BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of

AURORA SOLAR, LLC – Badger Mountain Solar Energy Project

APPLICANT’S LEGAL MEMORANDUM RE LAND USE CONSISTENCY

Legal Memorandum in Support of the Badger Mountain Solar Energy Project Regarding Consistency and Compliance with Land Use Plans and Zoning Ordinances

I. INTRODUCTION

On October 6, 2021, Aurora Solar, LLC, a wholly owned subsidiary of Avangrid Renewables, LLC (referenced collectively here as “Avangrid”), submitted to the Energy Facility Site Evaluation Council (“EFSEC”) an Application for Site Certification (“ASC”) to develop, construct, and operate the Badger Mountain Solar Energy Project (the “Project”). The Project is a proposed 200-megawatt solar photovoltaic energy generation project with an optional battery energy storage system, proposed to be located on an area of unirrigated dryland agricultural lands approximately 3.5 miles east of East Wenatchee, south of Badger Mountain Road, in unincorporated Douglas County (the “County”), Washington. Due to questions regarding land use consistency, Avangrid is not requesting expedited processing of its ASC,\(^1\) but submits this Memorandum to assist EFSEC by providing information regarding the Project’s consistency.

\(^1\) See RCW 80.50.075.
with County land use plans and zoning ordinances, as relevant to the upcoming public land use hearing for the Project.\(^2\)

As discussed below and detailed in the ASC, the Project is consistent with the applicable provisions of the Douglas County Comprehensive Plan and compliant with applicable County zoning ordinances for which the County has completed plan amendment and State Environmental Policy Act (“SEPA”) processes. Though the Project is inconsistent with one provision of an “interim” zoning ordinance limiting solar generation siting areas in the County—the latest in a long line of still-changing County solar development standards—the comprehensive plan amendment and mandatory SEPA analysis have not yet been adopted for the ordinance. Accordingly, and based on the Project’s substantial consistency with applicable County land use standards, the Project is certifiable under EFSEC’s preemptive authority as an important step forward in achieving the state’s clean energy goals.

II. BACKGROUND

A. Avangrid initially tried to permit the Project locally, at which time the Project was an allowable, conditional use.

Avangrid initiated local land use permitting discussions with the County in early 2018, soon after it began developing the Project. Avangrid continued to actively engage with the County in the months to come; it submitted a pre-development conference application to the County in 2019, attended numerous pre-development conferences with the County in 2019 and 2020 to ensure it was complying with local standards and requirements, and in May 2020

\[^2\] A more detailed local land use analysis is provided in the Project’s ASC, Attachment D, Land Use Consistency Review, enclosed here and available at https://apiproxy.utc.wa.gov/efsec/GetDocument?docID=8&year=EFSEC&docketNumber=210747.

\[^3\] See RCW 80.50.090; WAC ch. 463-26.
ultimately submitted a Master Land Use Application to the County and responded to several subsequent County information requests as part of the local permitting process.

At the time of the local application, the Project was expressly allowable on the subject site as a conditional use in the A-D and RR-20 zoning districts, in which the Project site is located. No specific buffers or other additional overlay requirements applied.

While the Project’s local application was pending, the County instituted a moratorium on wind and solar projects and declined to process the application. On September 14, 2020, the County sent Avangrid a Notice of Incomplete Application, citing a lack of certain ancillary structure site plans and property owner signatures. Attached to that notice was a copy of County Resolution No. TLS 20-45A and Ordinance No. TLS No. 20-05-45B, set to be enacted the very next day. Thus, Avangrid received no meaningful opportunity to address the purported deficiencies with the application prior to enactment of the moratorium. The resolution and ordinance established a moratorium on not only the approval of wind and solar energy generation projects in the County, but even the processing of applications for such projects. Though an official hearing was held on the moratorium on October 6, 2020, according to the minutes, no members of the public attended, and no public comments were provided. Thereafter, the County ceased all action on the Project’s local application, impeding any efforts to seek a determination of completeness. Accordingly, based on the moratorium, uncertainty as to

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5 See ASC, Att. D, Sec. 1.3.1.
6 Resolution No. TLS 20-45A; Ordinance No. TLS No. 20-05-45B (“[N]o application for a land use … [or] other development permit or approval associated with wind and solar energy farms [would] be accepted as complete.”).
7 See ASC, Att. D, Sec. 1.3.2.
whether or when a local permitting resolution would occur, existing investment, and market timing requirements, Avangrid made the choice to proceed with permitting through EFSEC.

B. After varied proposals, the County adopted Interim Controls that allow solar projects but impose vast avoidance buffers that functionally ban their siting.

From fall 2020 to summer of 2021, the County held several meetings to discuss its approach to solar and wind development. Proposals ranged from allowing such facilities to be located three or four or 10 miles beyond the County’s urban growth area (“UGA”) or other habitat or jurisdictional-related boundaries, to even conferring renewable energy facility siting authority to EFSEC rather than adopting any applicable local zoning requirements for such facilities. In short, the County explicitly relinquished its permitting authority to EFSEC, but as discussed below, also adopted standards disguised as “buffer” areas, which are tantamount to prohibitions on renewable energy facilities anywhere in Douglas County.

Ultimately, the County adopted a combination of these approaches when in July 2021 it ended the moratorium and adopted Ordinance No. TLS 21-17-47B, setting forth Interim Controls for the Placement and Permitting of Alternative Energy-Specific to Wind and Solar Energy Farms (the “Interim Controls”). Under the Interim Controls, energy generation facilities, including solar projects, are allowed as outright permitted uses in both A-D and RR-20 zones. However, such projects were subject to certain avoidance buffers under which wind and solar energy generation facilities cannot be located within:

- seven miles from a UGA boundary, city or town limit boundary, municipal airport boundary, Pangborn Airport boundary, and Pangborn Airport outer overlay zone boundary; or

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- seven miles from “habitat associated with sensitive, candidate, threatened or endangered plants or wildlife as identified on state and federal list.”

