcript, Day Tr. at 960:21-25, 961:1-20 (E.
Jansen) (“the [ferruginous hawk] faces a myriad of conservation issues that influence nest failure, nest
abandonment, and nest occupancy”); see also Exh-4020_Dep., Jason Fidorra Deposition, at 135-137 (July 20,
2023) (describing various anthropogenic impacts on ferruginous hawk population); Adjudication Transcript, Day
6 Tr. at 1252:19-25 (T. Rahmig) (describing how siting the Project on agricultural land minimizes the risk to
ferruginous hawk because the habitat is unattractive for them).

¹³⁸ See Adjudication Transcript, Day 5 Tr. at 962:25-963:12 (E. Jansen) (“[P]lac[ing] the impacts from the project
development in context with other sources of anthropogenic disturbance in the Horse Heaven Hills, ... there are
relatively fewer impacts to habitat compared to let’s say upcoming housing development in the Horse Heaven
Hills.”).

1 are simply not well-suited for the species’ recovery, with an average ferruginous hawk nesting
2 territory occupancy rate nearly 10 times below the statewide average.¹³⁹

3 Nor is there support, cited or otherwise, for the Council’s statement that the Project
4 “would threaten the persistence” of the species across “Washington State.”¹⁴⁰ The FEIS
5 identifies “potential impacts on ferruginous hawk” but concluded those impacts would be
6 “non-significant” with the recommended mitigation.¹⁴¹ It recommended, in addition to the suite
7 of other habitat and wildlife mitigation measures, a two-mile setback with a viability
8 assessment for *all* Project components.¹⁴² That is, the setback would not be triggered if a nest
9 site and foraging habitat around that site are “no longer available to the species.”¹⁴³

10 The Council’s conclusions in the Adjudicative Order focus primarily on the *size* of the
11 setback, and all but ignore *which* nest sites trigger a setback in the first place, by ignoring the
12 FEIS-recommended viability assessment. That misstep may derive from the Council’s
13 misunderstanding of Counsel for Environment biologist Don McIvor’s expert testimony,
14 which in fact supported a two-mile buffer as verified through “nuanced and biologically
15 informed approach” that takes into account nest and habitat viability, i.e., a buffer that includes
16 a nest viability assessment.¹⁴⁴ Mr. McIvor did not “c[o]me to agree with recommending a large
17 buffer around active and historic nest site core areas.”¹⁴⁵ Rather, with respect to a two-mile
18 buffer around “historical nests,” he advocated for “a rational conversation about what could
19 constitute a historic nest territory that has some probability of being reoccupied again in the
20 future,” and “th[ought] there could be a process for identifying some of these historic sites and
21
22

23 ¹³⁹ Adjudication EXH-3019_X_REDACTED, 2023 Raptor Survey at 19-20 (compare Horse Heaven Hills nesting
territory occupancy during five-year survey period, 5.6%, with most recent statewide occupancy of 41.0%).

24 ¹⁴⁰ *See id.*; FEIS at 5-14 to 5-15 (discussion of cumulative impact to species).

25 ¹⁴¹ FEIS ES-13.

26 ¹⁴² *Id.*; *see* FEIS ES-34 to -36.

¹⁴³ FEIS ES-34 to -36.

¹⁴⁴ *See* Ex. L, Adjudication Transcript, Day 8 Tr. at 1592:23-1593:4 (D. McIvor).

¹⁴⁵ Adjudicative Order at 31 (citing Adjudication Transcript, Day 8 Tr. at 1590:5-1593:3 (remainder of answer stricken as non-responsive)).

1 coming to an agreement that their likelihood of reuse would be slim or none,”¹⁴⁶ that is, a more
2 “nuanced approach.”¹⁴⁷

3 **2. With respect to FEIS Figures 2-5 and 2-6, even if turbines excluded by**
4 **Spec-5-also pose impacts to other resources, none of those other impacts**
5 **independently warrant avoidance.**

6 Perhaps recognizing the lack of scientific support for its Spec-5 recommendation, the
7 Council attempts to further justify those setbacks by stating that they will also serve to reduce
8 impacts to *other* resources as well.¹⁴⁸ Under this approach, the Council suggests it is using
9 Spec-5 as a proxy to address other, unspecified impacts, impacts that are already mitigated by
10 other measures. The Council’s bootstrapping approach here is unprecedented, untested, and
11 unsound for numerous reasons. The Council attempts to tout the generalized “multiple resource
12 impacts” depicted in FEIS Figures 2-5 and 2-6, additional benefits that “would also result in”
13 reducing impacts to other resources.¹⁴⁹ But those figures’ impact classifications are
14 unintelligible without more specific information because they do not explain why any given
15 wind turbine has been classified as class 3, 2, or 1. Indeed, for “class 3” turbines, the figures
16 do not even state *how many* resources are implicated, let alone *which* resource and to what
17 degree.¹⁵⁰ Scout is unaware of this type of multiple impact classification system ever being
18 used in an EIS, and it has certainly never been used as a basis for eliminating major clean
19 energy project infrastructure. The Applicant knows of no SEPA document, *ever*, that has taken
20 this approach. Other parties, including Project opponents, also criticize this presentation as
21 highly unclear and subjective.¹⁵¹ Accordingly, the Council’s *additional* multiple resource
22 impact justification is unclear, unprecedented, and unwarranted.

23 ¹⁴⁶ Adjudication Transcript, Day 8 Tr. at 1601:21-1602:13 (D. McIvor).

24 ¹⁴⁷ See *id.* at 1592:23-1593:4 (D. McIvor); see also Apr. Comment Letter at 9.

25 ¹⁴⁸ See Report to the Governor at 12-13 (relying on FEIS Figs. 2-5 & 2-6, which describe multiple impacts, to
26 exclude certain turbines).

¹⁴⁹ See *id.*

¹⁵⁰ Apr. Comment Letter at 20.

