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 MOTION TO STAY ADJUDICATIVE PROCEEDINGS PENDING FEIS ISSUANCE **(Oral Argument Requested)**

I. MOTION

Benton County respectfully submits this motion to stay further adjudicative proceedings in this matter until such time as the final environmental impact statement for the Horse Heaven Wind Farm ("Project") is issued. This motion seeks a stay of the adjudicative hearing as well as all associated prehearing deadlines.

II. STATEMENT OF FACTS

The following statement of facts is taken from public documents accessible at the EFSEC website.[1] Scout Clean Energy, LLC, submitted an application for site certification ("ASC") to the Energy Facility Site Evaluation Council for a proposed wind and solar energy generation facility to be located along the Horse Heaven Hills in Benton County, Washington, with a nameplate energy generating capacity of up to 1,150 megawatts on

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February 8, 2021. The Project's boundary encompasses approximately 72,428 acres. Along with the ASC, Scout submitted a request for expedited proceedings pursuant to RCW 80.50.075(1). Scout withdrew this request on March 29, 2021, and acknowledged that an environmental impact statement would likely be prepared for the Project. A determination of significance and associated scoping notice for the Project was issued on May 11, 2021. The scoping comment period ended on June 10, 2021. While preparing the draft environmental impact statement for the Project, EFSEC made seven separate data requests to Scout. EFSEC issued the DEIS for the Project on December 16, 2022. The comment period for the DEIS closed on February 1, 2023, and a public comment meeting was held the same day. Just prior to DEIS issuance, Scout submitted an updated ASC on December 1, 2022. The version of the Project reflected in the ASC is not addressed in the DEIS.

One day prior to issuance of the DEIS, on December 15, 2022, EFSEC issued an order commencing agency adjudication. This order set a deadline for petitions for intervention of February 3, 2023, and a pre-hearing conference for March 10, 2023. Petitions for intervention were filed by Tri-Cities C.A.R.E.S. (Tri-Cities Community Action for Responsible Environmental Stewardship) ("TCC") and the Confederated Tribes and Bands of the Yakama Nation. Both parties' petitions were granted on March 9, 2023. A second pre-hearing conference was held on March 20, 2023. A third pre-hearing conference was originally scheduled for March 27, 2023; however, the conference was cancelled on March 24, 2023. The third pre-hearing conference was finally held on May 2, 2023.

No order has yet been issued setting deadlines, although various "agendas" have been issued. In the agenda preceding the third pre-hearing conference, dated April 28, 2023, the

[1] https://www.efsec.wa.gov/energy-facilities/horse-heaven-wind-project

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parties were advised that an adjudicative hearing for the Project will take place over ten non-consecutive days in mid- to late-August 2023. The agenda statement also suggested the establishment of imminent deadlines for pre-filed testimony and pre- and post-hearing briefs, with the first proposed round of pre-filed testimony due May 24 (or May 31), 2023. This document also invited the parties to file procedural motions.

EFSEC staff stated on April 28, 2023, that there is no estimated date for FEIS publication.

III. ARGUMENT

During the three prehearing conferences in this matter, the County, TCC, and the Yakama Nation raised objections to proceeding with the adjudication prior to FEIS issuance on the basis that this process violates the State Environmental Policy Act, Ch. 43.21C RCW ("SEPA"). Despite these objections, it appears likely based on the current posture of the case that critical milestone events in the adjudicative process, potentially even including the adjudication hearing itself, will occur prior to FEIS issuance. This would be contrary to SEPA laws and regulations.

This would also cause the adjudicative process to be built on a deficient environmental record and will undermine any recommendation of the Council to the Governor, contrary to the Energy Facility Site Location Act, Ch. 80.50 RCW ("EFSLA"). Important information regarding the scope of the project and its environmental impacts will not be available to the parties prior to the hearing. Under this approach, these impacts will not be addressed in the development of the pre-hearing evidence or during the hearing process. The result will be not only an incomplete basis for EFSEC to make the recommendation required by RCW 80.50.090(4), but also an adjudicative hearing that will be

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focused on a version of the project reflected in an admittedly preliminary environmental record. The mitigation measures or project revisions that may occur after the hearing but during the transition from the current DEIS to a final EIS, will simply be taken out of any deliberative process in which the parties and the concerned public may participate. It is critical to recognize that a DEIS represents the efforts of only the lead agency and the project proponent. Not until public comments are considered and reflected in a final EIS is there any assurance that "opposing views on significant adverse environmental impacts and reasonable alternatives" will be given any analysis. WAC 197-11-405(3).

