BEFORE THE STATE OF WASHINGTON
WASHINGTON ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of Application No. 2017-01 of TUUSSO ENERGY, LLC COLUMBIA SOLAR PROJECT	DOCKET EF-170823 ORDER GRANTING EXPEDITED PROCESSING

BACKGROUND

Synopsis. *TUUSSO Energy LLC requested expedited review of an application it filed with the Energy Facility Site Evaluation Council (EFSEC or Council) for site certification and approval of the Columbia Solar Project. The Council may grant expedited review when it finds the project is consistent and in compliance with land use plans and zoning ordinances, and the environmental impacts are insignificant or can be mitigated to a nonsignificant level. The Council, by this order, concludes that the criteria for expedited review have been satisfied and will use the expedited process authorized by RCW 80.50.075 to evaluate the application.*

1 **Nature of Proceeding.** This matter involves an application (Application) filed on October 16, 2017, by TUUSSO Energy, LLC (Applicant) for site certification to construct and operate the Columbia Solar Photovoltaic Project (Project). The Project would be located in unincorporated Kittitas County near the city of Ellensburg, and consist of five discrete sites with a combined maximum generating capacity of 25 megawatts (MW).

2 The Applicant requests that EFSEC use the expedited process authorized by RCW 80.50.075 to evaluate the Application. An applicant is eligible for expedited processing when EFSEC finds (1) the environmental impacts of the proposed project are not

significant or can be mitigated to non-significant levels and (2) the proposed project is consistent and in compliance with city, county or regional land use plans.[1]

3 **SEPA**. On February 27, 2018, the Council issued a Mitigated Determination of Nonsignificance (MDNS). The MDNS listed 10 mitigation measures related to water, wildlife, and historic and cultural preservation. The public and agencies were invited to comment on this MDNS through March 13, 2018. The Council received 18 comments. Mitigation measures and a summary of the comments received are listed beginning on page 15.

4 **Land Use Consistency Hearing.** RCW 80.50.090(2) requires the 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 December 1, 2017, EFSEC issued a Notice of Land Use Consistency Hearing and scheduled the hearing in Ellensburg, Washington for 7:30 p.m. on Tuesday, December 12, 2017.[2]

5 On December 12, 2017, the Council conducted a land use hearing at the Kittitas Valley Event Center Armory in Ellensburg, Washington, to hear testimony regarding whether the Site was consistent and in compliance with Kittitas County's local land use provisions. The following EFSEC members were present: Cullen Stephenson (Department of Ecology), Jaime Rossman (Department of Commerce), Dan Siemann (Department of Natural Resources), Joe Stohr (Department of Fish and Wildlife), Laura Chartoff (Utilities and Transportation Commission), Ian Elliot (Kittitas County) and Kelley Cooper (Department of Health).[3] Cullen Stephenson presided over the hearing.

6 Tim McMahan, Stoel Rives Law Firm, represented the Applicant. The Applicant also filed a written hearing memorandum. Greg Poremba, Senior Energy Manager with SWCA Environmental Consultants, and Evan Dulin, Wetland Scientist and Biologist with SWCA Environmental Consultants, spoke for the Applicant. Neil Caulkins, Deputy

---

[1] RCW 80.50.075; WAC 463-43-030.

[2] The Council sent this Notice to all interested persons on the mailing list for the Facility and also to all subscribers to EFSEC's general minutes and agenda list. Further, the Council purchased advertisements in The Ellensburg Daily Record, the local daily newspaper of general circulation.

[3] Kelley Cooper appeared by phone. Laura Chartoff appeared for Council Member, Dennis Moss.

Prosecuting Attorney, represented Kittitas County and Paul Jewell, Kittitas County Commissioner and Chairman of the Board of County Commissioners, spoke for the County.

7 The Council also received oral comments from the following members of the public: Dave Nerpel, Jeff Brunson, Jeff Pittenger, Karen Poulsen, Dick Carkner, Doug Dicken, Mark Pritchard, Kathi Pritchard, Jim Joyner, Jeff Dunning, Colleen Donovan, Donald Chance, Joanne Chance, Mark Kirkpatrick, Matthew Cox, Keith Crimp, Stan Blazynski, Roger Clerf, Charles Weidenbach, and Ron Poulsen. Assistant Attorney General Bill Sherman, Counsel for the Environment, was present for the land use hearing.

8 At the request of Commissioner Jewell, the Council moved to extend the public comment period for 10 days to allow Kittitas County, and any interested member of the public, to provide additional information regarding land use consistency. During this public comment period, Kittitas County submitted a legal brief, and the Applicant submitted a supplemental memorandum. In addition, the Council received written statements from the following persons: Dick Carkner, Mary Christensen, Steven C. Rosbach, Karen Poulsen, Ron Poulsen, Kathi Pritchard, Mark Pritchard, and Fred Scarlett.

9 Kittitas County residents have expressed the greatest concern over potential loss of high-quality irrigated agricultural land and future proliferation of similar facilities. Other concerns were raised related to visibility, glare, or other impacts from the TUUSSO structures and operations, and also about a perceived loss of local control over land uses resulting in the loss of Kittitas County's rural character.

