

**WASHINGTON STATE
ENERGY FACILITY SITE EVALUATION COUNCIL**

RESOLUTION NO. 357

**HORSE HEAVEN WIND FARM
SITE CERTIFICATION AGREEMENT
IMPLEMENTATION**

**Partly Approving and Partly Denying Proposal to Construct Primary Infrastructure
within Two Miles of Documented Ferruginous Hawk Nests**

I. Nature of Action

This Resolution details the Council's **DATE** decision on Certificate Holder Horse Heaven Wind Farm, LLC's request for approval to site primary project components within two miles of 43 documented ferruginous hawk nest locations, as provided for in the Horse Heaven Wind Farm site certification agreement, Appendix 2, Mitigation Measure Special Status Species (Spec) Ferruginous Hawk (Spec-5).

II. Background

On October 18, 2024, Governor Inslee approved the application of Horse Heaven Wind Farm LLC to construct and operate the Horse Heaven Wind Farm Project (Project) in Benton County and executed the site certification agreement (SCA).

The SCA authorizes the Certificate Holder to site wind turbines, solar arrays, battery energy storage systems, and other infrastructure within areas depicted on maps in the final application. However, the SCA imposes "buffers" that prohibit the Certificate Holder from placing infrastructure in certain of these otherwise authorized areas. For instance, half mile buffers are imposed around nonparticipating residences, quarter mile buffers are imposed around recent wildfire locations, a buffer is imposed on Webber Canyon extending out one-mile from the top of its walls for the protection of traditional cultural places, and 0.6-mile buffers are imposed around any current or previously document ferruginous hawk nest locations distributed near and throughout the project.

In addition, the SCA requires additional buffers extending from 0.6 to two miles radius around the same ferruginous hawk nest locations unless the Certificate Holder, with input from a pre-operational technical advisory group (PTAG), can show the nest locations are unlikely to be viable for the hawks. The Council's

determination of the final boundary within which wind turbines, solar arrays and battery energy storage systems may be placed depends on whether the Certificate Holder can make the requisite showings to avoid any of the conditional 0.6-to-2-mile buffers.

Following the execution of the SCA, the Certificate Holder convened a PTAG, worked with the PTAG to develop parameters and documentation for evaluating the viability of habitat surrounding the nest locations, and has now presented its request for the Council's approval to site primary infrastructure within the 0.6-to-2-mile buffers surrounding 44 of the 45 historically documented ferruginous hawk nests located in or near the Project lease boundary.

This Resolution sets forth the Council's decision approving the Certificate Holder's request as to 39 specific nest locations and denying the request as to four nest locations. The Council declines to decide the Certificate Holder's request as to one of the nests, because no primary infrastructure is currently authorized within its two-mile radius.

III. Procedural Status

The question before the Council is whether to approve the Certificate Holder's request to construct primary infrastructure within 0.6 to two miles of 43 of the 44 documented ferruginous hawk nest sites within the lease boundary.

If the Council approves the Certificate Holder's request as to any of the historical nest locations, the Certificate Holder will need to develop a Project-specific ferruginous hawk mitigation and management plan, in consultation with the PTAG, for approval by the EFSEC Director.

IV. Discussion

A. The Certificate Holder has met the process and documentation requirements for a request to site primary components within two miles of historic nest locations.

This section explains the Council's determination that the Certificate Holder has met the process and documentation requirements for requesting approval to site primary project components within two miles of historic ferruginous hawk nests.

1. The Certificate Holder's Request in the Context of Special Status Species mitigation measure number five (Spec-5)

The SCA's Special Status Species mitigation measure number five (Spec-5) prohibits the siting of turbines, solar arrays and BESSs within one kilometer (0.6 mile) of each location where ferruginous hawks have been reported to have nested at any time over the past several decades since record-keeping began in 1978.¹

Spec-5 also conditionally requires a further buffer out to two miles from these same historic nest locations (that is, between the 0.6 mile mandatory buffer and a further two mile radius from the nest location) *unless* the Certificate Holder can demonstrate that either: (a) the nesting site, meaning the tree or cliff face that the nest was built on, is no longer available or (b) the foraging habitat within the two-mile buffer around that nest is no longer viable to support the species.²

The SCA requires the Certificate Holder to convene a PTAG to review and provide technical input on plans required under the SCA's mitigation measures for wildlife and habitat impacts.³

If the Certificate Holder proposes placing wind turbines, solar arrays or battery energy storage systems (BESS) (collectively "primary components") within a 0.6-2-mile radius of a nest, it must develop certain information in consultation with the PTAG, and the proposal must be reviewed by the PTAG and approved by EFSEC.⁴ The PTAG's role is to provide technical input and advice for Certificate Holder and EFSEC's consideration.⁵

Spec-5 requires EFSEC approval of two different Certificate Holder submittals.

