BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of the Application of: Innergex Renewable Development USA, LLC, Wautoma Solar Energy Project Applicant	DOCKET NO. EF-220355 COUNCIL ORDER NO. 896 ADJUDICATIVE ORDER RECOMMENDING PREEMPTION OF LOCAL LAND USE LAWS

OVERVIEW

In this Order, the Energy Facility Site Evaluation Council (Council or EFSEC) sets forth its determination, based on the adjudicative record, to recommend preemption of Benton County's ban on major solar facilities on agriculturally zoned property with respect to the proposed Wautoma Solar Project (Project) site.

The evidence presented through the adjudicative hearing convinces us that the declining water supply from the aquifer beneath the Project site means the land is of relatively marginal agricultural value. The Council appreciates that the Applicant's lease of the Project land will allow the multigenerational farm family owners to obtain revenue, while continuing to farm on land outside the project footprint on a scale that is more consistent with the reduced water availability. The Project site otherwise poses only minimal impacts and takes advantage of close proximity to an interconnection point with the Bonneville Power Administration transmission line.

The Council also finds that the conditions included in the Revised MDNS for project decommissioning, gravel use, soil monitoring, and soil management should be required in consideration of the state, local governmental, and community interests in protecting agricultural land and the purposes of the Benton County zoning provisions that would be preempted for the Project.

The County argues that the Council should decline to preempt its zoning for the site because there are no mitigation measures that can sufficiently protect state and local interests in preventing the conversion of local agricultural lands of long-term commercial significance ("ALLTCS"). However, the County's designation of ALLTCS did not consider parcel-specific circumstances, and in reviewing an application for site certification, this Council has the authority and responsibility to consider site-specific arguments advanced for either overriding or upholding zoning restrictions. The Council is charged with weighing the need for abundant clean energy against other important interests, including the need to preserve valuable agricultural land. In this case, the Council finds that the balance of interest tips in favor of preempting local land use regulations to enable the siting of the Project at the proposed site.

EFSEC will forward the adjudicative record and this Order to the Governor. The Council will also send a Recommendation to the Governor per RCW 80.50.100 that considers the adjudicative record and findings of this Order, the SEPA record, public comments, and input received from federally recognized tribes.

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I. BACKGROUND

A. EFSEC AND THE APPLICATION REVIEW PROCESS

The Energy Facility Site Evaluation Council (EFSEC or Council) is an executive branch agency created by Chapter 80.50 RCW. The Council's responsibilities include recommending to the Governor whether applications to construct proposed energy facilities on sites located within the state of Washington should be granted.

The Council Chair is appointed by the Governor with the advice and consent of the Senate. The Departments of Commerce, Ecology, Fish and Wildlife, Natural Resources, and the Utilities and Transportation Commission appoint members to the Council, as does the county or city in which the proposed project is to be sited.[1]

The Council for the Wautoma Solar Energy Project consists of Council Chair Kathleen Drew and members Elizabeth Osborne, Department of Commerce; Eli Levitt, Department of Ecology; Lenny Young, Department of Natural Resources; Mike Livingston, Department of Fish and Wildlife; Stacey Brewster, Utilities and Transportation Commission; Paul Gonseth, Department of Transportation; and David Sharp, Benton County.

Chapter 80.50 RCW sets out the Council's required procedural steps for reviewing an ASC.[2]

Part of what the Council considers in reviewing an application is local land use plans and zoning ordinances applicable to proposed facility sites. RCW 80.50.090(2) requires the Council to "conduct a public hearing to determine whether or not the proposed site is consistent and in compliance with city, county, or regional land use plans or zoning ordinances on the date of the application."

If EFSEC determines the proposed site to be inconsistent with local land use provisions, it subsequently holds an adjudicative proceeding to consider preemption. The Council is required to determine, based on that proceeding, whether to recommend to the governor that the state preempt the land use plans, zoning ordinances, or other development regulations for a site or portions of a site for the energy facility or alternative energy resource proposed by the applicant. WAC 463-28-060.

