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BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of

HORSE HEAVEN WIND FARM, LLC –
Horse Heaven Wind Farm

EFSEC Docket No. EF-210011

APPLICANT’S LEGAL
MEMORANDUM RE LAND USE
CONSISTENCY

Legal Memorandum in Support of the Horse Heaven Wind Farm’s Consistency and Compliance with Land Use Plans and Zoning Ordinances

I. INTRODUCTION

On February 8, 2021, Horse Heaven Wind Farm, LLC¹ submitted to the Energy Facility Site Evaluation Council (“EFSEC” or the “Council”) an Application for Site Certification (“ASC”) to develop, construct, and operate the Horse Heaven Wind Farm (the “Project”). The Project comprises a renewable energy generation facility, including wind and solar energy generation, battery energy storage systems (“BESS”), and supporting facilities, located within Benton County (the “County”).

In accordance with RCW 80.50.075 and WAC chapter 463-43, Scout requested that EFSEC use its expedited review process for review and approval of the ASC. To be eligible for expedited review, EFSEC must find that “the project is . . . consistent and in compliance with

¹ Horse Heaven Wind Farm’s indirect owner is Scout Clean Energy LLC. For purposes of this memorandum, both entities will be referenced herein as “Scout.”

1 city, county, or regional land use plans or zoning ordinances.”² Scout submits this Legal
2 Memorandum to support the Project’s consistency and compliance with applicable County land
3 use plans and zoning ordinances.

4 **II. BACKGROUND**

5 **A. EFSEC’s Critical Role in Renewable Energy Permitting**

6 EFSEC has a long history of reviewing essential energy generation facilities that advance
7 state policy but prove challenging for local governments to permit comprehensively and
8 objectively.³ Opposition and litigation overwhelm, and statewide policy is lost at the local level.
9 This frequent opposition and judicial challenges frustrate state energy and climate change policy
10 priorities. Such opposition does not imply that such facilities should not be sited as proposed.⁴
11 That is why the Washington legislature has created one of the most rigorous permitting processes
12 in the nation, to account for local concerns but also to advance important statewide interests and
13 policies in an entirely preemptive process.⁵ EFSEC’s authority has twice in recent years been
14 upheld unanimously by the en banc Washington Supreme Court.⁶ An important part of EFSEC’s

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16 ² RCW 80.50.075(1); RCW 80.50.090(2).

17 ³ At this early point in the EFSEC process, Scout understands that the Benton County
18 Commissioners have voted to oppose the Horse Heaven Project. Doing so before any material
19 public process and any evaluation of the proposal compromises the County’s credibility and
20 verifies why EFSEC remains an important permitting venue for essential infrastructure projects.

21 ⁴ *See, e.g.*, Letter from Governor Jay Inslee to Kathleen Drew, EFSEC Chair, re
22 Columbia Solar Project (Oct. 17, 2018) (approving project siting as proposed); Letter from
23 Governor Christine Gregoire to Jim Luce, EFSEC Chair, re Desert Claim Wind Power Project
24 (Feb. 2, 2010) (same); Letter from Governor Christine Gregoire to Jim Luce, EFSEC Chair, re
25 Kittitas Valley Wind Power Project (Sept. 18, 2007) (same).

26 ⁵ RCW 80.50.110.

⁶ *See Friends of Columbia Gorge, Inc. v. State Energy Facility Site Evaluation Council*,
178 Wash. 2d 320, 346 (2013); *see also Residents Opposed to Kittitas Turbines v. State Energy*
Facility Site Evaluation Council (EFSEC), 165 Wash. 2d 275, 311 (2008).

1 mission, expedited processing mechanisms are vital to facilitating Washington’s accelerated
2 clean energy transition.

3 The Washington legislature in 2019 passed legislation committing to aggressively
4 transforming its electricity systems and to transition to 100 percent clean electricity in the next
5 25 years.⁷ Washington law now requires utilities to transition to a carbon-neutral electricity
6 supply by 2030 and embarks the state on a path to entirely eliminate fossil fuels from electricity
7 generation by 2045.⁸

8 Accordingly, EFSEC has recognized that among the Council’s siting responsibilities is
9 analyzing “projects’ consistency with the state’s energy strategy, utilities’ integrated resource
10 plans, regional power plans, and state policy directives favoring deployment of renewable
11 technology.”⁹ Specifically, under the Council’s guiding statute, RCW 80.50.010, it must ensure
12 certified projects are aligned with “the objectives of reducing dependence on fossil fuels and
13 transitioning to a clean energy economy, with these goals balanced against the need to maintain
14 the availability of energy at competitive prices for consumers and businesses.”¹⁰

15 **B. Project and Site Description**

16 The Project is a renewable energy generation facility including a combination of wind
17 and solar facilities, as well as BESS, offering a nameplate energy generating capacity of up to
18 1,150 MW. The precise number of Project wind turbine generators (“Turbines”) and extent of
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20 ⁷ Office of Governor Jay Inslee, Policy Brief, “Washington Enacts Strongest Clean
21 Electricity Standard in the Nation” (May 2019).

22 ⁸ *Id.*; see Clean Energy Transformation Act, Washington Senate Bill 5116 (effective May
23 7, 2019).

24 ⁹ In the Matter of Vancouver Energy Terminal, EFSEC Report to Governor on
25 Application No. 2013-01, 70 (Dec. 19, 2017).

26 ¹⁰ *Id.*; see also ASC, Sec. 1.3 (discussing these goals as well as state interest in supplying
growing private demand for renewable energy).

1 solar arrays will depend on the final Turbine models and/or solar modules and array layout
2 options ultimately selected. See the full discussion of site features in ASC Sections 2.3-.4 and
3 Figures 2.3-1 and 2.

4 During the Project life, the Project features would impact 6,869 acres of leased
5 agricultural land, which accounts for just 1.1 percent of County agricultural lands.¹¹ However,
6 only 496 acres of agricultural lands would be permanently impacted by the Project, 239 of which
7 would be dedicated to the Project’s solar components.¹² Because the final Project design
8 remains to be finalized, Scout has executed leases covering all potentially affected parcels (the
9 “Project Lease Boundary”), an overarching area encompassing approximately 72,428 acres—
10 including approximately 11,850 acres for wind energy micrositing corridors and 10,755 acres for
11 solar siting areas.¹³ To ensure the ultimate Project footprint will be consistent and in
12 compliance for purposes of EFSEC’s initial land use analysis, Scout has evaluated land use
13 consistency and compliance for the full Project Lease Boundary. To be clear, upon construction
14 at the maximum buildout, the remaining 65,559 acres of the Project Lease Boundary would
15 remain available for existing agricultural land uses to continue.¹⁴

16 Much of the land encompassed within Project Lease Boundary is privately owned and
17 actively managed for dryland agriculture (primarily wheat farming) and livestock grazing.
18 Portions of this area may also be enrolled in the U.S. Department of Agriculture’s Conservation
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22 ¹¹ See ASC, Sec. 1.16.1.1(b), Table 2.1-1, Sec. 3.1.2, Secs. 4.2.1, 4.2.6.2.

