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BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of

AURORA SOLAR, LLC – Badger Mountain
Solar Energy Project

EFSEC Docket No. EF-210747

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.

1 with County land use plans and zoning ordinances,² as relevant to the upcoming public land use
2 hearing for the Project.³

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

16 A. **Avangrid initially tried to permit the Project locally, at which time the Project was** 17 **an allowable, conditional use.**

18 Avangrid initiated local land use permitting discussions with the County in early 2018,
19 soon after it began developing the Project. Avangrid continued to actively engage with the
20 County in the months to come; it submitted a pre-development conference application to the
21 County in 2019, attended numerous pre-development conferences with the County in 2019 and
22 2020 to ensure it was complying with local standards and requirements, and in May 2020
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25 ² A more detailed local land use analysis is provided in the Project’s ASC, Attachment D, Land
26 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.

1 ultimately submitted a Master Land Use Application to the County and responded to several
2 subsequent County information requests as part of the local permitting process.

3 At the time of the local application, the Project was expressly allowable on the subject
4 site as a conditional use in the A-D and RR-20 zoning districts, in which the Project site is
5 located.⁴ No specific buffers or other additional overlay requirements applied.⁵
6

7 While the Project’s local application was pending, the County instituted a moratorium on
8 wind and solar projects and declined to process the application. On September 14, 2020, the
9 County sent Avangrid a Notice of Incomplete Application, citing a lack of certain ancillary
10 structure site plans and property owner signatures. Attached to that notice was a copy of County
11 Resolution No. TLS 20-45A and Ordinance No. TLS No. 20-05-45B, set to be enacted the very
12 next day. Thus, Avangrid received no meaningful opportunity to address the purported
13 deficiencies with the application prior to enactment of the moratorium. The resolution and
14 ordinance established a moratorium on not only the *approval* of wind and solar energy
15 generation projects in the County, but even the *processing of applications* for such projects.⁶
16 Though an official hearing was held on the moratorium on October 6, 2020, according to the
17 minutes, no members of the public attended, and no public comments were provided. Thereafter,
18 the County ceased all action on the Project’s local application, impeding any efforts to seek a
19 determination of completeness.⁷ Accordingly, based on the moratorium, uncertainty as to
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23 ⁴ See Douglas County Code (“DCC”) 18.80.320 (2018).

24 ⁵ See ASC, Att. D, Sec. 1.3.1.

25 ⁶ Resolution No. TLS 20-45A; Ordinance No. TLS No. 20-05-45B (“[N]o application for a land
26 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.

1 whether or when a local permitting resolution would occur, existing investment, and market
2 timing requirements, Avangrid made the choice to proceed with permitting through EFSEC.

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

5 From fall 2020 to summer of 2021, the County held several meetings to discuss its
6 approach to solar and wind development. Proposals ranged from allowing such facilities to be
7 located three or four or 10 miles beyond the County’s urban growth area (“UGA”) or other
8 habitat or jurisdictional-related boundaries, to even conferring renewable energy facility siting
9 authority to EFSEC rather than adopting any applicable local zoning requirements for such
10 facilities. In short, the County explicitly relinquished its permitting authority to EFSEC, but as
11 discussed below, also adopted standards disguised as “buffer” areas, which are tantamount to
12 prohibitions on renewable energy facilities anywhere in Douglas County.
13

14 Ultimately, the County adopted a combination of these approaches when in July 2021 it
15 ended the moratorium and adopted Ordinance No. TLS 21-17-47B, setting forth Interim Controls
16 for the Placement and Permitting of Alternative Energy-Specific to Wind and Solar Energy
17 Farms (the “Interim Controls”). Under the Interim Controls, energy generation facilities,
18 including solar projects, are allowed as outright permitted uses in both A-D and RR-20 zones.⁸
19 However, such projects were subject to certain avoidance buffers under which wind and solar
20 energy generation facilities cannot be located within:
21

- 22 • seven miles from a UGA boundary, city or town limit boundary, municipal airport
23 boundary, Pangborn Airport boundary, and Pangborn Airport outer overlay zone
24 boundary; or
25

26 ⁸ See DCC 18.40.020, 18.31.020 (2021).

- 1 • seven miles from “habitat associated with sensitive, candidate, threatened or
2 endangered plants or wildlife as identified on state and federal list.”⁹

3 The Interim Controls ordinance also made clear the County’s intent to delegate energy
4 generation facility siting decisions to EFSEC, including requiring that “[p]rimary use energy
5 facilities must go through the [EFSEC] per Chapter 80.50 RCW to determine appropriate
6 location and mitigation measures.”¹⁰ The source of the County’s authority to assign the
7 County’s permitting jurisdiction to EFSEC is unclear and likely without legal basis. However,
8 from the Applicant’s perspective, the issue of whether the County has authority to delegate its
9 permitting authority to EFSEC is moot, as the Applicant seeks site certification through EFSEC.
10

