

**BEFORE THE STATE OF WASHINGTON  
WASHINGTON ENERGY FACILITY SITE EVALUATION COUNCIL**

RECEIVED  
REGIONS MANAGEMENT  
2018 MAY 18 PM 3:19  
STATE OF WASH.  
UTIL. AND TRNSP.  
COMMISSION

In the Matter of Application No. 2017-01 of  TUUSSO ENERGY, LLC COLUMBIA SOLAR PROJECT	DOCKET EF -170823  OBJECTION TO ORDER GRANTING EXPEDITED PROCESSING
---	--

Save Our Farms, LLC, a Washington nonprofit corporation (“Save our Farms”)<sup>1</sup> files this objection to EFSEC Order Granting Expedited Processing dated April 17, 2018. *Attachment A*. The objection is filed pursuant to RCW 80.50.140(2).

**I. BACKGROUND**

TUUSSO Energy, LLC (Applicant) filed an application with Energy Facility Site Evaluation Counsel (EFSEC) for Site Certification (ASC) to construct and operate the Columbia Solar Photovoltaic Project (Project) on October 16, 2017. The Project proposes to construct five new photovoltaic (PV) facilities at five separate and distinct locations (named Camas, Fumaria, Penstemon, Typhya, and Urtica) in Kittitas County, Washington. Two generation tie liens are also proposed to be constructed to connect the Fumaria and Typha locations. Each new PV solar array is to be capable of producing up to 5 megawatts (MW) with a total of 25 MW of electrical power.

Applicant requested that EFSEC utilize the expedited process authorized by RCW 80.50.075. This process is authorized upon two positive findings: (1) the proposed site is consistent with and in compliance with Kittitas County land use plans and zoning ordinances;

<sup>1</sup> Save Our Farms is a Washington nonprofit corporation with direct interest in preservation and protection of prime farmland within Kittitas County, Washington. Association members have provided comment and testimony on the application filed by TUUSSO Energy, LLC with respect to the Columbia Solar project. Testimony, comment and evidence were provided by association members Dave Nerpel, Karen Poulsen, Dick Carkner, Mark Pritchard, Kathi Pritchard, Jeff Dunning, Donald Chance, Joanne Chance, Matthew Cox, Roger Clerf, Charles Weidenbach, Ron Poulsen and Mary Christensen

and (2) environmental impacts may be mitigated to levels of nonsignificance. WAC 463-43-050. EFSEC undertook the initial review of a report for expedited processing and issued an Order Granting Expedited Processing on April 17, 2018. EFSEC also issued a Revised Mitigated Determination of Nonsignificance (MDNS) on the same date. Both decisions were publically announced by letter from Stephen Posner, EFSEC Manager on April 18, 2018.

## II. OBJECTION

Save Our Farms, a Washington nonprofit corporation (“Save Our Farms”) objects to Energy Facility Site Evaluation Council (EFSEC) Order Granting Expedited Processing (“Order”). This objection is filed in accordance with RCW 80.50.140(2). The objection includes the following:

(1) The order fails to provide required statement of available procedures and time limits for seeking reconsideration or other administrative relief arising from or related to the Order Granting Expedited Processing. RCW 34.05.461(3). EFSEC MDNS also failed to set forth applicable appeal procedures. WAC 197-11-970.

(2) The Order sets forth a vague instruction that “...staff will develop a means to receive information akin to what the County would receive during a conditional use hearing as to site-specific conditions and criteria.” EFSEC failed to identify the applicable procedure and improperly delegated responsibility to staff granting authority to establish new or supplemental procedures.

(3) EFSEC’s determination that the application “...is consistent and in compliance with Kittitas County Comprehensive Plan and applicable zoning laws as required by RCW 80.50.075(1)...” is erroneous as a matter of law. *Order Conclusions of Law* (6), (7), (8), (9) and (10).

(4) EFSEC’s determination that Kittitas County’s “moratorium on applications for solar projects that qualified as major alternative energy facilities” is not a land use plan or zoning ordinance is erroneous as a matter of law. *Order Finding 42, 43, 44 and 45*.

(5) EFSEC’s SEPA responsible official’s issued Mitigation Determination of Nonsignificance (MDNS) is clearly erroneous and contrary to law.

## III. ARGUMENT

Order Granting Expedited Processing is properly classified as an “order” under RCW 34.05.010(11)(a). An “order” means “a written statement of particular applicability that finally

determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons.” *Id.* The Order specifically determines legal rights with respect to expedited processing and adjudicative proceedings. Save Our Farms believes that EFSEC has committed numerous procedural errors with respect to determinations regarding expedited processing. RCW 80.50.140(2) provides:

Objections raised by any party in interest concerning procedural error by the council shall be filed with the council within sixty days of the commission of such error, or within thirty days of the first public hearing or meeting of the council at which the general subject matter to which the error is related is discussed, whichever comes later, or such objection shall be deemed waived for purposes of judicial review as provided in this section.