For all of these reasons, the adjudicative hearing should be stayed until after an FEIS is issued.

A. SEPA requires that the FEIS be issued prior to the adjudicative hearing.

"EFSEC conducts environmental review under SEPA and has explicitly adopted SEPA into its own regulations[.]" *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 80, 96 (2017). When processing an application for site certification, EFSEC must follow SEPA. *See* WAC 463-47-030. SEPA requires that an FEIS be issued prior to any action on a non-exempt proposal unless environmental review can be accomplished with a mitigated determination of nonsignificance. WAC 197-11-070(1).

SEPA's basic mission is procedural. "[A] major purpose of [the SEPA process] is to combine environmental considerations with public decisions…." RCW 43.21C.075(1). The Supreme Court has explained that use of an EIS in public decisions requires actual engagement with the document at a meaningful time in review of a proposal: "Thus, SEPA policy is to ensure through a detailed environmental impact statement (EIS) the full

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disclosure of environmental information so that it can be considered *during* decision making." *Barrie v. Kitsap County*, 93 Wn.2d 843, 854 (1980) (emphasis added).

In the SEPA statute, the term "decision" is given a broad definition and means any "substantive agency action." RCW 43.21C.075(8). The EFSEC adjudicative process results in a recommendation to the Governor. RCW 80.50.100(1). The critical point is that the Council must *decide* on what the recommendation will be. 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 it must be preceded by an FEIS.

The County anticipates as a counterargument the claim that the Council may avoid this problem by proceeding now with the hearing and suspending its recommendation to the Governor until after the FEIS is issued. This approach would be a blunt concession that the hearing will take place with an incomplete environmental record and a project status that is uncertain due to potential future mitigation measures and project modifications. Such an approach to the adjudication must be seen for what it is—a makeshift argument calculated to achieve an expedient result. Aside from endorsing the unwise view that the ends may justify the means, this option is also contrary to law.

1. WAC 197-11-070 prohibits any action on a proposal prior to an FEIS that may limit the choice of reasonable alternatives, which includes the EFSEC adjudicative hearing process.

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

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final environmental impact statement, no action concerning the proposal shall be taken by a government agency that would: (a) have an adverse environmental impact; or (b) limit the choice of reasonable alternatives." WAC 197-11-070(1); *see also* WAC 197-11-055(2)(c) ("Appropriate consideration of environmental information shall be completed before an agency commits to a particular course of action.").

The question in this case is whether proceeding with the adjudicative hearing prior to FEIS issuance is an action that will have an adverse environmental impact or limit the choice of reasonable alternatives? The answer is yes.

Because the FEIS will likely be issued prior to EFSEC's recommendation to the Governor, proceeding as scheduled may or may not have an adverse environmental impact—that issue is yet to be determined. Instead, a main point of the County's motion for a stay is that proceeding with the adjudication prior to FEIS issuance will limit 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.

WAC 197-11-786.

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." *Columbia Riverkeeper*, 188 Wn.2d at 98-99. The Supreme Court has 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." *Id*. at 101.

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Proceeding with the adjudication based on the DEIS commits EFSEC, the parties, and the interested public to respond to the version of the Project articulated therein. This imposes an improper limitation on the EFSEC adjudicative process. It is likely that reasonable Project alternatives in fact exist and will be developed during the transition from the DEIS to an FEIS. But with the current approach adopted by EFSEC, this will only occur at some indefinite point in the future after the adjudicative process is further underway, or even after the adjudicative hearing has concluded. This result may be attractive to Scout, but should be abhorrent to EFSEC. This is because it will effectively isolate and marginalize any participation by the parties and the public in the adjudicative process for the final iteration of the Project.

