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BEFORE THE STATE OF WASHINGTON  
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of the Application of:  
Scout Clean Energy, LLC, for Horse Heaven  
Wind Farm, LLC,  
Applicant.

DOCKET NO. EF-210011  
**APPLICANT SCOUT CLEAN  
ENERGY'S PETITION FOR  
RECONSIDERATION OF THE  
COUNCIL'S REVISED  
RECOMMENDATION TO THE  
GOVERNOR**

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I. INTRODUCTION

To quote Governor Inslee:

Washington state faces the stark reality that without a rapid buildout of new clean energy generation and transmission, the dependability of our electricity grid is at risk. We must come to grips with the fact that we will need to adapt and accept relatively moderate changes to our physical landscape, in order to ensure continued, reliable electricity service.<sup>[1]</sup>

The Horse Heaven Clean Energy Center (“Project”) as originally proposed would have represented a significant step toward accomplishing these goals. That is, until the Energy Facility Site Evaluation Council’s (“Council” or “EFSEC”) initial recommended Site Certificate Agreement (“SCA”) imposed unprecedented and overbroad mitigation that would have greatly reduced the Project’s proposed generation capacity.

Facing that recommendation, the Governor and his team of legal and policy advisors<sup>2</sup> rightly remanded the matter back to the Council with express directions to more narrowly tailor mitigation to particular impacts, with reasonability and feasibility in mind. As to ferruginous hawk mitigation, he told the Council to revise its overbroad siting restrictions, eliminate its approach using hawk mitigation as a proxy to address other “compounding” impacts, and instead consider specific alternative approaches to ensure mitigation is limited to “times and places where hawks are present” and does “not reduce the generation capacity of the Project.”<sup>3</sup>

The Council made some progress. But now, 44 months after the initial application was filed, Scout still lacks any certainty about the Project’s feasibility. And the Council’s revised SCA still suffers some of the same significant flaws as the initial recommendation. Indeed, the revised SCA has little value because it does not certify where or how much of the Project can even be built and imposes no timeline for *when* that determination will be made.

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<sup>1</sup> Letter of Governor Jay Inslee to EFSEC Chair Kathleen Drew re Horse Heaven Wind Farm Project – EFSEC Recommendation, April 29, 2024 (“Governor’s Letter”) at 1.

<sup>2</sup> *See Id.* at 3.

<sup>3</sup> *Id.* at 4, 5 & App. A, 4-14.

1 The Council’s revised recommendation is functionally unworkable and deficient in two  
2 key ways. *First*, ambiguity in the revised SCA’s ferruginous hawk mitigation measure Spec-  
3 5 (“revised Spec-5”) violates the Governor’s directives and existentially threatens the Project’s  
4 viability because it creates ongoing uncertainty about where primary Project components can  
5 be sited. *Second*, the Council’s delegation of substantive project design determinations to an  
6 unprecedented interim discretionary approval body—a pre-construction, Pre-Operational  
7 Technical Advisory Group (“PTAG”)—without any timelines is improper, will delay Project  
8 construction *indefinitely*, and will doom future Council meetings to devolve into technical  
9 minutia with the Council as mediator of biological disputes whenever consensus eludes PTAG  
10 members.

11 The compounding nature of these two deficiencies severely challenges the Project’s  
12 viability. Without clear criteria in Spec-5 to inform which historical ferruginous hawk nest  
13 sites trigger exclusion setbacks, and with the ambiguous Spec-5 standards being applied by  
14 PTAG members *before* final Project design can occur, there is scant possibility that  
15 mitigation will be narrowly tailored and no certainty about where the Project components  
16 will be sited or *when* the answer to that question will be resolved. This approach will delay  
17 final Project design for many months, will add unnecessary expense, waste both Scout’s and  
18 the Council’s resources, and threatens Washington’s clean energy future by introducing  
19 significant uncertainty for developers looking to bring renewable energy to the state.

20 For the reasons that follow, the Council should reconsider its revised SCA.

21 **II. BACKGROUND**

22  
23 For a detailed discussion of the Project and process leading up to the Council’s initial  
24 recommendation to the Governor, please see Scout’s Petition for Reconsideration of the  
25 Council’s (initial) Recommendation to the Governor (May 20, 2024) at pp. 6-12.

26

1 **A. Recognizing that ferruginous hawk no longer uses the Project area, the**  
2 **Governor directed EFSEC to ensure its mitigation is “narrowly tailor[ed],”**  
3 **reasonable, feasible, and focused on times when hawks may be present.**

4 All data show that, sadly, ferruginous hawks no longer use the Horse Heaven Hills,  
5 which have an average ferruginous hawk nesting territory occupancy rate nearly *ten times*  
6 *below* the statewide average.<sup>4</sup> Nor will this area support ferruginous hawk recovery due to the  
7 historical conversion of habitat to farmland and the ongoing rampant residential development  
8 from the Tri-Cities with no end in sight.<sup>5</sup> Nevertheless, the initial SCA imposed two-mile  
9 buffers around all hawk nests, with no exceptions, and tasked an unprecedented PTAG with  
10 determining which nests are subject to the final setbacks. Scout submitted extensive comments  
11 on these issues, detailing the lack of any supporting evidence and the many problems these  
12 SCA provisions create.<sup>6</sup>

13 The Governor recognized the many problems with the initial SCA and directed the  
14 Council to revise several of its most problematic mitigation measures.<sup>7</sup> The Governor noted  
15 that the SCA should be limited to conditions that “are reasonably and feasibly consistent with  
16 achieving the full or near-full clean energy generation capacity of the Project.”<sup>8</sup> He directed  
17 the Council to revise Spec-5’s “overbroad” restrictions and limit mitigation to “those times and

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18 <sup>4</sup> Adjudication Exhibit EXH-3019\_X\_REDACTED, 2023 Raptor Nest Surveys for the Horse  
19 Heaven Clean Energy Center, Benton County, Washington, Erik W. Jansen (Aug. 3, 2023)  
20 (“2023 Raptor Survey”) at 19-20 (compare Horse Heaven Hills nesting territory occupancy  
21 during five-year survey period, 5.6%, with most recent statewide occupancy of 41.0%); *see also*  
22 at 19 (“During the 5-year survey period, the number of occupied ferruginous hawk territories and  
23 nests declined, even as the number of surveyed territories and nests increased”); *see also* Letter  
24 from Scout Clean Energy, Horse Heaven Wind Project, to EFSEC – Applicant Comments on  
25 Practical and Policy Problems with EFSEC Proposed Recommendation to the Governor (“Apr.  
26 Comment Letter”) at 4-7, 10-12 (Apr. 10, 2024); Comment Letter, Att. A, Scout Clean Energy,  
Horse Heaven Wind Project – Applicant Comments and Concerns on EFSEC Proposed Final  
Action (Jan. 19, 2024) (“Jan. Comment Letter”).

24 <sup>5</sup> *See* Governor’s Letter at 4 (“The sad reality is that the ferruginous hawk population has  
25 declined to minimal levels at the site over many years due to various factors including  
agricultural and residential land use decisions that pre-date this project.”).

26 <sup>6</sup> *See* Apr. Comment Letter at 4-17; Jan. Comment Letter at 3-6 (Spec-5), 9 (PTAG).

<sup>7</sup> Governor’s Letter at 4, Appx. A.

<sup>8</sup> *Id.* at 3, Appx. A.

1 places where hawks are present.”<sup>9</sup> He also told the Council “to consider, at a minimum,”  
2 specific “alternative mitigation approaches,” including conservation easements, replacing  
3 siting restrictions with operational curtailment and suspension of construction activity,  
4 requiring additional monitoring to mitigate ferruginous hawk impacts, and other mitigation  
5 measures identified in Appendix A to his letter.<sup>10</sup>

6 **B. The Council did not limit mitigation to times when hawks are present, instead**  
7 **adopting a vague and incomplete viability standard.**

8 In July and August 2024 meetings, the Council deliberated on revised mitigation  
9 measures for the Project. During the deliberations, the Council acknowledged the Governor’s  
10 letter but did not consider most of the alternative mitigation options directed therein to limit  
11 the severe wind turbine reductions caused by the revised proposed SCA’s ferruginous hawk  
12 mitigation.<sup>11</sup>

13 The Council ultimately approved a revised SCA at a special council meeting on  
14 September 13, 2024.<sup>12</sup> The revised SCA contains minor changes to measure Spec-5 and no  
15 changes to the provisions relating to the fraught PTAG, leaving the final design of the Project  
16 in limbo.