23 ¹² ASC, Table 3.4-14.

24 ¹³ See ASC, Sec. 1.16.1.1(b).

25 ¹⁴ See ASC, Secs. 2.23, 4.2.1, 4.2.6, and Table 4.2.6-4, for additional information and
26 analysis.

1 Reserve Program. The Project Lease Boundary also encompasses lands managed by the
2 Department of Natural Resources.¹⁵

3 Just north of the Project site is the Nine Canyon Wind Project, an early Washington wind
4 generation facility, permitted and operated under the Benton County Comprehensive Plan
5 (“BCCP”) and the Benton County Development Code (“BCC”). The Nine Canyon Wind Project
6 was permitted in the 2000s as a conditional use under the BCC. Scout’s Project is substantially
7 similar to, seeks the same authorizations as, and as described in Part IV.B below poses the same
8 analytical questions as the Nine Canyon Wind Project. Thus, the County’s prior approval of the
9 Nine Canyon Wind Project as consistent and compliant with the BCCP and BCC strongly
10 supports the same conclusion with respect to the Horse Heaven Project.

11 **C. Applicant Siting Process and Analysis**

12 Scout selected the proposed site after conducting a comprehensive siting analysis. The
13 proposed site is optimal for the Project for numerous reasons.¹⁶ First, the site is well suited for
14 wind energy generation based on its use as dryland wheat farming, which is highly compatible
15 with typical renewable energy infrastructure due to the minimal permanent surface impact and
16 minimal obstruction to farming operations. Additionally important, the site avoids quality
17 wildlife habitat and meets the Washington Department of Fish and Wildlife’s (“WDFW”) stated
18 guideline preference for wind energy to be sited on agricultural lands and *not* on critical
19 habitat.¹⁷ Building renewable energy facilities in remote locations away from residential
20 development often comes at the cost of damaging priority habitat and constructing and extending
21 lengthy new high voltage (“HV”) transmissions lines — not so here. Further, the Project site

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23 ¹⁵ See ASC, Figure 2.1-2.

24 ¹⁶ See ASC Section 2.22.2 for a full site selection discussion.

25 ¹⁷ See ASC Sections 1.16.1.1, 2.23.2.2, and 3.4 for additional information about potential
26 impacts to habitat and habitat avoidance, minimization, and mitigation measures.

1 would yield the additional benefit to farmers by providing shared permanent all-weather access
2 roads. The site is also preferable given ready access to the regional transmission system; it is
3 crossed by three Bonneville Power Administration HV transmission lines, minimizing the need
4 for building and extending new HV transmission infrastructure. Thus, the site represents a
5 commercially viable wind resource area coupled with solar PV generation and battery storage – a
6 hybrid approach to renewable energy that significantly reduces the intermittency of clean power
7 generation and is favorable for regional utilities as it is coincident with peak loading demand.¹⁸

8 Moreover, the site conforms to industry-accepted siting criteria in the following ways:

- 9 • Access to HV (115-kV/230-kV/500-kV) transmission lines within a reasonable distance
10 to a project site, with sufficient available capacity to carry the project’s output;
- 11 • Absence of significant environmental constraints (i.e., no threatened or endangered
12 species, major archeological resources, critical wetlands, etc.);
- 13 • Absence of material impacts to high-value, prime irrigated agricultural lands;
- 14 • Willing landowner(s) with sufficient undivided acreage to support a project;
- 15 • Accessible site with sufficient road access to permit delivery of large Turbine components
16 and allow construction of project infrastructure; and
- 17 • As detailed in the analysis below, appropriate and compatible zoning designation and/or
18 lack of conflicting land uses.

19 **D. Engagement with County Planning Department**

20 To ensure local interests are represented and protected in its permitting process, Scout has
21 been in communication with the County about the Project since 2016. In July 2020, the County
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26 ¹⁸ See ASC Section 2.22.3 for a discussion of transmission routing considerations.

1 provided Scout with a planning determination confirming certain aspects of the local land use
2 consistency and compliance analysis.¹⁹

3 Based on that determination, Scout conducted and submitted a robust local land use analysis
4 as part of its ASC.²⁰ Scout's goal was to ensure an understanding of the local zoning code and to
5 seek a certification of land use consistency with Benton County, which the County ultimately
6 declined. Before submitting the final ASC, Scout requested that the Benton County Planning
7 Department comment on Scout's draft land use analysis, to confirm its completeness and
8 accuracy.²¹ The Benton County Community Development Director provided detailed comments
9 to the draft analysis. Scout addressed those comments in its final land use analysis provided in
10 the ASC.²²

11 As part of its draft review, on January 11, 2021, the County explained that the Project would
12 be allowable as a conditional use, but because the EFSEC process supplants the local conditional
13 use permit ("CUP") review procedures, the County expressed concerns that the process avoids
14 the local County hearing typically used to definitively conclude whether the Project in fact meets
15 the applicable County CUP criteria.²³ As discussed below in Part III, EFSEC will consider the
16 County's formal comments on the ASC, including the land use review therein, later in its site
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18 ¹⁹ Benton County Planning Department, Letter re Zoning Determination/Interpretation to
19 Dave Kobus, Scout (July 1, 2020), Ex. A.

20 ²⁰ See ASC, Sec. 2.23.3.

21 ²¹ See Email Correspondence between Tim McMahan, Stoel Rives LLP, on behalf of
22 Scout, and Greg Wendt, Director of Community Development, Benton County (Jan. 8-11, 2021),
23 Ex. B.

24 ²² See, e.g., ASC, Sec. 2.23.3, at pp. 2-137, 2-148 (incorporating analysis of potential
25 noise and road impacts); p. 2-139 (incorporating additional definitions into analysis); p. 2-159 to
26 161 (providing analysis under BCC Title 15).

²³ Email from Greg Wendt to Tim McMahan (Jan. 11, 2021, 3:19 PM), Ex. B.

1 certification process. The lack of a public hearing concerning the specific CUP criteria at this
2 stage has no bearing on EFSEC’s determination of land use consistency.

3 III. APPLICABLE STANDARDS

4 For every EFSEC project, the rules contemplate that an applicant will work with the
5 county to seek a determination of land use consistency, in the form of a certificate of
6 consistency.²⁴ In addition to the general requirement that an applicant make this effort, in
7 accordance with RCW 80.50.075 and WAC chapter 463-43, Scout has requested that EFSEC
8 review the ASC under EFSEC’s expedited review process. To be eligible for expedited
9 processing, EFSEC must find that “the proposed site is consistent and in compliance with city,
10 county, or regional land use plans or zoning ordinances.”²⁵ If EFSEC determines that the
11 proposed site is consistent and compliant with these local authorities,²⁶ it may process the
12 proposed project application on an expedited basis.²⁷

13 Importantly, the relevant inquiry for purposes of EFSEC’s initial land use analysis under
14 RCW 80.50.090(2) is “whether the pertinent local land use provisions ‘prohibit’ the [proposed
15 project site]expressly or by operation clearly, convincingly and unequivocally.”²⁸ If a proposed
16 project “can be permitted either outright *or conditionally*, it is and in compliance with the local
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19 ²⁴ WAC ch. 463-26.

