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 MOTION TO ENFORCE PROTECTIVE ORDER

Pursuant to RCW 34.05.578, the Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation") respectfully moves the Energy Facility Site Evaluation Council ("EFSEC" or "Council") to investigate an apparent recent public disclosure of sensitive wildlife data by Applicant Scout Clean Energy, LLC ("Applicant") and enforce the Protective Order issued by Judge Adam Torem on May 24, 2023. In the event that EFSEC does not diligently prosecute a petition for civil enforcement against Applicant, this Motion shall also serve as Yakama Nation's 60-day notice of its intent to petition for civil enforcement of the aforementioned Protective Order pursuant to RCW 34.05.582, effective immediately, and with notice hereby given to EFSEC, Applicant, and the Attorney General of the State of Washington through the Attorney General's Counsel for the Environment.

Based upon the information available to Yakama Nation at this time, it appears that the Applicant provided sensitive and confidential wildlife data to the Seattle Times in violation of the

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Protection Order in this proceeding. The attached Exhibit A was published by the Seattle Times February 21, 2024 and can be accessed on the Seattle Times' public website as of the date of this Motion.[1] The article includes a detailed map depicting historical Ferruginous Hawk nest locations, with the Applicant credited as a source for the map. Exhibit A at 3. The article also relies heavily on interviews with Applicant representatives. *Id*. at 3-5.

Individual Ferruginous Hawk nest sites have been designated and treated as confidential information throughout this adjudication. Every reference to the location of Ferruginous Hawk nests in pre-filed testimony, pre-hearing briefs, the closed sessions of the adjudication, and in the post-hearing briefs were redacted, often with a reference to RCW 42.56.430.[2] Simply put, the parties to this adjudication would not have been able to discuss important and sensitive information about Ferruginous Hawk nest locations but for agreeing to the terms of the Protection Order, which the Applicant has seemingly violated.

Consistent with the Protective Order and RCW Chapter 34.05, Yakama Nation respectfully requests that this Council immediately and transparently investigate Applicant's disclosure of confidential information and "seek enforcement of its rule or order by filing a petition for civil enforcement in the superior court." RCW 34.05.578(1).

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[1] https://www.seattletimes.com/seattle-news/climate-lab/how-an-endangered-hawk-could-topple-plans-for-was-largest-wind-farm/.

[2] *See e. g.* EXH-3017_X_Erik Jansen Cross Examination (Redacted); EXH-3019_X_Erik Jansen Cross Examination (Redacted); Updated Application for Site Certification ("ASC"), Appendix K-Biological Reports (Redacted); ASC, Appendix M-Bird and Bat Conservation Strategy (Redacted).

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Dated this 22nd day of February, 2024.

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CERTIFICATE OF SERVICE

I, Shona Voelckers, certify that on February 22, 2024 I electronically filed the foregoing document with the Energy Facility Site Evaluation Council ("EFSEC") at Adjudication@efsec.wa.gov.

I further certify that on February 22, 2024 I served the same upon all parties of record and identified EFSEC staff in this proceeding by electronic mail as follows:

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Dated this 22nd day of February, 2022.

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EXHIBIT A

How an endangered hawk could topple plans for WA's largest wind farm

Feb. 21, 2024 at 6:00 am | *Updated Feb. 21, 2024 at 6:00 am*

Wind turbines line the ridge overlooking Kennewick. The Horse Heaven Hills wind farm is proposed for this area. (Luke Johnson / The Seattle Times, 2023)

By Conrad Swanson

Seattle Times climate reporter

CLIMATE LAB

Climate Lab is a Seattle Times initiative that explores the effects of climate change in the Pacific Northwest and beyond. The project is funded in part by The Bullitt Foundation, Mike and Becky Hughes, University of Washington and Walker Family Foundation, and its fiscal sponsor is the Seattle Foundation.

What began as the largest wind project ever proposed in Washington — the Horse Heaven Hills wind farm — will likely soon be cut to a fraction of the original vision.

Why?

Because more than 100 of the turbines, which could stand taller than the Space Needle, might pose a danger to a little-known and

endangered species in the Tri-Cities area: the ferruginous hawk.

A ferruginous hawk. (U.S. Fish and Wildlife Service)

To protect the hawk, Washington's Energy Facility Site Evaluation Council, or EFSEC, will consider removing more than half of the project's proposed turbines, marking a victory for ecologists who petitioned for the changes but a substantial defeat for the Colorado developer behind the project and a delay for this state's renewable energy goals.