17 Revised Spec-5 continues to impose permanent exclusion zones regardless of whether  
18 ferruginous hawks are likely to be present. Revised Spec-5 prohibits siting of turbines within  
19 0.6 miles of any ferruginous hawk nest “[d]ocumented in [WDFW’s] PHS data on the effective  
20 date of the SCA, [i]dentified in the Certificate Holder’s nest surveys, and/or [t]hat may be  
21 newly established by the species between the SCA effective date and the time of  
22 construction.”<sup>13</sup> Revised Spec-5 allows turbines, solar arrays, and BESS siting between 0.6

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24 <sup>9</sup> *Id.* at 5.

<sup>10</sup> *Id.*

<sup>11</sup> EFSEC, Meeting Minutes (Aug. 29, 2024); EFSEC, Meeting Minutes (July 17, 2024).

<sup>12</sup> The Council sent the revised SCA to the Governor on September 17, 2024.

<sup>13</sup> Revised Draft Site Certification Agreement Between the State of Washington and Horse Heaven  
26 Wind Farm, LLC for the Horse Heaven Wind Farm Benton County, Washington (“Revised SCA”),  
Appx. 2, at 12-13 (Spec-5) (sent to Governor on Sept. 17, 2024).

1 and two miles<sup>14</sup> of a previously documented ferruginous hawk nest only if “the nesting site is  
2 no longer available” or “the foraging habitat within the 2-mile radius is no longer viable.” That  
3 is, revised Spec-5 *prohibits* turbines, solar arrays, and BESS based on nesting site viability  
4 *regardless* of whether any ferruginous hawk is using or likely to use the nest or habitat.<sup>15</sup>

5 Even more problematic, revised Spec-5 does not identify which nests would trigger the  
6 measure’s exclusion zones or even define when “the nesting site is no longer available” or “the  
7 foraging habitat ... is no longer viable,” which the Council has confirmed.<sup>16</sup> The Council  
8 expressly deferred those decisions to the PTAG.<sup>17</sup> Importantly, because the measure still does  
9 not fully define nest availability or habitat viability and because particular exclusion areas are  
10 not yet identified, revised Spec-5 could reduce the Project scope by nearly the same extent as  
11 the initial SCA and does not implement the Governor’s directive to restore the Project’s  
12 generation capacity.<sup>18</sup>

13 **C. The revised SCA continues to defer Project siting decisions statutorily required**  
14 **to be resolved by EFSEC in the SCA to a PTAG, without any timelines.**

15 Under the revised SCA, the PTAG has substantial involvement: It will review and  
16 consult on the development of plans and surveys, as well as on site design related to at least 12  
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19 <sup>14</sup> By employing a two-mile setback, revised Spec-5 continues to rely on WDFW policy guidance  
20 for the species that, while recently posted on WDFW’s website as no longer in draft form, was  
21 never peer reviewed or subject to public comment. As detailed in Scout’s prior comment letters,  
22 no other state or federal wildlife agency regulating the species imposes a setback this stringent.  
23 Apr. Comment Letter at 7-9; Jan. Comment Letter at 5.

24 <sup>15</sup> *Id.*

25 <sup>16</sup> EFSEC, Meeting Minutes at 13:7-20 (Aug. 29, 2024).

26 <sup>17</sup> *Id.*

<sup>18</sup> EFSEC, Meeting Packet at 168 (July 17, 2024) (indicating that Spec-5 as proposed could result  
in the elimination of 5.5% to 48% of turbines); *id.* at 41:2-8 (Aug. 29, 2024) (Young) (“[W]hat I  
also heard is that number, 36, could go up, depending upon the status that was determined for the  
total array of ferruginous hawk nests that are out there on the land. That number could go up  
significantly, depending upon how the status of each of those nests was determined to be.”); *id.* at  
41:12-14 (Greene) (“[I]t’s almost certainly going to go up. Just the extent of how [] much it goes  
up is [] still to be determined.”); Governor’s Letter at 4, 5.

1 separate SCA conditions, including for several different species and habitat types.<sup>19</sup> The scope  
2 of the PTAG’s subject matter is so broad that EFSEC is considering having “rotating members”  
3 to track the varied topics.<sup>20</sup> When the PTAG is acting in an advisory or consulting role  
4 (including defining and conducting nest availability and habitat viability assessments), EFSEC  
5 will *also* review this information before making the final decision.<sup>21</sup> But practically speaking,  
6 the PTAG members—not EFSEC staff or the Council—will be the ones reviewing the data  
7 and biological viability assessments and engaging in the substantive analysis to determine  
8 revised Spec-5’s exclusion zones. To be sure, those determinations will ultimately go to the  
9 Council as “recommendations” for approval. But without engaging in the formational analysis,  
10 Councilmembers will not be equipped or familiar with the substantial evidence supporting  
11 those recommendations. This approach will be highly disruptive to every monthly Council  
12 meeting and will necessitate micro-managing of this Project by the Council and re-litigation  
13 of previously decided issues on advocacy-, as opposed to science-, based decisions.

14 The Council’s approval of this approach was based on inaccurate statements on the  
15 record during its August 29, 2024 public meeting. EFSEC staff incorrectly explained to the  
16 Council that “EFSEC has used what is functionally a . . . technical advisory committee, or  
17 TAC, . . . and multiple projects have had these groups convene prior to the start of  
18 construction.”<sup>22</sup>

19 But a review of EFSEC’s existing site certificate agreements shows that no project has  
20 *ever* utilized a TAC that *advised on actual siting determinations, must less before construction.*  
21 For those projects that utilized a TAC, that committee never advised prior to final design  
22 approval and did not have authority to identify siting criteria or to make siting design

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24 <sup>19</sup> Revised SCA, Appx. 2, p. 26. The PTAG was formed for the sole purpose of advising on  
25 biological (habitat and wildlife) issues, as confirmed in the revised SCA. Under the revised SCA,  
26 additional delegation to the PTAG may occur.

<sup>20</sup> *Id.* at 15:4-14.

<sup>21</sup> *See, e.g.,* Revised SCA, Appx. 2, pp. 12-13 (Spec-5).

<sup>22</sup> Washington State Energy Facility Site Evaluation Council, Meeting Minutes at 14:11-24 (Aug. 29, 2024).



1 evaluations and recommendations.<sup>23</sup> This is not the same thing as a TAC. The PTAG’s  
2 mission significantly differs from the well-understood role of TACs throughout the Northwest.

3 Operating under this incorrect information, the Council finalized its proposed changes  
4 and, on September 17, 2024, sent the revised recommendation to the Governor.<sup>24</sup> The Council  
5 never addressed Scout’s comments or specific concerns raised, including not in any revised  
6 report or other accompanying document to the Governor.

### 7 III. LEGAL FRAMEWORK

8 A party to the adjudication may petition the Council to reconsider its recommendation  
9 to the Governor. WAC 463-30-335.