The Council must also comply with the State Environmental Policy Act, RCW 43.21C and WAC 463-47. The EFSEC Director, as the agency's "responsible official" under SEPA, must make a threshold determination as to whether the project is likely to have significant adverse environmental impacts requiring the preparation of an environmental impact statement. The outcome of this threshold determination can affect whether the Council must hold an adjudicative hearing on the application, as otherwise required by RCW 80.50.090(4) to hear general testimony in support of or opposition to the application. If the Director determines that the environmental

[1] RCW 80.50.030 allows the Departments of Agriculture, Health, Military, and Transportation the option to appoint a representative to the Council for any project of specific interest to those agencies. In this matter, the Department of Transportation appointed Council member Gonseth.
[2] *See* RCW 80.50.071–.100; *see also* Chapters 463-26 and 463-30 WAC.

impact of the proposed facility is not significant or will be mitigated to a nonsignificant level, the Council may limit the adjudicative hearing to the issue of whether any land use plans or zoning ordinances with which the proposed site is inconsistent should be preempted. RCW 80.50.090(4)(b).

The Council considers the application, public comments, its adjudicative order, the Director's SEPA determination, and any government-to-government consultations with affected federally-recognized tribal governments in developing its final recommendation to the Governor. The Council is required to send its report and make its recommendation to the Governor as to approval or rejection of an ASC within twelve months of receipt of a complete application, or such later time as mutually agreed by the Council and the Applicant.[3]

If the Council recommends approval of an application for certification, it must also submit a draft certification agreement with the report. The Council must include conditions in the draft certification agreement to implement the provisions of RCW 80.50 including conditions to protect state, local governmental, or community interests, or overburdened communities affected by the construction or operation of the facility, and conditions designed to recognize the purpose of laws or ordinances, or rules or regulations promulgated thereunder, that are preempted or superseded pursuant to RCW 80.50.110. RCW 80.50.100(2).

The state is authorized to preempt the regulation and certification of the location, construction, and operational conditions of certification of the energy facilities included under RCW 80.50.060. RCW 80.50.110(2). *See also* WAC 463-28-020.

B. REVIEW OF INNERGEX'S APPLICATION PRIOR TO THE ADJUDICATIVE HEARING

On June 9, 2022, Innergex Renewable Development USA, LLC, submitted to the Energy Facility Site Evaluation Council an application for site certification (Application or ASC) of the proposed Wautoma Solar Energy Project site in unincorporated Benton County.

The application requested site certification for the construction and operation of a solar photovoltaic (PV) project with a battery storage system. The Project's proposed location is in unincorporated Benton County, 12.5 miles northeast of the city of Sunnyside and 1 mile south of the State Route (SR) 241 and SR 24 interchange. The Project would be a 470-megawatt PV generation facility coupled with a 4-hour battery energy storage system (BESS) sized to the maximum capacity of the Project, as well as related interconnections and ancillary support infrastructure. Applicant Exhibit ("Appl. Ex.") 2.

On August 8, 2022, the Council conducted a hybrid in-person/virtual land use consistency hearing, to hear testimony regarding whether the Project was consistent and in compliance with Benton County's local land use provisions.

[3] RCW 80.50.100(1)(a).

Some Council members, along with interested members of the public, assembled in Benton County on the afternoon of November 2, 2022, for a site visit that included a tour of the proposed site.

On November 15, 2022, the Council issued Council Order 886, Order Finding Project Inconsistent with Land Use Regulations, which found the Project, as proposed by the Applicant, was inconsistent with Benton County's local zoning regulations. Council Order 886.

Council Order 866 set the matter for adjudication to consider whether to recommend preemption of Benton County's land use and zoning regulations. *Id*.

Council Order 866 further set out, "[i]f 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 general adjudicative proceeding required by RCW 80.50.090(4) to whether any land use plans or zoning ordinances with which the proposed site is determined to be inconsistent should be preempted." *Id*. at 6.

On May 15, 2024, EFSEC's SEPA responsible official, Director Sonia Bumpus, issued the State Environmental Policy Act (SEPA) threshold determination. Appl. Ex. 15.

The SEPA threshold determination concluded that "EFSEC has identified conditions that would allow it to issue a DNS [determination of nonsignificance], or the applicant has clarified or changed their proposal to include additional measures that allow EFSEC to issue a DNS. The DNS should be identified as mitigated. . . . *Id*. at 31.

Director Bumpus further, "identified no probable significant adverse environmental impacts if the mitigation measures identified in part B are included in a DNS and in the Site Certification Agreement" and recommended "a Mitigated Determination of Nonsignificance with a 14-day public comment period." *Id*. at 32.

