



Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON

Environmental Protection Division
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April 12, 2022

Sonia Bumpus, EFSEC Manager
Energy Facility Site Evaluation Council
PO Box 43172
Olympia, WA 98504-3172

RE: Badger Mountain Solar Energy Project, Agency Docket No. EF-210747

Dear Manager Bumpus:

As Counsel for the Environment for the Badger Mountain project, I encourage EFSEC to develop an Environmental Impact Statement (EIS) with an in-depth study of the project's impacts to wildlife, consideration of potential harms from a no-action decision, consideration of alternative locations, and consideration of whether mitigation measures can reduce or compensate for any environmental harms from building the project on the proposed site.

I. The Environmental Impact Statement Should Include Greater Study of Impacts to Wildlife.

The Scoping Notice correctly identifies impacts to wildlife and habitat as a core focus of the Environmental Impact Statement.¹ To fully assess those impacts, a more in-depth wildlife and vegetation survey is needed. The Application included a six-day survey completed in May 2021, but a survey conducted six days in one season does not adequately account for seasonal uses, migratory patterns, and recent proximate wildfires that may have displaced the Greater Sage-grouse and other species who use the area. *See, e.g., Oregon Nat. Desert Ass'n v. Jewell*, 840 F.3d 562, 568-571 (9th Cir. 2016) (remanding approval for wind farm for further NEPA analysis on harm to the Sage-grouse because the agency based its conclusion on unreliable data regarding Sage-grouse winter habitat). The survey should incorporate available telemetry data for endangered or threatened species, some of which indicates the Sage-grouse have used adjoining habitat east of the proposed project.² *See Keep the North Shore Country v. Bd. of Land & Natural*

¹ See EFSEC, Determination of Significance and Request for Comments on Scope of Environmental Impact Statement, (March 14, 2022).

² See Washington Wildlife Habitat Connectivity Working Group, *Washington Connected Landscapes Project: Analysis of the Columbia Plateau Ecoregion, Appendix A.2 Connectivity for Greater Sage-*

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Res., No. SCAP-19-0000449, 2022 WL 522648, *30 (Haw. Feb. 22, 2022) (affirming permit for wind farm despite impact on endangered bat because agency made a considered decision based on best available data).

The Environmental Impact Statement also should discuss how the project will affect Washington's wildlife recovery plans for the Greater Sage-grouse and the Golden Eagle.³ Washington's Recovery Plan for the Greater Sage-grouse identifies certain "Priority Areas of Conservation," which are considered essential for the long-term conservation of the Sage-grouse.⁴ The Badger Mountain project is sited within the Moses-Coulee Priority Area of Conservation, one of just two remaining locations in Washington where Sage-grouse live.⁵ The Application does not mention either plan or discuss the implications of solar development within a priority area for conservation.⁶

Finally, the Environmental Impact Statement should consider the cumulative impacts to wildlife and habitat in this environmentally-sensitive area. Climate change-induced wildfires, drought, and extreme heat, coupled with habitat loss from development will continue to threaten many of these species. Thus, even relatively small impacts from this project could be significant to their chances for survival.

II. The Environmental Impact Statement Should Consider the Potential Harms from a No-Action Decision.

Just as the Council must fully consider potential harms to wildlife from the project, it must also consider the potential harms if the project is *not* developed. For renewable energy projects, a no-action alternative does not preserve the environmental status quo if the energy from the project

grouse in the Columbia Plateau (Feb. 2012) https://waconnected.org/wp-content/uploads/2012/A2_GreaterSage-Grouse_ColumbiaPlateau_2012A.pdf at 18;

Letter from Brock Hoenes, WDFW, to EFSEC (Dec. 10, 2021), <https://www.efsec.wa.gov/energy-facilities/badger-mountain>.