The first submittal is a request to site primary components within two miles of documented nests, based on a determination that at least one of the criteria is met for each nest.

The second submittal, which can be submitted after EFSEC decides the first, is the ferruginous hawk mitigation and management plan that is required if EFSEC determines components may be placed within 0.6 to two miles of a nest. EFSEC's review is to determine whether the plan includes adequate: (a) measures, such as curtailment of turbine operation when a nearby nest is occupied, to reduce the risk of turbine blades striking hawks, (b) plans to create new habitat to offset habitat losses within the two-mile radius, (c) measures for avoiding construction during

¹ SCA, Appendix 2, p. 12.

² *Id.*

³ SCA, Art. IV.G, Appendix 2, pp. 8-9.

⁴ SCA, Appendix 2, pp. 12-13.

⁵ SCA, Art. IV.G.

sensitive times for the hawk, (d) provision for habitat and hawk use monitoring, and (c) plans for restoring habitat at decommissioning.⁶

At this time, the Certificate Holder is only seeking EFSEC's approval as to the first of these two Spec-5 submittals—whether primary infrastructure may be sited within two miles of 43 specified nests.

2. The PTAG process for evaluating the need for 0.6-to-two-mile ferruginous hawk nest buffers

To show that foraging habitat is no longer viable for the species within the two-mile radius, Spec-5 states that the Certificate Holder must develop, in consultation with the PTAG:

1. A set of habitat parameters to document whether habitat in a core range is considered non-viable. The results of habitat surveys and their relation to these habitat parameters shall be reviewed by the PTAG and approved by EFSEC.
2. A description of the current viable nesting habitat, available nesting sites, and a description of documented use of the core habitat by ferruginous hawk available through historic background information or field-based surveys.
3. A description of the type and location of infrastructure proposed within the core habitat.
4. The proximity of infrastructure to any known nest site or suitable foraging habitat.

With the EFSEC Director's approval, the Certificate Holder developed rules of procedure for the PTAG and a list of invitees representing various entities or individuals with pertinent expertise. Consistent with SCA Article IV.G, the PTAG consists of representatives from Washington Department of Fish and Wildlife (WDFW), Washington Department of Natural Resources (DNR), Yakama Nation, Confederated Tribes of the Umatilla Indian Reservation, Benton County, United States Fish and Wildlife Service (USFWS), two independent ecologists, Lower Columbia Basin Audubon Society, a local labor union representative, the Certificate Holder, the consultant for the Certificate Holder, and a participating landowner.⁷

⁶ SCA, Appendix 2, p. 13.

⁷ Horse Heaven Wind Farm Pre-Operational Technical Advisory Group Rules of Procedure, Attachment B, PTAG Participants; PTAG Facilitator Report: Spec-5, Attachment 3, PTAG Member and Alternate Bios.

The PTAG convened ten times between February 28, 2025 and July 25, 2025.⁸ These ten PTAG meetings discussed the availability of historic ferruginous hawk nest locations, assessed the viability of foraging habitat within the range of those nesting sites, and discussed the siting of primary project components within two miles of ferruginous hawk nests under the limitations and requirements of Spec-5.⁹

During this period, these meetings primarily focused on analyzing ferruginous hawk nest and habitat mapping data, developing standardized tools to make determinations on nesting site availability and foraging habitat viability, and developing recommendations on the application of Spec-5 to provide to EFSEC.

The PTAG meetings and discussions resulted in the following documents for the Council's consideration:

- 1) The presentations that were shown at the various PTAG meetings and the minutes of those meetings.
- 2) The Facilitator Report from the independent facilitator who organized the PTAG meetings. This Facilitator provided this report in draft form to the PTAG members for reviews and edits prior to finalization. The Report states that it is intended to provide an objective summary of the deliberations, findings, and recommendations of the PTAG. The Report reflects where the PTAG membership reached a consensus view and where there were differences of opinion among the members. The Report explains the areas of disagreement and references the PTAG meeting minutes (also included in the record) where appropriate so that the Council members could see the discussions verbatim.