Instead, almost by definition, the adjudicative process will be focused on the wrong version of the Project. This provides an obvious opportunity for Scout to revise the Project after the adjudicative hearing has concluded and thereby insulate the actual project from the public hearing process. The result will be a de facto elimination of consideration of reasonable alternatives. Nothing in SEPA provides safeguards that the FEIS will closely track the DEIS, or that the Project will not be substantially revised—perhaps in ways lessening its impacts, or perhaps not—as the DEIS transitions to an FEIS. Scout may have little interest in improving the suitability of the Project and exploring feasible mitigation after the hearing has closed. *See Public Util. Dist. No. 1 of Clark Cnty. v. Pollution Control Hearings Bd.*, 137 Wn. App. 150, 162 (2007) ("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.").

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Another problem lurks with this approach. The authority of EFSEC to identify and impose mitigation without requiring the FEIS prior to the hearing will be compromised with a premature adjudication. This is because SEPA only allows mitigation measures that correspond to "adverse environmental impacts which are identified in the environmental documents prepared under this chapter." RCW 43.21C.060. There will be no way for the adjudicative hearing to address the correlation between impacts and mitigation on the basis of a *draft* EIS. Even though mitigation may clearly be necessary as part of the Council's resolution of disputed issues following the hearing, mitigation measures cannot be established at that time because the FEIS may not exist. Incidentally, the issuance of an FEIS at the time of the hearing will not foreclose additional mitigation measures that may become apparent at the hearing. The problem of post-FEIS and post-hearing mitigation measures can be readily addressed by issuance of a supplemental EIS under WAC 197-11-620.

A stay is necessary so that EFSEC and the parties can actually respond to the final version of the Project and identify appropriate mitigation that can be adapted to the final Project. This is the only approach that can ensure that the Project's impacts will be lawfully correlated to a final environmental document. It bears emphasis that by focusing the adjudicative hearing on the DEIS, there will be *no adjudicative process* of the Project that occurs after issuance of the FEIS.

While EFSEC may review the FEIS prior to making its recommendation to the Governor, this is not the adjudicative process contemplated by EFSLA. Without a stay, the final Project—or at least its environmental record—may differ, perhaps significantly, from the Project that the parties and the public will have spent significant resources to review in the adjudication hearing. The practical effect of this approach is to suppress an opportunity

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for assessment of the Project's important features and its mitigation measures prior to the adjudicative hearing. This is contrary to the law:

> In all practical terms, the whole series of project variables—including design specifications, site location, land reclamation and closure requirements, mitigation measures, etc.—must *remain* variables until the EIS is complete. Before that time, if a project agency acts to eliminate one or more reasonable alternatives in any of these categories, it violates SEPA.

Columbia Riverkeeper, 188 Wn.2d at 107 (Stephens, J. dissenting).

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

The above shows that the basic purposes of SEPA in the EFSLA context are thwarted by a premature adjudication. At a more literal level, SEPA prohibits the adjudication from progressing beyond the most preliminary stages.

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." WAC 197-11-460(5); *see* WAC 197-11-070(2) ("FEISs require a seven-day period prior to agency action."). EFSEC is a state agency and is required to apply SEPA's regulations to "the the fullest extent possible" in accordance with an integrated approach that focuses on a detailed statement of environmental impacts. RCW 43.21C.030.

Regardless of whether proceeding with adjudication prior to FEIS issuance limits the choice of reasonable alternatives, EFSEC must not act on the Project until seven days after FEIS issuance. WAC 197-11-460(5). Proceeding with the adjudicative process is an "act." An "act" is the doing of a thing.[2] Requiring an FEIS prior to conducting disputed evidentiary

[2] https://www.merriam-webster.com/dictionary/act?utm_campaign=sd&utm_medium=serp&utm_source=jsonld

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proceedings where a proposal will be assessed is an elementary part of SEPA. 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.").

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. WAC 463-47-060(2). 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. But these limited steps are unlike the central role of the EFSEC adjudication hearing in evaluating the Project's compliance with the guidelines of EFSLA. RCW 80.50.040, .060(1).

Moving beyond the preliminary initiation of an adjudication and conducting an actual adjudication hearing, including the formulation of issues, disclosure of testimony, designating exhibits, and other critical path pre-hearing events, is not consistent with SEPA's overarching statutory requirement "to combine environmental considerations with public decisions." RCW 43.21C.075(1).

