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Q4. Share any comment	not answered
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June 20, 2025

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Dear Councilmembers:

This office represents Tri-Cities C.A.R.E.S. ("TCC"), a public interest organization representing community and business interests in the Tri-Cities community. TCC has been actively involved in the proposal to construct the Horse Heaven Wind Project, a project proposing 222 wind turbines stretching over 25 miles of the ridgelines of the Horse Heaven Hills in southern Benton County. TCC was an active participant in the adjudication for the project and has challenged the decision of the Governor to approve the proposal following judicial review provisions of EFSEC's governing statute, RCW chap. 80.50. TCC continues its active involvement in project review.

My client has asked me to comment on a proposed policy "Delegating Certain Plan Approvals to the EFSEC Director, Proposed Policy #16-01, dated June 25, 2025" ("Proposed Policy"). Notice that the Council will take "final action" on the Proposed Policy on June 25, 2025, was released at 8:30 am on June 16, 2025. The comment period for the Proposed Policy will "end on Sunday, 6/22/2025 at 11:59pm." During this six-day comment period, we had two weekend days plus a federal holiday (Juneteenth). EFSEC therefore gave us only three business days to review and submit comments. This was the first notice that this Proposed Policy would be considered by the Council; there is no previous mention of it in the transcripts of recent Council meetings or in any Council agendas or packets.

TCC opposes the Proposed Policy and urges the Council to reject it. The Proposed Policy unlawfully delegates decision-making statutorily reserved to the Council to the Council Director. The Policy removes final decisions on the siting of controversial projects and conflicts with the long established SEPA and adjudication processes. It

also continues the unfortunate policies of council staff to keep decision-making secret, eliminating public comment and preventing the creation of an administrative record for further review by either this Council or the Courts. In this regard, we incorporate the comments made by Friends of the Columbia Gorge that address most of TCC's concerns. We write separately to address the particular aspects of the Proposed Rule that impact the pending Horse Heaven matter.

First, the author or responsible party for the Proposal Rule is not identified. It is important to know whether the circulated draft was prepared by the Council, by the Chair, by the Director/Manager, by EFSEC staff or by EFSEC's legal counsel. We have reviewed agendas, agenda packets and transcripts of prior Council meetings and find no discussion of the need to amend or revise the prior version of Policy #16-01. Further, it is not known whether the draft of the Proposed Policy was developed in communications with any applicants that have pending applications or proceedings before the Council, including the Horse Heaven project. As far as we are aware, there was no advance notice to any community groups or local governments with identified interests in Council proceedings. In any review of this proposal, the Council should insist on full transparency of the process that led to the Proposed Policy becoming an agenda item.

Second, the current Chair of EFSEC, Kurt Beckett, was seated at the January 2025 meeting. At that meeting, he disclosed that he had been a lobbyist for the Horse Heaven applicant, Scout Clean Energy, on the Horse Heaven Wind Project itself, and indicated he would recuse himself from further proceedings concerning Scout's Horse Heaven application. It is now apparent that some unidentified person or persons at EFSEC has advanced the Proposed Policy as a means to influence the outcome of the pending Horse Heaven litigation. Accordingly, we ask full disclosure from the EFSEC Chair and staff as to Mr. Beckett's involvement in considering, drafting and promoting the adoption of the Proposed Policy to the Council. Mr. Beckett is requested to recuse himself from decision-making on the Proposed Policy because of conflicts of interest and the appearance of fairness doctrine.

Third, the Proposed Policy action removes statutorily required parties to EFSEC decision making. As the Council is aware, RCW 80.50.030(4) requires the following:

(4) The appropriate county legislative authority of every county wherein an application for a proposed site is filed shall appoint a member or designee as a voting member to the council. The member or designee so appointed shall sit with the council only at such times as the council considers the proposed site for the county which he or she represents, and such member or designee shall serve until there has been a final acceptance or rejection of the proposed site.

