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 POST-HEARING BRIEF **Oral Argument Requested**

I. INTRODUCTION

Benton County (the "County") respectfully submits this post-hearing brief in opposition to Scout Clean Energy, LLC's application for site certification for the Horse Heaven Wind Farm.

The Horse Heaven Wind Farm cannot meet the criteria for a conditional use permit under the Benton County Code and results in the inappropriate conversion of state-protected agricultural lands of long-term commercial significance. Additionally, the proceedings in this case were conducted in violation of the State Environmental Policy Act ("SEPA"), Ch. 43.21C RCW, because an action that would limit reasonable alternatives was taken without a final environmental impact statement having issued. The Energy Facility Site Evaluation Council should recommend denial of the application for site certification to the Governor.

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The County respectfully requests the Energy Facility Site Evaluation Council to hear oral arguments on post-hearing briefing. Given the complex procedural and substantive issues raised in the adjudication, oral argument would allow an opportunity for the parties to summarize their arguments and for the Council to ask questions of the parties about issues in dispute.

II. STATEMENT OF FACTS[1]

On February 8, 2021, Scout Clean Energy, LLC ("Scout"), submitted an application for site certification ("ASC") to the Energy Facility Site Evaluation Council ("EFSEC") for a proposed wind and solar energy generation facility to be located along the Horse Heaven Hills with a nameplate energy generating capacity of up to 1,150 megawatts. Scout submitted an updated ASC to EFSEC on December 1, 2022. The Horse Heaven Wind Farm ("HHWF") boundary encompasses approximately 72,428 acres. Within this large lease boundary, the HHWF proposes to install up to either 244 turbines with a height of 499 feet or 150 turbines with a height of 657 feet. In addition, the HHWF proposes to install three solar arrays, with both the wind and solar components storing their energy capacity in three battery energy storage systems. In total, the HHWF will result in the permanent conversion of at least 6,869 acres of land in the County's Growth Management Act Agricultural District ("GMAAD").

At the time of the EFSEC adjudication and as of the date of this brief, only a *draft* environmental impact statement ("DEIS") has been issued for the HHWF. As part of its comments on the DEIS, the County noted that there was no discussion in the DEIS on the

[1] All documents supporting the County's statement of facts can be found on EFSEC's website. https://www.efsec.wa.gov/energy-facilities/horse-heaven-wind-project

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impact of the HHWF to land designated as agricultural land of long-term commercial significance ("ALLTCS") within the GMAAD. The County filed a Motion to Stay with EFSEC on May 18, 2023, requesting that the adjudication be stayed pending the issuance of the final environmental impact statement ("FEIS") for the HHWF. The County based its motion on both the requirements of SEPA and the fact that no party, including EFSEC, knows how the FEIS will respond to the County's comments regarding impacts to ALLTCS. Similarly, the County does not know how the layout and specifics of the HHWF may change as a result of all comments received on the DEIS in the FEIS. Based upon the DEIS, the only mitigation measure proposed for the conversion of ALLTCS is a restoration plan of unknown and unproven effectiveness once the wind turbine and solar infrastructure associated with the HHWF is decommissioned. DEIS, p. 4-269; Updated ASC, Appendix A.

Pre-filed testimony, including direct, rebuttal, and reply testimony, was filed by all parties. A non-consecutive, seven and a half-day-long hearing commenced on August 14, 2023, and ended on August 25, 2023.

III. ARGUMENT

Pursuant to Council Order No. 883 and Pre-Hearing Order No. 2, in order for EFSEC to recommend approval of the HHWF to the Governor, Scout must show that the HHWF complies with Benton County's conditional use permit ("CUP") criteria.[2] At the outset of the adjudicative hearing, the Administrative Law Judge ("ALJ") framed the issue in this case as "having EFSEC focus on what conditions, if any, should be imposed for a conditional use permit if this project is to be recommended for approval."[3] However, that framing of the

[2] Order No. 883, ¶23; Pre-Hearing Order No. 2, p. 2.
[3] Tr 34:12-14.

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issue was inaccurate as it presupposed the key issue in this case. Whether or not Scout can actually satisfy Benton County's CUP criteria was improperly subordinated to an impetus to recommend approval. Scout's view of these proceedings put the cart before the horse, because the project cannot lawfully be approved if it does not meet the CUP criteria in the first place. Similarly, Scout has continually framed this case as one of conditions to be imposed as opposed to one of CUP compliance, seeming to take Council Order No. 883 for the proposition that EFSEC has already granted a CUP and the only remaining issue is to determine appropriate conditions.[4] In fact, Dave Kobus, the main spokesperson for the HHWF, testified to just as much:

> Ms. Foster: So you do not believe that there can be a finding that the project does not comply with the conditional use permit criteria?
>
> Mr. Kobus: That is my belief, yes.[5]

Council Order No. 883 does not go so far. Council Order No. 883 clearly states that "[t]he Council's land use consistency determination does not prejudge whether the Facility has met or can meet Benton County's conditional use criteria."[6] The HHWF is only "consistent" with the County's land use regulations in the sense that, at the time of its application, wind and solar farms were allowed as a conditional use in the GMAAD, *if* a project satisfied the County's CUP criteria.[7]

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[4] Applicant Scout Clean Energy, LLC's Prehearing Brief, p. 6-8.
[5] Dave Kobus Dep., 202: 4-7. On August 15, 2023, the ALJ granted TCC's Motion to Supplement Record, adding the deposition of Dave Kobus to the record. However, no exhibit number was given for this deposition. Benton County cites this deposition herein as "Dave Kobus Dep."
[6] Council Order No. 883, ¶23.
[7] Council Order No. 883, ¶36.

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As Scout's own expert witness testified "what is before [the] Council is the determination of whether the - - the use meets the conditional use permit criteria[.]"[8] As a condition precedent for EFSEC to decide appropriate conditions, EFSEC must first determine whether Scout has shown the HHWF is entitled to a CUP under the Benton County Code ("BCC"). Scout cannot do so in this case because the size, scale, and scope of the HHWF renders it incompatible with outright permitted uses in the GMAAD and otherwise in conflict with CUP criteria. In addition, EFSEC should recommend denial of the HHWF as it results in the improper conversion of ALLTCS, putting those lands to non-agricultural uses in violation of the mandates of the Growth Management Act ("GMA"), Ch. 36.70A RCW, which results in a violation of the purpose of the GMAAD and therefore the County's zoning and CUP requirements.