³ See generally Washington Dep't of Fish & Wildlife (WDFW), *Management Recommendations for Priority Species – Volume IV: Birds*, (May 2004), <https://wdfw.wa.gov/publications/00026>; Derek W. Stinson, *Periodic Status Review for the Greater Sage-grouse*, WDFW (April 2021), <https://wdfw.wa.gov/sites/default/files/publications/02173/wdfw02173.pdf?msclkid=847b385db9eb11ec94f90874de305a0b>.

⁴ See Mike Schroeder, et al., *Recovery of Greater Sage-grouse in Washington: 2016 Progress Report*, WDFW (December 2016), <https://wdfw.wa.gov/sites/default/files/publications/01876/wdfw01876.pdf> at 4.

⁵ Stinson, *Periodic Status Review for the Greater Sage-grouse*, *supra* n.3, at 1.

⁶ See Application for Site Certification, Badger Mountain Solar Energy Project (Oct. 5, 2021), <https://www.efsec.wa.gov/energy-facilities/badger-mountain/badger-mountain-application> at Attachment G.

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would have reduced the State's greenhouse gas emissions. Significantly, past failures to reduce greenhouse gas emissions is a primary cause of the Sage-grouse's decline. Wildfires, which are becoming larger and more frequent due to climate change, pose "the most immediate threat" to Sage-grouse in Washington.⁷

As the Council is aware, it is hard to overstate the harms from climate change in Washington. Each year, hundreds of Washingtonians lose their homes to wildfires, flooding, and sea level rise.⁸ Last June, for example, Washington suffered a historic heatwave that killed 112 people and over one billion sea creatures.⁹ Scientists concluded the event would have been "virtually impossible" without climate change.¹⁰

The Legislature has recognized the urgent need to address the climate crisis. "Extreme weather, a warming Pacific Northwest, reduced snow pack, and sea level rise are four major ways that climate change is disrupting Washington's economy, environment, and communities." RCW 80.80.005. The State determined that replacing fossil fuels with renewable energy is critical to addressing this issue, through passage of the Energy Independence Act, RCW 19.285 (2006), the Clean Energy Transformation Act, RCW 19.405 (2019), the Climate Commitment Act, RCW 70a.65 (2021), and the Clean Fuels Program, RCW 70a.535 (2021). The Council should carefully consider whether Washington can meet its clean energy mandates without this and similar projects.

On the other hand, the project's environmental benefits will only materialize if the energy generated actually displaces fossil fuels, rather than stimulating demand for new uses of

⁷ Stinson, *Periodic Status Review for the Greater Sage-grouse*, *supra* n. 3, at 9.

⁸ See, e.g., Joe Sutton, *Washington town sees 75% of homes damaged by floodwaters*, CNN (Nov. 17, 2021, 7:48 PM), <https://www.cnn.com/2021/11/16/weather/washington-severe-weather-flood-threat/index.html>; Joseph O'Sullivan, *Washington state's wildfires have now destroyed more than 626,000 acres, 181 homes*, The Seattle Times (Sep. 11, 2020, 8:45 PM), <https://www.seattletimes.com/seattle-news/environment/washington-states-wildfires-have-now-destroyed-more-than-626000-acres-181-homes/?msclkid=43f4bc04b9f011ecbc5428dc61c1bc70>; *Quinault Indian Nation Plans for Relocation*, Env'tl. Prot. Agency, <https://www.epa.gov/arc-x/quinault-indian-nation-plans-relocation#:~:text=Selected%20relocation%20as%20its%20adaptation,1%2D100%20year%20flood%20zone> (last accessed April 11, 2022).

⁹ See John Ryan, *2021 heat wave is now the deadliest weather-related event in Washington history*, KUOW (July 19, 2021, 7:05 PM), <https://www.kuow.org/stories/heat-wave-death-toll-in-washington-state-jumps-to-112-people>; Catrin Einhorn, *Heat Wave Killed Marine Wildlife en Masse*, The New York Times (July 9, 2021), <https://www.nytimes.com/2021/07/09/climate/marine-heat-wave.html>.