10 The Energy Facility Site Locations Act’s (“EFSLA”) *primary* directives are to:

11 reduce dependence on fossil fuels by recognizing the need for clean energy  
12 in order to strengthen the state’s economy, meet the state’s greenhouse gas  
13 reduction obligations, and mitigate the significant near-term and long-term  
14 impacts from climate change while conducting a public process that is  
transparent and inclusive to all with particular attention to overburdened  
communities.<sup>25]</sup>

15 To accomplish that goal, EFSEC must base its recommendations on six criteria, *one* of which  
16 focuses, among other things, on protection of the environment and “esthetic and recreational  
17 benefits of the air, water and land resources.”<sup>26</sup> Site certification decisions are subject to the  
18 Washington Administrative Procedures Act<sup>27</sup> and the State Environmental Policy Act.<sup>28</sup>

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21 <sup>23</sup> Regardless of when they are convened, a review of EFSEC’s current projects with TACs shows  
22 that while several TACs have been required to have their first meeting 60 days before the start of  
23 operations, *none* has a start date prior to construction. *See, e.g.,* Kittitas Valley Wind SCA at 23  
(effective Sept. 25, 2007); Whistling Ridge SCA at 24 (effective Nov. 18, 2013).

24 <sup>24</sup> This submission was nearly a month after the Governor’s 60-day deadline (Aug. 21, 2024) to  
24 submit a revised recommendation.

25 <sup>25</sup> RCW 80.50.010.

25 <sup>26</sup> RCW 80.50.010(2).

26 <sup>27</sup> *Residents Opposed to Kittitas Turbines v. EFSEC*, 165 Wn.2d 275, 304-05, 197 P.3d 1153  
(2008); RCW 34.05.570.

<sup>28</sup> RCW ch. 43.21C; *see* WAC ch. 463-47.

1 When administering its siting process, the Council must “review and consider  
2 comments received.” RCW 80.50.100(1)(b). The Council’s recommendation to the Governor  
3 must “dispos[e] of all contested issues.” WAC 463-30-320(6).

4 If the Governor “direct[s] the council to reconsider certain aspects of the draft  
5 certification agreement,” the Council must “reconsider” those aspects and “resubmit the draft  
6 certification to the governor incorporating any amendments deemed necessary upon  
7 reconsideration.” RCW 80.50.100(3)(a)(iii), (b). The Governor then has 60 days to  
8 “approve the application and execute the certification agreement”<sup>29</sup> or reject the application.  
9 RCW 80.50.100(3)(b).

#### 10 IV. ARGUMENT

11 **A. Revised Spec-5 violates the Governor’s directives because it is ambiguous and  
12 will likely trigger setbacks around non-viable and historical ferruginous hawk  
13 nest sites, and those occupied by competing avian species.**

14 The revised SCA’s version of mitigation measure Spec-5 does not meet the Governor’s  
15 directive and still poses significant practical obstacles that jeopardize the feasibility of the  
16 entire Project. The Governor expressly directed the Council to limit mitigation to “times and  
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19 <sup>29</sup> The Governor has broad approval authority under both (1) the EFSLA, *cf. Friends of Columbia*  
20 *Gorge, Inc. v. State Energy Facility Site Evaluation Council*, 178 Wn.2d 320, 333, 334, 310 P.3d  
21 780 (2013) (under EFSLA, Governor is not “subject to any restrictions” or “rules governing how  
22 the governor may exercise his or her discretion in approving or rejecting [a] project”); *see also*  
23 *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 80, 101, 392 P.3d 1025 (2017)  
24 (Council “or the governor” can “grant approval contingent on changes to the lease” if the project  
25 would not meet goals); and (2) the Washington Constitution, art. III, §§ 2, 5; *cf. Colvin v. Inslee*,  
26 195 Wn.2d 879, 892, 893, 467 P.3d 953 (2020) (respecting Governor’s exercise of Art. III, § 5  
authority); *Reiter v. Wallgren*, 28 Wn.2d 872, 881, 184 P.2d 571 (1947) (It is executive  
department’s “right and duty . . . to see that the laws as thus interpreted are properly enforced”;  
“final determination as to their enforcement and execution [is] lodged in the Governor.”); *State v.*  
*Clausen*, 146 Wash. 588, 592-93, 264 P. 403 (1928) (Governor is “highest executive authority,”  
thus, it would be “anomalous” if he could not execute law based on subordinate agency’s failure  
to implement his direction); *see also* RCW 80.50.030(2) (Governor appoints Council chair); RCW  
80.50.320 (Governor must evaluate Council operations).

1 places *where hawks are present*,” “based on the best available science *and ongoing site*  
2 *surveys*.”<sup>30</sup> Revised mitigation measure Spec-5 does neither.<sup>31</sup>

3 **1. Revised Spec-5 is not limited to times when ferruginous hawks could**  
4 **frequent the Project site and continues to ignore current science.**

5 Ferruginous hawks are migratory species that are only potentially present near the  
6 Project area during the spring and summer nesting season.<sup>32</sup> Therefore, as the Governor rightly  
7 recognized, ferruginous hawk-based restrictions have no potential benefit and need not apply  
8 outside of the nesting season. Further, surveys for ferruginous hawk nests in the Project area  
9 have been ongoing from 2017 to 2024 and, despite those many years of survey, show only one  
10 nesting attempt (documented five years ago in 2019).<sup>33</sup> So current data demonstrate that the  
11 species is absent from the Project area, even during the nesting season.

12 Yet Spec-5 does not limit siting restrictions to only those areas where ferruginous  
13 hawks are—or even likely to be—present. Instead, it imposes permanent, year-round  
14 exclusion zones that do not take into account nesting or other biologically significant seasonal  
15 considerations.

16 Revised Spec-5 also does not tailor its exclusion zones based on best-available current  
17 science in ongoing site surveys. Based on imprecise drafting, it could be interpreted to trigger  
18 an absolute 0.6-mile setback around any ferruginous hawk nest ever documented in WDFW’s  
19 PHS data, regardless of whether current science shows that a viable nest still exists or not.  
20 Revised Spec-5 is worded such that a 0.6-mile exclusion zone is triggered around any nest (1)

21 \_\_\_\_\_  
<sup>30</sup> Governor’s Letter at 5 (emphasis added).

22 <sup>31</sup> The Governor also directed the Council to “consider, at minimum,” three specific mitigation  
23 alternatives *instead of* absolute nest setbacks: (1) exclusion of most-valuable habitat types; (2)  
24 temporal options like operational curtailment and construction suspension during nesting and  
25 fledgling periods; and (3) monitoring-informed “adjustments to operating and construction  
26 activities as needed.” Governor’s Letter at 5. The Council did not expressly consider or even  
acknowledge these three alternatives in its deliberations or revised recommendation.

<sup>32</sup> Final Application for Site Certification: Horse Heaven Wind Farm at 1-8 (Sept. 2023) (describing  
ferruginous hawk sensitive nesting period); 2023 Raptor Survey at 4.

<sup>33</sup> 2023 Raptor Survey at 19-20; *see also* Jan. Comment Letter at 4; Apr. Comment Letter at 4, 11-  
12.

1 that is documented in PHS data, (2) that may be established before construction, “and/or” (3)  
2 that is identified in nest surveys.<sup>34</sup> But the use of “and/or” here makes it unclear if those three  
3 criteria are conjunctive (“and”) or disjunctive (“or”); thus, it is unclear whether all three criteria  
4 must be met or instead whether a setback is triggered when even just one criterion applies.<sup>35</sup>  
5 That is, the setback could apply even if the nest is not “available” to the species or is surrounded  
6 by only non-“viable” habitat. If a reader interprets the three criteria as disjunctive, then revised  
7 Spec-5 requires that a 0.6-mile setback is triggered by documentation *at any point* in the PHS  
8 database, even if the current survey data shows the nest site is non-existent, is now located in  
9 someone’s backyard, or is occupied by a competing avian species. That is the exact opposite  
10 of what the Governor directed.<sup>36</sup>

11 **2. Revised Spec-5’s ambiguity threatens to exclude just as much generation**  
12 **capacity as the initial recommendation.**

13 Revised Spec-5 allows some siting of Project infrastructure between 0.6 and two miles  
14 of certain ferruginous hawk nesting sites. But it does not include any clear criteria delineating  
15 *which* nesting sites, that is, when a nest is “available” or when habitat is “viable.” Absent such  
16 criteria, revised Spec-5 will likely preclude siting between 0.6 and two miles around even non-  
17 available nests surrounded by non-viable habitat—historical nest sites where ferruginous  
18 hawks have not been present for decades and will not be present in the future. Thus, it still  
19 risks excluding large siting areas due to outdated documentation of historical and other non-  
20 viable nests.