On June 14, 2024, EFSEC issued a Final Revised Mitigated Determination of Nonsignificance (MDNS). Appl. Ex. 16.

The Final MDNS determined that various mitigation measures were appropriate to minimize the proposal's impact to adjoining land that would remain in agricultural use, and to conserve soil and soil quality and provide for the land being returned to agricultural use if it ceases to operate as an energy facility. *Id*. at 9–10.

On June 20, 2024, the Council issued an *Order Commencing Agency Adjudication* delegating authorities to Administrative Law Judge Dan Gerard. That order set a deadline of July 12, 2024, for receipt of petitions for intervention and scheduled a telephonic pre-hearing conference for

July 22, 2024. The Applicant and Benton County were considered parties of right to the adjudication per EFSEC rule.[4] Counsel for the Environment (CFE) was a party by statute.[5] No other parties elected to participate in these proceedings.

As required by WAC 463-60-116(2), Innergex filed its revised Application on August 23, 2024.

II. ADJUDICATION

A. JURISDICTION AND AUTHORITY

The Energy Facility Site Evaluation Council has jurisdiction over the subject matter of this adjudicative proceeding and the parties to it under the regulatory authority established in Chapter 80.50 RCW. See RCW 80.50.040(7), RCW 80.50.060(1)(b)(ii), WAC 463-30-080, and WAC 463-28-060.

The Council conducted this adjudicative proceeding as part of its application review process pursuant to the Administrative Procedure Act, Chapter 34.05 RCW, as required by RCW 80.50.090(3) and Chapter 463-30 Washington Administrative Code (WAC).

B. ISSUES ADJUDICATED

Consistent with the *Order Commencing Agency Adjudication* the scope of the adjudication was limited to two issues:

1. If the Energy Facility Site Evaluation Council (EFSEC or Council) should recommend to the Governor that the state preempt the land use plans, zoning ordinances, or other development regulations for the site for the alternative energy resource proposed by Innergex Renewable Development USA, LLC, for Wautoma Solar Energy Project (Applicant).

2. If the Council approves the Applicant's request for preemption, what conditions the Council should include, if any, in a draft certification agreement to consider state or local governmental or community interests affected by the construction or operation of the alternative energy resource and the purposes of laws or ordinances, or rules or regulations promulgated thereunder that are preempted pursuant to RCW 80.50.110(2).

C. PARTICIPANTS AND EXHIBITS

The Council, assisted by the administrative law judge, presided over a virtual adjudicative hearing on September 25, 2024.[6] These hearings allowed for each party's witnesses to provide testimony under oath and then submit to cross-examination. Council members also posed their own questions to the witnesses. As part of the adjudicative hearing process, the Council held a virtual public comment meeting on the evening of Thursday, October 3, 2024.

[4] *See* WAC 463-30-060(1) and WAC 463-30-050.
[5] *See* RCW 80.50.080; *see also* WAC 463-30-060(3).
[6] Council member Levitt was not present at the virtual hearing on September 25. He independently reviewed the transcript and exhibits admitted to the record in preparation for deliberations.

Energy Facility Site Evaluation Council Quorum:
Kathleen Drew, EFSEC Chair
Elizabeth Osborne, Department of Commerce
Mike Livingston, Department of Fish and Wildlife
Lenny Young, Department of Natural Resources
Stacey Brewster, Utilities and Transportation Commission
David Sharp, Benton County
Paul Gonseth, Department of Transportation

Presiding Officer: Administrative Law Judge Dan Gerard

Applicant: Innergex Renewable Development USA LLC
Representatives: Erin Anderson, Attorney; Andrew Lewis, Attorney
Witnesses: Laura O'Neill, Wally Jossart, Leslie McClain, Robin Robert,

Participating Party: Benton County
Representative: LeeAnne Holt, Attorney
Witnesses: Greg Wendt, Michelle Mercer,

Participating Party: Counsel for the Environment
Representative: Yuriy Korol, Assistant Attorney General

Exhibits: Applicant's Exhibits 2 through 6, 8 through 12, 14 through 28 were admitted.
Benton County's Exhibits A through E were admitted.

Additional Documents Considered:
Council Order 886
Finding Project Inconsistent with Land Use Regulations
Agreed Stipulation of Facts

D. FINDINGS OF FACT

The Council makes the following findings of fact based on the record in this case.