¹⁵¹ See EFSEC, Horse Heaven SCA Comments 901-973, at 8 (Apr. 11, 2024),
https://www.efsec.wa.gov/sites/default/files/210011/draftscacomments/0901%20-%200973_r_0.pdf (comments
of Paul Krupin, Tri-Cities CARES (Figs. 2-5 & 2-6 make “it exceedingly difficult for anyone to reasonabl[y]
determine the impact the proposed mitigations will have”)); Letter from the Benton County Board of County

1 Nor does it avail substantively. The Council states it “believes” the exclusionary zones
2 imposed by Spec-5 will also decrease impacts to “Yakama Nation cultural resources,” the
3 “viewshed, paragliding and hang gliding, and areas of greatest concern regarding possible
4 obstruction to aerial firefighting.”¹⁵² But, as detailed below, the record makes clear that no
5 additional mitigation of those impacts is warranted or supported by the evidence.

6 **i. The Project’s impact to aerial firefighting is no different than any**
7 **other wind project approved and operating in the state under**
8 **established SCA conditions.**

9 With respect to aerial firefighting, the Project includes all EFSEC-required and current
10 best practices regarding public safety and fire suppression.¹⁵³ Specific aerial firefighting
11 concerns (raised by local opponent group TCC) are overstated and misplaced. The same
12 obstacles are also present at all other comparable wind farms in the eastern portion of the state,
13 including the nearby Nine Canyon Wind project. As Chair Drew correctly noted during the
14 Council’s January Meeting, from a fire control perspective, the unavailability of aerial
15 firefighting over wind turbine areas is far less important than firefighting capability around the
16 Project boundary. Thus, the key elements of any emergency response plan, including Scout’s,
17 are source prevention and ensuring adequate response access and resources and access should
18 a fire occur.¹⁵⁴

19 State and local fire officials agree. Russ Lane, Division Manager, Washington
20 Department of Natural Resources Wildland Fire Management Division, confirmed that even
21 with aerial firefighting restricted over the Project, “they have multiple effective tools to do

22 _____
23 Commissioners to EFSEC, Scout Clean Energy, LLC, for Horse Heaven Wind Farm, Applicant Docket No. EF-
24 210011, at 2, available at preceding hyperlink at pdf p. 124 (describing ambiguities that arise by using Spec-5 to
25 mitigate multiple impacts identified in FEIS Figs. 2-5 & 2-6).

26 ¹⁵² Report to the Governor at 13.

¹⁵³ ASC Sec. 4.1.2, 4.4.2.5 (describing the impacts from fire or explosion and measures for responding to a fire
during Project construction and operation); *see also* ASC, App. P (draft emergency response plan); FEIS 2.2.7
(noting Scout updated BESS design to implement evolving guidance for BESS fire protection); Adjudication
Transcript, Day 1 Tr. at 107:10-13 (L. McClain) (purposes of fire management plan and emergency response
plans are to respond to the rare event if fire occurs); *id.* at 1724:17-1725:3 (D. Kobus) (the best response to a
BESS facility with modular design (which mitigates risk of spreading) is to “let [any fire] burn out on [its] own,
without the need for high volumes of water or dangerous personnel involvement”).

¹⁵⁴ *See* ASC, App. P (draft emergency response plan).

1 aerial firefighting around the perimeter of wind projects from a safe standoff distance.”¹⁵⁵
2 Lonnie Click, Fire Chief for Benton County Fire District #1, concurred that their response to a
3 fire in the area would be “nearly exact.”¹⁵⁶ Thus, consistent with past practice and like with all
4 other wind turbine projects in the state, appropriate fire response can be performed from the
5 perimeter, one-quarter mile from the wind turbine area.

6 **ii. The evidence surrounding recreational impacts does not support**
7 **outright avoidance in any area.**

8 The Project’s impact to recreation is similarly overstated in the Council’s Order and
9 report. Until the Council’s recommendation to the Governor, concern and discussion about
10 recreational impacts were minimal. The only adjudication testimony offered on recreational
11 issues was in the context of visual impacts (discussed below).¹⁵⁷ The FEIS recognized the
12 Project would impact local paragliders (by removing flight paths and landing space and
13 increasing possible collision risk)¹⁵⁸ and have a medium-to-high visual impact on recreational
14 viewpoints.¹⁵⁹ But the only specific mitigation recommended was for Scout to coordinate with
15 DNR, Benton County, and EFSEC to identify and improve existing recreational activities and
16 build information boards, and to coordinate with local and regional recreation groups to
17 develop and maintain an adaptive safety management plan for recreational activities, including
18 paragliding.¹⁶⁰ No specific avoidance was recommended. Absent any other or new evidence
19 suggesting recreational impacts, the Council’s reliance on recreational impacts to further
20 justify the Spec-5 exclusion zone is unsupported and unwarranted.

21 ¹⁵⁵ Transcript of EFSEC Meeting Minutes at 9 (Feb. 21, 2024),
https://www.efsec.wa.gov/sites/default/files/181034/0023/20240221_CompletePacket.pdf (comment of Russ
22 Lane, Division Manager, Washington Department of Natural Resources Wildland Fire Management Division, as
stated by Amy Moon, EFSEC staff).

23 ¹⁵⁶ Transcript of EFSEC Meeting Minutes at 67 (Jan. 31, 2024),
https://www.efsec.wa.gov/sites/default/files/181034/0023/20240131_CompletePacket_0.pdf (comment of
24 Lonnie Click, Fire Chief for Benton County Fire District #1).

25 ¹⁵⁷ See Scout Post Hearing Brief at 31; EXH-1021_R at 6-7 (the VIA’s key observation points include views from
scenic overlooks and public recreation areas).

26 ¹⁵⁸ FEIS at 4-480.

¹⁵⁹ *Id.*

¹⁶⁰ FEIS ES-48 at 4-478 to -481 & Tbl. 4.12-5b (describing proposed recreation mitigation conditions)
(summarizing cumulative impacts to recreational activities during Project operation); Report to the Governor at
7 (summarizing same).

