SUBMITTED VIA E-MAIL

July 14, 2025

Energy Facility Site Evaluation Council
Via email to comments@efsec.wa.gov

Re: Proposed Policy entitled "Delegating Certain Plan Approvals to the EFSEC Director" (Policy #16-01)

Dear Chair Beckett and Members of the Council:

Friends of the Columbia Gorge ("Friends") submits the following comments in opposition to the proposed policy entitled "Delegating Certain Plan Approvals to the EFSEC Director" (Policy #16-01) ("Proposed Policy"). Friends is a nonprofit organization with approximately 4,000 members dedicated to protecting and enhancing the resources of the Columbia River Gorge, and with strong interests in responsible energy generation and the proper implementation of state law governing the approval, construction, and modification of large energy facilities in Washington.

Friends strongly opposes the Proposed Policy and urges the Council[1] to **not** adopt it. Among other problems, despite the fact that the Proposed Policy would result in sweeping changes to the Council's Rules and procedures, EFSEC has provided only two business days to comment on the Proposed Policy, which violates applicable law and is insufficient to inform and involve the public in the important regulatory questions presented by the Proposed Policy. In addition, because the Proposed Policy would substantially conflict with and effectively change the Council's Rules, it cannot be adopted without the Council first going through the required rulemaking procedures. Moreover, the Proposed Policy would unlawfully delegate the Council's decision-making powers and responsibilities to the EFSEC Director. And the Proposed Policy would unlawfully exempt important agency decisions from public involvement by allowing the Director to make a multitude of decisions under the cover of darkness, without having to involve the public in any way and with unfettered discretion whether to even involve the Council. For these and other reasons, the Council should reject the Proposed Policy.

[1] This letter uses the term "Council" to denote the Council, "Director" to denote the EFSEC Director (a.k.a. the EFSEC Manager), and "EFSEC" to refer to the agency as a whole.

1. By providing only two business days to comment on the Proposed Policy, EFSEC is violating applicable law and the due process rights of interested persons. If the Proposed Policy is not rejected outright, EFSEC should reopen and extend the comment period by at least 30 days.

On Thursday, July 10, 2025, at approximately 5:07 p.m., Friends received an email from EFSEC with the subject line "EFSEC upcoming action item: Policy #16-01 available for comment," in which EFSEC announced that "[p]ublic comment is being accepted from Thursday, 7/10/2025 through Monday, 7/14/2025 11:59pm."

Thus, EFSEC has provided only a four-day notice and comment period on the Proposed Policy, even though adoption of the Proposed Policy would result in sweeping changes to the Council's Rules and procedures applicable to industrial-scale energy projects throughout the State of Washington. Moreover, two days of the four-day comment period were weekend days (Saturday and Sunday, July 12 and 13, 2025). Thus, the four-day comment period provided by EFSEC was, in fact, only two business days. [2]

This woefully insufficient comment period violates applicable law and the due process rights of interested persons. In addition, by providing only two business days to review and comment on the Proposed Policy, EFSEC has deprived Friends of the opportunity to meaningfully inform Friends' members and supporters about the Proposed Policy and solicit their comments.

Apparently, EFSEC expected potentially interested persons and entities to immediately read the public notice, drop everything else they are working on, review the Proposed Policy, research the lawfulness and evaluate the policy implications of the proposed action, notify other potentially interested persons, and submit informed comments—all within four calendar days (two business days). This is no way for a responsible state agency to do business.

EFSEC's actions and procedures here violate the Washington Open Public Meetings Act, which requires EFSEC to provide to the public a "reasonable" amount of time to review and submit written comments on proposed agency actions. RCW 42.30.240(1). A comment period consisting of only two business days on this Proposed Policy is **not** reasonable by any stretch of the imagination.