10 **Applicant's Description of Proposed Facility.** The Project consists of five new photovoltaic facilities at five site locations in unincorporated Kittitas County. The five sites are named: Camas, Fumaria, Penstemon, Typha, and Urtica. Two generation tie lines would also be constructed to connect the Fumeria and Typha locations. Each new PV solar array would be capable of providing up to 5 megawatts (MW) of solar energy within the Puget Sound Energy (PSE) service area, for a total of 25 MW of electrical power generation. The five solar arrays and two generation tie lines would be constructed on 200 of approximately 232 leased acres, in close proximity to existing PSE electrical infrastructure.

11 Individually, the sites are 35 to 55 acres in size, and each site represents approximately .01 to .02 percent of the area in their County land use designations. Combined, the sites

include approximately 145 acres of commercial agricultural land, which is .05 percent of all lands in the County under that designation, and 87.2 acres of rural working-agriculture 20 lands, which is .03 percent of the total lands in the County under that designation. Four of the five project sites are active agricultural properties, either being used to grow hay or for grazing. The 35-acre Fumaria site is currently fallow agricultural land without irrigation. Data from the United States Department of Agriculture indicates that there are approximately 183,000 acres of farmlands in Kittitas County. Therefore, the TUUSSO project sites would constitute 0.13 percent of the 183,000 acres of total County farmlands. The expected life of the Project is approximately 30 years, after which time the project sites could be returned to their original agricultural uses.

12 The Camas, Penstemon, and Typha sites are on land zoned as "Commercial Agriculture" (CA) under Kittitas County zoning ordinances. Kittitas County Code (KCC) 17.32.010 describes the purpose and intent of the CA zone as follows: "The commercial agriculture zone is an area wherein farming and ranching are the priority. The intent of this zoning classification is to preserve fertile farmland from encroachment by nonagricultural land uses and protect the rights and traditions of those engaged in agriculture."

13 The Fumeria and Urtica sites are on land zoned as "Rural working – Agriculture 20" (A-20). KCC 17.29.010 describes the purpose and intent of A-20 zone as follows: "The agriculture (A-20) zone is an area wherein farming, ranching and rural life styles are dominant characteristics. The intent of this zoning classification is to preserve fertile farmland from encroachment by nonagricultural land uses; and protect the rights and traditions of those engaged in agriculture."

14 Proposed structure setbacks on the five sites would range from 20 feet to 60 feet. None of the solar arrays would be above eight feet tall, so there would be no shadow onto adjacent properties from the solar panels or inverters. The Projects would be located and designed so there will be no water drainage off-site. To avoid or minimize the growth of weeds, the Applicant plans to grow native vegetation, treat for any noxious weeds that appear, and possibly plant some hay crops.

15 On average, vehicle use associated with the construction phase of the Project would consist of six heavy trucks and 19 non-heavy vehicles per day to each site, which amounts to less than five percent of the current number of vehicles using the roads serving the Project sites. For the Fumaria site, vehicle use would be slightly higher, between 12 to 35 percent of current traffic use. It is not anticipated that any farm traffic

would be affected. State and local noise standards would be observed. During operation, traffic trips would be relatively small. It is anticipated that four to five operation maintenance personnel would conduct two to three visits per year to each of the five sites. Additional truck trips are indicated in the Application, specifically for panel washing during the life of the facility.

16 For analysis of the visual impacts of the sites, the Applicant conducted a visual assessment with a widely-accepted method designed for rural areas and energy projects. This takes into account land form, vegetation, bodies of water, and human-made structures to define the characteristics of sites and the contrast that a proposal would have on those sites and the surrounding areas. A key aspect of this evaluation is contrast. For all five sites, the visual impacts were classified at most as moderate, meaning that the structure(s) would begin to be considered above background level and attract the eye of a person. Observation points were placed at two miles from the structures. They were selected to assess the visual impact to people living or working around the sites, travelers along main transportation routes, and recreational users of public lands.

17 The researchers found that, although the structures would introduce horizontal and vertical lines to areas of farm country, open fields, and land forms, these lines would not dominate the landscape due to the presence of other structures in view, such as transmission lines and metal buildings. In sum, they found no strong contrast effects. In addition, the Applicant plans to plant vegetation such as native plants, shrubs, and trees specifically placed and designed to mitigate and screen some of these effects. To address concerns about glare from the solar arrays, the applicant explained that the arrays absorb most of the light and do not reflect it. The more light they absorb, the more efficient they are, and the more electricity they generate. Because of this, the panels are darker, and, from above, tend to look like dark blue ponds. The Applicant pointed to a U.S. Air Force study of solar panels to determine their impacts on planes flying in and out of airports. This study concluded the panels pose a minimal risk to air traffic around airports and would look like weathered concrete and similar to dark water bodies. After modeling the Project sites with a Solar Glare Hazard Analysis tool developed by Sandia National Labs, the researchers found the sites had either no unacceptable glare effects or were well within and below levels that are normally considered of concern.

18 At the hearing, the Council and the public were shown photographs illustrating the visual impacts from each of the sites at the locations where the structures would be visible to the

public from the surrounding lands. The Camas site visual contrast was at a moderate level, so specific plantings of trees and shrubs are planned, up to 15 feet tall when planted, to grow taller and provide additional screening height at maturity. At the Penstemon site, there was some moderate contrast potential, but there is a similar plan for appropriately sized shrub and tree planting. On the Urtica site, the contrast is much further in the background and more difficult to see from public observation points, so has less visual impact. The other two sites, Fumaria and Typha, had either no visual impacts or contrast levels of any kind because of how far away they were from the key observation points at roads or other properties, and they could not be seen.