1 iii. **The Council’s visual impact conclusions rely on questionable**
2 **evidence and subjective, unprecedented concepts propounded by a**
3 **local opposition group.**

4 The Council’s critiques of Scout’s industry-standard visual impact analysis (“VIA”)
5 rely on shaky evidence supplied by a local opposition group and on subjective determinations
6 about the “desirability” of “skylined” turbines. The Council in its Order found Scout complied
7 with accepted industry and EFSEC standards in conducting its visual analysis yet nevertheless
8 stated that analysis “was not adequately robust given the scale of the Project,” “particularly”
9 where public outreach was concerned.¹⁶¹ The Council did not, however, specify what more
10 was required, or what else Scout could or should have done differently. Moreover, EFSEC
11 staff requested and received from Scout supplemental analysis during SWCA’s EIS
12 development, including new visual simulations requested through public comment and Tribal
13 consultation.¹⁶²

14 The Council’s conclusions implicitly impose new, unpublished standards for VIAs.
15 Scout’s VIA was validated and corroborated by the FEIS’s independent VIA completed by
16 EFSEC’s own independent consultant, SWCA, which highlighted the difficulty of objectively
17 characterizing and mitigating visual impacts.¹⁶³ Both Scout’s and the FEIS’s VIAs ultimately
18 concluded there would not be significant long-term impacts to viewers in the middle ground
19 (0.5 to 5 miles) and the background (5 miles and beyond) since existing transmission lines,
20 wind farm, and other infrastructure already dominate the viewshed.¹⁶⁴ Natural conditions also
21 reduce the visual impact.¹⁶⁵ To mitigate foreground visual impacts identified by independent
22

23 ¹⁶¹ Adjudicative Order at 28.

24 ¹⁶² See Scout Responses to EFSEC Data Requests 2 & 7, <https://www.efsec.wa.gov/energy-facilities/horse-heaven-wind-project/horse-heaven-sepa>.

25 ¹⁶³ See FEIS at 4-372; FEIS at 4-378.

26 ¹⁶⁴ FEIS at 4-378.

¹⁶⁵ EXH-1021_R at 3-5 (pre-filed testimony of B. Guthrie) (“[T]he photographs tend to represent real and practical viewing conditions of the Project’s visual setting. . . . [T]he area frequently includes the presence of haze, even on clear days”). For a discussion of how dehazing was used to provide a “conservative” VIA, see *id.*; Scout Post Hearing Brief at 31.

1 contractor SWCA, the FEIS recommended a half-mile setback from nonparticipating
2 residence.¹⁶⁶ Nothing more.

3 While the Council criticizes Scout’s analysis as insufficiently “robust,” it points to no
4 evidence that further analysis would have changed the identified impacts and does not
5 affirmatively articulate any specific aspect Scout omitted.

6 The Council’s reliance on visual impact evidence submitted by TCC is unsound.
7 During the adjudication, the Council heard from two visual experts. Scout’s expert completed
8 a comprehensive, industry-standard VIA using an established methodology verified by
9 EFSEC’s consultant that identified a moderate-to-high degree of visual change from some key
10 observation points.¹⁶⁷ TCC, a local opposition group, also provided a visual impact witness,
11 Landscape Architect Dean Apostol, who claimed that Scout’s (and SWCA’s) VIA was
12 deficient.¹⁶⁸ Mr. Apostol advocated for an “alternative method”¹⁶⁹ of visual assessment that is
13 not based on any known methodology¹⁷⁰ and employs only one factor (distance) of several
14 required to evaluate visual impacts. Instead, he relied on data unrelated to visual impacts, like
15 zoning designations.¹⁷¹ Mr. Apostol also relied on a visual aid¹⁷² developed by a witness *who*
16 *was specifically disqualified as a visual expert.*¹⁷³ In short, Mr. Apostol’s VIA followed no
17 established or peer-reviewed methodology and, by excluding other factors that obscure visual

18
19
20 ¹⁶⁶ FEIS ES-45 (proposed vision mitigation conditions).

21 ¹⁶⁷ See ASC, App. Q, Fig. 13, Representative Viewpoint 9 (visual simulation from Benton City); ASC, App. Q,
22 Figs. 11-12, Representative Viewpoints 8a & 8b (visual simulation from Kennewick).

23 ¹⁶⁸ EXH-5104_R at 4-5 (D. Apostol); EXH-5101_T (D. Apostol’s “qualifications” document).

24 ¹⁶⁹ Adjudication Transcript, Day 7 Tr. at 1403:5-9.

25 ¹⁷⁰ EXH-1069_S at 2.

26 ¹⁷¹ *Id.* at 2-3 (pre-filed testimony of B. Guthrie (“Mr. Apostol’s map and figure seem to support a mitigation
development process that is at odds with established industry standards and regulatory practice” and “is a
subjective and unorthodox approach to not just visual impacts analyses, but project development in general”)).

¹⁷² See EXH-1065_S at 3, 8; Scout Post Hearing Brief at 35.

¹⁷³ See Adjudication Transcript, Day 7 Tr. at 1400:15-17 (D. Apostol testifying that Paul Krupin prepared Exhibit
5906); Order Granting Applicant’s Motion to Strike TCC Testimony of Rick Dunn, Paul Krupin, David Sharp,
and (In Part) Richard Simon at 3 (disqualifying Paul Krupin as a visual expert); Order Granting (In Part) TCC’s
Motion for Reconsideration of the Order on the Motion to Strike at 2 (“Mr. Krupin’s updated statement of
qualifications still does not establish him as a visual impact expert”).

1 impacts, did not reflect actual conditions. The Council apparently missed these shortcomings
2 entirely.

