

**BEFORE THE STATE OF WASHINGTON**  
**ENERGY FACILITY SITE EVALUATION COUNCIL**

In the Matter of

Docket No. EF-210011

Scout Clean Energy, LLC, for  
Horse Heaven Wind Farm, LLC,  
Applicant

**Council Order No. 883**

**ORDER FINDING PROPOSED  
SITE CONSISTENT WITH LAND  
USE REGULATIONS**

**BACKGROUND**

**Synopsis.** *Scout Clean Energy, LLC, submitted an application to the Energy Facility Site Evaluation Council (EFSEC or Council) on February 8, 2021, for site certification of the proposed Horse Heaven Wind Farm in Benton County. The applicant demonstrated that the Facility is not a prohibited use within the County’s agricultural zone but requires a conditional use permit (CUP). The County agrees that a CUP is required in order to approve the Facility. The Council determines the proposed Facility site was consistent with Benton County land use and zoning regulations at the time the application was filed. RCW 80.50.090(2). However, the Council has not yet determined whether the proposed Facility site meets the CUP criteria set out in Benton County’s zoning code, or whether it may require a variance from setback requirements. The Council will schedule an adjudicative proceeding to fully consider the Facility site’s suitability for a CUP and if so, whether the proposal qualifies for a setback variance under the local zoning code.*

- 1 **Nature of Proceeding.** This matter involves an application for site certification (Application or ASC) filed on February 8, 2021, by Scout Clean Energy (the Applicant) to construct and operate Horse Heaven Wind Farm (the Facility), a renewable energy generation facility including wind and solar energy generation with battery energy storage systems and supporting facilities. The Facility would be located in the Horse Heaven Hills area of unincorporated Benton County, Washington, approximately 4 miles south/southwest of the city of Kennewick and the larger Tri-Cities urban area, along the Columbia River (the Site). The Applicant estimates that the Facility would generate up to 1,150 megawatts (MW).

2     **Land Use Consistency Hearing.** RCW 80.50.090(2) requires EFSEC to “conduct a public hearing to determine whether or not a proposed site is consistent and in compliance with city, county, or regional land use plans or zoning ordinances.” On March 9, 2021, EFSEC issued a Notice of Informational Public Hearing and Land Use Consistency Hearing and scheduled a virtual hearing by Skype or by telephone participation for 5:30 p.m. on Tuesday, March 30, 2021.<sup>1</sup>

3     On March 30, 2021, the Council conducted a virtual land use consistency hearing to hear testimony regarding whether the Facility was consistent and in compliance with Benton County’s local land use provisions. The following EFSEC members were present at the March 30, 2021, hearing: Robert Dengel (Department of Ecology), Kate Kelly (Department of Commerce), Mike Livingston (Department of Fish and Wildlife), Leonard “Lenny” Young (Department of Natural Resources), Derek Sandison (Department of Agriculture), Stacey Brewster (Utilities and Transportation Commission), and Ed Brost (Benton County). Kathleen Drew, EFSEC Chair, presided over the hearing.

4     Assistant Attorney General Bill Sherman, Counsel for the Environment, was present for the land use consistency hearing.

5     Timothy McMahan, Stoel Rives Law Firm, represented the Applicant and spoke on the Applicant’s behalf. Ryan Brown, Benton County Deputy Prosecutor, represented the County and spoke on the County’s behalf. The Council allowed for but did not receive any testimony from members of the public.

6     *Applicant’s Description of Proposed Facility.* The proposed Horse Heaven Wind Farm is a renewable energy generation facility designed to generate a maximum of 1,150 MW utilizing wind turbines and solar photovoltaic panels to convert energy from the wind and sun into electric power. This power would then be either directly transferred to the electric power grid or stored on up to three battery energy storage systems (BESS) on the Site. The Facility would be located in the Horse Heaven Hills area of unincorporated Benton County, Washington, approximately 4 miles south/southwest of the city of Kennewick and the larger Tri-Cities urban area, along

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<sup>1</sup> The Council sent this Notice to all interested persons on the mailing list for the Facility including landowners within one mile and to all subscribers to EFSEC’s general minutes and agenda list. Further, the Council posted this Notice in English and Spanish on its public website, distributed the Notice to local libraries, and purchased advertisement in the Tri-City Herald and the Corvallis Gazette Times, the local daily newspapers of general circulation.

the Columbia River.

