

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of Application

Docket No. 270891

CYPRESS CREEK RENEWABLES –
High Top Solar, LLC and Ostrea
Solar, LLC

Council Order No. 884

ORDER GRANTING A FINDING
OF LAND USE CONSISTENCY

BACKGROUND

Synopsis. *Cypress Creek Renewables requested a finding of land use consistency to support its request for expedited review of an application it filed with the Energy Facility Site Evaluation Council (EFSEC or Council) for site certification and approval of the High Top Solar and Ostrea Solar Projects. The Council may find that the site proposed for a facility is consistent and in compliance with land use plans and zoning ordinances if the proposed use is one that can be approved under current land use and zoning laws conditionally or outright. The Council, by this order, concludes that the proposed sites of the projects are consistent with local land use plans and zoning ordinances because the projects can, with proper mitigation, be approved under the conditional use provisions of Yakima County Code (YCC) Title 19.*

- 1 **Nature of Proceeding.** This matter involves an application for site certification (Application or ASC) filed on April 7, 2022, by Cypress Creek Renewables (the Applicant) to construct and operate High Top Solar and Ostrea Solar (the Projects or the facility) solar photovoltaic (PV) projects with one planned and one optional battery storage system. The Projects would be located adjacent to one another on a total of eleven parcels in unincorporated Yakima County between SR-24 to the south and the Yakima Training Center to the north.
- 2 As part of a request for expedited processing of its Application, the Applicant has requested that EFSEC find that the proposed Project sites are consistent and in compliance with applicable land use plans and zoning ordinances.¹
- 3 The Applicant and the Council mutually agreed to extend the one hundred twenty-day

¹ RCW 80.50.090(2); WAC 463-26-110.

timeline for the Council to issue an order on the land use consistency and to decide the request for expedited process, by 10 weeks to encompass the later time of the Council's monthly meeting on October 18, 2022.

- 4 **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 May 25, 2022, EFSEC issued a Notice of Informational Public Hearing and Land Use Consistency Hearing and scheduled a virtual hearing by Microsoft Teams or by telephone participation for 5:00 p.m. on Wednesday, June 1, 2022.²
- 5 On June 1, 2022, the Council conducted a virtual land use consistency hearing, to hear testimony regarding whether the facility was consistent and in compliance with Yakima County's local land use provisions. The following EFSEC members were present at the June 1, 2022, hearing: Kate Kelly (Department of Commerce), Eli Levitt (Department of Ecology), Leonard “Lenny” Young (Department of Natural Resources), and Stacey Brewster (Utilities and Transportation Commission). Kathleen Drew, EFSEC Chair, called the hearing to order.
- 6 Managing Assistant Attorney General Sara Reyneveld, Counsel for the Environment, was present for the land use consistency hearing.
- 7 Susan Drummond, attorney from Law Offices of Susan Drummond, represented the Applicant and spoke on the Applicant's behalf.
- 8 Michael Tobin testified in opposition to a finding of land use consistency.
- 9 **Applicant's Description of Proposed Facility.** The facility will consist of two projects, High Top Solar, LLC (High Top Project) and Ostrea Solar, LLC (Ostrea Project). Each Project will consist of solar PV modules mounted on single-axis trackers with an aggregated injection capacity limited to 80 megawatts (MW) of alternating current. The proposal is to site the Projects in unincorporated Yakima County north of SR-24 and south of the Yakima Training Center and 20 to 22 miles east of the town of Moxee. The eleven parcels on which the facility will be located will together constitute the “facility parcels.” All parcels involved are owned by Zin and Najiba Badissy. The Applicant has executed options to lease and easement agreements with the landowners for adequate acreage to accommodate the facility long-term. The landowners have provided letters of

² The Council sent this Notice to all interested persons on the application mailing list and the project mailing list. Further, the Council purchased a legal advertisement in the Yakima Herald.

support for each Project making up the facility (Attachment M³ to the Application for Site Certification (ASC)).