¹⁰ Henry Fountain, *Climate Change Drove Western Heat Wave*, The New York Times (July 7, 2021), <https://www.nytimes.com/2021/07/07/climate/climate-change-heat-wave.html>.

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energy.¹¹ New and inexpensive power, if absorbed by cryptocurrency mining, would not displace greenhouse gas-emitting power sources.¹² Should the project be approved, the Council should consider ways to ensure the power generated achieves environmental benefits for the people of Washington.¹³

III. The Environmental Impact Statement Should Consider all Reasonable Alternatives.

SEPA requires consideration of reasonable alternatives that will feasibly meet the proposal's objectives at a lower environmental cost or decreased level of environmental degradation. *See* WAC 197-11-440(5)(b). The "required discussion of alternatives to a proposed project is of major importance, because it provides a basis for a reasoned decision among alternatives having differing environmental impacts." *Weyerhaeuser v. Pierce Cty.*, 124 Wn.2d 26, 38 (1994). In this case, the Council should consider alternative locations for the project and a least impactful alternative that mitigates potential harms from developing in the proposed site.

A. The Environmental Impact Statement Should Consider Alternative Site Locations.

Considering feasible alternative locations is well within the Council's SEPA authority,¹⁴ and the Council previously has done so¹⁵. In this case, the project is proposed in an area that supports endangered species.¹⁶ There may be other nearby areas with similar solar potential and transmission access, but that do not tread on habitat. For example, the Council and Avangrid

¹¹ *See* R. York, *Do alternative energy sources displace fossil fuels?*, Nature Climate Change (Mar. 18, 2012), https://legacy-assets.eenews.net/open_files/assets/2020/05/04/document_cw_01.pdf (discussing results of study finding that, over the past fifty years, each unit of total national energy use from non-fossil-fuel sources displaced less than one-quarter of a unit of fossil-fuel energy use because new energy sources had a tendency to increase overall demand for energy). The study notes, however, that renewable energy may be more effective at displacing fossil fuels if developed in tandem with policies to curb carbon emissions.

¹² *See* Paul Roberts, *Volative Bitcoin prices put Central Washington electrical utilities on alert*, The Wenatchee World (Jan. 9, 2021), https://www.wenatcheeworld.com/news/local/volatile-bitcoin-prices-put-central-washington-electrical-utilities-on-alert/article_6a5f2c70-543f-11eb-ac31-23139877c26c.html.

¹³ *See* Application, *supra* n.6, at 60 (stating the Receiving Utility for the project is "Unknown at this time. Commercial discussions for delivery of the power from the Project are in process.").

¹⁴ While SEPA regulations state agencies need not consider alternative locations for private projects on specific sites, that exemption does not apply where the proposal includes a "rezone." WAC 197-11-440(5)(d); *see also* *Barrie v. Kitsap Cty.*, 93 Wn.2d 843, 857 (1980) (holding County must consider alternative locations for shopping center because the project proposal included a rezone). To the extent the Council is considering changing the land use classification, consideration of alternative sites is authorized. *See id.*

¹⁵ *See, e.g.*, EFSEC, Kittitas Valley Wind Power Project Final Environmental Impact Statement, Ch. 2.6, (Feb. 1, 2007) <https://www.efsec.wa.gov/energy-facilities/kittitas-valley/kittitas-valley-sepa>.

¹⁶ *See* Letter from Brock Hoenes, WDFW, to EFSEC, *supra* n. 2.

