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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
ANSWER TO SCOUT CLEAN
ENERGY'S PETITION FOR
RECONSIDERATION

I. INTRODUCTION

Scout Clean Energy, LLC, uses a 45-page petition for reconsideration of the Council's recommendation to the Governor, including over 200 pages of attachments, as an improper attempt to re-litigate the entire adjudicative process. Scout portrays itself as having effectively lost the adjudication to bolster its request that EFSEC reconsider its recommendation so that Scout may have the maximum project it wishes. One ironclad tenet of any fair adjudication is that the ends never justify the means. Here, Scout's arguments are not only contrary to the rules on reconsideration, but also attempt to circumvent the integrity of the adjudication that the parties and EFSEC spent literally hundreds of hours undertaking. As Scout's petition shows nothing more than mere disagreement with EFSEC's recommendation to the Governor, it should be denied.

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3 **II. ANSWER**

4 WAC 463-30-335 allows parties of record to file a petition for reconsideration of
5 EFSEC's recommendation to the Governor. Benton County understands that the Governor
6 has already exercised his powers under RCW 80.50.100 and directed EFSEC to reconsider its
7 recommendation, effectively rendering Scout's petition moot. However, WAC 463-30-355
8 allows any party to file an answer to a petition for reconsideration. Additionally, while
9 EFSEC must reconsider its recommendation based upon the Governor's decision, there is
10 nothing in EFSEC's governing statutes or regulations that require EFSEC to change its
11 recommendation based upon the Governor's request for reconsideration. Therefore, the
12 County submits this answer to Scout's petition and requests that it be denied. Further, The
13 County asks that EFSEC consider the County's response when responding to the Governor's
14 request for reconsideration, particularly inasmuch as the Governor's position may have been
15 influenced by exaggerations and misstatements in Scout's petition that have heretofore been
16 un rebutted.
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19 **A. Scout has not met the standards for reconsideration.**

20 Nothing in WAC 463-30-335 states the standards for granting reconsideration. When
21 administrative rules do not otherwise provide standards for reviewing a motion for
22 reconsideration, administrative tribunals follow the Washington State Superior Court Civil
23 Rules. *See Friends of the San Juans v. San Juan Cnty.*, SHB No. 13-001 (Sept. 5, 2013)
24 (Shorelines Hearings Board); *Klineburger v. Dep't of Ecology*, PCHB No. 15-127 (May 31,
25 2016) (Pollution Control Hearings Board). In order for EFSEC to grant its petition, Scout
26 must show that it has met one of the standards for reconsideration under CR 59(a).
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CR 59(a) provides nine grounds for reconsideration. Scout's petition does not address the standards of CR 59(a), or any standards for reconsideration at all. On this basis alone Scout's petition should be denied. CR 59(b) ("A motion for a new trial or for reconsideration shall identify the specific reasons in fact and law as to *each ground* on which the motion is based.") (emphasis added). Instead, Scout provides four broad challenges to EFSEC's decision:

First, the decision guts the Project's generating infrastructure and sets precedent that will extinguish the state's climate progress. *Second*, the ferruginous hawk and wildlife movement exclusion zones in Spec-5 and Hab-1 are particularly untenable because they are unprecedented and lack any policy or substantial evidentiary support. *Third*, none of the Council's proffered justifications support those measures, based on the record evidence and the fact that the other impacts cited are already mitigated by other measures. *Fourth*, the decision violated the Siting Act, APA, and SEPA.

Petition, p. 14-15.

These claims seem to be attempting to invoke the standards of CR 59(a)(7) (*i.e.*, an absence of evidence to support EFSEC's recommendation and the recommendation is contrary to law) and CR 59(a)(9) (*i.e.*, substantial justice has not been done). Courts disfavor motions for reconsideration and will deny them "absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in controlling law." *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999) (per curiam). A motion for reconsideration "does not permit a plaintiff to propose new theories of the case that could have been raised before entry of an adverse decision." *Dynamic Res., Inc. v. Dep't of Revenue*, 21 Wn. App. 2d 814, 825 (2022) (quoting *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241 (2005)). Scout has not met its burden to prove that the standards for reconsideration have been met.