As stated above, to do otherwise will cause the adjudicative process to focus attention on only a preliminary iteration of the Project. This means either that the adjudication will violate SEPA "by shaping the details of a proposal before completing an EIS" or that the adjudicative process will be illusory, and Scout and EFSEC will refine the proposal only *after* the FEIS is completed and *after* the adjudication hearing has closed. Either way, this is not consistent with the law. *Columbia Riverkeeper v. Port of Vancouver USA*, 189 Wn. App.

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800, 818 (2017), *affirmed*, 188 Wn.2d 80 (2017) ("…an agency violates SEPA by shaping the details of a project before completing an FEIS….").

3. EFSEC regulations do not preempt SEPA.

Nothing contained in *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council (EFSEC)*, 165 Wn.2d 275 (2007), supports the view that any of the SEPA regulations implicated by a premature adjudicative process are preempted by EFSEC regulations.

The preemption established by EFSLA is limited. Pursuant to RCW 80.50.110(1), EFSLA governs and controls in the event of any conflict with "any other provision, limitation, or restriction which is now in effect under any other law of this state, or any rule or regulation promulgated thereunder." The EFSEC regulations clarify the scope of preemption under RCW 80.050.110. WAC 463-28-010 provides that "[t]his chapter sets forth procedures to be followed by the council in determining whether to recommend to the governor that the state *preempt land use plans, zoning ordinances, or other development regulations* for a site or portions of a site for an energy facility, or alternative energy facility." (emphasis added). Similarly, WAC 463-28-060(3) states "[t]he council shall determine whether to recommend to the governor that the state preempt the *land use plans, zoning ordinances, or other development regulations* for a site or portions of a site for the energy facility or alternative energy resource proposed by the applicant." (emphasis added).

Based on these regulations, EFSEC may preempt three different types of regulations: (1) land use plans; (2) zoning ordinances; and (3) development regulations. Even if EFSLA preemption is broader than as stated in the EFSEC regulations, there is no support for viewing SEPA as a valid subject of preemption.

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SEPA is a comprehensive environmental full-disclosure process. It is not a land use plan, zoning ordinance, or development regulation. It is a decision-making tool. *Columbia Riverkeeper*, 188 Wn.2d at 92. And in any event, the Supreme Court has ruled that "SEPA and EFSLA regulations do not conflict." *Id*. at 91. On this subject, there is nothing to preempt. EFSEC does not have the authority to preempt any requirement imposed under SEPA, including the requirement to issue an FEIS before taking any action on a proposal.

B. An amendment to WAC 463-47-060 aligned EFSEC regulations with SEPA by eliminating the requirement than an adjudicative proceeding must be concluded prior to issuance of an FEIS.

An earlier version of WAC 463-47-060(2) stated as follows:

> The council may initiate an adjudicative proceeding hearing required by RCW 80.50.090 prior to completion of the draft EIS. The council shall initiate and conclude an adjudicative proceeding prior to issuance of the final EIS.

See also Council Order No. 799, In re Kittitas Valley Wind Power Project (Sept. 1, 2004) ("However, pursuant to EFSEC rules implementing SEPA, EFSEC does *not* issue an FEIS prior to the adjudicative hearing on an application.") (emphasis in original).

In 2007, this regulation was amended to omit any requirement that the adjudication be concluded prior to issuance of the FEIS:

> The council may initiate an adjudicative proceeding required by RCW 80.50.090 prior to completion of the draft EIS.

The 2007 amendment not only omitted the second sentence of the former regulation ("shall initiate and conclude") but also revised the first sentence. The prior version authorized the council to initiate an "adjudicative proceeding hearing" while the revision eliminated the term "hearing" from this clause. This revision adds support to the County's view that minor preliminary steps towards commencement of an adjudicative *proceeding*

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should be acceptable, but not actual development of the *hearing* itself, including designation of pre-filed testimony, exchange of exhibits, and other issue-limiting deadlines.