21 \_\_\_\_\_  
22 <sup>34</sup> Revised SCA, Appx. 2, p. 26 (emphasis added).

23 <sup>35</sup> See Exhibit A to Petition, Letter from Scout Clean Energy, Horse Heaven Wind Project to  
24 EFSEC – Applicant Comments on Council’s Reconsidered SCA (Aug. 25, 2024) (“Aug. Comment  
25 Letter”) at 7-9, for a redlined version of Spec-5 fixing this drafting ambiguity.

26 <sup>36</sup> The Council’s deliberations also suggest it continues, capriciously, to use Spec-5 to address  
mitigation for *other* resources. Chair Drew stated she approved of revised Spec-5 because the way  
it “is structured will eliminate some of the most visible turbines. . . . That’s my opinion – I’ll leave  
it at that – and certainly what I was striving to accomplish.” Transcript of Proceedings, EFSEC  
Special Meeting (Aug. 29, 2024) at 21:9-14. The Governor expressly rejected this approach. See  
Governor’s Letter at 4.

1 Spec-5 is ambiguous in two important ways:

2 **i. Spec-5 contains no criteria for when “a nesting site is no longer**  
3 **available.”**

4 As detailed in Scout’s prior comments,<sup>37</sup> without specific criteria for when a nest site  
5 is “available,” Spec-5 provides no clear bounds for a future decisionmaker (be it PTAG  
6 members, EFSEC staff, or the Council) to determine when siting is permitted within two miles  
7 of a documented nest site. Without such criteria, any forthcoming decision on which nests are  
8 available will necessarily be contentious and, ultimately, arbitrary.

9 The Council can easily remedy this problem by adding the necessary criteria. As  
10 suggested in prior Scout comment letters, it could utilize WDFW’s existing classification for  
11 nesting structures<sup>38</sup> or more specific criteria provided by Scout and its qualified biologist.<sup>39</sup>  
12 Doing so will ensure that mitigation is narrowly tailored to where ferruginous hawk are present  
13 or likely to occur and avoid arbitrary and haphazard application of Spec-5.

14 **ii. Revised Spec-5’s habitat viability standard is too vague to inform**  
15 **final Project layout.**

16 In the revised SCA, EFSEC attempted to clarify the “habitat viability” component of  
17 Spec-5 by revising it to state that habitat is “no longer viable” when it “has been altered by  
18 landscape-scale development . . . rendering the territory non-viable. This could include  
19 habitats that have been altered such that insufficient native or foraging habitat remains.” That  
20 revision only further confuses the analysis, however. Its definition is circular because it states  
21 that habitat is “no longer viable” when the territory (i.e., habitat) is so altered that it is “non-  
22 viable.” It also uses vague terms that are not rooted in biology or objective standards. For  
23 example, it is unclear when alterations are “landscape-scale” and when “insufficient native or  
24 foraging habitat remain[s].” That is, Spec-5 provides no threshold for when habitat is so altered

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26 <sup>37</sup> Apr. Comment Letter at 13-14; Jan. Comment Letter at 3-4.

<sup>38</sup> E.g., “gone,” “remnant,” or “poor.”

<sup>39</sup> Apr. Comment Letter at 15; Aug. Comment Letter at 2, 7-9.

1 by landscape-scale development that it is non-viable or the amount or quality of “native or  
2 foraging” habitat is “sufficient” to trigger a setback.

3 Scout’s comment letters provided several methods to clarify this ambiguity. One  
4 option would be including the viability flowchart in Scout’s April Comment Letter.<sup>40</sup>  
5 Alternatively, the Council could incorporate WDFW’s 2024 guidance for the species. Per that  
6 guidance, EFSEC could define viable habitat as the “natural vegetation and agricultural types”  
7 identified in Table 2 of that guidance, which recognizes that ferruginous hawk do not nest in  
8 areas where more than 30% of the core area is cropland.<sup>41</sup> Scout also provided a third clarifying  
9 option utilizing aspects of each of these strategies as a redline of the revised Spec-5 with its  
10 August comment letter.<sup>42</sup>

11 The uncertainty caused by revised Spec-5’s ambiguous language poses serious  
12 problems for the Project’s technical and practical viability.<sup>43</sup> Under revised Spec-5’s  
13 ambiguous and incomplete guidance, members of the PTAG, many of which will not even be  
14 biologists, likely will disagree about whether specific nests or habitat are available or viable,  
15 and Councilmembers will not have any standards to guide their decision on final Project layout.  
16 If applied incorrectly and without scientific foundation, the viability determination will force  
17 elimination of key Project infrastructure, substantially decreasing generation capacity. Again,  
18 this is out of step with the Governor’s directives.

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22 <sup>40</sup> Apr. Comment Letter at 14-15; *see also* Scout Clean Energy’s Motion for Reconsideration, 24  
(May 20, 2024).

23 <sup>41</sup> *See* Apr. Comment Letter at 14; WDFW, Management Recommendations for Washington’s  
24 Priority Species: Ferruginous Hawk 7 (January 2024); *see also* Adjudication Exhibit EXH-  
25 4015\_X, Draft Management Recommendations for Washington’s Priority Species: Ferruginous  
26 Hawk, James W. Watson & Jeffrey M. Azerrad (July 5, 2023) (WDFW Draft Management  
Recommendations) at 6-7 tbl. 2.

<sup>42</sup> Aug. Comment Letter at 7-9.

<sup>43</sup> Apr. Comment Letter at 16; Scout Clean Energy, Petition for Reconsideration of *Initial  
Recommendation*, Exhibit K (Letter from PGE to EFSEC (Apr. 10, 2024)).

1 Finally, Scout also notes that proposed measure Spec-5’s reliance on the date of start  
2 of construction, rather than date of SCA execution, poses significant feasibility problems and  
3 should be revised, as proposed in Scout’s August 2024 comment letter.<sup>44</sup>

4 In sum, adding objective criteria to Spec-5 is critical to prevent precisely what the  
5 Governor prohibited: large areas of the Project being excluded “based on the radii of historic  
6 hawk nests.”<sup>45</sup> The Council must clarify when a “nesting site is no longer available” and use  
7 an unambiguous definition of non-viable habitat that reflects the current reality that ferruginous  
8 hawks are not nesting in the Horse Heaven Hills. Scout comments included revisions to Spec-  
9 5 that more clearly outline the process for determining when a nest is viable and better explain  
10 what is required in a project-specific ferruginous hawk management plan, should infrastructure  
11 need to be sited within 2 miles of a viable nest location. But to date, the Council has not  
12 considered or responded to that comment or the suggested criteria. *See* RCW 80.50.100(1)(b).  
13 Nor did the Council dispose of this issue in its recommendation to the Governor, as required  
14 by WAC 463-30-320(6). The Council must grapple with this critical clarification in order to  
15 implement the Governor’s directive and avoid an arbitrary result.

16 **B. By delegating Spec-5 viability assessments to the PTAG, the revised SCA is**  
17 **neither reasonable nor feasible and will indefinitely delay final Project design**  
18 **and construction.**

19 Revised Spec-5 continues to delegate the nest viability determinations to the PTAG.  
20 Under revised Spec-5, the PTAG would review and make substantive recommendations  
21 *impacting final Project design* even *before* the Project is built.<sup>46</sup> Contrary to the Council and  
22 staff’s inaccurate statements during Council deliberations, this PTAG proposal is wholly  
23 unprecedented and distinct from the well-understood role of a TAC, which advises on *post-*  
24 *construction* monitoring and adaptive mitigation issues and does not make recommendations

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26 <sup>44</sup> Aug. Comment Letter at 7-9.  
<sup>45</sup> Governor’s Letter at 5.  
<sup>46</sup> *See* Scout Clean Energy, Petition for Reconsideration of Initial Recommendation at 12.

