

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of
Docket No. EF-220355

Council Order No. 886

Innergex Renewable Development
USA, LLC, for Wautoma Solar Energy
Project, Applicant

**ORDER FINDING PROJECT
INCONSISTENT WITH LAND
USE REGULATIONS**

BACKGROUND

Synopsis. *Innergex Renewable Development USA, LLC, submitted an application to the Energy Facility Site Evaluation Council (EFSEC or Council) on June 9, 2022, for site certification of the proposed Wautoma Solar Energy Project site in unincorporated Benton County. On December 21, 2021, Benton County Board of County Commissioners adopted Ordinance Amendment (OA) 2021-004, which removed “solar power generation facility, major” from the list of uses allowed with a conditional use permit (CUP) in the Growth Management Act Agricultural District (GMAAD). The Applicant conceded that the project is not consistent with land use regulations after the adoption of OA 2021-004. Because the proposed site would be a solar power generation facility, major, within the GMAAD zone, the Council has determined the proposed project was not consistent with current Benton County land use and zoning regulations at the time the application was filed. RCW 80.50.090(2). The Council will schedule an adjudicative proceeding to consider whether to submit a recommendation to the Governor to preempt the local land use and zoning rules.*

- 1 **Nature of Proceeding.** This matter involves an application for site certification (Application or ASC) filed on June 9, 2022, by Innergex Renewable Development USA, LLC (the Applicant) to construct and operate Wautoma Solar Energy Project (the Project), a solar photovoltaic (PV) project with a battery storage system. The Project would be located 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.

- 2 **Land Use Consistency Hearing.** RCW 80.50.090(2) requires EFSEC to “conduct a public hearing to determine whether or not a proposed site is consistent and in compliance with city, county, or regional land use plans or zoning ordinances.” On July 27, 2022, EFSEC issued a Notice of Informational Public Hearing and Land Use Consistency Hearing and scheduled a partially in-person and virtual hearing by Microsoft Teams or by telephone participation for 5:00 p.m. on Monday, August 8, 2022.¹
- 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. The following EFSEC members were present at the August 8, 2022, hearing: Kate Kelly, (Department of Commerce), Mike Livingston (Department of Fish and Wildlife), Eli Levitt (Department of Ecology), Leonard “Lenny” Young (Department of Natural Resources), and Paul Gonseth, with the Washington State Department of Transportation. Kathleen Drew, EFSEC Chair, presided over the hearing.
- 4 Assistant Attorney General Megan Sallomi, Counsel for the Environment, was present for the land use consistency hearing. Also present were Dave Sharp, representing Benton County.
- 5 Erin Anderson, Attorney, represented the Applicant and spoke on the Applicant’s behalf. The Council also heard testimony from: Michelle Cooke, Benton County Planning Manager, and Benton County residents Allison Keeler, Jeanie Polehn, George Penn, Jim Melbauer, Bill Jenkins, and Lorre Gefre.
- 6 **Applicant’s Description of Proposed Facility - Wautoma Solar Energy Project.** The Project would be a 470-megawatt PV generation facility coupled with a 4-hour BESS sized to the maximum capacity of the Project, as well as related interconnections and ancillary support infrastructure. The Project would be located in unincorporated Benton County, 12.5 miles northeast of the city of Sunnyside and 1 mile south of the SR 241 and SR 24 interchange.
- 7 According to the application, the Project is located entirely on land within the Benton

¹ The Council sent this Notice to all interested persons on the mailing list for the Facility including landowners within one mile and to all subscribers to EFSEC’s general minutes and agenda list. Further, the Council posted this Notice on its public website, distributed the Notice to local libraries, and purchased advertisement in the Tri-City Herald, the Columbia Basin Herald and the Yakima Herald, the local daily newspapers of general circulation.

County GMAAD zone. *Application for Site Certification, Attachment C: Land Use Consistency Review at Sec. 1.3.*

- 8 The fifty-seven parcels on which the Project will be located will together constitute the “Project Parcels.” The owners of the parcels are listed in a table in Section C of the initial application. The owners are: Robert Ford and Marilyn Ford; Wautoma Energy LLC; Roberts Ranch 5+1 LLC; Michael Robert, et al.; High Valley Land LLC, Jean Emile Robert; Robin Robert; United States Government; Zirkle Four Feathers Vineyards LLC; State of Washington; Joseph Balmelli and Donna Balmelli; Jack Griffith; Wautoma Valley LLC; Stuckrath-Myers LLC; Western Land & Cattle LL; Wolf Lake Inc.; and an undetermined owner of Parcel No. 1182440055555555. The Applicant has executed or is pursuing options to lease with the landowners to accommodate the Project long-term. *Application for Site Certification, Part 1, Section A.3.*
- 9 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. *Board of Benton County Commissioner’s Regular Board Meeting Minutes, December 21, 2021.*
- 10 Prior to December 21, 2021, the Project would have been a conditionally permitted use in the GMAAD per former BCC 11.17.070(cc). The Applicant agrees that the site is not consistent with current land use regulations, but would like to proceed with the application and is not seeking an expedited process.

DISCUSSION

Land Use Consistency Determination

- 11 The purpose of the land use hearing is “to determine whether at the time of application the proposed facility was consistent and in compliance with land use plans and zoning ordinances.”² In this order, the Council will refer to land use plans and zoning ordinances collectively as “land use provisions” and will refer to its decision as pertaining to “land use consistency.”

² WAC 463-26-050.

