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BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of

INNERGEX RENEWABLE
DEVELOPMENT USA, LLC (IRD), for
Wautoma Solar Energy Project

DOCKET NO. EF-220355

**INNERGEX’S RESPONSE TO
PETITION FOR
RECONSIDERATION**

I. INTRODUCTION

Innergex Renewable Development USA, LLC (“Innergex” or “Applicant”), respectfully submits this briefing in response to the Petition for Reconsideration (“Petition”) submitted by Benton County (“County”) requesting that the Energy Facility Site Evaluation Council (“EFSEC” or “Council”) reconsider the issuance of the Adjudicative Order Recommending Preemption of Local Land Use Laws dated November 20, 2024 (“Order”). The Applicant strongly opposes any reconsideration of the Order and respectfully asks that the County’s Petition be denied in its entirety.

II. ARGUMENT

The Council is empowered under state law to recommend pre-emption of local land use controls. RCW 80.50.110(1)-(2). When recommending preemption, the Council must include conditions to protect community interests and “recognize” the purpose of the

1 local land use controls to be preempted. RCW 80.50.100(2). Accordingly, the two issues
2 before the Council in the recent adjudication regarding the Wautoma Project (“Project”)
3 were:

- 4 a. Whether the Council should recommend pre-emption of local land use
5 controls to the governor, and
- 6 b. If preemption is recommended, what conditions, if any, should be
7 imposed to “recognize” the purpose of local land use controls.

8 In petitioning the Council for reconsideration, a petitioner “shall specify the
9 challenged portions of the recommendation” and “shall refer to the evidence of record and
10 legal authority which is relied upon to support the petition.” WAC 463-30-335(2).

11 In their Petition, the County argues unconvincingly that the Council did not
12 adequately consider the County’s interests in their local agricultural land use controls.
13 Petition, p. 2-3. Contrary to the County’s assertion, the Order’s review of the adjudicative
14 record shows extensive analysis of the County’s land use policy and their stated rationale
15 in support of it. The Order recognizes potential impacts to agricultural lands and
16 accordingly imposes multiple extensive conditions designed to mitigate those impacts.
17 Therefore, the Council both appropriately recommended preemption and imposed
18 conditions, and the Petition should accordingly be rejected. ¹

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22 ¹ Parenthetically, the posture of the Petition for Reconsideration appears to conflate the Council’s reasons
23 for its decision to preempt (which is a discretionary action under EFSLA that is supported by policies
24 contained in RCW 80.50.010, *ROKT v. EFSEC*, 165 Wn.2d 275 (2008), and substantial evidence in the
25 record) with an inquiry into the adequacy of the County’s comprehensive planning. This is not a Growth
Management Act, RCW 36.70A (“GMA”) comprehensive plan adequacy challenge. The Council is not
purporting to find the County’s provisions inadequate under the GMA, as it lacks jurisdiction to do so. The
Council’s decision is grounded in the provisions of the Energy Facility Site Location Act, Ch. 80.50 RCW, a
specific body of law narrowly focused on energy facilities alone.

1 **1. The Council’s Order Considered the County’s Land Use Controls and**
2 **Appropriately Recommended Preemption.**

3 On November 20, 2024, the Council unanimously recommended to the governor
4 that the state preempt the County’s prohibition of major solar facilities on agriculturally
5 zoned property with respect to the Wautoma Project (“Project”). Order, p. 15. The
6 Council’s findings of fact and conclusions of law, as reflected in the Order, demonstrate
7 both a comprehensive recognition of the County’s interest in local land use controls
8 regarding agricultural land and the imposition of conditions calculated to protect that
9 interest in agricultural land.

10 The Council’s Order thoroughly analyzes the agricultural value of the specific
11 Project Property (“Property”). Order, p. 13. During the adjudicative hearing, County
12 representative Mr. Greg Wendt (“Mr. Wendt”) admitted that the County classifies all its
13 agriculturally zoned land as Agricultural Lands of Long-Term Commercial Significance
14 (“ALLTCS”) regardless of site-specific limitations. In fact, the Council made a finding of
15 fact recognizing the County’s practice. Order, p. 8. The Council also heard testimony from
16 the owner of the Property, Mr. Robin Robert (“Mr. Robert”), who noted that the aquifer
17 on the Property is in decline, substantially reducing the property’s usefulness for
18 agricultural use. Order, p. 8. The Council noted that this designation of the Property by the
19 County as ALLTCS, despite the lack of adequate water to be agriculturally productive,
20 demonstrated that the County “does not closely consider factors... that may cause
21 individual properties to have relatively lower agricultural value.” Order, p. 13. Having
22 duly considered this testimony and supporting evidence, the Council found that the Project
23 “presents no significant impacts... to agricultural lands...” Order, p. 9. Accordingly, the
24 Council properly recommended preemption of the County’s agricultural land use controls.
25 Order, p. 13.