All of the members of the PTAG concurred in a recommendation that, consistent with the criteria set forth by the Council in Spec-5, primary infrastructure can be built between 0.6 and two miles of 39 of the 44 historic nest locations that the PTAG evaluated.

A majority of the PTAG members recommended that a 0.6-to-two-mile buffer should be required around one nest that was occupied by a pair of ferruginous hawks and their fledglings this past spring. The certification holder is not requesting approval to site primary components within two miles of that nest.

Several of the PTAG members, notably those from state and federal agencies and Yakama Nation, also recommended against allowing primary infrastructure within

⁸ Horse Heaven PTAG Meeting Minutes, PTAG 2025 Meeting dates: Feb. 28; March 13 & 21; April 4 & 18; May 2, 16, 23 & 30; July 25.

⁹ *Id.*

the 0.6-to-two-miles surrounding the remaining four nests, which are located near the nest that was occupied this past spring. The Certificate Holder nonetheless requests approval to site primary infrastructure within two miles of these nest locations.

As a threshold matter, we are satisfied that the Certificate Holder's coordination with the PTAG met the four process documentation requirements described above.

The PTAG Facilitator Report¹⁰ describes how the Certificate Holder developed, in cooperation with the PTAG, "a set of habitat parameters to document whether habitat in a core range is considered non-viable":

In order to systematically assess each nest in a similar fashion, the PTAG used the Nest Assessment Sheet shown in Table 2. The considerations included in the sheet were not meant to be definitive or disqualifying in terms of the availability of a nest site or viability of habitat in a core area, but rather an intent to evaluate each nest in a similar fashion, asking the same questions, and examining consistent data. . . . There is not one sheet for each nest. Some nests are so close in proximity that the outcomes of the assessment are the same. In those instances, multiple nests may have been included on one Nest Assessment Sheet. The PTAG did consider whether ferruginous hawks are likely to use the nest locations in the future, based on changes in land use or proximity to human settlement and activity in the core area, since the last time the nest was documented as active. Table 2 shows the Nest Site Assessment Sheet and several of the considerations were aimed at documenting these factors.

...

The Certificate Holder provided the first draft of the Nest Assessment Sheet to the PTAG, in the form of a flow chart. The PTAG tested the flow chart using actual ferruginous hawk nests and offered recommendations for how to modify it. Ultimately it was determined that a Nest Assessment Sheet would work better than a flow chart and "considerations" were more appropriate than "criteria" when determining what the PTAG would recommend regarding primary Project infrastructure around each nest. Once the PTAG agreed on the Nest Assessment considerations, four meetings were spent reviewing

¹⁰ Pp. 6-7 and 9.

the draft assessment sheets for each nest, reviewing on-screen air photos, habitat data, land uses, and past nesting activity to inform whether the PTAG felt that placing new Project-related primary infrastructure between 0.6 – 2.0 miles of a nest would further reduce the likelihood that it would be used by ferruginous hawks in the future.

We find that the “considerations” listed on the Nest Assessment Sheets¹¹ present an adequate set of habitat “parameters” (in the sense of “a set of physical properties whose values determine the characteristics or behavior of something”¹²) for evaluating whether habitat in the core ranges surrounding each nest is considered non-viable.

We also are convinced that information developed by the Certificate Holder and the PTAG members to complete the Nest Assessment Sheets resulted in a sufficiently robust “description of the current viable nesting habitat, available nesting sites, and a description of documented use of the core habitat by ferruginous hawk available through historic background information or field-based surveys.” As summarized in the PTAG Facilitator Report.¹³

The Nest Assessment Worksheets, Section 4.3 of this report, includes a summary of the vegetation types and land uses within the 2.0-mile core area for each nest or group of nests. Due to the size of the core areas and the locations of the nest sites, large portions of the core areas are located outside of the Project Boundary and beyond the Certificate Holder’s site control, so no additional field surveys were conducted during the PTAG nest assessment process. The PTAG conducted an in-person site visit to the Project area including many of the areas surrounding the nests. In addition, the PTAG examined air photos, in Google Earth, including historical air photos going back to 1996, to assess changes in land use that could influence habitat viability or habitat quality over time. The PTAG membership includes local tribes, local area residents and agency staff who were also able to share current information about land use and development changes. This information was summarized in the Nest Assessment Sheet for each nest or group of nests. The nest assessments also focused on specific or discrete land uses or activities that could influence the likelihood of

¹¹ The recommendations that resulted from those discussions are summarized in Facilitator Report Section 6.0; the Assessment Sheets are Attachment 2 to the Facilitator Report.

