

1 **II. STATEMENT OF FACTS**

2 Benton County incorporates by reference the Stipulation of Facts filed herein and offers
3 the following additional facts in support of its position:¹

4 The Applicant submitted a Revised Application for Site Certification on August 23, 2024
5 (“Revised Application”). The Revised Application, p. 35 states that “...no land use mitigation or
6 monitoring measures are proposed. Mitigation measures specific to other topics (e.g., wetlands
7 and surface waters, wildlife habitat, or geological hazards) are addressed in their respective
8 resource sections in Part 3 and Part 4 of this application.” In addition to the Revised Application,
9 EFSEC has before it other applications involving Benton County Growth Management Act
10 Agricultural District (“GMAAD”) lands, including the Horse Heaven Wind Project (potentially
11 affecting 72,428 acres) and the Hop Hill Solar and Storage Project (requesting preemption of
12 regulations on 11,179 acres), among others. GMAAD lands are governed under Benton County
13 Code Chapter 11.17.
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15 **III. ARGUMENT**

16 EFSEC should recommend denial of the Application as the proposed Project conflicts with
17 State and local land use regulations and the purposes and policies behind the same – for which
18 there are no mitigating conditions available. The proposed Project, if approved, would result in the
19 improper conversion of 5,852 acres of prime agricultural lands of long-term commercial
20 significance that the County is statutorily obligated to preserve for agricultural use under the
21 Growth Management Act.
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23 **1. The Council has the authority to recommend against preemption.**

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25 ¹ Documentation supporting the County’s Statement of Facts can be found on EFSEC’s webpage:
26 <https://www.efsec.wa.gov/energy-facilities>.

1 As an initial matter, it is anticipated the Applicant will argue, the Council is *required* to
2 recommend preemption as RCW 80.50.110(2) states “[t]he state hereby preempts the regulation
3 and certification of the location, construction, and operational conditions of certification of the
4 energy facilities included under RCW 80.50.060 as now or hereafter amended.” *See* Revised
5 Application for Site Certification (“Revised Application”), p. 14. However, such interpretation of
6 the statute is in conflict with remaining provisions of Chapter 80.50 RCW.

7 Chapter 80.50 RCW sets forth the Council’s authority and responsibilities, which include
8 the authority to establish rules of practice when conducting public hearings and to make a written
9 recommendation as to the “approval or rejection of an application for certification” to the governor.
10 RCW 80.50.040(3) and (8)(c) and RCW 80.50.100(1)(a). Similarly, RCW 80.50.090(4)(b) states
11 that where the environmental impact of the proposed facility is not significant or will be mitigated
12 to a nonsignificant level, the Council may limit the topic to whether any land use plans or zoning
13 ordinances with which the proposed site is determined to be in consisted with, *should* be
14 preempted. The legislature when drafting these statutes gave the Council authority to recommend
15 for or against preemption.
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17 To interpret the Council’s duty regarding preemption as mandatory would create the absurd
18 result of granting private entity applicants, whose plans may not align with state or local interests,
19 the authority to force preemption of land use regulations by merely filing an application and
20 following EFSEC’s processes. If the Council were to accept Appellant’s anticipated argument that
21 preemption will *always* be required for certification of energy facilities, neither EFSEC nor local
22 governments could prevent a blanket erosion of local agricultural land protections and
23 designations. In Washington, while sparingly done, courts will avoid an absurd result even if it
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1 must disregard unambiguous statutory language to do so. Samish Indian Nation v. Washington
2 Dep't of Licensing, 14 Wash. App. 2d 437, 444, 471 P.3d 261, 265 (2020).

3 Thus, preemption should be interpreted as being in EFSEC's discretion rather than a
4 foregone conclusion. Under Chapter 80.50 RCW, the Council has discretion on whether it
5 recommends for or against preemption.

6 **2. In order to recommend preemption, the Council must also recommend conditions**
7 **designed to protect state, local, and community interests and recognize the purpose**
8 **of the laws being preempted.**

9 Chapter 463-28 WAC sets forth the procedures the Council must follow to determine
10 whether to recommend preemption. The code section as it currently exists does not express any
11 set criteria for the basis of the Council's decision regarding preemption other than, the proposed
12 site must first be found inconsistent with local land use and zoning. WAC 463-28-060. However,
13 in making its decision, the Council "shall review and consider comments received during the
14 application process in making its recommendation." RCW 80.50.100(1)(b).

