

**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

SECOND PRE-HEARING
CONFERENCE ORDER

Procedural Setting

On March 20, 2023, Administrative Law Judge (ALJ) Adam E. Torem conducted a Second Pre-Hearing Conference in this matter. On that date, the following items were discussed (summary):

- Venue Options and Preferences for Adjudication – in-person vs. hybrid vs. fully virtual
- Scheduling of Adjudication – accelerated schedule due to July 8, 2023 extension limit
- Filing Requirements – accord on fully electronic filing and service
- Pre-Filed Testimony and Motion Practice – potential initial filing date and intervals
- Parties’ Development of Disputed Issues List – tone/tenor, specificity, basis in law

On May 2, 2023, ALJ Torem conducted a Third Pre-Hearing Conference in this matter. On that date, the following items were discussed (summary):

- Venue – Confirmation of Virtual Hearing Format via Microsoft Teams (or by phone)
- Scheduling of Adjudication – additional time available per latest extension request (TBD)
- Filing Milestones and Deadlines – Three (3) rounds of Pre-Filed Testimony and Briefing
- Finalization of Disputed Issues List
- Discovery

Based on the parties’ inputs and discussions at the above-noted pre-hearing conferences; party letters filed on May 4, 2023; and coordination with EFSEC Chair Drew, the undersigned ALJ orders the following schedule, list of disputed issues, and procedural rules for the adjudication:

Schedule for Adjudication

EFSEC will conduct the virtual adjudicative hearing (for cross-examination of witnesses who have submitted pre-filed written testimony) in August 2023 on the following ten (10) dates:

- Thursday, August 10th & Friday, August 11th
- Monday, August 14th & Tuesday, August 15th
- Wednesday, August 16th –morning session only
- Monday August 21st through Friday, August 25th

The daily schedule for the adjudicative hearing will include up to three sessions for witness testimony and a lunch break. Timing for the public comment session shall be announced later.

Disputed Issues for Adjudication

In accordance with RCW 80.50, WAC 463-30-300, and the parties' submissions, these are the disputed issues approved for presentation of evidence and supporting witnesses:

1) Land Use Consistency – RCW 80.50.100(2) – limited to CUP / Variance Issues

- a) Benton County Zoning Code – Title 11 – Zoning – CUP/Variance Codes (2/8/21)
 - i) BCC 11.50.040(d) – Conditional Use Criteria
 - ii) BCC 11.50.030 – Standards for Variance
- b) Setback Requirements (i.e., for solar arrays)
- c) Possible Lot Line Adjustments (i.e., within solar array layouts)

2) Environmental / Physical Impacts

- a) Habitat, Vegetation and Wetlands
 - i) Habitat Fragmentation (Project layout issues / impact of east solar array)
- b) Wildlife
 - i) Bird and Bat Mortality
- c) Threatened / Endangered Species (i.e., Ferruginous Hawk)
- d) Air Quality
- e) Visual Aesthetics and Resources

3) Cultural / Historic / Archaeological Resource Impacts

- a) Protection of Yakama Nation's Traditional Cultural Properties/Places
 - i) Use and Access Issues within Project Boundary and on Adjacent Public Lands
 - ii) Impacts to legendary, monumental, and burial sites on or adjacent to the Project
- b) Archaeological Resources

4) Societal / Economic Impacts

- a) Agricultural Industry Interests (*only as can be differentiated from Land Use (above)*)
- b) Property Values / Housing / Local Economic Development
- c) Tourism / Recreation
- d) Local Concerns, Attitudes and Opinions¹
 - i) Overall Scope and Scale of Horse Heaven Wind Project

5) Cumulative Impacts

- a) Additional Renewable Energy Projects in Benton County and Immediate Region

6) Site Restoration and Decommissioning

¹ Any party wishing to present witness(es) on "Local Concerns, Attitudes and Opinions" should justify the witness' significance as a representative of the local area and ability to speak for the community-at-large and understand they will be subject to cross-examination. This category is *not* public comment that will be heard per RCW 80.50.090(4).

The scope and intent of these approved issues will be broadly construed to allow parties to present their individual cases for and against the project, subject to motions to strike irrelevant evidence or witness testimony that is clearly outside the scope of EFSEC's review process.

Issues Excluded from Adjudication

Although the approved issues list above will be broadly construed, the following issues will *not* be taken up during the adjudication unless specifically authorized by a subsequent order issued following a party's motion supported by a satisfactory offer of proof demonstrating relevance under RCW 80.50 and/or WAC 463.

- Preemption of local land use plans or ordinances
- Compliance with the Growth Management Act
- Compliance with the State Environmental Policy Act²
- Greenhouse gas emissions reductions analysis

All parties shall tailor their case presentations, witnesses, and supporting exhibits within the above-noted disputed issues list. Parties shall not assume their own proposed issues previously submitted to the Council, whether met by objections or not, can be presented at the adjudication.

Pre-Filed Testimony – Filing Schedule and Deadlines for Motions to Strike

There will be three rounds of pre-filed testimony prior to the adjudication, with each party permitted to file its own opening witness testimony, followed by testimony responsive to any other party's witnesses, and then a final round of reply/rebuttal testimony to any other party's witnesses. The deadlines for filing each round of testimony shall be as follows:

- Monday, June 12, 2023 – Opening Round of Testimony
- Friday, June 30, 2023 – Responsive Round of Testimony
- Wednesday, July 12, 2023 – Reply/Rebuttal Round of Testimony

All testimony must be electronically filed and a copy e-mailed to all other parties no later than 5:00 p.m. on the date due as noted above. Any party wishing to file a Motion to Strike any pre-filed testimony may do so at any time but shall do so no later than Tuesday, July 18, 2023. The potentially affected party shall file a responsive pleading, if desired, within four (4) business days following service of the motion. Oral argument will not be permitted. The undersigned ALJ will rule on any such motions within four (4) business days of receiving any responsive pleading. No motions for reconsideration will be entertained.