1. The real property that is the subject of the Wautoma Solar Energy Project Application for Site Certification – Volume I consists of the thirty-five (35) parcels ("Subject Properties"). Appl. Ex. 2 at 16.

2. The Subject Properties collectively total five thousand eight hundred fifty-two (5,852) acres. *Id*.

3. The Subject Properties are all located within Benton County's Growth Management Act Agriculture District (GMAAD). *Id*.

4. The amount of land constituting the Project Area is approximately 4,573 acres of the total Subject Properties. *Id*.

5. The Project is proposed primarily on land leased from: Robert and Marilyn Ford; Wautoma Energy LLC; Robert Ranch 5+1 LLC; Et Al Michael V Robert; High Valley Land LLC; Jean Emile Robert; and Robin Robert in Benton Co, WA. *Id*. at 13–14, 280.

6. Within the Project Area a smaller area of approximately 2,978 acres, will be unavailable for agricultural use during the operational period of the project. Stipulation of Facts.

7. In general, the Project Area is on relatively flat terrain with slopes of less than 3%. Appl. Ex. 2 at 17.

8. There are 649,153 acres of GMAAD-zoned land in Benton County. Stipulation of Facts.

9. Benton County classifies all GMAAD zoned land within the County as ALLTCS. Testimony of Greg Wendt.

10. The total area of the Subject Property (5,852 acres) makes up 0.9% percent (nine-tenths of one percent) of the total GMAAD zoned land in Benton County (649,153 acres) and the area that would be unavailable for agricultural use (2,978 acres) during the life of the Project is slightly less than one half of one percent (0.45%) of the total GMAAD zoned land in Benton County. Stipulation of Facts.

11. The aquifer on the Subject Property has been in decline for numerous years, necessitating the landowners to either drill deeper wells or curtail their farming operations to account for the depleted water supply. Testimony of Robin Robert.

12. EFSEC's Revised MDNS retained all conditions on Land Use proposed in the ASC and included additional conditions. Appl. Ex. 2 at 17.

13. Applicant agrees to the imposition of all MDNS conditions in a site certification agreement. *Id*.

14. Benton County conducts land use planning and zoning under the Growth Management Act, Chapter 36.70A RCW. *Id*.

15. The purpose of Benton County's Growth Management Act Agricultural District (GMAAD) zone is

> to meet the minimum requirements of the State Growth Management Act (Chapter 36.70A RCW) that mandates the designation and protection of agricultural lands of long term commercial significance. [Benton County Code chapter 11.17] 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 agricultural purposes.

Benton County Exhibit B (BC Ex. B); Benton County Code (BCC) 11.17.010.

16. BCC 11.17 outlines allowable uses of GMAAD lands outside of agriculture. Specifically, the following uses are permissible: floriculture, horticulture, nursery and general farming, agricultural buildings, agricultural related industries such as wineries, breweries, and distilleries, agricultural stands, bakeries, single family dwellings, manufactured homes constructed after 1976, commercial specialty/exotic domesticated animal raising, aquaculture, adult family homes, community club houses, grange halls, and other nonprofit organization halls, commercial establishments that primarily provide custom agricultural land grading, plowing, planting, cultivating, harvesting and soil preparation services, personal airstrips, pumping stations, fire stations, substations, and telephone exchange and distribution facilities, schools, churches, commercial and private kennels, communication facilities, 1 wind turbine with related support structure, meteorological towers, commercial stables, private stables, and riding academies. BC Ex. B; BCC 11.17.040.

17. BCC 11.17 further outlines allowable uses of GMAAD lands with the issuance of a Conditional Use Permit (CUP). These permissible conditional uses include, but are not limited to, slaughterhouses, meat-packing plants, feedlots, commercial dairy, hog, poultry, and rabbit operations, commercial establishments for the transportation of agricultural products, covered arenas, rodeo events, livestock sales rings, and working animal events, commercial airstrips, solid waste treatment facilities related to on-site processing of agricultural products, solid waste disposal sites, off-site hazardous waste treatment and storage facilities, asphalt manufacturing, child day care facilities, bio-diesel and alcohol fuel productions, commercial storage facilities, underground natural gas storage facilities, non-agricultural accessory uses that promote or sustain the continuation of the agricultural uses of a parcel, overnight lodging within a structure primarily used for processing of beer, wine, or spirits, event facilities for weddings, receptions, meetings/retreats, bed and breakfast facilities, filed mazes, sleigh rides, animal rides, and petting zoos, commercial sand and gravel pits, stone quarries, or other material extractions, veterinary clinics, shooting ranges, agri-tourism accommodations, agricultural research facilities, commercial agricultural establishments which store, repair, or sell irrigation, mechanical, and excavation services, and winery/brewery/distillery facilities. BC Ex. B; BCC 11.17.070.