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could consider areas zoned for industrial use or areas with habitat irreparably degraded by fire or other intensive use. As the Council weighs the need for solar energy against the potential impacts to the Sage-grouse and other endangered species, the existence of viable alternative sites for the project is an important factor.¹⁷

B. The Council Should Consider Measures to Mitigate Harmful Effects on Wildlife.

The Environmental Impact Statement should also consider whether the environmental harms from developing in the proposed site can be mitigated. The following is a non-exclusive list of environmental harms and potential mitigation measures that should be considered:

- *To mitigate the loss of critical habitat, consider preserving and restoring some lands in the project area.*

The project site includes a small amount of dwarf shrub-steppe and shrub-steppe habitat, as well as land enrolled in the Conservation Reserve Program. The Council could consider preserving these lands and imposing suitable buffers between these areas and the project site.¹⁸ While there are limits to the ability to restore shrub-steppe habitat,¹⁹ Avangrid could commit to restore an equivalent or greater area of the impacted land to native shrub-steppe over the long term. Restoring habitat with native plants could also reduce fire risk, which also would benefit the project and nearby communities.²⁰

- *To reduce avian collisions and fire risk from new transmission lines, consider minimizing new transmission lines or, if feasible, burying new lines.*

Electrical transmission lines can harm the Sage-grouse by further fragmenting their habitat and causing injury or death from collisions.²¹ The project proposal has two possible points of interconnection with existing transmission line. The least impactful alternative should consider using the closer point of interconnection, as well as the possibility of burying new transmission lines.

- *Because fences can fragment habitat and harm wildlife, consider limiting fencing to only where critically needed and using wildlife-friendly fence design.*

¹⁷ See *id.* at 2 (advising “relocation of [the Badger Mountain Solar Project] to lands that avoid adverse impacts to endangered species”).

¹⁸ See WDFW, *Management Recommendations for Washington’s Priority Habitats: Shrub Steppe*, (Updated Sept. 2020) <https://wdfw.wa.gov/publications/01333>.

¹⁹ See *id.* at 29.

²⁰ See *id.* at 8 (describing how areas dominated by invasive grasses are prone to more frequent and intense fires).

²¹ See Stinson, *Periodic Status Review for the Greater Sage-grouse*, *supra* n. 3, at 9.

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Fencing can restrict wildlife migration, which is especially important for species depending on an already-fragmented habitat. It can cause injury or death to birds or animals who collide with fences. Minimizing fences wherever possible could mitigate these impacts. If fences are critically necessary, the project should consider raising the fence four inches above grade, include periodic openings to facilitate wildlife passage, and use designs to minimize injury in the event of a wildlife collision. This may include clear markings to make the fence visible to birds, high-tensile fencing or barbed wire with a smooth wire on the lowest tier.²²

- *To preserve food sources for wildlife, consider restricting the use of pesticides and herbicides.*

Pesticides and herbicides can kill insects and suppress forbs that are an important part of the diet of juvenile Sage-grouse (and other species). Some chemicals also are highly toxic to wildlife or may harm the sagebrush on which many threatened species rely. Encouraging nonchemical techniques to control vegetation²³ or, if herbicides are applied, using only those shown to cause minimal harm could mitigate this impact²⁴.

Developing clean energy and protecting endangered species will, at times, conflict. A thoughtful analysis, based on the best available data, will help the Council and the public discern whether such a conflict necessarily exists here and, if it does, how to address it.

Thank you for your consideration of this comment.

Sincerely,



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²² See Colorado Parks & Wildlife, *Fencing with Wildlife in Mind*, 6-7, <https://cpw.state.co.us/Documents/LandWater/PrivateLandPrograms/FencingWithWildlifeInMind.pdf> (last accessed April 11, 2022) for examples of durable markers, such as PVC pipes, for fencing.

²³ See, e.g., Northwest Center for Alternatives to Pesticides, <https://www.pesticide.org/resources> (last visited April 12, 2022) for resources and consulting services.

²⁴ See WDFW, *Management Recommendations for Priority Species - Volume IV: Birds*, *supra* n. 3, Appendix A (stating organochlorine, organophosphate, and carbamate insecticides can be highly toxic to raptors and mammals, and their use in areas inhabited by golden eagles also should be avoided).