The council, which serves as a clearinghouse for regulatory and permitting hurdles these types of large projects face, asked its staff late last month to draft a recommendation that would remove any turbines too close to any hawk's nests. It's expected to vote whether to

finalize that decision in the coming days or weeks.

The potential cuts underscore the difficulties developers face in finding the right location for the kinds of massive renewable energy projects Washington needs to wean its grid off fossil fuels and to meet the ever-increasing demand for the power.

"It's just too risky to invest in Washington," said Michael Rucker, founder and CEO of the project's developer, Scout Clean Energy.

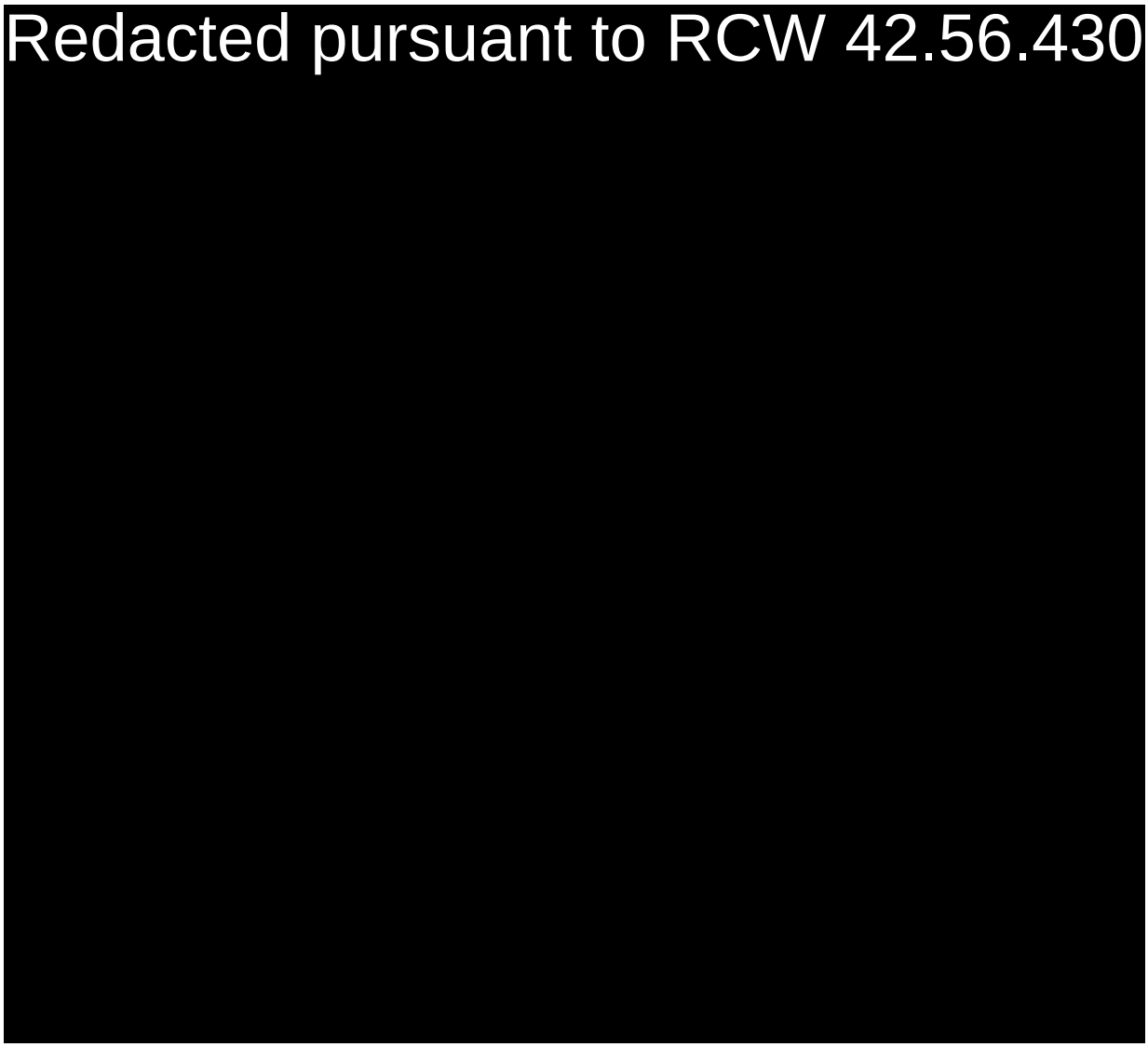
On the other hand, even if halved, the wind farm would still be Washington's second-largest. The Windy Point project in Klickitat County would continue to hold the first-place spot. And environmental advocates say the anticipated decision shows the state can protect its natural habitat and build more clean energy at the same time.