- 7 According to the Application, the Facility would be located entirely within the county's Growth Management Act Agricultural (GMA AG) land use designation and entirely within the county's corresponding Growth Management Act Agriculture District (GMAAD). Application for Site Certification, Sections 2.1.3 and 2.23.3.
- 8 The ASC seeks authorization for up to 244 wind turbine locations and three distinct solar arrays with BESS to be located on a maximum footprint of 6,869 acres of leased agricultural land, a figure representing 1.1 percent of County agricultural lands. Scout has executed leases covering all potentially affected parcels within the project lease boundary, a total area encompassing approximately 72,428 acres. Much of this land is privately owned and actively managed for dryland agriculture (primarily wheat farming) and livestock grazing; some parcels are managed by the Department of Natural Resources.<sup>2</sup> Application for Site Certification, Sections 2.1, 2.2, 2.3, 2.23, 3.1.2, 4.2.1, and 4.2.6.2; Tables 2.1-1, 2.3-1, and 4.2.6-4; Figures 2.1-1 and 2.1-2.
- 9 The Applicant contends the proposed Site is consistent and in compliance with Benton County's land use plans and zoning ordinances because the Facility is allowable as a conditional use in the GMAAD. The Applicant emphasizes that after construction and during operation of the Facility, existing agricultural land uses will continue on over 90 percent of the acreage within the project lease boundary. Scout also provided its analysis of how the Facility would meet the County's criteria for a conditional use permit (CUP).
- 10 *Benton County's Position.* Benton County contends that the Site proposed for the Facility is not consistent with its Comprehensive Plan's Agricultural zone because it would not preserve and protect prime agricultural land. The County stresses that eliminating over 1 percent of its prime agricultural land from actual or potential agricultural production is significant. Even so, the County concedes that the Facility *might* be allowed as a conditional use in the GMAAD, but only after an evidentiary hearing or adjudication. The County also objected to the Facility's proposed layout for security fencing around the solar arrays to span parcels, making compliance with existing setback provisions impossible.

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<sup>2</sup> The list of landowners within the project lease boundary is set out in Appendix F to the ASC.

## DISCUSSION

### I. Land Use Consistency Determination

- 11 The purpose of the land use hearing is “to determine whether at the time of application the proposed facility was consistent and in compliance with land use plans and zoning ordinances.”<sup>3</sup> In this order, the Council will refer to land use plans and zoning ordinances collectively as “land use provisions” and will refer to its decision as pertaining to “land use consistency.”
- 12 The Council’s evaluation of land use consistency is not dispositive of the Application and a determination of land use consistency is neither an endorsement nor an approval of the Facility.<sup>4</sup> The evaluation pertains only to the general siting of categories of uses, taking into account only the Site and not the Facility’s construction and operational conditions.
- 13 Whether a particular project will actually create on- or off-site impacts (including impacts to the environment) is considered separately through the State Environmental Policy Act (SEPA) process, during the Council’s adjudication, through the environmental permitting processes (if applicable), and through other Council processes (if applicable).<sup>5</sup> The Council’s ultimate recommendation to the Governor will be made after full and thorough consideration of all relevant issues.
- 14 The Applicant did not obtain certificates from local Benton County authorities attesting to land use consistency. Therefore, the Applicant retains the burden of proving the Site is indeed consistent and compliant with the local jurisdiction’s land use provisions.<sup>6</sup>

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3 WAC 463-26-050.

4 In re Whistling Ridge Energy Project, Council Order No. 868 at 9 (October 6, 2011) (Whistling Ridge Order). A determination of land use inconsistency simply results in the Council’s further consideration of whether local land use provisions should be preempted. WAC 463-28-060(1), see also RCW 80.50.110(2) and WAC 463-28-020. If they are preempted, the Council will include in any proposed site certification agreement conditions designed to recognize the purpose of the preempted provisions. WAC 463-28-070.

5 RCW 80.50.090(3), RCW 80.50.040(9), (12), WAC 463-30, WAC 463-47, WAC 463-76, WAC 463-78.

6 WAC 463-26-090. In cases where such certificates are obtained, they are regarded as *prima facie* proof of consistency and compliance with local land use plans and zoning ordinances absent contrary demonstration by anyone present at the hearing.

