BEN
HHWF Pre-Filed Reply Testimony
Greg Wendt
EXH 2004_R

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 REPLY TESTIMONY OF GREG WENDT

Please state your full name and job title.

My name is Greg Wendt and I am Director of Community Development for Benton County. I have worked in county government as a fulltime professional land use planner for the past 26 years in Maryland, Oregon, and Washington. I have worked for Benton County for the past six and a half years. I attended Eastern Washington University and graduated with a degree in urban and regional planning. I also attended Washington State University and received a masters in regional planning.

Have you reviewed the rebuttal testimony prepared by Scout Clean Energy in support of its Application for Site Certification for the Horse Heaven Wind Farm?

Yes. I would like to respond in particular to the testimony of Leslie McClain and Christopher Wiley.

Are you familiar with the Energy Facility Site Evaluation Council's Order No. 883 in this matter?

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Yes.

Please describe your understanding of Council Order No. 883.

My understanding of Council Order No. 883 is that the Energy Facility Site Evaluation Council ("EFSEC") found that, based upon the Benton County Code ("BCC") in effect at the time of Scout Clean Energy's ("Scout") Application for Site Certification ("ASC"), wind farms were allowed as a conditional use in the Growth Management Act Agricultural District ("GMAAD"). However, "[t]he Council's land use consistency determination does not prejudge whether the Facility has met or can meet Benton County's conditional use criteria." Council Order No. 883, ¶ 23.

In summary, my understanding of Council Order No. 883 is that it found the Horse Heaven Wind Farm ("HHWF") was "consistent with land use regulations" in the sense that the HHWF *may* be allowed as a conditional use, not in the sense that it actually satisfies the conditional use permit ("CUP") criteria. It is my understanding that whether the HHWF will satisfy CUP criteria will be addressed during the adjudication. One of the disputed issues identified in the Second Pre-Hearing Conference Order is BCC 11.50.040(d)—Conditional Use Criteria. The required CUP criteria are as follows:

(1) 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;

(2) 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;

(3) Will not cause the pedestrian and vehicular traffic associated with the use to conflict with existing and anticipated traffic in the

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neighborhood to an extent greater than that associated with any other permitted uses in the applicable zoning district;

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

(5) 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 screen vegetation to a greater extent than other permitted uses in the applicable zoning district.

BCC 11.50.040(d).

Do you disagree with the finding of "land use consistency" in Council Order No. 883?

EFSEC was correct that at the time of Scout's ASC, wind farms were allowed as a conditional use in the GMAAD. However, as I explain in more detail below, a proposed use being potentially allowed as a conditional use in a zoning district is not the same as the proposed use actually meeting the criteria for a CUP. This is why one of the disputed issues is whether the HHWF complies with Benton County's CUP criteria.

Do you agree with Ms. McClain's understanding of the conditional use permit process?

This is actually my main critique of Ms. McCain's testimony as it is clear that she does not understand how a CUP is processed. Ms. McCain believes that the "County's role [is] to provide the Council recommendations for conditions to place on the Project which address the County's conditional use criteria." McClain Rebuttal Testimony, p. 6. This testimony seems to suggest that because wind farms are allowed as conditional use in the GMAAD, Scout is automatically entitled to a CUP and the only discussion to be had is over applicable conditions. Not only is that not how the CUP process works, it is at odds with Council Order No. 883 which specifically states that EFSEC has not yet "prejudge[d] whether the Facility has met or can meet Benton County's conditional use criteria." Ms.

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McClain's understanding is also at odds with the issues for adjudication, which includes BCC 11.50.040(d).

It is important for EFSEC and Scout to understand that a conditional use is not the same as a permitted use. Permitted uses are just that—uses that are outright permitted in a zone and that may not even require a permit application to Benton County. Conditional uses, on the other hand, are uses that may be allowed in a zone if they can meet the County's CUP criteria. The CUP permit application process allows the hearing examiner to evaluate whether a proposed development protects the integrity and purpose of the underlying zoning district, including ensuring compatibility with outright permitted uses. The fact that a use is listed in the BCC as a conditional use is not sufficient for approval of a project. I want to be very clear that applications for a conditional use permit may be lawfully denied or conditions may be imposed that an applicant is unable or unwilling to fulfill. I have been involved with hundreds of CUP applications over my 26-year career and I estimate that I have recommended denial of approximately 10 to 15 CUPs because they did not satisfy applicable criteria. This is because I do not like accepting CUP applications as "complete" that do not and will not meet the CUP criteria. Still, uses must be evaluated on a proposal-by-proposal basis. Based upon the characteristics of an individual proposal, there may be projects that propose a use authorized as a conditional use, but the proposal itself is not consistent with the CUP criteria and cannot be allowed with any conditions.