18. The Board of County Commissioners for Benton County 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 Board stated that removal of the CUP option for commercial solar power generator facility, major would help the County to 1) protect long-term commercially agricultural lands, 2) limit incompatible & non-agricultural uses in the GMAAD, 3) conserve critical areas and habitat, 4) protect visual resources, and 5) protect the County's rural character. BC Ex. D at 3; Appl. Ex. 11 at 4.

19. Prior to December 21, 2021, the Project could have applied for a conditional use permit in the GMAAD per former BCC 11.17.070(cc).

20. There are no like-in-kind land use replacement requirements (such as a requirement to provide the same acreage of suitable GMAAD land for that taken up by siting a non-agricultural use) contained within any of the BCC's conditional use permits for GMAAD lands.

E. PUBLIC COMMENTS

On October 3, 2024, EFSEC held a public hearing per RCW 80.50.090(4)(a) and RCW 80.50.100(1)(b) to provide members of the public an opportunity to provide commentary in support or opposition to the matters in the adjudication.

Four members of the public provided comment. All speakers were part of the Robert family, lessors of a portion of the proposed project site: David Robert, Randy Robert, Michael Robert, and Robin Robert.

The commentary from each of the speakers was consistent. The Roberts described the site area as remote.

The aquifer from which the Roberts extract water for their crops has been dwindling for years, which they asserted has made their prior approach to farming no longer feasible or profitable.

The Roberts stated the siting area for the proposed project is, in their opinion, not really prime farmland.

The Roberts stated the Project would generate income for them as generational farmers and shared their view that the Project would allow the aquifer to recharge during its duration.

There were no comments in opposition to the Project at the public hearing on October 3, 2024.

F. ARGUMENTS PRESENTED BY THE PARTIES

1. Benton County

Benton County argued that, "[t]here are no proposed conditions for the Project that sufficiently recognize and address the State and local interests against the permanent conversion of protected local agricultural lands of long-term commercial significance." Benton County's Post-Hearing Brief at 1.

Benton County further argued that there are "no conditions to address the narrow issue of mitigating the loss of GMAAD lands during the life of the project." *Id*. at 3.

Benton County averred that the conditions of Revised MDNS are meant to mitigate any significant impacts on the environment, not on the land use regulations. *Id*. at 4.

While Benton County requested the Council to recommend against preemption of its land use regulations, it requested that if the Council recommends preemption, all the conditions in the Revised MDNS and Table A5 of Applicant's application be included in the draft certification agreement. *Id*. at 5.

2. Applicant

The Applicant argued that the Energy Facility Site Locations Act (EFSLA) controls preemption rather than the Growth Management Act, because of the court's decision in *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council (EFSEC)*, 165 Wn.2d 275, 197 P.3d 1153 (2008), commonly referred to as the "ROKT" decision. Applicant Innergex's Post Hearing Brief at 3.

The Applicant further argued that the mitigation requirements contained within the Revised MDNS sufficiently address the Project's potential impacts to Benton County's GMAAD and Agricultural Lands of Long Term Economic Significance. *Id*. at 5.

III. DISCUSSION AND DECISION

A. LEGAL STANDARD

The procedures the Council must follow in determining whether to recommend to the Governor that the state preempt land use plans, zoning ordinances, or other development regulations for a site or portions of a site for an energy facility, or alternative energy facility are outlined in WAC 463-28. EFSEC's rules do not set forth an explicit standard for determining whether to recommend preemption of local land use provisions. However, EFSEC's rules generally provide that when acting on an application for certification, the Council bases its decisions on the policies and premises set forth in RCW 80.50.010. WAC 463-14-020. The Legislature, through its enactment of RCW 80.50, has set out to

> reduce dependence on fossil fuels by recognizing the need for clean energy in order to strengthen the state's economy, meet the state's greenhouse gas reduction obligations, and mitigate the significant near-term and long-term impacts from climate change while conducting a public process that is transparent and inclusive to all with particular attention to overburdened communities.