3 In sum, the most credible, substantial record evidence on this point overwhelmingly
4 proves that any long-term changes to this rapidly urbanizing viewshed are adequately mitigated
5 by the FEIS-recommended buffers and other conditions to keep turbines appear clean,
6 unobtrusive, and uniform.¹⁷⁴

7 **iv. If the Council requires avoidance based on Tribal resource**
8 **impacts, it must analyze and differentiate between valid, deeply**
9 **held Tribal beliefs and TCPs that meet established state standards**
10 **for energy facility siting.**

11 To the extent the Council further justifies its exclusion zones based on Tribal resource
12 impact concerns, it does so without articulating any specific standard for what constitutes a
13 legally cognizable traditional cultural property (“TCP”) for energy facility siting. This
14 uncertainty, particularly surrounding recognition and identification of TCPs located on land
15 ceded by a *different* Tribe, poses serious concerns for developers looking to site projects in the
16 state. Under the Council’s recommendation, if a Tribe chooses not to provide TCP information
17 to a developer, that developer has no way to identify (let alone avoid or mitigate) where the
18 most tribally sensitive areas are located. Even if the developer could obtain that information,
19 the Council has announced no specific standard (a) as to which of those areas actually
20 constitute a TCP under the Siting Act or (b) for qualifying TCPs, which of those TCPs must
21 be avoided or mitigated, given that no provision of state law requires such protection.¹⁷⁵

22 The cultural issues raised by this Project are hardly unique and highlight the complexity
23 and need for clear standards from EFSEC. EFSEC’s “cultural” resource standards consider
24 architectural, archeological, and Tribal resources.¹⁷⁶ EFSEC and the Washington Department
25 of Archaeology and Historic Preservation (“DAHP”) have established and imposed clear

26 ¹⁷⁴ Scout Post Hearing Brief at 35-36; *see also* FEIS ES-45 (proposed vision mitigation conditions).
¹⁷⁵ Scout Post Hearing Brief at 20; Adjudication Transcript, Day 4 Tr. at 609:20-610:2 (E. Ragsdale).
¹⁷⁶ WAC 463-60-362(5).

STOEL RIVES LLP
760 SW Ninth Avenue, Suite 3000, Portland, OR 97205
Main 503.224.3380 Fax 503.220.2480

1 standards for siting around architectural and archaeological resources, and as a result, those
2 issues have been fully resolved with respect to the Project.¹⁷⁷ With respect to Tribal resources,
3 however, the Council’s recommendation not only lacks any clear standard; it muddies the
4 waters even further with an uncited definition and dearth of any analysis.¹⁷⁸

5 Here, most of the Project area are lands ceded and traditionally used by the CTUIR.¹⁷⁹
6 The remaining portion was treaty-ceded by the Yakama Nation.¹⁸⁰ None of the Project area is
7 on Tribal reservation and the vast majority is privately owned. Thus, Tribal members do not
8 currently have access rights.¹⁸¹ The area is now heavily developed with non-Tribal agricultural
9 and residential use and other large infrastructure like transmission lines and the Nine Canyon
10 Wind project.

11 For more than five years, Scout and its archaeology and cultural resource experts
12 endeavored to fully understand and assess Tribal concerns, including through outreach and
13 coordination with DAHP and potentially affected Tribes.¹⁸² Among other good-faith,
14 affirmative efforts, Scout invited the Tribes to meet to discuss the Project and potential
15 concerns, attend site visits, exchange TCP information, receive funding for additional
16 traditional use studies, review and comment on reports and Project layout, attend and monitor
17 field surveys, staff (with funding) their own field archeological technician positions during
18 surveys, and receive post-survey summaries.¹⁸³ At multiple points in the process, Scout and
19 its cultural resource experts provided findings to both DAHP and affected Tribes, seeking and
20 incorporating their feedback into the final reports.¹⁸⁴

21 _____
22 ¹⁷⁷ See Post Hearing Brief at 22-23; see also Adjudicative Order at 19-25 (no contested issues related to
archeological or architectural impact concerns).

23 ¹⁷⁸ Adjudication Transcript, Day 4 Tr. at 609:20-610:2 (E. Ragsdale).

24 ¹⁷⁹ See supra, note 14. These ceded lands represent areas where the CTUIR ceded title to their historic area of use
to the U.S. Government under the Walla Walla Treaty of Camp Stevens, June 9, 1855.

25 ¹⁸⁰ EXH-1063 X; Confidential Adjudication Transcript, Day 4 Tr. at 658:14-661:24 (J. Lally) [REDACTED]

26 ¹⁸¹ ASC at 2-137 (majority of the Project is on private land); Scout Post Hearing Brief at 27-28.

¹⁸² See ASC Sec. 1.12, Tbl. 1.12-2.

¹⁸³ See ASC Tbl. 1.12.2; see also Adjudication Transcript, Day 4 Tr. at 602:17-604:4 (E. Ragsdale).

¹⁸⁴ Adjudication Transcript, Day 4 Tr. at 600:2-25 (E. Ragsdale) (describing integration of CTUIR and Yakama
Nation feedback).

STOEL RIVES LLP
760 SW Ninth Avenue, Suite 3000, Portland, OR 97205
Main 503.224.3380 Fax 503.220.2480

1 DAHP reviewed and concurred with all cultural resource findings and
2 recommendations in Scout’s cultural resource reports.¹⁸⁵ The CTUIR accepted Scout’s
3 invitations to actively engage¹⁸⁶ in Project study and planning,¹⁸⁷ and ultimately developed and
4 executed a mutual agreement to mitigate and fully resolve any Project effects on CTUIR
5 cultural and religious resources.¹⁸⁸

6 Yakama Nation opposes the Project and asserts TCPs exist [REDACTED]
7 [REDACTED] including on CTUIR’s ceded and sovereign territory.¹⁸⁹ The Tribe chose to withhold that
8 TCP information from Scout and its cultural resource experts until the adjudication phase.¹⁹⁰

9 Scout respects the sovereignty and beliefs and traditions of Yakama Nation and its
10 People, from time immemorial to today, and appreciates the Tribe sharing some of that
11 information during the adjudication. To be clear, contrary to the Council’s suggestion in its
12 Adjudicative Order, Scout fully agrees that it is “wholly appropriate to defer to the Yakama
13 Nation’s traditional knowledge and classification system in determining what is or is not of
14 culturally significant value to its People.”¹⁹¹ Nor would it ever be appropriate for a developer,
15 or Council, to “define what qualifies as a TCP for the Yakama Nation.”¹⁹²

17 _____
18 ¹⁸⁵ *Id.* at 616:23-617:2 (E. Ragsdale) (“[DAHP] concurred with every recommendation we made as ... it relates to archaeology”).

