

**WASHINGTON STATE  
OFFICE OF ADMINISTRATIVE HEARINGS**

In the matter of:

Wautoma Solar,

Applicant.

Docket No. 279466

**INITIAL ORDER**

Agency: Energy Facility Site Evaluation Council

Program: Land Use Consistency

Agency No. EF-220355

**1. ISSUES**

- 1.1. Whether 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)?
- 1.2. 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)?

**2. ORDER SUMMARY**

- 2.1. EFSEC should recommend to the Governor that the state preempt Benton County's land use plans, zoning ordinances, or other development regulations for the site for the Wautoma Solar Energy Project.
- 2.2. All conditions contained in the MDNS should be included in the draft certification agreement.

**3. ADJUDICATION**

- 3.1. Adjudication Date: September 25, 2024
- 3.2. Energy Facility Site Evaluation Council Quorum:
  - 3.2.1. Kathleen Drew, EFSEC Chair
  - 3.2.2. Elizabeth Osborne, Department of Commerce
  - 3.2.3. Mike Livingston, Department of Fish and Wildlife
  - 3.2.4. Lenny Young, Department of Natural Resources

- 3.2.5. Stacey Brewster, Utilities and Transportation Commission
- 3.2.6. Dave Sharp, Benton County
- 3.2.7. Paul Gonseth, Department of Transportation
- 3.3. Presiding Officer: Administrative Law Judge Dan Gerard
- 3.4. Applicant: Innergex Renewable Development USA LLC
  - 3.4.1. Representatives: Erin Anderson, Attorney  
Andrew Lewis, Attorney
  - 3.4.2. Witnesses:
    - 3.4.2.1. Laura O'Neill
    - 3.4.2.2. Wally Jossart
    - 3.4.2.3. Leslie McClain
    - 3.4.2.4. Robin Robert
- 3.5. Participating Party: Benton County
  - 3.5.1. Representative: LeeAnne Holt, Attorney
  - 3.5.2. Witnesses:
    - 3.5.2.1. Greg Wendt
    - 3.5.2.2. Michelle Mercer
- 3.6. Participating Party: Counsel for the Environment
  - 3.6.1. Representative: Yuriy Korol, Assistant Attorney General
- 3.7. Court Reporter: John Botelho
- 3.8. Observers:
  - 3.8.1. Ami Hafkemeyer; Adrienne Barker; Joan Owens; Catherine Taliaferro; Audra Allen; Karl Holappa; Lance Caputo; Ian McManness; Martin McMurray; Sean Greene; Trevin Taylor; Jonathan Thompson; Lisa McLean; Zachary Packer; Don Jenkins; Sairy Reyes; Alondra Zalewski; Ali Smith; Maria Belkina; Paul Seilo; Joanne Snarski; Patrick Zemanek; Julia Mancinelli; Linda Atkins; Craig Gannett; Don Jenkins; Linnea Fossum; Matt Dadswell.
- 3.9. Exhibits: Applicant's Exhibits 2 through 6, 8 through 12, 14 through 28 were admitted. Benton County's Exhibits A through E were admitted.
- 3.10. Additional Documents Considered: Council Order 886, Order Finding Project Inconsistent with Land Use Regulations; Agreed Stipulation of Facts.

#### 4. FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

##### *Application History*

- 4.1. 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 (the Project) site in unincorporated Benton County.
- 4.2. 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. *Exhibit ("Ex.") 2.*
- 4.3. 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.
- 4.4. 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.*
- 4.5. Council Order 866 set the matter for adjudication to consider whether to recommend preemption of Benton County's land use and zoning regulations. *Id.*
- 4.6. Council Order 866 further set out, "If the environmental impact of the proposed facility is determined by the EFSEC responsible official to be non-significant or if the facility's impacts will be mitigated to a non-significant level, the Council may limit the topic of the 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.*
- 4.7. On May 15, 2024, EFSEC issued the State Environmental Policy Act (SEPA) determination. *Ex. 15.*
- 4.8. The SEPA determination concluded that "EFSEC has identified conditions that would allow it to issue a DNS, 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...". *Ex. 15, p. 31.*

- 4.9. EFSEC 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 p. 32.*
- 4.10. On June 14, 2024, EFSEC issued a Final Revised Mitigated Determination of Nonsignificance (MDNS). *Ex. 16.*
- 4.11. The Final MDNS determined the following mitigation measures were appropriate:

**4.11.1. Earth:**

**4.11.1.1. Geotechnical Engineering:**

- The Applicant would prepare a Final Geotechnical Engineering Report prior to the Project’s final design, which may include updated commitments. If any Applicant-proposed commitments are added, removed, or changed as a result of the Final Geotechnical Engineering Report, EFSEC would be required to review and approve the alterations prior to the start of construction.

**4.11.1.2. Erosion:2+1+**

- To limit erosion and disturbance of natural soil profiles, soil disturbance would be postponed when soils are excessively wet, such as following a precipitation event.

**4.11.2. Air:**

**4.11.2.1. Dust Emissions:**

- Limit traffic speeds on unpaved areas to 15 mph, rather than the Applicant-proposed 25-mph limit. This mitigation measure would reduce the anticipated fugitive dust emissions associated with the Project.

**4.11.3. Water:**

**4.11.3.1. Quality – Ephemeral Streams:**

- If the US Army Corps of Engineers determines the ephemeral streams are non-federally regulated waters, an Administrative Order would be needed if details showed the project would not meet the State’s water quality standards. Additional mitigation would be imposed if needed to replace any of the features’ functions and values.

#### **4.11.3.2. Quality – Wetland Buffers:**

- The Applicant would prepare a Wetland Buffer Planting Plan and a Wetland Buffer Mitigation Plan that would be provided to WDOE and EFSEC for review and approval prior to the start of construction.

#### **4.11.3.3. Quality – Spill Prevention Control:**

- The Applicant has committed to the preparation of a Construction Spill Prevention Control and Countermeasure (SPCC) Plan and Operations SPCC Plan to reduce the likelihood of an accidental release of a hazardous or regulated liquid and expedite the response to and remediation of the release should one occur. These Plans are to be completed and submitted to EFSEC for review prior to the start of construction. These Plans are to include a requirement that spill response equipment be stored in all Project vehicles (not to include personal vehicles) accessing the site during construction, operation, and decommissioning. Additionally, these Plans are to include a requirement that an oil pan be placed beneath heavy equipment when stored or not in regular use on site.

#### **4.11.3.4. Quality – Employee Training:**

- An employee training plan is to be included as part of the SPCC Plans. For the duration of the Project, employees and workers on site would receive appropriate training according to the employee training plan to ensure that any spills are reported and responded to in an appropriate manner. This would include training on the use of spill response equipment and orientations identifying the location of hazardous materials, proper storage of hazardous materials, and location of spill response equipment to ensure that workers are competent in spill response.

#### **4.11.3.5. Quality – Ephemeral and Intermittent Streams:**

- Project construction and decommissioning would be minimized during rainy periods and heavy rain—in particular, work near ephemeral or intermittent streams.