20 ²⁵ RCW 80.50.090(2); see also WAC 463-26-050.

21 ²⁶ Expedited processing also requires that EFSEC determines that the project’s
22 environmental impact is not significant outright or as mitigated, under the State Environmental
23 Policy Act. See RCW 43.21C.031. That analysis is outside the scope of this memorandum.

24 ²⁷ RCW 80.50.075(1).

25 ²⁸ See *In re Columbia Solar Project*, Docket No. EF-170823, Council Order – Expedited
26 Processing, ¶ 35 (Apr. 17, 2018) (hereafter, “Columbia Solar Order”) (citing *In re Trans
Mountain Pipeline*, Council Order 616, at 3 (May 26, 1981)).

1 land use provisions” for purposes of RCW 80.50.090(2).²⁹ Whether applicable conditional use
2 criteria are in fact met is a question for later EFSEC proceedings,³⁰ after which EFSEC will
3 recommend and impose conditions of approval in the Site Certification Agreement to uphold the
4 County’s CUP criteria.³¹

5 Not all local land use plan and zoning ordinance provisions are considered in EFSEC’s
6 review. A “land use plan” for EFSEC purposes means a comprehensive plan or land use element
7 thereof adopted by a unit of local government under RCW chapter 35.63, 35A.63, 36.70, or
8 36.70A.³² EFSEC interprets that this definition includes “the portions of a comprehensive plan
9 that outline proposals for an area’s development, typically by assigning general uses (such as
10 housing) to land segments and specifying desired concentrations and design goals.”³³ Examples
11 of relevant plan provisions include specific land use and resource land designations and utility-
12 related provisions.³⁴ A “zoning ordinance” for these purposes means an ordinance of local
13 government regulating the use of land and adopted pursuant to RCW chapter 35.63, 35A.63,
14 36.70, or 36.70A or Article XI of the state constitution.³⁵ EFSEC interprets that “zoning
15 ordinance[s]” include those that “regulate land use by creating districts and restricting uses in the
16 districts (i.e., number, size, location, type of structures, lot size) to promote compatible uses,”³⁶

17 ²⁹ *Id.* (emphasis added).

18 ³⁰ *Id.* ¶ 36.

19 ³¹ See RCW 80.50.100(2); WAC 463-64-020.

20 ³² RCW 80.50.020(14).

21 ³³ Columbia Solar Order ¶ 28 (citing *In re Northern Tier Pipeline*, Council Order 579, at
22 9 (Nov. 26, 1979)).

23 ³⁴ *Id.* ¶ 31.

24 ³⁵ RCW 80.50.020(22).

25 ³⁶ Columbia Solar Order ¶ 29.

1 for example, the applicable “zoning map, development restrictions, and associated definitions.”³⁷
2 The applicable Benton County “land use plan” and “zoning ordinance” provisions are found
3 within the BCCP and BCC.

4 If a local jurisdiction believes that a proposed EFSEC project is consistent and in
5 compliance with its land use plans and ordinances, it may provide—and the applicant may
6 enter—a “certificate[] . . . attesting” to that fact.³⁸ Such a certificate provides *prima facie* proof
7 of consistency and compliance with such land use plans and zoning ordinances,³⁹ but is not a
8 requirement for EFSEC site certification. Absent a local certificate of consistency, the applicant
9 and local authorities are directed to otherwise “address compliance or noncompliance with land
10 use plans or zoning ordinances,”⁴⁰ and *EFSEC* then determines “whether the proposed site is
11 consistent and in compliance with land use plans and zoning ordinances pursuant to RCW
12 80.50.090(2).”⁴¹

21 ³⁷ *Id.* ¶ 32.

22 ³⁸ WAC 463-26-090.

23 ³⁹ *Id.*

24 ⁴⁰ WAC 463-26-100.

25 ⁴¹ WAC 463-26-110.

1 IV. ANALYSIS

2 A. The Project Is Consistent and Compliant with Applicable County Land Use
3 Authorities as an Allowable Conditional Use

4 To the extent the County has affirmed that the Project can be “permitted ...
5 conditionally”⁴² under the BCC and BCCP,⁴³ the County has attested to land use “consistency
6 and compliance” for purposes of RCW 80.50.090(2), with the legal effect of a County-issued
7 certificate. ⁴⁴ Nevertheless, per WAC 463-26-100, Scout provides the following independent
8 analysis for the Council’s review.

9 While in some locations, a power generation facility may be a prohibited land use,
10 incapable of permitting under local CUP codes, that is not the case here. The Project is
11 allowable as a conditional use and is therefore consistent and compliant with the applicable
12 County comprehensive plan and zoning provisions for purposes of RCW 80.50.090(2).

13 Pursuant to Washington’s Growth Management Act, a comprehensive plan serves as a
14 county’s “generalized coordinated land use policy statement.”⁴⁵ Local development regulations,
15 such as zoning codes, carry out the comprehensive plan’s policies and must be consistent with
16 those policies. ⁴⁶ By adopting the BCC zoning ordinances discussed below, Benton County acted

17 ⁴² Columbia Solar Order ¶ 35.

18 ⁴³ See discussion *supra* in Part II.D; Email from Greg Wendt to Tim McMahan (Jan. 11,
19 2021, 3:19 PM), Ex. B (explaining that County authorities would allow the Project with “the
20 approval of a conditional use permit”).

21 ⁴⁴ WAC 463-26-090.

22 ⁴⁵ RCW 36.70A.030(5).

23 ⁴⁶ *Woods v. Kittitas County*, 162 Wn.2d 597, 613 (2007); *see also* RCW 36.70A.040
24 (Local development regulations “must be consistent with and implement the comprehensive
25 plan.”). The Washington Supreme Court has also explained that, “[i]f a zoning code explicitly
26 requires that all proposed uses comply with a comprehensive plan, then the proposed use must
comply with both the zoning code and the comprehensive plan.” *Woods*, 162 Wn.2d at 614
(2007); *Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 770 (2006). However,
because a comprehensive plan is not a document designed for making specific land use

1 through its land use planning process to determine that wind and solar facilities may be
2 consistent with the BCCP’s policies, depending on project- and location-specific considerations.

3 The Project is consistent with the BCCP’s planning vision and mandates and compliant
4 with the specific zoning provisions of the BCC. Under the BCCP, the Project site is located
5 outside of any Urban Growth Area, within the Growth Management Act Agriculture land use
6 designation.⁴⁷ More specifically, the Project Lease Boundary is located within the Growth
7 Management Act Agricultural District (“GMAAD”).⁴⁸ As detailed below, certain non-
8 agricultural uses, including wind and solar energy generation and battery storage, are permissible
9 in the GMAAD zone as conditional uses.

10 It is important to emphasize that a conditional use *is an allowed use*. The County stands
11 apart as a county that has long allowed wind energy generation facilities and has permitted them
12 through its local conditional use process, based on locally adopted conditional use criteria. The
13 north-adjacent Nine Canyon Wind Project is exemplary, as an early Washington wind generation
14 facility, permitted and operated pursuant to the BCC.