Additionally, as discussed below, the Council cannot adopt the Proposed Policy without first following the rulemaking requirements of the Washington Administrative Procedures Act ("APA"). The APA requires EFSEC to hold a public hearing, provide a public comment period,

[2] A different version of the Proposed Policy was previously disseminated for public comment in June 2025, and EFSEC provided only three business days to comment on that version. Since then, EFSEC staff have revised the Proposed Policy and supplied an unsigned staff memorandum ("Staff Memorandum") recommending adoption of the new version of the Proposed Policy. Given these changes, the prior three-business-day comment period applied only to the prior version and not the new version of the Proposed Policy. Moreover, despite receiving multiple objections to the prior three-business-day comment period, EFSEC has, for the new version, provided an even shorter comment period, this time allowing only two business days to review and comment on the Proposed Policy.

and publish notice in the state register of the opportunity to submit written comments at least twenty days before the public hearing. *See* RCW 34.05.320(1), 34.05.325(2). If the Council adopts the Proposed Policy on July 16, it will be violating these critical public participation requirements of the APA.

Moreover, consider the context of the Proposed Policy. EFSEC provided only four days (two business days) for comments on the Proposed Policy, even though adoption of the Proposed Policy would forever change the Council's Rules and procedures and, in turn, forever bar the public's ability to comment to the Council on countless site-specific project plans in the future.[3] This will exponentially compound the deprivations of any meaningful comment opportunity; the repercussions will reverberate for decades to come.

EFSEC is violating applicable law by providing only four days (two business days) for notice and comment on the Proposed Policy, and adoption of the Proposed Policy would further violate applicable law because the result would be to provide **no** notice and comment opportunities in the agency review of numerous project plans, which review would be unlawfully delegated to the EFSEC Director by the Proposed Policy. Among other authorities, providing only a single, two-business-day comment period for an unlawful policy that, if and when adopted, would bar any further public participation in the future, violates RCW 80.50.010(6), which specifies in pertinent part that EFSEC is required to "[e]ncourage meaningful public comment in energy facility decisions." Providing only a single two-business-day notice and comment period on sweeping rule changes that would have far-reaching implications for decades to come on numerous project plans, for numerous projects under the Council's jurisdiction, can hardly be said to encourage meaningful public comment. This egregiously short comment period thwarts the Legislature's intent and violates applicable law.

Furthermore, Friends asks whether and why there is a perceived need for urgency here, such that EFSEC is unlawfully short-changing the public on their rights to be meaningfully informed and fully participate in the Council's activities? EFSEC has not even attempted to justify its curtailment of public commenting rights, for example, by claiming any emergency necessitating immediate action. Instead, the agency is all but ignoring the public and attempting to take unlawful shortcuts in the law.

In order to achieve compliance with applicable law and as a matter of sound public policy, the Council should reopen and extend the comment period on the Proposed Policy by at least 30 days. An adequate comment period is warranted for matters like this involving important policy considerations that can affect all energy projects under Council jurisdiction for decades to come. Failure to enlarge the four-day (two-business-day) comment period will violate applicable law and will violate the due process rights of persons interested in the Council's review of energy projects.

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[3] The Proposed Policy effectively exempts numerous categories of proposed plans and applications from any public procedures by making them "subject to EFSEC Director approval" without prescribing any procedures for that review (other than giving the Director unfettered discretion whether to involve the Council in the decision-making process). (Proposed Policy at 2–3.)

2. Although the Proposed Policy is self-labeled as a "policy," it is in fact a proposed rule. Thus, the Council cannot adopt it without first following the rulemaking procedures required by the Washington Administrative Procedure Act.

The Proposed Policy is self-labeled as a "policy." But it does not qualify as a "policy statement" pursuant to the Washington Administrative Procedure Act, which defines a "policy statement" as "a written description of the current approach of an agency . . . to implementation of a statute or other provision of law, of a court decision, or of an agency order, including where appropriate the agency's current practice, procedure, or method of action based upon that approach," RCW 34.05.010(15), and which states that "[c]urrent . . . policy statements are advisory only," RCW 34.05.230(1).

The Proposed Policy admits that "[a]doption of this policy *formalizes the delegation* of [the Council's decision-making] authority to the EFSEC Director and specifies the type[s] of plans to which this delegated authority extends." (Proposed Policy at 2 (emphasis added).) The Policy would also functionally exempt a lengthy list of types of agency decisions (to be made by the Director) from any and all public participation procedures (such as notice of proposed actions, public comment periods, and administrative appeal rights). (*See* Proposed Policy at 2–3.)