¹² Merriam-Webster.com “parameter” definition 2.

¹³ P. 6.

ferruginous hawks nesting in the same locations again. This included things such as 1) residential development, 2) informal ATV and other public use or access to trails or property for recreation or dumping, 3) formal and informal shooting ranges, or 4) changes in habitat quality due to past wildfire activity.

Finally, we are also satisfied that the Certificate Holder's request meets the requirement of providing a description of the type and location of infrastructure proposed within the core habitat, and of the proximity of infrastructure to any known nest site or suitable foraging habitat. Confidential Figure 1 of the PTAG Facilitator Report depicts where turbines (depicted as black dots along blue microsites corridors) are proposed in relation to the two-mile radiuses surrounding historical nest locations. The same is true for the locations of solar arrays, depicted as orange fields within crosshatched solar siting areas. Battery storage areas are depicted as well. This information was available to the PTAG in developing its recommendations, and in some instances, played a role in their recommendations.¹⁴

3. The PTAG's interpretation of habitat viability for ferruginous hawks

The PTAG determined that all but one of the 44 nest sites were still "available," meaning the supporting nest structure, whether hillside, rock outcrop, cliff, or tree was still available, even if the previously documented nest is no longer present or in poor condition. Consequently, the availability of nest sites did not figure into the recommendations developed by PTAG members, and instead the continued viability of foraging habitat within the core two-mile radiuses was the focus of the analysis.¹⁵

Spec-5 clarifies that

Habitat considered no longer available for ferruginous hawk would include habitat that has been altered by landscape-scale development (conversion to cropland, residential development, industrial development) rendering the territory non-viable. This could include habitats that have been altered such that insufficient native or foraging habitat remains.

The PTAG Facilitator Report states that "the PTAG relied on published literature and WDFW guidance documents to elevate cropland foraging viability, rather than the language of Spec-5 regarding croplands."¹⁶ As further detailed in the Facilitator

¹⁴E.g., PTAG Meeting Minutes, Meeting 6, pp. 4, 7; Ferruginous Hawk Nest Assessment Sheets include the consideration "Are there other setback requirements in the SCA that adequately protect the nest location?"

¹⁵ Facilitator Report, p. 4.

¹⁶ P. 6.

Report, the referenced literature and guidance acknowledges that in Washington, ferruginous hawk tend to use a mosaic of habitat, consisting of native types (shrubsteppe and grassland), croplands, including both irrigated crops and dryland agriculture, as well as grazing lands. The management recommendations also note that ferruginous hawks use pasturelands and the margins and edges of croplands.¹⁷ The Council does not find this fact to be inconsistent with the above quoted language of Spec-5, which was merely intended to be suggestive of landscape changes that *could* have a degrading effect on foraging habitat value. In any case, the Council appreciates that the PTAG was guided by the scientific literature in developing its recommendations, rather than by a potentially less protective interpretation of the Spec-5 language.

The PTAG's formulation of the test for foraging habitat viability was whether "placing new Project-related primary infrastructure between 0.6 – 2.0 miles of a nest would further reduce the likelihood that it would be used by ferruginous hawks in the future."¹⁸ In some instances PTAG members also considered the extent to which the nest location already benefited from protections afforded by other buffers imposed in the SCA for non-participating residences, historical fires, and traditional cultural places and they used this consideration as a sort of tie-breaker in favor of recommending a finding that the habitat is no longer viable (since the risk of getting the determination wrong would be less consequential). The Council finds this approach to be consistent with the intent of Spec-5, considering that no ferruginous hawk nest reviewed had, until this year, been active for over five years, and only three have been active in the last 12 years. The SCA mandates 0.6 mile setbacks from each of these historic nest locations as a measure that will provide protection if, despite predictions to the contrary, hawks should return to these places.