15 As confirmed in the County’s July 2020 zoning determination letter,⁴⁹ based on its
16 features, the proposed Project would constitute both a “wind turbine farm”⁵⁰ and a “solar power
17

18 _____
19 decisions, the Supreme Court has required that “conflicts between a general comprehensive plan
20 and a specific zoning code be resolved in the zoning code’s favor.” *Citizens for Mount Vernon v.*
City of Mount Vernon, 133 Wn.2d 861, 874 (1997); *Cingular Wireless*, 131 Wn. App. at 769.

21 ⁴⁷ See BCCP, Appendix A, Figure 1; ASC, Figure 2.1-3.

22 ⁴⁸ See BCCP, Appendix A, Figure 4; ASC, Figure 2.1-4.

23 ⁴⁹ Ex. A.

24 ⁵⁰ A “Wind Turbine Farm” is defined as “two or more wind turbines on one parcel,”
25 BCC 11.03.010(191), and a “Wind Turbine” is “a machine with turbine apparatus (rotor blades,
26 nacelle and tower) capable of producing electricity by converting the kinetic energy of wind into
rotational, mechanical and electrical energy,” BCC 11.03.010(190).

1 generator facility, major”⁵¹ as defined under the BCC. Under BCC 11.17.070(t) and (cc), both of
2 these uses are allowable conditional uses in the GMAAD and are permitted in accordance with
3 BCC’s conditional use criteria.

4 Under the local CUP criteria (which EFSEC would consider later in the process), a
5 conditional use is permitted when it:

6 (1) Is compatible with other uses in the surrounding area or
7 is no more incompatible than are any other outright permitted uses
8 in the applicable zoning district;

9 (2) Will not materially endanger the health, safety, and
10 welfare of the surrounding community to an extent greater than
11 that associated with any other permitted uses in the applicable
12 zoning district;

13 (3) Would not cause the pedestrian and vehicular traffic
14 associated with the use to conflict with existing and anticipated
15 traffic in the neighborhood to an extent greater than that associated
16 with any other permitted uses in the applicable zoning district;

17 (4) Will be supported by adequate service facilities and
18 would not adversely affect public services to the surrounding area;
19 and

20 (5) Would not hinder or discourage the development of
21 permitted uses on neighboring properties in the applicable zoning
22 district as a result of the location, size or height of the buildings,
23 structures, walls, or required fences or screening vegetation to a
24 greater extent than other permitted uses in the applicable zoning
25 district.

26 BCC 11.50.040(d).

⁵¹ A “Solar Power Generator Facility, Major” means the “use of solar panels to convert sunlight directly or indirectly into electricity.” BCC 11.03.010(167). “Solar power generators” include, among other equipment “solar panels . . . and storage batteries.” *Id.* (emphasis added). And a solar facility is considered “Major” if it is “developed as the primary land use for a parcel on which it is located and does not meet the siting criteria for a minor facility.” *Id.*

1 As discussed *supra* in Part III, for purposes of the instant land use hearing and expedited
2 processing analysis, the applicable standard is simply whether the project as proposed “can be
3 permitted either outright or conditionally” or whether instead it is “clearly, convincingly and
4 unequivocally” prohibited under the local land use provisions.⁵² Under the applicable provisions
5 of the BCCP and BCC, the Project—as “wind turbine farm” and “solar power generator facility,
6 major” conditional uses in the GMAAD zone—“can be permitted . . . conditionally.” Therefore,
7 the Project is undoubtedly “consistent and compliant” with applicable County land use
8 authorities for purposes of RCW 80.50.090(2).

9 **B. Summary of ASC Section 2.23.3, Pertinent Local Ordinances and Permits.**

10 Consistent with established EFSEC precedent, whether the applicable conditional use
11 criteria of BCC 11.50.040(d) are in fact met is not part of the RCW 80.50.090(2) inquiry and will
12 be addressed in later EFSEC proceedings.⁵³ Nevertheless, to assist EFSEC’s future review,
13 Scout provides a summary of the Project’s CUP criteria analysis below.⁵⁴

14 **Criterion 1. Is compatible with other uses in the surrounding area or is no more**
15 **incompatible than other outright permitted uses in zone**

16 “Compatibility” of land uses under the BCC requires “the congruent arrangement of land
17 uses and/or project elements to avoid, mitigate, or minimize (to the greatest extent reasonable)
18 conflicts.”⁵⁵ Thus, “compatibility” under the BCC is judged by whether the Project would have
19 a substantiated negative impact on the ability of surrounding landowners to maintain their
20 *existing use of the land*, including the ongoing use for agricultural activities and residential uses.

22 ⁵² Columbia Solar Order ¶ 35 (citing *In re Trans Mountain Pipeline*, Council Order 616,
at 3, and RCW 80.50.090(2)).

23 ⁵³ See Columbia Solar Order ¶ 36.

24 ⁵⁴ See ASC Section 2.23.3 for a full analysis.

25 ⁵⁵ BCC 11.03.010(53).

1 The BCC does not require that there will be no change, nor does a change in the site use itself
2 indicate incompatibility.

3 As a threshold matter, the Project’s total permanent footprint would occupy a mere
4 fraction of the County’s overall agricultural lands: approximately 1.1 percent of existing
5 GMAAD area in the County.⁵⁶ And the total *agricultural* land within the Project’s footprint
6 represents just 0.9 percent of the existing agricultural lands in the County.⁵⁷

7 The Project is compatible and congruent with surrounding uses. The proposed site is
8 surrounded predominately by dryland agriculture and agricultural rangelands, including
9 developed rural residences, barns, corrals, and other rural and agricultural structures.⁵⁸ An
10 operating wind energy facility, the Nine Canyon Wind Project, is located north-adjacent to the
11 site.⁵⁹

12 The Project’s wind, solar, and battery storage uses would be benign and compatible with
13 these surrounding uses. The Project has been designed with input from participating landowners
14 to avoid or reduce impacts to existing onsite land uses, and agricultural uses would continue
15 within the Project Lease Boundary and surrounding area during construction and operation.
16 Beyond the specific agricultural land that would be directly disturbed by Project facilities during

17 _____
18 ⁵⁶ See ASC, Secs. 3.1.2, 4.2.1.

19 ⁵⁷ As identified in the County’s land cover dataset, which includes some additional land
20 outside of the GMAAD zoning district. See ASC, Sec. 4.2.6.

21 ⁵⁸ The Project Lease Boundary is predominantly surrounded by properties also within the
22 GMAAD. However, two short portions of the Project Lease Boundary are adjacent to the
23 County’s Rural Lands Five Acre District (RL-5) (Figure 2.1-4). Allowable uses in the RL-5
24 zoning district largely mirror those in the GMAAD zoning district, including single-family
25 dwellings, utility buildings and substations, and other agricultural uses. See BCC 11.11.030.
26 Based on the substantial similarities between the GMAAD and RL-5 uses, the Project is equally
as compatible with RL-5 permitted uses.

⁵⁹ See ASC, Sec. 4.2.6 and Figure 4.2.6-1 (depicting existing, surrounding land cover
based on land types identified in the BCCP).