The original proposal from 2021 would cost $1.7 billion and include up to 222 wind turbines across 24 miles of the Horse Heaven Hills near the Tri-Cities. In addition, three solar arrays would cover up to 5,447 acres in the area.

The wind farm marks the most ambitious step in recent years toward Washington's renewable energy and emission-cutting goals. Even so, if fully built, the project would add less than 5% of the total clean-energy capacity the state needs by 2035. And now EFSEC appears ready to cut that capacity in half.

Opposition to the project arose almost immediately, similar to that seen by the Nine Canyon Wind Farm, which was built in the area decades earlier. This time the most vocal pushback comes from a small group of local retirees called Tri-Cities C.A.R.E.S., arguing the new turbines would sit too close to the community, scarring their scenic views and lowering property values.

The group also seized on the threat to endangered species.



The ferruginous hawk

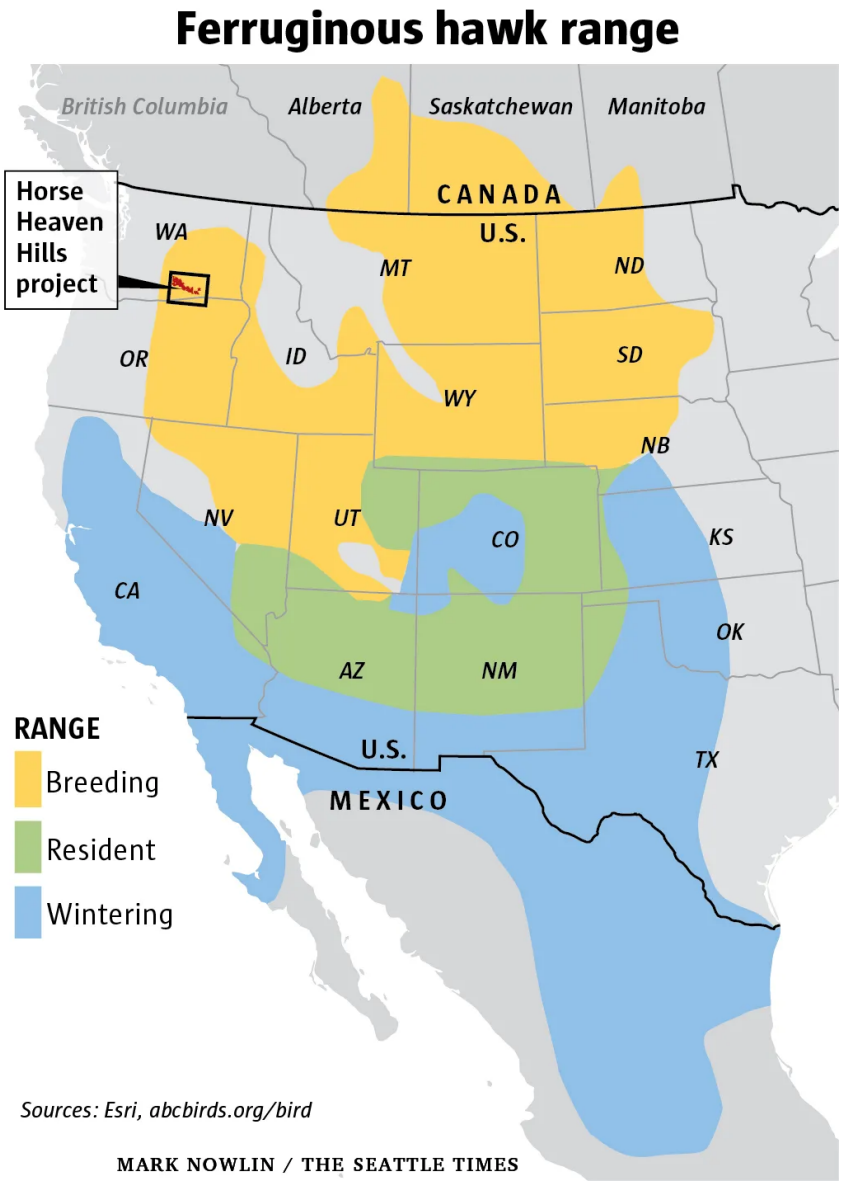
With a wingspan of up to 56 inches, the ferruginous hawk is North America's largest buteo, a type of medium to large, wide-ranging

raptor.

