

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of
Docket No. EF-240001

Aurora Solar, LLC for Wallula Gap
Solar Energy Project, Applicant

Council Order No. 895

ORDER FINDING PROJECT
INCONSISTENT WITH LAND
USE REGULATIONS

BACKGROUND

Synopsis. *Wallula Gap Solar LLC submitted an application to the Energy Facility Site Evaluation Council (EFSEC or Council) on February 23, 2024, for site certification of the proposed Wallula Gap Solar Energy Project site in Benton County. Under Benton County ordinances in effect on that date land use proposals meeting the definition of “solar power generation facility, major” are not permitted outright, nor are they among the list of uses allowed with a conditional use permit (CUP) in the Growth Management Act Agricultural District (GMAAD). The Applicant conceded that the project is not consistent with land use regulations. Because the proposed site would be a solar power generation facility, major, within the GMAAD zone, the Council has determined the proposed project was not consistent with current Benton County land use and zoning regulations at the time the application was filed. RCW 80.50.090(2). The Council will schedule an adjudicative proceeding to consider whether to submit a recommendation to the Governor to preempt inconsistent local land use plans and zoning ordinances.*

1. **Nature of Proceeding.** This matter involves an application for site certification (Application or ASC) filed on February 23, 2024, by Wallula Gap Solar LLC, a subsidiary owned by OneEnergy Renewables (the Applicant) to construct and operate Wallula Gap Solar Energy Project (the Facility), a 60-megawatt (MW) solar photovoltaic (PV) generation facility with optional battery storage. The Facility would be located in unincorporated Benton County approximately 4 miles northwest of the unincorporated community of Plymouth on parcels located north of SR-14, approximately 5 miles west of its intersection with Interstate 82. The Facility would have a maximum generating capacity of 60 MW and will utilize solar photovoltaic (PV) panels to convert solar energy into electric power which will then be delivered to the electric power grid.

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2. **Land Use Consistency Hearing.** RCW 80.50.090(2) requires EFSEC to “conduct a public hearing to determine whether or not a proposed site is consistent and in compliance with city, county, or regional land use plans or zoning ordinances.” On April 12, 2024, EFSEC issued a Notice of Informational Public Hearing and Land Use Consistency Hearing and scheduled an in person hearing with the option for participation by Microsoft Teams for 5:30 p.m. on Tuesday, April 23, 2024.¹
3. On April 23, 2024, the Council conducted the in person and virtual Land Use Consistency Hearing, to receive testimony regarding whether the Facility was consistent and in compliance with Benton County’s local land use provisions. The following EFSEC members were present at the April 23, 2024, hearing: Mike Livingston (Department of Fish and Wildlife), Lenny Young (Department of Natural Resources), Stacey Brewster (Utilities and Transportation Commission) and Adam Fyall (Benton County). Kathleen Drew, EFSEC Chair, presided over the hearing.
4. Assistant Attorney General Yuriy Korol, Counsel for the Environment, was present for the Land Use Consistency Hearing. Also present was Michelle Mercer, Planning Manager, representing the Benton County Planning Division and speaking on the County’s behalf.
5. Timothy McMahan, Stoel Rives Law Firm, represented the Applicant and spoke on the Applicant’s behalf. Also present for the Applicant were Nathan Stottler, an associate director for project development, Tanner Gillespie and Erin Lynch, associates on the project development team.
6. The Council allowed time for public testimony at the Land Use Hearing, however no members of the public or other interested parties gave comment.
7. ***Applicant’s Description of Proposed Facility.*** Wallula Gap Solar Energy Project, a proposed 60-megawatt (MW) solar photovoltaic (PV) generation facility with optional battery storage is proposed to be located in unincorporated Benton County. The project would be located approximately 4 miles northwest of the unincorporated community of Plymouth on parcels located north of SR-14, approximately 5 miles west of its intersection with Interstate 82.