1 on *siting* considerations.<sup>47</sup> The Council has never acknowledged these distinctions, and they  
2 matter.

3 Delegating substantive setback recommendations to this novel entity is problematic for  
4 many reasons. *First*, by deferring nest site viability determinations until *after* SCA issuance,  
5 revised Spec-5 will likely delay final Project design for many months. Under EFSEC’s typical  
6 approach, at this stage in the certification process, the applicant would use the objective  
7 standards set forth in the SCA to finalize the project design and submit it to EFSEC staff for  
8 Council approval. But under revised Spec-5, EFSEC now still needs to convene and educate  
9 the PTAG, and the PTAG must learn the Project, review the data, and analyze nest availability  
10 and habitat viability (without clear criteria); and make recommendations based on those  
11 analyses. EFSEC will then have to consider and approve *each* nest determination before the  
12 applicant can even start developing the final project design. That final design, too, must be  
13 reviewed by the PTAG before it goes to EFSEC for approval. Practically speaking, this  
14 approach renders the entire revised SCA meaningless because Scout cannot determine where  
15 or how much of the Project can be built. Accordingly, Scout cannot secure financing or begin  
16 the extensive construction planning processes and procurement necessary to get a project built.  
17 If you do not know what you are building, you cannot determine how much it will cost or order  
18 the parts.

19 EFSEC has never acknowledged or grappled with the delay revised Spec-5 will cause.  
20 This delay is completely unworkable because it leaves Scout with no certainty to develop final  
21 engineering or finalize the critical agreements and financing needed to actually construct the  
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26 <sup>47</sup> See Transcript of Proceedings, EFSEC Special Meeting (Aug. 29, 2024) at 14:7-15:2; *see also*  
Letter from Dave Kobus, Scout to Sonia Bumpus, EFSEC re Correction of Record Misstatement  
about Pre-Operational Technical Advisory Group (Sept. 11, 2024).



1 Project. The delay poses substantial administrative obstacles, as noted below. And it is  
2 contrary to the EFSLA.<sup>48</sup>

3 **Second**, giving the PTAG this authority violates Washington law prohibiting an agency  
4 from delegating its discretionary or quasi-judicial authority, like the authority to make  
5 substantive decisions over Project components and exclusion zone locations.<sup>49</sup> The Council  
6 seems to interpret that it can delegate these decisions to the PTAG so long as the Council calls  
7 them “recommendations” and retains final approval authority over them.<sup>50</sup> But the revised  
8 SCA’s novel PTAG delegation scheme cannot be saved by simply penciling in final approval  
9 authority for the Council.<sup>51</sup> In order to adequately perform the duties tasked by the EFSLA,  
10 the Council itself must meaningfully review and assess each nest viability determination  
11 recommended by the PTAG. Doing so will pose immense administrative challenges and  
12 consume substantial Council resources (as detailed below). Far more likely is that the Council  
13 will summarily accept the technical findings of the PTAG without meaningful review or an  
14 understanding of the gravity of that review, thus shirking its substantive siting duties under the  
15 EFSLA.

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18 <sup>48</sup> RCW 80.50.010 (goal of EFSLA to address “pressing need for increased energy facilities” and  
19 to “streamline application review for energy facilities to meet the state’s energy goals”); RCW  
20 80.50.320 (emphasizing “efficiency of the siting process”).

21 <sup>49</sup> See *Application of Puget Sound Pilots Ass’n*, 63 Wn.2d 142, 145, 385 P.2d 711 (1963) (“It is a  
22 general principle of law ... that a delegated power may not be further delegated by the person to  
23 whom such power is delegated”) (quoting 42 Am. Jur. *Public Administrative Law* § 73 (year));  
24 *Wash. Fed’n of State Emps. v. State Dep’t of Gen. Admin.*, 152 Wn. App. 368, 385, 216 P.3d  
25 1061 (2009) (General Administration Department engaged in improper delegation by delegating  
26 to other agencies its task to regulate governmental bidding process).

27 <sup>50</sup> See Transcript of Proceedings, EFSEC Special Meeting (Aug. 29, 2024) at 13:21-14:6.

28 <sup>51</sup> Cf. *Assiniboine & Sioux Tribes of Fort Peck Indian Rsrv. v. Bd. of Oil & Gas Conservation of*  
29 *State of Mont.*, 792 F.2d 782, 794-95 (9th Cir. 1986) (reversing trial court’s holding that Secretary  
30 of Interior could delegate his authority to outside board, “an entity that has no independent  
31 jurisdiction” or ““independent authority over the subject matter,”” absent “clear proof of legislative  
32 intent to relieve the Secretary of ... his duties” under relevant enabling statute because Secretary,  
33 though Bureau of Land Management, could simply have “approv[ed] Board orders without  
34 meaningful independent review”).

1           **Third**, the delay and uncertainty posed by this condition in all likelihood could severely  
2 chill the State’s future clean energy development. These practical obstacles will make it  
3 impossible for Scout, and future project developers, to determine project viability, negotiate  
4 energy off-take or sale agreements, secure necessary project financing, develop any realistic  
5 construction timeline, or even determine whether any SCA amendments are necessary.<sup>52</sup> An  
6 SCA is of little use when it does not make clear where a project can be built or when that  
7 determination will be made because the certificate holder cannot move forward with final  
8 engineering or construction planning or even secure financing without that information.

9           **Fourth**, the recommendation will present an administrative nightmare for the Council  
10 itself. The Council’s PTAG measures—which place not just minor details but final Project  
11 design in the hands of non-Councilmembers and require Council approval of highly technical  
12 biological findings—go beyond any past TAC practice. In so doing, this approach risks  
13 derailing the Council’s monthly meetings for several years to come. Administering the PTAG  
14 and prolonging the decision-making that should be finalized in the SCA will bog down  
15 approval of other much-needed proposed renewable energy projects by taking up valuable  
16 EFSEC staff and Council time. By omitting the complicating interim discretionary approval  
17 process of the PTAG and issuing clearer criteria, the Applicant, with Council staff’s help, could  
18 develop viability determination applications, and EFSEC could review and approve or deny  
19 them, without risking hundreds of interim decisions requiring Council approval.

20           With the PTAG structure adopted in the revised SCA, the Council is generating a  
21 significant amount of associated approval workload for both Council and staff for the  
22 foreseeable future. This workload will be compounded by the precedent set by the revised

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24 <sup>52</sup> See, e.g., Apr. Comment Letter at 16; Scout Clean Energy, Petition for Reconsideration of Initial  
25 Recommendation, Ex. E, Letter from Renewable Northwest, Horse Heaven Project – Stakeholder  
26 Comments and Concerns on EFSEC Proposed Final Action at 1 (Apr. 10, 2024); Ex. B, Letter  
from American Clean Power Association & Energy and Wildlife Coalition to EFSEC, Horse  
Heaven Project – Stakeholder Comments and Concerns on EFSEC Proposed Final Action at 1, 2  
(Apr. 8, 2024); Ex. F, Letter from GE Vernova to EFSEC, Horse Heaven Project – Stakeholder  
Comments and Concerns on EFSEC Proposed Final Action at 1 (Apr. 9, 2024).

1 SCA. If EFSEC must review and approve not just the pre-construction Project design  
2 recommendations for the Horse Heaven Clean Energy Center but also other projects in the  
3 EFSEC permitting pipeline, that burden will fall on an already resource-stretched agency  
4 facing both a surging demand of complex projects to review and a mission to support action  
5 on Washington’s climate requirements with greater surety and speed. Simply put, *the PTAG*  
6 *would unnecessarily delay and incapacitate the Applicant’s cost-conscious, value-based*  
7 *engineering efforts in favor of singularly focused and overly restrictive conservation*  
8 *initiatives.* The Council must remove the PTAG’s authority to make substantive conclusions  
9 impacting viability determinations and thus final Project design and restore those decisions to  
10 where they belong—with informed, objective Council staff who will formulate streamlined  
11 recommendations for the Council in a timeline and manner that will facilitate certainty in  
12 Project development.