#### **4.11.3.6. Quality – Water Source:**

- Prior to the start of construction, the Applicant would provide an executed agreement and/or permit to EFSEC that identifies the source and quantity of water intended to be supplied to the Project for construction and operation.

#### **4.11.3.7. Quality – Drought:**

- During periods of drought conditions or water shortage, as declared by any state or local government agency, water use would be minimized or postponed where possible or additional alternate off-site water supplies would be identified.

#### **4.11.3.8. Quality – Water Rights:**

- The Applicant would ensure that water rights held by the landowner in relation to irrigated farmlands within the Project Boundary are maintained and returned to the landowner following Project decommissioning. These rights can be retained either by meeting identified minimum water usage rates on an annual basis or by placement of the rights within a trust for the duration of the Project. This would be documented and provided to EFSEC prior to the start of operations.

#### **4.11.4. Plants:**

##### **4.11.4.1. Vegetation and Weed Management Plan:**

- Prior to the start of construction the Applicant would prepare a Vegetation and Weed Management Plan to be reviewed by WDFW and WDOE and approved by EFSEC which is to include the following mitigation measures, though further mitigation may be imposed as necessary:
  - a list of species under consideration for seeding in areas where passive revegetation is unsuccessful, a description of the Applicant's herbicide and/or pesticide plans, including a commitment to prohibit the use of any herbicides or pesticides restricted by WAC 16-230-600 and 16-230-800,
  - information on the proposed management for the "green strips" that would be used in the Project Area, and

- measures for controlling the establishment or spread of invasive and weed species, and other related topics.

#### **4.11.4.2. Restoration Plan:**

- The Applicant would create a Detailed Site Restoration Plan (DSRP), as required by WAC 463-72-050, that would include a description of revegetation to be undertaken during decommissioning. The DSRP would be prepared and submitted for approval by EFSEC for final revegetation prior to Project decommissioning for the temporary and permanent disturbance areas, including modified habitat. The DSRP would be a living document. It would include the methods, success criteria, monitoring, and reporting for revegetation at the end of the Project life. It would also include monitoring of the area for at least five years following decommissioning of the Project, provisions for adaptive management and would be updated based on any lessons learned from implementing the Revegetation Plan created for the temporary disturbance from Project construction.

#### **4.11.4.3. Technical Advisory Committee:**

- The Applicant, in consultation with EFSEC, would establish a Technical Advisory Committee (TAC) prior to the start of construction. The TAC may be composed of representatives from the Washington Department of Ecology, Washington Department of Fish and Wildlife, Washington Department of Agriculture, local interest groups, not-for-profit groups, and landowners and would be responsible for reviewing and providing technical advice on documents, reports, and data produced by the Applicant in relation to management of wildlife, habitat, and prime farmland. The TAC would also provide direction on adaptive management throughout the life of the Project. The TAC would be responsible for, at minimum:
  - Providing input to, and review of, Project wildlife and habitat management plans (i.e. Vegetation and Weed Management Plan, Detailed Site Restoration Plan, Wildlife Habitat Management and Mitigation Plan, etc.)

- Reviewing and providing advice to EFSEC on the final Project design following finalization of the microsite plan
- Advising on the monitoring of mitigation effectiveness and reviewing monitoring reports
- Advising on thresholds to be applied to the Project that would trigger the need for additional mitigation measures to reduce Project impacts to the desired level
- Advising on new or expanded mitigation measures that would be implemented at EFSEC's directive as adaptive management to ensure mitigation success thresholds are reached
- Advising on mitigation measures that can be removed or replaced based on new information (i.e. hydroseeding being unnecessary when native vegetation naturally recruits to the site)

#### **4.11.4.4. Monitoring:**

- The Applicant's Vegetation and Weed Management Plan would include a commitment to, within 60 days of Project completion, create an as-built report that documents the amount of modified habitat, temporary disturbances, and permanent impacts associated with the Project. Vegetation monitoring of modified habitat would be conducted annually for a minimum of three years, though EFSEC may, under advisement from the TAC, elect to extend this monitoring period. The TAC would review these monitoring reports for progress in meeting measurable success criteria for revegetation and recommend remedial management actions if success criteria are not being reached. At the end of the revegetation monitoring period, areas of modified habitat and temporary disturbance that have met the established success criteria would be eligible for offset by the Applicant at the respective ratios. EFSEC may impose additional mitigation requirements for areas that have not met the success criteria after the end of the revegetation monitoring period, potentially including offset requirements.



#### **4.11.4.5. Trees:**

- Construction would avoid removing or disturbing trees within the Project Lease Boundary. Disturbance to trees includes any disturbance, including topping, within the drip-line of the tree (i.e., the area from the edge of the outermost branches), which preserves an intact root system. Disturbance within the drip-line of the tree should be avoided as this can lead to tree mortality. The avoidance area within the drip-line of trees in work areas should be delineated using snow fencing or similar measure to improve the visibility of avoidance zones. Trees cannot be removed without pre-approval. Where tree disturbance cannot be avoided by the Project (e.g., near transmission lines), the number and location of the trees would be provided to EFSEC, along with a statement justifying why avoidance cannot be achieved, and a mitigation plan. The mitigation plan would include replanting trees at a 3:1 ratio within the Lease Boundary to maintain the diversity of habitat structures provided by trees and would require approval by EFSEC prior to proceeding.

#### **4.11.4.6. Special Status Plant Species:**

- The environmental orientation provided to workers on site would include information on special status plant species. This would include diagnostic characteristics, suitable habitat descriptions, and photos of special status plant species with potential to occur within the Lease Boundary. A protocol would be established for any chance find by workers, who would notify supervisory staff on site prior to proceeding with work. Work within proximity to any chance find would not proceed until the supervisory staff have informed the environmental monitor and the monitor has approved the resumption of normal work activities.

#### **4.11.5. Animals and Habitat:**

##### **4.11.5.1. Habitat Management and Mitigation Plan:**

- Prior to the start of construction, a Final Wildlife Habitat Management and Mitigation Plan would be developed in coordination with WDFW and EFSEC, as described in the

ASC, to include considerations of any potential additional mitigation as identified by WDFW or other micro-siting options that may be feasible to further reduce the impact to habitat connectivity. Among micro-siting options, the Applicant would consider if incremental expansion of Project wildlife corridors is practicable through intra-site relocation of solar arrays.

#### **4.11.5.2. Shrub-steppe:**

- For the purposes of impact assessment and compensatory mitigation, all burned and recovering shrub-steppe habitat should be mapped and considered as shrub-steppe, rather than as eastside (interior) grass.