19 ¹⁸⁶ The Council’s finding that Scout “did not consistently and effectively engage with underrepresented communities in the Tri-Cities region,” Adjudicative Order at 40, 46, contravenes the record evidence. The finding appears to stem from Yakama Nation’s assertion that Scout did “not consider[] further redesign of the Project” after 2022. *Id.* at 39. That is factually incorrect. [REDACTED]

20 [REDACTED]. Confidential Adjudication Transcript, Day 4 Tr. at 664:25-669:12, 664:4-
21 22 (J. Lally)

22 [REDACTED] *Id.* at 667:14-20 (J. Torem)

23 ¹⁸⁷ See ASC at 1-66 & 1-67; Adjudication Transcript, Day 4 Tr. at 610:11-611:19 (E. Ragsdale).

24 ¹⁸⁸ See ASC at 1-66; Letter from N. Kathryn Brigham, CTUIR Board of Trustees, to Amy Moon, EFSEC (Oct. 10, 2023); FEIS Sec. 4.9.2.4.

25 ¹⁸⁹ EXH-4003_T_CONFIDENTIAL at 4 (J. Lally); see, e.g., Confidential Adjudication Transcript, Day 4 Tr. at 723:6-10 (G. Selam).

26 ¹⁹⁰ Adjudication Transcript, Day 4 Tr. at 612:15-613:4 (E. Ragsdale) (E. Ragsdale testifying she had never seen the TCP information J. Lally submitted during adjudication).

¹⁹¹ Adjudicative Order at 23.

¹⁹² *Id.*

1 It is, however, *EFSEC*'s statutory duty to define what qualifies as a TCP *under state*
2 *law and EFSEC standards*. The Council has not done so in the recommendation. Scout and its
3 cultural resource expert have provided extensive testimony and briefing on the relevant legal
4 standard here,¹⁹³ and the Council does not expressly reject that standard. Indeed, the Council
5 acknowledges DAHP's prevailing policy that to be considered a formal TCP under state law—
6 and thus actionable in siting decisions—the resource must be inventoried or deemed eligible
7 for inclusion on state or federal historic registers.¹⁹⁴ But in its Order, the Council adds another,
8 uncited definition that claims DAHP has “more broadly” defined a TCP without reference to
9 the historic registry eligibility requirement.¹⁹⁵ It is unclear where that definition comes from.
10 The only publication of that language Scout has identified comes from a 2013 draft
11 Washington State Historic Preservation Plan, which used it to describe “Traditional Cultural
12 *Places*,” not properties.¹⁹⁶ Surely, the Council is not suggesting that as the standard to be
13 applied in a siting analysis. But even if that standard did somehow apply to EFSEC siting and
14 could support exclusionary zones, the Council neither analyzes nor explains how the resources
15 described by Yakama Nation qualify as TCPs under either definition.

16 To be sure, trying to interpret Tribal concepts within a western legal construct poses
17 ethnocentric problems. Yet that is precisely why the Council's role here is so important—to
18 clearly articulate the boundary between Tribal significance and a legally cognizable TCP under
19 established standards for energy facility siting.

20 If the Council does not do so or continues to justify its exclusionary zones with vague
21 reference to TCPs without clarifying what standards apply, the implications for renewable
22 siting in the state are dire. Under the Council's reasoning, a Tribe may choose to withhold
23

24 ¹⁹³ See Scout Post Hearing Brief at 20-29.

25 ¹⁹⁴ DAHP Policy No. 12.1.2017, Traditional Cultural Properties, at 1 (Dec. 1, 2017); see Adjudicative Order at
22-23 (citing DAHP Policy No. 12.1.2017); Scout Post Hearing Brief at 21.

26 ¹⁹⁵ Adjudicative Order at 23.

26 ¹⁹⁶ Wash. Dep't of Archaeology & Historic Pres., Washington State Historic Preservation Plan, at 26 (DRAFT
Oct. 31, 2013) (emphasis added), https://dahp.wa.gov/sites/default/files/public/images/news/2013/10/WA-Historic-Preservation-Plan_DRAFT_2013-1031.pdf.

1 information on sensitive cultural resources in areas well beyond that Tribe’s ceded territory
2 (i.e., of which a developer would have no notice), then later assert that those resources are
3 TCPs, and the Council will accept and enforce that statement at face value with no set criteria
4 or analysis. That approach (adopted here) leaves developers with no way to know whether or
5 where TCPs exist anywhere in Washington State. That result is clearly untenable from a
6 regulatory perspective. It is possible within the siting process both to validate Tribal beliefs
7 and resources and to enforce due process and administrative certainty. The Council must do
8 both.

9 **D. The recommendation violates numerous provisions of Washington law under the**
10 **EFSLA, APA, and SEPA.**

11 Given the serious substantive and procedural deficiencies noted above, the Council’s
12 decision violates numerous provisions of state law.

13 **1. The recommendation violates EFSEC’s own enabling statute in several**
14 **ways.**

15 **First**, nowhere in Council’s enumerated powers under RCW 80.50.040 is it authorized
16 to materially change the scope of a proposed Project. Nor would that make sense, given it is a
17 project developer who is best suited to conduct the technical and economic analyses required
18 to design a utility-scale hybrid energy project (and given that the SEPA Responsible Official
19 is best suited to review and assess its impacts). **Second**, the Council is shirking its primary duty
20 to actually *site* the Project, instead impermissibly delegating that key decision to the PTAG
21 and to WDFW by blindly adopting inaccurate PHS data. The current iteration of Spec-5, with
22 its reliance on WDFW-administered PHS data and absence of any nest viability standards for
23 solar, BESS, and secondary component siting, precludes any reliable conclusions about where
24 those components are in fact allowed. Scout’s preliminary assessments suggest the
25 recommendation eliminates about half the generating infrastructure, but the exact effect is
26 unclear until after the PTAG is convened and actually implements Spec-5.