RCW 80.50.010.

The Washington Supreme Court has held that the Growth Management Act, pursuant to which Benton and other counties adopt their land use plans and promulgate their zoning ordinances, does not repeal EFSEC's preemption power over state and local laws and regulations under RCW 80.50.110(2). *Residents Opposed to Kittitas Turbines,* 165 Wn.2d at 308–310. However, if

the Council recommends preemption, it must include conditions in the draft certification agreement which consider state or local governmental or community interests affected by the construction or operation of the energy facility or alternative energy resource and the purposes of laws or ordinances, or rules or regulations promulgated thereunder that are preempted pursuant to RCW 80.50.110(2). WAC 463-28-070.

B. COUNCIL'S DETERMINATIONS ON THE ISSUES

1. Issue 1: Preemption of inconsistent zoning

The Council finds it is appropriate to recommend preemption of Benton County's prohibition on major solar facilities on agriculturally zoned land as it applies to the proposed Project site.

The Council finds that the state's interest in the development of abundant, affordable clean energy, as stated in RCW 80.50.010, would be well-served by a solar facility at this location, which presents relatively low land use conflict. The policies that Benton County seeks to advance with its prohibition on major solar facilities on all agricultural lands, when considered in light of the circumstances of this site, are not sufficient to overcome that conclusion.

The Council finds it is not tenable to argue that all agriculturally zoned land must be protected without exception against clean energy development. The Least-Conflict Solar Siting on the Columbia Plateau report, developed by Washington State University at the Legislature's direction, posited that lower productivity agricultural lands could be considered as potential low-conflict locations with respect to agricultural impacts when siting commercial scale solar.

In contrast to its marginal agricultural value, the site affords unique advantages for a solar facility. The site is ideally situated to take advantage of regional Bonneville Power Administration interconnection with transmission facilities that are already on the site, rather than requiring the construction of distribution lines across intervening lands. Testimony of Leslie McClain.

The Revised MDNS does not identify any other significant adverse impacts that cannot be mitigated through the recommended mitigation measures. The site is well-suited to the policy directives of RCW 80.50.010. Its remoteness helps to avoid aesthetic and recreational impacts on the surrounding community. Testimony of Leslie McClain. And its character as previously disturbed agricultural land helps avoid the need to site the Project in more sensitive habitat.

Benton County argues the Council should decline to recommend preemption in this case, because the 2,978 acres that would be occupied by project infrastructure will be unavailable for agricultural use during the operation of the Project. Benton County's Brief at 3–4, 7.) The County cites the Growth Management Act's requirement for local jurisdictions to designate and protect Agricultural Lands of Long-Term Commercial Significance ("ALLTCS") in support of its argument that the Council should give effect, without exception, to the County's prohibition on major solar facilities in the agricultural zone. *Id.* at 5.

On the record of this adjudication, and for this specific site, the Council finds the County's arguments unpersuasive. In *Residents Opposed to Kittitas Turbines,* 165 Wn.2d 275, the state Supreme Court held that the specific mandates of EFSLA take precedence over the more generally applicable Growth Management Act when a conflict between the two arises. In such circumstances, the more specific law—in this case, EFSLA—should be given effect, and zoning provisions adopted by a county under the GMA can be preempted to authorize the siting of an energy facility pursuant to EFSLA.

The County admits that it designates all agricultural land in the county, without exception (constituting 59 percent of the land under county and city zoning jurisdiction) as ALLTCS. Testimony of Greg Wendt. The record of this adjudication also demonstrates that the county's designation does not closely consider factors, such as limited water availability, that may cause individual properties to have relatively lower agricultural value. (*See Id.*; Testimony of Leslie McClain.)

The Applicant presented uncontested evidence to indicate that the subject property has only marginal value as agricultural land with the potential to continue contributing to Benton County's agricultural industry:

- The site is extremely arid (receiving only 5-6 inches of rain per year) and is not very well suited for dryland farming. Testimony of Leslie McClain.

- The subject property's agricultural value is largely dependent on irrigation by a groundwater right in an aquifer that is steadily declining from over-withdrawal. *Id.*; Testimony of Wally Jossart; Testimony of Robin Robert. Without making prohibitively expensive investments in a deeper well to continue chasing sinking groundwater, the currently achievable pumping rate only allows irrigation of between 700 and 750 of the 6,000 combined acres to which the property's water rights are appurtenant. Testimony of Leslie McClain.

