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October 13, 2025

Energy Facility Site Evaluation Council
621 Woodland Square Loop SE
P.O. Box 43175
Olympia, WA 98504-3172

RE: *Horse Heaven Draft Resolution 357 on Implementation
of the Spec-5 Mitigation Measure*

Dear EFSEC Councilmembers:

This office represents Benton County (the “County”) in regards to the Horse Heaven Wind Farm Project (the “HHWF”). The County was an active participant during the adjudicative process for the HHWF and is currently a petitioner challenging EFSEC’s approval of the HHWF in Thurston County Superior Court. The County requested that this office comment on Draft Resolution 357 (“Resolution 357”) for the HHWF.

A. The actions of the PTAG underlying Resolution 357 were taken in violation of the OPMA.

As a threshold matter, Resolution 357 is improper because the PTAG is operating in violation of the Open Public Meetings Act (“OPMA”), Ch. 42.30 RCW. Any action taken in violation of the OPMA is void. RCW 42.30.060(1). The County objects to staff’s conclusion in the resolution that the “PTAG is not subject to the requirements of the OPMA” because the PTAG “is simply conducting internal discussions or providing advice or information to the governing body[.]” Resolution 357, p. 13-14. The actual records of the PTAG confirm that staff’s assertion is untrue and the PTAG is exercising de facto decision-making power on behalf of EFSEC.

EFSEC has seemingly concluded that the PTAG is not subject to the OPMA because EFSEC has deemed the PTAG to be a strictly advisory body. Whether or not the OPMA applies is not based on how EFSEC classifies the PTAG. Rather, the PTAG is subject to the OPMA if it is a committee of EFSEC and acts on EFSEC’s behalf. *Citizens Alliance for Prop. Rights Legal Fund v. San Juan Cnty.*, 184 Wn.2d 428, 448 (2015).

Staff’s citation to *Citizens Alliance* for the proposition that the PTAG is not subject to the OPMA is in error. *Citizens Alliance* dealt with an “informal group that met occasionally” and was associated with “the near-complete absence of official documents referencing the team or its

work.” *Citizens Alliance*, 184 Wn.2d at 433. The Court found that the OPMA did not apply to the CAO Team meetings, emphasizing that the San Juan County Council did not create the CAO Team and therefore the CAO Team could not have acted on the Council’s behalf. *Id.* at 436.

Here, EFSEC created the PTAG and directly made it responsible for reviewing and resolving deliberations on disputed information regarding the appropriate siting of primary HHWF infrastructure surrounding ferruginous hawk nests. The PTAG held monthly meetings and generated agendas, meeting minutes, and a report with its conclusions to EFSEC. It was the PTAG, not EFSEC, that received testimony and scientific data regarding whether ferruginous hawk nests are still available. And it was PTAG, not EFSEC, that reviewed data and held discussions and deliberations on whether the foraging habitat within the two-mile buffer surrounding available nests is viable to support the ferruginous hawk.

Under the OPMA, the decision-making that must occur in public is not just the final decision that concludes the input of earlier steps. The intermediate steps of siting decisions overseen by the PTAG manifestly narrowed and constrained the basis for review by EFSEC. For OPMA purposes those steps must also be publicly deliberated, because they are “actions.” RCW 42.30.020(3). “Action” under the OPMA is much more expansive than a “final decision.” *Id.* The OPMA could not be clearer on this, because it actually defines “final action” as only one type of “action.” *Id.* The latter term also encompasses “deliberations, discussions, considerations, reviews, [and] evaluations...” *Id.* The PTAG, as a committee of EFSEC, held deliberations, discussions, and reviewed evidence regarding the appropriate siting buffers for primary infrastructure surrounding documented ferruginous hawk nests, which resulted in the facilitator report to EFSEC. Such meetings were subject to the OPMA. *See Clark v. City of Lakewood*, 259 F.3d 996, 1013-14 (9th Cir. 2001).