The Council had initially recommended for the Governor's approval mandatory two-mile setbacks from all previously documented nests.¹⁹ But in response to the Governor's request to more narrowly tailor the SCA's mitigation to allow a fuller buildout of the Project, the Council developed the current version of Spec-5. Like the earlier version, it is meant to mitigate the risk of deterring hawks from someday returning to regular use of nests in and near the Project site and the risk of turbine blade strikes should any do so. But the measure is also written to allow fuller buildout of the Project near nest sites where the evidence suggests hawks are less likely to return as result of adverse habitat changes since the nests were last active.

¹⁷ P. 4.

¹⁸ Facilitator Report, p. 9.

¹⁹ Report to the Governor on Application Docket No. EF-220011, April 29, 2024, Page 13.

Thus, consistent with the PTAG's analysis, the question before the Council is whether – considering when the nest was last active, surrounding habitat quality, changes in habitat quality and human activity since the nest was occupied – there is a low likelihood that ferruginous hawks will return to a nest, and therefore the additional 0.6-to-two-mile buffer may be removed.

B. The Certificate Holder has made the showing required by Spec-5 for approval to site primary components within two miles of nests A-B, but has failed to do so for nests X-Y.

In this section, we explain our decision that the Certificate Holder's request should be approved for certain nest locations but denied for others. Our decision is based on the habitat survey parameters developed by the Certificate Holder in consultation with the PTAG, the ferruginous hawk historic use data, and in some cases, the proximity of proposed infrastructure to known nest sites and foraging habitat.

With the assistance of EFSEC staff we have reviewed the foundation for the request as it pertains to each of the nest sites in question.

The Council declines to make a decision on the nest designated [REDACTED] in the Priority Species Habitat (PSH) database. Although the two-mile radius surrounding this nest extends into the project's leased boundary, the SCA did not authorize the placement of any primary components within this area.

Turning next to the 38 nests designated as [REDACTED] in the PHS database, we are persuaded, along with all of the members of the PTAG, that primary infrastructure can be built between 0.6 and two miles of these nests consistent with the considerations under Spec-5. We agree with the unanimous opinion of the PTAG members that the lack of documented ferruginous hawk activity, combined with land use changes over time, human disturbance and changes in habitat quality and availability (and in some cases the added assurance already provided by setbacks from historical fires, non-participating residences, and Webber Canyon) are compelling considerations to allow primary infrastructure within 0.6 - 2.0 miles of these nests.

We also are persuaded by the consensus conclusion of the PTAG members that foraging habitat is viable surrounding the nest in which a pair of ferruginous hawks fledged young in the spring of 2025. But because the Certificate Holder did not

request the Council's approval to place primary infrastructure within two miles of this nest, there is no decision before the Council with regard to this nest site.

For the four remaining documented nest locations that are clustered near the recently occupied nest (designated [REDACTED], in the PHS database), we are persuaded by the opinions of those PTAG members (including the independent ecologist, the USFWS representative, the WDFW representatives, and the Yakama Nation representative) who recommended against a determination that the habitat surrounding this cluster of nests is no longer viable.²⁰ The documentation shows the nest sites are all very similar in terms of geographic context and surrounding habitat viability to the nearby nest at which a pair of ferruginous hawks successfully fledged chicks this spring, providing compelling evidence of continued habitat viability. The Certificate Holder has not supplied any evidence for us to draw a different conclusion about the viability of the foraging habitat surrounding these former nest locations from that of the nest that was most recently active. The area around the five nests has the least habitat change and the most recent use by ferruginous hawks of the 44 nests considered.²¹

In its request, the Certificate Holder asks EFSEC to reach a different conclusion, citing “the substantial economic and practical challenges posed” by full two-mile buffers at these previously documented nest locations. The Certificate Holder’s request explains that its compliance with the 0.6-to-two-mile buffers around this cluster of five nests would result in the loss of 39 wind turbines (approximately 118 megawatt), the removal of 100 megawatt Alternating current of solar planned for this area, and the need to reroute electrical infrastructure through the affected area.²²

To reach the conclusion urged by the Certificate Holder we would need to be presented with a request to amend Spec-5 to allow for more nuanced buffers than the two-mile radius that the measure currently provides for. The Certificate Holder has elected not to submit such a request at this time. The question before us now is limited to the terms of Spec-5 as currently written: whether the nesting sites are still available and the foraging habitat is still viable. Unless the Certificate Holder can show that the answer to one of these is no, then a 0.6-to-two-mile buffer is required. We decline the Certificate Holder’s request to reach the opposite conclusion based on consideration of the impact that imposing the buffer would have on the Project’s

²⁰ Horse Heaven PTAG Meeting 7 Minutes, pp. 12-15.