1 **Third**, the Council is ignoring its statutory mandate under RCW 80.50.100(1)(b) to
2 “review and consider comments received,” as evidenced by the lack of any meaningful or
3 substantive response (but a single PowerPoint slide presented by EFSEC staff)¹⁹⁷ and by the
4 uninformed Councilmember statements during deliberations. **Fourth**, the Council has not
5 provided the public, or Scout, with the information necessary to fully understand its decision.
6 More egregiously, the Council has not published any specific information explaining why the
7 “class 3” turbines depicted in FEIS Figures 2-5 and 2-6 are classified as such. Equally
8 important, neither EFSEC nor DAHP has given Scout the information necessary to identify the
9 Yakama Nation TCPs now asserted to exist on the Project site, in areas well beyond Yakama
10 Nation’s ceded lands—lands that lie under *CTUIR* sovereignty.

11 **Fourth**, the recommendation upends the statutory EFSEC process by forcing
12 significant amendment even before certification, initiating a cycle of never-ending amended
13 applications.¹⁹⁸ When the Council imposes novel requirements at the 11th hour, neither Scout
14 nor any other developer looking to invest in energy projects in the state can have any certainty
15 that the goalposts will remain fixed or even be apparent during the siting process. The
16 Council’s decision is untethered from existing standards and from EFSEC staff or SEPA
17 Responsible Official recommendations.

18 **2. The recommendation also defies multiple foundational requirements of**
19 **the Washington APA.**

20 EFSEC’s certification actions, and the Governor’s ultimate decision on EFSEC’s
21 recommendation, are subject to review under the APA.¹⁹⁹ Under the APA, an agency decision
22 is invalid when it exceeds the agency’s statutory authority, was issued under unlawful or
23

24 _____
¹⁹⁷ See Monthly Council Meeting, *supra* note 46.

25 ¹⁹⁸ In particular, the Council’s material reduction of both the Project footprint and generation capacity forces
26 Scout to reevaluate and design its proposed mitigation (including mitigation ratios per WDFW Wind Power
Guidelines) and previous proposed voluntary reduction of certain turbines, which was premised on the Project as
proposed. See Apr. Comment Letter at 1-2.

¹⁹⁹ *Residents Opposed to Kittitas Turbines*, 165 Wn.2d at 304-05.

1 improper process, is unsupported by substantial evidence, is inconsistent with the agency’s
2 rules (unless justified by facts and reasons), or is arbitrary and capricious.²⁰⁰

3 The Council’s decision fails under several of those grounds. **First**, the Council’s
4 recommendation is arbitrary and capricious in multiple ways. An agency acts arbitrarily when
5 it disregards scientific information relevant to understanding biological conditions relevant to
6 project approval.²⁰¹ Similarly, an agency decision is arbitrary when it conflicts with prior
7 agency representations without substantive explanation or support.²⁰² An agency also acts
8 arbitrarily and capriciously when it applies novel standards and/or disregards its overarching
9 legislative directives.²⁰³ Here, the Council disregards and excludes from its decision the best
10 data on the current ferruginous hawk nesting and foraging conditions and wildlife movement
11 corridors. Moreover, its Spec-5, Hab-1, and Hab-4 requirements (as well as its additional
12 “multiple resource impact” justification) are contrary to past Council practice and have never
13 before even been published, let alone applied to energy facility siting.

14 **Second**, the Council’s exclusion zones, including but not limited to those in Spec-5,
15 Hab-1, and Veg-10, are unsupported by substantial evidence.²⁰⁴ Substantial evidence considers
16 both the source and the weight of evidence, which must be “substantial when viewed in light
17 of the whole record.”²⁰⁵ Though the Council has painstakingly cherry picked the few

18 ²⁰⁰ RCW 34.05.570(3).

19 ²⁰¹ See *State, Dep’t of Ecology v. Pub. Util. Dist. No. 1 of Jefferson Cnty.*, 121 Wn.2d 179, 204, 849 P.2d 646
20 (1993) (Pollution Control Board acted arbitrarily when it rejected certain water flow rates in water quality
21 certificate because it disregarded factors impacting the biological understanding of actual stream conditions,
22 rendering its reasoning “insupportable”).

21 ²⁰² See *Rios v. Wash. Dep’t of Lab. & Indus.*, 145 Wn.2d 483, 507-08, 39 P.3d 961 (2002) (agency’s decision to
22 reverse course on agency progress and not follow through with prior, science-based commitment to pursue a
23 specific rulemaking was arbitrary).

22 ²⁰³ See *Children’s Hosp. & Med. Ctr. v. Wash. State Dep’t of Health*, 95 Wn. App. 858, 868, 871-72, 873, 975
23 P.2d 567 (1999) (health department’s decision not to conduct certificate of need review before allowing new
24 hospital to perform certain services was arbitrary when it was made pursuant to novel interpretation of rules and
25 disregarded its enabling “legislative directive”); see also *Olmstead v. Dep’t of Health, Med. Section*, 61 Wn. App.
26 888, 895, 812 P.2d 527 (1991) (Medical Disciplinary Board acted arbitrarily when it based suspension of medical
license on licensee’s noncompliance with a standard that had not been previously provided or documented or part
of typical compliance program).

26 ²⁰⁴ RCW 34.05.461(4); see also *Residents Opposed to Kittitas Turbines*, 165 Wn.2d at 317 (EFSEC’s decision
must be supported by “substantial evidence,” which is “a sufficient quantity of evidence to persuade a fair-
minded person of the truth or correctness of the order” (citation omitted)).

²⁰⁵ RCW 34.05.570(3)(e).

1 adjudication and record citations in its latent adjudicative order and report to the Governor, as
2 detailed above and in Scout’s post-adjudication brief, those references belie objective science.
3 Indeed, the overwhelming weight of evidence in the record, including the regulatory decisions
4 of *all* other state and federal wildlife agencies that protect ferruginous hawk—and the best
5 sources of evidence, which are not the subjective interpretations of two biologists but rather
6 the actual data, and testimony from arguably the foremost ferruginous hawk expert Erik
7 Jansen²⁰⁶—prove that the Spec-5 and Hab-1 exclusions zones are unsupported.