19 A wetland scientist and biologist provided information on wetland and wildlife impacts and mitigation measures for the Project. She described the Project sites as including fallow fields, recently grazed areas, and natural vegetation along riparian, wetland, and open-water areas, as well as some native shrub steppe areas nearby. The Project would avoid all water impacts on site through project design. Any access roads or internal access roads would be located along uplands and existing roads and bridges, so no additional road construction would be needed. The one proposed wetland impact would be on the Typha site entrance, requiring a limited wetland fill of about 600 square feet to address a collapsed and clogged culvert causing flooding of the road, preventing year-round access to the site. On all other sites, impacts to wetlands would be avoided with buffers. Any unanticipated impacts identified for wetlands will be addressed by the Applicant in coordination with EFSEC.

20 Wildlife impacts would be limited to any game species traversing the Kittitas Valley that might be impacted by the fences. But none of the project sites are within identified big game migratory corridors or migratory bird fly-ways. Two protected species have a likelihood to occur in or near the project sites: bald eagles and Columbia spotted frogs. However, all impacts to the frogs would be avoided with setback distances from the aquatic resources and construction best management practices. No eagle nests were observed within the project site areas. Should any nests be encountered during the construction period, the Applicant would coordinate with EFSEC, Washington Department of Fish and Wildlife and the U.S. Fish and Wildlife Service, construction would be delayed during the critical use period (January 1 – May 31). There was no likelihood of any protected fish species occurring within the analysis area as any stream that could potentially have those species was avoided.

21 To avoid impacts to wetlands, existing roads would be used to the extent possible. In addition, seeding and planting of the sites will be conducted to reduce erosion and improve water quality. Currently there are no buffers on riparian corridors, so establishing them will improve riparian corridor quality for wildlife. The wetland scientist determined that, other than the road repair, the Project will not impact waters or wetlands, or have any significant impact on wildlife and available habitat. In addition to the review by the wetland scientist contracted by the Applicant, mitigation measures four and five indicate that the Department of Ecology, as contractor to EFSEC will perform further evaluation of wetlands and that any unanticipated impacts identified will be addressed and/or compensated for by the Applicant.

22 The Applicant contends that the Project satisfies the conditional use criteria at KCC 17.60A.015 and therefore is consistent and in compliance with Kittitas County's applicable land use plans and zoning ordinances. The Applicant provided oral comments and a memorandum detailing how each of the conditional use criteria are met, and how the Project is compatible and will not jeopardize farming and ranching activities on surrounding lands.

23 **Kittitas County's Response**. Kittitas County argues that "a conditional use permit application is not amenable to a summary determination of code consistency, by definition."[4] The County explains that Kittitas County Code defines a conditional use as "a use which may be permitted in a zone classification following review and hearing under the provisions of KCC Chapter 17.06A." Thus, the County contends that absent a review and hearing contemplated by the county code, one could not determine if the Application meets the criteria for a conditional use. With regard to specific conditional use criteria, the County argues that the Project is not in keeping with "rural character," nor consistent with the Kittitas growth management plan, and that the Project is "not essential or desirable to the public convenience." The County further argues that the project is inconsistent due to the moratorium on solar facility applications.

24 **Public Comment**. Members of the public provided oral as well as written comments. Four people supported the Application while 20 people were opposed. Persons in support of the Project commented that the Project will help meet renewable energy goals, offers income diversification for farmers, is an allowed conditional use under county zoning

---

[4] County's Brief on Land Use Consistency, p.2.

codes, has little environmental impact, and that the Applicant has been working with neighbors to mitigate impacts. Citizens opposed to the Project commented that irrigated farmland is a valuable resource that should be preserved, the Project is not in compliance with land use due to the moratorium, and the Project cannot satisfy conditional use criteria because it is inconsistent with rural character, and visual, noise, and wildlife impacts cannot be sufficiently mitigated. Opponents also commented that EFSEC should delay a decision and allow the County's Solar Facilities Citizen Advisory Committee to develop zoning regulations. Opponents also expressed fear that EFSEC's decision in this case will set a precedent requiring approval of all future solar projects.

DISCUSSION

I. Land Use Consistency Determination

25 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."[5] 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."

26 The Council's evaluation of land use consistency is not dispositive of the Application and a determination of land use consistency is neither an endorsement nor an approval of the Project.[6] The evaluation pertains only to the general siting of categories of uses, taking into account only the Site (in this case, the Sites) and not the Project's construction and operational conditions. 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

---

[5] WAC 463-26-050.

[6] 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.

other Council processes (if applicable).[7] The Council's ultimate recommendation to the Governor will be made after full and thorough consideration of all relevant issues.

27 The Applicant did not obtain certificates from local authorities attesting to the land use consistency. Therefore, the Applicant retains the burden of proving the Sites are consistent.[8]

28 **Definitions of "Land Use Plan" and "Zoning Ordinances."** 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.[9] 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.[10] Comprehensive plan elements and provisions that do not meet this definition are outside of the scope of the Council's present land use consistency analysis.

29 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.[11] 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. Ordinances that do not meet this definition are outside of the scope of the Council's present land use consistency analysis.

