

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of Application

Docket No. EF-220011

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

Council Order No. 888

ORDER DENYING REQUEST TO CALL
WDFW EMPLOYEES FOR CROSS
EXAMINATION

On August 24, 2023, Yakama Nation legal counsel submitted a letter to the Council requesting:

that the Council, in your capacity as the presiding officer for the Horse Heaven Hills Project (“Project”) adjudication, allow the parties to call as witnesses and cross-examine Washington Department of Fish and Wildlife (“WDFW”) biologists Jim Watson and Jason Fidorra regarding their scientific opinions and resulting concerns with the Project. Their testimony is critical to developing as complete a record as possible for the Council to determine whether or not the Project will sufficiently avoid, minimize, and mitigate impacts to wildlife and habitat.

In this Order, the Council provides the reasoning for its conclusion that it is not appropriate or necessary to call Mr. Watson and Mr. Fidorra to stand cross-examination in the adjudicative hearing.

The December 15, 2022, Order Commencing Adjudication included a deadline of February 3, 2023, for eligible state agencies to elect to participate as parties in the adjudication. WDFW did not elect to participate as a party in the adjudication.

Further, EFSEC has an interagency agreement (IAA) with WDFW to provide technical expertise and support for EFSEC staff’s evaluation of the proposal’s impacts and for the development of appropriate mitigation for inclusion in the State Environmental Policy Act (SEPA) analysis being prepared by EFSEC’s SEPA responsible official, Director Sonia Bumpus. That contract provides, in part, that WDFW “Take steps to ensure that WDFW staff who are involved in the Tasks/Statement of Work described herein are completely insulated from FISH & WILDLIFE’s participation as a party in any EFSEC proceeding or process involving an [application for site certification].”.

Mr. Watson and Mr. Fidorra, along with Mr. Michael Ritter are providing input on tasks under the IAA including assisting EFSEC staff in “determining fish, wildlife and habitat impacts of the proposed project” and identifying “appropriate mitigation to comply with EFSEC requirements, Fish and Wildlife requirements, (SEPA) and other applicable laws, rules, and regulations.” Despite this fact, and despite the EFSEC rule that “[n]o subpoena shall be issued or given effect to require the attendance and testimony of, or the production of evidence by, any . . . member of the council staff,” including “the council's

independent consultant,”¹ Yakama Nation was permitted to subpoena and depose Mr. Ritter, Mr. Watson and Mr. Fidorra. However, in order to address EFSEC staff’s objection, Yakama Nation agreed not to inquire into the deponents’ contributions to the SEPA process or their opinions on that process or the SEPA documents. The reason for these limitations was because the adjudicative hearing is not for the purpose of appealing or collaterally questioning EFSEC’s SEPA determinations or documents.

The full transcripts of the three WDFW employees’ depositions have been made a part of the record for the adjudication as Exhibits EXH-4018_Dep, EXH-4019_Dep, and EXH-4020_Dep. Also, all of the parties in this case were allowed to attend those depositions and to ask their own questions of the deponents, and at least some did so. Yakama Nation can highlight in its post-hearing brief those portions of the deposition transcripts that it wants the Council to take particular note of.

The purpose of the live portion of the adjudicative hearings is to allow for cross-examination of witnesses sponsored by the parties on their pre-filed written testimony².

The Council will receive the benefit of the WDFW employees’ expertise. They have provided their expertise and input on the wildlife portions of the Draft Environmental Impact Statement and for the preparation of the forthcoming Final Environmental Impact Statement that the Council will consider--along with the record of the adjudicative proceeding—in making its recommendation to the Governor. In addition, EFSEC Staff plans to have Mr. Watson and Mr. Fidorra present at the public meeting where the FEIS will be presented in order to assist with answering any questions from Council members.

Given all of the foregoing, the Council concludes that there is not sufficient cause to allow the Yakama Nation to call the WDFW employees for cross examination.

DATED at Olympia, Washington, and effective September 15, 2023.

WASHINGTON STATE ENERGY FACILITY SITE EVALUATION COUNCIL


KATHLEEN DREW, Chair

¹ WAC 463-30-200(5).

² WAC 463-30-310(2)(a); Second Pre-Hearing Conference Order, May 19, 2023.