¹ The Council sent this Notice to all interested persons on the distribution list and general mailing. Further, the Council sent this Notice in English and Spanish to the project mailing list on GovDelivery, as well as the Tri-City Herald, Yakima Herald, and the Columbia Basin Herald, the local daily newspapers of general circulation.

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8. According to the application, the proposed solar project would be located entirely on land within the Benton County GMAAD zone. *Application for Site Certification, Attachment C: Land Use Consistency Review at Sec. 1.3.*
9. The three parcels on which the Facility will be located will together constitute the “Facility Parcels.” The owner of the parcels is listed in a table in Part 1, Section A3 of the initial application. The owner of all three parcels is Farmland Reserve, Inc. The Applicant has executed or is pursuing options to lease with the landowner for adequate acreage to accommodate the Facility long-term. *Application for Site Certification, Part 1, Section A.3.*
10. The Board of County Commissioners for Benton County (Commissioners) adopted Benton County Ordinance Amendment (OA) 2021-004, on December 21, 2021. OA 2021-004 removed the CUP option for commercial solar power generator facility, major from the GMAAD. The purpose of the removal of the CUP option for commercial solar power generator facility, major was to 1) protect long-term commercial agricultural lands, 2) limit incompatible and non-agricultural uses, 3) conserve critical areas and habitat, 4) protect visual resources, and 5) protect rural character. *Board of Benton County Commissioner’s Regular Board Meeting Minutes, December 21, 2021.*
11. The Applicant agrees that the site is not consistent with current land use regulations but would like to proceed with the application and is not seeking an expedited process.

DISCUSSION

Land Use Consistency Determination

12. The purpose of the land use hearing is “to determine whether at the time of application the proposed facility was consistent and in compliance with land use plans and zoning ordinances.”² In this order, the Council will refer to land use plans and zoning ordinances collectively as “land use provisions” and will refer to its decision as pertaining to “land use consistency.”
13. The Council’s evaluation of land use consistency is not dispositive of the Application and a determination of land use consistency or inconsistency is neither an endorsement nor an approval nor rejection of the Project.³ The evaluation pertains only to the general siting

² WAC 463-26-050.

³ *In re Whistling Ridge Energy Project*, Council Order No. 868 at 9 (October 6, 2011) (Whistling Ridge Order). A determination of land use inconsistency simply results in the Council’s further consideration of whether local land use provisions should be preempted. WAC 463-28-060(1), *see also* RCW 80.50.110(2) and WAC 463-28-020. If they are preempted, the Council will include in any proposed site certification agreement conditions designed to recognize the purpose of the preempted provisions. WAC 463-28-070.

of categories of uses, taking into account only the Site and not the Project's construction and operational conditions.

14. Whether a particular project will actually create on- or off-site impacts (including impacts to the environment) is considered separately through the State Environmental Policy Act (SEPA) process, during the Council's adjudication (if applicable), through the environmental permitting processes (if applicable), and through other Council processes (if applicable).⁴ The Council's ultimate recommendation to the Governor will be made after full and thorough consideration of all relevant issues.
15. **Definitions of "Land Use Plan" and "Zoning Ordinance."** The term "land use plan" is defined by statute as a "comprehensive plan or land use element thereof adopted ... pursuant to" one of the listed planning statutes.⁵ EFSEC interprets this definition as referring to the portions of a comprehensive plan that outline proposals for an area's development, typically by assigning general uses (such as housing) to land segments and specifying desired concentrations and design goals.⁶ The term "zoning ordinance" is defined by statute as an ordinance "regulating the use of land and adopted pursuant to" one of the listed planning statutes.⁷ EFSEC has interpreted this definition as referring to those ordinances that regulate land use by creating districts and restricting uses in the districts (i.e., number, size, location, type of structures, lot size) to promote compatible uses.
16. EFSEC has defined the phrase "consistent and in compliance" based on settled principles of land use law: "Zoning ordinances require compliance; they are regulatory provisions that mandate performance. Comprehensive plan provisions, however, are guides rather than mandates and seek consistency."⁸
17. **Proof of non-consistency and non-compliance.** EFSEC accepts the Applicant's concession that the project is not consistent or compliant with Benton County land use provisions.
18. Even when a project is non-compliant with local land use provisions, the Governor, upon recommendation from the Council, may preempt land use plans and zoning regulations to authorize the siting of an energy facility.⁹ In such cases, the Council will conduct an