#### **4.11.5.3. Habitat Mitigation:**

- The Applicant would prepare a Final Wildlife Habitat Management and Mitigation Plan prior to Project construction, which may identify additional impacts to Priority Habitats. All impacts to Priority Habitats and rabbitbrush shrubland would be mitigated for at the following ratios:
  - Eastside (interior) grass
    - 1:1 for permanent impacts
    - 0.5:1 for altered habitat impacts
    - 0.1:1 for temporary impacts
  - Shrub-steppe
    - 2:1 for permanent impacts
    - 2:1 for altered habitat impacts
    - 1:1 for temporary impacts
  - Rabbitbrush shrubland
    - 2:1 for permanent impacts
    - 2:1 for altered habitat impacts
    - 1:1 for temporary impacts

#### **4.11.5.4. Trash Containers:**

- All trash containers would be wildlife resistant.

#### **4.11.5.5. Pesticides:**

- The Applicant would avoid the use of pesticides, including rodenticides, during Project construction and operation. If

the use of pesticides is required, the Applicant would develop a management plan for submission to and approval by EFSEC that describes how the Applicant would avoid and/or otherwise minimize potential impacts on wildlife, including all potentially impacted special status species.

**4.11.5.6. Sensitive Area Flagging:**

- The Applicant would limit construction disturbance by identifying sensitive areas on mapping and flagging any sensitive areas including wildlife features, such as wildlife colonies, active nests, dens, and wetlands in the field. The Applicant would conduct ongoing environmental monitoring during construction to ensure that flagged areas are avoided.

**4.11.5.7. Mortality Management:**

- The Applicant would maintain a database of identified wildlife carcasses found within the Project area, especially on or along roadways and wildlife corridors, through construction and operation as part of the operational procedures. The Applicant and the TAC would review mortalities annually and propose additional mitigation for areas under the control of the Applicant with frequent mortalities or wildlife crossing observations. Additional mitigation measures may include, but are not limited to, speed control, signage, temporary road closures (e.g., during migration periods), or fencing changes.

**4.11.5.8. Bird Breeding:**

- Vegetation clearing and grubbing would avoid local bird breeding periods, when feasible, to reduce potential destruction or disturbance of nesting birds. If avoidance of this period is not feasible, additional mitigation measures, such as pre-construction surveys for and buffering of active bird nests, would be undertaken.

**4.11.5.9. Movement Corridors:**

- The Applicant would locate Project components, including roads and powerlines, outside of identified movement corridors to the extent feasible. Rationale would be

provided to EFSEC for siting components within movement corridors, and a Corridor Mitigation Plan would be required that describes:

- Extent of direct and indirect habitat impact within the movement corridor
- Proposed measures to be implemented to reduce potential impacts on movement corridors (e.g., habitat enhancements to promote continued use of corridors)
- Proposed features to accommodate wildlife movement for linear Project components (e.g., roads, powerlines)
- Proposed restoration in movement corridors following Project decommissioning

#### **4.11.5.10. Roadway Removal:**

- All roadways constructed for the Project during the construction and operation phases would be removed and restored during decommissioning. The Applicant would provide EFSEC with rationale and propose additional mitigation measures for EFSEC review and approval if roadways are not decommissioned post-operation.

### **4.11.6. Energy and Natural Resources:**

#### **4.11.6.1. High-Efficiency Fixtures:**

- The Applicant would install high-efficiency electrical fixtures and appliances in the O&M facility, BESSs, and substations to reduce energy needs for the Project's operations stage.

#### **4.11.6.2. High-Efficiency Lighting:**

- The Applicant would install high-efficiency security lighting to reduce energy needs for the Project's operations stage.

#### **4.11.6.3. Foundation Removal:**

- The Applicant would remove all concrete foundations associated with the Project to a level of no less than 3 feet below the surface of the ground, unless some portions of the foundations are requested to be maintained by the landowner.

#### **4.11.6.4. Decommissioning:**

- To retrieve as much of the natural resources used in construction and operation of the Project as possible, the Applicant would demolish and remove all Project-related equipment and facilities from the Lease Boundary upon Project decommissioning. The Applicant would recycle all components of the Project that have the potential to be used as raw materials in commercial or industrial applications. For any Project components that the Applicant deems non-recyclable, the rationale for that determination shall be presented to EFSEC for approval prior to the disposal of the components. If the Applicant intends to leave any portion of the facility, including concrete foundations, they must submit a request to EFSEC in an update to their decommissioning plan.

#### **4.11.7. Environmental Health:**

##### **4.11.7.1. Site Assessment:**

- The Applicant would prepare a Phase 1 Environmental Site Assessment prior to Project construction, which may identify site contamination. If evidence of potential contamination is found within the Project area, the Applicant would perform a Phase 2 Environmental Site Assessment and consult with EFSEC to identify potential additional mitigation measures.

##### **4.11.7.2. Green Strip Firebreak:**

- The Applicant will work with the landowner, local fire management districts, WDFW, and EFSEC to construct and maintain one or more green strips within the Project Lease Boundary or vicinity to reduce the risk of spread of wildfire unless another more effective measure is identified during this coordination. The Applicant would work with WDFW and EFSEC to determine an appropriate width, linear distance, and seed mix for the green strips.

##### **4.11.7.3. Artificial Water Source:**

- The Applicant would locate an artificial water source outside of the fenced project area to provide a water source for helicopter fire suppression.

#### **4.11.8. Land and Shoreline Use:**

#### **4.11.8.1. Site Restoration Plan:**

- Prior to decommissioning, the Applicant would submit a Detailed Site Restoration Plan, per WAC 463-72-050, for restoring the site to its preconstruction character. This would assist in preventing conversion of a land use that is not in alignment with the Lease Boundary's current designation (Growth Management Act Agricultural District). The Applicant would be responsible for working with landowners to return all agricultural land to its preconstruction status. If future site conditions or land ownership no longer allows for the land to be returned to agricultural production, the Applicant would submit a request to EFSEC for an alternative land use that would be in alignment with the Lease Boundary's preconstruction rural character and resource value. If the Detailed Site Restoration Plan requests an alternative land use, EFSEC may require that the Applicant provide additional mitigation to offset impacts from a permanent conversion of the land.

#### **4.11.8.2. Soil Monitoring:**

- The Applicant would develop a Soil Monitoring Plan for the 690 acres of prime farmlands to be impacted prior to the start of construction which would be provided to EFSEC, the Washington Department of Agriculture, and Washington Department of Fish and Wildlife for review and approval. This Plan would last for the duration of the Project's life with a baseline soil test conducted within the fall season immediately prior to the start of construction on the impacted prime farmlands, annual fall season testing for the first 5 years following the completion of construction, and testing once every 5 years following the initial 5-year period (i.e., Years 10, 15, 20, etc.). With the understanding that specific testing methods and criteria may be modified by the TAC as appropriate, the soil monitoring should include, at a minimum, measurements for the following soil traits and characteristics:
  - Compaction
  - Topsoil depth
  - Water-holding capacity
  - Organic carbon content

- Organic matter
- Nutrient content
- pH levels
- Productivity
- Structure

#### **4.11.8.3. Gravel Use:**

- The use of gravel on prime farmlands would be reduced to the greatest extent feasible, with justification for its use presented to EFSEC for approval prior to the start of construction. If gravel must be used on areas designated as prime farmland, EFSEC may require additional relevant mitigation.