Although self-characterized as a "policy," it qualifies as a "rule," because it is an "agency directive . . . or regulation of general applicability . . . which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of . . . privileges conferred by law." RCW 34.05.010(16). The Proposed Policy lists numerous specific categories of types of decisions for which the Council, by adopting the Proposed Policy, will completely delegate its decision-making powers and "formalizes [that] delegation" across the board for all such future decisions. (Proposed Policy at 2–3.) This proposed broad, sweeping, binding[4] delegation governing the review of entire classes of applications and project plans is a "directive of general applicability," which makes it a rule rather than a policy statement. *Failor's Pharmacy v. Dep't of Soc. & Health Servs.*, 125 Wn. 2d 488, 495, 886 P.2d 147 (1994) (citing *Simpson Tacoma Kraft Co. v. Dep't of Ecology*, 119 Wn.2d 640, 647–48, 835 P.2d 1030 (1992)).

Moreover, the Proposed Policy directly conflicts with WAC 463-68-050, which requires a certificate holder to "provide the plans and specifications required by the site certification agreement *to the [C]ouncil for approval*" (emphasis added). This Council Rule expressly retains the Council's decision-making authority with the Council, and certainly does not delegate (or even allow the delegation of) that authority to the Director. To adopt the Proposed Policy and thereby delegate that authority to the Director would be in direct conflict with WAC 463-68-050.

In addition, the Council's Rules also specify that the Director "*administers* the decisions of the [C]ouncil," rather than making those decisions herself. WAC 463-10-010(6) (emphasis

[4] Compare with EFSEC's Policy #15-01, entitled "Enforcement Guidance," which states that "[t]his document . . . is *not intended to be binding* as a formally adopted rule" and specifies that "[t]he Council retains discretion to apply and adapt its enforcement efforts in individual cases." EFSEC Policy #15-01 at 1 (emphasis added) (available at https://efsec.wa.gov/sites/default/files/2025-05/20150818_EnforcementGuidelines.pdf).

added). Except in very limited circumstances (such as SEPA threshold determinations), the EFSEC staff and Director are not approval authorities or decision makers. Rather, the staff play an advisory role in the Council's decision-making process. The Proposed Policy would fundamentally change that arrangement by making the Director the sole decision-maker for most of EFSEC's decisions.

The Proposed Policy does much more than articulate an advisory approach or practice. It effectively amends the Council's Rules by transferring to the Director the Council's decision-making authority for numerous types of plans and applications, and by exempting these plans and applications and the agency's review thereof from any and all public participation. The Proposed Policy conflicts with WAC 463-68-050 and 463-10-010(6), and is thus effectively "the amendment or repeal of a prior rule," which is, itself, deemed to be a "rule." RCW 34.05.010(16).

The Proposed Policy is a rule, and it therefore cannot be adopted without going through agency rulemaking pursuant to the required rulemaking procedures of the Washington Administrative Procedures Act, including providing the public with statutorily prescribed notice and comment rights and opportunities. *See* RCW 34.05.310–.395. "These procedures allow members of the public to meaningfully participate in the development of agency policies that affect them." *Nw. Pulp & Paper Ass'n v. Dep't of Ecology*, 200 Wn.2d 666, 672, 520 P.3d 985 (2022). EFSEC has not followed these required procedures here. Unless and until EFSEC does so, it cannot adopt the Proposed Policy.

Even if the Proposed Policy did qualify as a policy statement rather than a rule, it should still be enacted via rule, per the guidance of the Washington Legislature. Unbeknownst to Friends until last month, the Council in 2016 enacted a policy similar to the Proposed Policy. EFSEC now proposes to expand and modify that 2016 policy and retain all of this as a mere "policy," rather than incorporate any part of the policy into the Council's Rules. Yet the Legislature has specified that "[t]o better inform and involve the public, an agency is encouraged to convert long-standing interpretive and policy statements into rules." RCW 34.05.230(1).

The public is entitled to rely on the Council's Rules to specify whom at EFSEC has decision-making authority over which types of matters and what the applicable review and decision-making procedures are, without needing to be aware of obscure policy statements for such important matters. Adoption of the Proposed Policy as a "policy statement" rather than as a Council Rule would not only be unlawful, it is also an imprudent and disfavored way to conduct agency review proceedings.