30 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

---

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

[8] WAC 463-26-090. In cases where such certificates are obtained, they are regarded as *prima facie* proof of consistency and compliance with local land use plans and zoning ordinances absent contrary demonstration by anyone present at the hearing.

[9] RCW 80.50.020(14).

[10] In re Northern Tier Pipeline, Council Order No. 579 (Northern Tier Pipeline Order) at 9 (November 26, 1979).

[11] RCW 80.50.020(22).

that mandate performance. Comprehensive plan provisions, however, are guides rather than mandates and seek consistency."[12]

31 **The County's Comprehensive Plan**. The portions of the Comprehensive Plan (the Plan) that meet the statutory definition are within Chapter 2 (Land Use), Chapter 6 (Utilities), and Chapter 8 (Rural and Resource Lands). Chapter 2 identifies the land use designations assigned in the Comprehensive Plan, along with corresponding zone classifications present in each land use designation. Lands zoned for "Commercial Agriculture" (CA) are "resource" lands and lands zoned "Rural working – Agriculture 20" (A-20) are "rural working" lands. The CA designation is for "agricultural land of long-term commercial significance." Rural working lands "generally encourage farming, ranching, and storage of agriculture products, and some commercial and industrial uses compatible with rural environment and supporting agriculture and/or forest activities." The goals, policies and objectives (GPOs) for rural and resource lands are in Chapter 8. Generally, the applicable GPOs give priority to farming uses, and require any development to preserve rural character. Solar facilities are briefly addressed in GPO 6.36 which states: "Develop a study area encompassing the entire county to establish criteria and design standards for the siting of solar farms."

32 **The County's Zoning Ordinances**. The portions of the County's zoning ordinances that meet the statutory definition are the County's zoning map, development restrictions, and associated definitions. Three of the sites—Camas, Penstemon, and Typha—would be on land zoned as CA. KCC 17.32.010 describes the purpose and intent of the CA zone as follows: "The commercial agriculture zone is an area wherein farming and ranching are the priority. The intent of this zoning classification is to preserve fertile farmland from encroachment by nonagricultural land uses and protect the rights and traditions of those engaged in agriculture." In addition to farming, the following uses may be permitted in the CA zone: religious institutions, schools, shooting range, refuse disposal/recycling, public facilities, utilities, farming-related and vehicle repair, and airports.[13]

33 Two of the sites—Fumaria and Urtica—would be on land zoned as "Rural working – Agriculture 20" (A-20). KCC 17.29.010 describes the purpose and intent of the A-20

---

[12] Whistling Ridge Order at 10 n 15.

[13] TUUSSO Energy – Columbia Solar Project, Land Use Analysis Report, Prepared by Washington State Department of Commerce.

zone as follows: "The agriculture (A-20) zone is an area wherein farming, ranching and rural life styles are dominant characteristics. The intent of this zoning classification is to preserve fertile farmland from encroachment by nonagricultural land uses; and protect the rights and traditions of those engaged in agriculture." Additional non-agricultural uses that may be allowed include: religious institutions, schools, interpretive center, veterinary hospital, shooting range, forest product processing, refuse disposal/recycle, campgrounds, golf course, parks and playgrounds, mining and excavation, public facilities and utilities.[14]

34 Under the Kittitas County Code, each of the Project Sites would qualify as a "major alternative energy facility."[15] Major Alternative Energy Facilities may be permitted as a "conditional use" in the A-20 and CA zones if they satisfy the conditional use criteria in KCC 17.60A.015,[16] which are:

1. The proposed use is essential or desirable to the public convenience and not detrimental or injurious to the public health, peace, or safety or to the character of the surrounding neighborhood.
2. The proposed use at the proposed location will not be unreasonably detrimental to the economic welfare of the county and that it will not create excessive public cost for facilities and services by finding that
   A. The proposed use will be adequately serviced by existing facilities such as highways, roads, police and fire protection, irrigation and drainage structures, refuse disposal, water and sewers, and schools; or
   B. The applicant shall provide such facilities; or
   C. The proposed use will be of sufficient economic benefit to offset additional public costs or economic detriment.
3. The proposed use complies with relevant development standards and criteria for approval set forth in this title or other applicable provisions of Kittitas County Code.
4. The proposed use will mitigate material impacts of the development, whether environmental or otherwise.
5. The proposed use will ensure compatibility with existing neighboring land uses.

---

[14] TUUSSO Energy – Columbia Solar Project, Land Use Analysis Report, Prepared by Washington State Department of Commerce.

[15] KCC 17.61.010(9).

[16] KCC 17.61.020.

6. The proposed use is consistent with the intent and character of the zoning district in which it is located.
7. For conditional uses outside of Urban Growth Areas, the proposed use:
   A. Is consistent with the intent, goals, policies, and objectives of the Kittitas County Comprehensive Plan, including the policies of Chapter 8, Rural and Resource Lands;
   B. Preserves "rural character" as defined in the Growth Management Act (RCW 36.70A.030(15));
   C. Requires only rural government services; and
   D. Does not compromise the long term viability of designated resource lands.