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3 **1. EFSEC’S recommendation was supported by substantial evidence.**

4 Scout’s arguments in support of its petition can be distilled down to bald
5 disagreement with the substance of EFSEC’s judgment. Scout argues that the
6 recommendation will “likely render[] the Project nonviable unless it undergoes substantial
7 and costly amendment.” Petition, p. 1. The arguments presented in Scout’s petition are not
8 sufficient to meet the high standards for reconsideration. “A party seeking reconsideration
9 must show more than a disagreement with the Court’s decision, and recapitulation of the
10 cases and arguments considered by the court before rendering its original decision fails to
11 carry the moving party’s burden.” *United States v. Wetlands Water Dist.*, 134 F. Supp. 2d
12 1111, 1131 (E.D. Cal. 2001) (internal quotations omitted). “To succeed, a party must set
13 forth facts or law of a strongly convincing nature to induce the court to reverse its prior
14 decision.” *Id.*

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16 When seeking reconsideration under CR 59(a)(7), if a motion would require any
17 weighing of conflicting evidence, that motion should be denied. *Johnson v. Dep’t of Lab. &*
18 *Indus.*, 46 Wn.2d 463 (1955). EFSEC made its recommendation to the Governor after pre-
19 hearing briefing, pre-hearing testimony, an eight-day adjudicative hearing, post-hearing
20 briefing, an FEIS, and open EFSEC meetings where the project was discussed. Scout
21 presented evidence throughout this process and made clear to EFSEC the project that it
22 believes it should be able to build and its reasoning in support. Scout claims that EFSEC’s
23 recommendation is “unsupported by evidence,” but in all actuality the recommendation
24 suggests that EFSEC simply disagreed with Scout as to the appropriate scope of the project.
25 EFSEC as the trier of fact was to give testimony and other evidence the weight it believed the
26 evidence warranted. *See Segall v. Ben’s Truck Parts, Inc.*, 5 Wn. App. 482, 483 (1971); *see*
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3 *also Yorkston v. Whatcom Cnty.*, 11 Wn. App. 2d 815, 831 (2020) (“the trier of fact is free to
4 believe or disbelieve any evidence presented at trial”).

5 Replete throughout Scout’s petition are citations to the adjudicative record and
6 Scout’s own comment letters, all of which are now offered as “evidence” that EFSEC erred
7 in reaching its recommendation. *See e.g.*, Petition, p. 11 (arguing “[d]espite detailed
8 comment letters from Scout and other members of the utility and renewable energy
9 community, the Council ultimately incorporated those revisions into its recommendation to
10 the Governor.”); p. 23 (claiming “[a]s detailed in Scout’s comment letters to the Council, and
11 proven by substantial evidence in the record,” and then citing to Scout’s post-hearing brief
12 for the “substantial evidence,” Spec-5 is not supported by substantial evidence); p. 34-35 (“In
13 short, Mr. Apostol’s VIA followed no established or peer-reviewed methodology and, by
14 excluding other factors that obscure visual impacts, did not reflect actual conditions. The
15 Council apparently missed these shortcomings entirely.”).

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18 EFSEC was free to give weight to Scout’s evidence as it deemed fit in making its
19 recommendation to the Governor. What Scout does not provide now is any new evidence or
20 argument that it either did not, or could not, previously present during the arduous
21 adjudicative process. Scout has provided no basis for EFSEC to grant reconsideration under
22 CR 59(a)(7). Because granting Scout’s motion for reconsideration would require EFSEC to
23 re-weigh the evidence presented by all parties during the adjudicative and recommendation
24 process, Scout’s motion should be denied.

