LAW OFFICES OF J. RICHARD ARAMBURU PLLC

705 Second Avenue, Suite 1300
Seattle, WA 98104-1797
Telephone 206.625.9515
Facsimile 206.682.1376

www.aramburulaw.com
www.aramburu-eustis.com

October 13, 2025

Energy Facility Site Evaluation Council
PO Box 43172
Olympia, WA 98503-3172
By Delivery to Email: comments@efsec.wa.gov; efsec@efsec.wa.gov and to Brewster, Stacey (UTC) <stacey.brewster@utc.wa.gov>; Levitt, Eli (ECY) <elev461@ecy.wa.gov>; Blake Nelson Blake.nelson@ecy.wa.gov; Nathan.Pamplin@dfw.wa.gov; Osborne, Elizabeth (COM) <elizabeth.osborne@commerce.wa.gov>; Young, Lenny (DNR) <Leonard.young@dnr.wa.gov>; Ed.Brost (WaTech Guest, for Benton County) <eddyboy4511@gmail.com>

Re: Proposed EFSEC Resolution No. 357 Horse Heaven Project and Renewed Objections to Project Review

Dear Councilmembers:

As you know, this office represents Tri-Cities C.A.R.E.S., (TCC) a local public interest organization concerned with the Horse Heaven project that spans 25 miles along ridgelines of the Horse Heaven Hills. TCC has been an active participant in all levels of review and consideration of this substantial project, including intervention during the adjudication.

TCC also filed its “Objection of Tri-Cities C.A.R.E.S. to PTAG Establishment, Operations, Membership and Meetings” on March 28, 2025 (“TCC Objection”), and filed its “First Addendum to Objection by Intervenor Tri-Cities C.A.R.E.S. to PTAG Establishment, Operations, Membership and Meetings” on April 18, 2025 (“First Addendum;” or together, “Objections”).[1] Those prior objections, dated March 28 and April 18, 2025, are part of the record and are incorporated by reference as is the entirety of evidence presented by TCC during the adjudication. These objections addressed a variety of errors regarding the PTAG, including unlawful delegation of

[1] See https://efsec.wa.gov/sites/default/files/2025-05/TCC%20Public%20Comment.pdf and pages 105-162 of https://efsec.wa.gov/sites/default/files/2025-06/Horse%20Heaven%20general%20comments%201901%20-%201965.pdf.

authority, improper adoption of rules of procedure, secret meetings, no recording of meetings, lack of an unbiased administrative law judge (“ALJ”), lack of a transcript of proceedings, appearance of fairness issues, improper inclusion of economic consideration and the improper conclusion regarding esthetic impacts of the project.

Despite TCC’s objections, the PTAG has conducted numerous meetings, mostly without public notice, in secret and without maintenance of a verbatim record and without compliance with any of the legal issues included in TCC’s Objections. Recently, a “Facilitator’s Report” was prepared by the Applicant’s appointed “Facilitator” and the Applicant has also made certain requests concerning Special Status Species Mitigation Measures Number 5 (“Spec-5"). After discussion at its September 17 meeting, EFSEC staff have prepared Proposed Resolution 357 for consideration and possible adoption at the October 15 EFSEC meeting.[2] Though there are fifteen additional wildlife conditions that require PTAG review, it has only considered and reported on Spec-5. Notice has been given that Proposed Resolution 357 will be reviewed and possibly acted on at EFSEC’s monthly meeting on October 15, 2025. There is no indication when, or if, the remaining PTAG conditions will be reported out.

This correspondence should be considered as a comment on Proposed Resolution 357 and TCC requests it be included in the record and posted to the website. In addition, this letter should be considered an “Objection” as described in RCW 80.50.140(2) concerning continuing “procedural error” by the Council as

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[2] Page 14 of Proposed Resolution 357 attempts to buttress the recommendation by stating: “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**.” (Emphasis added). Indeed the Rules of Procedure provide:

> “PTAG members should limit their input to those topics on which they have relevant expertise or knowledge that qualifies them to provide input.

PTAG ROP at Page 2. At page 3, the Rules state:

> PTAG member input on facts relevant to the matters to be reviewed by the PTAG must meet standards of reliability applicable to agency SEPA analysis (e.g.attribution of photographs, reference to surveys, citation of pertinent records).

Despite the restriction, two PTAG members lack technical background and are members because they were supporters of the Applicant; it cannot be said they were “independent.” The extent to which they influence or will influence PTAG recommendations is not known because the PTAG’s meetings are not open to the public and there are no recordings or transcripts of the meetings.

described herein.[3] Further, this letter includes a request for a conditional recusal of certain EFSEC Councilmembers.

In summary, TCC requests that the Council disapprove the continuing and ongoing violations of EFSEC statutes and regulations, including the Washington Administrative Procedures Act, Chapter 34.05, RCW (the "APA") and remove Section C of Proposed Resolution 357 at pages 12-17. Moreover, the Council should assure such errors are not repeated as review of PTAG and other Article IV conditions continues.

1. PTAG DECISIONS ON SPEC-5 CONTINUE TO VIOLATE LEGAL STANDARDS.

On March 28, 2025, TCC filed its "Objections to PTAG Establishment, Operations, Membership and Meeting." This Objection challenged the delegation of certain substantive decisions vested by statute to EFSEC to the "Pre-Operational Technical Advisory Group" or PTAG. Included was objection to the adoption of "Rules of Procedure" of the PTAG, its membership and meetings; objections to the secrecy of meetings, lack of record keeping and recording (for verbatim records); and request for the appointment of an objective hearing officer. The First Addendum to that Objection was filed on April 18, 2025.

For the most part TCC's objections involved only modest revisions to PTAG procedures and meetings, including, *inter alia,* the installation of the applicant-appointed facilitator, maintenance of a verbatim record of proceedings and adjustment to the PTAG members. However, the Applicant ignored and rejected these reasonable and easily implemented requests. Secret meetings continued, with no verbatim transcripts prepared and with PTAG meetings presided over by the "Facilitator" selected and paid for by the Applicant. Now, the Applicant asks the Council to ignore these legal issues and push ahead with Scout's agenda, not only for Spec-5 issues but other pre-construction conditions as well.

The Applicant asks that the Council dismiss the legal consequences of its actions in the hope that the violations of law will be ignored because the project will achieve a level of completion putting it beyond court rulings. But our Supreme Court has rejected the kind of gamesmanship employed here:

> The developer contends that at time of trial and appeal construction had continued despite the litigation, and the project has thereby achieved a present stage of completion removing it from SEPA. Advancement towards the project's

[3] TCC also incorporates by reference the comment letter of the Yakama Nation dated October 10, 2025 and the Benton County Joinder in TCC's Objections dated April 18, 2025.

> completion done in disregard of litigation-raising issues, such as SEPA, which may be held to be correct, can be of no consequence in the effort to refute the act's applicability. To permit such a contention would invite circumvention of SEPA by those quick to advance their projects to completion.

Eastlake Cmty. Council v. Roanoke Assocs., 82 Wash. 2d 475, 497, 513 P.2d 36, 50 (1973).

The Council should decline to accept the decision-making process employed by PTAG , though the action identified at pages 11-12 of Proposed Resolution 357, as a result of independent Council review, has merit.

2. REVIEW OF THE HORSE HEAVEN PROPOSAL IS NOT FINAL BECAUSE NUMEROUS AND SIGNIFICANT PRE-CONSTRUCTION CONDITIONS HAVE NOT BEEN CONSIDERED AND RESOLVED.

Attachment A to the PTAG Rules of Procedure lists 16 separate “SCA Conditions Requiring PTAG Involvement.” However, Proposed Resolution 357 deals with only a <u>single</u> pre-construction condition, “Spec-5 Ferruginous Hawk.” The Proposed Resolution does not disclose when or if the PTAG will address and report on the remaining 15 conditions, nor what procedures it will follow.

Whatever the outcome of Proposed Resolution 357, it does not result in a final, appealable action because it does not resolve all of the matters that were referred to PTAG by EFSEC in the SCA. This issue is discussed in additional detail in Section 3 of this letter below.

Settled caselaw confirms that only final agency action is subject to judicial review:

> Thus, we hold that <u>only final agency actions are subject to judicial review</u> under RCW 34.05.542(3) and RCW 34.05.570(4).
>
> An agency action is “‘final’” when it “imposes an obligation, denies a right, or fixes a legal relationship <u>as a consummation of the administrative process</u>.” Bock v. State Bd. of Pilotage Comm'rs, 91 Wn.2d 94, 99, 586 P.2d 1173 (1978).

Wells Fargo Bank, NA v. Dep't of Revenue, 166 Wash. App. 342, 356, 271 P.3d 268, 276 (2012)

EFSEC’s own regulations provide:

> **Submittal of plans and specifications prior to start of construction.** At least 90 days prior to start of construction as defined in WAC 463-68-040, a certificate holder shall provide the plans and specifications required by the site certification agreement to the council for approval.

WAC 463-68-050 (emphasis supplied). Indeed, Pre-construction Condition Hab-6 “Project Layout & Design” provides:

> **Hab-6 Project Layout & Design:** The Certificate Holder shall work with EFSEC, with advice from the PTAG, on the development of the final Project layout and design, including the application of Certificate Holder commitments and recommended mitigation measures. These final plans must include compliance with all pre-construction conditions.

(Emphasis supplied). As a part of this review, under RCW 80.50.060(7) the Council is required to work with local governments, here Benton County:

> (7) The council must work with local governments where a project is proposed to be sited in order to provide for meaningful participation and input during siting review and compliance monitoring.

(Emphasis supplied).

The foregoing provisions for final action are included in Article IV.A to the Horse Heaven SCA:

> Unless otherwise noted, all plans and submissions required prior to beginning site construction activities are required to be filed with EFSEC ninety (90) days prior the start of Construction. The Certificate Holder shall not begin Construction activities until all applicable elements of the required pre-construction plans or commitments outlined in this Agreement and the ASC are in place, and Council approval of required plans and authorization to begin construction has been obtained.

(Emphasis supplied). Condition CC to Article IV of SCA provides that:

> The Certificate Holder shall submit to EFSEC those construction plans, specifications, drawings, and design documents that demonstrate the Project design will be in compliance with the conditions of this Agreement.