1 The County asserts in their Petition that the Order mischaracterizes their
2 agricultural lands policy as “sweeping and rigid...” Petition, p. 3. It further asserts the
3 County “*does* consider water availability, parcel size, and other factors on a county or area
4 wide approach...” Petition, p.3 (emphasis original). However, their own Petition
5 acknowledges that consideration of site-specific characteristics fundamental to
6 agricultural viability, like water availability, are only considered at the county or area
7 wide level. *Id.* This all but confirms the Order’s view that designating the Wautoma
8 property as part of 59% of the County’s total land area as ALLTCS² is over-inclusive as to
9 the parcels in question. No evidence was presented to the Council that the County has ever
10 specifically considered this agriculturally designated land as suitable for long-term
11 commercial significance.

12 Even if it had, this is a red herring to the Council’s decision. This is because there
13 is no law, and none is cited by the County, that precludes EFSEC from preempting local
14 land use controls *even if* they are designated as agricultural lands of long-term
15 significance. The argument that EFSEC is bound by land use controls adopted by a county
16 pursuant to the Growth Management Act, Chapter 36.70A (“GMA”) was squarely rejected
17 by the Washington Supreme Court in *Residents Opposed to Kittitas Turbines v. EFSEC*,
18 165 Wn.2d 275, 308, 197 P.3d 1153 (2008) (“ROKT”). There, the Supreme Court held
19 that “the GMA does not supersede or repeal EFSEC's preemption powers under EFSLA.”
20 *ROKT* at 311.

21 The County in their Petition has submitted no new information or argument
22 indicating that the Council inadequately considered the County’s interest in protecting
23 agricultural lands. Accordingly, the County’s Petition should be rejected.

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25 ² Agricultural lands of long-term commercial significance designated pursuant to GMA regulation WAC
365-196-815(1)(a).

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2. The Council’s Order Appropriately Imposes Conditions that “Recognize” the Purpose of Local Land Use Controls.

The Council must recommend conditions that consider the purpose of local land use controls as part of their preemption recommendation to the governor. RCW 80.50.110(2). In their Petition, the County asserts that this requires formal consideration of conditions proffered by them during the adjudication for the Council to require the Applicant to either obtain and make available new agricultural land to “offset” the Project or seek an alternatively zoned site. Petition, p. 3-4. The County cites to no state law or county code provision or policy to support such a demand. The County mistakes the mandate for the Council to consider the purpose of the laws to be preempted as requiring the Council to accept every condition proffered to mitigate impacts to those laws. The Council considered the purpose of the laws recommended to be preempted (the protection of agricultural lands) and imposed conditions designed to mitigate impacts to those interests. Accordingly, the County’s Petition should be rejected.

In their Order, the Council recommends the conditions identified in the Mitigated Determination of Non-Significance (“MDNS”) be adopted in their entirety, per the unanimous recommendation of the parties, including the County. Order, p. 13-14. These conditions were created with the long-term agricultural viability of the Property in mind, and “conserve soil and soil quality and provide for the land being returned to agricultural use if it ceases to operate as an energy facility.” Order, p. 5. These are the precise measures that the County elected to *not comment on* as they were being developed through EFSEC’s SEPA process. Instead, the County remained silent in an effort to preserve County financial resources per the adjudication testimony of Mr. Wendt. Notwithstanding the County’s silence during SEPA, conditions recognizing impacts to the

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DATED this 17th day of December, 2024.

VAN NESS FELDMAN

s/ Erin L. Anderson
Erin L. Anderson, WSBA #23282

s/ Andrew J. Lewis
Andrew J. Lewis, WSBA #51541

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*Attorneys for Applicant Innergex Renewable
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1 **CERTIFICATE OF SERVICE**

2 I, I’sha Willis, declare as follows:

3 That I am over the age of 18 years, not a party to this action, and competent to be a
4 witness herein:

5 That I, as a Legal Assistant in the office of Van Ness Feldman LLP, caused true
6 and correct copies of the following documents to be delivered as set forth:

- 7
8 1. Innergex’s Response to Petition for Reconsideration;
9 2. Certificate of Service

10 and that on December 17, 2024, I hereby certify that I have this day served the foregoing
11 document upon all parties of record in this proceeding, but authorized method of service
12 pursuant to WAC 463-30-120(3) as follows:

13 **ENERGY FACILITY SITE EVALUATION
14 COUNCIL**

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11 EXECUTED at Washington, DC on this 17th day of December, 2024.

12 *s/ I'sha Willis*

13 I'sha Willis, Declarant

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