A. The Horse Heaven Wind Farm, even with conditions, does not meet Benton County's conditional use permit criteria.

Benton County's CUP criteria are found in the BCC and require that a proposal, as conditioned, meet the following criteria:

> (1) Is compatible with other uses in the surrounding area or is no more incompatible than are other outright permitted uses in the applicable zoning district;
>
> (2) Will not materially endanger the health, safety, and welfare of the surrounding community to an extent greater than that associated with any other permitted uses in the applicable zoning district;
>
> (3) Would not cause the pedestrian and vehicular traffic associated with the use to conflict with existing and anticipated traffic in the neighborhood to an extent greater than that associated with other permitted uses in the applicable zoning district;

[8] Tr. 128: 5-7.

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(4) Will be supported by adequate service facilities and would not adversely affect public services to the surrounding area; and

(5) Would not hinder or discourage the development of permitted uses on neighboring properties in the applicable zoning district as a result of the location, size or height of the buildings, structures, walls, or required fences or screening vegetation to a greater extent than other permitted uses in the applicable zoning district.[9]

These are the same criteria that were in effect when Scout submitted its ASC.[10] While Scout must present sufficient evidence to support a finding that the HHWF complies with all five CUP criteria, the key is the first condition—Scout must show that the HHWF is compatible with other permitted uses in the GMAAD or is no more incompatible than outright permitted uses in the GMAAD.[11] EFSEC must understand that neither Benton County nor any other party to the adjudication has to show that the HHWF is incompatible in order for a CUP to be denied. Instead, the burden is on Scout to show that the CUP conditions are met and the HHWF is entitled to a CUP.[12]

1. The HHWF is not compatible with outright permitted uses in the GMAAD.

The starting point for any compatibility analysis is comparing the size, scale, and scope of the proposed project with the outright permitted uses in the underlying zoning district.[13] "Compatibility" is the congruent arrangement of land uses and/or project elements

[9] BCC 11.50.040(d).
[10] ASC, p. 2-152-158; Tr. 55: 15-18.
[11] BCC 11.50.050 ("It is the applicant's burden to present sufficient evidence to allow the above conclusions to be made.").
[12] *Id*.
[13] Tr. 250: 17-18; 343:13-17.

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to avoid, mitigate, or minimize (to the greatest extent reasonable) conflicts.[14] Crucially, compatibility does not merely or even primarily evaluate, and therefore renders irrelevant, the impacts of the project on surrounding landowners to maintain their ability to farm or the increase in cost to agricultural uses and practices.[15] Instead, as Benton County's Director of Community Development, Greg Wendt testified, compatibility focuses on the size, scale, and scope of the proposed use in a zone as compared to the permitted uses in a zone.[16]

As noted above, the test for compatibility is whether the proposed use is the same or complementary to surrounding uses in the zoning district based upon project scale, traffic impacts, and/or operational impacts and conflicts.[17] When discussing orderly and compatible development, the first step must be to look at the permitted uses in a zone.[18] Permitted uses in a zone are uses that the legislature of the planning jurisdiction, in this case the Benton County Board of County Commissioners (the "Board"), has determined to be orderly and compatible with one another—i.e., a single-family home in a rural area may be compatible with a horse stable as they have a similar intensity of use.[19] With an unpermitted use, or even a potential conditional use like the HHWF, there is a higher likelihood for conflict in the intensity of uses.[20] Conflict in the intensity of uses results in incompatible uses.[21] In

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[14] BCC 11.03.010(53); Tr. 198: 13-18.
[15] *See* Tr. 79: 9-11 (claiming HHWF is compatible because some farming uses will continue and will not increase the cost to farm).
[16] Tr. 203: 19-22 ("I mean, we're talking about the size, the mass, the location, just the overall scope of the project as it relates to the permitted uses in the zone."); 215: 6.
[17] BEN EXH-2001_T, p. 7; Tr. 215; 6.
[18] BEN EXH-2001_T, p. 10.
[19] *Id*.
[20] *Id*.
[21] *Id*.

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order to determine the likelihood of conflict, one must compare and contrast the intensity of a proposed conditional use with the intensity of outright permitted uses.[22]

Scout cannot meet its burden to show compliance with the CUP criteria because first, as explained in detail *infra*, Scout analyzed the HHWF under the incorrect compatibility standard. Second, Scout cannot meet its burden because Scout views the size and scale of the HHWF as irrelevant to EFSEC's consideration,[23] and therefore did not provide any analysis on how the size and scale of the HHWF either does or does not make it compatible with outright permitted uses in the GMAAD.

When asked on cross-examination to relate the HHWF with the size, scale, and scope of outright permitted uses in the GMAAD, Scout's land use planner evaded questioning, implicitly acknowledging that there is *no harmony* between the HHWF and the size, scale, and scope of outright permitted uses in the GMAAD.

> Mr. Harper: Do you acknowledge that any number of turbines or height of turbines or density of turbines or associated solar facilities would be simply too much and incompatible with the GMAAD zoning district?
>
> Ms. McClain: Any number? I - - I would not agree with that. I think that scale is not in and of itself a determination of what's compatible.[24]

Again, rather than acknowledge the extraordinary size, scale, and scope of the HHWF, Scout's planner evaded questioning.

> Mr. Harper: So, Ms. McClain, your testimony is that - - is that, in fact, that the - - the purpose statement of the GMAAD zoning district would never reach a breaking point where a - - a particular number of turbines - - let's say it's twice the number that Scout is proposing - - would never, per se, become incompatible. Is that right?

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[22] *Id*.
[23] Tr. 71: 2-4; 72: 24-25-73:1.
[24] Tr. 72: 20-25-73: 1.

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> Ms. McClain: You're coming up with a hypothetical situation that I - - I think every project needs to be examined on its own merit and its own evidence that's brought forward to the Council.[25]

In reality, Scout has deliberately rejected any concessions to reduce the size of the HHWF to attempt to make it compatible with the GMAAD; instead, Scout is focused on seeking the maximum build-out possible to make the HHWF marketable to potential offtakers.[26] This is business opportunism, which in and of itself is not objectionable, but is not consistent with the CUP criteria.

> Mr. Harper: Is there - - is there any concession contemplated - - as you can read Mr. Kobus's testimony, is there any concession being made to scale back the project to support congruence, harmony, compatibility with surrounding uses?
>
> Ms. McClain: I mean, I feel like this is taken out of context. You're applying a quote from this deposition to the - - the consistency analysis in the CUP.
>
> But what I do think is important to maybe point out here is that- - that the project has been described in the ASC with a maximum building envelope. And so what has been put forward as the proposed action, the proposed project, in the ASC is what Mr. Kobus has and Scout has identified as the - - the size of the project that they want to bring forward, and it has a phasing approach.[27]

Scout's argument provides no acknowledgement of the County's CUP criteria, which require a proposed conditional use to be compatible in size, scale, and scope to outright permitted

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[25] Tr. 73: 14-24.
[26] *See* Dave Kobus Dep., 17: 10-13 ("You know, we - - in marketing the project, we market to any potential offtaker, any potential purchaser, for the entire time we develop these projects."); 44: 18-20 ("And so all of these things work together to optimize the project for the eventual offtaker.").
[27] Tr. 77: 7-22.