(Emphasis supplied). Subsection 4 to Condition CC specifies:

4. The plans shall identify any items relevant to the mitigation measures contained in this Agreement, the final EIS, and the ASC.

In summary, RCW chapter 80.50, EFSEC regulations and the specific Horse Heaven SCA define and articulate final action on the Horse Heaven project application. Proposed Resolution 357 deals with only a part of the overall plans and specifications for the project and is nowhere close to final action on the Horse Heaven proposal.

The Council should determine that project review is not final, but ongoing. The final decision of the Council will only be made when the final project layout and plans, showing compliance with all pre-construction conditions, is approved.

3. PTAG'S ISOLATED CONSIDERATION OF SPEC-5 IMPROPERLY PIECEMEALS REVIEW OF SCA CONDITIONS, PREVENTING ANALYSIS OF CUMULATIVE IMPACTS, DELAYING ISSUANCE OF A FINAL AGENCY DECISION.

As described above, there are 16 conditions specified in the SCA for which EFSEC required "PTAG's involvement." In addition, there are 30 "Plans, Approvals and Actions Required Prior to Construction" found in Article IV of the SCA (pages 18-30), some of which involve the PTAG. The EFSEC website shows that none of these Article IV approvals and actions have been issued or decided. Proposed Resolution 357 deals with just one of these conditions.

The separation and segmentation of SCA decision-making found in Proposed Resolution 357 violate the requirement to avoid piecemeal review under environmental regulations, including SEPA. Here Proposed Resolution 357 only deals with a single environmental issue, separation of turbines and other project facilities from ferruginous hawk nests. Though an important issue, it is not the only issue of importance to wildlife and project operations.[4] For example, condition Wild-8 requires a wind turbines buffer zone around all known raptor nests; Spec-4 requires survey of burrowing owls which will be used "to inform the final project layout," as will Ground Squirrel surveys; Article IV conditions include requiring a "plan to continue access to recreational activities in the project area while keeping recreation enthusiasts safe." In addition to the Burrowing Owl, there are several other species, including the Striped Whipsnake, Sagebrush

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[4] In the EFSEC Chair's letter to the Governor on September 17, 2024, she addressed "Visual" impacts at page 3. Though she admits the revised SCA "does not include additional mitigation for visual impacts," she optimistically says: "*the Council has concluded that the exclusion of turbines to mitigate impacts to wildlife, tribal cultural resources and public fire safety will reduce the Project's visual impact on the Tri-Cities Community.*" *Id.* However, nothing in Proposed Resolution 357 addresses the visual impact of Spec-5 setback conditions, nor how future PTAG or EFSEC reviews will mitigate visual impacts. From initial reviews, it appears current conditions have not lessened visual impacts at all.

Lizard, Prairie Falcon, Townsend's Ground Squirrel, and Loggerhead Shrike, as well as multiple other PTAG and Article IV conditions that must be reviewed.

The analysis of these conditions by the Council or the PTAG may create conflicts between compliance with various conditions.[5] For example, placing turbines consistent with Spec-5 ferruginous hawk nest buffers could conflict with protection of recreational interests or Burrowing Owl habitat. The piecemeal consideration could result in conflicts between competing interests, or at a minimum, require removal or relocation of turbines. As a practical matter, the piecemeal consideration of conditions and the resulting requirement for multiple separate reviews stresses EFSEC's resources. Moreover it creates unnecessary time and financial burdens on public agencies and community interests such as TCC.

Our courts have condemned piecemeal review in a similar environmental context:

> But although phased review may be beneficial in some circumstances, FEIS reviewers may not piecemeal the process by limiting review to "current segments of public works projects and postponing environmental review of later segments until construction begins." *Concerned Taxpayers Opposed to Modified Mid-South Sequim Bypass v. Dep't of Transp*., 90 Wn. App. 225, 231 n.2, 951 P.2d 812 (1998). Moreover, phased review of a project is inappropriate where phasing avoids discussion or distorts the impact of a project's cumulative effects. See *Indian Trail Prop. Owner's Ass'n v. City of Spokane*, 76 Wn. App. 430, 443, 886 P.2d 209 (1994).

Reclamation Co. v. Bjornsen, 125 Wash. App. 432, 441, 105 P.3d 94, 99 (2005).

Proposed Resolution 357 would improperly piecemeal the review of the project without consideration of the cumulative impacts of the fifteen other wildlife conditions to be reviewed, as well as Article IV conditions. Consideration of the Spec-5 conditions should be consolidated with review of other wildlife issues when a final set of plans and specifications is available.

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[5] These conditions also do not address impacts and conditions necessary to address operations of Very Large Air Tanker (VLAT) operations during wildfires.

4. IMPROPER EXCLUSION OF BENTON COUNTY REPRESENTATIVE FROM DECISION-MAKING ON RESOLUTION 357 VIOLATES RCW 80.50.030(4).

A central and critical element of statutorily mandated decision-making for EFSEC is the inclusion of a representative from the county in which the proposed project is located pursuant to RCW 80.50.030(4):

> (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.

EFSEC staff contends that there was a "final acceptance" of the Horse Heaven proposal when the SCA was approved, saying, in short, the Council should determine that Mr. Brost is "out of a job." But EFSEC is nowhere close to a final decision on the Horse Heaven proposal as described in Section 2 of this letter above. Even the Applicant in its Motion for Reconsideration of the Council's Revised Recommendation pointed out that, even after the PTAG recommendation:

> EFSEC will then have to consider and approve each nest determination before the applicant can even start developing the final project design. That final design, too, must be reviewed by the PTAG before it goes to EFSEC for approval. Practically speaking, this approach renders the entire revised SCA meaningless because Scout cannot determine where or how much of the Project can be built. Accordingly, Scout cannot secure financing or begin the extensive construction planning processes and procurement necessary to get a project built. If you do not know what you are building, you cannot determine how much it will cost or order the parts.

See Attachment A to TCC Objections dated March 28, 2025, "Applicant Scout Clean Energy's Petition for Reconsideration of the Council's Revised Recommendation to the Governor" at page 14 (links to Objections provided in Footnote 1).

In defiance of the statute and the Supreme Court decision, the Council is asked to refuse to allow the Benton County representative to participate in the October 15 meeting on Proposed Resolution 357 and presumably on upcoming Council decisions on the Horse Heaven project. However, our Supreme Court has held that "EFSEC does not have the authority to determine its own membership." *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wash. 2d 275, 313-15, 197 P.3d 1153, 1172-73 (2008).

TCC understands that Mr. Brost voted against the recommendation of the Council on the Horse Heaven matter, but that is not grounds for excluding him from the continuing integral decisions on the project, including Proposed Resolution 357. The Council should reject the exclusion of the Benton County representative from participation in review and consideration of Proposed Resolution 357 at the Council's October 15 meeting and direct staff to provide the proposed resolution and supporting documentation to Mr. Brost or the designated Benton County representative.

As stated in Section 2 above, upcoming review and consideration of pre-construction conditions involves essential and critical elements of the project, and decision-making on the project is far from complete. The Benton County representative should be included in continuing review on the Horse Heaven project, including whether the Council should delegate decisions to the Executive Director, which action essentially eliminates any voice from Benton County.

The Council should take definite action that welcomes the Benton County representative to participate and to vote on Proposed Resolution 357.

5. OBJECTION TO CONTINUED PTAG DECISION-MAKING UNDER THE CONTROL OF THE APPLICANT.

As identified in TCC's two previous Objections, EFSEC staff has permitted the Applicant to essentially take over the PTAG process.

Among other items, the EFSEC staff has allowed Applicant to set the rules of procedure for the PTAG, appoint PTAG's membership, and even to select its own "facilitator" (replacing the usual ALJ), further permitting meetings to be secret, without even an audio recording so that the public and involved parties may monitor what has occurred during the proceedings.

Any further review and decisions by the PTAG on Spec-5 conditions must open the process to public review, eliminate secrecy and follow traditional administrative processes.

6. CONDITIONAL REQUEST FOR RECUSAL/DISQUALIFICATION OF CERTAIN COUNCIL MEMBERS.

As some Council members will remember, the Horse Heaven application was the subject of an extensive and contested adjudication. During the adjudication, there were multiple witnesses on a variety of important resource and wildlife issues, many of whom were experts in their fields. Council members attended all adjudication sessions. The end result of the adjudication was a recommendation to the Governor.

One of the decisions of the Council was to include conditions on wildlife issues that required separate consideration by a pre-construction technical advisory group henceforth known as the "PTAG" discussed herein. But as identified in TCC's Objection, the organization, rules and membership drastically departed from what was set in the adjudication.

The adjudication was a public process, with opportunity for examination and cross-examination and a full transcript of proceedings. Regrettably, as described herein, the PTAG turned out to be run by the Applicant (with approval of EFSEC staff) with rules and procedures that favored the Applicant's interests, e.g., allowing it to pick the presiding officer. As discussed above, meetings were held in secret, presided over by the Applicant's hand-picked facilitator, with membership including Applicant's veteran supporters and without a transcript to learn what actually transpired. Gone were rules of evidence and cross-examination. The result of this process is now before the council in the form of Proposed Resolution 357.

Council members who presided during the adjudication have first-hand knowledge of the wildlife issues from witnesses presented by the parties. However, there are now one or more new members on the Council that did not participate in the adjudication and are not familiar with those proceedings; those members only have the product of the PTAG, largely controlled by the applicant.

Based on these background factors, these new Council members should not vote on the current application unless they can certify, on the record, that they have reviewed all transcripts, exhibits and documents leading to the adoption of the SCA. Generally, a judicial officer may not act as a decision-maker where he or she "was not present and sitting as a member of the court at the hearing of a matter submitted for its decision." RCW 2.28.030(2).[6] To the same effect is Washington administrative law:

> Even if a unanimous Board vote had been required, rather than a simple majority, an administrative decision will not be invalid because an officer who participated in the decision was absent during presentation of evidence, <u>provided he subsequently familiarized himself with the evidence before voting.</u> *State ex rel. American Telechronometer Co. v. Baker*, 164 Wash. 483, 2 P.2d 1099 (1931). See *McGraw Elec. Co. v. United States*, 120 F. Supp. 354 (E.D. Mo. 1954), aff'd, 348 U.S. 804, 99 L. Ed. 635, 75 S. Ct. 45 (1954); *Allied Compensation Ins. Co. v. Industrial Accident Comm'n,* 57 Cal. 2d 115, 367 P.2d 409, 17 Cal. Rptr. 817 (1962); 2 K. Davis, Administrative Law Treatise § 11.02 (1958).