Thus, if the Council wishes to formally delegate any of its decision-making and approval powers and authorities to the Director, and assuming for the sake of argument that the Council has statutory authority to do so (which Friends disputes, as discussed below), the Council must pursue such significant revisions of its procedures as rules rather than as policy statements (and as stated above, EFSEC must sufficiently inform the public, which means doing much more than emailing notice of a two-business-day period to review and submit comments). The Council should not adopt the Proposed Policy without first undergoing rulemaking.

3. The Proposed Policy would violate applicable law as well as stakeholders' due process rights by unlawfully transferring the Council's exclusive decision-making authority over numerous project plans and applications to the Director, and by exempting these plans and applications and the agency's review thereof from any public participation.

The Proposed Policy would transfer and delegate the Council's exclusive decision-making authority over numerous project plans and applications to the Director in violation of applicable law. Furthermore, the Proposed Policy would exempt the Director's review of these plans and applications from any public participation. The Proposed Policy would violate applicable law and stakeholders' due process rights, and therefore cannot be approved by the Council.

In 2016, the Council adopted an original version of the Proposed Policy. But the substance of that 2016 version, as well as the process by which it was adopted, suffered from many of the same defects as the Proposed Policy discussed herein. Moreover, as EFSEC staff seemingly now acknowledge, the alleged statutory authority cited and relied upon in the 2016 version (RCW 80.50.030(2)(b) (2016)) has since been repealed. *See* Laws of 2022, ch. 183, § 3. For these and other reasons, the 2016 version of the Proposed Policy is invalid and has no force and effect.

The EFSEC staff now propose to delete the Policy's reliance on RCW 80.50.030(2)(b) (2016) and replace it with a citation to RCW 80.50.360. (Proposed Policy at 2.) With this change, the Proposed Policy would cite RCW 80.50.360 generally, which presumably indicates all three of its subsections. It is perhaps telling that the Proposed Policy does not cite or quote specific language or even subsections in RCW 80.50.030, because there is no language therein that would authorize the type of delegation contemplated here.

The first subsection of RCW 80.50.360 involves the Chair of the Council and specifies that the Chair "shall execute all official documents, contracts, and other materials on behalf of the [C]ouncil." RCW 80.50.360(1). This statutory subsection does not authorize the delegation of any functions of the Council to the EFSEC Director or staff. Thus, it cannot be relied upon here as authority.

The second subsection contains three concepts articulated in two sentences. RCW 80.50.360(2). First, it specifies that "[t]he chair of the [C]ouncil shall appoint a [D]irector to oversee the operations of the [C]ouncil." *Id.* This language authorizes the Director to implement the "operations" of the Council, which is very different from statutory language that would authorize a transfer or delegation of the Council's decision-making authority to the Director. The latter type of language does not appear in RCW 80.50.360(2), nor anywhere else in the Energy Facility Site Locations Act ("EFSLA").

Similarly, RCW 80.50.360(2) also specifies that the Director is authorized "to . . . carry out the duties of this chapter *as delegated by the Chair*" (emphasis added). Under this language, only the powers that are vested in the Chair may be delegated to the Director. And since the Council's decision-making authority over energy projects lies with the full Council (not with the

Chair), the Chair does not have such authority and may not delegate it to the Director. Rather, RCW 80.50.360(2) authorizes the Director, when delegated by the Chair, to perform certain functions that lie with the Chair, such as providing required notifications of applications for certification, initiating tribal consultation regarding such applications, and authorizing financial expenditures. *See, e.g.*, RCW 80.50.060(6), (8), 80.50.390.

The second sentence of RCW 80.50.360(2) specifies that "[t]he [C]hair of the [C]ouncil may delegate to the director its status as appointing authority for the [C]ouncil." The reference to the Chair's "status as appointing authority" means the Chair's ability to make appointments and other personnel decisions. *See* House Bill Report, ESHB 1332 (2019), available at https://lawfilesext.leg.wa.gov/biennium/2019-20/Htm/Bill%20Reports/House/1332-S.E%20HBR%20APH%2019.htm (referring to the EFSEC Chair's "supervisory and appointing authority over EFSEC staff") (emphasis added).[5] Thus, this statutory language does not authorize the transfer or delegation to the Director of anything other than the employment decisions.