²¹ *Id.* at 10; Facilitator Report Attachment 1.

²² Scout Clean Energy letter to Sonia Bumpus of June 17, 2025, p. 11.

output and its offers of voluntary buffers in areas outside the currently authorized Project site.

In reaching the foregoing conclusions, we emphasize that although we highly value the expert input of the members of the PTAG, and in this case agreed with the advice of some PTAG members, the ultimate decision on matters on which the SCA requires PTAG input resides with EFSEC.²³

C. Tri-Cities C.A.R.E.S. and Benton County's objections to the requirement for the Certificate Holder to obtain technical advice on mitigation plans from a PTAG, and to the manner in which this PTAG was constituted, are without merit.

While the Certificate Holder and EFSEC staff were coming to agreement on the PTAG rules of procedure and on the group's membership, Tri-Cities C.A.R.E.S. (TCC) submitted written objections to PTAG.²⁴ Benton County followed with its own objections and Tri-Cities C.A.R.E.S. supplemented its original objection with concerns about the manner of the PTAG's formation around the time of the first meeting of the PTAG.²⁵ We address in this section why TCC and Benton County's objections are not well-founded and why the Council concludes the process for receiving advice from the PTAG members was lawful.

1. The Certificate Holder's meetings with the PTAG were not adjudicative hearings, and the appearance of fairness doctrine is inapplicable to an advisory group like the PTAG.

TCC argues that the PTAG was constituted in violation of various legal requirements that pertain to adjudicative hearings, including the appearance of fairness doctrine.

TCC's arguments are misplaced. The Council is only required to hold an adjudicative hearing under the Administrative Procedure Act, Revised Code of Washington (RCW) 34.50, in one instance – prior to making a recommendation the governor on an application for site certification. RCW 80.50.090(4).²⁶

²³ SCA Art. IV.G.

²⁴ "Objection of Intervenor Tri-Cities C.A.R.E.S. to PTAG Establishment, Operations, Membership and Meetings," March 28, 2025; "Benton County's Joinder in Objection By Tri-Cities C.A.R.E.S. to PTAG Establishment, Operations, Membership and Meetings." Although captioned as pleadings in the adjudicative hearing, that hearing process concluded with the Council's Adjudicative Order Resolving Contested Issues, entered April 17, 2024.

²⁵ "First Addendum to Objection By Intervenor Tri-Cities C.A.R.E.S. to PTAG Establishment, Operations, Membership and Meetings," April 18, 2025.

²⁶ At that hearing, "any person shall be entitled to be heard in support of or in opposition to the application for certification by raising one or more specific issues, provided that the person has raised the issue or issues in writing with specificity during the application review process." *Id.*

The SCA's requirement for the Certificate Holder to assemble a PTAG to provide technical input on its plans to implement required habitat mitigation measures does not trigger the need for another adjudicative hearing.

The Administrative Procedure Act (APA) requires an agency to conduct adjudicative hearings only when required by law or constitutional right. RCW 34.05.413(2). There is nothing in law²⁷ to require, nor any practical reason to hold an adjudicative hearing on the details of a Certificate Holder's plans for implementing an approved site certification agreement.

The PTAG process is designed to be collaborative rather than adversarial. The PTAG members are expected to bring their own knowledge, expertise, and perspectives to bear in the advice they provide. Neither the APA's provisions for adjudicative hearings nor the appearance of fairness doctrine applies to this technical advisory process.

2. Because the PTAG member's role is merely advisory and not that of the governing body of an agency or subagency, and it does not receive public comment on behalf of the Council, the Open Public Meetings Act does not apply to its discussions.

TCC and Benton County argue, incorrectly, that the PTAG's meetings are in violation of the Open Public Meetings Act (OPMA), RCW 42.30.

The PTAG is not subject to the requirements of the OPMA (such as publication of notice or meetings, opportunity for public attendance at a physical location, and in some instances an opportunity for public comment). Moreover, because its discussions are concerned with sensitive wildlife information protected from public disclosure under RCW 42.56.430(2), opening the PTAG's sessions to the public would severely hinder free discussion and exchange of opinions and information.