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[6] The only exception to that rule is in CR 63(b) based on the disability of a judge "by reason of death, sickness or other disability."

Johnston v. Grays Harbor Cty. Bd. of Adjustment, 14 Wash. App. 378, 385, 541 P.2d 1232, 1237 (1975)(emphasis supplied).[7] Recusal by Councilmembers that are not familiar with the background in this case is fully appropriate. Should a Council member need to review these background materials, the review and decision on Proposed Resolution 357 should be continued to allow such reviews.

7. EFSEC SHOULD HAVE OPEN REVIEW AND DECISION-MAKING ON REMAINING SCA CONDITIONS WITH PUBLIC INVOLVEMENT.

Proposed Resolution 357 deals with issues related to Special Species Condition 5 or "Spec-5." However, as noted above, there are at least fifteen other pre-construction conditions that involve PTAG that remain to be considered and decided. Those conditions are attached to the PTAG Rules of Procedure and are Appendix A to this comment letter.

In addition to conditions that involve the PTAG, there are other pre-construction conditions that are critical to the public interest. These are found in Article IV: "Plans, Approvals and Actions Required Prior to Construction, Appendix 2: Mitigation Measures." These are included in Appendix B hereto.

Both Appendices A and B's pre-construction conditions involve matters of substantial public concern, matters that were addressed by TCC, other Intervenors and the public during the adjudication. Under these conditions, materials "are required to be filed with EFSEC ninety (90) day prior the start of Construction." Section IV.A. For example, Section IV.H involves the "Indirect Loss Management Plan;" Section IV.Q, the "Adaptive Safety Management Plan" is to "mitigate the loss of safe recreation, use for

[7] During the adjudication the presiding ALJ, at the beginning of the hearing on August 16, 2023, stated:

> I'm going to ask that we call the roll of the Council members. Hopefully we have the Chair plus seven today. And, again, any Council member that misses part of the testimony can go back and review the video and/or look at the transcript when that is posted.

Transcript page 429.

recreational enthusiasts;" Article IV.R is the "Initial Site Restoration Plan;"[8] and Article IV.Z, for "Soil Destabilization Notification and Fugitive Dust Control," among others.

Article IV does not describe the process of review and consideration of these conditions. However, when it comes to these very important matters, the public should be informed of the decision-making process and have an opportunity to review pertinent materials, provide comments and be informed of any decision made. Public records requests are not a satisfactory source of information because of the delays attendant to such requests.

EFSEC organic legislation in RCW 80.50.010 requires "balancing the increasing demands for energy facility location and operation in conjunction with the broad interests of the public." As an adjunct to the balancing mandate, so too Council decisions must be based on the following "premise:"

> (6) To avoid costly duplication in the siting process and ensure that decisions are made timely and without unnecessary delay while <u>also encouraging meaningful public comment and participation in energy facility decisions.</u>

(Emphasis supplied). The making of decisions on such important issues as mitigation for wildlife losses, safety and availability of recreational resources, dust impacts to the adjacent community and how the site will be restored after its useful life are of paramount import to the public interest; the public should be involved in this decision-making.

Nothing in chapter RCW 80.50 provides authority for EFSEC (or the PTAG) to conduct decision-making on these issues in secret without public involvement. Indeed, the permitting and approval of this project is not final until <u>all</u> pre-construction

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[8] The "Initial Site Restoration Plan" is required by WAC 463-72-040 "[a]t least 90 days prior to the beginning of site preparation, . .". The initial site restoration plan must meet certain public interest requirements per subsection 3:

> (3) The initial site restoration plan shall be prepared in sufficient detail to identify, evaluate, and resolve all major environmental and public health and safety issues presently anticipated. It shall describe the process used to evaluate the options and select measures that will be taken to restore or preserve the site or otherwise protect all segments of the public against risks or danger resulting from the site. The plan shall include a discussion of economic factors regarding <u>the costs and benefits of various restoration options versus the relative public risk and shall address provisions</u> for funding or bonding arrangements to meet the site restoration or management costs. The provision of financial assurances shall include evidence of pollution liability insurance coverage in an amount justified for the project, and a site closure bond, sinking fund, or other financial instrument or security in an amount justified in the plan.

(Emphasis supplied). Public involvement in a plan that must address "public risk" is plainly required.

elements and requirements are confirmed and approved as described above in Section 2 of this comment.

The Council should make provisions to assure public notice, open decision-making, opportunity for comment on all pre-construction conditions and future reviews are consistent with legal requirements.

8. EFSEC SHOULD REQUIRE OPEN REVIEW AND DECISION-MAKING ON REMAINING SCA CONDITIONS WITHOUT DELEGATION.

It appears that some or all of the decision-making of the Council on additional PTAG conditions under the SCA may be delegated to the Executive Director. However, there has been no actual council decision (at a public meeting) delegating to the Executive Director upcoming important decisions on these conditions.[9]

As the Council is aware, TCC has promptly objected to delegation of decision-making in this case, which includes upcoming decisions on other PTAG preconstruction conditions. Based on these issues, we urge the Council to determine that any remaining pre-construction decisions on the Horse Heaven SCA not be delegated to the Executive Director, but be retained by the Council. As noted above, the retention of authority should include restructuring the current PTAG rules, procedures and membership to be consistent with existing law. Such actions being consistent with existing law will serve to remove uncertainties.

9. THE REQUEST THAT THE COUNCIL ISSUE RULINGS ON TCC AND BENTON COUNTY OBJECTIONS CREATES LEGAL ERROR AND IS AGAINST PUBLIC POLICY.

Paragraph C of proposed Res. 357 would have the Council determine that objections submitted by both TCC and Benton County "are without merit." Proposed Resolution 357 at pages 12-17. This would have the Council reach legal conclusions.

Before discussing the legal issues posed by Paragraph C, the Council must consider public policy implications of its decision on these issues. Whoever drafted Proposed Resolution 357 urges this Council to decide that proceedings of the PTAG should remain secret, out of the view of interested parties and the public, and that public comment is forbidden during PTAG review, all as specified by its current Rules of

[9] Policy 16-01 is silent as to when and under what circumstances Council responsibilities will be delegated to the Executive Director. Whatever other limitations apply to Policy 16-01, it cannot be read to vest the Executive Director with an ability to take over decision-making whenever she wants.

Procedure.[10] Paragraph C.2 (pages 13-14). Proposed Resolution 357 claims that the secret adoption of PTAG rules of procedure and membership, controlled by the Applicant, is an appropriate manner of deciding important wildlife matters. Paragraph C.4.

What is clear is that adoption of the stated concerns of both TCC and Benton County would not make the process illegal, because the choices to be made are <u>entirely discretionary</u>. The Council can open the PTAG process to public review and scrutiny; it is not required to approve secret meetings. The Council can review proposed Rules of Procedure and membership of the PTAG; it is not required to delegate these important procedural tasks to the Applicant and its Executive Director. The Council can require PTAG to maintain recordings of its meetings; it is not required to prohibit recording. The Council can require that an unbiased Administrative Law Judge preside at the PTAG meetings; it is not required to allow the Applicant's paid facilitator" to preside over meetings and issue a decision. The Council can decide the membership of the PTAG should not include witnesses that testified for the Applicant and support the project; it is not required to accept the Applicant's hand-picked supporters as decision makers on important issues. The Council can decide that PTAG meetings must be fair and be consistent with the Appearance of Fairness doctrine; it is not required to accept the wishes and preferences of the Applicant.

In short, the Council has the authority to assure the important PTAG process maintains orderly and fair hearings; it is not required to approve a process that favors the applicant.

In addition, the Council adoption of Paragraph C creates unnecessary risk to the validity of its decisions and risks significant delay in the approval process. If the positions taken by TCC (and Benton County and the Yakama Nation) are ultimately determined to be correct by the State Supreme Court, there could be a remand to conduct proceedings according to law. Such a remand could result in significant delays in the process. Any blame for such delay will fall on the Applicant and the EFSEC Council.

The legal merits of the defenses that are included in Proposed Resolution 357 have previously been addressed in TCC's original Objection and First Addendum filed with the Council on March 28 and April 18, 2025. TCC stands by the content of its Objections and intends to vigorously pursue them.

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[10] For the reasons expressed by the Applicant in its Motion for Reconsideration at page 14 (see references above in Section 4), allowing comment only *after* the PTAG or other processes are complete does not allow effective and meaningful public participation.

10. SUMMARY AND CONCLUSION.

In summary, TCC requests that the Council membership take the following actions.

1. Strike Section C from Proposed Resolution 357 (pages 12-17).
2. Take all necessary steps to assure that the Benton County representative can participate and vote on Proposed Resolution 357 and continuing interim decisions on the Horse Heaven matter until a final decision on the project is made.
3. Decline to take final procedural action on the Horse Heaven application until final Project layout and designs, including the application of Certificate Holder commitments and recommended mitigation measures, are included
4. Revamp the PTAG process to be consistent with existing law and remove Applicant control over the PTAG process for all upcoming reviews and recommendations to EFSEC.
5. Take steps to insure timely, adequate and effective public notice, open decision-making and opportunity for public comment on all pre-construction conditions.
6. Current Council members that have not reviewed the administrative record should recuse themselves.

Thank you for your consideration of these comments.

Sincerely,

J. Richard Aramburu

J. Richard Aramburu

JRA:cc
cc: Clients
Counsel for Benton County
Counsel for the Yakama Nation

TCC Appendix A
to 20251013
Comment/Objection:
ROP Attachment A

Pre-Operational Technical Advisory Group Rules of Procedure

The Site Certification Agreement (SCA) for the Horse Heaven Wind Farm (the "Project") includes mitigation measures referred to in this Charter as "Conditions." Site Certificate Agreement (SCA) Condition Hab-4 requires the Certificate Holder to establish a Pre-Operational Technical Advisory Group (PTAG) to advise on the development and implementation of pre-construction compliance activities. The PTAG is responsible for reviewing and providing technical advice on documents produced by the Certificate Holder related to wildlife and habitat, which will then be submitted to the Energy Facility Site Evaluation Council (EFSEC) for approval. After construction and before Project operation, the PTAG will cease to exist and be replaced by the Technical Advisory Committee (TAC), with its respective Charter.