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uses.[28] In fact, this is by design. The market is the driving force behind Scout's site, not compliance with Benton County's CUP terms.

It is Scout's burden to show EFSEC it meets Benton County's CUP criteria, not Benton County's burden to show non-compliance. Without properly analyzing the size, scale, and scope of the HHWF in comparison to outright permitted uses in the GMAAD, Scout has not met its burden.

a. The HHWF is significantly larger than the typical parcel size for permitted uses in the GMAAD.

The permitted uses in the GMAAD consist of: agricultural activities (usually limited to one or only a few parcels); agricultural-related industries (usually limited to one parcel); agricultural stands (usually limited to one parcel); bakeries associated with agriculture (usually limited to one parcel); single-family homes (limited to one parcel); manufactured homes (limited to one parcel); commercial specialty/exotic animal raising (usually limited to one parcel); aquaculture (usually limited to one parcel); adult family homes (limited to one parcel); club houses, grange halls associated with agriculture (usually limited to one parcel); custom agricultural services (usually limited to one parcel); personal airstrips (usually limited to one parcel); public or quasi public buildings (limited to one parcel); cell towers (no greater in height than 150') (usually limited to one parcel); personal use wind turbines (no greater in height than 60') (usually limited to one parcel); meteorological towers (usually limited to one parcel); and commercial horse stables (usually limited to one parcel).[29]

[28] BCC 11.50.040(d); Tr. 203: 19-22 ("I mean, we're talking about the size, the mass, the location, just the overall scope of the project as it relates to the permitted uses in the zone.")
[29] BEN EXH-2001_T, p. 6-7.

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Most permitted uses in the GMAAD are agricultural-related and limited to one parcel, with the agricultural activities sometimes encompassing around a thousand or so acres.[30] The HHWF is "an industrial use. It's not an agricultural use."[31] Industrial uses are not permitted in the GMAAD.[32] Even if the HHWF can somehow be typed as a similar "agricultural use," a typical parcel size in the GMAAD ranges from 150 to 640 acres.[33] The HHWF's entire project boundary is 72,428 acres or, assuming the largest typical parcel size, approximately 113 times larger than a typical project in the GMAAD.[34] Even just taking the HHWF's wind micrositing corridor, which will house all turbines and supporting infrastructure, it encompasses 11,850 acres and is approximately 18 times larger than a typical project in the GMAAD.[35] This does not count the solar arrays, which will take up an additional 10,755 acres, and are approximately 16 times larger than a typical project in the GMAAD. The wind energy micrositing corridor and solar arrays combined (22,605 acres) are approximately 35 times larger than a typical project in the GMAAD.

The size, scale, and scope of the HHWF is not similar to outright permitted uses in the GMAAD, resulting in a conflict in the intensity of uses and rendering the HHWF incompatible with outright permitted uses.[36] Scout cannot satisfy the first CUP condition and, as such, EFSEC should deny the HHWF.

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[30] *Id*., at p. 7.
[31] Tr. 203: 24.
[32] Tr. 1127: 22-25.
[33] BEN EXH-2001_T, p. 7.
[34] *Id*.
[35] *Id*.
[36] While the CUP criteria focuses on comparing a proposed use with outright permitted uses in a zoning district, argument was made over the fact that the County had previously allowed the Nine Canyon Wind Farm as a CUP in the GMAAD. While comparison between conditional uses is not a CUP criterion, the HHWF is not comparable to the Nine Canyon

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b. The HHWF has a larger per-parcel structural density than outright permitted uses in the GMAAD.

The HHWF micrositing corridor encompasses 11,850 acres and will house 244 turbines. Appendix F to the Updated ASC shows an average parcel size of 341 acres for the landowners with whom Scout holds a lease agreement. Understanding that the lease agreements cover the entire project boundary, and Scout holds lease agreements with landowners who may not host any portion of the HHWF,[37] the exact number of parcels the micrositing corridor covers is unknown to the County. However, taking this average parcel size of 341 acres, the micrositing corridor can be assumed to cover 35 parcels. 244 turbines across 35 parcels averages out to approximately seven turbines per parcel. This does not include the necessary haul routes associated with each turbine, which may cross multiple parcels.

Dryland farming can encompass thousands of acres and multiple parcels, but usually only has about two or three structures associated with the entire operation.[38] This is similar to other outright permitted uses, which encompass large areas but include few structures and roads. As Scout's own witness testified, the roads in the GMAAD are closer to dirt tracks as compared to the graveled service roads that will be constructed for the HHWF.[39] Power infrastructure for the farms in the Horse Heaven Hills do not intersect, and therefore do not

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Wind Farm. The Nine Canyon Wind Farm encompasses approximately 63 wind turbines across 75 acres, with a maximum generating capacity of 95.9 megawatts. https://www.energy-northwest.com/energyprojects/nine-canyon/Pages/default.aspx. The HHWF, on the other hand, proposes 244 wind turbines, along with solar arrays, across a 72,428 acres lease boundary, with a maximum generating capacity of 1,150 megawatts. Even if the comparison of conditional uses were relevant to these proceedings, the size, scale, and scope of the HHWF is not similar to that of the Nine Canyon Wind Farm.

[37] Dave Kobus Dep., 196: 3-6

[38] BEN EXH-2001_T, p. 11.

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fragment, any of the properties as there are no ditches and "all of the power poles run along the road right-of-way infrastructure."[40] Similarly, the roads do not divide the property, but instead are only on one side of a property.[41] As Scout admitted, the project's new roads would divide the property.[42]

Permitted uses in the GMAAD are almost invariably low-intensity activities. The intensity of the HHWF is significantly greater than the intensity of permitted uses within the GMAAD, as it covers a much larger land area, involves more ground disturbance, and is not ancillary to existing agricultural uses. There are no conditions that are sufficient for the permanent loss of such a large percentage of the County's agricultural land, which is the dominant land use throughout the region.[43]

In attempting to circumvent the fact that there is no set of conditions that will make the HHWF compatible with outright permitted uses in the GMAAD, Scout states that the environmental review and adjudicative process will "make sure that [the HHWF] is sited in the most environmentally conscientious way possible and to minimize the impacts and to make sure that everything is mitigated as much as possible."[44] While Benton County disputes that the environmental review process has resulted in the most environmentally conscientious project, Scout's position is irrelevant. Mitigating the HHWF's *environmental* impacts is not the same as supplying sufficient conditions so the HHWF is *compatible* with permitted uses in the GMAAD. The HHWF is fundamentally incompatible with permitted

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[39] SCE EXH_1035_R, p. 5; Tr. 1099: 20-22.
[40] Tr. 313: 17-20.
[41] Tr. 1099: 15-17.
[42] Tr. 1099: 12-14.
[43] Tr. 243: 7-12.
[44] Tr. 78: 17-20.