Ed Brost was appointed by Benton County as its voting member of the Council for the Horse Heaven project. He was an active participant in all proceedings regarding the project. Indeed, Mr. Brost voted against approval of the Horse Heaven project when it was before the Council.¹

The Proposed Policy would eliminate the participation of the local county representative for all decisions listed in the Proposed Policy. The importance of the Benton County representation is emphasized in *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wn.2d 275, 314-15, 197 P.3d 1153 (2008) (the “ROKT” decision):

The legislature provided a right for a county to appoint a representative to EFSEC when it considered an application located in that county. RCW 80.50.030(4). Without question, any county in which an energy facility is proposed would have a great interest in the decision whether to preempt the county's authority to site such a facility. Indeed, in this case, the County appointed a representative to EFSEC and later intervened as an interested party. The presence of the County on EFSEC demonstrates that the legislature envisioned EFSEC to include a variety of perspectives and interested parties in the decision-making process. We will not disturb the legislature's decision.

165 Wn.2d at 314. The decision in *ROKT* also made clear that “EFSEC does not have the authority to determine its own membership.” The removal of the county representative violates the terms of the EFSLA and disenfranchises the residents of Benton County, including TCC and its supporters.

In addition, RCW 80.50.080 requires the appointment of a “Counsel for the Environment” (“CFE”) who “shall represent the public and its interest in protecting the quality of the environment.” The Proposed Policy would eliminate any role of the Counsel for the Environment in the decision-making, removing any assurance that the public interest is represented during EFSEC decision-making. The issues before the PTAG concern wildlife and habitat protection, issues clearly within the statutory portfolio of the CFE. Removal of the Counsel for the Environment from such decision-making on these critical issues violates RCW 80.50.080.

Fourth, and as pointed out in Friends’ letter, the Proposed Policy would make the Director/Manager the gatekeeper as to whether the Council will actually review certain

¹One of Mr. Brost’s concerns was that “This vote to approve the project is premature with several important issues yet to be clarified/defined.” Among the important issues was: “The number & type of wind turbines to be sited has not yet been determined or agreed to by the project developer and the Cities and County(ies) to be most impacted by the project.” Report to the Governor on Application No. EFSEC-220011, Page 16.

proposals. Again, these are decisions that will be made off-the-record, without notice to any interested persons, at a time that the Applicant has unfettered access to staff.

Fifth, if the position of Director/Manager is to be elevated to decision-maker, the EFSEC organic statute, chapter 80.50 RCW, must be amended to provide authority to do so. Even if a statutory change is not called for, the delegation of decision-making authority requires rule-making, as revised Policy #16-01 is obviously a “rule” under the Washington Administrative Procedure Act, RCW 34.05.010(16).

Under the APA, an agency like EFSEC must “solicit comments from the public under RCW 34.05.310(1):

RCW 34.05.310

Prenotice inquiry—Negotiated and pilot rules.

(1)(a) To meet the intent of providing greater public access to administrative rule making and to promote consensus among interested parties, agencies must solicit comments from the public on a subject of possible rule making before filing with the code reviser a notice of proposed rule making under RCW 34.05.320. The agency must prepare a statement of inquiry that:

- (i) Identifies the specific statute or statutes authorizing the agency to adopt rules on this subject;
- (ii) Discusses why rules on this subject may be needed and what they might accomplish;
- (iii) Identifies other federal and state agencies that regulate this subject, and describes the process whereby the agency would coordinate the contemplated rule with these agencies;
- (iv) Discusses the process by which the rule might be developed, including, but not limited to, negotiated rule making, pilot rule making, or agency study;
- (v) Specifies the process by which interested parties can effectively participate in the decision to adopt a new rule and formulation of a proposed rule before its publication.

These provisions enhance public knowledge and transparency consistent with the mandate for “encouraging meaningful public comment and participation in energy facility decisions.”² However, in its rush to approve the Proposed Policy, no prenotice inquiry has been provided which addresses the five points found in RCW 34.05.310. Importantly, the statute requires a statement as to “why rules on this subject may be needed and what they might accomplish; . . .”