The SCA requires the Certificate Holder to "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." SCA Art. IV.G. This document serves that purpose.

Establishing Language

SCA Condition IV.G creates the foundation of the PTAG:

> ***Pre-Operational Technical Advisory Group***
> *The Certificate Holder, in consultation with EFSEC, shall establish a Pre-operational Technical Advisory Group (PTAG) as defined by mitigation measure Hab-4 in Appendix 2. The PTAG shall be established at least one year prior to construction and is responsible for reviewing and providing technical advice on documents produced by the Certificate Holder related to wildlife and wildlife habitat. The PTAG shall also provide advice on adaptive management. The PTAG shall be responsible for, at a minimum:*
> *1. Reviewing and providing technical advice on Project wildlife and habitat management plans (e.g. ferruginous hawk management plans).*
> *2. Reviewing and providing advice to EFSEC on pre-design and pre-construction data collection requirements to address Project mitigation measures and conditions or management plans.*
> *3. Reviewing and providing advice to EFSEC on the final Project design.*
> *4. Advising on thresholds to be applied to the Project that would trigger the requirement for additional mitigation measures.*

SCA Conditions Under Consideration by the PTAG

The SCA defines which SCA Conditions the PTAG will advise the Certificate Holder and EFSEC on during the pre-operations period. The following SCA Measures in the SCA invoke the PTAG:

- Hab-1 Wildlife Movement Corridors

Attachment A

SCA Conditions Requiring PTAG Involvement

Hab-1 **Wildlife Movement Corridors:** The Certificate Holder shall provide rationale to EFSEC for siting any Project components within movement corridors modeled in Washington Wildlife Habitat Connectivity Working Group (2013) as medium to very high linkage, and a Corridor Mitigation Plan shall be required that describes:

- Extent of direct and indirect habitat impact within the movement corridor
- Proposed measures to be implemented to reduce potential impacts on movement corridors (e.g., habitat enhancements to promote continued use of corridors)
- Proposed features (e.g., open-bottom culverts) to accommodate wildlife movement for linear Project components (e.g., roads, powerlines)
- Proposed restoration in movement corridors following Project decommissioning
- Performance standards to assess the effectiveness of mitigation measures and restoration
- Methods to monitor and measure performance standards

The Corridor Mitigation Plan shall be developed in consultation with the PTAG and reviewed and approved by EFSEC prior to implementation. Results of corridor monitoring shall be reviewed annually with the TAC to evaluate the effectiveness and apply additional measures if necessary. Data shall be provided to EFSEC with additional mitigation measures for review and approval prior to implementation.

Hab-4 **Establish PTAG and TAC:** The Certificate Holder, in consultation with EFSEC, shall establish a PTAG and TAC. The PTAG shall be established at least one year prior to construction and will be responsible for reviewing and providing technical advice on documents produced by the Certificate Holder related to wildlife and wildlife habitat. The PTAG will also provide advice on adaptive management. The PTAG will be responsible for, at a minimum:

- Reviewing and providing technical advice on Project wildlife and habitat management plans (e.g., ferruginous hawk management plan)
- Reviewing and providing advice to EFSEC on pre-design and pre-construction data collection requirements to address Project mitigation measures and conditions of management plans
- Reviewing and providing advice to EFSEC on the final Project design
- Advising on thresholds to be applied to the Project that will trigger the requirement for additional mitigation measures

The Certificate Holder, in consultation with EFSEC, shall establish a TAC prior to Project operation. The PTAG will cease to exist once the Certificate Holder has completed all planned construction and will be replaced by the TAC, which will exist for the life of the Project. The TAC will be responsible for, at a minimum:

- Advising on the monitoring of mitigation effectiveness and reviewing monitoring reports
- Advising on additional or new mitigation measures that will be implemented by the Certificate Holder to address exceedances of thresholds
- Reviewing the results of annual data generated from surveys and incidental observations and providing recommendations for alternative mitigation and adaptive

management strategies, as well as advising on aspects of existing mitigation that are no longer needed.

The PTAG and TAC may include representation by WDFW, the Washington Department of Natural Resources, interested tribes, Benton County, and the USFWS. The PTAG and TAC may also include local interest groups, not-for-profit groups, and landowners. The exact composition of the PTAG and TAC will be determined through discussions between the Certificate Holder and EFSEC and will depend on the relevance and/or availability of proposed members.

Hab-5 **Indirect Habitat Loss Management Plan:** As noted by the Certificate Holder, the Project is expected to result in indirect habitat loss through loss of habitat function and changes in wildlife behavior in response to the Project. Further, as noted by the Certificate Holder, WDFW guidelines require that compensatory habitat mitigation must fully offset the loss of habitat function and value. To address indirect habitat loss associated with the Project, the Certificate Holder shall develop an Indirect Habitat Loss Management Plan that addresses potential indirect habitat loss resulting from the Project. The Certificate Holder shall work with the PTAG during the development of the Indirect Habitat Loss Management Plan (IHLMP) for review and approval by EFSEC. EFSEC and the PTAG will review the IHLMP prior to its implementation. The IHLMP shall be provided to the PTAG for review 90 days prior to construction.

The objectives of the IHLMP will be to identify a Project-specific ZOI and required mitigation based on the Project-specific ZOI. The Project-specific ZOI will be developed based on Project conditions and may differ from the ZOI presented in the EIS. The IHLMP shall include:

- A description of the study's purpose and objectives
- A description of methods to define Project-specific ZOIs (e.g., gradient analysis, nest density)
- A description of data requirements to establish Project-specific ZOIs and field programs that will be implemented (pre-construction and post-operation)
- A description of the duration of studies required to establish Project-specific ZOIs
- A description of criteria to be used to compensate for loss of habitat function and value
- An environmental effectiveness monitoring strategy of compensatory habitat to ensure that the habitat meets success criteria

The IHLMP shall also include a series of compensatory site-selection criteria, developed in consultation with the PTAG. The selection criteria will be used to evaluate candidate habitat compensation habitats. Habitats that achieve more of the criteria will be identified as the preferential sites. Selection criteria shall include, at a minimum:

- Proximity to the Lease Boundary (e.g., hierarchy of preferences with respect to location— within the Lease Boundary being the highest priority, adjacent to the Lease Boundary being the second highest priority, and off site being the third priority)

- Protection of existing native shrub-steppe or grassland habitats
- Encompassing sensitive or important wildlife habitat (e.g., mapped movement corridors, ferruginous hawk core habitat, HCAs, areas of high prey abundance)
- Proximity to Project infrastructure

Hab-6 **Project Layout & Design:** The Certificate Holder shall work with EFSEC, with advice from the PTAG, on the development of the final Project layout and design, including the application of Certificate Holder commitments and recommended mitigation measures.

Hab-8 **Indirect Habitat Loss Compensation:** The Certificate Holder shall be required to provide compensation habitat loss and alteration (indirect habitat loss) (See Hab-5, Veg-4) through one or more actions of land acquisition, onsite easement and restoration (excluding areas impacted by the project such as temporary laydowns), and/or fee-based mitigation. The Certificate Holder shall prioritize development of conservation easements (Option 11 in the Certificate Holder's Draft Wildlife and Habitat Mitigation Plan) and shall compensate for the remaining permanent and altered (indirect) impacts by providing money to WDFW, or a third party identified by WDFW, and agreed to by EFSEC, to purchase other lands suitable as in-kind and/or enhancement mitigation. The Certificate Holder shall provide EFSEC, for review and approval, with rationale for fee-based mitigation (Options 2 and 3 in the Certificate Holder's Draft Wildlife and Habitat Mitigation Plan) including a description of how much compensatory habitat will be addressed through Option 1 (conservation easement) and rationale for why fee-based mitigation is required. The fee-based mitigation includes a per acre fee that shall be determined by market rates and land sales within the general vicinity of the Lease Boundary for lands containing comparable habitat types and quality present within the Lease Boundary. The per acre fee shall be developed by the Certificate Holder in consultation with WDFW and approved by EFSEC. The Total Financial Obligation (TFO) shall be determined by multiplying the cost per acre by the total Compensatory Mitigation Acres (CMA) remaining after the application of Option 1 mitigation strategy and shall include a one-time 15% premium to cover administration and management costs for the purchased lands. The TFO for compensatory mitigation shall be determined and agreed to by EFSEC 90 days before construction. If construction has not begun within 12 months of the approval of the TFO, the TFO identified shall expire and be recalculated prior to beginning construction. The TFO shall be calculated based on the following: Average Comparable Land Sale Cost (per acre)*(CMA-Option 1 Acres)*1.15 = TFO In addition to the wildlife and habitat mitigation measures, the following measures developed for the Vegetation chapter are applicable to wildlife and habitat.

Wild-1 **Post-construction Bird and Bat Fatality Monitoring Program:** Prior to initiation of operation, the Certificate Holder shall develop, in coordination with the Pre-operational Technical Advisory Group (PTAG) and approval by EFSEC, a post-construction bird and bat fatality monitoring program. Monitoring shall be conducted for a minimum of three years. While the three years of monitoring need not be consecutive, all post-construction monitoring shall be conducted within the initial five years of operation to document variation in annual fatality rates. The program shall describe survey methods, timing, and effort as described in the Certificate Holder's Bird and Bat Conservation Strategy (Appendix M of the Final ASC). Surveys shall include carcass surveys to document the longevity of carcass persistence and detectability of carcasses. Surveys shall be conducted year-round to account for variation in bird and bat abundance and diversity. Additional surveys (e.g., survey frequency) shall be conducted during sensitive periods for birds and bats (e.g., migration periods). Surveyed area shall include turbines, solar arrays, and transmission lines at a minimum.

Bird and bat fatality adaptive management strategy development
Prior to initiation of operation, the Certificate Holder shall develop, in coordination with the PTAG and approval by EFSEC, an adaptive management strategy. The adaptive management strategy shall include additional mitigation measures to be applied during sensitive periods (e.g. migration) or if mortality thresholds are exceeded.