#### **4.11.8.4. Soil Adaptive Management:**

- The TAC would review the results of the soil testing, provide adaptive management guidance, and recommend mitigation to EFSEC to ensure that the impacts of soil cracking, compaction, and nutrient loss are minimized to the extent that the Applicant can completely recover the prime farmlands to their pre-Project production capacity following decommissioning. The form of mitigations imposed by EFSEC would be dependent on the site conditions, but can include, among other measures:
  - Periodic grazing and/or mowing
  - Water dispersal events
  - Conservation tilling
  - Application of soil amendments, nutrients, or minerals
  - Seedings or plantings to reinforce natural revegetation

#### **4.11.9. Socioeconomics:**

##### **4.11.9.1. Decommissioning Housing Analysis:**

- Prior to decommissioning, the Applicant would provide a new housing analysis that would include up-to-date housing information to determine if current socioeconomic analysis and Project impacts on housing are appropriate or if additional mitigation is needed to address temporary housing availability.

#### **4.11.10. Noise and Vibrations:**

##### **4.11.10.1. Laydown Yards:**

- Avoid laydown and equipment storage/parking areas closer than 2,500 feet from the nearest noise sensitive receptor (NSR) location. These laydown and storage areas would have more noise sources for longer periods of time than other areas; therefore, setting these locations further from NSR locations would limit the sound level and the duration that such equipment can impact an NSR.

##### **4.11.10.2. Daytime Hours:**

- Limit large, noise-generating equipment activities, such as earth-moving equipment, cranes, and trucks to daytime hours (between 7 a.m. and 10 p.m.) and limit the loudest and most impulsive pieces of construction equipment and activities, such as pile-driver operations and blasting, to typical working hours only: 7 a.m. to 6 p.m., Monday through Saturday. Nighttime operations should be atypical.

##### **4.11.10.3. Nighttime Hours:**

- Monitor noise during nighttime operations (between 10 p.m. and 7 a.m.), when operations have the potential to impact Class A NSRs to ensure that operations do not exceed state noise limits. When nighttime operations do not have the potential to exceed state noise levels, monitoring would not be required.

##### **4.11.10.4. Public Reporting:**

- Set up a “noise hot line” or other form of communication that the public could use to report any undesirable noise conditions associated with the Project, with the ability to log the date and time of a complaint and complainants receiving a contact attempt within 24 hours. This line of communication would be maintained through construction and for at least the first year of Project operation, with all complaints and resolutions shared with the EFSEC Council during the Project’s monthly updates.

##### **4.11.10.5. Noise Monitoring:**



- Perform noise monitoring during operations, at a frequency and at locations identified in coordination with EFSEC for the first 180 days of operation. Noise monitoring results would be adjusted appropriately for extraordinary weather events (e.g. high wind, rain, etc.) that significantly influence noise levels. Additional mitigation (e.g., noise barriers, etc.) and subsequent noise monitoring would be required if the facilities are receiving and documenting ongoing substantiated noise complaints and/or operational noise levels exceed maximum permissible noise levels as indicated in WAC 173-60-040.

#### **4.11.11. Visual Aesthetics:**

##### **4.11.11.1. Vegetation Removal:**

- Avoid complete removal of vegetation beneath solar arrays during construction, where possible, to reduce contrast between the exposed soil and adjacent undisturbed areas during project operation.

##### **4.11.11.2. Opaque Fencing:**

- Unless an alternative contractual agreement has been made with the owner of such a property, opaque fencing to directly screen views of the solar arrays where sited within 150 feet of viewpoints (i.e. public roadways) or residences. To allow the proposed fencing to blend into the setting, color-treat the opaque fencing material to minimize color contrast with the existing landscape.

##### **4.11.11.3. BESS Design:**

- To the extent practicable, design BESS to blend with the adjacent agricultural character, including selecting materials and paint colors to reduce contrast with the existing setting. By mimicking design characteristics of agricultural structures in the area, the BESS facilities would appear consistent with the area's agricultural setting, including the overall visual scale of those existing structures.

##### **4.11.11.4. Transmission Structures:**

- Choose the type of proposed transmission structure (H-frame or monopole) to best match the adjacent

transmission lines and to minimize visual clutter from the introduction of different structure types into the landscape, which would result in increased visual contrast.

#### **4.11.12. Recreation:**

##### **4.11.12.1. Hunting:**

- The Project area is located within District 4 (which includes the Blackrock Valley hunting grounds), which has high quality hunting opportunities. To mitigate the impacts to access and use of the Blackrock Valley hunting grounds by the Project, the applicant would develop a Recreational Hunting Access Management Plan in coordination with WDFW prior to construction which would include:
  - A map of the allowed hunting areas and access points during construction and operation
  - Allowed access times
  - Types of games and hunting seasons
  - Identification of potential health and safety risks to hunters during Project construction, operation, and decommissioning
  - Appropriate mitigation measures such as scheduling and planning construction activities with the aim of minimizing conflicts with important hunting seasons as much as practicable
  - Engagement procedures with key stakeholders such as WDFW, guided hunting outfitters, and recreational hunters

#### **4.11.13. Historic and Cultural Resources:**

##### **4.11.13.1. Tribal Engagement:**

- Maintain ongoing engagement with affected Tribes to facilitate identification, location, quantification, and mitigation recommendations to EFSEC regarding potential impacts to TCPs. Tribal review of site/engineering plans could provide input to guide design and avoidance without confidential disclosure of sensitive locations. This engagement should also include opportunities to evaluate the effectiveness of any implemented mitigation measures throughout the Project's lifecycle. Appropriate mitigation

measures that the Tribes may recommend to EFSEC could include (but are not limited to) the demarcation of “no-go,” culturally sensitive areas to be avoided by contractors through Project redesign, refinement, or maintenance of safe access by Tribes.

#### **4.11.13.2. Ongoing Discussions:**

- The Draft Inadvertent Discovery Plan must be finalized and approved by EFSEC prior to construction. Mitigation discussions would be ongoing once site impacts are fully assessed by EFSEC, affected Tribes, and DAHP. These discussions would occur on a case by case basis for any case where additional archaeological resources or historic properties are identified during construction and include affected Tribes and DAHP as described in the Inadvertent Discovery Plan.

#### **4.11.13.3. TCPs:**

- As the Applicant further refines the Project layout, they anticipate that reduction and/or relocation of panels is likely as part of micrositing. Pending ongoing engagement with the Yakama Nation to reduce visual impacts and physical encroachment on an identified TCP landform, there must be a reduction in the total panel footprint within Benton County Assessor Parcels 133240000000000 and 132241000002000 unless effective alternate mitigation is identified to address these impacts. The exact scale of the reduction would be determined during the micrositing process, but all reductions and/or relocations must first come from these identified parcels. EFSEC will be responsible for the determination whether a proposed panel footprint reduction or alternate mitigation will be effective in addressing these TCP impacts.