1 the life of the Project,⁶⁰ the Project use does not preclude or erode existing or future agricultural
2 uses within the Project Lease Boundary.

3 The Project’s wind components are largely compatible with existing agricultural
4 operations, including grazing activities. Cattle, sheep, and other domestic animals can graze up
5 to the Turbines and around aboveground transmission and collector line support structures.
6 Though it is not anticipated, it is possible that Turbine construction and operation may result in
7 minor alterations to aerial application of pesticides or fertilizers; however, these alterations
8 would not change harvesting patterns and would not be significant so as to increase the cost of
9 farming within the Project Lease Boundary or on surrounding lands. Scout would coordinate
10 with landowners to ensure no disruption to current land use activities.

11 Moreover, there are already existing wind facilities located in agricultural areas of the
12 County, including the Nine Canyon Wind Project adjacent to the Project Lease Boundary.
13 Research has shown that large-scale wind energy facilities do not negatively affect the value of
14 either agricultural properties that host wind Turbines or rural residential or agricultural properties
15 surrounding wind facilities.⁶¹ And the Project’s wind facility components would comply with
16 all—and in some instances even exceed—County setback standards.⁶²

17 The Project’s solar or battery components, too, are compatible with surrounding uses. To
18 be sure, construction, operation, and maintenance of the proposed solar arrays and potential
19 BESS would reduce the area available for agricultural cultivation within the Project Lease
20 Boundary during the Project’s life. However, Scout continues to work with landowners to
21 microsite the solar arrays within the specific solar siting areas to minimize adverse impacts to the
22

23 ⁶⁰ See ASC, Sec. 4.2.6.

24 ⁶¹ See ASC, Sec. 2.23.3, p. 2-158 (citing Hoen et al. 2009; Hoen et al. 2013; MaRous &
25 Company 2018); see also ASC, Secs. 4.4.1.3, 4.4.2.3.

26 ⁶² See ASC, Sec. 2.23.3, p. 2-142 to 143.

1 landowners' ongoing agricultural operations. And the solar and battery facilities would not
2 change land uses or preclude access to farm operations on any surrounding properties, require
3 relocating existing farm access routes or farm infrastructure, or result in changes to the practices
4 for planting, irrigating, fertilizing, or harvesting on surrounding properties. In fact, the roads
5 associated with the Project would generally facilitate agricultural activities associated with the
6 existing use by improving access to surrounding agricultural fields and potentially limiting soil
7 erosion and airborne dust. The Project's solar arrays and potential BESS, too, would comply
8 with the County's applicable setback and screening standards.⁶³

9 As demonstrated throughout its ASC, since commencing its initial siting analysis, Scout
10 has developed measures to avoid, mitigate, or minimize potential conflicts with surrounding land
11 uses. For one, Scout has developed a suite of measures to reduce the potential for aesthetic
12 impacts from the Project.⁶⁴ The Project would use non-reflective materials in muted tones, as
13 well as white or light gray, non-reflective paint to eliminate the need for daytime aviation
14 lighting and eliminate glare from the Turbines.⁶⁵ Potential shadow flicker impacts were assessed
15 against the industry standard threshold of 30 hours per year. Of the 742 receptors analyzed in the
16 study, only seven were predicted to experience more than 30 hours of shadow flicker per year;
17 those seven receptors are direct Project participants.⁶⁶ Residences on neighboring non-
18 participating properties would only experience shadow flicker within industry standard
19 thresholds.

20
21
22 ⁶³ See ASC, Sec. 2.23.3, p. 2-147 to 150.

23 ⁶⁴ See ASC, Sec. 4.2.3.

24 ⁶⁵ See also ASC, Sec. 4.2.3 (summarizing the shadow flicker analysis conducted for the
25 Project).

26 ⁶⁶ See ASC, Appendix G.

1 Nor is glare expected to be problematic to surrounding areas. A glare modeling analysis
2 completed for the Project indicates that the surrounding observation points and vehicle routes
3 would not experience glare as a result of the Project facilities.⁶⁷ And Scout has consulted with
4 the U.S. Department of Defense and modified the siting of Turbines following instruction from
5 NORAD to ensure the Project is compatible with military training activities.⁶⁸

6 Project construction activities may have limited temporary impacts to neighboring land
7 uses, but would proceed under site-specific best management practices (“BMPs”) to minimize
8 potential impacts to traffic, noise, air quality, and vegetation, as described in ASC Sections
9 1.10.1, 3.1-2, 3.4, 4.3, and 4.4.1. These temporary impacts do not render the Project
10 incompatible with surrounding uses of the lands given the temporary nature of much of the
11 disturbance compared to the overall acreage in agricultural production on surrounding lands.
12 And, again, the Project would not even *temporarily* negatively impact land uses beyond the
13 Project footprint.

14 Following construction, temporary impact areas would be returned to pre-construction
15 conditions, which primarily consist of crop and pasture lands. Upon decommissioning of the
16 Project, discussed in detail in Section 2.3.13 of the ASC, the Project owner would remove all
17 above-grade facilities as well as below-grade facilities within at least three feet below grade.
18 The Project owner would also replace topsoil and reseed areas where facilities were located with
19 grasses and/or other vegetation reasonably acceptable to the landowner. Therefore, no
20 irreversible changes to land use would remain beyond the operating life of the Project.

21 Further, the Project yields the potential for significant economic benefits for the
22 surrounding community, including direct wind and solar lease payments to landowners, new
23 local temporary and long-term employment for construction and operations, and taxes paid to the

24 _____
25 ⁶⁷ See ASC, Sec. 4.2.2, Appendix H.

26 ⁶⁸ See ASC, Sec. 2.23.1.1.

1 County. Based on the proposed Project layout, no residences or businesses would be displaced
2 due to the Project, and impacts to non-participating property values are not anticipated from the
3 Project.

4 To be sure, the Project’s proposed location rests at the intersection of residential and
5 agricultural uses within the County. This confluence of conflicting uses is an unfortunate result
6 of the County’s history of non-compliance with the GMA by allowing residential development
7 outside of the UGA and inappropriately extending urban services to rural areas.⁶⁹

8 But BCC 11.50.040(d)(1) requires only that a conditional use is “no more incompatible
9 than are any other outright permitted uses in the applicable zoning district.” The BCC permits
10 outright within the GMAAD minor solar power energy facilities, wineries, breweries, distilleries,
11 personal airstrips, utility yards and buildings (such as substations), and meteorological towers.⁷⁰
12 As demonstrated throughout the ASC, the Project’s uses would be no more incompatible (i.e.,
13
14