- 10 Each Project will consist of single axis tracking PV modules and inverters connected to the Projects' substations. Each string of panels will be arranged in rows with at least eight feet of space between the rows when the modules are at the closest orientation point.
- 11 Throughout the Projects, inverters paired with medium voltage step-up transformers will convert the generated electricity from direct current (DC) to alternating current (AC). The output will be conveyed to a substation transformer. The substation transformer will house a generator step-up transformer, which will convert the power up to 230 kV interconnection voltage for the High Top Project and to 115 kilovolts (kV) interconnection voltage for the Ostrea Project.
- 12 If needed, the battery energy storage system (BESS) for the High Top Project will be located next to the High Top Project substation or in small battery containers collocated throughout the site. Battery energy storage systems would not exceed the nominal 80 MW capacity of the facility.
- 13 The Ostrea Project will have a BESS that would not exceed the nominal 80 MW capacity of the Project. The BESS will consist of individual battery modules organized in racks and located in containers with integrated thermal management systems. The containers will be placed on concrete pads to the west of the substation.
- 14 The High Top Project will interconnect through a dedicated switchyard located on the High Top Project Adjacent to PacifiCorp's Union Gap-Midway 230 kV transmission line that runs through the southern part of the Project.
- 15 The Ostrea Project will interconnect through a line tap to Bonneville Power Administration's (BPA) Midway to Moxee 115 kV transmission line that runs through the southern part of the project. The Midway to Moxee Transmission line connects to BPA's Moxee substation, which is approximately 25 miles west and north of the Project and BPA's shared Midway station nine miles east and north of the Project.
- 16 For both Projects, an Operations and Maintenance (O&M) trailer, and employee parking will be located just west of each Project substation. During construction, a temporary lay-down area will be utilized for delivery of major equipment. This area will convert to employee parking during operations. The facility will be accessed by an existing approach from Washington State Route 24. Access to the High Top Project

³ On the EFSEC website two attachments identified as M are listed. Although nearly identical, one attachment is the letter referencing the High Top Project and the other letter addresses the Ostrea Project.

will be from Washington State Route 24 (SR-24) on the east side of the Project. Access to the Ostrea Project will be from SR-24 on the west side of the eastern most parcel of the Project.

- 17 Sites for both Projects are in unincorporated lands of Yakima County. The land is designated as Agricultural Resource in the Yakima County Comprehensive Plan, also known as Horizon 2040.
- 18 Agricultural Resources areas are “those lands primarily devoted to or important for the long-term commercial production of horticultural, viticultural, floricultural, dairy, apiary, vegetable, or animal products or of berries, grain, hay, straw, turf, see, Christmas trees not subject to excise tax imposed by state law, or livestock.”⁴
- 19 Lands designated to this category generally meet the criteria for lands of long term commercial significance and may: a) contain prime soils; b) include “pockets” of non-agricultural land uses; c) contain high-value crops including fruit trees, hops, specialty field crops, and dairies; d) include residential uses related to agricultural activities including farm worker housing and family farm dwellings; e) uses compatible with the marketing of regional agricultural products; and f) include non-agricultural accessory uses or activities consistent with the size, scale, and intensity of the existing land use.⁵ In addition, Agricultural Resource lands also include lands located outside established Urban Growth Areas.
- 20 Currently, the land on which the facility will sit is active rangeland. Approximately 69 percent of the Maximum Project Extent (MPE) for the High Top Project and 30 percent of the MPE for the Ostrea Project is designated farmland of unique importance. Farmland of statewide importance exists in 11 percent of the MPE of the High Top Project and 17 percent of the MPE for the Ostrea Project. The land on which the Projects will sit has not been used for crops in over 25 years. There is no on-site water supply for active cultivation of crops.
- 21 The land for both Projects’ MPE contains: cheatgrass dominated pasture and mixed environs, shrub-steppe, and disturbed/reclaimed land. The majority of the High Top MPE is in areas dominated by cheatgrass and mixed environs habitats. In the MPE for the Ostrea Project there is a fourth vegetation community of crested wheatgrass dominated pasture and mixed environs. The majority of the Ostrea MPE is in the shrub-steppe and cheatgrass dominated pasture and mixed environs habitats.
- 22 The parcels on which the facility is proposed are wholly outside of the 100-year FEMA floodplain. There are two isolated wetlands and several ephemeral channels in the