#### **4.11.14. Transportation:**

##### **4.11.14.1. Train Crossings:**

- To mitigate for potential collisions at train crossings, the Applicant should work with WSDOT and Operation Lifesaver to provide train safety presentations to relevant Project employees and contractors to increase knowledge regarding train safety, including train track crossings. The

Applicant should establish procedures to be followed if the load should become lodged at a rail crossing and would review the emergency contact numbers for each crossing.

#### **4.11.14.2. Decommissioning Traffic Analysis:**

- To ensure that no changes have occurred since the traffic analysis originally provided prior to construction, a third-party engineer would provide a traffic analysis prior to decommissioning. The traffic analysis would evaluate all modes of transportation (e.g., waterways, rail, roads, etc.) used for the movement of people and materials during decommissioning via the haul route(s) in Washington State.

#### **4.11.14.3. Decommissioning:**

- The analysis of impacts from decommissioning is based on existing laws and regulations at the time when the ASC was submitted to EFSEC. To ensure that no changes have occurred to laws and regulations used in this analysis, the Applicant should consult with WSDOT, Benton County, and Yakima County on the development of a decommissioning-stage Traffic and Safety Management Plan prior to decommissioning. The Traffic and Safety Management Plan must include a safety analysis of the WSDOT-controlled intersections (in conformance with the WSDOT Safety Analysis Guide) and provide mitigation or countermeasures where appropriate. The analysis would review impacts from decommissioning traffic and be submitted to WSDOT for review and comment prior to decommissioning activities.

### **4.11.15. Utilities and Waste Management:**

#### **4.11.15.1. Water Rights:**

- Prior to construction, an approved source of water with enough legally available (approximately 80,000 gallons/day) water to supply the needed amount for construction would be identified and confirmed via a contract or certificate of availability, whether that be an existing on-site well with a valid water right, off-site sources with existing water rights, or some combination of the two.

#### 4.11.15.2. Water Cistern:

- The Applicant would install a 10,000-gallon water cistern to store water for potential fire suppression needs.

#### *Stipulated and Uncontested Facts*

- 4.12. Neither the MNDS nor the SEPA determination were appealed by any party of interest.
- 4.13. 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). *Ex. 2, p. 16.*
- 4.14. The Subject Properties collectively total five thousand eight hundred fifty-two (5,852) acres. *Id.*
- 4.15. The Subject Properties are all located within Benton County's Growth Management Act Agriculture District (GMAAD). *Id.*
- 4.16. The amount of land constituting the Project Area is approximately 4,573 acres of the total Subject Properties. *Id., p. 16.*
- 4.17. The Project is proposed primarily on land leased from privately owned by 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., pgs. 13-14.*
- 4.18. 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. *Agreed Stipulation of Facts (Stipulations).*
- 4.19. In general, the Project Area is on relatively flat terrain with slopes of less than 3%. *Ex. 2, p. 17.*
- 4.20. There are 649,153 acres of GMAAD-zoned land in Benton County. *Stipulations.*
- 4.21. The total area of the Subject Property (5,852 acres) makes up .09% percent (nineths 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 (0.045%), slightly less than one-half of one percent of the total GMAAD zoned land in Benton County. *Id.*
- 4.22. The aquifer on the Subject Property has been in decline for numerous years, necessitating the land owners to either drill deeper wells or curtail their farming operations to account for the depleted water supply. *Testimony of Robin Robert.*
- 4.23. EFSEC's Revised MDNS retained all conditions on Land Use proposed in the

ASC and included additional conditions. *Ex. 2, p. 17.*

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

*Benton County Codes and Comprehensive Plan*

- 4.25. Benton County conducts land use planning and zoning under the Growth Management Act, Chapter 36.70A RCW. *Id.*
- 4.26. The purpose of Benton County's 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. The chapter protects the GMA Agricultural District (GMAAD) and the activities therein by limiting non-agricultural uses in the district to those compatible with agriculture and by establishing minimum lot sizes in areas where soils, water, and climate are suitable for agricultural purposes." *Ex. B; Benton County Code (BCC) 11.17.010.*
- 4.27. 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. *Ex. B; BCC 11.17.040.*
- 4.28. 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, agritourism accommodations, agricultural research facilities, commercial agricultural establishments which store, repair, or sell irrigation, mechanical, and excavation services, and winery/brewery/distillery facilities. *Ex. B; BCC 11.17.070.*

- 4.29. The Board of County Commissioners for Benton County (Commissioners) adopted Benton County Ordinance Amendment (OA) 2021-004, on December 21, 2021. OA 2021-004 removed the CUP option for commercial solar power generator facility, major from the GMAAD. The purpose of the removal of the CUP option for commercial solar power generator facility, major was to 1) protect long-term commercially agricultural lands, 2) limit incompatible & non-agricultural uses, 3) conserve critical areas & habitat, 4) protect visual resources, and 5) protect rural character. *Ex. D; Ex. 11, pgs. 4-6.*
- 4.30. Prior to December 21, 2021, the Project would have been a conditionally permitted use in the GMAAD per former BCC 11.17.070(cc).
- 4.31. On May 14, 2024, Benton County updated its Comprehensive Plan. *Ex. C.*
- 4.32. The Comprehensive Plan seeks, in part, “to preserve the natural environment, local customs, culture, and quality of life for County residents. Simultaneously, it seeks to facilitate and encourage economically productive use of the land and resources base to enable economic growth, prosperity, and enjoyment of a quality life.” *Id., at p. 11.*
- 4.33. The Comprehensive Plan contains fourteen ‘goals’ as required by RCW 36.70A.020. *Id.*
- 4.34. Relevant to these proceedings are the following:

**5. Economic Development** – Encourage economic development throughout the state consistent with adopted comprehensive plans, promote economic opportunity for all citizens of the state, especially for the unemployed and the disadvantaged, and encourage growth in areas experiencing insufficient economic growth, all within the capacity of the state’s natural resources, public services, and public facilities.

**6. Property Rights** - Private property shall not be taken for public use without just compensation. The property rights of landowners shall be protected from arbitrary and discriminatory action.

**7. Permits** - Application for state and local government permits should be processed in a timely and fair manner.

**8. Natural Resource Industries** - Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses.

**9. Open Space and Recreation** - Encourage the retention of open space and development of recreation opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks.

*Id.*, at p. 12.

- 4.35. In addition to the fourteen required goals set out in RCW 36.70A.020, a county's Comprehensive Plan must also include a land use element, a rural element, housing element, and a transportation element. *Id.*
- 4.36. Specifically, the land use element must contain, "designated land uses and intensities that all other elements must serve. Citizens and private and public-sector service providers can use this element to plan future uses of their properties and to project and meet future locational demands". *Id.*
- 4.37. The County's Land Use Goal 1 (LU Goal 1) is to, "Ensure that land uses are compatible with surrounding uses that maintain public health, safety, and general welfare." *Id.*, at p. 21.
- 4.38. The County outlined seven policies to achieve LU Goal 1.

Policy 1: Maintain a mix of land uses that supports the character of each rural community.