- 15 **Definitions of “Land Use Plan” and “Zoning Ordinances”.** The term “land use plan” is defined by statute as a “comprehensive plan or land use element thereof adopted ... pursuant to” one of the listed planning statutes.<sup>7</sup> EFSEC interprets this definition as referring to the portions of a comprehensive plan that outline proposals for an area’s development, typically by assigning general uses (such as housing) to land segments and specifying desired concentrations and design goals.<sup>8</sup> Comprehensive plan elements and provisions that do not meet this definition are outside of the scope of the Council’s present land use consistency analysis. The term “zoning ordinance” is defined by statute as an ordinance “regulating the use of land and adopted pursuant to” one of the listed planning statutes.<sup>9</sup> EFSEC has interpreted this definition as referring to those ordinances that regulate land use by creating districts and restricting uses in the districts (i.e., number, size, location, type of structures, lot size) to promote compatible uses. Ordinances that do not meet this definition are outside of the scope of the Council’s present land use consistency analysis.
- 16 EFSEC has defined the phrase “consistent and in compliance” based on settled principles of land use law: “Zoning ordinances require compliance; they are regulatory provisions that mandate performance. Comprehensive plan provisions, however, are guides rather than mandates and seek consistency.”<sup>10</sup>
- 17 **The County’s Comprehensive Plan.** The portions of the Benton County Comprehensive Plan that meet the statutory definition are within Chapter 3 (Land Use Element), Chapter 4 (Natural Resource Land Elements), Chapter 5 (Economics Element), Chapter 8 (Parks, Recreation, Open Space and Historic Preservation Element), and Chapter 10 (Utilities Element). Chapter 3 identifies the land use designations assigned in the Comprehensive Plan, along with corresponding zone classifications present in each land use designation. Lands designated for “Growth Management Act Agriculture” (GMA AG) are considered agricultural lands of long-term commercial significance. Chapter 4 sets out policies to conserve GMA AG areas “for a broad range of agricultural uses to the maximum extent possible and protect these areas from the encroachment of incompatible uses,” but also to

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7 RCW 80.50.020(14).

8 In re Northern Tier Pipeline, Council Order No. 579 (Northern Tier Pipeline Order) at 9 (November 26, 1979).

9 RCW 80.50.020(22).

10 Whistling Ridge Order at 10 n 15.

“recognize that only uses related or ancillary to, supportive of, complimentary to, and/or not in conflict with agricultural activities are appropriate in areas designated GMA Agriculture.”

- 18 **The County’s Zoning Ordinances.** The portions of the County’s zoning ordinances that meet the statutory definition are the County’s zoning map, Title 11 of the Benton County Code (Zoning), specifically BCC 11.17 GMAAD, and associated definitions. The entirety of the Facility is zoned Growth Management Act Agriculture District (GMAAD). BCC 11.17.010 describes the purpose of the GMAAD as “protection of agricultural lands of long term commercial significance” in the district “by limiting non-agricultural uses to those compatible with agriculture and by establishing minimum lot sizes in areas where soils, water, and climate are suitable for agricultural purposes.” In addition to farming, the following uses are among those allowed by BCC 11.17.040 in the GMAAD: single family dwellings, adult family homes, wineries/breweries/distilleries, airstrips (personal), schools and churches, kennels (commercial and private), single wind turbines less than sixty feet in height, and meteorological towers.
- 19 Under the Benton County Code, the Facility would meet the definitions of a “Solar Power Energy Facility, Major”<sup>11</sup> and of a “Wind Turbine Farm.”<sup>12</sup> Both of these uses may be permitted as a “conditional use” in Benton County’s GMAAD zoning district after notice and public hearing if they satisfy the conditional use criteria.<sup>13</sup>
- 20 Under Benton County Code Section 11.50.040(d), a conditional use is permitted when it:
- (a) Is compatible with other uses in the surrounding area or is no more incompatible than are any other outright permitted uses in the applicable zoning district;
  - (b) Will not materially endanger the health, safety, and welfare of the surrounding community to an extent greater than that associated with any other permitted uses in the applicable zoning district;
  - (c) Would not cause the pedestrian and vehicular traffic associated with the use to conflict with existing and anticipated traffic in the neighborhood to an extent greater

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<sup>11</sup> BCC 11.03.010(167).

<sup>12</sup> BCC 11.03.010(190) and (191).

<sup>13</sup> BCC 11.17.070(t) and (cc).

- than that associated with any other permitted uses in the applicable zoning district;
- (d) Will be supported by adequate service facilities and would not adversely affect public services to the surrounding area; and
  - (e) Would not hinder or discourage the development of permitted uses on neighboring properties in the applicable zoning district as a result of the location, size or height of the buildings, structures, walls, or required fences or screening vegetation to a greater extent than other permitted uses in the applicable zoning district.

