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

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| In the Matter of the Application of:<br><br>Scout Clean Energy, LLC, for Horse Heaven Wind Farm, LLC,<br><br>Applicant | DOCKET NO. EF-210011<br><br>ORDER DENYING (WITHOUT ORAL ARGUMENT) PARTIES' MOTIONS TO CONTINUE OR STAY ADJUDICATIVE PROCEEDINGS PENDING ISSUANCE OF FINAL ENVIRONMENTAL IMPACT STATEMENT (FEIS) |

**Procedural Background:**

On May 18, 2023, Intervenor Tri-Cities C.A.R.E.S. (TCC) filed a *Motion for Stay Pending SEPA Compliance* (*TCC Stay Motion*). That same afternoon, Intervenor Yakama Nation filed a *Motion For Continuance of Adjudication Deadlines* (*Yakama Continuance Motion*). Just hours later, Benton County filed its *Motion to Stay Adjudicative Proceedings Pending FEIS Issuance*. (*County Stay Motion*). All three parties requested oral argument on their respective motions.

On May 25, 2023, Applicant Scout Clean Energy filed its *Response in Opposition to Motions to Stay or Continue Adjudicative Proceedings Pending FEIS Issuance* (*Applicant Response*). The Applicant stated that the motions should be decided on the pleadings without oral argument.

On May 30, 2023, Benton County filed its *Reply in Support of Motion to Stay Adjudicative Proceedings Pending FEIS Issuance* (*County Reply*). On May 31, 2023, TCC filed its *Reply to Applicant's Response to Motion to Stay Pending FEIS Issuance* (*TCC Reply*) and the Yakama Nation filed its *Reply to Motion for Continuance of Adjudication Deadlines* (*Yakama Reply*).

**Requests for Oral Argument – Denied.** The parties' motions to stay or continue these adjudicative proceedings are non-dispositve motions seeking to postpone previously established procedural deadlines and the adjudicative hearing. In Washington administrative law practice, non-dispositive motions may be, and typically are, decided without oral argument.[1] A motion to stay or continue a proceeding is a non-dispositive motion. In this case, the parties have provided adequate briefing on which to decide their motions without further elaboration. Therefore, no opportunity for oral argument was provided prior to issuance of this order.

[1] RCW 34.05.437(1) does not require oral argument on motions but only a "full opportunity to submit and respond to pleadings [and] motions"; *see also* the approaches taken by Washington's Pollution Control Hearings Board (WAC 371-08-450(3) and 371-08-460(1)); Utilities and Transportation Commission (WAC 480-07-385(2)(a)), and Board of Industrial Insurance Appeals (WAC 263-12-118(1)(a) and (6)(a)).

**Summaries of Party Positions:**

TCC asks the Energy Facility Site Evaluation Council (EFSEC or Council) to stay this adjudication until the SEPA process is complete and the final environmental impact statement (FEIS) has been issued. TCC asserts that (1) EFSEC's SEPA process is not a "separate but parallel process" from the adjudication, (2) EFSEC must issue its FEIS before the parties to this adjudication file their written testimony, and (3) a stay of proceedings is proper until the Council has fully complied with and completed all SEPA requirements. TCC argues that amendments to the Application for Site Certification (ASC) filed December 1, 2022, less than three weeks before EFSEC published its draft environmental impact statement (DEIS), create a substantial flaw in the SEPA process. In sum, TCC contends that this adjudication cannot lawfully go forward until and unless the FEIS has been issued.

The Yakama Nation moves the Council to wait for the FEIS, or at least a DEIS that addresses recent amendments to the Project application, before EFSEC commences this adjudication. According to the Yakama Nation, failure to do so means the Council would not be fully informed of all potential environmental impacts during the adjudication. As with TCC, the Yakama Nation relies on language set out in SEPA's procedural rules as the basis for its arguments. The Yakama Nation cites to WAC 197-11-070(1) for the proposition that no action can be taken on a proposed project that might have an adverse environmental impact or limit the choice of reasonable alternatives is prohibited prior to issuance of the FEIS. Therefore, the Yakama Nation contends that EFSEC's moving forward with its adjudication now is prohibited because the FEIS has not been published and can't be considered during the adjudicative hearing. Further, the Yakama Nation argues that under the Administrative Procedures Act (APA), specifically RCW 34.05.437(1), proceeding with the adjudication without the FEIS would deprive parties of their "full opportunity" to participate in the adjudicative process. This includes the opportunity to analyze design alterations or alternatives to the proposed project and the opportunity to conduct additional discovery prior to the adjudicative hearing. The Yakama Nation ultimately contends that EFSEC's discretion to begin its adjudication prior to completion of its SEPA obligations violates both the letter and spirit of SEPA and its own statute, the Energy Facility Site Location Act (EFSLA),[2] by precluding a full consideration of the project's environmental impacts and all reasonable alternatives.