The OPMA applies to "governing bodies" and to any "committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment." RCW 42.30.020(2). In 2015, the State Supreme Court concluded that a committee "acts on behalf of the governing body" only "when it exercises actual or de facto decision-making authority for the governing body." *Citizens Alliance for Prop. Rights Legal Fund v. San Juan County*, 184 Wn.2d 428, (2015). A committee is not exercising such authority when it is simply conducting

²⁷ EFSEC's decisions on a Certificate Holders' plans for implementing SCA mandated habitat and wildlife mitigation measures do not deprive anyone of a recognized property interest so as to trigger constitutional due process and the need for an adjudicative hearing.

internal discussions or providing advice or information to the governing body, as is the role of the PTAG set forth in Article IV.G of the site certification agreement.²⁸

3. The PTAG rules of procedure ensured that each PTAG member's expert advice was communicated, without undue influence or screening by the Certificate Holder.

In its April 2025 objection, TCC argued that the PTAG would be biased in favor of the Certificate Holder, that the recommendations of its members would be subject to the Certificate Holder's control, and that EFSEC would merely rubber stamp its thus flawed recommendations.

The record before us demonstrates that TCC's concerns were misplaced. The PTAG's rules of procedure and the membership of the PTAG helped ensure that the process was rigorous and reflective of the independence and professional integrity of its technically qualified members. The Facilitator's Report and the Minutes of the PTAG Meetings (both of which were reviewed by PTAG members before being provided to EFSEC) transparently reflect the nuanced and at-times-differing views of the PTAG members on the issues before them.

4. The PTAG's rules of procedure are not "generally applicable" rules and EFSEC was not required to adopt them through notice and comment rulemaking under the Administrative Procedure Act.

TCC incorrectly argues that EFSEC was required to follow the Administrative Procedure Act's formal rulemaking procedures to approve the Horse Heaven Wind Farm PTAG rule of procedure.

The APA defines a "rule" to which the Act's rulemaking procedures apply as "any agency order, directive, or regulation of *general applicability*." RCW 34.05.010(16). An action is of general applicability if it applies uniformly to all members of a class. The application of policy to a single contract or assessment of individual benefits is not a rule. *Northwest Pulp & Paper Ass'n v. Dept. of Ecology*, 200 Wash.2d 666, 673 (2022). The Horse Heaven Wind Farm PTAG's rules of procedure are not "generally applicable." They apply only to Horse Heaven Wind Farm LLC's implementation of

²⁸ See 1986 Op. Att'y Gen. No. 16 (Dec. 31, 1986) citing the analysis of the court in *Sanders v. Benton*, 579 P.2d 815 (Okla. 1978) as illustrative of "the line between exercising actual or de facto decisionmaking powers and simply giving advice." That court ruled that a citizens advisory committee impaneled by the state Board of Corrections to provide information to assist in determining the site for a community treatment center for the housing of certain classes of criminal offenders was not subject to the open meeting law. That committee's advisory role, and its lack of actual or de facto decisionmaking authority, is analogous to that of the PTAG.

the Horse Heaven Wind Farm SCA. EFSEC was not required to adopt them through formal notice and comment rulemaking under the APA.

5. The EFSEC Director's approval of the PTAG Rules of Procedure was consistent with EFSEC's lawful delegation policy.

TCC incorrectly argues that the EFSEC Director acted without legal authority to approve the PTAG rules of procedure.²⁹

EFSEC's longstanding Policy #16-01, *Delegating Certain Plan Approvals to the EFSEC Manager* authorized the EFSEC Manager (now Director) to approve "technical advisory committee rules of procedure." Director Bumpus approved the Horse Heaven Wind Farm's PTAG rules of procedure under that lawful delegation of authority.

Courts have consistently upheld the transfer of authority from the heads of agencies to subordinates to free agency heads to concentrate their attention on the larger and more important questions. This practice is referred to as "subdelegation." At the federal level "[t]he courts permit subdelegation when Congress has authorized subdelegation *or when the statute is silent on the matter.*" In *Jackstadt v. Wash. State Patrol*, 96 Wash.App. 501, 512-13 (1999), the Washington court of appeals favorably cited this federal case law in upholding delegation of a decision by the Chief of the Washington State Patrol to a subordinate.

Because RCW 80.50 does not expressly assign approval of the plans Certificate Holders must submit under certification agreements to the Council itself, the Council may lawfully delegate review and approval of these plans to the Director.