Migratory bat species are at risk of population level impacts due to wind power facilities and these species are most at risk of collisions with turbines during spring and fall migration. As such, adaptive management strategies will be applied during these sensitive periods, which are generally April to June (spring migration) and August to October (fall migration) (Hayes and Wiles 2013). Acoustic surveys during operation may be used to define a project-specific migratory period. Acoustic detectors may be deployed across the Lease Boundary prior to spring and fall migration to detect increased bat activity suggesting the onset of bat migration. These data will be used to adjust the generalized bat sensitive periods listed above. Similarly, acoustic data will be used to document the end of bat migration and when adaptive management strategies may no longer be required. Bat data shall be downloaded and analyzed on a weekly basis to document the start and end of migration.

Adaptive management mitigation strategies that will be considered include altering the operation of the turbines by increasing the cut-in speed to above 18 feet (5.5 meters) per second (Alberta Government 2013) and curtailing turbines during known bird and bat migration period. As noted in in Section 4.6.2.2, projected impacts of wind power projects estimate that wind power could result in mortality levels of 3 to 46 percent of the hoary bat population by 2050. Friedenberg and Frick (2021) conclude that a 5 m/s curtailment could avoid hoary bat extinction in several of the modeled scenarios. Acoustic monitors and smart curtailment may also be included in adaptive management to refine data on bat presence near turbines and when curtailment mitigation should be implemented. Mitigation strategies may be limited to groups of turbines based on the results of post-construction monitoring.

Bird and bat fatality adaptive management review
The Certificate Holder, the TAC, EFSEC, and WDFW will review the results of the bird and bat post-construction fatality monitoring program after each monitoring period to determine whether the mitigation measures outlined in the adaptive management strategy should be revised or adjusted. The data will also be used to determine whether monitoring efforts are sufficient to verify predicted impacts on birds and bats. EFSEC may require the Certificate Holder to conduct more intensive surveys (e.g., additional spatial extent or frequency) or extend the duration of post-construction monitoring beyond the minimum three years. The Adaptive management mitigation strategies shall be periodically reviewed (minimum of every five years) with the TAC during operation to consider inclusion of new science and technologies that may more efficiently reduce bird and bat fatalities.

Wild-8 **Turbine Buffer Zones:** Wind turbine buffer zones shall be established around all known raptor nests and be a minimum of 0.25 miles. The Certificate Holder shall prepare a Raptor Nest Monitoring and Management Plan for review by EFSEC and the PTAG if buffer zones cannot be maintained.

Wild-10 **Pre-construction Bat Monitoring:** The Certificate Holder shall conduct pre-construction surveys to develop an estimate of regional bat populations and identify to what degree seasonality affects the bat population in the area. The PTAG shall be contacted prior to undertaking these surveys and shall be involved in the development of the methodology and review of the results.

Spec-1 **Striped Whipsnake & Sagebrush Lizard:** The Certificate Holder shall conduct pre-construction surveys for sensitive reptile species prior to alteration or destruction of suitable habitat such as areas within the Lease Boundary identified as core habitat in GAP mapping, as well as shrubland (e.g., shrub-steppe, rabbitbrush). WDFW shall be contacted prior to undertaking these surveys. If these species are identified through pre-construction surveys, the Certificate Holder shall prepare a Reptile Management Plan to reduce potential impacts on habitat, mortality, and barriers to movement. The Reptile Management Plan shall describe:

- How the Certificate Holder will avoid suitable habitat, including where the species were observed
- How the Certificate Holder will implement management recommendations in Larsen (1997)
- How the Certificate Holder will maintain rodent burrows in suitable reptile habitat (e.g., shrubsteppe)
- Additional mitigation measures to reduce potential mortality of these species during the construction and operation stages of the Project

The Reptile Management Plan shall be reviewed by the PTAG and approved by EFSEC prior to initiation of construction. Survey results and proposed adaptive management shall be reviewed by the PTAG and approved by EFSEC prior to implementation (see Hab-4).

Spec-4 **Burrowing Owl:** The Certificate Holder shall conduct burrowing owl surveys within areas of direct loss (permanent, temporary, and modified) and associated ZOIs. The results of these surveys shall be provided to the PTAG and EFSEC and used to inform the final Project layout. Active burrows shall be retained and satellite burrows with characteristics used by burrowing owls shall be avoided where feasible to maintain habitat capacity. WDFW-recommended seasonal buffers (0.5 miles) shall be applied around burrowing owl nests to avoid disturbing nesting burrowing owls, if present (Larsen et al. 2004). Seasonal buffers (February 15 to September 25) shall be applied during construction and for temporary disturbances, such as periodic maintenance, during operation. If active burrowing owls are identified within the Lease Boundary, the Certificate Holder shall develop a species-specific management plan that describes:

- The location of active burrows.

- How active burrows will be avoided through re-alignment or reconfiguration of Project features.
- Additional mitigation measures that will be applied where disturbance to active burrows is expected (e.g., construction of artificial burrows).
- Additional mitigation measures that will be applied during operation if burrowing owl mortalities are recorded.
- How ongoing monitoring of active burrows will be undertaken.

The Burrowing Owl Management Plan shall be reviewed by the PTAG and approved by EFSEC prior to initiation of construction. Survey results and proposed adaptive management shall be reviewed by the PTAG and approved by EFSEC prior to implementation (see Hab-4).

The Certificate Holder shall monitor access roads for burrowing owl use and mortalities. Mortalities shall be reported to the PTAG or TAC (depending on the Project phase) and EFSEC within 5 days of the observation. Incidental observations of burrowing owl use shall be provided to the PTAG (construction) or TAC (operation) on an annual basis.

Spec-5 **Ferruginous Hawk:** The Certificate Holder shall not site any wind turbines, solar arrays, or BESS within a 0.6-mile (1km) radius surrounding ferruginous hawk nests:

- documented in PHS data on the effective date of the SCA,
- identified in the Certificate Holder's nest surveys, and/or
- that may be newly established by the species between the SCA effective date and the time of construction.

The Certificate Holder shall avoid siting wind turbines, solar arrays, and BESS within a 0.6-2-mile radius surrounding documented ferruginous hawk nests, unless the Certificate Holder is able to demonstrate that:

- compensation habitat, as described below, will provide a net gain in ferruginous hawk habitat and either:
  - the nesting site is no longer available, or
  - the foraging habitat within the 2-mile radius is no longer viable for the species.

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. Project turbines, solar arrays, or BESS shall not be sited within 2 miles of a ferruginous hawk nest without prior approval by EFSEC based on the process described below.

The extent of component encroachment into core habitat in ferruginous hawk territories, defined as the area within a 2-mile radius surrounding documented nests, may vary depending on the type of infrastructure proposed (i.e., turbine, solar array, BESS). If siting of these components within 2 miles of a nest is considered by the Certificate Holder, the Certificate Holder shall develop, in consultation with the PTAG for approval by EFSEC:

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.

In the event that a Project component is proposed for siting within the 2-mile buffer, the Certificate Holder shall, in consultation with the PTAG, develop a Project-specific ferruginous hawk mitigation and management plan for approval by EFSEC:

1. A description of efforts to site Project infrastructure to avoid core habitat, identified as the area within 2 miles of nests documented in PHS data and the Certificate Holder's nest surveys:
   a. If Project turbines, solar arrays, or BESS are sited within 2 miles of a ferruginous hawk nest, the infrastructure shall be reviewed by the PTAG and approved by EFSEC.
   b. Additional mitigation measures shall be developed to reduce potential ferruginous hawk strikes with turbines, including curtailing turbine operation within the 2-mile core habitat of any actively occupied nests diurnally during the breeding and rearing periods when ferruginous hawks are present in Benton County.
   c. The plan shall explain how and where the Certificate Holder will create new offset habitat to mitigate for direct and indirect habitat loss within the 2-mile core area of ferruginous hawk nests documented in PHS data and the Certificate Holder's nest surveys.
2. A description of when construction activities will be undertaken to avoid sensitive timing periods for ferruginous hawk.
3. A description of pre- and post-monitoring programs that will be conducted to establish:
   a. Habitat use within the Lease Boundary.
   b. Mapping of ground squirrel colonies and other prey.
   c. Identification of potential flyways between nest sites and foraging habitat and monitoring of potential flyways to inform final turbine siting and orientation.
   d. Ongoing monitoring of nest use and territory success.
4. A description of restoration activities that will be undertaken during Project decommissioning to enhance ferruginous hawk habitat in disturbed areas.

Results of ferruginous hawk monitoring programs and adaptive management will continue through Project operation and decommissioning with review by the TAC and approval by EFSEC.

Exemption from Spec-5 for East BESS: The Certificate Holder intends to locate the East BESS within the footprint of the East Substation, which is itself located within 0.6-miles of a documented ferruginous hawk nest. The East BESS is exempted from the 0.6-mile and 2-mile buffers described in this measure so long as it remains co-located with the East Substation and remains subject to the other requirements of this measure. While the substation is not subject to buffer requirements of this mitigation measure, absent this exemption, relocation of the BESS would be required. The rationale for this exemption is that the footprint of the East Substation represents an area of permanent disturbance. Relocating the East BESS elsewhere would necessarily result in an increase in permanent habitat disturbance without any accompanying mitigative effect. Applying this 0.6-mile and 2-mile nest buffers to the East BESS would be contrary to the mitigative intent of this measure.

Spec-7 **Loggerhead Shrike, Sagebrush Sparrow, Sage Thrasher, & Vaux's Swift:** The Certificate Holder shall maintain connectivity between natural habitat patches to reduce potential habitat loss and fragmentation. The Certificate Holder shall restore areas with shrubs, where feasible, to reduce potential habitat loss. The Certificate Holder shall avoid the use of insecticides and herbicides to reduce potential mortality and loss of prey items.

Spec-8 **Prairie Falcon:** The Certificate Holder shall conduct pre-construction surveys for prairie falcon nests for construction work proposed during the prairie falcon nesting season and the winter season preceding the start of construction and maintain a seasonal buffer of 2,640 feet from active nest sites (Larsen et al. 2004) to reduce potential destruction or disturbance of active nests. Observational data and proposed adaptive management strategies will be reviewed with the TAC annually (see Hab-4).