Pre-Hearing and Post-Hearing Briefs

Pre-hearing briefs are permissible and encouraged in order to allow parties to present their cases for and against the proposed project. Any party wishing to file a pre-hearing brief must do so no

² Compliance with RCW 43.21C and WAC 197-11 is a separate and parallel process.

later than Wednesday, August 2, 2023. Opening briefs shall not exceed 15 pages;³ oversized briefs will not be considered by the Council. The Council does not anticipate allowing opening oral statements at or during the adjudication.

Post-hearing briefs may be required by the Council. The tentative due date, subject to revision at the close of the adjudication, will be Friday, September 22, 2023. Post-hearing briefs may choose to raise policy and legislative intent issues.

Discovery

In accordance with RCW 34.05.446 and WAC 463-30-190 and as noted during the third pre-hearing conference, discovery is authorized. The parties' pre-filed testimony shall serve as the chief source of discovering each party's principal position(s) and supporting evidence. Any additional discovery must seek only information that is relevant to the approved issues for the adjudication (e.g., no inquiries into the SEPA process). Parties must not seek discovery that is unreasonably cumulative or duplicative or obtainable from another source that is more convenient, less burdensome, or less expensive.

All parties may agree to informal discovery procedures in addition to or in place of the procedures set out in this pre-hearing conference order. Use of any formal discovery methods (as contemplated in Washington's Superior Court Civil Rules 26 through 37) will be subject to expedited response times of no more than 10 business days. Parties shall endeavor to resolve any discovery disputes without involving the Council or the undersigned ALJ. Filing motions to compel discovery should be a last resort for any party and must show good cause and further demonstrate how and why less formal measures were attempted and refused.

Depositions of EFSEC staff or other supporting personnel will not be allowed without the permission of the undersigned presiding officer and, per WAC 463-30-200(5), no subpoena shall be issued or given effect to require the attendance or testimony of, or the production of evidence by, any member of the Council or any member of the Council's staff.

Scope of Intervention – Yakama Nation and Tri-Cities C.A.R.E.S. (TCC)

The Preliminary Order on Intervention issued on March 9, 2023, indicated that the exact scope of the intervening parties' intervention would be determined at a later date. Per WAC 463-30-092, Council policy allows intervenors broad procedural latitude, but limits may be imposed to avoid undue delay to the adjudication. Participation by the Yakama Nation and Tri-Cities C.A.R.E.S. will not prejudice the rights of existing parties. Development of the list of disputed issues approved for the adjudication has more narrowly tailored the relevant subject matter for all parties, including both intervenors. However, some further limitation remains appropriate in order to avoid undue delay to this proceeding.

³ Pre-hearing and post-hearing briefs shall be double-spaced and with font size not less than 12-point text.

Yakama Nation. The Yakama Nation’s petition for intervention makes explicitly clear its significant interest in protecting historic and cultural resources as well as defending inherent and Treaty-reserved rights to hunt as well as to gather roots and berries on open and unclaimed lands. However, the Yakama Nation’s petition for intervention also asserts more general interests in the potential impacts of the Project on visual aspects, light and glare; recreation and recreational land use; and transportation and roadway safety. Those potential impacts of the Project are more directly the concern of statutory parties of right: Benton County and Council for the Environment. **Therefore, except as it directly pertains to the Yakama Nation’s legendary, monumental or burial sites, per WAC 463-30-092, the Yakama Nation shall limit its participation and (a) coordinate its presentation of evidence related to the visual aspects, light, and glare with the County and Counsel for the Environment (CFE) who shall jointly take lead party status for that issue and (b) coordinate its presentation of evidence related to recreation or recreational land use; transportation; and roadway safety issues with the County who shall be the lead party on those issues.**

Tri-Cities C.A.R.E.S. TCC’s petition for intervention makes clear with particularity the organization’s significant interest in wildlife and ecosystem conservation as well as local decision-making to preserve the community’s uniquely picturesque natural landscapes. TCC’s assertion of interest in land use consistency topics to be taken up during the adjudication is identical to that of Benton County, particularly with regard to the evaluation of conditional use criteria to be applied to the siting of this Project. **Therefore, per WAC 463-30-092, TCC shall limit its participation and presentation of evidence on land use topics and coordinate its concerns with the County who shall be the lead party for that issue.**

Final Pre-Hearing Conference

The parties should hold time on their calendars for a final pre-hearing conference before the adjudicative cross-examination hearing on Tuesday, August 8, 2023 from 1:00 p.m. to 4:00 p.m. At that conference, all final “housekeeping” matters (i.e., ordering of witnesses, marking of exhibits, coordination and testing of virtual hearing mechanics, etc.) will be discussed to ensure the adjudication runs as smoothly as possible.

DATED and effective at Olympia, Washington, on the 19th day of May, 2023.

WASHINGTON ENERGY FACILITY
SITE EVALUATION COUNCIL



Adam E. Torem, Administrative Law Judge