35 **The Test for Consistency and Compliance**. Under the test for land use consistency previously established by the Council, the Council considers whether the pertinent local land use provisions "prohibit" the Sites "expressly or by operation clearly, convincingly and unequivocally."[17] If a Site can be permitted either outright or conditionally, it is consistent and in compliance with the local land use provisions.[18]

36 Applying the facts to the test established, we conclude the Sites are consistent with the pertinent portions of the land use provisions because neither the pertinent portions of the Plan nor the pertinent portions of the zoning ordinances clearly, convincingly, and unequivocally prohibit the Project. The Plan does not provide guidance on the siting of solar facilities. The zoning ordinances specifically allow the proposed use to be authorized in the CA and A-20 zones as a conditional use, KCC 17.61.020, and one solar facility was previously permitted by the County in an A-20 zone.[19] Therefore, we conclude the pertinent land use provisions do not clearly, convincingly or unequivocally prohibit the Sites. It follows that under the established precedent for a minimal threshold for determining land use consistency, the Project is consistent and in compliance with the County's land use provisions. This determination does not prejudge whether the conditional use criteria are met at the sites. When making determinations of land use

---

[17] In re TransMountain Pipeline, Council Order 616 at 3 (May 26, 1981).

[18] *Id.*

[19] *See* Kittitas County Board of County Commissioners Resolution No. 2015-106, Osprey Solar Farm Conditional Use Permit & Shoreline Substantial Development Permit (CU-14-00003 & SD-14-00002) (July 7, 2015); *see also,* Findings of Fact and Decision Teanaway Solar Reserve – Condition Use Permit CU-09-0005.

consistency in prior cases, the Council has stated that consideration of land use criteria would be taken up in later hearings.[20] The Council in this matter has decided that if it were to grant expedited processing, it would afford a means for it to receive information akin to what the County would receive during a conditional use hearing as to site-specific conditions and criteria.[21] To the extent that the County is arguing that that conditional use criteria may only be applied by the legislative body of the County government, and not by EFSEC, this argument is at odds with RCW 80.50.110(2) (preempting the regulation and certification of the location, construction, and operational conditions of certification of energy facilities included in RCW 80.50.060) and RCW 80.50.100(2) (providing that if EFSEC recommends that the governor approve an application for certification, it shall include conditions designed to recognize the purpose of the ordinances preempted by RCW 80.50.110).

37 Kittitas County and members of the public argued that the Project is inconsistent with land use provisions because it cannot satisfy the conditional use criteria. Specifically, opponents argued the Project is inconsistent with rural character because the Project covers entire parcels, and therefore results in the built environment predominating over "open space, the natural landscape, and vegetation."

38 The Applicant performed a visual impact assessment and provided evidence that the Project would not dominate or substantially impact the current visual landscape. In addition, the Applicant proposes to plant vegetation to mitigate and screen some of the effects. The Applicant provided photographs showing low to moderate visual impacts where the built environment does not dominate over the landscape. Therefore, we conclude the Applicant has shown that the Project could be consistent with rural character and that the Project is not clearly prohibited.

39 The County cites GPO 8.21A which states a policy that "residential and commercial buildings" in rural and resource lands be "located in areas buffered by vegetation and along the edges of fields or areas of shrub steppe vegetation to maintain Kittitas County's historic rural character." However, KCC 17.08.130 defines "building" as "a structure having roof supported by columns or walls for the shelter, support or enclosure of

---

[20] *In re TransMountain Pipeline*, Council Order 616 at 3 (May 26, 1981); *In re Northern Tier Pipeline*, Council Order 529 at 2 (April 11, 1977).

[21] EFSEC February 20, 2018 meeting minutes, pp. 51-52.

persons, animals or chattels." In addition, the siting of "major alternative energy facilities" including "solar farm[s]" is specifically and separately addressed for CA and A-20 lands as a use that is reviewed under the conditional use criteria. KCC 17.61.010(9), 020(4). There is no zoning code provision that expressly limits solar arrays to being located only in areas buffered by vegetation and along the edges of fields or areas of shrub steppe vegetation. It does not appear that the County asserted this interpretation about solar arrays constituting "buildings" in its prior permitting decision regarding the Osprey solar facilities permitted by the county, or even in its denial of a permit for the Iron Horse facilities.[22] We find that the solar arrays are not "residential [or] commercial buildings," and that GPO 8.21A is therefore not applicable. However, even if the County's argument is correct and not at odds with its prior interpretations, it merely raises issues about the positioning or extent of coverage of solar arrays on the proposed sites. It does not establish that solar farms constituting "major alternative energy facilities" are unequivocally prohibited in rural and resource lands. Clearly, they are not. KCC 17.61.010(9), 020(4).

40 The County further argues that it denied a conditional use permit to another solar farm applicant (OneEnergy Development LLC) and that the Superior Court affirmed the County's decision, agreeing that the project violated rural character. The Superior Court's decision is on appeal. In addition, the Superior Court decision is not controlling with respect to a different project by a different applicant and the decision states that it applies only to the specific project in that specific location. Therefore, the Superior Court decision in OneEnergy Development LLC does not convince us that the Project cannot satisfy the rural character criteria and is therefore prohibited by the pertinent land use provisions.

41 The County also argues the Project is not "essential or desirable to the public convenience" because several permitted alternative energy projects have not been built. The Applicant argues that the Project helps the State meet renewable energy goals.[23] Because the legal standard is whether the proposed use is clearly prohibited, we cannot

---

[22] Kittitas County Board of County Commissioners Resolution No. 2015-106, Osprey Solar Farm Conditional Use Permit & Shoreline Substantial Development Permit (CU-14-00003 & SD-14-00002) (July 7, 2015); Kittitas County Board of County Commissioners Resolution No. 2017-022, Iron Horse Conditional Use Permit Denial (CU-15-00006).