13 **V. CONCLUSION**

14 In his remand letter, the Governor correctly identified the problems with the  
15 mitigation measures contained in the Council’s initial recommended SCA. He remanded that  
16 recommendation for the Council to fix it, with specific directions on how to do so.

17 The Council tried, but after ignoring Scout’s detailed comments and several key  
18 aspects of the Governor’s directives, it fixed only some of the problems in the initial SCA.  
19 The Council must reconsider the critical aspects of its revised SCA recommendation  
20 discussed above and take seriously the Governor’s clear directives to correct the SCA in  
21 specific ways. Spec-5 must be revised to take current science into account and provide clear  
22 standards for nesting site viability. And recommendations affecting final Project siting and  
23 design must be returned to the Applicant and EFSEC staff, where they belong consistent with  
24 EFSEC’s typical practice.

25 Scout therefore respectfully requests that the Council reconsider the revised SCA to  
26 solve the problems discussed above.

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DATED: October 7, 2024.

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1 **CERTIFICATE OF FILING AND SERVICE**

2 I hereby certify that on October 7, 2024, I filed the foregoing **APPLICANT SCOUT**  
3 **CLEAN ENERGY’S PETITION FOR RECONSIDERATION OF THE COUNCIL’S**  
4 **REVISED RECOMMENDATION TO THE GOVERNOR** with the Washington Energy  
5 Facility Site Evaluation Council through an authorized method of service pursuant to WAC  
6 463-30-120(3).

7 I also hereby certify that I have this day served the foregoing document upon all  
8 parties of record in the adjudication proceeding by electronic mail at the email addresses  
9 listed on the attached Service List.

10  
11 DATED: October 7, 2024.

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# Exhibit A



August 25, 2024

Energy Facility Site Evaluation Council  
621 Woodland Square Loop SE  
Lacey, WA 98503

**Re: Horse Heaven Wind Project – Applicant Comments on Council’s Reconsidered Site Certification Agreement and Conditions, for Consideration, August 29, 2024**

Dear Chair Drew and Councilmembers:

Scout Clean Energy (“Scout” or “Applicant”), on behalf of the Horse Heaven Clean Energy Center (the “Project”), continues to appreciate the Energy Facility Site Evaluation Council’s (“Council” or “EFSEC”) consideration of the Project. On May 25, 2024, the Governor remanded the Council’s recommendation to approve the Project, as mitigated by Site Certification Agreement (“SCA”) conditions, and specifically directed the Council to “reconsider the conditions and mitigation in its recommendation in favor of an approach to mitigation that is more narrowly tailored to the specific impacts identified,” and that is limited “to those measures that are reasonably and feasibly consistent with achieving the full or near-full clean energy generation capacity of the proposed Project.”<sup>1</sup>

Scout appreciates EFSEC staff’s efforts to develop mitigation measures that are narrowly tailored to mitigate impacts while achieving the proposed generation capacity. Scout sees progress in the draft provided on August 19, 2024 (“proposed SCA”). Specifically, Scout agrees with the eastern battery energy storage system’s exemption from Spec-5 in the proposed SCA.<sup>2</sup>

However, the proposed SCA’s version of mitigation measure Spec-5 still does not meet the Governor’s objectives and poses significant practical obstacles that jeopardize the Project’s feasibility. As stated in the Applicant’s Petition for Reconsideration, the Council is shirking its primary duty *to site the Project*, instead impermissibly deferring that key decision until after the SCA is issued. Moreover, the Council proposes to relegate that decision to a Pre-operational Technical Advisory Group (“PTAG”) and to Washington Department of Fish and Wildlife (“WDFW”) staff through the measure’s blind adoption of inaccurate and poorly controlled Priority Habitat and Species (“PHS”) data unintended for regulatory purposes. In addition to the discussion below, in Exhibit A to this letter Scout has prepared recommended revisions to the proposed measure Spec-5 to cure the current issues.

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<sup>1</sup> Letter from Jay Inslee to Kathleen Drew (the “Governor’s Letter”), at 3 (dated May 23, 2024).

<sup>2</sup> See Proposed SCA, Appendix 2.

**I. Spec-5 remains too broad and ambiguous, and likely would arbitrarily exclude large areas that will gut the Project’s generating capacity.**

Proposed Spec-5 still threatens to exclude large areas of the Project because there are no clear objective criteria delineating when a nest is “available” or when habitat is “viable.” As a result, the measure still risks gutting large siting areas due to outdated documentation of historical and other non-viable nests. Nor does it follow the Governor’s specific guidance on Spec-5.

As currently proposed, Spec-5 allows turbines, solar arrays, and BESS siting between 0.6-2 miles of a known ferruginous hawk nest only if “the nesting site is no longer available” or “the foraging habitat within the 2-mile radius is no longer viable for the species.”<sup>3</sup> But Spec-5’s current wording does not comply with the Governor’s directive to limit mitigation to “times and places where hawks are present”<sup>4</sup> because as written, the measure’s ambiguous criteria for which nests are “available” and what surrounding habitat is “viable” could trigger avoidance zones around any nest, even historical nest sites where ferruginous hawks have not been present for decades. We believe this is not the Council’s intended outcome, but absent clarifying revisions to Spec-5, it is the likely outcome. Adding objective criteria is critical to prevent precisely what the Governor prohibited; large areas of the Project being excluded “based on the radii of historic hawk nests.”<sup>5</sup> To remedy this we have offered revisions to Spec-5 that more clearly outline the process for determining when a nest is viable and to better explain what is required in a project-specific ferruginous hawk management plan, should infrastructure need to be sited within 2 miles of a viable nest location. *See Exhibit A.*

**A. EFSEC must clarify when a “nesting site is no longer available” to uphold the Governor’s directive that Project exclusions are narrowly tailored to “times and places where hawks are present.”**

Spec-5 does not describe when “a nesting site is no longer available.” As explained in Scout’s prior submissions, more objectivity and specificity are needed to prevent a future situation in which scientists (or Councilmembers) must debate over a nest location’s availability and viability.<sup>6</sup> The Council has several options to remedy this issue. The Council could utilize WDFW’s existing classification for nesting structures<sup>7</sup> and/or the more specific criteria provided by Scout in its April Comment Letter.<sup>8</sup> Defining these key terms will ensure that mitigation is narrowly tailored to where ferruginous hawk are present or likely to occur. In our revised version

<sup>3</sup> Proposed SCA, Appx. 2, at 12 (August 19, 2024).

<sup>4</sup> Governor’s Letter at 5.

<sup>5</sup> Governor’s Letter at 5.

<sup>6</sup> Letter from Scout Clean Energy, Horse Heaven Wind Project, to EFSEC - Applicant Comments on Practical and Policy Problems with EFSEC Proposed Recommendation to the Governor 13-14 (“Apr. Comment Letter”) (Apr. 10, 2024); Letter from Scout Clean Energy, Horse Heaven Wind Project - Applicant Comments and Concerns on EFSEC Proposed Final Action (Jan. 19, 2024) (“Jan. Comment Letter”);

<sup>7</sup> E.g., “gone,” “remnant,” “poor”.

<sup>8</sup> Apr. Comment Letter at 15; Jan. Comment Letter at 4.

of Spec-5, attached, we provided clear definitions of what should be considered a viable or non-viable ferruginous hawk nest location. *See Exhibit A.*

Rather than leaving these determinations to a volunteer Pre-operational Technical Advisory Group (PTAG), we recommend that WDFW, the state’s natural resource agency with jurisdiction over state-listed species, agree to adopt the nest viability parameters presented in the attached revised Spec-5, in order to create a Project-specific ferruginous hawk nest database that will be relied upon to regulate ferruginous hawk nests as described in Spec-5. This database would incorporate existing PHS nest location information, as well as field-verified data from Scout’s biologists’ site surveys, to create a list of all documented ferruginous hawk nests in the Project area and surrounding areas, with their current condition compiled, all in one place. This list would serve as an up-to-date, field-verified inventory to inform the viability assessment contemplated in Spec-5.