15 ⁶⁹ See, e.g., *Futurewise v. Benton County*, EWGMHB Case No. 20-1-0002 (July 28, 2020)
16 (County attempt to expand Kennewick’s UGA violated the GMA by failing to comply with
17 sizing requirements or reduce sprawl from “low-density development”); *Futurewise v. Benton*
18 *County*, EWGMHB Case No. 14-1-0003, Order Issuing Determination of Invalidity (Jan. 15,
19 2015) (County attempt to expand Kennewick’s UGA by 1,263 acres and change use from
20 “GMA Agricultural” to “Industrial” held invalid based on the “landowner-initiated annexation
21 petition[’s]” likelihood to “circumvent the GMA compliance process”); *Futurewise v. Benton*
22 *County*, EWGMHB Case No. 14-1-0003, Final Decision and Order (Oct. 15, 2014) (County
23 attempt to expand Kennewick’s UGA by 1,263 acres and change use from “GMA Agricultural”
24 to “Industrial” violated the GMA, resource conservation criteria, and Washington Department
25 of Commerce agricultural resource land regulations by failing, among other deficiencies, to
26 “prevent sprawl”); *Brodeur/Futurewise v. Benton County*, EWGMHB Case No. 09-1-0010c,
Order Finding Continuing Non-Compliance (West Richland UGA) (Sept. 24, 2010) (County
attempt to add 545 acres to West Richland’s UGA violated the GMA absent basis in urban
growth projections); *Roberts v. Benton County*, EWGMHB Case No. 05-1-0003, Final
Decision and Order (Sept. 20, 2005) (County attempt to add 3,322 acres to Richland’s UGA
violated GMA by failing to adequately plan for capital facilities, utilities, and transportation
facilities or follow growth management population projections).

⁷⁰ See BCC 11.17.040.

1 would be equally compatible) on surrounding areas compared to a minor⁷¹ solar power
2 generating facility or utility substation, both of which are outright allowed uses in the GMAAD.
3 For all the reasons described above, the Project is compatible with other uses of the lands in the
4 surrounding areas and complies with BCC 11.50.040(d)(1).

5 **Criterion 2. Will not materially endanger the health, safety, and welfare of the**
6 **surrounding community to an extent greater than any other**
7 **permitted uses in the zone**

8 The Project would not endanger the health, safety, and welfare of the surrounding
9 community, materially or in any other way. The Project would implement a variety of BMPs
10 and mitigation measures to ensure and preserve community health, safety, and welfare. These
11 measures are summarized in Section 1.10 of the ASC and, among others, include:

- 12 • Wind turbine equipment certification per international standards;⁷²
- 13 • Compliance with all County setback requirements as described in the ASC;
- 14 • Development and implementation of a Transportation Management Plan. This plan
15 would include measures to avoid and reduce Project-related delays on local roadways and
16 protect public safety;
- 17 • Use of non-reflective materials in muted tones to reduce potential aesthetic, glare, and
18 shadow flicker impacts;
- 19 • Implementation of a Dust Control Plan to avoid or minimize dust generated from
20 construction activities to protect local air quality;
- 21 • Coordination with Benton County Fire Marshal concerning hazardous materials storage
22 Special Permit and Project fire safety measures;
- 23 • Coordination with local emergency service providers to develop procedures for response
24 to natural hazards and human-caused incidents. Scout would register each Turbine location

23 ⁷¹ A “minor” solar facility does not convey that the project is spatially or generationally
24 smaller; it simply conveys that the solar facility is located on the premises of the beneficiary of
25 the power and is a secondary or accessory use to another primary land use. BCC
26 11.03.010(168).

⁷² See ASC, Sec. 2.3.1.

1 and the operations and maintenance (“O&M”) facilities with the rural
2 identification/addressing (fire number) system and 911 system;

3 • Implementation of a Stormwater Pollution Prevention Plan as well as all erosion control
4 measures identified in accordance with the Ecology Stormwater Management Manual for
5 Eastern Washington, to be included in the Project’s Erosion and Sediment Control Plan;
6 and

7 • Implementation of a Spill Prevention, Control, and Countermeasure (“SPCC”) Plan to
8 prevent leaks or spills and provide for rapid response in the unlikely event of an incident.

9 No extremely hazardous materials would be used for the Project, and no special emergency
10 services would be required. Construction may pose marginal additional risk for workers or
11 the public, as it would for any large construction project. However, work plans and
12 specifications would be prepared to address worker and community safety during construction.

13 In addition, Scout or its designated contractor would work with local emergency service
14 providers to develop appropriate emergency prevention and response procedures. The Project
15 would follow site-specific plans that are protective of health and safety, including but not limited
16 to a Stormwater Pollution Control Plan, Dust Control Plan, SPCC Plan, and Benton County
17 Special Permit General obtained from the Fire Marshal, which would be submitted to EFSEC
18 before construction.

19 Finally, the Project would be constructed with a SCADA system that allows real-time and
20 remote detection of any potential safety issues. The Project substations and O&M facilities
21 would be fenced and monitored to prevent unauthorized access. Project infrastructure would be
22 kept locked, and additional security would be provided as appropriate. “No trespassing” signs
23 and signs with emergency contact information would be posted as needed. Additional detail
24 regarding Project design features and activities is provided in the Project Description in Section
25 2.3 of the ASC, and further health and safety information is provided in Section 4.1.2 of the
26 ASC.

1 **Criterion 3. Would not cause the pedestrian and vehicular traffic associated with**
2 **the use to conflict with existing and anticipated traffic in the**
3 **neighborhood to an extent greater than any other permitted uses in**
4 **the zone**

4 The pedestrian and vehicular traffic associated with the Project would not cause any
5 greater conflict than would any of the other permitted uses in the GMAAD. Project construction
6 may cause a temporary increase in traffic on local roadways for short-term periods spread out
7 over the duration of phased construction described in ASC Section 2.15. Movement of
8 construction equipment and large-scale Project components, such as Turbine blades, would be
9 coordinated with local landowners to ensure that Project-related traffic does not interfere with
10 the transport of agricultural products. An estimated 16 to 20 personnel would be employed
11 onsite during the lifespan of the Project.⁷³ During Project operation, there would be minimal
12 Project-related traffic associated with these workers' vehicles commuting to the site and
13 conducting periodic O&M activities. During Project decommissioning, potential traffic impacts
14 would be similar to those evaluated for construction and the Project owner would implement
15 similar controls.⁷⁴

16 Section 4.3 of the ASC provides additional detail regarding proposed road improvements,
17 control measures to minimize potential impacts to local traffic, and access for emergency
18 vehicles. With implementation of these mitigation measures, the Project is not expected to
19 conflict with existing and anticipated traffic in the Project vicinity to an extent greater than that
20 associated with any other permitted use in the GMAAD and, therefore, is compliant with BCC
21 11.50.040(d)(3).

22
23
24 _____
25 ⁷³ ASC, Sec. 2.15.2.

26 ⁷⁴ ASC, Sec. 4.3.3.

1 **Criterion 4. Will be supported by adequate service facilities and would not**
2 **adversely affect public services to the surrounding area**

3 The Project would be in the service area of the Kennewick Police Department, Benton
4 County Sheriff’s Office, Washington State Patrol, Benton County Fire Department Districts 1
5 and 2, Kennewick Fire Department, Trios Health Southridge Hospital, and Kennewick School
6 District. The Project would likely be built using a “phased approach” with distinct, fully
7 functional portions of the Project potentially being built and implemented in a staggered manner.
8 See also ASC Section 2.15 for more information regarding the construction schedule and
9 construction workforce estimates of the example phased approach.