11 At the time of the ASC submittal to EFSEC—and still today—the ultimate iteration and
12 permanent adoption of these provisions remained uncertain. On November 10, 2021, the County
13 Planning Commission held a public hearing on the Interim Controls to consider certain
14 amendments, including changes to the avoidance buffers and delegation to EFSEC for certain
15 permitting aspects, and to determine whether to recommend those amendments for adoption by
16 the County Board of Commissioners.¹¹ At the time of submittal of this Memorandum, the
17 County had not yet provided information as to the outcome of that hearing. Whatever the
18 outcome, the County’s solar development standards remain very much in a state of flux, in an
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24 ⁹ DCC 18.16.355.B-.C (2021). See discussion in ASC, Att. D, Sec. 1.3.3 for additional detail.

25 ¹⁰ DCC 18.16.355.A (2021); *see also* DCC 14.98.277 (2021) (defining “energy generation
26 facility- primary use” to incorporate by reference EFSEC’s definition of the same).

¹¹ *See* Douglas County Transportation & Land Services “Meeting Packet,” Planning Commission
Meeting November 10, 2021, <https://www.douglascountywa.net/DocumentCenter/View/2238/November-10-2021> (last visited Nov. 12, 2021).

1 “interim” status, without completion of supporting comprehensive plan revisions, and without
2 the mandatory SEPA process required to support the changes to the zoning code.¹²

3 III. ANALYSIS

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

5 As detailed in the ASC, Att. D, the Project is wholly consistent with the applicable
6 provisions of the Douglas County Comprehensive Plan and wholly consistent with the applicable
7 portions of the Douglas County Code (“DCC”) for which the County has completed plan
8 amendment and SEPA processes. The Project is consistent with the purposes of the A-D and
9 RR-20 zoning districts, complies with the conditional use criteria in effect when Avangrid
10 submitted its local land use application, and complies with all applicable DCC standards
11 incorporated into the County comprehensive plan and for which SEPA analysis has been
12 completed. Accordingly, the Project is substantially consistent with the current version of the
13 DCC, inclusive of the Interim Controls, and wholly consistent with the local land use standards
14 for which all state planning requirements and procedures have been met. The Project is not
15 consistent with the evolving and unresolved “buffers,” which currently appear to have no rational
16 basis, either under the Growth Management Act or to further goals and objectives for any
17 science-based habitat and wildlife protection. These evolving regulatory provisions and
18 associated buffer designations are both vague and overbroad.
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25 ¹² To permanently effectuate these changes, the County Board of Commissioners must adopt
26 Comprehensive Plan amendments and formal zoning and complete the SEPA process. See RCW 36.70A
and 43.21C.

1 **B. The Project is certifiable under EFSEC’s preemptive authority.**

2 EFSEC’s statutes and regulations contemplate scenarios like this one and empower
3 EFSEC to preempt inconsistent local land use standards¹³ while protecting local interests through
4 specific site certificate conditions, when needed. This authority is necessary in order for EFSEC
5 to fulfill its many duties, including ensuring consistency with “the state’s energy strategy,
6 utilities’ integrated resource plans, regional power plans, and state policy directives favoring
7 deployment of renewable technology,” and state “objectives of reducing dependence on fossil
8 fuels and transitioning to a clean energy economy, ... balanced against the need to maintain the
9 availability of energy at competitive prices for consumers and businesses.”¹⁴
10

11 Specifically, EFSEC may preempt local “regulation and certification of the location,
12 construction, and operational conditions” of energy facilities pursuing EFSEC certification.¹⁵
13 And if EFSEC does elect to preempt certain aspects of the County code, it may ensure County
14 interests are protected by recommending specific conditions in the certification agreement
15 “designed to recognize the purpose of” the preempted local standards.¹⁶
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18 ¹³ Though the applicant and local jurisdiction are directed to “address compliance or
19 noncompliance with land use plans or zoning ordinances,” WAC 463-26-100, it is *EFSEC* that ultimately
20 must “make a determination as to whether the proposed site is consistent and in compliance with land use
21 plans and zoning ordinances” through its permitting process. WAC 463-26-110; *see also* RCW
22 80.50.100.

23 ¹⁴ In the Matter of Vancouver Energy Terminal, EFSEC Report to Governor on Application No.
24 2013-01, 70 (Dec. 19, 2017).

25 ¹⁵ RCW 80.50.110(2); *see also* RCW 80.50.040(1); WAC 463-28; *see, e.g.*, In the Matter of
26 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.

1 **IV. CONCLUSION**

2 Whether and to what extent EFSEC may exercise its preemptive authority is a question to
3 be addressed through a later adjudicative proceeding.¹⁷ We look forward to providing additional
4 information and analyses on this topic as part of that proceeding, as we continue to work with the
5 County, EFSEC and its consulting state agencies, and other important stakeholders in the
6 permitting process.
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8 DATED: Nov. 15, 2021.
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¹⁷ WAC 463-28-060.