**B. EFSEC’s proposed habitat viability clarification is not narrowly tailored to mitigate impacts without decreasing the Project’s generation capacity.**

EFSEC has attempted to clarify Spec-5 by stating that habitat is “no longer viable” when it “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,*” (“non-viable habitat”).<sup>9</sup> This language does not provide sufficient bounds to clearly formulate the Project’s final layout. For example, it is unclear from this definition when alterations are “landscape-scale development” or “insufficient native or foraging habitat remain[s].” That is, Spec-5 provides no threshold for when habitat is so altered by landscape-scale development that it is non-viable or the amount or quality “native or foraging” habitat “sufficient” to warrant an exclusion zone.

Scout’s comment letters provide several methods to clarify this ambiguity. One option would be including the viability flowchart in Scout’s April Comment Letter.<sup>10</sup> Alternatively, incorporating WDFW’s guidance for the species (2024) would be the most straightforward way to do so. EFSEC could define viable habitat as the “natural vegetation and agricultural types” identified in Table 2 of WDFW 2024 and recognize that ferruginous hawk do not nest in areas where more than 30% of the core area is cropland.<sup>11</sup>

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<sup>9</sup> Proposed SCA, Appx. 2, at12 (August 19, 2024).

<sup>10</sup> Apr. Comment Letter at 14-15; *see also*, Scout Clean Energy’s Motion for Reconsideration, 24 (May 20, 2024);

<sup>11</sup> *See* Apr. Comment Letter at 14; WDFW, Management Recommendations for Washington’s Priority Species: Ferruginous Hawk 7 (January 2024); *see also* Adjudication Exhibit EXH-4015\_X, Draft Management Recommendations for Washington’s Priority Species: Ferruginous Hawk, James W. Watson & Jeffrey M. Azerrad (July 5, 2023) (WDFW Draft Management Recommendations) at 6-7 tbl. 2.

As outlined in previous submissions, the uncertainty caused by Spec-5’s ambiguous language poses serious problems for technical and practical viability.<sup>12</sup> Under the current iteration, biologists likely will disagree whether specific FEHA nests or habitat is not viable. If applied incorrectly and without scientific foundation, the viability determination could force elimination of key components, including turbines, solar facilities, and BESS, substantially decreasing generation capacity.

The Council must clarify when a “nesting site is no longer available” and use an unambiguous, narrowly tailored definition of non-viable habitat. See Exhibit A.

**II. By impermissibly deferring and relegating viability determinations to the PTAG after site certification, Spec-5 will prevent final Project design, incapacitating and further delaying construction.**

Continuing its unprecedented approach, proposed Spec-5 delegates the nest viability determination to the PTAG.<sup>13</sup> Unlike the well understood role of a Technical Advisory Committee, which has a largely *advisory* role, the PTAG, would review and make conclusions dictating final Project design even before the Project is built.<sup>14</sup> This delegation to this novel entity is problematic for several reasons. **First**, by deferring the technical nest site viability determination until *after* SCA issuance, proposed Spec-5 will delay final Project design for many months (or even longer). This delay is completely unworkable, as it leaves Scout with no certainty to develop final engineering or finalize the critical agreements and financing needed to actually construct the Project. **Second**, giving the PTAG this authority violates Washington law prohibiting an agency from delegating its discretionary or quasi-judicial authority, like the authority to make substantive decisions over Project components and exclusion zone locations.<sup>15</sup> **Third**, it is not “reasonably and feasibly consistent with” achieving “full or near-full clean energy generation capacity” because the viability determination affecting final Project build-out will not be conducted by EFSEC staff or Councilmembers, but rather PTAG members several months later who are far too attenuated to implement the Governor’s directive.<sup>16</sup> **Fourth**, the delay and uncertainty posed by this condition will chill future clean energy development by making it impossible for Scout, and future project developers, to determine project viability, negotiate energy off-take or sale agreements, secure necessary project financing, develop any

<sup>12</sup> Apr. Comment Letter at 16; Scout Clean Energy, Petition for Reconsideration, Exhibit K: Letter from PGE to EFSEC (Apr. 10, 2024);

<sup>13</sup> Proposed SCA, Appx. 2, 12-13.

<sup>14</sup> Scout Clean Energy, Petition for Reconsideration at 12.

<sup>15</sup> See *Application of Puget Sound Pilots Ass’n*, 63 Wn.2d 142, 145 (1963) (It is a general principle of law ... that a delegated power may not be further delegated by the person to whom such power is delegated. (quoting 42 Am. Jur. Public Administrative Law § 73)); *Wash. Fed’n of State Emps. v. State Dep’t of Gen. Admin.*, 152 Wn. App. 368, 385 (2009) (General Administration Department engaged in improper delegation by delegating to other agencies its task to regulate governmental bidding process).

<sup>16</sup> See Apr. Comment Letter at 1.

realistic construction timeline, or even determine whether any SCA amendments are necessary.<sup>17</sup> The proposal here—which would place not just minor construction details but *final Project design in the hands of non-Councilmembers and would require consideration and approval of detailed, biological information during Council meetings—goes much further, risking derailing the Council’s monthly meetings for several years to come.* By omitting the complicating middle-process of the PTAG and issuing clearer criteria, the Applicant could develop viability determination applications, and EFSEC could review and approve or deny them, without risking hundreds of interim decisions requiring Council approval.

Simply put, the PTAG would unnecessarily delay and incapacitate the Applicant’s cost-conscious value-based engineering efforts in favor of singularly focused and overly restrictive conservation initiatives. *The Council must remove the PTAG’s authority to make substantive conclusions impacting viability determinations and thus final project design.*

In addition to the Spec-5 problems discussed above, Scout also notes that proposed measure Spec-5’s reliance on the date of start of construction, rather than date of SCA execution, poses significant feasibility problems and should be revised, as proposed in Exhibit A.<sup>18</sup>

## CONCLUSION

In sum, as proposed, Spec-5 does not comply with the Governor’s letter and ignores the Governor’s most specific critique of the Council’s many mitigation measures. It is critical that these remaining problems be addressed to accomplish the Governor’s directive, uphold the Council’s duties, and ensure the full or near-full generation capacity of the approved Project without further delay.

If the Council finalizes this Proposed SCA with the current deficiencies, the Governor can—and must—use his plenary authority to override EFSEC’s decision, and to ensure the mandates of the Energy Facility Site Location Act and the state’s climate goals are met. We urge the Council to uphold its duties and ensure a meaningful clean energy future for Washington.

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<sup>17</sup> See e.g. Apr. Comment Letter at 16; Scout Clean Energy, Petition for Reconsideration, Ex. E, Letter from Renewable Northwest, Horse Heaven Project - Stakeholder Comments and Concerns on EFSEC Proposed Final Action, at 1 (Apr. 10, 2024); Scout Clean Energy, Petition for Reconsideration, Ex. B, Letter from American Clean Power Association & Energy and Wildlife Coalition to EFSEC, Horse Heaven Project -Stakeholder Comments and Concerns on EFSEC Proposed Final Action, at 1, 2 (Apr. 8, 2024) ; Scout Clean Energy, Petition for Reconsideration, Ex. F, Letter from GE Vernova to EFSEC, Horse Heaven Project - Stakeholder Comments and Concerns on EFSEC Proposed Final Action, at 1 (Apr. 9, 2024)

<sup>18</sup> In addition, to the extent that any of Scout’s concerns as asserted in previous submissions, including our January Comment Letter, April Comment Letter, and its Petition for Reconsideration have still not been addressed, we reassert them here. See Jan. Comment Letter; Apr. Comment Letter, Scout Clean Energy, Petition for Reconsideration.



Scout Clean Energy LLC  
1805 29<sup>th</sup> Street, Suite 2050  
Boulder, CO 80301  
(303) 284-7566

Sincerely,

A handwritten signature in black ink that reads "Michael Rucker".