Finally, RCW 80.50.360(3) specifies that "[t]he [D]irector shall employ such administrative and professional personnel as may be necessary to perform the administrative work of the [C]ouncil and implement this chapter. The [D]irector has supervisory authority over all staff of the [C]ouncil. Not more than four employees may be exempt from chapter 41.06 RCW." As with the "appointing authority" language of RCW 80.50.360(2), this statutory language involves employment and personnel matters, and provides no authority to transfer or delegate the Council's decision-making authority to the Director.

Thus, the three subsections of RCW 80.50.360 do not authorize the Council to delegate or transfer to the Director the Council's decision-making (approval and denial) powers for specific energy facilities. Yet, the Proposed Policy purports to rely on RCW 80.50.360 as a whole, including all three of its subsections, as statutory authority supposedly authorizing such delegation. This is an invalid interpretation of the statute, and the net result is that the Proposed Policy provides no valid statutory authority as any basis for the delegations proposed in the Policy.

No language anywhere in EFSLA authorizes broad delegation by the Council of its discretionary decision-making powers and authority to the Director or to EFSEC staff. For such a delegation to be lawful, it would need to have been authorized by the Legislature. *See, e.g.*, *McNiece v. Washington State University*, 73 Wn. App. 801, 802–05, 871 P.2d 649 (1994) (construing RCW 28B.10.528 (1994), which provided that "[t]he governing boards of institutions of higher education shall have power, when exercised by resolution, to *delegate* to the president or his designee, of their respective university or college, *any of the powers and duties vested in or imposed upon* such governing board by law" (emphasis added) to mean that "the Legislature must have contemplated a wide delegation of those powers and duties"). But here, with no such broad delegation authority provided by the Legislature, there can be no such delegation.

[5] *See also McNiece v. Washington State University*, 73 Wn. App. 801, 871 P.2d 649 (1994) (evaluating whether state employee was "laid off by a person with 'appointing authority.'"); *Matson v. City of Tacoma Civil Service Bd.*, 75 Wn. App. 370, 375–77, 880 P.2d 43 (1994) (evaluating whether an "appointing authority" was required to fill unoccupied employee positions and was empowered to cancel personnel requisitions).

The Proposed Policy cites *Jackstadt v. Washington State Patrol*, 96 Wn. App. 501, 512–13, 976 P.2d 190 (1999), for the proposition that "[a]gency heads are presumed to have the authority to delegate decision making to subordinates unless the agency's enabling statute indicates it is forbidden." (Proposed Policy at 2.) But that is not what *Jackstadt* says; by omitting any discussion of the facts and context of *Jackstadt*, the Proposed Policy improperly attempts to transform *Jackstadt* into supposedly establishing broad delegation authority that simply does not appear in that case.

Jackstadt involved the stated "narrow[]" purpose of "allow[ing] for a fair quasi-adjudicative proceeding when an agency head who otherwise would be the reviewing officer is subject to a conflict of interest." 96 Wn. App. at 511. In that case, the chief of the Washington State Patrol, who had previously worked as an attorney representing appellant Jackstadt, recused herself from a subsequent, unrelated disciplinary proceeding involving her former client (Jackstadt) and delegated her decision-making authority to an assistant chief—all to eliminate any potential concerns involving conflicts of interest and appearance of fairness. *Id.* at 503–07. The court held that "*[b]ecause of [the chief's] apparent conflict of interest*," the challenged subdelegation was permissible and was not an abuse of discretion. *Id.* at 511–13 (emphasis added).

Here, there is no alleged conflict of interest and no appearance of fairness concerns. Rather, EFSEC staff are proposing radical, sweeping, forever binding changes to the Council's rules (disguised in the form of a proposed policy statement), all merely in an effort to further the stated goals of "providing certificate holders a more efficient and predictable pre-construction process," "allow[ing] for the . . . efficient and effective review of plans," and "minimiz[ing] added time and administrative burden during the pre-construction phase."[6] (Staff Memo. at 1.) *Jackstadt* simply does not apply here, and that case certainly does not provide the Council with broad power to transfer away their core decision-making decisional authority, merely for the possible prospect of increasing administrative efficiency.[7]

In summary, nothing in EFSLA authorizes the Council to delegate its decision-making powers and authorities to the Director. To the contrary, Council staff, including the Director, may merely "review all information submitted," "*recommend* resolutions to issues in dispute," and "make *recommendations* to the [C]ouncil." RCW 80.50.085 (emphasis added). The Proposed Policy would exceed the Council's statutory authority by unlawfully delegating the Council's decision-making powers and authority to the Director.