How does the conditional use permit process work?

As with any permit process, the CUP process starts with an application by a project proponent describing the proposal. The County would look at the use proposed and determine whether it was authorized in the zoning district in which the property is located. If

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the proposal is for a use that is conditionally allowed, the County would begin the CUP process. This process would include evaluating the project as a whole, which includes the application and comments received on the application, to see if it meets the CUP criteria. If the County found that the project as proposed, or as conditioned, could satisfy the CUP criteria, it would recommend approval to the hearing examiner, the decision-making body for the County on CUPs. On the other hand, if the County found that the specific project as proposed, even with conditions, could not satisfy the CUP criteria, it would recommend denial to the hearing examiner. The fact that a use may be allowed subject to a CUP does not automatically entitle a project to a CUP. It is not the County's obligation to identify or invent a full complement of conditions such that any application is essentially assured of approval. Instead, the project proponent must show that the proposed use meets the criteria set forth in BCC 11.50.040(d), which are the same criteria that were in effect at the time of Scout's ASC application.

Taking the HHWF as an example, under the BCC in effect at the time of the application, wind turbine farms were an allowed conditional use in the GMAAD. Under BCC 11.03.010(191), a wind turbine farm "means two or more wind turbines on one parcel." From the base definition of a wind turbine farm, it should be obvious that any number of proposals could be submitted to the County for a "wind turbine farm." In this case, Scout proposes a project boundary of 72,428 acres, with 244 wind turbines to be constructed across an 11,850-acre micrositing corridor.

I will not repeat my earlier pre-filed testimony that goes into detail over how the HHWF is not compatible with outright permitted uses in the GMAAD and does not satisfy the CUP criteria; however, at a base level, I hope that my testimony has demonstrated that a

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proposal for 244 wind turbines is significantly different than a proposal for two wind turbines. Therefore, while a wind turbine farm (aka, more than two wind turbines) is allowed as a conditional use in the GMAAD, it is my professional opinion that the specific HHWF does not satisfy the CUP criteria and therefore should not be granted a CUP.

Ms. McClain is correct that I did not suggest any conditions to EFSEC for the HHWF. She is incorrect in suggesting that my testimony was that the HHWF is not *eligible* for a CUP, regardless of conditions. I acknowledge that the HHWF is eligible for a CUP. However, she is correct that my professional opinion is that there is no set of conditions that would allow the HHWF to meet the conditional use criteria found at BCC 11.50.040. As I stated in my pre-filed testimony, and ignored by Ms. McClain, if all necessary reasonable conditions are not accepted by the applicant so as to allow the decision maker to make the conclusions required by BCC 11.50.040, *the conditional use application shall be denied.*

Do you have other critiques of Ms. McClain's testimony?

Outside of my other critiques of Ms. McClain's testimony mentioned above, her resume indicates that she has never worked for a government agency. This means that while she is well respected and has experience with land use permit applications in an advocacy role, she has not listed or identified experiences from the perspective of assessing a project in the role of a local government land use planner with the responsibility to objectively administer and implement government plans, policies, and requirements. This includes objectively reviewing project permit applications, such as CUPs.

Project proponents tend to believe that their projects comply with all applicable regulations and meet whatever criteria are necessary for permit approval—they would not apply for a project otherwise. In my role as a governmental land use planner, I am required

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to objectively review a project and make a determination based upon all available information as to whether a project complies with applicable regulations.

I also take issue with her testimony that the County is somehow estopped from recommending that EFSEC deny the HHWF based on its noncompliance with Benton County's CUP criteria. I acknowledge that the County has previously permitted wind farms in the GMAAD. However, projects must be evaluated on a project-by-project basis. The fact that the County may have granted a wind farm a CUP in the past does not automatically entitle the HHWF to a CUP. Ms. McClain mentions that Benton County previously permitted the Nine Canyon Wind Farm. That is correct. However, as Ms. McClain notes in her testimony, the Nine Canyon Wind Farm totals 63 wind turbines with a height of 265 feet. Here, Scout proposes either 244 wind turbines with a height of 499 feet or 150 turbines with a height of 657 feet. The original generating capacity for the Nine Canyon Wind Farm was 32 megawatts. Scout anticipates the nameplate energy generating capacity for the HHWF to be up to 1,150 MW. The features of the HHWF are significantly different, and in my opinion result in a drastically more intense use, than the Nine Canyon Wind Farm and as such, there is very little use in comparing the two when it comes to conditional uses in the GMAAD.