- The property owners entered into the solar facility lease with the Applicant as a way of generating revenue to continue growing alfalfa for cattle and wine grapes, while reducing water withdrawals to possibly allow for aquifer recovery. Testimony of Wally Jossart; Testimony of Robin Robert. They intend to bank the portion of the water right they will no longer need. Testimony of Robin Robert.

For the foregoing reasons, the Council finds it is appropriate to recommend preemption of the Benton County Code provisions that would prohibit construction and operation of the Project at the proposed site.

2. Issue 2: Conditions to recognize the purpose of preempted ordinances

The Council finds that the conditions related to land use in the Application for Site Certification (ASC) and Revised MDNS should be imposed to consider the purposes of Benton County's preempted land use plans and zoning ordinances at this site.

The Applicant and Benton County agreed that if preemption is recommended, then all the conditions proposed in the Revised MDNS should be imposed. The Applicant additionally concurred that the measures contained in Section A5 of the ASC would be appropriate conditions in a site certification agreement. No supplemental conditions have been proposed by Benton County or the Counsel for the Environment.

In its post-hearing brief, Benton County argues that the Applicant proposes "no conditions to address the narrow issue of mitigating the loss of GMAAD lands during the life of the project." Benton County's Post-Hearing Brief at 3. (County witnesses readily admitted, however, that it is impossible to create replacement agricultural land.) The County then argues, that because "there are no conditions proposed to offset the interests of the state, local government, and community in protecting those lands. . . the Council cannot satisfy the conditions requirement of RCW 80.50.100(2) and should recommend denial of the Revised Application." *Id.* at 4.

The County's argument is unavailing for two reasons. First, EFSEC's rules clarify that the Council need only include certification conditions "which *consider*. . . the purposes of laws or ordinances. . . preempted." WAC 463-28-070 (emphasis added). EFSLA does not require the imposition of conditions that fully offset any impact to the purposes of preempted ordinances.

Second, the Revised MDNS evaluated land use as an element of the environment and contains multiple conditions intended to mitigate the Project's impacts to land use and to preserve the opportunity to return the property to agricultural use if the facility is no longer in operation. Appl. Ex. 16 at 9–11. These measures were developed with input from Washington State Department of Agriculture staff and address project decommissioning, gravel use, soil monitoring, and soil management. Both the Applicant and Benton County agree these mitigation measures are appropriate if the Council recommends preemption. And as noted above, Benton County proposed no supplemental conditions.

For the foregoing reasons, the Council finds that the conditions related to land use in the ASC and Revised MDNS should be included as requirements of site certification in order to consider the purposes of the zoning ordinances that would be preempted.

IV. ORDER

The Council hereby recommends that with respect to the proposed Wautoma Solar Project site, the state preempt Benton County's prohibition on major solar facilities on agriculturally zoned property.

The Council further recommends that the conditions included in the Revised MDNS for project decommissioning, gravel use, soil monitoring, and soil management should be required as conditions of site certification for the Wautoma Solar Project in consideration of the state, local

governmental, and community interests in protecting agricultural land that would be affected by the construction or operation of the alternative energy resource, as well as the purposes of the Benton County zoning provisions that would be preempted for the Project.

DATED and effective at Olympia, Washington, on the 20th day of November 2024.

WASHINGTON ENERGY FACILITY
SITE EVALUATION COUNCIL

Kathleen Drew
Chair

Elizabeth Osborne
Department of Commerce

Eli Levitt
Department of Ecology

Mike Livingston
Department of Fish and Wildlife

Lenny Young
Department of Natural Resources

Stacey Brewster
Utilities and Transportation Commission

David Sharp
Benton County

Paul Gonseth
Department of Transportation

NOTICE TO PARTIES: In accordance with WAC 463-30-335, parties may petition for reconsideration of the Council's recommendation package to the Governor. The Council requires requests for reconsideration to address all of the filing party's concerns raised by the recommendation package in a single petition. Petitions for reconsideration must be filed within 20 days of the service of the recommendation package to the Governor. If any such petition for reconsideration is timely filed, the deadline for answers is fourteen days after the date of service of each such petition. The formatting of petitions for reconsideration shall be governed by WAC 463-30-120 and shall be limited to 50 pages.