The Interim Controls ordinance also made clear the County’s intent to delegate energy generation facility siting decisions to EFSEC, including requiring that “[p]rimary use energy facilities must go through the [EFSEC] per Chapter 80.50 RCW to determine appropriate location and mitigation measures.” The source of the County’s authority to assign the County’s permitting jurisdiction to EFSEC is unclear and likely without legal basis. However, from the Applicant’s perspective, the issue of whether the County has authority to delegate its permitting authority to EFSEC is moot, as the Applicant seeks site certification through EFSEC.

At the time of the ASC submittal to EFSEC—and still today—the ultimate iteration and permanent adoption of these provisions remained uncertain. On November 10, 2021, the County Planning Commission held a public hearing on the Interim Controls to consider certain amendments, including changes to the avoidance buffers and delegation to EFSEC for certain permitting aspects, and to determine whether to recommend those amendments for adoption by the County Board of Commissioners. At the time of submittal of this Memorandum, the County had not yet provided information as to the outcome of that hearing. Whatever the outcome, the County’s solar development standards remain very much in a state of flux, in an

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10 DCC 18.16.355.A (2021); see also DCC 14.98.277 (2021) (defining “energy generation facility- primary use” to incorporate by reference EFSEC’s definition of the same).
“interim” status, without completion of supporting comprehensive plan revisions, and without the mandatory SEPA process required to support the changes to the zoning code.\textsuperscript{12}

III. ANALYSIS

A. The Project is consistent with adopted County land use standards.

As detailed in the ASC, Att. D, the Project is wholly consistent with the applicable provisions of the Douglas County Comprehensive Plan and wholly consistent with the applicable portions of the Douglas County Code (“DCC”) for which the County has completed plan amendment and SEPA processes. The Project is consistent with the purposes of the A-D and RR-20 zoning districts, complies with the conditional use criteria in effect when Avangrid submitted its local land use application, and complies with all applicable DCC standards incorporated into the County comprehensive plan and for which SEPA analysis has been completed. Accordingly, the Project is substantially consistent with the current version of the DCC, inclusive of the Interim Controls, and wholly consistent with the local land use standards for which all state planning requirements and procedures have been met. The Project is not consistent with the evolving and unresolved “buffers,” which currently appear to have no rational basis, either under the Growth Management Act or to further goals and objectives for any science-based habitat and wildlife protection. These evolving regulatory provisions and associated buffer designations are both vague and overbroad.

\textsuperscript{12} To permanently effectuate these changes, the County Board of Commissioners must adopt Comprehensive Plan amendments and formal zoning and complete the SEPA process. See RCW 36.70A and 43.21C.
B. The Project is certifiable under EFSEC’s preemptive authority.

EFSEC’s statutes and regulations contemplate scenarios like this one and empower EFSEC to preempt inconsistent local land use standards\(^{13}\) while protecting local interests through specific site certificate conditions, when needed. This authority is necessary in order for EFSEC to fulfill its many duties, including ensuring consistency with “the state’s energy strategy, utilities’ integrated resource plans, regional power plans, and state policy directives favoring deployment of renewable technology,” and state “objectives of reducing dependence on fossil fuels and transitioning to a clean energy economy, … balanced against the need to maintain the availability of energy at competitive prices for consumers and businesses.”\(^{14}\)

Specifically, EFSEC may preempt local “regulation and certification of the location, construction, and operational conditions” of energy facilities pursuing EFSEC certification.\(^{15}\)

And if EFSEC does elect to preempt certain aspects of the County code, it may ensure County interests are protected by recommending specific conditions in the certification agreement “designed to recognize the purpose of” the preempted local standards.\(^{16}\)

\(^{13}\) Though the applicant and local jurisdiction are directed to “address compliance or noncompliance with land use plans or zoning ordinances,” WAC 463-26-100, it is EFSEC that ultimately must “make a determination as to whether the proposed site is consistent and in compliance with land use plans and zoning ordinances” through its permitting process. WAC 463-26-110; see also RCW 80.50.100.

\(^{14}\) In the Matter of Vancouver Energy Terminal, EFSEC Report to Governor on Application No. 2013-01, 70 (Dec. 19, 2017).

\(^{15}\) RCW 80.50.110(2); see also RCW 80.50.040(1); WAC 463-28; see, e.g., In the Matter of Kittitas Valley Wind Power Project, Council Order No. 826, at 2, 28-29 (Mar. 27, 2007) (exercising preemptive authority over county’s local wind farm overlay ordinance and height restriction); Letter from Governor Christine Gregoire to Chair Jim Luce, EFSEC re Kittitas Valley Wind Power Project (Sept. 18, 2007) (approving preemption recommendation as to project); Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council (EFSEC), 165 Wn.2d 275, 311, 197 P.3d 1153 (2008) (affirming same); cf. Friends of Columbia Gorge, Inc. v. State Energy Facility Site Evaluation Council, 178 Wn.2d 320, 346, 310 P.3d 780 (2013) (affirming EFSEC’s determination of local land use consistency).

\(^{16}\) RCW 80.50.100(2); WAC 463-64-020.
IV. CONCLUSION

Whether and to what extent EFSEC may exercise its preemptive authority is a question to be addressed through a later adjudicative proceeding.\textsuperscript{17} We look forward to providing additional information and analyses on this topic as part of that proceeding, as we continue to work with the County, EFSEC and its consulting state agencies, and other important stakeholders in the permitting process.

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Timothy L. McMahan, WSBA No. 16377
tim.mcmahan@stoel.com
Attorney for Applicant

\textsuperscript{17} WAC 463-28-060.