By reason of the order authorizing expedited review, the public, interested parties, impacted property owners, agencies and local jurisdictions are deprived of an opportunity to participate in adjudicative public processes to evaluate and comment on site specific impacts of the five diverse and independent energy generating facilities. Save Our Farms registers its objection.

**A. Order fails to identify procedures for reconsideration or other administrative relief.** Washington Administrative Procedures Act (APA) specifically sets forth the requirements and content for initial and final orders. RCW 34.05.461(3) provides, in pertinent part, as follows:

(3) Initial and final orders shall include a statement of findings and conclusions, and the reasons and basis therefore, on all material issues of fact, law, or discretion presented on the record, including the remedy or sanction and, if applicable, the action taken on a petition for stay of effectiveness. ...*The order shall also include a statement of the available procedures and time limits for seeking reconsideration or other administrative relief. An order shall include a statement of any circumstances under which the initial order, without further notice, may become a final order.*

(Italics added). The order granting expedited processing does not include the required statement regarding available procedures and time limits applicable to reconsideration or other administrative relief. The adjudicative process in integral to public participation in the review of the proposed land use. Kittitas County procedures for review of conditional use permits mandates an “open record hearing” on all applications for “major alternative energy facilities.” KCC 15A.01.040(4)(d) and KCC 15A.02.060. The place of filing and other procedures



applicable to a petition for reconsideration must be specified by agency rule and included in the operative order.

APA's stated purpose is to "provide greater public and legislative access to administrative decision-making." RCW 34.05.001. Because EFSEC conducts hearings and processes subject to the APA, that Act's expressed purpose directs its deliberations. This general proposition is also consistent with EFSEC which promotes public participation through its own statute, stating that its procedures are designed "...to assure Washington State's citizens that, where applicable, operational safeguards ... are technically sufficient for their welfare and protection." RCW 80.50.010(1). EFSEC's decision and findings of fact take on special importance because any subsequent court review is restricted to the agency's findings of fact. RCW 34.05.558.

**B. Order fails to identify procedure to receive information regarding conditional use criteria.** The order directed that "...Staff will develop a means to receive information akin to what the County would receive during a conditional use hearing as to site-specific conditions and criteria." Kittitas County's conditional use permit review process requires an "open record hearing" before a hearing examiner. KCC 15A.01.040(4). This open record process allows the public to provide both written and oral testimony, submit evidence, cross-examine witnesses and make legal argument with respect to the site specific components of an application. The Order provides no guidelines and impermissibly delegates to staff authority to adopt policy, practice, procedures and rules governing the extraordinary process. This is an impermissible delegation of authority.

The development of the supplemental administrative process "...to receive information akin to what the County would receive during a conditional use hearing..." must require full disclosure and opportunity to comment by parties directly impacted by the procedure. In no event, should the process reduce the rights and opportunities afforded the public under the conditional use procedures in place at the county level. EFSEC should disclose the specific procedures to be utilized and provide opportunity for comment upon those procedures prior to implementation of the supplemental process.

**C. Order is a procedural determination that is contrary to applicable law.** EFSEC Order made a determination that the application "...is consistent and in compliance with Kittitas

County Comprehensive Plan and applicable zoning laws as required by RCW 80.50.075(1)....” This procedural determination is erroneous as a matter of law. *Order Conclusions of Law* (6), (7), (8), (9) and (10). The procedural determination terminates participatory rights in the adjudicative process and prohibits any challenges to the legal foundation for the order authorizing expedited review.

EFSEC Order also erroneously concludes that Kittitas County’s “moratorium on applications for solar projects that qualify as major alternative energy facilities” is not a land use plan or zoning ordinance. The moratorium is authorized by RCW 36.70A.390 and is currently extended through July 20, 2018. The moratorium specifically prohibits processing of solar application and, as a consequence, is inconsistent with EFSEC’s consistency determination. Growth Management Act (GMA) specifically defines “development regulations” as follows:

“Development regulations” or “regulation” means the controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, critical area ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendments thereto.

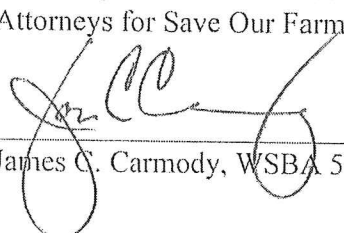
EFSEC’s reliance on the case of *Save our Scenic Area v. Skamania County*, is misplaced and incorrect. Order incorrectly concludes that the moratorium can be disregarded for purposes of land use consistency. EFSEC has authority under RCW 80.50.110(2) to preempt local comprehensive plan and land use laws but may do so only after conducting an adjudicative process.

#### IV. CONCLUSION

Save Our Farms registers its objection pursuant to RCW 80.50.140(2) and requests that the Order Granting Expedited Review be rescinded.

Dated this 16<sup>th</sup> day of May, 2018.

MEYER, FLUEGGE & TENNEY, P.S.  
Attorneys for Save Our Farms

  
James C. Carmody, WSBA 5205