[23] Applicant's Legal Memorandum regarding Land Use, Page 4.

conclude the Project is not essential or desirable to the public convenience based solely on the failure of similar projects to be built.

42 **Kittitas County Moratorium on Energy Facility Applications**. On January 10, 2018, the Board of County Commissioners (BCC) passed "a moratorium on applications for solar projects that qualify as major alternative energy facilities" as authorized in RCW 36.70A.390. On July 18, 2017, the BCC extended the moratorium through January 2018. On August 15, 2017, the BCC formed a Solar Facilities Citizens Advisory Committee to gather information and make recommendations concerning criteria for siting of solar facilities that qualify as major alternative energy systems. On January 3, 2018, the BCC extended the moratorium until July 20, 2018, or earlier upon the County adoption of standards and/or criteria. Kittitas County argues that the moratorium is a land use plan or zoning ordinance that was in effect when the Application was submitted, and, therefore, the Project is inconsistent and noncompliant with County land use plans and zoning ordinances.[24]

43 We conclude that the County's moratorium is not a land use plan or zoning ordinance for purposes of EFSEC's land use consistency determination. In order to come within the Energy Facilities Site Location Act, RCW 80.50 (EFSLA's) definition of a "land use plan," the directive must be "a comprehensive plan or land use element thereof" adopted pursuant to one of Washington's statutory provisions for land use planning,[25] which in the case of Kittitas County would be the Growth Management Act, RCW 36.70A. The Growth Management Act addresses moratoria separately from comprehensive plan documents.[26] The County's moratorium plainly is not an amendment to the County's Comprehensive Plan or a land use element thereof and therefore is not a "land use plan" under EFSLA. A somewhat closer question is presented by whether the moratorium meets EFSLA's definition of a "zoning ordinance," but ultimately it does not. In *Friends of Columbia Gorge, Inc. v. State Energy Facility Site Evaluation Council*, the Washington Supreme Court held that a moratorium on the acceptance of SEPA checklists did not fall within EFSLA's definition of "zoning ordinance," which is "an ordinance of a unit of local government regulating the use of land and adopted pursuant to chapter ...

---

[24] Jewell, TR 33:11-17.

[25] RCW 80.50.020(14).

[26] *See* RCW 36.70A.390.

36.70[] or 36.70A."[27] The Court explained that the moratorium in that case "does not regulate how land is used. Rather, it regulates the county's processing of SEPA checklists and is not land use regulation within the definition provided by EFSLA."[28] Similarly here, the County's moratorium on the acceptance of applications for solar projects is not a land use regulation because it regulates the processing of applications and does not regulate how land is used.

44 The Washington Supreme Court in *Save Our Scenic Area v. Skamania County*[29] described zoning moratoria as the "temporary suspension of established regulations" that "do[] not repeal, amend, or contradict" the existing regulations. The Growth Management Act (GMA), RCW 36.70A, also distinguishes between "development regulations" (a term defined under the GMA to include "zoning ordinances"[30]) and moratoria. RCW 36.70A.160 requires a county proposing adoption of development regulations to notify the Department of Commerce of its intent to adopt development regulations at least sixty days prior to final adoption and to allow state agencies to provide comments prior to adoption. The County's moratorium is not styled as a development regulation. Instead, the moratorium cites to RCW 36.70A.390, concerning moratoria. Under that GMA provision, moratoria may be adopted through less involved procedural requirements than are required for adoption of development regulations, but are also subject to limits in duration. The County's moratorium does not repeal or amend existing zoning ordinances and does not restrict EFSEC from making a determination that, "at the time of application the proposed facility was consistent and in compliance with land use plans and zoning ordinances."[31] Under the test previously established by the Council, the Council considers whether the pertinent local land use provisions "prohibit" a site "expressly or by operation clearly, convincingly and unequivocally."[32] A temporary suspension of a

---

[27] RCW 80.50.020(22).

[28] 178 Wn.2d 320, 346 (2013).

[29] 183 Wn. 2d 455, 465, 352 P.3d 177 (2015) (citing favorably Fairhurst, J., dissenting in *Biggers v. City of Bainbridge Island,* 162 Wn. 2d 683, 709, 169 P.3d 14 (2007)).

[30] RCW 36.70A.030(7).

[31] WAC 463-26-050.

[32] In re TransMountain Pipeline, Council Order 616 at 3 (May 26, 1981).

zoning ordinance that does not repeal, amend or contradict that ordinance cannot be said to prohibit a site.[33]

45 We therefore conclude that the County's moratorium on acceptance of permit applications for solar facilities is not a land use plan or zoning ordinance for purposes of this land use consistency determination. Under the established precedent for a minimal threshold for determining land use consistency, the Project is consistent and in compliance with the City's land use provisions. However, the Council's evaluation of land use consistency is not dispositive of the Application and a determination of land use consistency is neither an endorsement nor an approval of the Project. The County and the public raised many important issues during this proceeding including the loss of agricultural land, lack of local control, and whether the Project is consistent with rural character. This finding does not preclude the Council's future consideration of issues raised in EFSEC's recommendation to the Governor.