[6] Friends disputes whether the Proposed Policy would, in fact, further such goals. For example, it will not at all be "predictable" to allow the EFSEC Director unfettered discretion to decide, completely at her own discretion and with no guidance or parameters for exercising such discretion, which types of plans and applications she should send to the Council for their review and decisions. And it will neither be "efficient" nor "effective" to allow the Director to make numerous decisions under cover of darkness and with no prescribed procedures or timelines, thus resulting in indefinite delays and subjecting the resulting decisions to potential court challenges brought by certificate holders and project opponents alike.

[7] The Proposed Policy also cites a federal case from the 10th Circuit Court of Appeals. (Proposed Policy at 2 (citing *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1190–91 (10th Cir. 2014).) The Proposed Policy fails to explain or establish why federal case law should control this matter.

The Proposed Policy also cites and relies on the definition of "Council" in WAC 463-10-010 (Proposed Policy at 2.) That definition of "Council" is "the . . . [C]ouncil created pursuant to chapter 80.50 RCW and, where appropriate, to [*sic*] the staff of the [C]ouncil." This definition is a far cry from an authorization of the delegation of the Council's decision-making authority to any of the Council staff, including the Director—let alone such an authorization by the Legislature. This rule language simply requires that the Council's Rules should be read, "where appropriate," to refer to the Director or Council staff. For example, because the Director is authorized to process public records requests on behalf of the Council, WAC 463-06-070, references in the Rules to the "[C]ouncil" in the public records context may also, where appropriate, refer to the Director. This definition of "Council" does not, in and of itself, create any general or specific delegations of Council authority to the Director or other staff.

The Proposed Policy would also give the Director unfettered discretion whether to involve the Council in the decision-making process for numerous types of plans and applications. (*See* Proposed Policy at 2–3.) Under the Proposed Policy, if the Director chooses to "forward[]" any plans and applications to the Council in advance, then the Council may decide at that point to exercise its authority to "approv[e]"[8] such plans. (Proposed Policy at 3.) But unless the Director chooses to forward a plan or application to the Council in the first place, the Council would never have the opportunity to exercise such authority: "For plans subject to EFSEC Director approval, *the Director shall consider whether* any individual plan should be forwarded to the Council for review and, at the Council's discretion, Council approval." (Proposed Policy at 2 (emphasis added).) This is the hallmark of an arbitrary and capricious policy, because it leaves completely to the whims of the Director which applications and plans should be forwarded in advance to the Council (prior to a Director decision), with no criteria, guidelines, or parameters for which types of applications and plans should be so forwarded.[9]

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[8] Curiously, there is no reference in the Proposed Policy to the Council *denying* or *rejecting* such plans. Instead, the Proposed Policy refers only to "Council *approval*." (Proposed Policy at 3 (emphasis added).) Similarly, the Proposed Policy repeatedly refers solely to "approval" of various plans by the Director and/or the Council, including within the very title of the Proposed Policy ("Delegating Certain Plan *Approvals* to the EFSEC Director"). (Proposed Policy at 1–4 (emphasis added).) This language is improper because it seemingly presupposes that all agency decisions will be approvals.