Nor is the County's previous approval of wind farms a statement that the HHWF complies with the CUP criteria. Instead, as I explained in detail in my pre-filed testimony, based upon the specific proposal that is currently before EFSEC, it is the County's position that the HHWF does not comply with the CUP criteria in BCC 11.50.040(d).

Do you agree with Ms. McClain's testimony that Scout's Application for Site Certification shows that the Horse Heaven Wind Farm satisfies the conditional use permit criteria?

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No. First, the County has responded to Scout's analysis of the CUP criteria in the ASC—the County does not believe that Scout's analysis was correct and accurate and does not believe that the HHWF meets the County's CUP criteria. I understand that Scout likely does not agree with the County's analysis, but is different than saying the County did not respond constructively. It is Scout that failed to substantively respond to my consideration of the CUP in my pre-filed testimony. Second, I understand that Ms. McClain believes that Section 2.23.2 of the ASC shows that the HHWF complies with Benton County's CUP criteria; however, as noted above, every project applicant believes that their project complies with the applicable criteria and will make statements to this effect. This is why the permitting jurisdiction must look to the project as a whole and evaluate the project independently of what the applicant believes. This includes consideration of all comments received on a project.

I understand that in this case, the "permitting jurisdiction" is EFSEC. Therefore, I also understand that Benton County is in an oppositional, but similar, role to Scout, in that EFSEC will need to evaluate my testimony regarding non-compliance just as it needs to evaluate Scout's statements of compliance. As such, I would direct EFSEC to my pre-filed testimony for a statement of the reasons why Benton County believes the HHWF does not comply with BCC 11.50.040(d). I would also like to point out to EFSEC that Ms. McClain did not address my evaluation of the HHWF's compliance with Benton County's CUP criteria, but instead simply restated what was in the ASC. As I pointed out in my pre-filed testimony, the ASC does not use the correct test of "compatibility" as is defined in BCC 11.03.010(53).

Can you explain the purpose of the Growth Management Act Agricultural District?

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The purpose of the GMAAD

> is to meet the minimum requirements of the State Growth Management Act (Chapter 36.70 RCW) that mandates the designation and protection of agricultural lands of long term commercial significance. The chapter protects the GMA Agricultural District (GMAAD) and the activities therein by limiting non-agricultural uses in the district to those compatible with agriculture and by establishing minimum lot sizes in areas where soils, water, and climate are suitable for agriculture purposes. This chapter is intended to work in conjunction with Chapter 14.05 BCC entitled "Right to Farm" which protects normal agricultural activities from nuisance complaints.

BCC 11.17.010. The conservation of agricultural lands of long-term commercial significance ("ALLTCS") through the GMAAD is not simply a County policy. Instead, it is a state mandate that Benton County must follow. Once Benton County designates land as ALLTCS, it cannot either de-designate ALLTCS or allow non-agricultural uses upon ALLTCS without first making a determination that the lands no longer meet ALLTCS status. Benton County has designated ALLTCS through its GMAAD. If land is zoned GMAAD, it is ALLTCS and cannot be rezoned or put to non-agricultural uses unless the land has been de-designated.

What does it mean for GMAAD land to be de-designated?

Essentially, it means that the land is no longer considered ALLTCS. Once land is no longer considered ALLTCS, Benton County no longer has a GMA obligation to protect and conserve the land and can allow the land to be put to non-agricultural uses. However, until GMAAD land is de-designated, Benton County has a mandate to protect ALLTCS. Therefore, when Ms. McClain mentions the reduction in GMAAD from the County's 2006 Comprehensive Plan to its 2018 Comprehensive Plan, all that means is that Benton County determined that those 95,599 acres no longer met the criteria to be designated as ALLTCS.

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The fact that the County has de-designated ALLTCS is irrelevant to this case as the HHWF is proposed on land that is still designated as ALLTCS. Additionally, reduction in available GMAAD land is not the same as improper conversion of ALLTCS. Reduction in available GMAAD land means that the County has concluded that the land no longer qualifies as ALLTCS. Improper conversion of ALLTCS means that a non-agricultural use is taking place on land that still qualifies as ALLTCS. The County has a state mandate to prevent the latter, not the former.

Can you explain the County's concern with the location of the HHWF?

