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To: [EFSEC mi Comments](#)
Subject: Comments Ferruginous Hawk Nest Mitigation Plan
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External Email

PUBLIC COMMENT LETTER

These comments were inadvertently not submitted last night. We did not see that they were not transmitted until this morning Please accept them.

PJK

Ferruginous Hawk Nest Mitigation Plan – Legal and Procedural Deficiencies

Submitted to: Washington Energy Facility Site Evaluation Council (EFSEC)

Date: February 15, 2026

From: Paul Krupin, Kennewick, WA

I. Introduction

Thank you for the opportunity to comment on the proposed **Ferruginous Hawk Nest Mitigation Plan** (“Plan”) for the Horse Heaven Wind Farm.

After reviewing the Plan in detail and comparing it to the requirements of **RCW 80.50, WAC 463, SEPA (RCW 43.21C; WAC 197-11)**, and controlling Washington case law, it is clear that the Plan **does not meet EFSEC’s statutory obligations**.

The Plan repeatedly defers required analyses, weakens mitigation, and relies on future undefined actions. These patterns appear consistent with the policy acceleration directive in **Executive Order 2511**, but inconsistent with EFSEC’s binding legal duties. Executive Orders cannot override statutes, and EFSEC must apply the law—not policy preferences—when reviewing mitigation plans.

Because the deficiencies are significant and structural, **EFSEC cannot lawfully approve the Plan in its current form**.

II. EFSEC Must Apply Statutory and Regulatory Requirements—Not Executive Policy

A. Executive Order 2511 Cannot Modify EFSEC’s Legal Obligations

EO 2511 directs agencies to accelerate clean-energy permitting and support projects seeking federal tax credits. But Washington courts have repeatedly held that **executive policy cannot override statutory mandates:**

Wash. State Farm Bureau v. Gregoire, 162 Wn.2d 284 (2007) – The Governor may not “alter or amend statutory requirements.”

Brown v. Owen, 165 Wn.2d 706 (2009) – Executive orders cannot direct agencies to disregard statutes.

SEIU 775 v. Gregoire, 168 Wn.2d 593 (2010) – Executive authority does not extend to modifying statutory duties.

Thus, EFSEC may consider EO 2511 as background policy, but it **cannot use it to relax or bypass:**

RCW 80.50 (EFSEC statute)

WAC 463 (EFSEC regulations)

SEPA (RCW 43.21C; WAC 197-11)

State endangered species protections (WAC 232-12-014)

The Plan’s structure and omissions strongly suggest reliance on EO 2511 rather than compliance with binding law.

III. The Plan Fails to Demonstrate Required Avoidance and Minimization (WAC 463-62-040)

Washington law requires a clear hierarchy:

Avoid impacts first

Minimize impacts second

Mitigate only what cannot be avoided

The Plan does not provide:

Any alternatives analysis

Any demonstration that turbine siting within **0.6–2.0 miles** of nests was unavoidable

Any evidence that avoidance was maximized

Instead, it states:

“EFSEC approved primary infrastructure between 0.6–2.0 miles in 38 nest locations...” (Plan, p. 5)

This is not a legal justification. EFSEC cannot approve mitigation without a showing that avoidance was attempted and exhausted.

Washington courts require meaningful alternatives analysis:

Kittitas County v. EWGMHB, 172 Wn.2d 144 (2011) – Agencies must meaningfully evaluate alternatives; conclusory statements are insufficient.

Citizens for Clean Air v. Spokane, 114 Wn.2d 20 (1990) – SEPA requires a “reasoned evaluation” of alternatives.

The Plan does not meet these standards.