[9] Moreover, the new version of the Proposed Policy would give the Director even freer rein to arrogate the Council's decision-making powers as compared to the version released in June 2025, in that the new version would delete proposed language that would have forbidden delegation of the Council's ultimate decision-making authority to the Director for plans that are determined to require an environmental impact statement or mitigation measures pursuant to SEPA and its implementing rules. (*See* Redline Version of Proposed Policy at 3 (proposing to delete the Policy language reading "The Manager will forward to the Council for Council review any plan for which the EFSEC responsible official issues a SEPA Determination of Significance or a Mitigated Determination of Nonsignificance.").) The EFSEC staff attempt to justify the recommended deletion of this language "as irrelevant, because any additional State Environmental Policy Act (SEPA) review is not pertinent to the delegation of authority to the EFSEC Director to approve plans." (Staff Memo. at 2.) Friends disputes this mischaracterization. The environmental impacts of energy facilities (as partially determined pursuant to SEPA) are highly relevant for the question of which matters should be decided by the Council. To that end, the Council should not even consider delegating and transferring away its ultimate decisional authority for plans and similar proposals that trigger environmental impact statements or mitigation measures under SEPA.

The Proposed Policy is also unlawful because it would result in agency actions by the Director, while exempting these agency actions from any public participation procedures, such as notice and comment. Decisions by the Director whether to approve plans and applications would constitute "agency actions" as defined by the Washington Administrative Procedure Act, because they would be "the implementation or enforcement of a statute and the "application of an agency rule or order." RCW 34.05.010(3). Yet, despite purporting to authorize the Director to take agency actions, the Proposed Policy does not require any notice to the public of either the plans and applications themselves or of the Director's decisions approving or rejecting them, nor does it provide any opportunities for interested persons to submit comments to EFSEC in advance of a Director decision. This violates the public's rights to meaningful public participation in agency decision-making as well the due process rights of adjacent landowners and other stakeholders. Simply put, the Proposed Policy would allow the Director to make important decisions under the cover of complete darkness, and the interested public may not even find out about these decisions until long after they are made.

The approaches taken in the Proposed Policy are inconsistent with the Washington Supreme Court's holdings in *Friends of the Columbia Gorge, Inc. v. EFSEC*, 178 Wn. 2d 320, 310 P.3d 780 (2013). In that case, the court stated that any approval of an application for site certification "is the starting point of a longer process and more specific decisions are addressed throughout the process," and also noted EFSEC's "ongoing oversight of the project." 178 Wn. 2d at 336. Given this "longer process" and the required "more specific [subsequent] decisions," the court held that Friends "could not be 'substantially prejudiced' by claimed application shortcomings" in an initial application for site certification. *Id.* (quoting RCW 34.05.570(1)(d)). The court also held that most of the Council's substantive Rules "apply to the [site certification agreement] and the later ongoing operation and construction of the facility" rather than the Council's initial recommendation. *Id.* at 340.

Thus, the Washington Supreme Court held in *Friends v. EFSEC* that many of the Council's substantive rules are "ongoing operation standards" that do not come into play until later, starting with the submission by a site certificate holder of plans and specifications to obtain approval for construction of the facility. *Id.* As a result, it was "not ripe" for Friends to challenge compliance with these standards at the time an application for site certification is approved. *Id.* at 343, 348 & n. 17.

Given this context of the Washington Supreme Court's holding in *Friends v. EFSEC*, adoption of the Proposed Policy would result in the creation of an agency shell game, whereby interested persons would not be allowed to challenge compliance with many of the Council's rules at the time a site certification is granted, and yet, under the Proposed Policy, interested persons would also not be allowed to participate in or influence—or even timely learn about, let alone challenge, subsequent agency decisions applying these same standards. The net result is that the public would be completely shut out of EFSEC's decision making. The Council should not engage in such unlawful shell games by adopting the Proposed Policy.

When review of proposed plans and applications for projects are submitted to the Council for review, the public is guaranteed, at the very least, the opportunity to comment to the Council in advance of agency action. *See* RCW 42.30.240(1). In contrast, the Proposed Policy would

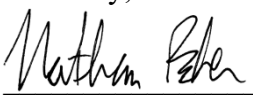
alter that statutorily required practice by delegating the Council's discretionary, decision-making authority to the Director, and thereby insulating the review and decision making for numerous types of plans and applications from *any* public process or public involvement.

Thus, the Proposed Policy would unlawfully delegate the Council's core decision-making authority to the Director and authorize the Director to make important decisions on behalf of the entire agency but without providing any public notice and comment opportunities by interested persons, all in violation of applicable law and stakeholders' due process rights. The Council should reject the Proposed Policy.

4. Conclusion

For the reasons stated above, the Council should reject the Proposed Policy.

Sincerely,



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