Spec-10 **Black-tailed Jackrabbit & White-tailed Jackrabbit:** The Certificate Holder shall conduct surveys for jackrabbit in suitable habitat identified through GAP predictive mapping. If jackrabbits are identified, the Certificate Holder shall develop and implement a management plan with additional mitigation measures to reduce potential loss of habitat supporting jackrabbits. Observational data and proposed adaptive management strategies will be reviewed with the TAC annually (see Hab-4).

Spec-12 **Townsend's Ground Squirrel:** The Certificate Holder shall conduct surveys for Townsend's ground squirrel colonies within the Lease Boundary in areas of the Project disturbance footprint to inform final design.

The Certificate Holder shall avoid habitat loss within Townsend's ground squirrel habitat concentration areas, as well as known colonies, in final design. Additional Townsend's ground squirrel colonies identified through surveys shall be shown on Project mapping. If Project components are required in habitat concentration areas (rated as medium or greater) or near known colonies, the Certificate Holder shall prepare a species-specific management plan for areas where avoidance is not feasible. This plan shall provide rationale for why colonies cannot be avoided and shall detail additional mitigation measures to reduce impacts to Townsend's ground squirrel. Additional mitigation measures may include identification of setbacks, colony monitoring, habitat restoration, colony relocation, and reconstruction of habitat features. The plan shall also describe monitoring and adaptive management measures to be implemented during Project operation. The plans shall be provided and discussed with the PTAG, and approved by EFSEC, if avoidance of identified ground squirrel colonies is not feasible. Observational data and adaptive management strategies will be reviewed with the TAC annually.

Spec-13: **Pronghorn Antelope:** The Certificate Holder shall limit fencing where feasible (e.g., around solar arrays). Final fencing layouts and design, including use of non-barbed-wire security fencing, shall be provided to the PTAG and EFSEC with rationale for fencing requirements. The Certificate Holder shall design and implement a study of seasonal pronghorn antelope occurrence and use of the Lease Boundary before construction and during operation to document the change, if any, of pronghorn antelope presence, abundance, and habitat use within the Lease Boundary. The PTAG will review and provide input to the study design. The results of the study will be used to develop adaptive management measures to respond to changes in pronghorn antelope habitat use. Survey results and proposed adaptive management will be reviewed by the PTAG and TAC prior to implementation (see Hab-4). The Certificate Holder shall maintain a potentially confidential database of pronghorn antelope observations, including details such as numbers, location, age, and sex, and shall make this database available to WDFW, EFSEC, and the Yakama Nation.

TCC Appendix B
to 20251013
Comment/Objection:
SCA Article IV.

SITE CERTIFICATION AGREEMENT
BETWEEN

THE STATE OF WASHINGTON

AND

HORSE HEAVEN WIND FARM, LLC

For the

HORSE HEAVEN WIND FARM
BENTON COUNTY, WASHINGTON
EXECUTED *October 18th, 2024*

ENERGY FACILITY SITE EVALUATION COUNCIL
OLYMPIA, WASHINGTON

ARTICLE IV: PLANS, APPROVALS AND ACTIONS REQUIRED PRIOR TO CONSTRUCTION

A. Plan Submission Requirements

All identified plans and submissions must adhere to the requirements and obligations set forth in relevant regulations, this Agreement and the ASC.

Unless otherwise noted, all plans and submissions required prior to beginning site construction activities are required to be filed with EFSEC ninety (90) days prior the start of Construction. The Certificate Holder shall not begin Construction activities until all applicable elements of the required pre-construction plans or commitments outlined in this Agreement and the ASC are in place, and Council approval of required plans and authorization to begin construction has been obtained.

B. Notice of Federal, State, and Local Permit Approvals

The Certificate Holder shall notify the Council of all Federal, State, and Local permits, not preempted by RCW 80.50.110 and 120, that are required for construction and operation of the Project, if any, and the anticipated date of permit issuance to the Certificate Holder. The Certificate Holder shall notify the Council when all required permits have been obtained, no later than ten (10) business days after the permit has been issued. Construction shall only be initiated upon EFSEC determination that all applicable permits have been issued.

C. Mitigation Measures

During construction, operation, decommissioning, and site restoration of this Project, the Certificate Holder shall implement the conditions set forth in this Agreement, including, but not limited to, commitments presented in the ASC, mitigation measures identified in the final EIS, and conditions identified in the recommendation to the governor (see Appendix 2 for a full list).

No later than sixty (60) days prior to the beginning of Site Preparation, the Certificate Holder shall file with EFSEC a comprehensive list of these conditions, or at such time defined within the condition. For each of these mitigation measures, the Certificate Holder shall in the same filing further identify the construction plan and/or operation plan addressing the methodology for its achievement.

The specific plans and submittals listed in the remainder of this Article IV, and Articles V, VI, VII, and VIII, shall incorporate these mitigation measures as applicable. The mitigation measures included in the final EIS are presented in their entirety in Appendix 2 of this Agreement.

D. Construction Stormwater Pollution Prevention Plan

1. Notice of Intent. No later than 60 days prior to the beginning of Site Preparation the Certificate Holder shall file with EFSEC a Notice of Intent to be covered by a General National Pollutant Discharge Elimination System (NPDES) Permit for Stormwater Discharges Associated with Construction Activities.

2. <u>Construction Stormwater Pollution Prevention Plan</u>. No later than 60 days prior to the beginning of Site Preparation, the Certificate Holder shall submit to EFSEC a Construction Stormwater Pollution Prevention Plan (Construction SWPPP). The Construction SWPPP shall meet the requirements of the Ecology stormwater pollution prevention program (WAC 173-230), and the objectives and requirements in Special Condition S.9 of the *National Pollutant Discharge Elimination System (NPDES) and State Waste Discharge General Permit for Stormwater Discharges Associated with Construction Activities* issued by the Department of Ecology on January 1, 2021 or as revised. The Certificate Holder shall include measures for temporary erosion and sedimentation control in the Construction SWPPP as included in the Stormwater Management Manual for Eastern Washington.

The Construction SWPPP shall identify a regular inspection and maintenance schedule for all erosion control structures. The schedule shall include inspections after significant rainfall events. Any damaged structures shall be addressed immediately. Inspections, and subsequent erosion control structure corrections, shall be documented in writing and available for EFSEC's review on request (see Appendix 2; W-6 Wetland SWPPP).

E. Temporary Erosion and Sediment Control Plan.

The Certificate Holder shall develop a Temporary Erosion and Sediment Control (TESC) Plan. No later than sixty (60) days prior to the beginning of Site Preparation, the Certificate Holder shall submit the TESC Plan to the Council for approval and provide a copy to Ecology for comment. The Certificate Holder shall not begin Site Preparation prior to obtaining Council approval of the TESC Plan. As an alternative to submitting a separate TESC Plan, the Certificate Holder may include measures for temporary erosion and sedimentation control in the Construction SWPPP required in Article IV.D.2, above.

F. Spill Prevention, Control and Countermeasures Plan

The Certificate Holder shall develop a Spill Prevention, Control, and Countermeasures Plan (SPCCP) in the event that quantities of materials maintained on site are of sufficient quantity to qualify, consistent with the requirements of 40 CFR Part 112 and shall adhere to requirements identified in this agreement and the ASC including an employee training plan to include the use of spill response equipment, orientations identifying the location of hazardous materials, proper storage of hazardous materials, and location of spill response equipment to ensure that workers are competent in spill response (see Appendix 2; W-5 Employee Training).

The Construction SPCC Plan shall include the Project Footprint, and all access roads. The Certificate Holder shall require all contractors working on the facility to have a spill prevention and countermeasure program consistent with the above requirements. The Certificate Holder shall not begin Site Preparation prior to obtaining approval of the Construction SPCC Plan. All applicable elements of the Construction SPCC Plan shall be implemented prior to the beginning of Site Preparation.

Spill response equipment shall be stored in every project vehicle regularly accessing the site during construction, operation, and decommissioning (see Appendix 2; W-8 Spill Response Equipment). In addition, an oil pan shall be placed below heavy equipment when stored or not in use on site.

G. Pre-operational Technical Advisory Group

The Certificate Holder, in consultation with EFSEC, shall establish a Pre-operational Technical Advisory Group (PTAG) as defined by mitigation measure Hab-4 in Appendix 2. The PTAG shall be established at least one year prior to construction and is responsible for reviewing and providing technical advice on documents produced by the Certificate Holder related to wildlife and wildlife habitat. The PTAG shall also provide advice on adaptive management. The PTAG shall be responsible for, at a minimum:

1. Reviewing and providing technical advice on Project wildlife and habitat management plans (e.g. ferruginous hawk management plans).

2. Reviewing and providing advice to EFSEC on pre-design and pre-construction data collection requirements to address Project mitigation measures and conditions or management plans.

3. Reviewing and providing advice to EFSEC on the final Project design.

4. Advising on thresholds to be applied to the Project that would trigger the requirement for additional mitigation measures.

The PTAG shall cease to exist once the Certificate Holder has completed all planned construction and shall be replaced by the Technical Advisory Committee (TAC). The PTAG may include representation by WDFW, DNR, interested tribes, Benton County, and the USFWS. The PTAG may also include local interest groups, not-for-profit groups, and landowners. The exact composition of the PTAG will be determined through discussions between the Certificate Holder and EFSEC and will depend on the relevance and/or availability of proposed members.

The Certificate Holder shall contact the agencies and organizations identified through discussions with EFSEC requesting that they designate a representative to the PTAG, and that the agencies or organizations notify EFSEC in writing of their PTAG representative and of their member’s term of representation.

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. The Certificate Holder will provide a copy of the proposed Rules of Procedure at the first PTAG meeting for review and comment. Any modifications to the Rules of Procedure suggested by the PTAG must be approved by EFSEC prior to adoption.

The PTAG will provide advice on adaptive management and the development of the final Project layout and design as defined in the final EIS mitigation measures in Appendix 2 of this SCA. The mitigation measures may not be limited to those listed in Appendix 2 and the ultimate authority to require implementation of additional mitigation measures, including any recommended by the PTAG, shall reside with EFSEC.