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uses in the GMAAD as it is an industrial or quasi-industrial use and should not be allowed as a conditional use.

2. Economic benefits or incentives to participating landowners are not a relevant consideration under Benton County's conditional use permit criteria.

In support of its application, Scout presented testimony from a local farmer who will benefit from lease payments, Christopher Wiley. The County has no reason to dispute Mr. Wiley's characterization of how he and his family may use Scout's lease payments. However, Mr. Wiley is only one farmer along the Horse Heaven Hills and within the HHWF boundary and, as he himself noted, he cannot speak for how other lease holders may use their income.[45] However, and most importantly for EFSEC's consideration, "[u]nfortunately, the economics, income, and the utilization of people's money isn't a criteria that we evaluate on the planning level of how compatible [a] certain use is with the zoning designation."[46] Therefore, EFSEC should not view economic benefits as relevant to its consideration of whether the HHWF can meet Benton County's CUP criteria.

3. Scout improperly uses Oregon statutes and regulations for its definition of compatibility.

At no point in its ASC, briefing, or testimony does Scout ever substantively engage with the concept of whether the HHWF is compatible with other permitted uses in the GMAAD. This lack of engagement is likely because Scout conflated the standards for compatibility under the BCC and an Oregon statute that governs the standards for approval of uses in what Oregon designates "exclusive farm use zones." Similar to the the GMAAD, an "exclusive farm use zone" is intended to provide an area for the continued practice of

[45] Tr. 1121: 6-8.
[46] Tr. 1124: 4-8.

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agriculture and protect agriculture from non-farm uses.[47] However, a key difference between the GMAAD and the "exclusive farm use zone" is that the "exclusive farm use zone" focuses on commercially viable agriculture, while the GMAAD simply focuses on lands designated as ALLTCS—regardless of their commercial viability.[48] For example, Scout believes "the question is whether the Project would undermine existing uses or cause any increase in the costs of agricultural uses and practices of land."[49] As noted above, that is not the test for compatibility under the BCC. The test for compatibility is actually whether the size, scale, and scope of a proposed conditional use is congruent with the size, scale, and scope of outright permitted uses in a zone.[50]

In Oregon, certain non-farm uses are permitted in the "exclusive farm zone," provided that the use meets certain approval criteria. Specifically, in Oregon

> A use allowed under ORS 215.213 (Uses permitted in exclusive farm use zones in counties that adopted marginal lands system prior to 1993) (2) or (11) or 215.283 (Uses permitted in exclusive farm use zones in nonmarginal lands counties) (2) or (4) may be approved only where the local governing body or its designee finds that the use will not:
>
> (a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or

[47] *See* Marion County Code 17.136.010; Or. Rev. Stat. § 215.203.
[48] *Compare* Or. Rev. Stat. §215.203 ("As used in this section, 'farm use' means the current employment of land for the primary purpose of obtaining a profit in money"), *with* BCC 11.17.010 ("The purpose of this chapter is to meet the minimum requirements of the State Growth Management Act (Chapter 36.70A RCW) that mandates the designation and protection of agricultural lands of long term commercial significance.").
[49] SCE EXH-1023_R, p. 14.
[50] Tr. 203: 19-22 ("I mean, we're talking about the size, the mass, the location, just the overall scope of the project as it relates to the permitted uses in the zone."); 215: 6.

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> (b) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.[51]

Scout's reliance on this statute, or the concepts embodied therein, is fundamentally wrong as to the test for compatibility in this case. Scout's apparent reliance on this statue also helps to explain its erroneous belief that "scale is not in and of itself a determination of what's compatible"[52] and that "the scale and the scope is not in and of itself a reason for the project to not be compatible with the GMAAD."[53]

The BCC specifically defines compatibility as the congruent arrangement of land uses and/or project elements to avoid, mitigate, or minimize (to the greatest extent reasonable) conflicts.[54] As Mr. Wendt testified, "we're talking about the size, the mass, the location, just the overall scope of the project as it relates to the permitted uses in the zone."[55] The test for compatibility under the BCC, therefore, is congruence with *outright permitted uses*.[56] Congruence requires a comparison of the size, scale, and scope of a proposed conditional use against the size and scale of permitted uses.[57] The economic incentives that a conditional use may offer to other surrounding landowners cannot be considered a legitimate counterbalance to actual compliance with the CUP code. This is pitting business expediency against code compliance, with Scout asking EFSEC to conclude that the ends justify the means.

Although the burden is on Scout to show EFSEC congruence, Benton County, in its pre-hearing brief, its testimony during the adjudication, and *supra*, has shown that the size,

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[51] Or. Rev. Stat. § 215.296(1); *see also* Or. Admin. R. 660-033-0130.
[52] Tr. 72: 24-25-73: 1.
[53] Tr. 79: 11-13.
[54] BCC 11.03.010(53).
[55] Tr. 203: 19-22.
[56] *Id*.

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scale, and scope of the HHWF is not congruent, and therefore is not compatible, with the GMAAD. Scout has provided no evidence to the contrary, instead relying on self-justifying statements that "this project as described in the ASC is compatible with the GMAAD."[58] This is not sufficient.