Policy 2: Promote compatible mixed uses of urban intensity that are appropriate in Urban Growth Areas (UGA) where community sewer and water are available or provided, and outside of UGAs within designated Rural Community Center areas and Commercial zones, and Planned Developments (PDs).

Policy 3: Maximize the opportunities for compatible development within land use designations to serve a multitude of compatible uses and activities.

Policy 4: Establish regulations for site planning and design to avoid or reduce potential impacts associated with "land use incompatibility" of proposed non-farm developments on parcels adjacent to lands designated GMA Agriculture, Rural Resource, or adjacent to lands being farmed commercially within other rural designations.

Policy 5: Encourage multi-modal connectivity between land uses that enhances community access and promotes healthier and more active



lifestyles for residents.

Policy 6: Encourage compact development within UGAs.

Policy 7: Encourage “green infrastructure” in new developments and redevelopments to address flooding and storm water runoff.

*Id.*, at pgs. 21-22.

4.39. In addressing Natural Resource Lands, Benton County’s Goal 1 (NR Goal 1) is to “Conserve and maintain agricultural land of long-term commercial significance as the local natural resource most essential for sustaining the County’s agricultural economy.” *Id.*, at p. 26.

4.40. The County outlined 4 policies to achieve NR Goal 1.

Policy 1: Conserve areas designated "GMA Agriculture" in the Comprehensive Plan for a broad range of agricultural uses to the maximum extent possible and protect these areas from the encroachment of incompatible uses.

Policy 2: In the event of a conflict between residential uses and normal and routine practices of commercial agriculture on lands designated as GMA Agriculture, support the agricultural use where it is evident that the agricultural practice is consistent with or equivalent to recognized Best Management Practices.

Policy 3: Recognize that only uses related or ancillary to, supportive of, complimentary to, and/or not in conflict with agricultural activities are appropriate in areas designated GMA Agriculture.

Policy 4: Apply development standards that conserve water resources when reviewing proposed new non-agricultural developments to sustain the ability of the regional agricultural economy to expand and respond to new market conditions and opportunities.

*Id.*

4.41. Benton County’s Economic Development Goal 1 (ED Goal 1) is to “ Create a balanced and diverse economy that provides an opportunity to make economic and lifestyle choices for Benton County residents..” *Id.*, at p. 32.

4.42. The County outlined 4 policies to achieve ED Goal 1.

Policy 1: Promote industries that are diverse and support an agriculture-based economy.

Policy 2: Promote and protect tourism related to viticulture and other agricultural activities.

Policy 3: Provide adequate, accessible commercial areas while minimizing impact on surrounding uses.

Policy 4: Facilitate economic growth and prosperity while preserving the

existing rural quality of life and character, as it is defined by rural residents.

*Id.*

- 4.43. Benton County's Comprehensive Plan does not include any accommodations for situations where the state has explicitly preempted all local land use regulations for the siting of a major energy facility. *Ex. C.*

*Public Comments, per RCW 80.50.090(4)(a) and RCW 80.50.100(1)(b)*

- 4.44. On October 3, 2024, EFSEC held a public hearing to provide members of the public an opportunity to provide commentary in support or opposition to the matters in the adjudication.
- 4.45. Four members of the public provided comment. All speakers were part of the Robert family, David Robert, Randy Robert, Michael Robert, and Robin Robert, lessors of a portion of the proposed project site.
- 4.46. The commentary from each of the speakers was consistent. The site area is remote, filled mostly with sagebrush and Conservation Reserve Program (CRP) land.
- 4.47. The aquifer from which the Roberts' use to extract water for their crops has been dwindling for years, making farming not feasible or profitable.
- 4.48. The siting area for the proposed project is not on prime farmland. *Testimony of Robin Robert under oath and during the unsworn public comment hearing.*
- 4.49. Approval of the project would generate income for generational farmers and would allow the aquifer to recharge during the duration of the Project.
- 4.50. There were no comments in opposition to the Project at the public hearing on October 3, 2024.

*Arguments – Benton County*

- 4.51. Benton County argues that, "there 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 ("ALLTCS")." *Benton County's Post-Hearing Brief (BC PHB), p. 1.*
- 4.52. Benton County further argues that there are "no conditions to address the narrow issue of mitigating the loss of GMAAD lands during the life of the project." *Id., p. 3.*
- 4.53. Benton County avers that the conditions of revised MDNS are meant to mitigate any significant impacts on the environment not the land use regulations. *Id, p. 4.*
- 4.54. While Benton County requests the Council to recommend against preemption of

its land use regulations, it requests 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.*, p. 5.

- 4.55. There are no like-in-kind land use replacement requirements contained within any of BCC's outright or conditional use permits for GMAAD lands.

#### *Arguments - Applicant*

- 4.56. Applicant argues that the Energy Facility Site Locations Act controls preemption rather than the Growth Management Act, because of the Washington Supreme Court's decision in *Residents Opposed to Kittas Turbines V. EFSEC*. 165 Wn.2d 275, 197 P.3d 1153 (2008). Applicant's Post-Hearing Brief (APP PHB).
- 4.57. Applicant further argues that the mitigation requirements contained within the revised MDNS sufficiently address the projects potential impacts to Benton County's GMAAD and ALLTCS. *Id.*, p. 5.

## **5. CONCLUSIONS OF LAW**

Based upon the facts above, I make the following conclusions:

#### *Jurisdiction*

- 5.1. The Energy Facility Site Evaluation Council has jurisdiction over the subject matter of this 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.

#### *EFSLA*

- 5.2. The Energy Facility Site Locations Act (EFSLA) is designed to streamline the process for siting energy facilities, such as power plants and transmission lines, while ensuring environmental protection and public safety. Its main purposes include:
- a. **Regulatory Framework:** Establishing a clear regulatory process for evaluating and approving the location of energy facilities.
  - b. **Public Involvement:** Ensuring that the public has opportunities to participate in the decision-making process, including input from local communities and stakeholders.
  - c. **Environmental Protection:** Assessing the environmental impacts of proposed facilities to mitigate potential harm to ecosystems and communities.

- d. **Energy Needs:** Facilitating the development of necessary energy infrastructure to meet the demands of the population while balancing environmental and social considerations.
- e. **Streamlining Processes:** Reducing delays in the permitting process by consolidating reviews and approvals under a single framework.