Benton County raises arguments similar to the Yakama Nation and TCC, notably that without the FEIS, the adjudicative process would be conducted with a deficient environmental record. The County asserts that this alleged deficiency would undermine the Council's ultimate recommendation to the governor. According to the County, without the FEIS the Council will not be able to comply with SEPA's requirement[3] that "opposing views on significant adverse environmental impacts and reasonable alternatives" are analyzed because it will be working from only the DEIS. Benton County argues that there cannot be one SEPA process for EFSEC and

[2] RCW 80.50.
[3] Per WAC 197-11-405(3).

another for all other state agencies. The County also characterizes the Council proceeding with its adjudication as an "act" taken with regard to the Application.

The Applicant contends that nothing in the plain text of SEPA or EFSLA or any of their implementing regulations requires EFSEC to complete its FEIS before commencing its adjudication. So long as EFSEC incorporates the required environmental review into its evaluative process prior to makings its recommendation to the governor, it complies with both laws. Scout Clean Energy argues that requiring the FEIS be published prior to the adjudicative hearing would provide another route of attacking or appealing the FEIS, essentially creating an additional SEPA appeal not contemplated by EFSLA. The Applicant believes waiting for the FEIS before the adjudication would create additional unwarranted delays before the Council can make its recommendation to the governor.

**Law**

In accordance with RCW 80.50.090, EFSEC is required to conduct several public hearings after it receives a project application. EFSEC's statute mandates the sequence of these hearings. An informational public hearing must be held "as soon as practicable but not later than sixty days after receipt" of the application.[4] Next, the Council must conduct a public hearing to determine whether the proposed site is consistent and in compliance with city, county, or regional land use plans or zoning ordinances."[5] Then the Council, based on the applicant's environmental checklist, notifies the applicant of any anticipated threshold determination of significance under SEPA,[6] a decision specifically characterized by law to not be an official determination by EFSEC's director and not subject to appeal under chapter 43.21 RCW.[7] Finally, "[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 the APA must be held at which "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 . . ."[8] EFSEC's statute directs the specific timing of the initial informational public hearing and general sequencing of the other public hearings but the law does not otherwise determine the time intervals between hearings. Finally, EFSEC is to report its recommendations to the governor "within twelve months of receipt by the council of such an application, or such later time as is mutually agreed by the council and the applicant."[9]

The Council's rules for scheduling the adjudicative hearing make no reference to the SEPA process but do provide for certain subject areas to be heard, including on-site and local impacts (physical), on-site and local impacts (societal), peripheral area impacts, and adverse impacts

[4] RCW 80.50.090(1); *see also* WAC 463-26-025(3).
[5] RCW 80.50.090(2).
[6] RCW 80.50.090(3)
[7] RCW 80.50.090(3)(b).
[8] RCW 80.50.090(4) (prior to June 30, 22, this section was numbered as .090(3)).
[9] RCW 80.50.100(1).

minimization and consideration of conditions of certification.[10] However, EFSEC's SEPA rules specifically allow for initiating the adjudication "prior to completion of the draft EIS."[11]

SEPA defines a project action[12] as:

> a decision on a specific project, such as a construction or management activity located in a defined geographic area. Projects include and are limited to agency decisions to:
>
> (i) License, fund, or undertake any activity that will directly modify the environment, whether the activity will be conducted by the agency, an applicant, or under contract.
>
> (ii) Purchase, sell, lease, transfer, or exchange natural resources, including publicly owned land, whether or not the environment is directly modified.

SEPA prohibits an agency from taking action "on a proposal for which an EIS has been required prior to seven days after issuance of the FEIS."[13] SEPA's policy statement allows agencies to integrate its requirements "with existing agency planning and licensing procedures and practices, so that such procedures run concurrently rather than consecutively."[14] SEPA also directs agencies to "prepare EISs concurrently with and coordinated with environmental studies and related surveys that may be required for the proposal under other laws, when feasible."[15] If the FEIS is published in time "to be included in appropriate recommendations or reports on the proposal" being considered by the agency, its completion is timely.[16]

**Analysis:**

EFSEC's SEPA process and the adjudication proceed along parallel but separate tracks; this has been the case for approximately the last forty years, and likely since EFSEC's creation.[17] The moving parties in this adjudication raise arguments that the Council has rejected multiple times in the past.[18] These SEPA-related motions filed in this adjudication preserve this familiar issue for appeal, but, based on existing precedent, had absolutely no chance of being granted. As explained below, each of the motions seeking to delay EFSEC's adjudicative hearing are denied.