B. The Horse Heaven Wind Farm violates the Growth Management Act's mandate to conserve and protect agricultural lands of long-term commercial significance.[59]

In addition to its inability to satisfy Benton County's CUP criteria, the HHWF suffers from another fatal flaw—it impacts and unlawfully converts ALLTCS in violation of the GMA. In order for EFSEC to recommend approval of the HHWF, it must first find that the HHWF is consistent with zoning and land use regulations.[60] As noted above, the consistency determination during the adjudicative hearing is different from the initial consistency determination under Council Order No. 883. The HHWF is located within Benton County's GMAAD. The purpose of the GMAAD:

> *[i]s to meet the minimum requirements of the State Growth Management Act (Chapter 36.70A RCW) that mandates the designation and protection of agricultural lands of long term commercial significance.* This chapter protects the GMA Agricultural District (GMAAD) and the activities therein by limiting non-agricultural uses in the district to those compatible with agriculture and by establishing minimum lot sizes in areas where soils, water, and climate are suitable for agricultural purposes. This

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[57] *Id*.
[58] Tr. 79: 7-8.
[59] The County acknowledges that Pre-Hearing Order No. 2 excluded from adjudication the issue of compliance with the Growth Management Act. However, the County's position is that non-compliance with the GMA has a substantial relationship to EFSEC's evaluation of the issue of land use as the HHWF is located on land zoned GMAAD, which was enacted to meet the minimum requirements of the GMA. Additionally, Pre-Hearing Order No. 2 allows for post-hearing briefs to raise policy and legislative intent issues. Compliance with the GMA falls squarely within the issue of legislative intent for cities and counties to conserve agricultural lands.
[60] WAC 463-30-300(2).

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> chapter is intended to work in conjunction with Chapter 14.05 BCC entitled "Right to Farm" which protects normal agricultural activities from nuisance complaints.[61]

Therefore, in order for EFSEC to find that the HHWF is consistent with the requirements of the GMAAD, it must also be consistent with the requirements of the GMA. As Scout's land use expert testified "the Council's task, then, is to ensure the development in the GMAAD zoning district protects the integrity of that district[.]"[62]

1. The GMA *requires* conservation of agricultural lands of long-term commercial significance.

The GMA imposes on Benton County a mandate for conservation of a type of natural resource land identified by the GMA as ALLTCS.[63] The County is required "(1) to designate agricultural lands of long-term commercial significance; (2) to assure the conservation of agricultural land; (3) to assure that the use of adjacent lands does not interfere with their continued use for agricultural purposes; (4) to conserve agricultural land in order to maintain and enhance the agricultural industry; and (5) to discourage incompatible uses."[64]

The conservation of ALLTCS is a mandate that *must* be followed.[65] Once land is designated as ALLTCS, it cannot either be de-designated or put to non-agricultural uses without the local jurisdiction first making a determination that the land no longer meets

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[61] BCC 11.17.010 (emphasis added).
[62] TR 56: 14-17.
[63] RCW 36.70A.060.
[64] *King Cnty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 558 (2000) (*Soccer Fields*).
[65] *See Yakima Cnty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 146 Wn. App. 679, 687 (2008) ("The legislature has been particularly concerned with agricultural lands when addressing the problem of growth management. Read together, RCW 36.70A.020(8), .060(1), and .170, reveal a legislative mandate for the conservation of agricultural land.") (internal citation omitted).

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ALLTCS status.[66] This protection mandate was highlighted by Benton County's planning manager, Michelle Cooke, who testified "we protect it, because the State mandates that we protect from these pressures or other pressures, such as industrial uses or other noncompatible uses."[67]

2. The HHWF is incompatible with the GMAAD and will result in the improper and illegal conversion of agricultural lands of long-term commercial significance.

In order to fulfill the GMA's mandate to protect ALLTCS, Benton County enacted the GMAAD.[68] Permitted activities within the GMAAD are limited to agricultural uses and non-agricultural uses "which are dependent upon, supporting of, ancillary to, or compatible with, agricultural production as the principle land use."[69] These permitted activities include: agricultural activities; agricultural-related industries; agricultural stands; bakeries associated with agriculture; single-family homes; manufactured homes; commercial specialty/exotic animal raising; aquaculture; adult family homes; club houses, grange halls associated with agriculture; custom agricultural services; personal airstrips; public or quasi-public buildings; schools/churches; dog kennels; cell towers (no greater in height than 150'); personal use wind turbines (no greater in height than 60'); meteorological towers; and commercial horse stables.

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[66] *Clark Cnty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn. App. 204 (2011), *vacated in part on other grounds*, 177 Wn.2d 136 (2013).
[67] Tr. 1127: 22-25.
[68] BCC 11.17.010
[69] *Id*.

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The HHWF is "an industrial use. It's not an agricultural use."[70] Mr. Wendt is a planner with over 24 years of experience in the Columbia Basin region. Mr. Wendt has seen countless land use applications, including CUP applications, come before him during his career.[71] Based upon his experience, and in his role as the Community Development Director for Benton County, he believes the HHWF to be an industrial project.[72] Scout did not provide any admissible evidence to rebut the determination of Mr. Wendt that the HHWF is an industrial use; instead, all Scout provided was its attorney's disagreement with Mr. Wendt's statement.[73] Therefore, without even getting into the improper conversion of ALLTCS, it is not compatible with the GMAAD because industrial uses in the GMAAD are not allowed.[74]

In addition to the fact that the HHWF is an industrial project that is simply not allowed in the GMAAD, it also circumvents the purpose of the GMAAD as it results in the conversion of ALLTCS. The HHWF will encompass a total lease boundary of 72,428 acres within the GMAAD. All land within the GMAAD is ALLTCS.[75] It is undisputed that within the project boundary, the HHWF will result in the permanent conversion of 6,869 acres—over 10 square miles—of ALLTCS.[76] This is not supposition by the County. This was plainly acknowledged by Scout during the adjudication:

> Mr. Harper: Do you agree with me that the footprint of the permanent disturbance area is greater than ten square miles?

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[70] Tr. 203: 24; *see also* 213: 21 ("Well, it's an industrial use"); ("I believe it to be an industrial project.").
[71] *See* BEN EXH-2004_R, p. 4; Tr. 228: 23-25-229: 1-6.
[72] *Id*.
[73] *See* Tr. 211: 16-20; 213: 19-20.
[74] Tr. 1127: 22-25.
[75] BEN EXH-2002, p. 54.
[76] SCE EXH-1023_R, p. 13-14.

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> Ms. McClain: I haven't done that calculation, but I know the permanent footprints are around 6,800 acres.
>
> Mr. Harper: Yeah. I'll represent to you that if you break out the math, it does come in to about ten miles.[77]

There has been no de-designation of any of the land within the HHWF lease boundary. Therefore, any place where infrastructure is placed or roads are constructed within the HHWF project boundary converts ALLTCS. This is unlawful under the GMA and the BCC.