IV. The Plan Fails SEPA Mitigation Requirements (WAC 197-11-768)

SEPA requires mitigation to be:

Specific

Measurable

Enforceable

Proportional to the impact

The Plan repeatedly uses vague, nonbinding language:

“Mitigation actions will include a combination of...” (p. 7)

“Monitoring... will include documentation of management activities...” (p. 8)

“The specifics... will be described in the habitat mitigation plan currently being developed...” (p. 8)

Washington courts have consistently rejected deferred or vague mitigation:

Wells v. Whatcom County, 105 Wn. App. 753 (2001) – Mitigation cannot be deferred.

Swinomish Indian Tribal Community v. Skagit County, 161 Wn. App. 333 (2011) – Vague mitigation is legally insufficient.

Thornton Creek Legal Defense Fund v. Seattle, 113 Wn. App. 34 (2002) – Mitigation must be “certain and enforceable.”

The Plan’s mitigation framework violates SEPA.

V. Mitigation Ratios Are Unsupported and Contrary to WAC 463-62

The Plan assigns **0:1 mitigation** for agricultural land impacts, despite acknowledging that ferruginous hawks forage extensively in agricultural landscapes.

This contradicts:

WAC 463-62-040(2)(d) (mitigation must reflect functional habitat loss)

WDFW ferruginous hawk guidance

SEPA’s proportionality requirement

Washington courts require mitigation to address **functional ecological impacts**, not just vegetation categories:

Spokane County v. EWGMHB, 176 Wn. App. 555 (2013)

The Plan’s ratios are unsupported and unlawful.

VI. The Monitoring Program Lacks Required Metrics (WAC 463-62-040(2)(f))

The Plan provides no:

Quantitative metrics

Success criteria

Adaptive management triggers

Monitoring duration

Enforcement mechanisms

This violates EFSEC's monitoring requirements and SEPA's enforceability requirement.

Courts have invalidated monitoring plans lacking measurable standards:

Swinomish, 161 Wn. App. at 353

Wells, 105 Wn. App. at 759

The Plan's monitoring framework is legally inadequate.

VII. Curtailment Measures Are Non-Specific and Not Enforceable

The Plan proposes curtailment "during daylight hours" but:

Does not define "daylight hours"

Does not define "active nest"

Provides exceptions unsupported by evidence

Defers operational protocols to future decisions

This violates:

WAC 463-62-040(2)(c) (operational mitigation must be effective and enforceable)

SEPA's enforceability requirement

Thornton Creek, 113 Wn. App. at 54 (mitigation cannot be discretionary)

VIII. Restoration and Decommissioning Plans Are Improperly Deferred

The Plan states:

"An initial site restoration plan will be submitted... prior to construction... a detailed plan... within 90 days of the end of operations." (p. 8)

This violates:

WAC 463-72 (restoration plans must be complete before approval)

SEPA's prohibition on deferred mitigation

Wells and **Swinomish** (mitigation cannot be deferred)

IX. The Plan Appears to Rely on Executive Order 2511 Instead of Statutory Requirements

The Plan's structure—deferred mitigation, weakened standards, and reliance on future undefined actions—mirrors EO 2511's acceleration directive.

But Washington courts are clear:

Executive Orders cannot override statutes.

Agencies must follow RCW 80.50 and WAC 463.

Policy cannot substitute for law.

See:

Wash. State Farm Bureau v. Gregoire, 162 Wn.2d 284

Brown v. Owen, 165 Wn.2d 706

If EFSEC relied on EO 2511 to relax statutory requirements, that would constitute a procedural defect subject to judicial reversal.

X. Conclusion

For all the reasons described above, the Ferruginous Hawk Nest Mitigation Plan does **not** comply with Washington law. EFSEC cannot approve the Plan in its current form.

A legally compliant Plan must include:

A full alternatives analysis

Specific, enforceable mitigation

Functional habitat assessments

Quantitative monitoring metrics

Defined curtailment protocols

Complete restoration plans

Washington's endangered species protections, SEPA requirements, and EFSEC's statutory obligations demand nothing less.

Thank you for considering these comments.

/s/

Paul J. Krupin

Feb 15, 2026

Kennewick, WA