Confirming that the PTAG was delegated de facto decision-making authority was the discussion, or more accurately lack thereof, by EFSEC when receiving staff’s recommendation regarding Spec-5. After EFSEC staff presented the facilitator report and staff recommendation, EFSEC asked almost no questions regarding the staff recommendation and essentially rubber-stamped staff’s recommendation. Yet the basis for EFSEC’s rubber-stamped decisions were withheld from the public because the PTAG meetings were closed. These were the exact concerns that led the County to filing its objection to the PTAG process—that the PTAG, not EFSEC, will make all relevant substantive decisions regarding the HHWF and EFSEC will do nothing more than approve whatever the PTAG puts in front of it. These concerns will continue to persist after the passage of Resolution 357 as the PTAG process continues as long as EFSEC takes the position that PTAG meetings are not open to the public.

As a public agency itself, fully subject to the OPMA, the County is particularly disappointed to observe another branch of government treat the OPMA dismissively. This project is massive and commits enormous resources to irreversible changes to the Horse Heaven landscape. As the Attorney General’s Office has stated in materials that should be a guide to all public agencies, the “the courts will interpret the OPMA to accomplish the Legislature’s intent.” That intent, expressed at RCW 42.30.010 is that the actions of all “public commissions, boards, councils,

committees, subcommittees...and all other public agencies of this state” “be taken openly and that their deliberations be conducted openly.”

B. The processing and approval of Resolution 357 violates SEPA and the EFSLA.

The County also objects to Resolution 357 as it undermines and contravenes the requirements of the State Environmental Policy Act (“SEPA”), Ch. 43.21C RCW, and the Energy Facility Site Location Act (“EFSLA”), Ch. 80.50 RCW. As a general matter, the County reiterates its objections raised during the adjudicative hearing process that the entire review and approval of the HHWF was improper due to EFSEC conducting the adjudicative hearing on the HHWF without first issuing an FEIS. Continuing to create new mitigation measures outside of the SEPA process and after issuance of the SCA compounds the SEPA errors already committed. This is particularly offensive where the new mitigation appears to be heavily influenced by the business enterprise desires of the applicant, and may in that sense be “mitigation” in name only.

In specific reference to Resolution 357, a final decision on the HHWF has not been reached and, as such, any environmental review or discussion of mitigation measures for the HHWF should be accounted for in a lawful SEPA process. The EFSLA contemplates that after an adjudicative hearing, EFSEC will prepare a draft SCA for the Governor’s review and execution. Traditionally, the Governor’s execution of the SCA constitutes a final decision. Yet, in this case, the nominally final SCA decision is not final at all.

This failure to account for the environmental information associated with the PTAG in a transparent and open manner renders the current process in violation of SEPA in several ways. SEPA prohibits agencies from committing to a particular course of action before the completion of the consideration of environmental information. WAC 197-11-055(2)(c). Here, EFSEC approved the SCA prior to completing the environmental review necessary to appropriately site the HHWF. The PTAG has now provided recommendations to EFSEC regarding necessary buffers, which are acknowledged to impact final layout design and potentially result in expansion of the overall project area. Any decision by EFSEC on Spec-5 will result in new exclusionary zones, which Scout has indicated may result in the submittal of an amended SCA or execution of new lease areas. The environmental impacts from such decisions are unknown because EFSEC failed to conduct the required environmental review at the appropriate time.

In support of its contention that Resolution 357 does not violate SEPA, EFSEC staff states “[t]he 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.” Resolution 357, p. 16. That may be a generally correct proposition, but it actually points to a second separate violation of SEPA. The foregoing statement ignores the fact that the PTAG, and by extension EFSEC, are doing more than fixing minor details of the required mitigation for the HHWF. EFSEC is now establishing new mitigation measures.