II. Environmental Impact

46 On February 27, 2018, EFSEC's SEPA responsible official[34] issued a Mitigated Determination of Non-Significance (MDNS) under WAC 197-11-350 based on its determination that mitigating conditions included in the MDNS report, along with required compliance with applicable county, state and federal regulations and permit requirements, will mitigate all significant adverse impacts to the environment. The responsible official made this determination after a review of a completed environmental checklist and other information on file with the lead agency and existing regulations applicable to the proposal.

47 The following table details the required mitigation measures in the revised MDNS report:

---

[33] It should also be noted that whether or not a proposed site is consistent and in compliance with land use plans and zoning ordinances does not determine EFSEC's authority to make a recommendation to the Governor, or for the Governor to take action on the application. RCW 80.50.110(2) provides that "[t]he state hereby preempts the regulation and certification of the *location*, construction, and operational conditions of certification of energy facilities included under RCW 80.50.060 as now or hereafter amended." (Emphasis added.)

[34] Within EFSEC, the SEPA responsible official is the council manager. WAC 463-47-051.

Resource	Impact	Mitigation
Water	Flow path disruption in floodplains	(1) Prior to construction, TUUSSO will provide final construction and micrositing plans to EFSEC showing that structures (including roads and fences) placed within floodplains are designed so as to not restrict or redirect flows from their natural flow path. If impervious surfaces such as roads are placed in the floodplain, measures will be taken to mitigate for the lack of floodplain storage.
	Riparian habitat	(2) Prior to construction, TUUSSO will provide final construction and micrositing plans to EFSEC that apply a 100-foot minimum setback from Type F (fish-bearing) streams in the Project sites, including the Yakima River, as well as compliance with updated (draft) Kittitas County Critical Areas Ordinances for the protection of riparian areas. (3) Further, TUUSSO will compensate for habitat impacts of the Project by submitting a plan for EFSEC approval detailing riparian habitat enhancement within the 100-foot buffers adjacent to fish-bearing streams. The plan will include, at a minimum, the following: • TUUSSO will plant native riparian plants (including shrubs) within the riparian area buffers where current vegetation has been reduced or eliminated from agricultural practices. • TUUSSO will establish benchmarks and timeline for revegetation success, and monitor revegetation activities in the riparian areas to ensure success.
	Wetland impacts during construction	(4) Prior to construction, TUUSSO will provide plans to EFSEC for coordination with Ecology to conduct additional wetlands surveys and identification of hydrologic features at each site. (5) Further, TUUSSO will compensate for habitat impacts of the Project by submitting a plan for

		EFSEC approval detailing buffer zones and/or any required compensatory mitigation as identified through coordination with EFSEC and Ecology.
	Resources	(6) TUUSSO will verify that landowners' water shares purchased from the controlling water companies will be maintained throughout the life of the facility.
Wildlife	Disturbance of nesting birds during construction	(7) TUUSSO will survey all Project sites for nesting raptors and great blue heron in the spring of each year of construction, and if found to be active, establish the following seasonal work avoidance buffers (in addition to those proposed by TUUSSO in the SEPA Environmental Checklist): • 0.25-mile avoidance buffer during nesting season for raptors. If construction near active raptor nests might occur during the critical use period, TUUSSO will consult with EFSEC and local U.S. Fish and Wildlife Service (USFWS) biologists for appropriate mitigation or monitoring. • 0.25-mile avoidance buffer from February through May for great blue heron.
	Hazards to birds during construction and operation	(8) TUUSSO will develop an Avian Protection Plan (APP) in consultation with EFSEC, USFWS, and WDFW prior to construction that specifies mitigation or monitoring for impacts to birds from the Project, with particular attention to Birds of Conservation Concern known or likely to occur in the Project area. The APP will include, at a minimum, the following: • TUUSSO will follow measures listed in Avian Power Line Interaction Committee (APLIC) guidelines for new electrical poles installed for the Project. If the APLIC guidelines are not feasible on a pole location, TUUSSO will present the reasons to EFSEC and determine appropriate mitigation or monitoring measures. • TUUSSO will avoid avian attraction to solar panels (birds may attempt to land on panels due to "lake effect") by planting

		vegetation around panels, adding patterns to panels, or using other strategies to reduce the risk of avian collisions.
	Hazards to wildlife during construction and operation	(9) TUUSSO will install fencing at all site locations at a minimum of eight feet in height, with a single line of barbed wire installed at the top of the fence. Razor wire will not be used in Project fencing.
Historic and Cultural Preservation	Resource disturbance or degradation during construction	(10) Prior to construction, TUUSSO, in consultation with EFSEC and Washington Department of Archaeology and Historic Preservation (DAHP), will provide final construction and micrositing plans and plans for avoidance of impacts to resources. TUUSSO will continue to coordinate with EFSEC to obtain all necessary permits and perform all required archeological work in order to comply with RCW 27.53.

48 The Council received 18 comments during the public comment period, including from Kittitas County. Seven commenters were in favor of the Project. Eight commenters were opposed for one or more of the following reasons: impacts to farmlands; aesthetic impacts; impacts to tourism, recreation and property values; conflict with local land use permitting; and opposition to expedited process. Three requested deletion of mitigation measure number six and one requested language revision to mitigation measure seven and eight. Finally, one requested extension of the public comment period and one requested information from Applicant but did not comment on the MDNS. After close of the public comment period, EFSEC staff reviewed all eighteen comments and subsequently prepared a revised MDNS. The revised MDNS mitigation measures shown above reflect revisions to mitigation measures six and ten.