- 12 **Definitions of “Land Use Plan” and “Zoning Ordinances.”** The term “land use plan” is defined by statute as a “comprehensive plan or land use element thereof adopted ... pursuant to” one of the listed planning statutes.³ EFSEC interprets this definition as referring to the portions of a comprehensive plan that outline proposals for an area’s development, typically by assigning general uses (such as housing) to land segments and specifying desired concentrations and design goals.⁴ The term “zoning ordinance” is defined by statute as an ordinance “regulating the use of land and adopted pursuant to” one of the listed planning statutes.⁵ EFSEC has interpreted this definition as referring to those ordinances that regulate land use by creating districts and restricting uses in the districts (i.e., number, size, location, type of structures, lot size) to promote compatible uses.
- 13 EFSEC has defined the phrase “consistent and in compliance” based on settled principles of land use law: “Zoning ordinances require compliance; they are regulatory provisions that mandate performance. Comprehensive plan provisions, however, are guides rather than mandates and seek consistency.”⁶
- 14 **Proof of non-consistency and non-compliance.** EFSEC accepts the Applicant’s concession that the project is not consistent or compliant with Benton County land use provisions.
- 15 Even when a project is non-compliant with local land use provisions, the governor, upon recommendation from the council, may preempt land use plans and zoning regulations to authorize the siting of an energy facility.⁷ In such cases, the council will conduct an adjudication to consider whether to recommend that the state preempt local plans or regulations that would prohibit the site.⁸

FINDINGS OF FACT

1. On June 9, 2022, Innergex Renewable Development USA, LLC, submitted an application for site certification to construct and operate Wautoma Solar Energy Project (the Project), a solar photovoltaic project with an optional battery storage system, on 4,399 leased acres in Benton County, Washington.
2. The Project would be a 470-megawatt PV generation facility coupled with a 4-hour battery

³ RCW 80.50.020(14).

⁴ *In re Northern Tier Pipeline*, Council Order No. 579 (Northern Tier Pipeline Order) at 9 (November 26, 1979).

⁵ RCW 80.50.020(22).

⁶ *In re Whistling Ridge Energy Project*, Council Order No. 868 at 10 n 15 (October 6, 2011)..

⁷ RCW 80.50.110 and *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council and Christine O. Gregoire, Governor of the State of Washington*, 165 Wash.2d 275, 285-86 (2008).

⁸ WAC 463-29-060

energy storage system sized to the maximum capacity of the Project, as well as related interconnections and ancillary support infrastructure.

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. The Project would be located in unincorporated Benton County, Washington. The Project would be located entirely on land within the Benton County Growth Management Act Agricultural District (GMAAD). The primary land use of the parcels of the Project site would be for solar power generators, consisting of solar panels, with an optional storage system.
5. On December 21, 2021, the Board of County Commissioners for Benton County adopted Benton County Ordinance Amendment (OA) 2021-004. OA 2021-004 removed the conditional use permit (CUP) option for commercial solar power generator facility, major, from the GMAAD.

CONCLUSIONS OF LAW

1. The Council has jurisdiction over the subject matter of this proceeding and the parties to it pursuant to RCW 80.50.075 and WAC chapter 463-43.
2. The Council provided adequate notice to interested parties, and the Council has adequate information to render a land use consistency decision.
3. "Solar Power Generator Facility, Major" means the use of solar panels to convert sunlight directly or indirectly into electricity. Solar power generators consist of solar panels, charge controllers, inverters, working fluid system, and storage batteries. Major facilities are those that are developed as the primary land use for a parcel on which it is located and does not meet the siting criteria for a minor facility in BCC 11.03.010(168). Benton County Code (BCC)11.03.010(167).
4. "Solar Power Generator Facility, Minor" means the use of solar panels to convert sunlight directly or indirectly into electricity. Solar power generators consist of solar panels, charge controllers, inverters, working fluid system, and storage batteries. Minor facilities are those that are sited on the power beneficiary's premises, are intended primarily to offset part or all of the beneficiary's requirements for electricity/gas, and are secondary or accessory to the beneficiary's use of the premises. BCC 11.03.010(168).

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5. As the primary land use for the Project site would be for solar power generation and not primarily to offset part or all of the Applicant's requirement for electricity, the Project is a solar power generator facility, major, as defined in BCC 11.03.010(167).
6. Effective December 21, 2021, solar power generator facilities, major, may not apply for a conditional use permit for lands contained within the GMAAD. Benton County Ordinance Amendment (OA) 2021-004.
7. As the Applicant filed the application on June 9, 2022, after the effective date for OA 2021-004 on December 21, 2021, the Project site is not in compliance with Benton County's applicable zoning ordinances.
8. Pursuant to WAC 463-28-060 and 070, the matter will be scheduled for an adjudication to consider whether the council should recommend to the governor that the state preempt Benton County's land use plans, zoning ordinances, or other development regulations for the site or portions of the site for the proposed facility, and if so, to determine conditions to be included in a draft certification agreement that consider local governmental or community interests affected by the construction or operation of the alternative energy resource and the purposes of the ordinances to be preempted pursuant to RCW 80.50.110(2).

ORDER

THE COUNCIL ORDERS:

Innergex Renewable Development USA, LLC's, application is not consistent with local zoning regulations. The matter shall be set for adjudication, concurrent with the general adjudication required by RCW 80.50.090(4), to consider whether to recommend preemption of Benton County's zoning regulations. 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.

DATED at Olympia, Washington, and effective _____.

WASHINGTON STATE ENERGY FACILITY SITE EVALUATION COUNCIL

KATHLEEN DREW, Chair