10 Under this phased approach, on average, the Project could employ between
11 approximately 230 and 260 workers per month depending on the construction phase.⁷⁵ Actual
12 construction employment will be higher or lower than this average and could reach a maximum
13 of up to approximately 350 to 375 workers during some months. It is possible this workforce
14 could create a short-term increase in the need for emergency services, including police, fire, and
15 medical response during the phased construction periods. However, the Project owner would
16 coordinate with local service providers and develop service agreements to ensure the Project is
17 within their response capacity. Construction workers are not anticipated to relocate their families
18 to the Project vicinity for the duration of the phased construction periods. Therefore, no
19 additional demand for local school or nonemergency health services is anticipated during
20 construction.

21 During operations, the addition of up to 16 to 20 permanent employees and their families
22 would represent a minimal potential change to local schools and other public services, but no
23 greater change than would occur from other job-creating permitted uses in the GMAAD. ASC
24 Sections 4.1.2 and 4.4 provide additional detail regarding Project control measures to manage

25 _____
26 ⁷⁵ ASC, Sec. 2.15.1.

1 and minimize the need for public services. With these conditions, the Project would not
2 adversely affect public services to the surrounding area. Therefore, the Project complies with
3 BCC 11.50.040(d)(4).

4 **Criterion 5. Would not hinder or discourage the development of permitted uses on**
5 **neighboring properties in the zone as a result of the location, size or**
6 **height of the buildings, structures, walls, or required fences or**
7 **screening vegetation to a greater extent than other permitted uses in**
8 **the zone**

9 Neither the Project's location, size, nor height of structures would hinder or discourage
10 the development of permitted uses on neighboring properties in the GMAAD zone. The Project,
11 located outside of the County's Growth Management Urban Growth Area, would not cause any
12 changes nor impose additional costs on the uses of the surrounding properties. The Project
13 would comply with required setback buffers, as discussed *supra*, and all other development
14 standards, building requirements, and fencing standards necessary for development in the
15 GMAAD zone. Specifically, the wind facility components comply with the development
16 standards for wind Turbine farms addressed under BCC 11.17.070(t), and the solar array and
17 BESS components comply with the development standards for major solar power generating
18 facilities under BCC 11.42.100(b).

19 Again, research has consistency shown that wind farms do not negatively impact the
20 property values of agricultural properties that host wind Turbines or on rural residential or
21 agricultural properties surrounding wind facilities. There may be temporary, short-term impacts
22 to traffic in the Project Lease Boundary during the Project construction period. However, these
23 impacts would be mitigated through implementation of traffic control measures identified in
24 ASC Section 4.3.3 and would not hinder or discourage the development of other permitted uses
25 in the area.
26

1 As described above in the Criterion 1 summary, the Project would incorporate measures
2 to reduce potential aesthetic, glare, and shadow flicker impacts.⁷⁶ The shadow flicker analysis
3 conducted for the Project demonstrates that residences on neighboring non-participating
4 properties would not experience shadow flicker in exceedance of industry standard thresholds.⁷⁷
5 The glare modeling analysis completed for the Project indicates that surrounding observation
6 points and vehicle routes would not experience glare as a result of the Project.⁷⁸ Thus, the
7 Project is not expected to hinder or discourage the development of permitted uses on neighboring
8 properties within the GMAAD, and the Project complies with BCC 11.50.040(d)(5).

9 DATED: March 25, 2021.

10
11 
12

13
14 Timothy L. McMahan, WSBA No. 16377
tim.mcmahan@stoel.com

15 Attorney for Applicant
16
17
18
19
20
21
22

23 _____
24 ⁷⁶ ASC, Secs. 4.2.2-.3.

25 ⁷⁷ See ASC, Appendix G, Shadow Flicker Report.

26 ⁷⁸ See ASC, Appendix H, Glare Analysis Report.

Exhibit A

Planning Department

(509) 786-5612
P.O. Box 910
Prosser, WA 99350



www.co.benton.wa.us

planning.department@co.benton.wa.us

Prosser Office: 620 Market Street, 1st Floor
Kennewick Office: 102206 East Wiser Parkway

July 1, 2020

Dave Kobus
Scout Clean Energy & Horse Heaven Wind Farm, LLC
4865 Sterling Drive, Suite 200
Boulder, CO 80303

Email: Dave@scoutcleanenergy.com

Re: Zoning Determination/Interpretation

Dear Mr. Kobus,

Thank you for your inquiry and request for a zoning determination. Your request, dated July 1, 2020, seeks zoning clarity as it relates to the use of battery energy storage systems relative to BCC 11.17.070 (t), and specifically if a battery storage system/facility would be considered a "related support structure and other improvements" in the administration of BCC Title 11.

Further you request to apply for a wind tower facility with a battery storage system/facility within a single Conditional Use Permit and in turn a single SEPA Checklist.

Upon reviewing BCC Title 11, the Planning Department has determined the following findings:

1. BCC 11.030 identifies the applicable *definitions* related to the requests:

(167) "Solar Power Generator Facility, Major" means the use of solar panels to convert sunlight directly or indirectly into electricity. Solar power generators consist of solar panels, charge controllers, inverters, working fluid system, and **storage batteries**. Major facilities are developed as the primary land use for a parcel on which it is located and does not meet the siting criteria for a minor facility in BCC 11.03.010(168).

(190) "Wind Turbine" means a machine with **turbine apparatus (rotor blades, nacelle and tower)** capable of producing electricity by converting the kinetic energy of wind into rotational, mechanical and electrical energy; provided, the term does not include electrical distribution or transmission lines, or electrical substations.

(191) "Wind Turbine Farms" means two or more wind turbines on one parcel.

2. BCC 11.17.07 identifies the following *uses* as requiring a conditional use permit the GMA Agricultural District.

(t) One (1) wind turbine with a wind turbine height of sixty (60) feet or more or a wind turbine farm and related support structures and other improvements under the following conditions

(cc) Solar power generator facility, major.

Upon reviewing the request, Benton County and Code, and findings, the Planning Department has determined that a battery storage facility, whether it is a stand-alone facility or to be used in conjunction with another use, is a Solar Power Generator, Facility for the purposes of administering BCC Title 11.

With this, a conditional use permit is required for a **wind turbine facility** under BCC 11.17.07(t) and a conditional use permit is required for a **solar power general facility**, major per BCC Title 11. 17.07 (cc).

Should an applicant choose to submit both conditional use application requests at the same time and with it, provide a description of how the projects are connected or related, the two (2) public hearings will appear before the Hearings Examiner on the same agenda. Additionally, under this scenario, a single SEPA Checklist and environmental determination for the two (2) uses may submitted for review.

Appeals of this determination may be made to the Benton County Planning Department. Appeals are scheduled to appear before the Benton County Hearings Examiner in a public hearing. Such an appeal must be made in writing (detailed explanation stating the reason for the appeal) and filed together with the appropriate appeal fee (\$700.00). This information shall be submitted to the Planning Department within fourteen (14) working days from the date of this letter. If an appeal is not submitted, the decision included in this letter is final and no further appeal may be made.

If you have any questions, please do not hesitate to contact our Department at 509-786-5612.