RCW 80.50

- 5.3. This act aims to support the growth of energy infrastructure while prioritizing sustainability and community engagement. *Id.*
- 5.4. Specifically, EFSLA determines that “the present and predicted growth in energy demands in the state of Washington requires a procedure for the selection and use of sites for energy facilities and the identification of a state position with respect to each proposed site” and “recognizes that the selection of sites will have a significant impact upon the welfare of the population, the location and growth of industry and the use of the natural resources of the state.” RCW 80.50.010.
- 5.5. The Legislature, through its enactment of EFSLA, sets 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.” *Id.*
- 5.6. Further, EFSLA recognizes “the pressing need for increased energy facilities, and to ensure through available and reasonable methods that the location and operation of all energy facilities and certain clean energy product manufacturing facilities will produce minimal adverse effects on the environment, ecology of the land and its wildlife, and the ecology of state waters and their aquatic life.” *Id.*
- 5.7. EFSLA’s intent is to “seek courses of action that will balance the increasing demands for energy facility location and operation in conjunction with the broad interests of the public” and “to streamline application review for energy facilities to meet the state's energy goals and to authorize applications for review of certain clean energy product manufacturing facilities...” *Id.*
- 5.8. EFSLA’s goals are to:
  - 1) Assure Washington state citizens that, where applicable, operational safeguards are at least as stringent as the criteria established by the federal government and are technically sufficient for their welfare and protection.
  - 2) Preserve and protect the quality of the environment; to enhance the public's opportunity to enjoy the esthetic and recreational benefits of the air, water and land resources; to promote air cleanliness; to pursue beneficial

changes in the environment; and to promote environmental justice for overburdened communities.

- 3) Encourage the development and integration of clean energy sources.
- 4) Provide abundant clean energy at reasonable cost.
- 5) Avoid costs of complete site restoration and demolition of improvements and infrastructure at unfinished nuclear energy sites, and
- 6) Use unfinished nuclear energy facilities for public uses, including economic development, under the regulatory and management control of local governments and port districts.
- 7) Avoid costly duplication in the siting process and ensure that decisions are made timely and without unnecessary delay while also encouraging meaningful public comment and participation in energy facility decisions.

*Id.*

- 5.9. EFSLA empowers EFSEC to receive applications for energy facility locations and to investigate the sufficiency thereof, to enter into contracts to carry out the provisions of this chapter, to conduct hearings on the proposed location and operational conditions of the energy facilities under the regulatory authority of RCW 80.50, to prepare written reports to the governor which shall include: (a) A statement indicating whether the application is in compliance with the council's guidelines, (b) criteria specific to the site and transmission line routing, (c) a council recommendation as to the disposition of the application, and (d) a draft certification agreement when the council recommends approval of the application, and to prescribe the means for monitoring of the effects arising from the construction and the operation of energy facilities to assure continued compliance with terms of certification and/or permits issued by the council. RCW 80.50.040(5)-(9).
- 5.10. After receiving an application for site certification, EFSEC staff is required to assist applicants in identifying issues, review all information submitted and recommend resolutions to issues in dispute that would allow site approval, and may make recommendations to the council on conditions that would allow site approval. RCW 80.50.085.
- 5.11. EFSEC is required to report to the governor its recommendations as to the approval or rejection of an application for certification within twelve months of receipt by the council of an application deemed complete by the director, or such later time as is mutually agreed by the council and the applicant and review and consider comments received during the application process in making its recommendations. RCW 80.50.100(1)(a) & (b).

- 5.12. If the council recommends approval of an application for certification, it shall also submit a draft certification agreement with the report. The council shall include conditions in the draft certification agreement to implement the provisions of this chapter including, but not limited to, 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).
- 5.13. If any provision of EFSLA is in conflict with any other provision, limitation, or restriction which is now in effect under any other law of this state, or any rule or regulation promulgated thereunder, EFSLA shall govern and control and such other law or rule or regulation promulgated thereunder shall be deemed superseded for the purposes of Chapter 80.50 RCW. RCW 80.50.110(1).
- 5.14. 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).

#### *Growth Management Act (GMA)*

- 5.15. The Legislature determined that that uncoordinated and unplanned growth, together with a lack of common goals expressing the public's interest in the conservation and the wise use of our lands, pose a threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by residents of this state. It is in the public interest that citizens, communities, local governments, and the private sector cooperate and coordinate with one another in comprehensive land use planning. Further, the legislature finds that it is in the public interest that economic development programs be shared with communities experiencing insufficient economic growth. RCW 36.70A.010.
- 5.16. Comprehensive plans and development regulations adopted under the act should accommodate situations where the state has explicitly preempted all local land use regulations, as for example, in the siting of major energy facilities under RCW 80.50.110. WAC 365-196-560(1).

#### *Conflicts between EFSLA and GMA*

- 5.17. The Washington Supreme Court held that the "GMA does not expressly repeal EFSEC's preemption power under RCW 80.50.110(2). The GMA provides that the State maintains "authority to site any other essential public facility under RCW 36.70A.200 in conformance with local comprehensive plans and development regulations adopted pursuant to chapter 36.70A RCW." RCW 36.70A.103. RCW

36.70A.200(1) requires a county's comprehensive plan to include a process for siting "essential public facilities," which it refers to as airports, schools, transportation, correctional, waste, inpatient, substance abuse, mental health, group home, and transitional facilities. The GMA makes no mention of an energy facility nor gives any express indication that the legislature intended to repeal EFSEC's preemption power to site energy facilities." *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wn.2d 275, 310, 197 P.3d 1153, 1170 (2008).

### *Preemption*

- 5.18. 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. WAC 463-28-010.
- 5.19. In conjunction with RCW 80.50.040(1) and 80.50.110(2), WAC 463-28-020, authorizes the state to preempt the regulation and certification of the location, construction, and operational conditions of certification of energy facilities. WAC 463-28-020.
- 5.20. After EFSEC has determined inconsistency, an adjudicative proceeding is conducted to consider preemption. The council is required to determine 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(1)&(3).
- 5.21. If the council approves the request for preemption it shall 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.

### *Analysis - Preemption*

- 5.22. While the RCW 80.50 and WAC 463-28 expressly grant EFSEC the ability to recommend preemption of local land use plans and/or zoning ordinances to the Governor and grant the state the authority to effectuate that preemption, the codes are silent as to the considerations EFSEC must apply in determining if preemption is appropriate.
- 5.23. Although the legislative intent portion of EFSLA, RCW 80.50.010, does not directly speak to preemption, it does outline the Legislature's goal to "seek courses of

action that will balance the increasing demands for energy facility location and operation in conjunction with the broad interests of the public“.

- 5.24. Specifically, it recognizes the intersectionality between the state’s need for clean energy, the need to preserve and protect the quality of the environment, and the welfare and protection of Washington citizens. See RCW 80.50.010(1)-(4).
- 5.25. It is through the lens of these legislative goals that the appropriateness of EFSEC’s potential preemption recommendation should be viewed.
- 5.26. As a solar photovoltaic 470-megawatt generation facility, the Project would satisfy EFSLA’s mandate to create “in-state manufacture of industrial products that enable a clean energy economy is critical to advancing the state’s objectives in providing affordable electricity, promoting renewable energy, strengthening the state’s economy, and reducing greenhouse gas emission.” RCW 80.50.101.
- 5.27. The Project would be located in a remote area of Benton County, 12.5 miles from the nearest population center, and sited almost exclusively on leased land from private, Benton County citizens. The remoteness of the Project site addresses, in part, EFSLA’s concerns that the clean energy facilities would diminish the “public’s opportunity to enjoy the esthetic and recreational benefits of the air, water, and land resources.” *Id.*
- 5.28. In addition, preemption would foster Benton County’s Comprehensive Plan goal of protecting the property rights of landowners from arbitrary and discriminatory action. *Ex. C, p. 12.* The landowners/lessors of the proposed Subject Properties have all expressed consistent and vociferous support of the Project and the economic benefits it would bring to the generational farmers on the impacted lands.
- 5.29. The Project, if approved, would use considerably less water than current agricultural uses on the Subject Properties and allow the dwindling aquifer to recharge/refill.
- 5.30. The project area on the Subject Properties are 4,573 acres, less than 1% of Benton County’s total GMAAD zoned land. Of the 4,573 acres, only 2,978 acres would be unavailable for agricultural use during the life of the project. If preemption is exercised and the Project is approved, the Project would remove less than one half of one percent (0.045%) of GMAAD land in Benton County. *Stipulations.*
- 5.31. Given the relative insignificant percentage of the GMAAD agricultural land impacted, the siting of the Project would not, in any meaningful way, undermine Benton County’s Natural Resource Lands Goal 1 for “sustaining the County’s agricultural economy”. *Ex. C, p. 26.*