15 If the council were to recommend approval of the application for certification, it must also
16 submit a draft certification agreement with the report. RCW 80.50.100(2). In the draft agreement,
17 it is mandatory for the Council to "include conditions in the draft certification agreement to
18 implement the provisions of this chapter *including*, but not limited to, conditions to protect state,
19 local governmental, or community interests, or overburdened communities as defined in RCW
20 70A.02.010 affected by the construction or operation of the facility, *and* conditions designed to
21 recognize the purpose of laws or ordinances, or rules or regulations promulgated thereunder, that
22 are preempted or superseded pursuant to RCW 80.50.110 as now or hereafter amended." *Id.*,
23 emphasis added; *See also* Residents Opposed to Kittitas Turbines v. State Energy Facility Site
24 Evaluation Council (EFSEC), 165 Wash. 2d 275, 285, 197 P.3d 1153, 1158 (2008) ("...EFSEC
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1 must include conditions in a site certification to protect the interests of the local government or
2 community affected by the proposed facility”, citing former version of RCW 80.50.100).

3 The State and Benton County have an interest in preserving agricultural lands of long-term
4 commercial significance which must be addressed by the Council in making a recommendation to
5 the governor.

6 **3. The proposed Project violates the Growth Management Act’s mandate to conserve
7 and protect agricultural lands of long-term commercial significance without
8 proposing conditions designed to recognize such laws or protect such interests.**

9 The State, through the implementation of the Growth Management Act, Chapter 36.70A
10 RCW (GMA), expresses both a goal of promoting climate change and resiliency, but also the
11 protection of agricultural lands. RCW 36.70A.020(8) and (14). That statute is not ordered to place
12 priority of one goal higher than another. *Id.*

13 The GMA goes on to impose on counties a mandate to assure conservation of a type of
14 natural resource land identified by the GMA as ALLTCS. RCW 36.70A.060. Jurisdictions are
15 required “(1) to designate agricultural lands of long-term commercial significance; (2) to assure
16 the conservation of agricultural land; (3) to assure that the use of adjacent lands does not interfere
17 with their continued use for agricultural purposes; (4) to conserve agricultural land in order to
18 maintain and enhance the agricultural industry; and (5) to discourage incompatible uses.” King
19 Cnty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 142 Wn.2d 543, 558 (2000) (*Soccer*
20 *Fields*).

21 The conservation of ALLTCS is a mandate that must be followed. *See* Yakima Cnty. v. E.
22 Wash. Growth Mgmt. Hearings Bd., 146 Wn. App 679, 687 (2008) (“The legislature has been
23 particularly concerned with agricultural lands when addressing the problem of growth
24 management. Read together, RCW 36.70A.020(8), .060(1), and .170, reveal a legislative mandate
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1 for the conservation of agricultural land.”) (internal citation omitted). Once land is designated as
2 ALLTCS, it cannot either be de-designated or put to non-agricultural uses without the local
3 jurisdiction first determining that the lands no longer meet ALLTCS status². Clark Cnty. v. W.
4 Wash. Growth Mgmt. Hearings Bd., 161 Wn. App. 204 (2011), *vacated in part on other grounds*,
5 177 Wn.2d 136 (2013).

6 The GMA’s design is “to maintain and enhance the agricultural industry by assuring the
7 conservation of ALLTCS, and preventing interference with agricultural activities by nearby non-
8 agricultural land uses.” *Soccer Fields*, 142 Wn.2d at 554. EFSEC must “give effect to the
9 Legislature’s stated intent to *conserve* such land in order to *maintain* and *enhance* the agricultural
10 industry.” *Id.*, at 559. Whether the environmental conditions proposed under the Revised MDNS
11 may assist in the possible conversion of the land back to agricultural uses in the future is irrelevant.
12 Case law in Washington suggests that *any* conversion of ALLTCS is improper because it is
13 presumptively irreversible. *See Id.*, at 562 (argument that land could be returned to agricultural use
14 was unpersuasive to find that zoning complied with GMA requirements in regard to ALLTCS);
15 *Lewis Cnty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 508 (2006) (noting that
16 *Soccer Fields* court “concluded that the soccer field zoning was noncompliant because ‘it would
17 result in a long-term removal’ of agricultural land from agricultural production, possibly never
18 returning to agricultural use.”).

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21 With regard to the goal of promoting climate change and resiliency, the GMA allows for
22 the *optional* element of developing solar energy. RCW 36.70A.080 states:

23 (1) A comprehensive plan may include additional elements, items, or
24 studies dealing with other subjects relating to the physical development
within its jurisdiction, including, but not limited to:

25 ² There is no record of Benton County determining that the property no longer meets ALLTCS
26 status as outlined in WAC 365-190-050.

- (a) Conservation;
- (b) Solar energy; and
- (c) Recreation.