Consideration of Spec-5 required the PTAG to undertake environmental review to determine whether there was viable foraging habitat surrounding identified ferruginous hawk nests. This review should have occurred in the FEIS, as that would have allowed the public an opportunity

to comment. Instead, the actual mitigation for impacts to ferruginous hawks was punted to post-decision, closed-door review. For those nests where primary infrastructure is allowed within the 0.6- and two-mile buffers, Scout is required to submit a ferruginous hawk mitigation and management plan. These new, post-decision, studies and mitigation measures violate the required SEPA process because they are not part of any SEPA-recognized environmental document. *See* WAC 197-11-402(8) (FEIS to be prepared concurrently with environmental studies and related surveys); WAC 197-11-660(1)(b) (FEIS to state the mitigation measures that will be implemented as part of decision).

The fact that the PTAG has conducted additional environmental review for the HHWF in relation to the relevant buffers for ferruginous hawks compels, at the least, that EFSEC issue a supplemental environmental impact statement (“SEIS”) under WAC 197-11-620. The environmental review and analysis by the PTAG on whether or not there is viable foraging habitat surrounding the identified ferruginous hawk nests is important new information on the HHWF’s probable significant adverse environmental impacts. This review and analysis has not been previously disclosed in any environmental document. Additionally, the likely changes to the HHWF’s layout as a result of the PTAG’s work has never been previously analyzed, despite the fact that such changes will likely result in significant environmental impacts. In a case such as this, an SEIS is required. WAC 197-11-405(4)(b).

C. EFSEC has improperly excluded Ed Brost from the Council for the HHWF.

Lastly, the County objects to Resolution 357, and any EFSEC action taken thereon, due to EFSEC’s exclusion of Mr. Ed Brost. Pursuant to RCW 80.50.030(4), the composition of EFSEC for a proposed project is to include a designee from the county legislative authority of the county in which an application for a proposed site has been filed. Said designee “shall serve until there has been a final acceptance or rejection of the proposed site.” RCW 80.50.030(4).

Mr. Brost was appointed by the County to serve on EFSEC in relation to the HHWF. Mr. Brost was removed from EFSEC subsequent to the Governor’s approval of the SCA for the project. However, Mr. Brost is entitled to remain on EFSEC as there has not been a final acceptance of a proposed site in this case.

Due to the establishment of the PTAG, there are numerous mitigation measures, including the ultimate project layout and design, that must be considered by the PTAG and ultimately presented to EFSEC. While the SCA has been issued, the HHWF has not yet been sited and approved due to the unprecedented decision-making role given to PTAG. Additionally, given the outcome of EFSEC’s decision on Spec-5, it is likely that there will be significant changes to the project layout from what was approved via the SCA. Or more simply put, until the PTAG process is completed, the layout and siting of the project is unknown. There will be no acceptance or rejection of the proposed site until the final layout and siting of the project is known. Pursuant to RCW 80.50.030(4), Mr. Brost is entitled to retain his full role on EFSEC for consideration of the HHWF.

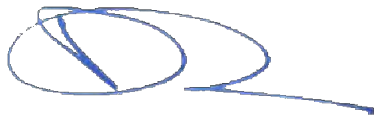
D. Concluding Remarks.

Based on the foregoing, the County requests that EFSEC deny Resolution 357. In denying Resolution 357, the County requests that EFSEC remand consideration of Spec-5 back to the PTAG to hold open and public meetings consistent with the OPMA. This should encompass all of the substantive deliberations, discussions, considerations, reviews, and evaluations that were the subject of the meetings improperly held in violation of the OPMA. EFSEC should also require all future PTAG meetings, including the consideration of non-Spec-5 mitigation measures, to be conducted in accordance with the OPMA.

The County also requests that EFSEC require preparation of an SEIS for the consideration of the environmental impacts associated with Spec-5, including the appropriateness of buffers surrounding identified ferruginous hawk nests.

Lastly, the County requests that EFSEC reestablish Mr. Brost as a fully participating member of the Council when considering the HHWF.

Very truly yours,



Kenneth W. Harper

cc: Client

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