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 **APPLICANT INNERGEX'S POST HEARING BRIEF**

I. INTRODUCTION

Innergex Renewable Development USA, LLC, the applicant in this matter ("Innergex" or "Applicant"), submits this post-hearing brief in support of the Application for Site Certification ("ASC") for the Wautoma Solar Energy Project ("Project"). There are only two issues before the Washington Energy Facility Site Evaluation Council ("Council" or "EFSEC"), namely:

i. Whether the 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 the Applicant, and

ii. 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).[1]

[1] June 20, 2024, *Order Commencing Adjudication* at 3-4.

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Based on the energy laws of the State of Washington, including without limit the policies set forth in RCW 80.50.010, the evidence in the record and the testimony received in this matter, it is respectfully submitted that the Council should recommend, to the Governor, the preemption of Benton County's local land use controls that are inconsistent with the siting of the Project. The Council should further recommend approval of the Project accompanied by a draft Site Certification Agreement ("SCA") that imposes the conditions identified in the Revised Mitigated Determination of Non-Significance ("RMDNS")[2] issued under the State Environmental Policy Act, Ch. 43.21C RCW ("SEPA"), as well as those contained in Section A5 of the ASC and the additional condition articulated by the Council at the adjudication of this matter, which was concurred with by the Applicant.

II. PREEMPTION

To advance the State's policy goals codified in EFSLA, the Council should recommend preemption of the local Benton County land use controls inconsistent with the siting of the Project because the mandate of EFSLA takes precedence when in conflict with the GMA. Moreover, impacts to agricultural lands are mitigated by imposition of the conditions identified in the RMDNS. Last, Benton County has otherwise failed to plan for the siting of EFSEC facilities in their comprehensive planning, necessitating preemption.

a. EFSLA, not the GMA, controls deliberations regarding preemption.

EFSLA states that it is the "policy of the state of Washington to recognize the pressing need for increased energy facilities…"[3] and to put that mandate into action by encouraging the development of clean energy sources[4] and providing clean energy at reasonable cost.[5] To realize these critical and ambitious goals and confront the realities of

[2] September 25, 2024, Adjudication, Innergex Exhibit 16.
[3] RCW 80.50.010.
[4] RCW 80.50.010(3).
[5] RCW 80.50.010(4).

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climate change, EFSLA mandates that "any… provision, limitation, or restriction… now in effect under any other law of this state… be deemed superseded…"[6] and preempts other statutes purporting to govern the "regulation and certification of the location, construction, and operation conditions of… energy facilities…"[7]

There is no question that Benton County Code Section 11.17.070 limits and restricts the location, construction and operation of the Project. In their pre-hearing brief, Benton County relies heavily on the mandate of the Growth Management Act ("GMA") to designate and protect Agricultural Lands of Long-Term Commercial Significance ("ALLTCS") for the proposition that the Council should give effect to their local regulations rather than the state-wide policies in RCW 80.50.010.[8] They note that the GMA also requires that jurisdictions adopt policies to respond to the threats posed by climate change.[9] In Benton County's framing, the task of the Council is to balance between these competing mandates within the GMA to determine a recommendation on preemption, positing that the GMA "is not ordered to place priority of one goal higher than another."[10]

This reframing is incorrect as a matter of law. The Council has no jurisdiction to be the decision-maker between competing obligations in the GMA and it is not guided by the GMA.[11] This argument is a red-herring as it fails to account for the authority contained in *Residents Opposed to Kittitas Turbines v. EFSEC*. 165 Wn.2d 275, 197 P.3d 1153 (2008), commonly referred to as the "*ROKT*" decision, namely that the specific mandate of EFSLA takes precedence over the general applicability of the GMA when a conflict between the two arises. In such circumstance, the specific law – in this case, EFSLA – should be given effect, under which preemption is necessary to enable this important clean energy generation facility to be sited and constructed.

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[6] RCW 80.50.110(1).
[7] RCW 80.50.110(2).
[8] Benton County Pre-Hearing Brief, at 5, citing RCW 36.70A.020(14).
[9] *Id.* citing RCW 36.70A.020(8).
[10] *Id.*
[11] *See, generally*, RCW 80.50.040, RCW 80.50.175.