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26 **2. There has been no substantial injustice.**

27 Scout’s petition also appears to rely on CR(a)(9) as a basis for reconsideration. Scout
28 claims that its petition should be granted because EFSEC’s recommendation “guts the
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3 Project's generating infrastructure and sets precedent that will extinguish the state's climate
4 progress" and would "likely" render the project nonviable. Petition, p. 14, 1. CR 59(a)(9)
5 provides for reconsideration as a catch-all when "substantial justice has not been done." CR
6 59(a)(9). The Supreme Court has cautioned that reconsideration on this basis should only
7 rarely be granted. *Knecht v. Marzano*, 65 Wn.2d 290, 297 (1964). It should be saved for
8 cases where "the circumstances have been fairly egregious." Elizabeth A. Turner, 4 *Wash.*
9 *Prac., Rules Practice CR 59* at *23 (6th ed. 2020).
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11 The present case was argued with an adequate record and Scout actually *opposed* the
12 County's objection to procedural irregularities that might have resulted in better integration
13 of the FEIS with the adjudication. *See infra*, Section C. Specifically, the County was
14 concerned, and remains concerned, that EFSEC's decision to proceed with the adjudication
15 prior to FEIS issuance violated the requirements of SEPA enumerated in Chapter 197-11
16 WAC, and can only be remedied by reconvening the adjudicative process.
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18 Unlike the County, Scout raises no actual procedural irregularities with the SEPA
19 process. Scout argues that EFSEC adopted mitigation measures beyond those in the FEIS,
20 but this is exactly how SEPA anticipates an iterative process for development review
21 throughout the environmental review process. The point of SEPA is to inform the decision
22 making process, not to bind the decision maker to the terms of an environmental impact
23 statement. WAC 197-11-448 ("SEPA does not require that an EIS be an agency's only
24 decision making document."). This means that a decision maker may include necessary
25 changes to a project *after* issuance of an FEIS. Scout's complaints raise no procedural
26 irregularities, but rather dissatisfaction with the outcome of the EFSEC process. The only
27 "substantial injustice" is the result that EFSEC did not recommend the full project that Scout
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3 wished to build. However, EFSEC's role is not to ensure that Scout gets the project it wants.
4 EFSEC's role is to receive and investigate the sufficiency of applications it receives and to
5 prepare a report and recommendation to the Governor. RCW 80.50.040.

6 EFSEC is tasked with the difficult role to balance the need for clean energy with
7 ensuring that projects "will produce minimal adverse effects on the environment[.]" RCW
8 80.50.010. In order to carry out this balancing, EFSEC is empowered to receive proposals
9 for energy facilities and conduct hearings on the proposed facilities. RCW 80.50.040. As
10 noted above, during the adjudicative hearing on the project, EFSEC received information on
11 the various impacts the project would have on the environment. EFSEC, in making its
12 recommendation to the Governor, balanced the environmental impacts of the project with the
13 need for the project itself, and reached an outcome that allowed the project to proceed, but
14 also mitigated impacts to important aspects of the environment, such as the ferruginous hawk
15 and Yakama Nation's traditional cultural properties. Outside of mere disagreement with
16 EFSEC's recommendation, Scout has presented no evidence in its petition that EFSEC failed
17 to reasonably balance the need for the project with the environmental impacts of the project.
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20 **B. The County has not allowed residential development in the Horse Heaven Hills.**

21 An oft-repeated theme in Scout's motion for reconsideration is the proposition that
22 much of the mitigation surrounding the ferruginous hawk is unnecessary because the project
23 rests "in the heart of the historically agricultural Horse Heaven Hills that are now being
24 aggressively converted to expanding residential developments encouraged by Benton
25 County." Petition, p. 2. Not only is this statement patently false, but it ignores Benton
26 County's position throughout the adjudicative process. It is untrue and recklessly contrary to
27 the actual adjudicative record.
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3 Benton County has consistently opposed the project on the grounds that the project
4 will unlawfully convert agricultural lands of long-term commercial significance
5 (“ALLTCS”) to non-agricultural use. The County does not raise this point in an attempt to
6 relitigate its concerns, which it still holds, but rather to highlight the fact that significant
7 residential development *cannot and has not* occurred in the Horse Heaven Hills. The central
8 point of much of the County’s presentation to EFSEC was to demonstrate that the County’s
9 commitment to preservation of the site’s agricultural lands dates back decades and was not
10 raised merely as an opportunistic objection.
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12 As noted in the County’s briefing, the project, along with most of the Horse Heaven
13 Hills region, is located within the County’s Growth Management Act Agricultural District
14 (“GMAAD”). Benton County’s Pre-Hearing Brief, p. 7. All land located within the County’s
15 GMAAD is also designated as ALLTCS. Once land is designated as ALLTCS, it cannot
16 either be de-designated or put to non-agricultural uses (such as residential development)
17 without the local jurisdiction first making a determination that the lands no longer meet
18 ALLTCS status. *Clark Cnty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn. App. 204
19 (2011), *vacated in part on other grounds*, 117 Wn.2d 136 (2013). The *only* activities
20 allowed in the Horse Heaven Hills are agricultural uses and non-agricultural uses “which are
21 dependent upon, supportive of, ancillary to, or compatible with, agricultural production as the
22 principal land use.” BCC 11.17.010. The only “residential development” authorized in the
23 GMAAD is a single-family dwelling. BCC 11.17.010. Any subdividing or intense
24 residential development is explicitly prohibited in the GMAAD. BCC 11.17.080.
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27 This is because allowing residential development in the GMAAD could have
28 significant consequences. When speaking directly to the consequences of introducing a
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3 nonagricultural development like the project into the Horse Heaven Hills, the first concern of
4 Michelle Cooke, Benton County's Planning Manager, was "the fragmentation of the land as
5 far as those who are currently continuing their - - their normal farming operations and those
6 who have or are within the project lease area and have this infrastructure built on their
7 property." Tr. 1125: 10-14. This fragmentation is anathema to Benton County's goal of
8 protecting the agricultural viability of the Horse Heaven Hills. *See* BEN EXH-2003_T, p. 2-
9 3.