H. Indirect Habitat Loss Management Plan

The Certificate Holder shall in coordination with the PTAG develop an Indirect Habitat Loss Management Plan (IHLMP) that addresses potential indirect habitat loss resulting from the Project (see Appendix 2; Hab-5 Indirect Habitat Loss Management Plan). Compensatory habitat mitigation must fully offset the loss of habitat function and value. The IHLMP must be provided to the PTAG for review 90 days prior to construction. Approval of the IHLMP shall reside with EFSEC.

The objectives of the IHLMP would be to identify a Project-specific Zone of Influence (ZOI) and required mitigation based on the Project-specific ZOI. The Project-specific ZOI would be developed based on Project conditions and may differ from the ZOI presented in the EIS. The IHLMP would include:

1. A description of the study's purpose and objectives.
2. A description of methods to define Project-specific ZOIs (e.g., gradient analysis, nest density).
3. A description of data requirements to establish Project-specific ZOIs and field programs that would be implemented (pre-construction and post-operation).
4. A description of the duration of studies required to establish Project-specific ZOIs.
5. A description of criteria to be used to compensate for loss of habitat function and value.
6. An environmental effectiveness monitoring strategy of compensatory habitat to ensure that the habitat meets success criteria.

The IHLMP would also include a series of compensatory site-selection criteria, developed in consultation with the PTAG. The selection criteria would be used to evaluate candidate habitat compensation habitats through one or more actions of land acquisition, on-site easements and restoration (excluding areas impacted by the Project such as temporary laydown areas), and/or fee-based mitigation (see Appendix 2; Hab-8 Indirect Habitat Loss Compensation). The development of conservation easements shall be prioritized. Habitats that achieve more of the criteria would be identified as the preferential sites. Selection criteria would include, at a minimum:

1. Proximity to the Lease Boundary (e.g., hierarchy of preferences with respect to location— within the Lease Boundary being the highest priority, adjacent to the Lease Boundary being the second highest priority, and off site being the third priority).
2. Protection of existing native shrub-steppe or grassland habitats.
3. Encompassing sensitive or important wildlife habitat (e.g., mapped movement corridors, ferruginous hawk core habitat, HCAs, areas of high prey abundance).
4. Proximity to Project infrastructure.

Fee-based mitigation to compensate for the remaining permanent and altered (indirect) impacts to purchase other lands suitable as in-kind and/or enhancement mitigation shall be provided to WDFW, or a third party identified by WDFW, and agreed to by EFSEC to purchase other lands suitable as in-kind and/or enhancement mitigation. The fee-based mitigation rationale, including a description of how much compensatory habitat would be addressed through conservation easements (see Option 1 of the ASC Draft Wildlife and Habitat Mitigation Plan mitigation strategy) and the rationale for why fee-based mitigation is required shall be submitted to EFSEC for review and approval (see Option 2 and 3 of the ASC Draft Wildlife and Habitat Mitigation Plan). Fee-based mitigation shall be determined by market rates and land sales within the general vicinity of the Lease Boundary for lands containing comparable habitat types and quality present within the Lease Boundary.

I. Total Financial Obligation

Fee-based mitigation will be determined and agreed to by EFSEC as a Total Financial Obligation (TFO) (see Appendix 2; Hab-8 Indirect Habitat Loss Compensation). The TFO will be determined by multiplying the cost per acre by the total Compensatory Mitigation Acres (CMA) remaining after the application of conservation easements as detailed in Option 1 of the ASC Draft Wildlife and Habitat Mitigation Plan mitigation strategy. A one-time 15% premium to cover administration and management costs for the purchased lands shall also be applied to the TFO. The TFO would be calculated based on the following: *Average Comparable Land Sale Cost (per acre)*(CMA-Option 1 Acres)*1.15 = TFO*

If construction has not begun within 12 months of the approval of the TFO, the TFO identified will expire and must be recalculated prior to beginning construction.

J. Wildlife and Habitat Mitigation Plan

The Certificate Holder shall develop a Wildlife and Habitat Mitigation Plan, in consultation with EFSEC and WDFW (see Appendix 2; Hab-8 Indirect Habitat Loss Compensation).

1. The Plan shall specify the Certificate Holder's plan for meeting Compensatory Mitigation Obligations. The Certificate Holder's Compensatory Mitigation Obligations will be met through the mechanisms identified in the final EIS and associated staff memos.

2. Pre-construction Project layout drawings will show expected permanent and temporary land disturbances.

3. The Plan shall include a process to determine the actual impacts to habitat following the completion of construction. In the event that actual impacts to habitat exceed the expected impacts determined prior to construction, the Wildlife and Habitat Mitigation Plan will include a mechanism for the Certificate Holder to provide supplemental compensatory mitigation (Supplemental Mitigation). In the event of such determination, WDFW shall provide evidence of such exceedance of impacts. Supplemental Mitigation, if any, would be proportional to impacts and may take the form of additional on-site habitat enhancement or the payment of an additional fee equivalent to the value of permanently disturbed project acres to WDFW in lieu of mitigation. Any supplemental

mitigation would be established in coordination with WDFW and reviewed and approved by the Council prior to implementation.

K. Raptor Nest Monitoring and Management Plan

Wind turbine buffer zones shall be established around all known raptor nests and be a minimum of 0.25 miles. The Certificate Holder shall prepare a Raptor Nest Monitoring and Management Plan for review by EFSEC and the Pre-operational Technical Advisory Group (PTAG) if buffer zones cannot be maintained (see Appendix 2**;** Wild-8 Turbine Buffer Zones).

L. Species Specific Mitigation Plans

Striped Whipsnake & Sagebrush Lizard: The Certificate Holder must conduct pre-construction surveys for the striped whipsnake and sagebrush lizard prior to alteration or destruction of suitable habitat (see Appendix 2; Spec-1 Striped Whipsnake & Sagebrush Lizard). WDFW shall be contacted prior to undertaking these surveys. If these species are identified through pre-construction surveys, the Certificate Holder shall prepare a Reptile Management Plan to reduce potential impacts on habitat, mortality, and barriers to movement for review by the PTAG and approved by EFSEC prior to implementation.

Burrowing Owl: The Certificate Holder shall conduct burrowing owl surveys within areas of direct loss (permanent, temporary, and modified) and associated Zones of Influence (ZOI). The results of these surveys would be provided to the PTAG and EFSEC and used to inform the final Project layout. If active burrows are identified within the Lease Boundary, the Certificate Holder shall develop a Burrowing Owl Management Plan for review by the PTAG and approved by EFSEC prior to implementation per Appendix 2; Spec-4 Burrowing Owl.

Ferruginous Hawk: In the event that a wind turbine, solar array, or BESS is proposed for siting within the 2-mile[1] radius surrounding a documented ferruginous hawk nest, the Certificate Holder shall, in consultation with the PTAG, develop a Project-specific Ferruginous Hawk Mitigation and Management plan for approval by EFSEC (see Appendix 2; Spec-5 Ferruginous Hawk).

M. Revegetation and Noxious Weed Management Plan

The Certificate Holder shall develop a Revegetation and Noxious Weed Management Plan, in consultation with EFSEC staff, WDFW, and Ecology.

1. The Plan must address vegetation management activities related to Project construction and operation.

2. The Certificate Holder shall develop the Plan to require all temporarily disturbed areas to be reseeded with an appropriate native seed mix selected in coordination with WDFW.

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[1] The draft site certification agreement provided to the Governor included a typographical error here that stated "within the 0.6 -mile (1km) radius". The Governor's office correctly determined from context that this was an error and asked EFSEC staff for confirmation that it was a typographical error, which EFSEC staff provided before the Governor executed the agreement. The SCA language here should state: "within the 2-mile radius".

3. In consultation with WDFW, the Plan shall include a restoration schedule that identifies timing windows during which restoration should take place, and an overall timeline for when all restoration activities will be completed.

4. The Plan shall also include benchmarks and a timeline for revegetation success, and a plan for monitoring revegetation to ensure success.

5. This plan must address the requirements set forth in BCC 15.08.220 and WAC 463-60-332(3).

6. The Plan must specify methods that will be implemented for effective noxious weed control and revegetation.

7. The plan must identify mowing schedule for vegetation maintenance and must be restricted March 15 to May 15 and limited to the extent practicable from February 1 to March 15 and May 15 to September 30.

N. Corridor Mitigation Plan

The Certificate Holder shall develop a Corridor Mitigation Plan for any siting Project components within medium to very high linkage movement corridors, as defined in Hab-1, in consultation with the PTAG and reviewed and approved by EFSEC. The plan shall describe the extent of direct and indirect habitat impact within the movement corridor, proposed measures to be implemented to reduce potential impacts on movement corridors, proposed features to accommodate wildlife movement for linear Project components, proposed restoration in movement corridors following Project decommissioning, performance standards to assess the effectiveness of mitigation measures and restoration, and the methods to monitor and measure performance standards as detailed in Appendix 2; Hab-1 Wildlife Movement Corridors. Results of corridor monitoring shall be reviewed annually with the TAC to evaluate the effectiveness and apply additional measures if necessary.

O. Livestock Management Plan

The Certificate Holder shall prepare a Livestock Management Plan with property owners and livestock owners to control the movement of animals within the Lease Boundary during construction, operation and decommissioning (see Appendix 2**;** LSU-1 Livestock Management Plan).

P. Dryland Farming Management Plan

The Certificate Holder shall prepare a Dryland Farming Management Plan for construction, operation, and decommissioning that outline communication requirements between the Certificate Holder and the landowners. The plan would establish work windows that would allow farmers uninterrupted access to their fields for dryland wheat planting and harvesting (see Appendix 2; LSU-2 Dryland Farming Management Plan)**.**

Q. Adaptive Safety Management Plan

To mitigate the loss of safe recreation, use for recreation enthusiasts, the Certificate Holder shall coordinate with local and regional (when appropriate) recreation groups (e.g., the Northwest Paragliding Club, the Tri-City Bicycle Club) to develop and maintain an Adaptive Safety

Management Plan to continue access to recreation activities in the Project area while keeping recreation enthusiasts safe (see Appendix 2**;** R-3 Recreation Safety Management Plan).