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

5 RCW 80.50.020(18).

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

7 RCW 80.50.020(30).

8 Whistling Ridge Order at 10 n 15.

9 RCW 80.50.110; *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wn.2d 275, 285-86 (2008).

adjudication to consider whether to recommend that the state preempt local plans or regulations that would prohibit the site.¹⁰

FINDINGS OF FACT

1. On February 23, 2024, Wallula Gap Solar LLC, a subsidiary owned by OneEnergy Renewables, submitted an application for site certification to construct and operate Wallula Gap Solar Energy Project (the Facility), a 60-megawatt (MW) solar photovoltaic (PV) generation facility with optional battery storage located in unincorporated Benton County, Washington.
2. On April 23, 2024, the Council convened an in person and virtual land use consistency hearing, pursuant to due and proper notice. The Council received testimony from the Applicant's attorney. The Council also received testimony from Michelle Mercer on behalf of the Benton County.
3. The Site is located in unincorporated Benton County, Washington. The Site is located approximately 4 miles northwest of the unincorporated community of Plymouth on parcels located north of SR-14, approximately 5 miles west of its intersection with Interstate 82.

CONCLUSIONS OF LAW

1. The Council has jurisdiction over the subject matter of this proceeding and the parties to it pursuant to RCW 80.50.060 and WAC Title 463.
2. The Council provided adequate notice to interested parties, and the Council has adequate information to render a land use consistency decision.
3. "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 those that are developed as the primary land use for a parcel on which it is located and do not meet the siting criteria for a minor facility in BCC 11.03.010(168). Benton County Code (BCC) 11.03.010(167).
4. As the primary land use for the Project site would be for solar power generation and not primarily to offset part or all of the Applicant's requirement for electricity, the Facility is a solar power generator facility, major, as defined in BCC 11.03.010(167).

¹⁰ WAC 463-28-060.

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5. Effective December 21, 2021, solar power generator facilities, major, may not apply for a conditional use permit for lands contained within the GMAAD. Benton County Ordinance Amendment (OA) 2021-004.
6. The site is not in compliance with Benton County’s applicable zoning ordinances in effect as of the date of the application.
7. Pursuant to WAC 463-28-060 and -070, the matter will be scheduled for an adjudication to consider whether the Council should recommend to the Governor that the state preempt Benton County’s land use plans, zoning ordinances, or other development regulations for the site or portions of the site for the proposed facility, and if so, to determine conditions to be included in a draft certification agreement that consider local governmental or community interests affected by the construction or operation of the alternative energy resource and the purposes of the ordinances to be preempted pursuant to RCW 80.50.110(2).

ORDER

THE COUNCIL ORDERS:

Wallula Gap Solar LLC’s application is not consistent with local zoning regulations. The matter shall be set for adjudication, concurrent with the general adjudication under RCW 80.50.090(4) if one is required, to consider whether to recommend preemption of Benton County’s zoning regulations with which the proposed site is inconsistent. If the environmental impact of the proposed facility is determined by the EFSEC responsible official to be non-significant or if the facility’s impacts will be mitigated to a non-significant level, the Council may limit the topic of the adjudicative proceeding to whether to recommend preemption of Benton County’s zoning ordinances.

DATED at Olympia, Washington, and effective _____.

WASHINGTON STATE ENERGY
FACILITY SITE EVALUATION COUNCIL

Kathleen Drew, EFSEC Chair