Attempting to skirt this obvious violation of state law, Scout minimizes the County's concerns by highlighting that the HHWF will "only" result in the permanent conversion of 6,869 acres of ALLTCS, or just over one percent of the County's GMAAD land.[78] This argument is irrelevant under the GMA. The GMA's mandate to conserve ALLTCS does not concern itself with a numerical limitation on the amount of ALLTCS that may be converted. Instead, the GMA states that *any* conversion of ALLTCS is improper.[79]

Scout's argument is particularly telling—it is well aware that it is converting and putting ALLTCS to non-agricultural uses. Instead of actually engaging with this fact, Scout attempts to minimize any alleged damages the HHWF may cause to ALLTCS. This argument is exactly why both state law and the Benton County Code require the conservation of *all* designated ALLTCS. Even if the conversion only impacts a small amount of the overall ALLTCS, allowing piecemeal conversion of "small" portions of ALLTCS one project at a time would in fact result in the conversion of almost all of the County's ALTLCS. If the

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[77] Tr. 65: 8-14.
[78] Tr 66: 21-22 ("So it's not displacing that many acres of agricultural.")

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County approved project after project that only converted a portion of ALLTCS, at some point in time, the County would have allowed all of its ALLTCS to be converted. This irrevocable and uncontrolled erosion of the agricultural land base is exactly what the GMA was designed to protect against.

Scout also attempted to argue that the HHWF, and the associated lease payments, will actually help protect GMAAD land because it would keep farmers farming and "the Horse Heaven Hills farmland is under threat from urban expansion from the Tri-Cities. That is the biggest threat in terms of what would take our land out of farm production."[80] Scout seems to base its argument upon the idea that the County is opposed to the HHWF because the County wants to use the Horse Heaven Hills as an area to expand the rapidly growing Tri-Cities.[81] However, as Ms. Cooke testified, "from a planning standpoint, that's just not true."[82] It is not true because once land is designated as ALLTCS, it *cannot* be put to non-agricultural uses unless the County can meet the high burden for de-designation.[83] As such, the County actually must protect the Horse Heaven Hills and all other ALLTCS from development that results in the conversion of ALLTCS, such as the HHWF.

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[79] *See Lewis Cnty.*, 157 Wn.2d at 508 (noting "the GMA conservation requirement" when discussing zoning ordinance that would allow residential subdivisions and other nonfarm uses).
[80] Tr 1104: 8-11; *see also*
[81] SCE EXH-1035_R, p. 13 ("This sleight-of-hand technique used by the County to scapegoat Scout Clean Energy is a thin veil that poorly hides the County's true long-term plans for the Horse Heaven Hills and its farms.").
[82] Tr. 1127: 16-19.
[83] *Clark Cnty.*, 177 Wn.2d 136.

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While this fact was clearly spelled out in the County's pre-filed testimony,[84] Scout attempted to paint the County as hypocritical for its concern over the HHWF's impact on ALLTCS by erroneously claiming that Benton County removed land from the GMAAD designation from its 2006 to 2018 comprehensive plan.[85] Ms. McClain claimed in her testimony "there has been a reduction in the GMAAD over time in the Benton County. And that reduction is due to urbanization and not due to wind or solar projects."[86] Scout is factually wrong. In 2006, the County designated 643,476 acres as GMAAD.[87] In 2018, the County designated 649,153 acres of land as GMAAD.[88] Therefore, contrary to Scout's contentions, the County was actually able to *increase* the size of its GMAAD, further showing its attempts to conserve and protect ALLTCS. Approving the HHWF would run contrary to the GMAAD and GMA's intent to conserve and protect ALLTCS.

3. The HHWF will result in improper agricultural fragmentation.

Benton County's concerns with the HHWF reach further than the actual conversion of ALLTCS in violation of the GMA—the HHWF will result in agricultural fragmentation within the GMAAD. Dryland farming has an economy of scale requiring large operations, typically in the thousands of acres.[89] This is due to the fact that dryland farming has low per-acre yield and profits.[90] By fragmenting farming operations within and beyond the HHWF

[84] BEN EXH-2004_R, p. 9 ("However, until GMAAD land is de-designated, Benton County has a mandate to protect ALLTCS.").
[85] SCE EXH-1023_R.
[86] TR. 85: 3-5.
[87] BEN EXH-2011_X, p. 3.
[88] *Id*., p. 2.
[89] *See* Tr. 1097: 23-25.
[90] Tr. 1101: 17-18.

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area, the County will experience pressure to allow non-agriculture uses to replace an intact, regional agricultural area.

When asked about likely consequences of the HHWF, Ms. Cooke testified "[f]irst would be the fragmentation of the land…."[91] In fact, it is the County's mission of "protection and conservation of the agricultural lands as a whole and keeping those [agricultural lands] from fragmenting."[92] Specifically, Ms. Cooke testified to what the County generally sees when an incompatible use is introduced into a landscape:

> So what typically happens in land-use planning is, let's say for some reason a use isn't allowed or it was what we call grandfathered in and today it's not allowed. Well, it's been there forever, so I should be able to do this thing.
>
> And so if we have an industry scale or an industrial-type use out in an agricultural zone and that use ends its life cycle or goes away, but maybe the infrastructure is there or something of that nature, we'll see inquiries of more industrial uses come in, say, Yeah, well, but for the last 30 years, there's been a wind turbine here, so of course I should have a communication facility, or of course I should have, you know, a data server farm. It - - it won't be any more intense than what was there previously.
>
> And that's a - - that's a hard argument from our standpoint to make. That's typically when we see a lot of petitions for rezoning, reclassification, when you have that legacy of fragmentation in a particular zone.[93]

As Ms. Cooke testified, the disruptive effect of the HHWF on farming operations will be apt to result in the transition of this land to other uses that will have little or nothing to do with agriculture.

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[91] Tr. 1125: 10; *see also* Tr. 341: 11-13 ("Well, It's going to - - it's going to continue fragmenting the landscape it they're not able to restore it.").
[92] Tr. 302: 14-16.
[93] Tr. 341: 16-25-342: 1-9.

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> As Mr. Wiley so eloquently spoke in his grandmother's poem about how important this landscape is and the stewardship of the land is to the people who live there, I think that will become unraveled and we're going to see many more instances where, if there's one wind farm project, there will be another one. And it will kind of have a snowball effect and eventually become [an] energy reservation as Hanford is today, which would be completely unfortunate, because this is a unique and very prime area for our region.[94]

Specifically, in her role as planning manager for Benton County, Ms. Cooke is concerned about the long-term future of agriculture and ALLTCS in Benton County. As Ms. Cooke noted

> I think a lot of people are looking at this project within a limited scope, you know, whether it's 30 years or a lifetime. And from planning, we try to look much further out.
>
> And for us, we only have a limited area of agriculture. We're not making new agricultural lands. And so that protection is key.[95]

Road building, traffic, and new land use pressures will range beyond the HHWF area and will cause large-scale changes to the landscape as a viable farming area.[96] Simply put, the HHWF will result in the conversion of ALLTCS and future fragmentation of the land within the GMAAD.

