BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of the Application of: Scout Clean Energy, LLC, for Horse Heaven Wind Farm, LLC, Applicant	DOCKET NO. EF-210011 BENTON COUNTY'S REPLY IN SUPPORT OF MOTION TO STAY ADJUDICATIVE PROCEEDINGS PENDING FEIS ISSUANCE

Benton County (the "County") submits this reply in support of its motion to stay Energy Facility Site Evaluation Council ("EFSEC") adjudicative proceedings until a final environmental impact statement ("FEIS") is issued.

I. REPLY

A. SEPA applies to all government agencies equally.

The applicant's argument appears be that there is a "regular" State Environmental Policy Act ("SEPA") that applies to every other state and local agency and a special "EFSEC only" SEPA that allows EFSEC to circumvent SEPA requirements, such as requiring that an FEIS be issued prior to any required project hearing. This argument is not supported by SEPA or EFSEC's own regulations.

The purpose of the SEPA regulations is "to establish uniform requirements for compliance with SEPA." WAC 197-11-020. While agencies may adopt their own SEPA

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rules, the rules must be "consistent with these statewide rules." *Id*. SEPA applies to all agencies throughout Washington. No party has ever disputed that EFSEC is subject to SEPA as laid out in Chapter 43.21C RCW and Chapter 197-11 WAC. *See Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 80, 96 (2017). There is not a special "EFSEC only" SEPA process that allows EFSEC to pick and choose the regulations it will follow. EFSEC must follow the procedures laid out in Chapter 197-11 WAC.

The applicant argues that EFSEC has the discretion to determine the proper sequence of events for this adjudication. App. Response, p. 4. While that statement may be true as a general principle, EFSEC cannot establish an approach to the adjudication that will violate SEPA. As the County thoroughly briefed in its motion, proceeding with the adjudication prior to FEIS issuance will violate SEPA.

As support for its arguments that SEPA operates differently in the EFSEC context, the applicant points to previous EFSEC orders in which adjudication proceeded prior to FEIS issuance. This is unpersuasive for several reasons. First, these orders were issued on a completely different set of facts than the facts of this case. Second, the applicant has cited no authority for the premise that EFSEC orders are compelling authority; *stare decisis* plays only a limited role in the administrative agency context. *Stericycle of Wash. Inc. v. Wash. Util. & Transp. Comm'n*, 190 Wn. App. 74, 93 (2015). Lastly, regardless of prior rulings EFSEC is required to follow the law if presented with compelling legal argument. *See Def. of Wildlife v. Zinke*, 856 F.3d 1248, 1263 (9th Cir. 2017); *see also Azurin v. Von Raab*, 803 F.2d 993, 997 (9th Cir. 1986).

B. SEPA requires an FEIS prior to adjudication.

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The applicant argues that proceeding without an FEIS prior to adjudication is proper under SEPA because "SEPA and WAC chapter 197 do not require a particular sequence." App. Response, p. 3. That is fundamentally incorrect.

WAC 197-11-070(1) states that "[u]ntil the responsible official issues a final determination of nonsignificance or final environmental impact statement, *no action* shall be taken by a government agency that would: (1) have an adverse environmental impact; or (b) limit the choice of reasonable alternatives." WAC 197-11-070(1) (emphasis added); *see also* WAC 197-11-055(2)(c). The plain text of SEPA requires a particular sequence—an FEIS must be issued *prior* to any action on a project.

It is quite telling that the applicant does not address, let alone dispute, the fact that the adjudicative hearing is an "act" for purposes of SEPA. Instead, the applicant argues that proceeding with and concluding the adjudication will not effectively limit the choice of reasonable alternatives. Not only is that argument incorrect, it also ignores WAC 197-11-460, which simply prohibits *any act* on a project, even if the act will not limit the choice of reasonable alternatives, until seven days after FEIS issuance. WAC 197-11-460(5); *see also* WAC 197-11-070(2). This should be dispositive.

Instead of disputing that the adjudication is an "act," the applicant relies on *Columbia Riverkeeper* for the idea that the adjudication will not limit the choice of reasonable alternatives and therefore WAC 197-11-070 is not violated. *Columbia Riverkeeper* does not stand for such a proposition.

In *Columbia Riverkeeper*, the Port of Vancouver entered into a lease with Tesoro-Savage to construct a petroleum-based energy facility. *Columbia Riverkeeper*, 188 Wn.2d at

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87. The lease contained a preliminary description of the facility but required the parties to work together and mutually approve final designs and specifications. *Id*. Tesoro-Savage was not allowed to otherwise occupy or develop the property until it obtained all necessary approvals, including EFSEC site certification. *Id*. If any one of the lease conditions was not satisfied, a party had the option to terminate the lease. *Id*. Only after the lease was executed, and Tesoro-Savage applied to EFSEC for site certification, was it determined that an EIS was necessary. *Id*. at 87-88.

Riverkeeper challenged the lease agreement on the grounds that, among other reasons, the lease violated SEPA because it was executed prior to the issuance of an FEIS. *Id*. at 88. In addressing Riverkeeper's argument, the Court confirmed that WAC 197-11-070(1)(b) applied to the Port. *Id*. at 100. However, the Court ultimately found no SEPA violation due to the lease's condition precedent that no occupancy or development of the land could occur without EFSEC certification. *Id*. at 102. The Port, simply by entering into the lease, did not limit the choice of any reasonable alternatives for the facility and did not violate SEPA. *Id*.