Michael Rucker, President and Chief Executive Officer  
Scout Clean Energy



Horse Heaven Wind Farm LLC  
Site Certification Agreement  
EXCERPTS - Appendix 2. Mitigation  
Measures

**Spec-5 Ferruginous Hawk:** The Certificate Holder shall not site any wind turbines, solar arrays, or BESS within a 0.6-mile (1 km) radius surrounding ferruginous hawk nests listed in a WDFW-established, project-specific regulatory version of the PHS database. The project-specific database will differentiate between viable and non-viable ferruginous hawk nests.

Ferruginous hawk nests are considered viable if:

- The nest is documented as “Good” or “Fair” in the PHS regulatory database project-specific database and Certificate Holder’s nest surveys on the effective date of the SCA, and
- The nest has breeding habitat, as listed in Table 2 of WDFW (2024), that represents more than 30% of the total area within the 2-mile radius of the nest location for the species identified in the Certificate Holder’s nest surveys, and/or

Ferruginous hawk nests are considered no longer viable if:

- The nest is no longer available (i.e., is listed as Gone, Remnant, or Poor condition in the project-specific database PHS or the Certificate Holder’s nest survey data), or
- Breeding habitat, as listed in Table 2 of WDFW (2024), does not represent more than 30% of the total area within the 2-mile radius of a viable nest location for the species.

Appropriate mitigation to address any ferruginous hawk nest sites that may be newly established by the species and confirmed by future nest surveys between the SCA effective date and the time of construction will be evaluated addressed via the adaptive management strategy specified in measure Wild-1.

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

—unless a ferruginous hawk management plan is completed, as described below compensation habitat, as described below, will provide a net gain in ferruginous hawk habitat,

and either:

- the nesting site is no longer available (i.e., is listed as Gone, Remnant, or Poor condition in PHS or the Certificate Holder’s nest survey data), or
- the foraging breeding habitat, as defined by listed in Table 2 of WDFW (2024), does not represent more than 30% of the total area within the 2-mile radius of a is no longer viable nest location for the species.

Habitat considered no longer available viable for ferruginous hawk would include habitat that does not meet the definition of breeding habitat in WDFW 2024. If a 2-mi core area around a nest location contains less than 30% viable habitat, has been altered by landscape scale development (conversion to cropland, residential development, industrial development) rendering the territory nest location will be considered 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 viable ferruginous hawk nest without prior approval by EFSEC based on the process described below.

The extent of component encroachment into the core area of a viable nest, -described above habitat in ferruginous hawk territories, defined as the area within a 2-mile radius surrounding documented that nests,

**Commented [A1]:** Revision recommended to add clarity and incorporate current science into development of avoidance areas.

**Commented [A2]:** Proposed revisions provide clarity drawn from PHS existing nest classification system and WDFW 2024, the species’ management recommendation guidance. First, any land cover or vegetation types not on that list would be considered non-viable (See WDFW 2024, Table 2 on Page 9). Second, incorporating the guidance’s science with respect to a 30% habitat metric. See WDFW 2024 guidance at p.7 (“Effects of cultivation on ferruginous hawk nesting have been studied extensively in grassland habitats in Alberta where ground squirrels were the primary prey ...In that study, hawk densities were greatest on random survey plots where ≤10% of the land was in cultivation. Hawk densities declined in areas where cultivated lands exceeded 30% (Schmutz 1999).”)

**Commented [A3]:** Proposed revisions provide clarity drawn from PHS existing nest classification system and WDFW 2024, the species’ management recommendation guidance. First, any land cover or vegetation types not on that list would be considered non-viable (See WDFW 2024, Table 2 on Page 9). Second, incorporating the guidance’s science with respect to a 30% habitat metric. See WDFW 2024 guidance at p.7 (“Effects of cultivation on ferruginous hawk nesting have been studied extensively in grassland habitats in Alberta where ground squirrels were the primary prey ...In that study, hawk densities were greatest on random survey plots where ≤10% of the land was in cultivation. Hawk densities declined in areas where cultivated lands exceeded 30% (Schmutz 1999).”)

**Commented [A4]:** Per comment below regarding Measure PHS-2, by relying on the date of “time of construction,” these two measures defer any certainty on final project design until the day construction begins. This is not feasible and will bar project development. Moreover, by staggering EFSEC’s review of the final project design, this timeline unnecessarily wastes the Council’s resources by requiring a piecemeal review process.

Any new nests are best addressed through adaptive management. The revisions proposed incorporate the approach employed in Spec-1 and Spec-2, for example.

**Commented [A5]:** Clarifying to avoid interpretation that only PHS-documented nests are included.

**Commented [A6]:** Proposing for internal consistency with use of “viable” below.

**Commented [A7]:** “Territory” typically refers to a group of nests, which is not the intended meaning here. Propose changing for clarity.

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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, develop a Project-specific ferruginous hawk mitigation and management plan in consultation with the PTAG~~ for approval by EFSEC, which includes:

1. ~~A description of a~~ A set of habitat parameters to document whether habitat in a core ~~range-area~~ is considered non-viable. ~~T~~ 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 ~~nearest~~ viable nesting habitat, ~~and~~ available nesting sites, and a description of documented use of ~~nesting locations and associated~~ 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 area~~.  
~~1.~~ The proximity of infrastructure to any known nest ~~site or location and associated~~ suitable foraging habitat.  
~~2.~~
4. ~~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.~~
5. A description of efforts to site Project infrastructure to avoid ~~core~~ breeding and foraging habitat in the core area, 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 viable 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~~ active 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 viable ferruginous hawk nests documented in PHS data and the Certificate Holder's nest surveys.
- ~~A~~
6. ~~A~~ description of when construction activities will be undertaken to avoid sensitive timing periods for ferruginous hawk.
7. 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 within the Lease Boundary and any accessible areas (i.e., publicly accessible or access granted by a private land owner/landowner) outside of the Lease Boundary.
  - c. Identification of potential flyways between nest sites and foraging habitat and monitoring of ~~e-d.~~ potential flyways to inform final turbine siting and orientation.
  - d. Ongoing monitoring of nest use and ~~territory~~ success.
8. 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, as set forth in Wild-1, 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.

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**Commented [A8]:** As detailed in the comment letter, EFSEC's delegation of these aspects of the avoidance areas and mitigation measures impacting final project design to the PTAG is improper, inefficient, and unwarranted.

All substantive aspects of Spec-5 can and should be implemented by the Applicant based on existing WDFW authorities and approved directly by EFSEC staff and the Council.

**Commented [A9]:** Revisions intended to clarify meaning of this requirement. As worded, it is unclear what this description is intending.

**Commented [A10]:** Again, revising to clarify intent of this description.

**Commented [A11]:** Revision proposed to ensure internal consistency with established monitoring program.



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.~~

**Rationale:** The mitigation measure avoids and reduces potential loss of ferruginous hawk habitat, disturbance to ferruginous hawk, and ferruginous hawk mortality, while allowing for adaptive management throughout Project construction and operation. ~~The rationale for the exemption of the East BESS 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.~~

\* \* \*

**PHS-2 Firefighting Aircraft Standoff Buffers:** No wind turbines shall be sited within 0.25 miles of the maximum perimeter of one or more historic wildfires that have been recorded between January 1, 2000 and the ~~start of construction~~ time of SCA execution.

**Rationale:** The Washington Department of Natural Resources (DNR) has stated that any firefighting aircraft in service with their agency would observe a minimum of a 0.25-mile standoff buffer from wind turbines during aircraft operation. This mitigation measure ensures that DNR firefighting aircraft can safely and effectively be deployed to areas of higher wildfire likelihood within and adjacent to the Project Lease Boundary to assist in firefighting when needed.

**Commented [A12]:** Revision proposed to ensure internal consistency of structure of conditions in Appendix 2 of the SCA.

**Commented [A13]:** Revision proposed to ensure necessary certainty in final project design before beginning of construction, and to facilitate more efficient, consolidated EFSEC review. As written, this would practically delay the final layout indefinitely based on a moving target and unnecessarily stagger EFSEC's final review.

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