4. The HHWF's decommissioning plan is not sufficient mitigation.

Scout attempts to paint the County's concerns as irrelevant by pointing out that any land impacted by the HHWF will be returned to agricultural production via Scout's decommissioning plan.[97] As a matter of substantive law, the fact that land may, in the future, be returned to its "preconstruction character" does not comply with GMA's mandate that

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[94] Tr. 1129: 24-25-1130: 1-8.
[95] Tr. 338: 13-19.
[96] BEN EXH-2003_T, p. 4.
[97] *See* SCE EXH-1023_R. p 27.

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ALLTCS be preserved.[98] Benton County's concerns regarding the HHWF's conversion of ALLTCS is due to the fact that "once gone, *the capacity of those lands to produce food is likely gone forever*."[99] Simply put, Benton County does not agree with Scout that its decommissioning plan provides sufficient support for the proposition that the converted ALLTCS can be returned to viable agricultural production. No witness from Scout offered any support for this view.

Historically speaking, roads and accessory industrial uses do not revert back to an agricultural use because the impacts to soils regarding soil depth, nutrient content, and overall fertility are nearly irreparable.[100] Soil regeneration in the real world is often impractical and is seldom pursued on an area-wide basis.[101] This is especially true in the Horse Heaven Hills as dryland farming requires farmers to grow crops on a cycle, resting their soil for at least a year after each harvest to give it time to collect enough rain to produce another crop.[102] If the soil is tilled, or if there is any other disturbance of the soil, the bare soil becomes subject to wind and water erosion, losing water storage to evaporation and weeds.[103] If a dryland field does not contain adequate organic material or retain enough water, it will not yield a profitable crop.[104]

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[98] *Soccer Fields*, 142 Wn.2d at 562 ("The County's argument that the land could be returned to agricultural use at a future time, despite the intensive use demanded by the growing urban population and the profitability of that use, is unpersuasive.").
[99] *Lewis Cnty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 496 (2006) (emphasis added).
[100] BEN EXH-2003_T, p. 4.
[101] *Id*.
[102] *Id*., at p. 5; *see also* Tr. 1096: 21-22 ("So because of the limited precipitation, we only harvest our land every other year.").
[103] BEN EXH-2003_T, p. 5.
[104] *Id*.

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In order to return a dryland farm to viable agricultural production one must put organic material back into the soil and stabilize the soil.[105] Straw is generally the cheapest organic material that can be used, at $50-80 per ton.[106] The general application rate of straw is about two tons per acre.[107] Most dryland wheat farms cover thousands of acres.[108] Assuming a farm of one thousand acres and straw at its present-day price, the cost solely for the necessary organic material to put the land back into production is $100,000.[109] Because farming is a commodity, an additional $100,000 expense is a cost that will render any given farming operation uncompetitive.[110]

While the above is an example of what site remediation would entail, Scout provides no actual evidence of its decommissioning plan or to back up its claims that its decommissioning plan will be sufficient to return converted ALLTCS to viable agricultural production. What the evidence does show is that the County presented a "professional opinion as a land-use planner that the majority of the land will not go back to agriculture after the lifetime of this project."[111] In any event, reliance on a decommissioning plan is at odds with previous decisions of the Washington State Supreme Court.[112]

C. The adjudicative process violates the State Environmental Policy Act because it constituted an action that may limit the choice of reasonable alternatives prior to the issuance of an FEIS.

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[105] *Id*., at p. 6
[106] *Id*.
[107] *Id*.
[108] *Id*.
[109] *Id*.
[110] *Id*.
[111] Tr. 325: 1-3.
[112] *See Lewis Cnty.*, 157 Wn.2d at 496; *Soccer Fields*, 142 Wn.2d at 562.

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"EFSEC conducts environmental review under SEPA and has explicitly adopted SEPA into its own regulations[.]"[113] When processing an application for site certification, EFSEC must follow SEPA.[114] SEPA's basic mission is procedural. "[A] major purpose of [the SEPA process] is to combine environmental considerations with public decisions…."[115] The Supreme Court has explained that use of an EIS in public decisions requires actual engagement with the EIS at a meaningful time in review of a proposal: "Thus, SEPA policy is to ensure through a detailed environmental impact statement (EIS) the full disclosure of environmental information so that it can be considered *during* decision making."[116]

In the SEPA statute, the term "decision" is given a broad definition and means any "substantive agency action."[117] The EFSEC adjudicative process results in a recommendation to the Governor.[118] The critical point is that EFSEC must *decide* on what the recommendation will be. Specifically, as the County noted above, EFSEC must *decide* whether the HHWF complies with Benton County's CUP criteria. Compliance with SEPA's regulations cannot be excused on the basis that the outcome of the EFSEC adjudicative hearing is less than a "decision" merely because the Governor will subsequently act on that decision as he sees fit. The recommendation of EFSEC is a "decision" under the terms of SEPA, and consequently, the adjudicative hearing was required to be proceeded by an FEIS.

1. <u>EFSEC has limited the choice of reasonable alternatives for the HHWF in violation of SEPA.</u>

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[113] *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 80, 96 (2017).
[114] *See* WAC 463-47-030.
[115] RCW 43.21C.075(1).
[116] *Barrie v. Kitsap Cnty.*, 93 Wn.2d 843, 854 (1980) (emphasis added).
[117] RCW 43.21C.075(8).
[118] RCW 80.50.100(1).

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The regulations implementing SEPA are found in Ch. 197-11 WAC. On the issue of timing of government action in relation to the issuance of an FEIS, 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 concerning the proposal shall be taken by a government agency that would: (1) have an adverse environmental impact, or (b) limit the choice of reasonable alternatives."[119] Conducting the adjudicative hearing prior to FEIS issuance has in fact limited the choice of reasonable alternatives.

A "reasonable alternative"

> … means an action that could feasibly attain or approximate a proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation. Reasonable alternatives may be those over which an agency with jurisdiction has authority to control impacts, either directly, or indirectly through requirement of mitigation measures.[120]

The prohibition contained in WAC 197-11-070 "prevents EFSEC or other agencies with jurisdiction from eliminating alternate designs before they can be properly evaluated."[121] The Supreme Court held that this regulation applies not only to the stage of review by the Governor, but also to the role of EFSEC: "… both EFSEC and the governor remain subject to the reasonable alternatives requirement of WAC 197-11-070(1)(b) themselves."[122]

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[119] WAC 197-11-070(a); *see also* WAC 197-11-055(2)(c) ("Appropriate consideration of environmental information shall be complete before an agency commits to a particular course of action.").
[120] WAC 197-11-786.
[121] *Columbia Riverkeeper*, 188 Wn.2d at 98-99.
[122] *Id*., at 101.