R. Initial Site Restoration Plan

The Certificate Holder is responsible for Project decommissioning and site restoration pursuant to Council rules. The Certificate Holder shall develop an Initial Site Restoration Plan at least 90 days prior to the beginning of site preparation in consultation with EFSEC staff pursuant to the requirements of WAC 463-72-040 in effect on the date of Application. The objective of the Plan shall be to restore the Project Site to approximate pre-Project condition or better (see Appendix 2; LSU-5 Site Restoration Plan. Refer also to Veg-7 Detailed Site Restoration Plan, Hab-1 Wildlife Movement Corridors, Hab-8 Indirect Habitat Loss Compensation, Spec-5 Ferruginous Hawk, Spec-9 Ring-necked Pheasant, and Spec-12 Townsend's Ground Squirrel for additional habitat and species-specific restoration requirements).

The Initial Site Restoration Plan shall be prepared in detail commensurate with the time until site restoration is to begin. The scope of proposed monitoring shall be addressed in the Initial Site Restoration Plan pursuant to the requirements of WAC 463-72-020.

The Plan shall include the following elements:

1. A detailed engineering estimate of the costs of the Certificate Holder or Transferee hiring a third party to carry out Site Restoration. A third party is a party who is neither a parent nor a subsidiary of the Certificate Holder. The estimate may not be reduced for "net present value" and may not include any salvage value that may be realized from the sale of facility structures or equipment, property interests, or other assets associated with the facility at the time of decommissioning and Site Restoration.

2. Decommissioning Timing and Scope, as required by Article VIII.D of this Agreement.

3. Decommissioning Funding and Surety, as required by Article VIII.Q of this Agreement.

4. Mitigation measures described in the final EIS, the Revised Final Application, and this Agreement.

5. A plan that addresses both the possibility that site restoration will occur prior to, or at the end of, the useful life of the Project and also the possibility of the Project being suspended or terminated during construction.

6. A description of the assumptions underlying the plan. For example, the plan should explain the anticipated useful life of the Project, the anticipated time frame of site restoration, and the anticipated future use of the Project Site.

7. An initial plan for demolishing facilities, salvaging equipment, and disposing of waste materials.

8. Performing an on-site audit and preparing an initial plan for disposing of hazardous materials (if any) present on the site and remediation of hazardous contamination (if any)

at the site. In particular, if the Certificate Holder constructs the Project with solar panels incorporating hazardous materials, such as Cadmium Telluride, then the Certificate Holder shall use appropriate precautions during decommissioning and removal of the solar panels to safely dispose of and to avoid, and, if necessary, remediate any soil contamination resulting from the panels' hazardous materials.

9. An initial plan for restoring the Project Site, including the removal of structures and foundations to four feet below grade and the restoration of disturbed soils.

10. Provisions for preservation or removal of Project facilities if the Project is suspended or terminated during construction.

S. Construction Traffic Control Plan

The Certificate Holder shall develop a Construction Traffic Control Plan, in consultation with EFSEC, the Benton County Public Works Department, and WSDOT.

1. The Traffic Control Plan must address traffic management during improvement of highway access.

2. The plan must contain measures to facilitate safe movement of vehicles in the vicinity of the construction zone and be in accordance with 23 CFR Part 655, Subpart F.

T. Cultural and Archaeological Resources Unanticipated Discovery Plan

With the assistance of an experienced archaeologist, and in consultation with EFSEC, Department of Archaeology and Historic Preservation (DAHP), and any concerned Tribes, the Certificate Holder shall develop a Cultural and Archaeological Resources Unanticipated Discovery Plan for monitoring construction activities and responding to the discovery of archaeological resources or buried human remains.

1. Prior to construction, the Certificate Holder shall obtain any necessary DAHP permits and perform any additional necessary archaeological work in order to comply with RCW 27.53.

2. The recommended mitigation measures included in Appendix 2; Table CR-2 Summary of Recommendations for Archaeological and Architectural Resource Mitigation shall be used in development of mitigation strategies.

3. The Certificate Holder shall obtain all necessary DAHP permits and perform all necessary archaeological work in order to comply with RCW 27.53 prior to disturbing the site.

4. The Certificate Holder shall provide copies of the draft Cultural and Archaeological Resources Unanticipated Discovery Plan for comment from the Yakama Nation and other potentially affected tribes prior to EFSEC approval.

5. The Cultural and Archaeological Resources Unanticipated Discovery Plan shall include, but not be limited to, the following:

a. A copy of the final construction and micro-siting plans for the Project and shall provide for the avoidance of archaeological sites where practical.

b. For sites to be avoided, the boundaries of identified cultural resources and buffer zones located within project boundaries shall be staked in the field and flagged as no-disturbance areas to avoid inadvertent disturbance during construction. These site markings will be removed following construction.

c. The Plan shall address alternative mitigation measures developed in coordination with DAHP and affected tribes to be implemented if it is not practical to avoid archaeological sites or isolates.

d. The Plan shall address the possibility of the unanticipated discovery of archaeological artifacts during construction.

e. If any archaeological artifacts, including but not limited to human remains, are observed during construction, then disturbance and/or excavation in that area will cease, and the Certificate Holder shall notify DAHP, EFSEC, and any affected Tribes and, in the case of human remains, the County Coroner or Medical Examiner.

    i. At that time, appropriate treatment and mitigation measures shall be developed in coordination with the agencies and tribes cited above and implemented following approval by EFSEC.

    ii. The Certificate Holder Shall develop a Cultural and Archaeological Resources Monitoring and Mitigation Plan in coordination with the Yakama Nation, other effected Tribes, and DAHP and submit the plan for EFSEC for final approval.

    iii. If Project facilities cannot be moved or re-routed to avoid the resources, the Certificate Holder shall contact EFSEC and DAHP for further guidance, which may require the implementation of a treatment plan. If a treatment plan is required, it shall be developed in consultation with DAHP and any affected Tribes.

Mitigation measures are intended to minimize impacts on historic and cultural resources with elevated sensitivity (precontact archaeological resources, National Register of Historic Places (NRHP)-eligible historic-period archaeological resources, TCPs, and unidentified historic and cultural resources), primarily through avoidance. If avoidance is not possible, the mitigation clarifies which resources would require a DAHP permit prior to disturbance. Mitigation measures also identify instances where engagement with DAHP, Tribes, and/or landowners would be required.

U. Construction Emergency Response Plan

The Certificate Holder shall prepare and submit a Construction Emergency Response Plan.

1. The Certificate Holder shall coordinate development and implementation of the Plan with applicable local and state emergency services providers.

2. The Certificate Holder shall retain qualified contractors familiar with the general construction techniques and practices to be used for the Project and its related support facilities.

3. The construction specifications shall require contractors to implement a safety program that includes an Emergency Plan.

4. The Construction Emergency Response Plan shall include consideration of the items identified in Appendix P of the ASC.

V. Construction Fire Control Plan

The Certificate Holder shall develop and implement a Construction Fire Control Plan in coordination with state and local agencies to minimize the risk of accidental fire during construction and to ensure effective response to any fire that does occur on the Project Footprint at any time. The Certificate Holder shall submit the Construction Fire Control Plan to EFSEC for review and approval at least ninety (90) days prior to Construction and provide a copy to Benton County Fire Districts #1 and #5. The Certificate Holder shall not begin Construction prior to obtaining EFSEC approval of the Construction Fire Control Plan.

W. Construction Health and Safety Plan

The Certificate Holder shall develop and implement a Construction Health and Safety Plan in consultation with local and state organizations providing emergency response services to ensure timely response in the event of an emergency.

X. Construction Site Security Plan

The Certificate Holder shall develop and implement a Construction Site Security Plan in consultation with local and state organizations providing emergency response services.

Y. Utilities

1. The Certificate Holder Shall identify the source of potable water for use during project operations and provide to EFSEC confirmation of availability of water via a drinking well permit or some other agreed upon mechanism for supply of potable water.

2. The Certificate Holder Shall provide certification of water availability for process waters used for site construction to include all Project actions, including vegetation management and solar panel washing.

Z. Soil Destabilization Notification and Fugitive Dust Control

The Certificate Holder must notify EFSEC of its intent to being construction at least 90 days prior to commencing construction. This notification is referred to as a Proof of Contact: Soil Destabilization Notification (see Appendix 2; A-2 Speed Limit). The Certificate Holder shall implement appropriate mitigation measures to control fugitive dust from roads and construction activities. The Certificate Holder shall use water or a water-based, environmentally safe dust palliative such as lignin, for dust control on unpaved roads during Project construction. The Certificate Holder shall not use calcium chloride for dust suppression.

AA. Construction Management Plan

The Certificate Holder shall, with the assistance of Council staff, develop a detailed Construction Management Plan in consultation with affected state and local agencies.

1. The Plan shall address the Construction phases for the Project and shall be generally based on the mitigation measures contained in this Agreement and the ASC.

2. The plan shall identify the construction management protocols used to address the mitigation measures contained in this Agreement and the ASC.

BB. Construction Schedule

No later than thirty (30) days prior to the beginning of Construction, the Certificate Holder shall submit to EFSEC an overall construction schedule. Thereafter, the Certificate Holder shall notify EFSEC of any significant changes in the construction schedule.

CC. Construction Plans and Specifications

The Certificate Holder shall submit to EFSEC those construction plans, specifications, drawings, and design documents that demonstrate the Project design will be in compliance with the conditions of this Agreement.

1. The Certificate Holder shall also provide copies to WDFW, Ecology, DAHP, and other agencies as EFSEC may direct, for comment.

2. The plans shall include the overall Project site plans, equipment, and material specifications.

3. The construction plans and specifications shall be in compliance with Benton County construction and building codes.

4. The plans shall identify any items relevant to the mitigation measures contained in this Agreement, the final EIS, and the ASC.

5. The Certificate Holder shall consult with emergency services suppliers prior to preparing final road construction plans, to ensure that interior all-weather access roads are sufficient to provide reliable access by emergency vehicles.

6. In its final design for construction, the Certificate Holder shall maximize the use of existing roads and pathways and minimize the construction of new roads as much as reasonable and practical to minimize disturbance of existing habitat. The final design shall be subject to approval by EFSEC as part of the overall construction plans and specifications.