EFSEC is a unique agency in the State of Washington. It is the only authority to which an applicant can apply to site an energy facility and have all required permits issued by a single

[10] See WAC 463-30-300(5) through (8).
[11] WAC 463-47-060(2)
[12] *See* WAC 197-11-704(2)(a).
[13] WAC 197-11-460(5).
[14] WAC 197-11-030(2)(e).
[15] WAC 197-11-402(8).
[16] WAC 197-11-406.
[17] In recent memory, EFSEC has not issued an FEIS prior to commencing and conducting its adjudication on a proposed project. *See* In the Matter of Whistling Ridge Energy Project, Application No. 2009-01, Council Order No. 848 (June 29, 2010) and In the Matter of Vancouver Energy Distribution Terminal, Case No. 15-001, Order Denying Motion to Continue Adjudication Until After FEIS is Issued (June 21, 2016).
[18] *Id*.; *see also* In the Matter of Kittitas Valley Wind Power Project, Application No. 2003-01, Council Order No. 799, Order Denying Intervenor Residents Opposed to Kittitas Turbines Motion to Stay Adjudicative Hearing Until Issuance of FEIS (September 1, 2004).

agency. EFSEC allows an applicant to avoid multiple bureaucracies of various state and local agencies along with multiple administrative and judicial appeals of individual permits that must be obtained to allow siting of an energy facility.[19] For applicants, the benefit of EFSEC is this state agency's ability to streamline the environmental review and permitting processes, aspirationally within only one year, and then make a recommendation to the governor. Once the governor makes a decision, the only appeal is to Thurston County Superior Court for consolidation of the record and then directly to our state Supreme Court.

EFSEC's consolidated review process is obviously different from the typical environmental or land use permitting experience, but it does not deprive interested parties or communities of due process, the ability to comment on a proposed project, or to influence the Council's ultimate recommendation to the governor. EFSEC conducts the environmental review required by SEPA and also conducts an adjudication that allows parties of right (including the Applicant, the county and/or city where an application proposes to site a facility, and Counsel for the Environment (CFE)) and qualified intervenors to litigate contested issues surrounding the proposed project.[20]

EFSEC's governing statutes provide no requirement for the Council to complete its SEPA review process before conducting its adjudication. SEPA requires state and local agencies to "include in every recommendation or report on proposals for . . . major actions significantly affecting the quality of the environment" an environmental impact statement.[21] EFSLA requires the EFSEC council to "report to the governor its recommendations as to the approval or rejection of an application for certification within twelve months of receipt by the council of an application deemed complete by the director, or such later time as is mutually agreed by the council and the applicant."[22]

Because RCW 80.50.100 imposes a one-year limit on the Council's development of a recommendation to the governor on a proposed energy facility, it is impracticable for EFSEC's SEPA responsible official[23] to complete the EIS before the adjudication. Consequently, EFSEC has promulgated a rule that explicitly provides that the Council "may initiate an adjudicative proceeding required by 80.50.090 *prior to completion of the draft EIS.*"[24] In this case, however, EFSEC waited until the issuance of the DEIS to issue the order commencing adjudication.

The moving parties attempt to make much of the 2007 amendment to this rule which deleted a second sentence requiring the Council to "initiate and conclude an adjudicative proceeding prior to issuance of the final EIS," but none of the moving parties acknowledge the unambiguous meaning of the remaining sentence that has always been part of this rule. The contested sentence means exactly what it says: the Council may begin its adjudication even *before* a DEIS has been

[19] *See* RCW 80.50.010(5)'s legislative finding that EFSEC's creation includes the purpose of avoiding "costly duplication in the siting process" to "ensure that decisions are made timely and without unnecessary delay."
[20] *See* RCW 80.50.030(3) and RCW 80.50.080.
[21] RCW 43.21C.030(c).
[22] RCW 80.50.100(1)(a).
[23] EFSEC's Director (formally called the EFSEC Manager prior to the 1992 amendments to EFSLA (*see* RCW 80.50.360) is the EFSEC's SEPA responsible official. Neither the Council nor EFSEC as an agency takes this role. *See* WAC 463-47-051; *compare* WAC 463-47-050.
[24] WAC 463-47-060(2).

published. If an adjudication can be started before the DEIS is done, it stands to reason that the same adjudicative process can occur before issuance of the FEIS. The moving parties cite to no EFSEC statute or rule directing this Council to wait for publication of the FEIS before completing its adjudicative hearing. That is because there is no such law and no such rule.

EFSLA does not require parties to have the FEIS before presenting their arguments "in support of or in opposition to the application for site certification."[25] Although it is true that EFSEC's rules do not speak directly about whether the FEIS may or may not be issued before or after the filing of pre-filed written testimony or the cross-examination hearing, there is no rule prohibiting this approach. The adjudication does not limit alternatives and does not involve any decision on the proposed project. Therefore, there is no violation of SEPA and the requirements set out in WAC 197-11-070(1) or WAC 197-11-055(2)(c).[26] The Council only takes action after full deliberations that consider the results of both the adjudication and the SEPA process (the resultant FEIS) and only then makes its recommendation to the governor.