8 **Third**, Spec-5’s lack of nest viability standards suffers fatal vagueness flaws. **Fourth**,
9 several procedural violations underlie the recommendation, including the lack of notice with
10 respect to Figures 2-5 and 2-6 class 3 turbine impacts and purported TCPs on areas outside
11 Tribal sovereignty lands, and the referenced SEPA and EFSLA violations, among others.
12 **Fifth**, the decision poses severe improper rulemaking risks. Indeed, this is the only Project in
13 EFSEC’s history ever to be subject to these exclusion zone requirements. But if the Council
14 imposes the same requirements on future projects, they are tantamount to a rule, improperly
15 promulgated.²⁰⁷ Thus, these novel requirements violate the APA either way—either as
16 arbitrary standards applied only to Scout or, if more broadly applied, as improper rulemakings.

17 **3. The recommendation also violates numerous SEPA requirements.**

18 **First**, the Council’s decision in effect approves a Project that was not evaluated in the
19 FEIS because it does not meet the stated purpose and need. The Project approved under the
20 Council’s recommendation is so changed from its original proposal that it would not—and did
21 not—qualify as even a “reasonable alternative” in the FEIS because it does not meet the
22
23

24 ²⁰⁶ See EXH-1003_REVISIED (E. Jansen curriculum vitae).

25 ²⁰⁷ *Simpson Tacoma Kraft Co. v. Dep’t of Ecology*, 119 Wn.2d 640, 648-49, 835 P.2d 1030 (1992) (en banc)
26 (invalidating Ecology’s revised numeric water quality standard as improper rulemaking based on standard’s
application to all “members of a class” of permittees); see also *City of Tacoma v. Dep’t of Ecology*, 28 Wn. App.
2d 221, 245, 535 P.3d 462 (2023) (invalidating certain “commitments” in a letter denying a rulemaking petition
as an improper rulemaking because they represented new requirements applicable to all entities regulated under
the existing permit regime).

1 purpose and need.²⁰⁸ The Council can only consider and choose a project that was among the
2 “reasonable alternatives *for achieving the proposal’s objective* on the same site.” WAC 197-
3 11-440(5)(d) (emphasis added). Importantly, the FEIS emphasizes that the Project’s purpose
4 and need included the specified nameplate generating capacity.²⁰⁹ The Council’s
5 recommendation violates SEPA by approving a Project that was not reviewed and in fact was
6 rejected from the review because of lower generating capacity and therefore was not a
7 “reasonable” alternative.²¹⁰ The Council attempts to sidestep this requirement by suggesting
8 that the “economic viability of an applicant’s proposal” is “beyond the scope of EFSEC’s scope
9 of review.”²¹¹ But where a particular nameplate generating capacity is clearly stated as the
10 Project’s purpose and need in the application, and affirmed in SEPA review, it cannot simply
11 be ignored in the final siting decision and recharacterized (and disregarded) as an economic
12 viability consideration.

13 **Second**, Spec-5 and Hab-1 improperly exceed the Council’s conditioning authority.
14 SEPA requires not only that state agencies take environmental (including wildlife) impacts
15 into account; it also requires that any conditions ultimately imposed as a result of those
16 concerns be based on specific standards “incorporated into regulations, plans, or codes which
17 are formally designated by the agency ... as possible bases for the exercise of” conditioning
18 authority.²¹²

19 _____
20 ²⁰⁸ WAC 197-11-786 (“reasonable alternative” means “an action that could feasibly attain or approximate a
21 proposal’s objectives”); WAC 197-11-655(3)(b) (the agency’s final decision must “be within the range of
22 alternatives discussed in the relevant environmental documents”); FEIS at 2-37 (eliminating alternatives “from
detailed analysis because *they would not generate the designed nameplate generating capacity proposed by the
Applicant*” (emphasis added)).

23 ²⁰⁹ FEIS ES-2.2.

24 ²¹⁰ WAC 197-11-440(5)(d).

25 ²¹¹ Adjudicative Order at 9.

26 ²¹² RCW 43.21C.060; *see also* WAC 197-11-660(1)(a) (“Mitigation measures or denials shall be based on
policies, plans, rules, or regulations formally designated by the agency[.]”); *see, e.g., Maranatha Mining, Inc. v.
Pierce County*, 59 Wn. App. 795, 805, 801 P.2d 985 (1990) (rejecting County’s denial of development permit,
which disregarded impact conclusions and recommended mitigation in SEPA analysis “based ... on community
displeasure and not on reasons backed by policies and standards as the law requires”); *Prisk v. City of Poulsbo*,
46 Wn. App. 793, 801, 732 P.2d 1013 (1987) (under RCW 43.21C.060, local government could not condition
development permit on park fee intended to mitigate environmental impacts because that requirement was not
“based on environmental policies of the City” that had been incorporated into its ordinances or other standards).

1 Here, neither the ferruginous hawk setbacks nor habitat movement corridor exclusion
2 requirements has been published as specific standards before this decision, and they certainly
3 have not been “formally designated” by EFSEC or incorporated into EFSEC’s siting
4 authorities.

5 *Third*, mitigation measure conditions ultimately imposed must “be reasonable and
6 capable of being accomplished.”²¹³ A condition is “reasonable” if the conditions are
7 “reasonably based on thorough analysis.”²¹⁴ The exclusionary zones in Spec-5 and Hab-1,
8 with no science-based off ramp, are unreasonable in every sense of the word. As detailed
9 above, they go far beyond any other regulatory treatment, including even WDFW’s
10 unpublished draft guidance, and they exceed the FEIS recommendations, gutting half the
11 Project’s generation capacity, and cutting off thousands of acres of prime renewable siting area
12 in the state.

13 *Finally*, SEPA requires that an agency’s approval “be conditioned only to mitigate
14 specific adverse environmental impacts which are identified in the environmental
15 documents.”²¹⁵ As described in Section IV.C.2 above, to the extent the Council bases its Spec-
16 5 exclusion zone on other unspecified “multiple resource impacts” shown in FEIS Figures 2-5
17 and 2-6, that condition does not mitigate specific impacts identified in the FEIS.