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11 Based on evidence argument presented throughout the County's participation in the
12 adjudicative process, Scout is incorrect that the County is "encouraging" residential
13 development in the Horse Heaven Hills such that the project's erosion of ferruginous hawk
14 viability may be brushed aside. Petition, p. 2. Ms. Cooke testified in response to Scout's
15 claim of "encroachment of the urbanization and residential pressure" in the Horse Heaven
16 Hills that "from a planning standpoint, that's just not true." Tr. 1127: 9-19. Ms. Cooke's
17 un rebutted testimony was that the County is *not* looking to use the Horse Heaven Hills as an
18 area to expand the rapidly growing Tri-Cities. *Id.* Ms. Cooke was also clear that further
19 urbanization is "flat-out not allowed" in the GMAAD. Tr. 1127: 20-21. As the County
20 argued at length, the Horse Heaven Hills are designated as ALLTCS and cannot be put to any
21 non-agricultural uses unless the County can meet the high burden for de-designation. *Clark*
22 *Cnty.*, 177 Wn.2d 136.

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24 Scout's attempt to minimize the project's impacts on the ferruginous hawk with this
25 untrue claim is an exercise in whitewashing the realities of the project's effect on this
26 species. Residential development in the Horse Heaven Hills will not threaten the ferruginous
27 hawk as residential development is not allowed in the GMAAD. Instead, as EFSEC noted in
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3 its recommendation, it is the project as proposed by Scout that “would pose a new and
4 significant threat to the ferruginous hawk.” Recommendation, p. 10. EFSEC should not be
5 persuaded by Scout’s mischaracterization of Benton County’s land use regulations as a basis
6 to grant Scout’s petition.

7 **C. Scout’s objections to the SEPA process are misplaced.**

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9 It is particularly noteworthy that Scout argues that the EFSEC process has violated
10 SEPA. In truth, though, Scout is reaping what it sowed. Benton County argued that the
11 adjudicative proceedings in this case should have been stayed pending the issuance of the
12 FEIS on the basis that otherwise the “the adjudicative process [would] be built on a deficient
13 environmental record and [would] undermine any recommendation of the Council to the
14 Governor” and that “[t]he mitigation measures or project revisions that may occur after the
15 hearing but during the transition from the current DEIS to a final EIS, will simply be taken
16 out of any deliberative process in which the parties and the concerned public may
17 participate.” Benton County’s Motion to Stay, p. 3-4. Tri-Cities Cares (“TCC”) and the
18 Yakama Nation filed similar motions to stay the adjudicative process until an FEIS was
19 issued. Scout opposed all motions on the basis that SEPA and the EFSLA “emphasize that
20 state agencies like EFSEC have the power to devise their own procedures to incorporate
21 SEPA environmental review into their unique administrative processes.” Scout’s Opposition
22 to Motions to Stay, p. 1.
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24
25 Seemingly unaware of this background, Scout now claims that EFSEC’s
26 recommendation violates SEPA because the project recommended to the Governor “is so
27 changed from its original proposal[.]” Petition, p. 42. This was Benton County’s point in
28 requesting that the adjudicative proceedings be stayed until the FEIS was issued. “The
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3 invited error doctrine ‘prohibit[s] a party from setting up an error at trial and then
4 complaining of it on appeal.’” *Angelo Prop. Co. v. Hafiz*, 167 Wn. App. 789, 823 (2012)
5 (quoting *City of Seattle v. Patu*, 147 Wn.2d 717, 720 (2002)). This is exactly what Scout is
6 doing in this case. Scout strenuously argued that the SEPA process for the adjudication was
7 proper and waiting for the FEIS to issue was not a valid basis to stay the adjudication. Scout
8 now complains about the outcome of its objection as a basis for EFSEC to reconsider its
9 recommendation. Scout is prohibited from doing so and EFSEC should not grant Scout’s
10 petition on this basis.
11