The parties have the DEIS. That document informs the parties of EFSEC's SEPA responsible official's assessment of the potential impacts of the proposed project. Additionally, EFSEC staff's data requests to the Applicant for additional information are posted on the Council's website as they are issued and the Applicant's responses are posted as they are received. The parties have more than sufficient insight into the ongoing SEPA process to inform the development of their positions during the adjudication. All parties are free to argue that the Council should condition or reject the application but it is up to the Council or the governor to decide whether to invoke SEPA's substantive authority as a basis to condition or reject this project. EFSLA provides additional authority for the Council to recommend approval or rejection of the application, to include conditions in a draft site certification agreement "to protect state, local government, or community interests, or overburdened communities . . . affected by the construction or operation of the facility."[27]

It is worth noting that the two cases cited by Benton County in its motion are inapposite. Both of those cases *rejected* arguments that (1) a Port entering into a lease for an oil facility[28] and (2) the drilling of an investigative well at a proposed well field site prior to issuance of an EIS[29] limited alternatives in violation of SEPA.

The parties' speculations that conducting the adjudicative hearing in advance of publication of the FEIS will somehow prevent full analysis of all environmental impacts of the proposed Horse Heaven Wind Farm are simply incorrect. The EIS process is a tool developed under the direction of the Council's responsible official for identifying and analyzing probable adverse environmental impacts, reasonable alternatives, and possible mitigation. The Council made no decisions regarding the project following issuance of the DEIS. The Council will make no

[25] *See* RCW 80.50.090(4)(a).
[26] WAC 197-11-055(2)(c) states that "[a]ppropriate consideration of environmental information shall be completed before an agency commits to a particular course of action."
[27] RCW 80.50.100(1) and (2).
[28] *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 80 (2017).
[29] *Public Util. Dist. No. 1 of Clark Cnty. V. Pollution Control Hearings Bd.*, 137 Wn. App. 150 (2007).

decisions immediately after the adjudicative hearing. The Council will not deliberate any of the environmental impacts or potential mitigation measures until the entire application review process is complete. At that time, the amended application[30] and draft FEIS will both be under consideration, along with all the information developed during the adjudication and will all factor into the Council's ultimate recommendation to the governor. This process may be different than some of the parties to this adjudication have previously experienced, but they are wrong in their allegations that EFSEC's procedure is legally or substantively deficient in any way. Further, TCC's speculation that EFSEC is somehow withholding the FEIS until after the adjudication to avoid criticism or challenge to the FEIS is not well taken and is wholly unfounded.[31]

EFSEC's approach is fully consistent WAC 197-11-055(1) that directs "[t]he SEPA process shall be integrated with agency activities at the earliest possible time to ensure that planning decisions reflect environmental values, to avoid delays later in the process, and to seek to resolve potential problems." The EFSEC adjudication is not an administrative appeal of the EIS. The adjudication is an opportunity for persons present their arguments in support or opposition to the *application* in a trial-like setting where legal and factual assertions relevant to those arguments can be tested.[32] See RCW 80.50.090(4).

The council's recommendation to the governor is informed by both the findings of fact and conclusions of law developed through the adjudication and by the EIS. The findings of fact and conclusions of law for the adjudication are concerned with deciding disputes of fact and law pertinent to the parties' arguments in support or opposition to the project.

EFSEC's adjudicative hearing by itself is not the agency "action" contemplated by SEPA. EFSEC will only take "action" on the Horse Heaven Wind Farm application when the Council makes its recommendation to the governor. Conducting an adjudication does not limit the choice of reasonable alternatives before the issuance of the EIS because the adjudication is merely for the purpose of hearing arguments in support or opposition to the ASC to help inform the council's recommendation to the governor. The Council's recommendation is not issued until after EFSEC's SEPA responsible official issues the final EIS and the council has had an opportunity to consider it. As required by SEPA, the Council's recommendation will not be issued until at least seven days after EFSEC publishes its FEIS.

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[30] *See* WAC 463-60-116 with regard to when amendments can be made to an application for site certification and the timing of the adjudication.
[31] *See* TCC Reply at 4-5. It should also be noted that it is not the "decision of the ALJ to delay the FEIS until after the adjudication." The ALJ has no substantive role in the SEPA process.
[32] *See* RCW 80.50.090(4).

For all of the foregoing reasons, the parties' motions for continuance of a stay of this adjudication is DENIED.

DATED and effective at Olympia, Washington, on the 5th day of June, 2023.

WASHINGTON ENERGY FACILITY
SITE EVALUATION COUNCIL

Adam E. Torem, Administrative Law Judge