⁴ *Horizon 2040*, Section 5.10.2 citing WAC 365-190

⁵ *Horizon 2040*, Section 5.10.3

project site control boundaries for each Project. The wetland and ephemeral channels are outside the High Top MPE, and the U.S. Army Corps of Engineers (USACE) has issued a “no permit required” letter for that Project. The Ostrea MPE construction and operation access roads cross five of the ephemeral channels. For the Ostrea Project, the applicant will obtain a Clean Water Act, Section 4040 Nationwide Permit from USACE as part of the project permitting and a 401 permit from the Department of Ecology, if required.

23 The total acreage of the facility parcels is 3264 acres. The Projects’ maximum project extents (MPEs) would not exceed 1740 acres. The project study area is the extent of the acreage that was surveyed for the wildlife, cultural and wetland surveys, which totals 2237.

24 The Applicant requests that EFSEC allow the Applicant flexibility to microsite the precise location of facility components within the facility area extent and provide an updated site plan prior to construction.

25 As shown in the Preliminary Site Plan (Attachment K to the ASC), the facilities would consist of PV panels, inverters, mounting infrastructure, an electrical collection system, operation and maintenance building, access roads, interior roads, security fencing, a new collector substation and electrical interconnection infrastructure.

26 **Yakima County’s Certificates.** On March 7, 2022, Jason Earles, Zoning and Subdivision Manager and the Yakima County Planning Official provided the Applicant with a Certificates of Zoning Compliance (Certificates) for both Facilities, which the Applicant in turn provided to the Council. According to the Certificates, the Projects are defined as Power Generating Facilities under Yakima County Code (YCC) Title 19, the Unified Land Development Code, and are proposed to be within the Agricultural Zoning District (AG). Power Generating Facilities are classified as a “Type 3” conditional use in the County’s AG zoning district (YCC Table 19.14-010). Type 3 Uses are “uses which may be authorized subject to the approval of a conditional use permit as set forth in Section 19.30.030. Type 3 conditional uses are not generally appropriate throughout the zoning district. Type 3 uses require Hearing Examiner review of applications subject to a Type 3 review under the procedures of Section 19.30.100 and YCC Subsection 16B.03.030(1)(c).” (YCC Title 19.19-010(2)). Therefore, the proposed facility site is consistent with Title 19 insofar as the Projects are eligible for review and permitting under Yakima County conditional use permit processes.⁶

27 **Public Comment.** A member of the public commented that he disagreed with the

⁶ Appendix A to Attachment A. Land Use Consistency Review for each project.

description of land use consistency provided by the Applicant because the proposed use is not consistent with agricultural use of the land.

DISCUSSION

I. Land Use Consistency Determination

- 28 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.”⁷ 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.”
- 29 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.⁸ The evaluation pertains only to the general siting of categories of uses, considering only the site (in this case, the sites) and not the project’s construction and operational conditions.
- 30 Whether a particular facility will 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).⁹ The Council’s ultimate recommendation to the Governor will be made after full and thorough consideration of all relevant issues.
- 31 Under the test for land use consistency previously established by the Council, EFSEC considers whether the pertinent local land use provisions “prohibit” the site “expressly or by operation clearly, convincingly and unequivocally.” A facility meets this initial standard so long as it “can be permitted either outright or conditionally.”¹⁰ Whether applicable conditional use criteria are in fact met is a question for later EFSEC

7 WAC 463-26-050.

8 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.

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

10 In re Columbia Solar Project, Docket No. EF-170823, Council Order – Expedited Processing, ¶ 35 (April 17, 2018).

proceedings,¹¹ after which EFSEC may recommend and impose conditions of approval in the Site Certification Agreement (SCA) to uphold Yakima County’s conditional use permit criteria¹².