Moreover, having now reviewed the terms of the PTAG's rules of procedure, the Council finds them reasonable and acceptable for the PTAG's advisory purposes under the SCA.

6. The site certification agreement's requirement for the Certificate Holder to develop detailed mitigation plans with advice from the PTAG does not mean EFSEC's environmental impact statement was incomplete or legally inadequate.

²⁹ The SCA, at Art. IV.G, states that: "The Certificate Holder shall submit to EFSEC for approval proposed Rules of Procedure describing how the PTAG shall operate, including but not limited to a schedule for meetings, a meeting procedure, a process for recording meeting discussions, a process for making and presenting timely PTAG recommendations to the Council, and other procedures that will assist the PTAG to function properly and efficiently."

In its objection, Benton County argued that the requirement for the Certificate Holder to receive technical input from the PTAG on its implementation of mitigation measures required under the SCA violates the State Environmental Policy Act (SEPA), RCW 43.21C. Benton County's objections misunderstand the purpose of the PTAG in implementing the SCA's wildlife and habitat mitigation measures.

The general concept of the Spec-5 mitigation measure was developed in EFSEC's environmental impact statement prepared to inform the Council's recommendation to the Governor on the application for site certification.

The measure was designed to mitigate significant adverse impacts of the Proposal to ferruginous hawks as a result of placing primary infrastructure near the birds' historic nest locations to which they might one day return. The adverse effects sought to be mitigated were 1) discouraging the hawks from returning to their historic nesting sites as a result of placing primary components within the two-mile core habitats surrounding the locations, and 2) turbine strikes, should the birds return to use those nest locations following construction. The Final Environmental Impact Statement (FEIS) recommended a presumptive two-mile buffer from documented nest sites, with allowance for the buffer to be removed if further analysis showed the nest structure or surrounding foraging habitat was actually no longer viable.

The Council added more protectiveness to the mitigation measure as presented in the FEIS by requiring a 0.6 mile buffer around all documented ferruginous hawk nests regardless of any subsequent recommendation about whether the nest still exists or the surrounding foraging habitat is still viable. But between 0.6 and two miles, the version of Spec-5 adopted in the SCA mirrors the FEIS recommendation by imposing a buffer for primary infrastructure *unless* the Certificate Holder can show that the nest structure is no longer present or the surrounding habitat is no longer viable.

The SEPA rules do not require that all the details of the mitigation required for a proposal be fixed at the first decision point for that proposal. The rules state that "the lead agency shall prepare its threshold determination and environmental impact statement (EIS), if required, at the earliest possible point in the planning and decision-making process, *when the principal features of a proposal and its environmental impacts can be reasonably identified.*" (Emphasis added.)³⁰ "The fact that proposals may require future agency approvals or environmental review shall

³⁰ WAC 197-11-055(2).

not preclude current consideration, as long as proposed future activities are specific enough to allow some evaluation of their probable environmental impacts.”³¹

Spec-5’s allowance for the Certificate Holder to obtain relief from the presumptive 0.6-to-two-mile buffers represents a cautious and protective, yet flexible approach, and was recommended in the FEIS when the principal features of the proposal and its environmental impacts could be reasonably identified.

RESOLUTION

The Council hereby:

Declines to decide the Certificate Holder’s request to site turbines, solar arrays and BESS (primary components) within 0.6 to two miles of the nest location designated as [REDACTED] in the Washington Department of Fish and Wildlife’s Priority Species and Habitat (PHS) database.

Approves the Certificate Holder’s request to site primary components within 0.6 to two miles of the nest locations designated as [REDACTED]

[REDACTED]
[REDACTED] in the PHS database.

Denies the Certificate Holder’s request to site turbines within 0.6 to two miles of the nests designated as [REDACTED] in the PHS database.

For the nest locations where the Council has approved the siting of primary infrastructure within 0.6 to two miles of designated nests, the Certificate Holder must obtain the EFSEC Director’s approval of a Project-specific ferruginous hawk mitigation and management plan conforming with SCA’s Special Status Species mitigation measure number five (Spec-5).

DATED at Lacey, Washington and effective on DATE

WASHINGTON ENERGY FACILITY SITE EVALUATION COUNCIL

Stacey Brewster, EFSEC Acting Chair

Sonia E. Bumpus, EFSEC Director

³¹ *Id.*