Together, these changes reinforce the proper sequence of issuing the FEIS first, followed by an adjudicative hearing. This result is consistent with the SEPA regulations and fulfills the need for EFSEC to possess a complete record for the adjudication hearing. In short, this change to WAC 463-47-060(2) supports the County's argument that under SEPA and under EFSEC's own regulations, the adjudicative process should not advance beyond the early stages (beyond its *initiation*) until the FEIS for the Project is issued.

C. The purpose of an EFSEC adjudicative hearing requires a completed environmental review record.

An "adjudicative proceeding" "means a proceeding conducted pursuant to RCW 80.50.090(3)." WAC 463-10-010(3).[3]

This section states that "[p]rior to the issuance of a council recommendation to the governor under RCW 80.50.100 a public hearing, conducted as an adjudicative proceeding under chapter 34.05 RCW, the administrative procedure act, shall be held." At this hearing, "any person shall be entitled to be heard in support of or in opposition to the application for certification by raising one or more specific issues, provided that the person has raised the issue or issues in writing with specificity during the application review process or during the public comment period that will be held prior to the start of the adjudicative hearing." RCW 80.50.090(4)(a).

As with any adjudicative hearing under Ch. 34.05 RCW, EFSEC's adjudication must make allowances for due process. According to RCW 34.05.449, "to the extent necessary for

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full disclosure of all relevant facts and issues, the presiding officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence…." The substantive law defines the basis for relevancy. Evidence that "is of consequence to the determination of the action" is relevant. ER 402. No different approach to relevancy is required in an EFSEC adjudication. RCW 34.05.452.

In this context, the law establishing what "all relevant facts and issues" entails is RCW 80.50.090(4). This section indicates two main focal points of the adjudication: first, a consideration and evaluation of specific disputed issues raised by persons in support of or in opposition to the application (RCW 80.50.090(4)(a)); second, a consideration of the role of preemption in light of any local plans or zoning ordinances with which the proposal is inconsistent if the environmental impact of the facility is not significant or will be mitigated to a nonsignificant level under SEPA. RCW 80.50.090(4)(b). Each of these topics will be addressed below.

1. Issues for adjudication raised by the County cannot properly be developed and argued without an FEIS.

At an EFSEC adjudicative hearing, any party may raise arguments the following subject areas:

(1) The description of the particular energy facility and the proposed site.

(2) Consistency of the proposal with zoning and land use regulations.

(3) Physical site suitability and related safety considerations.

(4) NPDES, PSD, or other permits.

[3] Likely due to a recent statutory amendment RCW 80.50.090(3) does not actually address the adjudicative hearing process. The correct reference should be RCW 80.50.090(4).

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(5) On-site and local impacts (physical): such as aquatic, terrestrial and atmospheric.

(6) On-site and local impacts (societal): such as housing, services, recreation, economics, transportation, health, and tax base.

(7) Peripheral area impacts (all categories).

(8) Adverse impacts minimization and consideration of conditions of certification.

WAC 463-30-300; *see also Friends of Columbia Gorge, Inc. v. State Energy Facility Site Evaluation Council (EFSEC)*, 178 Wn.2d 320, 329 (2013) ("EFSEC must conduct an adjudicative hearing consistent with the APA that allows interested parties to challenge initial determinations.").

Of particular importance is the last topic listed above. Any party may challenge the impacts of a project. To reiterate a basic point, an FEIS is a disclosure document. *See* WAC 197-11-400. SEPA does not demand any particular result. *Moss v. City of Bellingham*, 109 Wn. App. 6, 14 (2001). Instead, it requires that appropriate considerations are given to environmental impacts. *Id*. In this case, appropriate consideration cannot be given to the environmental impacts of the Project if the hearing proceeds prior to FEIS issuance. The County submitted comment letters during the DEIS process that raised specific factual concerns regarding the Project's impacts. Most of these points were not discussed in the DEIS at all or were treated only superficially. A representative list includes the following:

- The DEIS contains no discussion or analysis of the feasibility of ever returning any of the Project site's agricultural lands to any agricultural purpose after the site is decommissioned;

- The DEIS contains no discussion or analysis of the Project's effect, by fragmenting active farming operations in the Horse Heaven Hills, of increased pressure beyond the Project to allow new non-agricultural uses on an area-wide basis;

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- The DEIS contains no discussion or analysis of the Project's likelihood of creating cumulative loss of agricultural lands by establishing other alternative energy facilities in the County;
- The DEIS contains minimal discussion of fugitive dust levels likely to be created by an extensive network of access roads and nearly 34 miles of 36' wide crane paths, potentially altering the County's EPA Air Quality designations.