² EFSEC staff certainly know how to meet these statutory requirements, as it recently adopted rule CR-103P, resulting in the entry of Rule-Making Order CR-103P sent to the Code Reviser on May 22, 2025.

That the Council would provide only six days for comment (ending the period on a Sunday night at midnight) is entirely inconsistent with orderly rule-making.

Sixth, it is apparent that the timing and content of the Proposed Policy is intended to backstop prior decisions made by the Director/Manager in the Horse Heaven application. Those decisions include the approval of Rules of Procedure and members of the “Pre-operational Technical Advisory Group” or “PTAG.” One of the revisions to Policy #16-01 is that “Pre and Post Construction Technical Advisory Committee Rules of Procedure and Recommendations” will now become “Plans Subject to EFSEC Director Approval.” This language is not found in the Policy #16-01 adopted on March 25, 2016. Indeed, for the Horse Heaven project the Director/Manager approved the Rules of Procedure and membership of the PTAG after negotiations with the Applicant, but without notice to the public and without even notice to the Council. We filed two objections to this decision-making with the Council, as required by statute, but received no response. Indeed, our second objection to Director/Manager decision-making was never put on the EFSEC website and we doubt Councilmembers were ever made aware of it.

Seventh, as described above, the delegation of decision-making authority to the Council Director/Manager violates the EFSLA statute. However, the elevation of the Director/Manager from “overseeing the operations of the council” (RCW 80.50.360) and “handling day-to-day administration”(WAC 463-10-010(6) to decision-maker indicates that the Director/Manager would be subject to the requirements of the Appearance of Fairness Doctrine if the Proposed Policy is adopted.

In the *ROKT* case, the Supreme Court held that the Washington Appearance of Fairness Doctrine applied to decisions and decision-making by EFSEC. *ROKT*, 165 Wn.2d at 313. Though the court held that the statutory members of EFSEC would not be precluded from making decisions, the court did hold that “[O]f course, the appearance of fairness doctrine certainly can be used to challenge an individual's participation as an administrative decision maker.” 165 Wn.2d at 315. If the Director/Manager is now the decision-maker, all of that individual's decisions will be subject to the Appearance of Fairness Doctrine.³ This will include elimination of ex parte contacts with the applicant, disclosure of all communications, prejudgment and review for bias, including questions of partiality and entangling influences. See *ROKT*, 165 Wn.2d at 313. To the extent that the Council decides to apply the Proposed Policy

³In addition, if a request for disqualification of the Director/Manager on a particular delegated decision is made, and improperly denied, such decision may be the basis for challenge to that decision under RCW 34.05.570(3)(g):

(g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;[.]

retroactively, the prior decision made by the Director/Manager will be subject to the Appearance of Fairness Doctrine. TCC believes that the prior decision of the Director/Manager to approve the Rules of Procedure and Membership of PTAG violates the Appearance of Fairness Doctrine.

Finally, why is EFSEC staff in such a hurry to adopt a new rule of this importance to the on-going operations of EFSEC? The proposal to adopt such an important rule comes with no advance notice and sets a short-term deadline for midnight on a summer Sunday evening. It appears that staff is trying desperately to justify, after the fact, the illegal and improper decision-making by the Director/Manager approving Horse Heaven Rules of Procedures and membership in April, 2025. Those rules made the PTAG process secret, with no record of what was said or done, and no opportunity for public comment, all in violation of the Open Public Meetings Act.

Given the importance of the "policy," a legislative amendment of EFSEC's organic statute (RCW chap. 80.50) is required, or, at the least, orderly rule-making with full opportunity for public and agency review and comment.

In summary, the Proposed Policy is bad law and bad policy and should not be adopted.

Sincerely,

A handwritten signature in dark ink, appearing to read "J. Richard Aramburu". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

J. Richard Aramburu

JRA:cc

cc: Tri-Cities C.A.R.E.S.
Benton County
Yakama Nation
Friends of the Columbia Gorge