- 5.32. Additionally, as repeatedly stated by the Subject Property landowners, the Subject Properties are currently not viable for agricultural purposes. The land is arid, filled with sagebrush and CPR land. The diminished aquifer makes farming the area not economically feasible and the Subject Properties are not, contrary to Benton County's argument, prime farmland. *Robert Testimony.*
- 5.33. Benton County's arguments that "there 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 ("ALLTCS")" and there are ""no conditions to address the narrow issue of mitigating the loss of GMAAD lands during the life of the project" are not persuasive.
- 5.34. First, Benton County Code 11.17.040 outlines nearly 40 permissible uses for GMAAD land that are not utilizing the land to grow crops or farm in other ways. These non-agricultural uses include, but are not limited to, schools, firehouses, grange halls, and personal airstrips.
- 5.35. BCC 11.17.070 further outlines another nearly 40 non-agricultural uses of GMAAD lands with a conditional use permit, such as bed and breakfast facilities, asphalt manufacturing, wedding retreats, commercial airstrips, and solid waste disposal sites.
- 5.36. The argument that it is impermissible to site the Project on GMAAD land because it is not agricultural in nature is objectively false as demonstrated by BCC 11.14.040 and 11.14.070. Further, Benton County's argument that the Project would need to mitigate the loss of GMAAD lands during the life of the project is inconsistent with its current Benton County Codes. Of Benton County's nearly 80 permissible or conditionally permissible non-agricultural uses of GMAAD lands, none require the project to replace-in-kind the GMAAD land used for the project with equally viable GMAAD land. To require this of the Applicant is an artificial and unsubstantiated barrier to the Project's potential approval.
- 5.37. Further, Benton County's Comprehensive Plan does not accommodate situations where the state has explicitly preempted all local land use regulations under RCW 80.50.110, as urged in WAC 365-196-560(1). Rather, Benton County amended its County Code to remove the CUP option for commercial solar power generator facility, major, from the GMAAD. In doing so, Benton County has abdicated its direct control of the siting of commercial solar power generator facility majors in its GMAAD zones to the potential preemption authority in RCW 80.50 and WAC 463-28.
- 5.38. For the foregoing reasons, the undersigned concludes EFSEC should recommend to the Governor that the state preempt Benton County's land use

plans, zoning ordinances, or other development regulations for the site for the Wautoma Solar Energy Project.

*Analysis – Conditions*

- 5.39. On June 14, 2024, EFSEC issued a robust and comprehensive Final Revised Mitigated Determination of Nonsignificance (MDNS). The MDNS addressed fifteen separate main categories and fifty-seven subcategories of conditions required of Applicant if the Project is approved, including Tribal concerns, recreational uses, aesthetic considerations, protection of water, air, and land, as well as socioeconomic impacts, foal and fauna management plans, and decommissioning requirements.
- 5.40. Benton County agrees that if preemption is exercised, all the conditions in the revised MDNS and Table A5 of Applicant’s application be included in the draft certification agreement.
- 5.41. Applicant agrees to the imposition of all MDNS conditions in a site certification agreement.
- 5.42. The Council for the Environment was silent about which conditions, if any, would be appropriate if the state preempts Benton County’s land use and zoning codes.
- 5.43. All of the conditions contained in Applicant’s Table A5 were incorporated into the MDNS.
- 5.44. Given the parties express or tacit acquiescence to the conditions contained in the MDNS, the undersigned concludes all the terms and requirements of the MDNS should be included in the draft certification agreement.

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**6. INITIAL ORDER**

IT IS HEREBY ORDERED THAT:

- 6.1. EFSEC should recommend to the Governor that the state preempt Benton County's land use plans, zoning ordinances, or other development regulations for the site for the Wautoma Solar Energy Project.
- 6.2. All conditions contained in the MDNS should be included in the draft certification agreement.

Issued from Olympia, Washington on the date of mailing.



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Dan Gerard  
Administrative Law Judge  
Office of Administrative Hearings

**CERTIFICATE OF SERVICE ATTACHED**

## **APPEAL RIGHTS**

Any party may file a petition for review of the ALJ's initial findings of fact and conclusions of law. **The procedure for such petitions shall be as follows:**

- a) The petition for review shall be filed with the council by email to EFSEC's adjudication mailbox, [adjudication@efsec.wa.gov](mailto:adjudication@efsec.wa.gov) within twenty days of the date of service of the initial findings and conclusions. Copies of the petition shall be served upon all other parties at the time the petition is filed.
- b) The petition for review shall specify the portions of the initial findings and conclusions to which exception is taken and shall refer to the evidence of record which is relied upon to support the petition.
- c) Any party may file a reply to a petition for review. The reply shall be filed in the same manner the petition for review was filed within ten days of the date of service of the petition and copies of the reply shall be served upon all other parties or their representatives at the time the reply is filed.

The Council will consider and decide any timely petitions for review either prior to, or as part of its final adjudicative order.

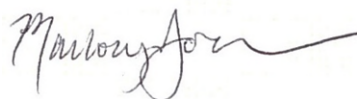
**CERTIFICATE OF SERVICE FOR OAH DOCKET NO. 279466**

I certify that true copies of this document were served on those listed below, from Olympia, Washington via Consolidated Mail Services by one of the following: First Class Mail, Certified Mail, Hand Delivery via Messenger, Campus Mail, Facsimile, or by email.

<p>Erin Anderson                  Andrew Lewis                  Van Ness Feldman LLP                  1191 Second Ave Ste 1800                  Seattle, WA 98101  <b><i>Applicant Representatives</i></b></p>	<p><input type="checkbox"/> First Class Mail  <input type="checkbox"/> Certified Mail, Return Receipt  <input type="checkbox"/> Campus Mail  <input checked="" type="checkbox"/> E-mail:  <a href="mailto:eanderson@vnf.com">eanderson@vnf.com</a>  <a href="mailto:alewis@vnf.com">alewis@vnf.com</a></p>
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Date: Friday, October 18, 2024

OFFICE OF ADMINISTRATIVE HEARINGS



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