- 21 **The Test for Consistency and Compliance.** Under the test for land use consistency previously established by the Council, EFSEC considers whether the pertinent local land use provisions “prohibit” the site “expressly or by operation clearly, convincingly and unequivocally.” If a site can be permitted either outright or conditionally, it is consistent and in compliance with the local land use provisions.<sup>14</sup>
- 22 Applying the facts to the test established, we conclude the Site is consistent with the pertinent portions of the land use provisions because neither the pertinent portions of the Plan nor the pertinent portions of the zoning ordinances clearly, convincingly, and unequivocally prohibit the Facility. The Plan does not provide guidance on the siting of renewable energy facilities. The zoning ordinances specifically allow the proposed use to be authorized in the GMAAD zone as a conditional use. We note that the County previously permitted the Nine Canyon Wind Project (25 turbines) in this zoning district. Therefore, we conclude the pertinent land use provisions do not clearly, convincingly or unequivocally prohibit the Facility. Under the established precedent for a minimal threshold for determining land use consistency, the Facility is consistent and in compliance with Benton County’s land use provisions.
- 23 The Council’s land use consistency determination does not prejudice whether the Facility has met or can meet Benton County’s conditional use criteria. Additionally, the Council’s land use consistency determination also does not address the question raised by the County regarding specific parcel setback requirements for solar arrays. These are questions for later EFSEC proceedings,<sup>15</sup> after which EFSEC may recommend and impose conditions of approval to address Benton County’s CUP and

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14 In re Columbia Solar Project, Docket No. EF-170823, Council Order – Expedited Processing, ¶ 35 (April 17, 2018).

15 Id., ¶ 36.

variance<sup>16</sup> criteria in a Site Certification Agreement (SCA).

### FINDINGS OF FACT

- 24 (1) On February 8, 2021, Scout Clean Energy submitted an application for site certification to construct and operate Horse Heaven Wind Farm (the Facility), a renewable energy generation facility, including wind and solar energy generation with battery energy storage systems and supporting facilities to be located in Benton County, Washington.
- 25 (2) On March 30, 2021, the Council convened a virtual land use consistency hearing, pursuant to due and proper notice. The Council received presentations from the Applicant's attorney and the County's attorney. No testimony was presented.
- 26 (3) The Site is located in unincorporated Benton County, Washington. The Site is located entirely within the Growth Management Act Agricultural (GMA AG) land use designation and entirely within the county's corresponding Growth Management Act Agriculture District (GMAAD).

### CONCLUSIONS OF LAW

- 27 (1) The Council has jurisdiction over the subject matter of this proceeding and the parties to it pursuant to RCW 80.50.090 and WAC chapter 463-26.
- 28 (2) The Council provided adequate notice to interested parties, and the Council has adequate information to render a land use consistency decision.
- 29 (3) Under the Benton County Code, the Facility meets the definitions of a "solar power generation facility, major" and a "wind turbine farm."
- 30 (4) The Facility Site is on land zoned GMAAD, an area of Benton County primarily dedicated for agricultural uses. However, major solar power generation facilities and wind turbine farms are conditionally permitted in the GMAAD.
- 31 (5) A site is consistent and in compliance with land use plans and zoning ordinances if it is permitted absolutely or conditionally. To be inconsistent and noncompliant, the plan or ordinances must expressly, or by operation, clearly

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<sup>16</sup> See BCC 11.50.030.

convincingly, and unequivocally prohibit the facility site.

- 32 (6) The Applicant has met its burden of proof of demonstrating that the site is consistent and in compliance with Benton County's Comprehensive Plan and applicable zoning ordinances in effect as of the date of the application as required by RCW 80.50.090(2).
- 33 (7) The matter will be scheduled for an adjudication to consider whether the Council should recommend approval of the Application and, if so, to determine specific conditions to include in a draft site certification agreement that address the County's criteria for issuance of a conditional use permit.

**ORDER**

THE COUNCIL ORDERS:

- 34 (1) Scout Clean Energy's application is consistent and in compliance with local land use plans and zoning regulations.
- 35 (2) Scout Clean Energy's application would require a conditional use permit under local zoning regulations.
- 36 (3) The matter shall be set for an adjudication to consider any conditions which might be required for the construction, operation and maintenance of the Facility in the GMAAD, consistent with Benton County's conditional use criteria in effect at the time the application for site certification was filed with EFSEC. The adjudication may be held concurrent with, or separate from the adjudication related to the application for site certification under RCW 80.50.090(3).

DATED at Olympia, Washington, and effective May 17, 2022.

WASHINGTON STATE ENERGY FACILITY SITE EVALUATION COUNCIL

  
KATHLEEN DREW, Chair