Sincerely,

A handwritten signature in black ink, appearing to read 'Greg Wendt', with a long horizontal flourish extending to the right.

Greg Wendt
Planning Manager

Exhibit B

From: Greg Wendt <Greg.Wendt@co.benton.wa.us>
Sent: Monday, January 11, 2021 3:19 PM
To: McMahan, Tim <tim.mcmahan@stoel.com>
Cc: Ryan Brown <Ryan.Brown@co.benton.wa.us>; Jerrod MacPherson <Jerrod.MacPherson@co.benton.wa.us>; Dave Kobus <Dave@scoutcleanenergy.com>; Darin Huseby <Darin@scoutcleanenergy.com>; Pat Landess <pat@scoutcleanenergy.com>
Subject: FW: [EXTERNAL] Horse Heaven - DRAFT Land Use Compliance

Tim,

Thank you for your recent update on the Horse Heaven Wind Project (January 13, 2021).

I have reviewed the land use summary document you submitted to Benton County on Friday, January 8, 2021. We appreciate the opportunity to review and provide comment.

The Planning Department's general comments are as follows:

1. The document makes reference, on Page 17, to a *"Zoning Determination and Interpretation letter from Benton County to the Applicant reviews the applicability of these definitions, including as Attachment XX-County Zoning Determination"* that is contemplated to be an attachment. When do you expect to share a draft of that document with the County? Or is that something you assume the County will be preparing? And has that planned changed as a result of our discussion this morning where we described that the County can only determine if a CUP would be issued, i.e. is the project is allowed under our zoning, after a public hearing to allow potential opponents an opportunity to present evidence as to why they believe a CUP would not be legally issued? This issue is further discussed below.
2. Suggestion: Add an analysis on how the project impacts or complies with BCC 6A.15 (Noise) and BCC 3.18 (Roads). This information may be addressed in SEPA checklist, but it may be beneficial to include in the land use review documents.
3. I tried to review the citations throughout the document for accuracy. They generally look pretty accurate, but it was a quick review. I did notice an erroneous citation in the table to BCC 11.17.0170, which is not an accurate code citation.
4. Please note that activities which are deemed to be "allowable uses" in Title 11 Zoning (BCC 11.17.040) do require review and approval under Title 15 Environment and other applicable codes.
5. Please note the following definitions in BCC 11.03.010 (Zoning)

(53) "Compatibility" means the congruent arrangement of land uses and/or project elements to avoid, mitigate, or minimize (to the greatest extent reasonable) conflicts.

(57) "Conditional Use Permit" means a permit which is granted for a conditional use. The term "conditional use" means a use subject to specified conditions which may be permitted in one (1) or more classifications as defined by this title but which use, because of characteristics peculiar to it, or because of size, technological processes or type of equipment, or because of the exact

location with reference to surroundings, streets and existing improvements or demands upon public facilities, or impacts to ground or surface water requires a special degree of control to make such uses consistent with and compatible to other existing or permissible uses in the same zone or zones, and to assure that such use shall not be adverse to the public interest.

6. Please note the Benton County Comprehensive Plan seeks to preserve the natural environment, local customs, culture, and quality of life for County residents. Simultaneously, it seeks to facilitate and encourage economically productive use of the land and resources base to enable economic growth, prosperity, and enjoyment of a quality life. The goals, policies and elements of the Plan provide the foundation for land use requirements and decision making in the County.

As we have discussed, to obtain zoning compliance in Benton County the proposed use requires the approval of a conditional use permit and in turn evidence is to be presented to the Hearing Examiner that allows for the positive affirmation of the required Findings of Fact. Benton County is unable to conclude if your client's project is consistent with our zoning, i.e. entitled to a CUP, until the completion of the public meeting and public hearing process that would allow us to receive evidence from anyone in opposition to the issuance of a CUP. The County Code is very specific in BCC 11.50.050 (b) that an open record hearing be held and in BCC 11.50.050 (c) that following the conclusion of the open record hearing the Hearing Examiner shall make a decision. The Code states the use shall be granted only if the findings of fact can be affirmed and made based upon the evidence presented during the process. As we discussed this morning, for these reasons we fail to see how the County could provide a certification before the EFSEC hearing as to the County's conclusion as to whether or not a CUP would be appropriately issued for this project. We understand that, as Dave pointed out, your filing with EFSEC will preclude our Hearings Examiner from holding the hearing otherwise required by County code. However, that does not mean that she or the County is required to or should pre-judge the application and issue a certification without allowing third parties an opportunity to be heard. This just does not seem to be a situation where a Certificate of Consistency can be issued at this point in time.

Once again, we appreciate your time earlier today and look forward to reviewing the SEPA materials associated with the Project. If you have any questions on the above comments, please let us know.

Sincerely,
Greg



Greg Wendt
Director of Community Development
Benton County Public Services Building
102206 E Wiser Parkway
Kennewick, WA 99336
(509) 786-5612

Mailing Address:

Benton County Community Development Department
PO Box 910, Prosser, WA 99350

From: Ryan Brown <Ryan.Brown@co.benton.wa.us>

Sent: Monday, January 11, 2021 10:48 AM

To: McMahan, Tim <tim.mcmahan@stoel.com>

Cc: Darin Huseby <Darin@scoutcleanenergy.com>; Dave Kobus <Dave@scoutcleanenergy.com>; Jerrod MacPherson <Jerrod.MacPherson@co.benton.wa.us>; Greg Wendt <Greg.Wendt@co.benton.wa.us>
Subject: RE: [EXTERNAL] Horse Heaven - DRAFT Land Use Compliance

Tim,

Thanks for the update this morning. Our Planning Director will take a look at your draft report on land use issues and let you know his thoughts.

Ryan K. Brown

Chief Deputy Pros. Attorney, Civil
Benton Co. Pros. Attorney's Office
Phone: (509) 735-3591

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From: McMahan, Tim <tim.mcmahan@stoel.com>
Sent: Friday, January 8, 2021 2:10 PM
To: Ryan Brown <Ryan.Brown@co.benton.wa.us>; Dave Kobus <Dave@scoutcleanenergy.com>; Greg Wendt <Greg.Wendt@co.benton.wa.us>; Jerrod MacPherson <Jerrod.MacPherson@co.benton.wa.us>
Cc: McMahan, Tim <tim.mcmahan@stoel.com>; Darin Huseby <Darin@scoutcleanenergy.com>
Subject: [EXTERNAL] Horse Heaven - DRAFT Land Use Compliance

CAUTION: This email originated from outside of Benton County. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hi guys: In preparation for our Monday call/"meeting," attached is our draft land use section for the Application for Site Certification to be filed with EFSEC. We would greatly appreciate any input you can provide. For our call, Dave and I anticipate providing status updates and discussing what we anticipate the process to be once we file with EFSEC.

Thank you all for your time. We look forward to our discussion on Monday at 10:00 AM. Have a great weekend. TLM

Timothy L. McMahan | Partner
STOEL RIVES LLP | 760 SW Ninth Avenue, Suite 3000 | Portland, OR 97205
Direct: (503) 294-9517 | Mobile: (503) 504-8693 | Fax: (503) 220-2480
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