Early historical records indicate the species was once “relatively abundant” in the state (mostly in Eastern Washington), according to a 2021 report from the state Department of Fish and Wildlife.

Over the past 50 years as farms and cities expanded, the hawk’s habitat shrank, and by the early to mid-’90s, an average of 55 breeding pairs nested in the state, the report found. Since then the numbers declined further and habitat conditions have only grown worse.

More than 200 nests are known to exist throughout 12 Washington counties, with the majority sitting in Franklin and Benton counties, the report says. The hawks build their nests on rocky outcrops and the ground. If those nests are close to turbines they’re at an increased risk of being killed by the fast-spinning blades.



The hawk had been listed as “threatened” by the department since 1983, but after a routine review in 2021, which also generated the report, the species was pushed onto the “endangered” list, department spokesperson Jennifer Becar said.

Despite the state listing in Washington, the hawks enjoy no such protections at the national level. Federal officials considered the matter in 1983 and 1991 but found that a national listing was not warranted.

Eastern Washington could be considered the edge of the hawk’s range, said Trina Bayard, interim executive director for the National Audubon Society’s Washington office. Even so, the hawks have been known to return to empty nests decades after they left.

Bayard and biologists with the Department of Fish and Wildlife recommended that any turbines in the area should not sit within 2 miles of any ferruginous hawk nests.

Halving the wind farm

Scout originally proposed building 244 turbines in the area, and later reduced the number to 222 in an effort to appease detractors. But EFSEC now might cut another 117 or more to provide enough buffer for the nests.

Dave Kobus, the developer's senior project manager, said now their best-case scenario is to try for 105 turbines.

He chafed at EFSEC's proposed reduction, arguing that many of those nests have sat empty for quite a few years and might already have other developments nearby.

"It doesn't make any sense to eliminate that number of turbines for a twig on the ground," Kobus said.

To be clear, wind turbines do kill birds, probably hundreds of thousands every year. Those deaths also pale in comparison to the number killed each year by house cats, large buildings, power lines or, for that matter, the fossil fuels the turbines are meant to replace, according to the Massachusetts Institute of Technology's climate team.

Renewable energy opponents repeatedly cite turbine-related deaths to block or attack wind farm projects despite the broader understanding that climate change represents a much more significant threat.

Bayard and Adam Maxwell, senior policy manager for Audubon's Washington office, acknowledge the dynamic but believe EFSEC found the right balance for the Horse Heaven Hills wind farm, a project they support.

"We're really pleased," said Bayard, who also holds a doctorate in ecology.

"We have to recognize that climate change is a massive threat, and it's one of the biggest threats there is to birds and people," Maxwell said. "But that doesn't mean we can just sacrifice our most important resource in the process of trying to meet those [renewable energy] goals. And we don't have to."

Pam Minelli, of Tri-Cities C.A.R.E.S., agreed that the changes are welcome, particularly since most in the group worried that the council would rubber-stamp the project as proposed.

While the ferruginous hawk was indeed the common factor among the turbines removed, EFSEC spokesperson Karl Holappa noted that the council also considered opposition from other sources.

The Yakama Nation argued that the wind farm would damage the cultural and historical significance of the Horse Heaven Hills. And an attorney for Benton County said the project would inappropriately change the use of state-protected agricultural lands.

Korbus and Rucker say they're still hoping to win back as many turbines as they can, though they acknowledge the challenge ahead. Even if they're only allowed to build a fraction of the turbines, they said the effort might still be worth it.

Demand for electricity that the wind farm would produce is only growing.

Rucker noted, though, that EFSEC's anticipated decision will set a precedent for similar projects in the future. Scaling back the size of future wind farms could make it impossible for the state to meet its renewable energy goals in the years ahead, he said.

The fate for the Horse Heaven Hills wind farm hasn't yet been sealed. Holappa said EFSEC wouldn't vote on the recommendation until today at the earliest, and the documents must also pass through a public comment period first, so the process is likely to take longer.

Wherever the council lands, its recommendation will then pass on to Gov. Jay Inslee, who could either uphold the recommendation or make tweaks of his own. A representative for the governor declined to comment on the project because it's still under consideration.

Even after the final decision, the developer or other groups involved in the process could decide to file an appeal, which would move the case before the Washington Supreme Court.

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