Here, of the 5,852 ALLTCS acres included in the properties proposed for the Project, at least 4,573 acres will be dedicated to the Project Area and at minimum 2,978 acres will be wholly unavailable for agricultural use during the operational period of the project. *See* Stipulation of Facts, D.5 and D.6. The applicant conducted no studies of the Project solely for the purpose of land use and proposed no land use mitigation or monitoring measures. *See* Revised Application, p. 35. The Applicant's Land Use Consistency Review does address land use in the context of whether the Project is compatible with surrounding agricultural uses, but not the loss of agricultural lands. *See* Application Exhibit D - Land Use Consistency Review, Sections 2 and 3. Benton County has not proposed any mitigating conditions because it does not believe there are any which adequately mitigate the loss of agricultural lands.

While the preservation of ALLTCS lands is mandatory under the GMA, the promotion of solar energy facilities is not. Thus, the State has a higher interest in the protection of ALLTCS lands under RCW 36.70A.060 and such interests cannot be adequately addressed in a recommendation to preempt the applicable land use regulations.

4. The Council should recommend against preemption as the Project, even with the conditions recommended in the Revised MDNS, is prohibited under Benton County's local land use codes and is inapposite to local interests.

The proposed Project is not merely inconsistent with Benton County's codes and Comprehensive Plan, but would undermine local interests the County has specifically sought to protect. *See* Revised Application, p. 14 and Order Finding Project Inconsistent with Land Use Regulations, p. 1 (Applicant concedes and Council found inconsistency with local land use regulations).

1 Benton County submitted its comment discussing its opposition to the initial Application
2 and providing rationale for the County’s prohibition of commercial solar facilities. *See* Benton
3 County Public comment filed on or about August 8, 2022. As noted therein, Benton County
4 contains agricultural lands of long-term significance, categorized as GMAAD lands, which play a
5 significant role in Benton County’s economy, natural resources industries, and way of life. *Id.*, p.
6 3. Benton County has developed its land use goals and policies aimed at protecting such lands for
7 agricultural use.

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9 The operative local zoning regulations are found in Chapter 11 of the Benton County Code
10 (“BCC”). The Revised Application describes a proposal for a solar power generator, which is not
11 primarily to offset Applicant’s own need for electricity. *See* Revised Application, P. 4, 13. As
12 conceded by the Applicant, such use would be categorized as a Solar Power Generator Facility,
13 Major under the Benton County Code. *See* Revised Application, p. 14, BCC 11.03.010 (167) and
14 (168). The Project site is proposed for property designated GMAAD lands and are regulated by
15 Chapter 11.17 BCC. *See* Revised Application, p. 14 and Benton County Public Comment, p. 2.

16 The County’s zoning code states that the purpose of the GMAAD zone is to “meet the
17 minimum requirements of the State Growth Management Act (Chapter 36.70A RCW) that
18 mandates the designation and protection of agricultural lands of long-term commercial
19 significance.” BCC 11.17.010. This purpose is accomplished in part by “limiting non-agricultural
20 uses in the district to those compatible with agriculture”. BCC 11.17.010.

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22 As of December 21, 2021, to ensure consistency with the GMA, the County
23 Comprehensive Plan, and GMAAD Zoning District, the County took action to amend the
24 regulations such that solar power generator facilities, major could no longer apply for a conditional
25 use permit for lands contained within the GMAAD. *See* BCC 11.17.040 -.070 and Benton County

1 Ordinance Amendment (OA) 2021-004, Section (1)(b). The County’s purpose in removing the
2 conditional use permitting option was to protect long term commercially significant agricultural
3 lands, conserving critical areas and habitat, visual resources, and protect rural character. *See* OA-
4 020-004, Recommendation of the Benton County Planning Commission at 5-6; *See also* Benton
5 County’s Comprehensive Land Use Plan, p. 26 (“only uses related or ancillary to, supportive of,
6 complimentary to, and/or not in conflict with agricultural activities are appropriate in areas
7 designated GMA Agriculture”).

8
9 The Applicant has represented that “the Project will have no significant adverse effects on
10 land use.” Revised Application, p. 35. The statement is not true. Due to the large role that
11 agriculture plays in the local economy, the GMAAD lands encompass 649,153 acres or
12 approximately 59% of the County. *See* Stipulation of Facts, D.8 and, Application p. 4-33, Table
13 4.2-1; Figure 2.1-3. That number is the result of an increase in 2018. The Applicant proposes
14 leasing 5,852 acres or approximately .09% of the County’s GMAAD lands for which there are no
15 planned uses for such land related or ancillary to, supportive of, complimentary to, and/or not in
16 conflict with agricultural activities appropriate for GMAAD lands. *See* Stipulation of Facts, C.2
17 and D.9; *See also* Revised Application, generally. There are no mitigation measures or conditions
18 of approval proposed that respond to the loss of protected farmland which will be taken out of
19 current and potential production. *Id.*, p. 35. While the County requests all the proposed site
20 conditions set forth in the Revised Mitigated Determination of No significance (Revised MDNS)
21 be imposed if preemption is recommended, those only addresses whether the proposal is likely to
22 have a significant adverse *environmental* impact and do not address mitigation of the local land
23 use interests. Regardless, as stated above, *any* conversion of ALLTCS is improper because it is
24 presumptively irreversible. *Soccer Fields*, 142 Wn.2d at 562.