The County's issue with the HHWF's location in the GMAAD is more subtle than Ms. McClain suggests. While yes, the County is concerned about the HHWF's impact on land available for farming, it is also concerned about the incompatibility of the HHWF with the GMAAD regardless of the quantitative impact on land available for farming. As I stated above, the County has an obligation to protect and conserve ALLTCS. The County has done so through implementation of the GMAAD zoning designation. The GMAAD requires limiting non-agricultural uses in the district to those compatible with agriculture. The HHWF is *not* an agricultural use. Based upon the particular characteristics of the HHWF, it is my professional opinion that the HHWF is not compatible with agriculture and cannot meet CUP criteria with our without conditions. Additionally, the HHWF will result in the conversion of ALLTCS in the areas where the solar components and wind turbines are installed. As a planner for the County, I am familiar with the case law surrounding the conversion of ALLTCS due to the potential consequences to the County for any improper de-designation of ALLTCS. Therefore, I am familiar with *King Cnty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543 (2008), also commonly referred to as the

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"*Soccer Fields*" case, in which the Washington State Supreme Court found the argument that land *could* be returned to agricultural use unpersuasive so as to find that zoning complied with GMA requirements in regard to protection of ALLTCS. My main point here is not necessarily the violation of the GMA that this represents, but also the inconsistency with the BCC's criteria for CUP analysis.

Having reviewed the ASC and DEIS, that is essentially Scout's argument—there is a decommissioning plan to revert the land back to agricultural uses once the life of the project is complete and, as such, no ALLTCS is converted. The Supreme Court has already rejected this argument. Therefore, anywhere the HHWF installs long-term supportive wind and solar facility infrastructure, Scout is converting ALLTCS contrary to state and local law

Contrary to Ms. McClain's testimony, the County is not concerned about sprawling residential developments in the GMAAD because those developments are not allowed absent a zoning change. My pre-filed testimony detailed the *permitted* uses within the GMAAD, none of which are residential developments. If there was a zoning change, the land would possibly no longer qualify as ALLTCS and the County might not have to limit the non-agricultural uses.

What are the consequences if the County does not properly de-designate GMAAD?

The most likely consequence if the County does not properly de-designate land in the GMAAD is that the County will be in violation of the GMA and vulnerable to an appeal before the Growth Management Hearings Board ("GMHB"). This is not a speculative consequence either, as it is my understanding that Franklin County's most recent comprehensive plan was appealed to the GMHB based upon an alleged improper de-designation of GMAAD. Additionally, while not dealing with the de-designation of

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GMAAD, Benton County's 2018 comprehensive plan update was appealed to the GMHB for an alleged non-compliance with the GMA.

Once appealed, the GMHB will determine if the County properly de-designated GMAAD. If the GMHB finds that the County did not properly de-designate GMAAD, it will issue either an order of invalidity or non-compliance and Benton County will likely have to rescind its de-designation. Therefore, the fact that no one appealed the County's designation of ALLTCS in 2018 inherently means those lands no longer qualified as ALLTCS and could be put to non-agricultural uses. The County has not attempted to de-designate the lands on which the HHWF is proposed because the County believes those lands still meet the criteria for ALLTCS found in WAC 365-190-050. Regardless of whether an appeal is threatened or likely in the present case, the County intends to follow the law.

Do you have any response to Mr. Wiley's testimony?

First, I think it's important to point out that neither Mr. Wiley nor Bubba Wiley Wheat, LLC, are listed as landowners within the project lease boundary in Appendix F. Instead, I see a Jason Wiley and Wiley Ranches, Inc., listed as a participating landowner. I assume that Mr. Wiley helps with Wiley Ranches, Inc.; however, I do think it is important to point out to EFSEC that Scout has yet to be able to produce an actual participating landowner to testify as to the alleged beneficial impacts of the HHWF.

Second, I respect Mr. Wiley's testimony that the HHWF will be beneficial for him and his family. The County has never disputed that the HHWF may be beneficial for those specific farmers that enter into a lease agreement with Scout. Instead, the County is concerned for the agricultural industry as a whole within Benton County, including the agricultural support economy and those farmers who have not entered into a lease agreement

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with Scout. I think Ms. Cooke's pre-filed testimony does a good job of describing the County's tangible concerns in this regard. While Mr. Wiley testifies to his belief that the HHWF will be beneficial to seemingly all farmers, he does not parse out those farmers subject to lease agreements and those that will still feel the impacts of the HHWF but are not subject to lease agreements with Scout.

Mr. Wiley's testimony is further lacking because it is based on short-term economic self interest, while the County's position must consider the long-term needs of this agricultural region as a whole. This also includes protecting the land from gradual erosion of agricultural land use patterns primarily by land use actions that will permanently transition this area so that it will practically never be farmed again.

I, GREG WENDT, declare under penalty of perjury under the laws of the State of Washington that the foregoing REPLY TESTIMONY OF GREG WENDT is true and correct to the best of my knowledge.

DATED this 11 day of July, 2023, at Kennewick, Washington.

GREG WENDT

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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DATED THIS 14th day of July, 2023, at Yakima, Washington.

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