12 Scout also takes issue with the fact that EFSEC imposed mitigation and requirements
13 in excess of and in addition to those provided for in the FEIS. However, Scout previously
14 acknowledged that:

15 SEPA regulations make clear that an FEIS is *not* a culminative document
16 that must come after all other internal agency process. *See* WAC 197-11-
17 448(1). Rather, the FEIS ‘analyzes *environmental* impacts and must be
18 used by agency decision makers, along with other relevant considerations
19 or documents, in making final decisions on a proposal.’ *Id.* (italics in
20 original; underline added). Consistent with that requirement, the FEIS is
21 but one of several ‘deliberative process[es]’ utilized by EFSEC to makes
22 its recommendation to the Governor. WAC 463-14-080.

23 Applicant’s Opposition to Motions to Stay, p. 6.

24 While the County continues to object to the adjudication on the basis that the FEIS
25 should have been issued prior to the EFSEC hearing, the fact that the project ultimately
26 approved is different than the project studied in the FEIS is not a proper basis for
27 reconsideration. At its core, as Scout acknowledges, an FEIS is a disclosure document, not a
28 decision document. WAC 197-11-448(1) (“The EIS provides a basis upon which the
29 responsible agency and officials can make the balancing judgment mandated by SEPA,
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3 because it provides information on the environmental costs and impacts. SEPA does not
4 require that an EIS be an agency's only decision making document."). Furthermore, "SEPA
5 is essentially a procedural statute to ensure that environmental impacts and alternatives are
6 properly considered by the decision makers." *Save Our Rural Environment v. Snohomish*
7 *Cnty.*, 99 Wn.2d 363, 371 (1983). No statute or case law forecloses EFSEC from imposing
8 conditions or mitigation measures outside of those recommended in the FEIS.
9

10 Scout had the opportunity to join with Benton County, TCC, and the Yakama Nation
11 and request that EFSEC stay the adjudicative proceedings until the FEIS was issued. This
12 would have provided Scout an opportunity to argue and present evidence on what it is now
13 attempting to achieve through its motion—that the only mitigation necessary for the project
14 is that contained in the FEIS. Instead, Scout decided to gamble on a quicker, pre-FEIS
15 decision on the basis that Scout believed EFSEC would approve the full project Scout
16 proposed. Scout's gamble failed. Scout should now bear the results of its gamble. The
17 integrity of the public EFSEC process will be undermined by turning EFSEC's adjudicative
18 role into merely bending the outcome of a hearing to support an applicant's desires.
19

20 **III. CONCLUSION**

21 Scout's motion for reconsideration has essentially been rendered moot based on the
22 Governor's decision. However, to the extent that the Governor's direction to EFSEC raises
23 similar arguments that Scout presented in its petition, Benton County respectfully requests
24 that EFSEC consider this response in its review of the Governor's request to reconsider the
25 project.
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27 DATED this 3rd day of June, 2024.
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/s/ Kenneth W. Harper

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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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4 *Counsel for Yakama Nation*

5 DATED this 3rd day of June, 2024, at Chico, California.

6 /s/Julie Kihn
7 JULIE KIHN
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