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Benton County's argument strongly resembles the case proffered by Kittitas County in *ROKT* that the Supreme Court unanimously rejected. In *ROKT*, Kittitas County argued that the GMA requirement that "[s]tate agencies shall comply with the local comprehensive plans and development regulations and amendments thereto adopted pursuant to this chapter…"[12] superseded the mandate of EFSLA because the GMA was adopted later in time and, therefore, it prevented preemption under EFLSA of local land use controls. The Supreme Court disagreed, holding that irrespective of timing, statutes governing the same subject matter – here, the propriety of siting of the Project where proposed - must be read together "in pari materia," with the more specific statute controlling, or given precedence over, the more general statute.[13] In their analysis, the Court determined EFSLA to be the more specific statute, finding that it "governs a discrete and *specific* function of certifying sites for the construction and operation of energy facilities."[14] By contrast, the Court found the GMA "applies to the comprehensive planning and management of land within counties and cities…"[15] and is thereby general in its scope. As the more specific statute, the Court unanimously found that EFSLA controls over the GMA.[16]

In such a case, the Council must look to the purposes of the statute that guides EFSEC's action, which is EFSLA and decidedly not the GMA. The purposes and policies that guide the Council's work are set forth clearly in RCW 80.50.010, and the urgency with which this Council should act is recognized by the need to "mitigate the significant near-term and long-term impacts from climate change. . ." Since the issuance of the *ROKT* decision in 2008, the state's policies regarding the pressing need for more energy facilities, and more clean energy, have been reinforced through statutes like the Clean Energy Transformation Act, Ch. 19.405 RCW, rather than diluted by policies requiring

[12] RCW 80.50.110(2).
[13] *ROKT*, at 308-309.
[14] *Id.* at 309-310 (emphasis added).
[15] *Id.* citing RCW 36.70A.040.
[16] *Id.* at 311.

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deference to local land use regulations. Benton County's reliance on the GMA to trump state-wide policy is misplaced.

b. The RMDNS has identified mitigation sufficient to address potential impacts to the Growth Management Act Agricultural District (GMAAD) and ALLTCS.

Despite the mandate of EFSLA, and the legal clarity of *ROKT*, the County argues against preemption because they allege the 2,978 acres unavailable for agricultural use during the operation of the Project will be impacted beyond mitigation.[17] This contention is not supported by the RMDNS, which concluded that a decommissioning plan,[18] soil monitoring plan,[19] and soil adaptive management plan[20] can maintain the agricultural viability of the site. To the extent that Benton County suggests that either SEPA or the RMDNS does not include consideration of 'Land Use' the Council should refer to two things.

First, SEPA's implementing regulations define 'Land Use' as an element of the environment[21] that must be evaluated during environmental review. Lest 'Land Use' be unclear, SEPA review includes assessing a proposal's "[r]elationship to existing land use plans and to estimated population"[22] and its effects on "[a]gricultural crops."[23] Any argument that SEPA review does not include consideration of a proposal's potential impacts on land use plans or agricultural crops is patently false.

Second, the RMDNS in this case expressly calls out 'Land and Shoreline Use'[24] as an element of the environment that was evaluated by EFSEC staff during SEPA review. Indeed, the RMDNS contains multiple conditions that are intended to mitigate the impacts

[17] Benton County Pre-Hearing Brief, at 7.
[18] RMDSN, at 9.
[19] *Id.* at 10.
[20] *Id.*
[21] WAC 197-11-444(2)(b).
[22] WAC 197-11-444(2)(b)(i).
[23] WAC 197-11-444(2)(b)(vii).
[24] Exhibit 16, Revised Mitigated Determination of Significance, June 14, 2024, at pp. 9 – 11.

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to land use plans and the continued ability to grow agricultural crops on the land leased for the Project. It is only now, in the adjudication rather than during SEPA review, that Benton County has taken the position that impacts to land use and agriculture are not mitigated under SEPA and, therefore, the Council should ignore its own staff's final – and unappealed – RMDNS. That the impacts to land use and agricultural crops are reduced to a non-significant level with the inclusion of the RMDNS conditions in the SCA is a finality that is not subject to challenge in this case, precisely because of the mitigative effect of the final RMDNS.[25]

Nearly inexplicably,[26] the County declined to comment during the SEPA environmental review process about why the above conditions are inadequate to mitigate the Project's potential adverse impacts to local land use plans or agricultural crops. With the finalization of the RMDNS without the County's participation, the County's ability to challenge the adequacy of the SEPA conditions can be,[27] and in this case was, removed from contention.[28] The adequacy of the SEPA conditions regarding Land Use is now final as a matter of law.