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Dave Kobus, Scout's representative, made it extremely clear that Scout has submitted to EFSEC the project it believes is the most economically viable.[123] In order to ensure the HHWF is attractive to yet to be identified "offtakers," Scout has no interest in improving the suitability of the HHWF and exploring feasible mitigation now that the hearing has closed.[124] Simply put, this adjudication has committed EFSEC to the version of the HHWF disclosed in the DEIS. This adjudication with a hearing prior to FEIS issuance violated SEPA and was conducted contrary to the legislative intent expressed through state law that environmental considerations are disclosed before action is taken on a project.

2. WAC 197-11-460 prohibits any action on a proposal until after issuance of an FEIS.

WAC 197-11-460 prohibits an agency from acting "on a proposal for which an EIS has been required prior to seven days after issuance of the FEIS."[125] EFSEC is a state agency and is required to apply SEPA's regulations to "the fullest extent possible" in accordance with an integrated approach that focuses on a detailed statement of environmental impacts.[126] Regardless of whether proceeding with the adjudication prior to FEIS issuance has now limited the choice of reasonable alternatives, EFSEC was not allowed to act on the HHWF until seven days after FEIS issuance.[127] Holding the adjudicative hearing, and the associated

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[123] Dave Kobus Deposition, 102: 23-25-103: 1-3.
[124] *See Pub. Util. Dist. No. 1 of Clark Cnty. v. Pollution Control Hearings Bd.*, 137 Wn. App. 150, 162 ("If CPU invested significant financial resources in building test wells at Fruit Valley, It might be less inclined to explore alternate sites that would have a lower environmental impact.").
[125] WAC 197-11-460(5); *see* WAC 197-11-070(2) ("FEISs require a seven-day period prior to agency action.").
[126] RCW 43.21C.030.
[127] WAC 197-11-460(5).

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process, is an "act." An "act" is the doing of a thing.[128] Requiring an FEIS prior to conducting disputed evidentiary proceedings on a proposal is an elementary part of SEPA.[129]

The County recognizes that these SEPA regulations should be read to harmonize with EFSEC's own regulations. Convening prehearing conferences and seeking input from the parties on a future adjudication appears consistent with the EFSEC rule that the Council may "initiate" an adjudication prior to an FEIS.[130] This interpretation would also be consistent with the listed exceptions for actions allowed prior to FEIS issuance under WAC 197-11-070(4): developing plans or designs, issuing requests for proposals, securing options, or performing other work necessary to develop an application for a proposal.

Moving beyond the preliminary initiation of an adjudication, however, and actually holding the adjudicative hearing, including the formulation of issues, disclosure of testimony, designating exhibits, and hearing live testimony, is not consistent with SEPA's overarching statutory requirement "to combine environmental considerations with public decisions."[131] This adjudicative process has focused its attention on only a preliminary iteration of the HHWF. This means either that the adjudication has violated SEPA "by shaping the details of a proposal before competing an EIS" or that the adjudicative process is illusory, and Scout

[128] https://www.merriam-webster.com/dictionary/act?utm_campaign=sd&utm_medium=serp&utm_source=jsonld
[129] WAC 197-11-055(3)(a) ("A final threshold determination or FEIS shall normally precede or accompany the final staff recommendation, if any, in a quasi-judicial proceeding on an application.").
[130] WAC 463-47-060(2).
[131] RCW 43.21C.0785(1).

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and EFSEC will refine the proposal only *after* the FEIS is complete and *after* the adjudicative hearing has closed. Either way, this is not consistent with the law.[132]

3. EFSEC's recommendation to the Governor is *ultra vires* because proceeding with the adjudication prior to FEIS issuance violates the policies underlying SEPA.

As any recommendation to the Governor will be taken in violation of SEPA and the policies underlying SEPA, EFSEC's action in this case is *ultra vires*. "An ultra vires act is one performed without any authority to act on the subject."[133] While the County does not allege that EFSEC lacks total power to act in this instance, "government entities may remain responsible for lesser deviations in authority, such as failures to comply with proper procedure."[134] The *ultra vires* doctrine applies in this case as one set of procedures that EFSEC must follow are those provided by SEPA.[135] As the Washington State Supreme Court has noted, "[t]he ultra vires doctrine is just as necessary to prevent ill-considered environmental action as it is to prevent ill-considered financial action."[136]

As explained in detail above, and the County's Motion to Stay Adjudicative Proceedings Pending FEIS Issuance, SEPA "requires an EIS prior to any major action significantly affecting the environment."[137] "Thus, an agency *has no authority* to undertake such an action until it has prepared an EIS."[138] This is because "[o]ne of the central purposes

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[132] *Columbia Riverkeeper v. Port of Vancouver USA*, 189 Wn. App. 800, 818 (2017), *affirmed*, 188 Wn.2d 80 (2017) ("…an agency violates SEPA by shaping the details of a project before completing an FEIS….").
[133] *Haslund v. City of Seattle*, 86 Wn.2d 607, 622 (1976).
[134] *S. Tacoma Way, LLC v. State*, 169 Wn.2d 118, 122 (2010).
[135] *Noel v. Cole*, 98 Wn.2d 375, 380 (1982), *superseded on other grounds*, *Young v. Young*, 164 Wn.2d 477 (2008).
[136] *Noel v. Cole*, 98 Wn.2d 375, 380 (1982).
[137] *Id*., at 379 (internal citation omitted).
[138] *Id*. (emphasis added).

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of SEPA is to 'insure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making.' RCW 43.21C.030(2)(b)."[139]

Simply put, EFSEC did not have authority to proceed with the adjudication prior to FEIS issuance. While the FEIS may be available by the time EFSEC makes its recommendation to the Governor, the violation of SEPA has already occurred—EFSEC has already taken a major action affecting the environment. This renders any positive recommendation to the Governor, and subsequently the Governor's recommendation, void.

IV. CONCLUSION

Due to the size, scale, and scope of the HHWF, it is incompatible with outright permitted uses in the GMAAD and cannot satisfy Benton County's CUP criteria. Additionally, the HHWF will result in the improper conversion of ALLTCS and cause agricultural fragmentation within the GMAAD. Lastly, EFSEC does not have the authority to recommend approval of the HHWF because the adjudicative proceeding was conducting in violation of SEPA. EFSEC should recommend denial of the HHWF to the Governor.

DATED this 13th day of October, 2023.

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[139] *Noel*, 98 Wn.2d at 380.

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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 13th day of October, 2023.

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