The facts of the current case are not similar to *Columbia Riverkeeper*. In *Columbia Riverkeeper*, site certification was not even yet at issue—the only ripe topic was the lease. The lease specifically stated that the design was preliminary and subject to final design and specification. *Id*. at 87. The EFSEC process had yet to commence. Here, there is an actual application for site certification before EFSEC. The application represents, presumably, the design and specifications that the applicant desires. However, the final site design may change as a result of the FEIS. *See* WAC 197-11-560(1), (2). It is likely that reasonable

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project alternatives in fact exist and could be developed during the transition from the DEIS to an FEIS. Yet, proceeding with adjudication based on the DEIS commits EFSEC, the parties, and the interested public to respond to the version of the project articulated therein, in effect eliminating all of the plausible, reasonable alternatives from consideration in the public adjudication forum. This violates WAC 197-11-070. *See Columbia Riverkeeper*, 188 Wn.2d at 98-99 (WAC 197-11-070 "prevents EFSEC or other agencies with jurisdiction from eliminating alternate designs before they can be properly evaluated.").

C. The County does not request a stay to challenge the adequacy of the FEIS.

In claiming that waiting for FEIS issuance to proceed with the adjudication is somehow "unfair," the applicant suggests that the County is attempting to use this process as a challenge to the adequacy of the FEIS. It should be noted that at no point in the County's initial motion did the County raise an issue with the adequacy of the DEIS. The County simply highlighted its comments on the DEIS to further its point that the project could change in the FEIS in response to comments.

The County recognizes that the adjudicative process is not the proper forum to challenge FEIS adequacy. The County understands that EFSEC does not allow for an administrative appeal of an FEIS and any appeal must be consolidated with the Governor's recommendation. Instead, the County's motion raises the more basic point that no party will know the proper scope and impacts of the project until FEIS issuance. If the public adjudication process is to legitimately examine the applicant's actual proposal along with its expected mitigation measures, this view of SEPA should be almost self-evident.

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In attempting to skirt the authority the County presented, the applicant cites a number of prior EFSEC orders. Those orders are not legal precedent and are readily distinguishable. For example, in *Vancouver Energy Distribution Terminal*, it was argued that SEPA "requires that EFSEC have before it, a complete and adequate EIS to inform its decision making, prior to taking any action on Tesoro-Savage's application for site certification." *In the Matter of Vancouver Energy Distribution Terminal*, Case No. 15-001, Order Denying Motion to Continue Adjudication Until After FEIS is Issued at 1 (June 21, 2016). Additionally, "[t]he City present[ed] a copy of its extensive critique of the Draft Environmental Impact Statement (DEIS) in the Tesoro-Savage application, asserting that the environmental studies are inadequate and that numerous changes and additions are necessary." *Id*.

The posture of the present case is different. The County has no objection to the general *commencement* of the adjudicatory process, so long as that process does not extend beyond a point limited by SEPA, which certainly includes imposing case-defining limits and deadlines for the adjudication, and with even greater force to holding the public adjudication hearing. The County's point is that no one will know how the project will change in response to comments, including the County's comments, on the DEIS. The changes to the project could potentially change the entire scope and tenor of the adjudication. However, all of this is an unknown until the FEIS is issued, which, if it occurs after the adjudication, effectively renders the adjudication a formal public proceeding about a project that is no longer even the relevant proposal.

Any reliance on Kittitas Valley Wind Power Project is misplaced as it was based on the old version of WAC 463-47-060(2) that specifically required EFSEC to *complete*

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adjudication prior to FEIS issuance. *In the Matter of Kittitas Valley Wind Power Project*, Application No. 2003-01, Council Order No. 799 at (Sept. 1, 2004). While the parties dispute the effect of the change to WAC 463-47-060(2), no party can dispute that there is no longer a mandate that EFSEC complete adjudication prior to FEIS issuance.

EFSEC has never cited to any authority to support its premise that the adjudication and SEPA run on separate, but parallel tracks. *See State v. Logan*, 102 Wn. App. 907, 911 n.1 (2000) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none."). EFSEC has claimed that "[t]he environmental review and the application review proceed on parallel tracks until the conclusion of the process. Doing so allows the Council, in simultaneously making final decisions on each track, to preserve the integrity of both processes while ensuring consistency in the results. Issuing the final EIS prior to hearing could compromise the result of the adjudicative hearing." *In the Matter of Whistling Ridge Energy Project, Application No. 2009-01*, Council Order 848 at 3 (June 29, 2010). No case, statute, or regulation supports this view.

It is unclear to the County how issuing the FEIS prior to the adjudication could compromise the adjudication, unless the adjudication does not matter or unless meaningful public review must be subservient to the applicant's scheduling deadlines. The FEIS is the only document that will disclose the actual impacts of the project. During adjudication, parties are allowed to present evidence on, among other topics, "[a]dverse impacts minimization[.]" WAC 463-30-300(8). The adverse impacts of a project cannot be known

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until FEIS issuance. Rather than compromising the adjudication, having an FEIS will allow appropriate consideration of adverse impacts and allow for a full development of the record.

II. CONCLUSION

For the foregoing reason, the County respectfully requests that its motion to stay the adjudicative proceedings until FEIS issuance be granted.

DATED this 30th day of May, 2023.

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CERTIFICATE OF SERVICE

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

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DATED THIS 30th day of May, 2023, at Yakima, Washington.

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