Nevertheless, in the guise of challenging the conditions that the Council could place in the SCA to reflect the preempted regulations, the County argues in its pre-hearing brief and in its witnesses' testimony that, in essence, only the creation of 2,978 new acres of agricultural land elsewhere would be adequate mitigation for land use and agricultural impacts.[29] The topic of mitigation for impacts on land use and agricultural crops has been foreclosed. The potential impact of the Project on Benton County's agricultural land and land use plans has been mitigated definitively to non-significance by a SEPA RMDNS that the County did not deem worth commenting on. The Council can recommend preemption

[25] RCW 80.50.090(4)(b).
[26] Benton County witness Greg Wendt, Benton County Director of Community Development, testified to the effect that Benton County has limited resources and determined that allocating them to participating in SEPA review of the Project was not warranted.
[27] RCW 80.50.090(4)(b).
[28] *Order Commencing Adjudication* at pp. 3-4.
[29] Benton County Pre-Hearing Brief, at 7.

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with confidence that the recommended conditions adequately recognize the preempted land use controls.

c. Benton County has failed to accommodate EFSLA preemption in their Comprehensive Planning and Zoning Controls.

While the planning requirements of the GMA do not supersede the mandate of EFSLA, they do advise local jurisdictions to accommodate the pre-emption of local land use controls inconsistent with state mandates. Per WAC 365-196-560(1), "[c]omprehensive plans and development regulations adopted under the [GMA] 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 [EFSLA].*"[30] (Emphasis supplied). A review of the Benton County Comprehensive Plan ("Comp Plan")[31] reveals no section identifying a process or policy to accommodate facilities sited under EFSLA. In her testimony, Benton County Planning Manager Michelle Mercer similarly offered no explanation of how or where Benton County's comprehensive planning or land use controls comply with this this GMA regulation. Instead, Benton County has simply banned solar generation-major from its GMAAD zone with full knowledge of RCW 80.50 and, presumably, with full awareness of WAC 365-196-560(1). It cannot, and should not, now be heard to complain about any preemptive effect resulting from their approach.

The matter of decarbonizing our electric supply is a matter of great, state-wide importance. The role of EFSEC in achieving this important goal cannot be overstated. For the foregoing reasons, the Council is respectfully but firmly encouraged to recommend that the Governor preempt local land use controls inconsistent with the siting of the Project.

[30] WAC 365-196-560(1).
[31] September 25, 2024 Adjudication Benton County Exhibit C.

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III. CONDITIONS

Based on a review of the pre-hearing briefs and the testimony at the hearing in this case, the parties to this adjudication agree that if preemption is recommended, then all the conditions proposed in the RMDNS should be imposed.[32] Applicant additionally concurred that the measures contained in Section A5 of the ASC would be appropriate conditions in an SCA. No supplemental conditions have been indicated or proposed by Benton County or the Counsel for the Environment throughout the pendency of this adjudication. During the adjudicative hearing before the Council on September 25, 2024, it was suggested by Councilmember Mike Livingston that the Applicant consider participating in conversations with other area solar developers about creation of a 'fire district',[33] a measure that Applicant representative Laura O'Neill agreed was acceptable. In accordance with EFSEC regulations, a revision to the ASC will be submitted to the agency to reflect this.

With these measures included in an SCA, the Council can be confident that not only will this be a well-sited project, but that it will also reflect the interests of the community and the purposes of the inconsistent Benton County land use provisions that that would be preempted.

IV. CONCLUSION

For the afore-mentioned reasons, the Council should recommend preemption of Benton County's land use controls that are inconsistent with RCW 80.50 and the siting of the Project. The specific mandate of EFSLA controls over the general requirements of the GMA, impacts to land uses and agriculture are mitigatable and addressed in the unchallenged RMDNS, and Benton County's Comp Plan and zoning ordinances fail to plan for and accommodate EFSEC-sited projects in contrivance of the GMA. Additionally, the parties agree to the imposition of the conditions identified in the RMDNS should

[32] Benton County Pre-Hearing Brief, at 9.
[33] Verbatim transcripts of the September 25, 2024, adjudication hearing were unavailable at the time of drafting this brief.

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preemption be recommended, and Innergex is willing to work with EFSEC and local authorities in their efforts to create a fire district or other agreed upon emergency response measures.

Given these considerations, the Council is urged to recommend preemption of inconsistent land use controls and support approval of the Project application with the afore-mentioned conditions.

DATED this 2nd day of October, 2024.

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CERTIFICATE OF SERVICE

I, I'sha Willis, declare as follows:

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

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

1. Applicant's Post Hearing Brief;
2. Certificate of Service

and that on October 2, 2024, I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, but authorized method of service pursuant to WAC 463-30-120(3) as follows:

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EXECUTED at Washington, DC on this 2nd day of October, 2024.

s/ I'sha Willis
I'sha Willis, Declarant

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