1 Elimination of these acres of prime agricultural land from actual or potential agricultural
2 production would usurp approximately .09% of Benton County's agricultural land of long-term
3 commercial significance. While it is anticipated that Applicant will argue that .09% by itself is not
4 significant, the Applicant is not alone in its bid to preempt as several other applicants are in the
5 process of also seeking preemption of Benton County's GMAAD land regulations. *See* Revised
6 Application, p. 202 (claiming a de minimus reduction of farmland) and
7 <https://www.efsec.wa.gov/energy-facilities> listing energy facilities under the consideration or
8 control of EFSEC. If the Council were to find preemption mandatory for energy facilities in this
9 case, that could result in a devastating cumulative impact upon local government's preservation of
10 agricultural lands.
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12 In total, the proposed Project is fundamentally incompatible with the permitted uses in the
13 GMAAD and there are no conditions which can be proposed to offset the interests of the state,
14 local government, and community in protecting GMADD lands. Thus, the Council cannot satisfy
15 the conditions requirement of RCW 80.50.100(2) and should recommend denial of the Revised
16 Application.
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18 CONCLUSION

19 It is undisputed that the Project is proposed for operation upon GMAAD lands which, under
20 the GMA and BCC, is not permitted. Applicant instead relies on the Council's ability to preempt
21 such regulations. Approval of the project would place a significant portion, if not all of the of the
22 5,852 ALLTCS acres out of agricultural uses for the life of the project and presumptively beyond.
23 *Soccer Fields*, 142 Wn.2d at 554. The Applicant has not proposed conditions which would alter
24 that fact. Revised Application, p. 35. There are no sufficient conditions which could be proposed
25 to balance the loss of GMAAD lands and EFSEC must recommend denial of the Revised
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1 Application to the Governor. If the Council disagrees, conditions for approval included in a draft
2 certification agreement, at minimum, should include all those contained in the Revised MDNS to
3 mitigate the environmental impact of the Project.

4 Dated this 18th day of September 2024.

5 Respectfully submitted,

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7 Prosecuting Attorney

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by authorized method of service as required under the Prehearing Conference Order, Section 4 as follows:

<p>ENERGY FACILITY SITE EVALUATION COUNCIL ATTN: Wautoma Adjudication 621 Woodland Square Loop SE P.O. Box 43172 Olympia, WA 98504-3172</p>	<p><input type="checkbox"/> U.S. Regular Mail, Postage Prepaid <input type="checkbox"/> Commercial Parcel Delivery, Fedex Overnight Express <input checked="" type="checkbox"/> Filed Via Electronic Mail to adjudication@efsec.wa.gov <input checked="" type="checkbox"/> Copy via Electronic Mail to efsec@efsec.wa.gov</p>
<p>OFFICE OF THE ATTORNEY GENERAL Attn: Jonathan Thompson 1125 Washington St. SE P.O. Box 40100 Olympia, WA 98504-0100 P: 360-586-6740</p>	<p><input type="checkbox"/> U.S. Regular Mail, Postage Prepaid <input type="checkbox"/> Commercial Parcel Delivery, Fedex Overnight Express <input checked="" type="checkbox"/> Via Electronic Mail to jonathan.thompson@atg.wa.gov and CEPSeaEF@atg.wa</p>
<p>COUNSEL FOR THE ENVIRONMENT Office of the Attorney General AAG Yuriy Korol 805 5th Avenue, Suite 2000 Seattle, WA 98104-3188 P: 509-735-3591</p>	<p><input type="checkbox"/> U.S. Regular Mail, Postage Prepaid <input type="checkbox"/> Commercial Parcel Delivery, Fedex Overnight Express <input checked="" type="checkbox"/> Via Electronic Mail to yuriy.korol@atg.wa.gov</p>
<p>COUNSEL FOR APPLICANT Erin L. Anderson Andrew J. Lewis Van Ness Feldman LLP 1191 Second Avenue, Suite 1800 Seattle, WA 98101 Phone: (206) 623-9372</p>	<p><input type="checkbox"/> U.S. Regular Mail, Postage Prepaid <input type="checkbox"/> Commercial Parcel Delivery, Fedex Overnight Express <input checked="" type="checkbox"/> Courtesy Copy via Electronic Mail to eanderson@vnf.com and alewis@vnf.com</p>

DATED this 18th day of September, 2024, at Kennewick, Washington.

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