32 The EFSEC process contemplates that the Applicant will coordinate with the local jurisdiction to attempt to determine whether the project would be consistent and compliant with the jurisdiction’s land use plans and ordinances.¹³ If through these discussions the local jurisdiction determines the project is indeed consistent and compliant with its land use plans and ordinances, it may provide, and the applicant may present to the Council, a certificate attesting to that fact. Such a certificate provides prima facie proof of consistency and compliance with County land use plans and zoning ordinances.¹⁴

33 **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.¹⁵ 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.¹⁶ 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. 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.¹⁷ 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.

34 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

11 Id., ¶ 36.

12 RCW 80.50.100(2); WAC 463-64-020

13 WAC 463-26-090

14 Id.

15 RCW 80.50.020(18).

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

17 RCW 80.50.020(30).

guides rather than mandates and seek consistency.”¹⁸

- 35 **Proof of consistency and compliance.** EFSEC accepts the Certificates issued to the Applicant by Yakima County as prima facie proof of consistency and compliance with Yakima County land use plans and zoning ordinances. EFSEC received one comment from a member of the public challenging the use as not appropriate for agricultural resource lands. The Council does not find this testimony persuasive because the County’s comprehensive plan contemplates non-agricultural accessory uses for agricultural resource lands and Yakima County has expressly provided that power generating facilities may be authorized subject to qualifying for a conditional use permit.

FINDINGS OF FACT

- 36 (1) On April 7, 2020, Cypress Creek Renewables, LLC submitted an application for site certification to construct and operate High Top Solar and Ostrea Solar Projects (the facility), solar photovoltaic (PV) projects with an optional battery storage system at the High Top Project and battery storage at the Ostrea Project. The facility would be located on 3,263 leased acres in Yakima County, Washington.¹⁹
- 37 (2) On April 7, 2022, the Applicant submitted a written request that the Council use the expedited processing procedure authorized by RCW 80.50.075. By mutual agreement, the Applicant and the Council set a later time of October 18, 2022, for the Council to issue an order on the request for expedited process.
- 38 (3) On June 1, 2022, the Council convened a virtual land use consistency hearing, pursuant to due and proper notice. The Council received testimony from the Applicant’s attorney and community member, Michael Tobin.
- 39 (4) The Applicant presented Certificates of Zoning Compliance from Yakima County’s Zoning and Subdivision Manager, Jason Earles, attesting to the facility’s consistency and compliance with local land use plans and zoning ordinances.
- 40 (5) The facility sites are located in unincorporated Yakima County, Washington.

¹⁸ Whistling Ridge Order at 10 n 15.

¹⁹ The respective Project Site Control Boundaries are: 1,564 acres for High Top; and 1,699 acres for Ostrea.

CONCLUSIONS OF LAW

- 41 (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.
- 42 (2) The Council provided adequate notice to interested parties, and the Council has adequate information to render a land use consistency decision.
- 43 (3) Under Yakima County Code Title 19, the facility meets the definition of a “power generating facility.”
- 44 (4) The proposed sites for the facility are on land in the Agricultural Zoning District (AG) under Yakima County Code. In the AG zoning district, power generating facilities are a Type 3 Use.
- 45 (5) Yakima County determined the Projects are consistent with YCC Title 19 and would be eligible for review and permitting under Yakima County conditional use permitting processes and issued the Applicant a Certificate of Zoning Compliance.
- 46 (6) The Applicant has met its burden of proof of demonstrating that the sites are consistent and in compliance with Yakima County’s Comprehensive Plan and applicable zoning ordinances as required by RCW 80.50.075(1).

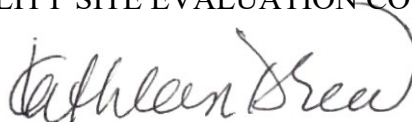
ORDER

THE COUNCIL ORDERS:

- 47 (1) Cypress Creek Renewable, LLC’s request for a finding of land use consistency is GRANTED, consistent with RCW 80.50.090(2) and WAC 463-26-110.
- 48 (2) The Council will provide a means to receive information regarding site-specific conditions and criteria akin to what Yakima County would receive during a conditional use hearing.

DATED at Olympia, Washington, and effective October 18, 2022.

WASHINGTON STATE ENERGY FACILITY SITE EVALUATION COUNCIL



KATHLEEN DREW, Chair