18 **E. Specific changes must be made to the SCA to ensure that the Project approved**
19 **resembles that proposed and that the best available science is incorporated.**

20 To assist the Council—or Governor—in implementing the necessary changes to the
21 SCA, in Exhibit A, Scout has prepared a redline document of the Draft SCA, Appendix 2,
22 included in the Council’s recommendation. This redline contains the changes discussed above,
23
24

25 ²¹³ RCW 43.21C.060; *see also* WAC 197-11-660(1)(c); WAC 463-47-110(2)(i) & (iii).

26 ²¹⁴ *Anderson v. Pierce County*, 86 Wn. App. 290, 306, 936 P.2d 432 (1997).

²¹⁵ RCW 43.21C.060; WAC 197-11-660(1)(b) (“Mitigation measures shall be related to specific, adverse environmental impacts clearly identified in an environmental document on the proposal and shall be stated in writing by the decision maker.”).

1 as well as other technical changes raised in Scout’s previous submittals to the Council that
2 have not been addressed.²¹⁶

3 **V. CONCLUSION**

4 The Council and Governor face this decision at the precipice of the future of renewable
5 energy siting in Washington. To bridge the divide between the state’s steep, growing climate
6 goals and the slow trudge of new projects in the siting pipeline, the Siting Act (and APA and
7 SEPA) demands more. Simply put, if the Council’s recommendation is left to stand,
8 administrative precedent and certainty will be dashed and meeting CETA’s goals will become
9 a practical impossibility as utility-scale renewable energy developers look elsewhere.

10 The Council has a chance to right the ship by reconsidering its decision. EFSEC
11 absolutely must capitalize on the substantial progress forged by EFSEC staff over the years of
12 engagement and project planning with Scout and the robust mitigation framework of the FEIS
13 by rescinding the late-breaking errors in its recommendation and by reintroducing science and
14 certainty into its decision-making. There is still time to answer the question Scout has posed
15 in the affirmative and prove that Washington is capable of authorizing an ambitious,
16 responsibly sited and mitigated project like the Horse Heaven Clean Energy Center.

17 DATED: May 20, 2024.

STOEL RIVES LLP



TIMOTHY L. MCMAHAN
tim.mcmahan@stoel.com
WILLA B. PERLMUTTER
willa.perlmutter@stoel.com
ARIEL STAVITSKY
ariel.stavitsky@stoel.com
EMILY K. SCHIMELPFENIG
emily.schimelpfenig@stoel.com
Telephone: (503) 294-9517
Attorneys for Applicant

26 _____
²¹⁶ The redline document in Ex. A references two prior submittals from Scout: (1) Ex. D, Scout’s Apr. Comment Letter, and (2) Ex. M, relevant excerpts of the Scout Jan. 2023 DEIS Comments.

1 **CERTIFICATE OF FILING AND SERVICE**

2 I hereby certify that on May 20, 2024, I filed the foregoing **APPLICANT SCOUT**
3 **CLEAN ENERGY’S PETITION FOR RECONSIDERATION OF THE COUNCIL’S**
4 **RECOMMENDATION TO THE GOVERNOR** with the Washington Energy Facility Site
5 Evaluation Council through an authorized method of service pursuant to WAC 463-30-
6 120(3).

7 I also hereby certify that I have this day served the foregoing document upon all
8 parties of record in the adjudication proceeding by electronic mail at the email addresses
9 listed on the attached Service List.

10
11 DATED: May 20, 2024.

12 **STOEL RIVES LLP**



13 **TIMOTHY L. MCMAHAN**
14 **tim.mcmahan@stoel.com**
15 **WILLA B. PERLMUTTER**
16 **willa.perlmutter@stoel.com**
17 **ARIEL STAVITSKY**
18 **ariel.stavitsky@stoel.com**
19 **EMILY K. SCHIMELPFENIG**
20 **emily.schimelpfenig@stoel.com**
21 Telephone: (503) 294-9517
22 *Attorneys for Applicant*

STOEL RIVES LLP
760 SW Ninth Avenue, Suite 3000, Portland, OR 97205
Main 503.224.3380 Fax 503.220.2480

Adjudication Parties and EFSEC Service List

- 1
- 2 AAG Sarah Reyneveld
- 3 Attorney General's Office
- 4 800 Fifth Avenue, Suite 2000 (TB/14)
- 5 Seattle, WA 98104-3188
- 6 sarah.reyneveld@atg.wa.gov
- 7 CEPSeaEF@atg.wa.gov
- 8 Julie.dolloff@atg.wa.gov
- 9 *Attorney for Counsel for the Environment*
- 10
- 11 Kenneth W. Harper
- 12 Aziza L. Foster
- 13 Menke Jackson Beyer, LLP
- 14 807 North 39th Avenue
- 15 Yakima, WA 98902
- 16 kharper@mjbe.com
- 17 zfoster@mjbe.com
- 18 julie@mjbe.com
- 19 *Attorneys for Benton County*
- 20
- 21 J. Richard Aramburu
- 22 Law Offices of J. Richard Aramburu, PLLC
- 23 705 2nd Ave, Suite 1300
- 24 Seattle, WA 98104-1797
- 25 rick@aramburulaw.com
- 26 aramburulaw@gmail.com
- 27 *Attorney for Tri-Cities C.A.R.E.S.*
- 28
- 29 Ethan Jones
- 30 Shona Voelckers
- 31 Jessica Houston
- 32 Yakama Nation Office of Legal Counsel
- 33 P.O. Box 151
- 34 Toppenish, WA 98948
- 35 ethan@yakamanation-olc.org
- 36 shona@yakamanation-olc.org
- 37 jessica@yakamanation-olc.org
- 38 *Attorneys for Confederated Tribes*
- 39 *and Bands of the Yakama Nation*
- 40
- 41 EFSEC Contacts
- 42 adjudication@efsec.wa.gov
- 43 adamtorem@writeme.com
- 44 jennaslocum@atg.wa.gov
- 45 jonathan.thompson@atg.wa.gov

1 sonia.bumpus@efsec.wa.gov
2 andrea.grantham@efsec.wa.gov
3 alexshiley@efsec.wa.gov
4 catherine.taliaferro@efsec.wa.gov

4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26