A distinction should be made on this subject. Presenting evidence and argument at the EFSEC adjudicative hearing on the impacts disclosed in an FEIS is not the same thing as challenging the *adequacy* of the FEIS. The County does not dispute that an EFSEC adjudicative hearing is not a proper avenue to challenge the adequacy of an FEIS. However, just because the County may not challenge FEIS adequacy does not mean that the FEIS is not integral to the adjudicative hearing.

The County has raised issues that are legitimate elements of the environment that the Project will affect. But the County itself cannot write the lacking DEIS analysis on these subjects. And without that analysis, the County's presentation at the hearing may be unfounded. No party knows how the FEIS will change in response to DEIS comments. *See* WAC 197-11-560(1),(2); *see also Columbia Riverkeeper*, 188 Wn. 2d at 112 (Stephens, J. dissenting) ("idea that lessons learned from environmental review should inform project planning is foundational to this court's case law requiring timely SEPA review.").

It is possible that the FEIS will address the concerns that the County has with the Project and allow a more streamlined adjudicative hearing. Even if the FEIS does not address all concerns with the Project, it should highlight the key areas of environmental impact that the County may dispute pursuant to WAC 463-30-300, once again streamlining the adjudicative process. Proceeding with the hearing prior to FEIS issuances could result in

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a 10-day-long hearing with evidence and arguments on issues that are mooted by the content of the FEIS. This is a waste of resources and can be avoided by EFSEC properly not proceeding with the hearing until FEIS issuance.

A more disturbing possibility is that the County's issues may be developed in an FEIS released only after the hearing. An EFSEC adjudication hearing without the benefit of the FEIS will not give the County an opportunity to focus the Council's consideration and evaluation at a detailed factual level on specific disputed issues as promised by RCW 80.50.090(4)(a)).

2. EFSEC's preemption power over local land use regulations cannot be properly evaluated without a complete environmental record.

The second assurance of EFSLA is found in RCW 80.50.090(4)(b), which links the remarkable authority of EFSEC to preempt local plans and zoning ordinances to the Council's determination that a project will be mitigated to a nonsignificant level under SEPA.

In this way, the substantive law of EFSLA prohibits separating SEPA considerations from EFSEC's adjudicative task. This second purpose of the adjudication is independent of the issues raised by the parties. In this case, EFSEC's order finding consistency "has not yet determined whether the proposed Facility site meets the CUP criteria set out in Benton County's zoning code, or whether it may require a variance from setback requirements." (Order Finding Proposed Site Consistent With Land Use Regulations at 1). In accordance with EFSLA, this finding has minimal value for gauging the Project's actual environmental impacts because EFSEC's finding only concluded that the County's land use provisions do not "clearly, convincingly or unequivocally prohibit the Facility." (*Id*. at 7).

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This does not mean, however, that EFSEC has determined whether the Project has met or can meet the County's conditional use permit criteria, nor whether the Project qualifies for a setback variance. (*Id.*). These issues must be decided as part of the adjudicative hearing. The Council's consideration of the Project relative to the conditional use permit and variance issues can only be resolved in conjunction with evaluating whether "the environmental impact of the proposed facility in an application for certification is not significant or will be mitigated to a nonsignificant level under RCW 43.21C.031…." RCW 80.50.090(4)(b).

One of the central purposes of the EFSEC adjudicative hearing is thus to relate an evaluation of the Project under SEPA with EFSLA preemption. This same result was shown above to be required by SEPA. But the point here is that even EFSLA considered solely on its own terms compels the Council to make its adjudicative hearing process an assessment of preemption in *relation to the Project's environmental impacts*. This cannot be done with an incomplete SEPA review document. Only a final EIS can form the basis for the public adjudication hearing to address this part of EFSLA.

IV. CONCLUSION

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

DATED this 18th 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 18th day of May, 2023, at Yakima, Washington.

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