49 Kittitas County submitted comments that it termed "SEPA objections." Citing WAC 197-11-330(3)(e)(iii), the County argued that a project that is in "conflict with local, state, or federal laws or requirements for the protection of the environment" will have a significant adverse environmental impact, and that an MDNS is inappropriate when such a conflict exists. The County then asserted various inconsistencies between the project, as proposed, and the County code. According to the County, these include the applicant's failure to obtain an "adequate water supply determination" and the project's failure to

meet two of the County's conditional use criteria: "consistency with rural character" and "necessary or desirable to the public convenience." In response to the County's objections, EFSEC's SEPA responsible official has tentatively concluded that no adequate water supply determination is required under KCC 13.35.020 because none of the proposed structures would have potable water plumbing. The responsible official has also concluded that aesthetic impacts related to rural character have been mitigated below significant levels by the applicant's proposed site plans—which include vegetative screening where needed—and may be mitigated further by EFSEC through conditions such as those listed a KCC 17.60A.020. EFSEC may choose to impose additional conditions related to preservation of rural character after receiving site-specific comments and testimony on conditional use criteria from the public and the County. Finally, the SEPA responsible official concludes that solar alternative energy facilities are beneficial to the public convenience as a matter of state law and policy[35] as well as past County permitting decisions, notwithstanding the fact that some permitted sites have not yet been constructed.

50 The Council finds that the responsible official's conclusions are reasonable and that the MDNS is appropriate based on currently available information. The Council has the ability to revisit the threshold determination, or to require an addendum to the MDNS following the receipt of site-specific comments and testimony related to conditional use criteria or other relevant information.

FINDINGS OF FACT

51 (1) On October 16, 2017, TUUSSO Energy, LLC submitted an application for site certification to construct and operate five photovoltaic solar projects on 232 leased acres in Kittitas County, Washington.

52 (2) Also on October 16, 2017, the Applicant submitted a written request that the Council use the expedited processing procedure authorized by RCW 80.50.075.

53 (3) On December 12, 2017, the Council convened a public information hearing and land use consistency hearing in Ellensburg, Washington, pursuant to due and proper notice. The Council received testimony from the Applicant, Kittitas

---

[35] E.g., RCW 82.16.110, RCW 19.285.020, RCW 80.60.005.

County, and all others who wished to be heard on the issue of land use consistency for the Project.

54 (4) The Council extended the public comment period for 10 days and received 8 written comments from the public, and legal briefs from Kittitas County and the Applicant.

55 (5) The Applicant did not present certificates from local authorities attesting to the Project's consistency or compliance with local land use plans and zoning ordinances.

56 (6) The five project sites (Camas, Fumeria, Penstemon, Typha, and Urtica) are all located in unincorporated Kittitas County, Washington.

CONCLUSIONS OF LAW

57 (1) The Council has jurisdiction over the subject matter of this proceeding and the parties to it pursuant to RCW 80.50.075 and WAC chapter 463-43.

58 (2) The Council provided adequate notice to interested parties, and the Council has adequate information to render a land use consistency decision.

59 (3) Under Kittitas County Code, each of the projects qualifies as a "major alternative energy facility."

60 (4) The Camas, Penstemon and Typha sites are on land zoned as Commercial Agriculture (CA) under Kittitas County Code.

61 (5) The Fumeria and Utica sites are on land zoned as Rural Working – Agriculture 20 (A-20) under Kittitas County Code.

62 (6) Major alternative energy facilities are permitted as conditional uses in the CA and A-20 zones.

63 (7) A site is consistent and in compliance with land use plans and zoning ordinances if it is permitted absolutely or conditionally. To be inconsistent and noncompliant,

the plan or ordinances must expressly, or by operation, clearly, convincingly, and unequivocally prohibit the facility site.

64 (8) The Applicant has met its burden of proof of demonstrating that the site is consistent and in compliance with Kittitas County's Comprehensive Plan and applicable zoning ordinances as required by RCW 80.50.075(1).

65 (9) The environmental impact of the proposed TUUSSO energy facility will be mitigated to a nonsignificant level under RCW 43.21C.031 as required by RCW 80.50.075(1).

66 (10) The criteria for expedited processing set forth in RCW 80.50.090 and WAC 463-43-050 as of the date of the Application have been satisfied, and therefore, the Applicant's request for expedited processing should be granted.

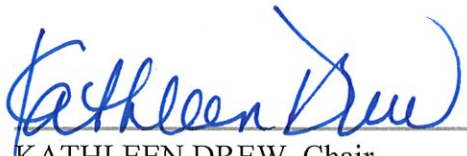
ORDER

THE COUNCIL ORDERS:

67 TUUSSO Energy, LLC's request for expedited processing is GRANTED; EFSEC will evaluate TUUSSO ENERGY, LLC's Application for site certification of the Columbia Solar Project in an expedited process consistent with the requirements of RCW 80.50.075 and WAC chapter 463-43. In addition, Staff will develop a means to receive information akin to what the County would receive during a conditional use hearing as to site-specific conditions and criteria.

DATED at Olympia, Washington, and effective April 17, 2018.

WASHINGTON STATE ENERGY FACILITY SITE EVALUATION COUNCIL



KATHLEEN DREW, Chair