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2
3 **BEFORE THE STATE OF WASHINGTON**
4 **ENERGY FACILITY SITE EVALUATION COUNCIL**
5
6

In the Matter of Application No. 2013-01:

COUNCIL ORDER No. 872

TESORO SAVAGE

ORDER DETERMINING

LAND USE CONSISTENCY

VANCOUVER ENERGY

DISTRIBUTION TERMINAL

7
8 **NATURE OF THE PROCEEDINGS:** This matter involves an application (Application) filed on
9 August 29, 2013, by Tesoro Savage Petroleum Terminal LLC (Applicant) for a site certification
10 agreement to build and operate the Vancouver Energy Distribution Terminal (Facility) at the Port of
11 Vancouver (Site) in Vancouver, Washington. The Applicant's plans call for the Facility to be
12 capable of receiving up to an average of 360,000 barrels of crude oil per day by rail, storing this oil
13 on-site, and then loading the oil onto marine vessels for delivery to domestic refineries primarily
14 located on the West Coast of the United States.

15
16 **LAND USE CONSISTENCY:** RCW 80.50.090(2) requires the Energy Facility Site Evaluation
17 Council (EFSEC or Council) to "conduct a public hearing to determine whether or not the proposed
18 site is consistent and in compliance with city, county, or regional land use plans or zoning
19 ordinances." On May 9, 2014, EFSEC issued a Notice of Land Use Consistency Hearing and
20 scheduled the required public hearing in Vancouver, Washington for 6:00 p.m. on Wednesday, May
21 28, 2014.¹

22
23 The purpose of the land use hearing is "to determine whether at the time of application the proposed
24 facility was consistent and in compliance with land use plans and zoning ordinances."² EFSEC's
25 governing statute defines a "land use plan" as "a comprehensive plan or land use element thereof
26 adopted by a unit of local government" under specified laws.³ The statute further defines a "zoning
27 ordinance" as "an ordinance of a unit of local government regulating the use of land and adopted

¹ The Council sent this Notice to all interested persons on the mailing list for the Facility and also to all subscribers to EFSEC's general minutes and agenda list. Further, the Council purchased advertisements in The Columbian, the local daily newspaper of general circulation; a legal advertisement published on May 14, 2014; and a display advertisement published on May 18, 2014. Finally, the Council issued a media advisory on May 21, 2014.

² WAC 463-26-050.

³ RCW 80.50.020(14), which specifies plans adopted under chapters 35.63, 35A.63, 36.70, or 36.70A RCW, or as otherwise designated by chapter 325, Laws of 2007.

1 pursuant to” specified laws.⁴ In this order, the Council will refer to land use plans and zoning
2 ordinances collectively as “land use provisions” and will refer to its decision as pertaining to “land
3 use consistency.”
4

5 The Council’s evaluation of land use consistency is not dispositive of the Application⁵ and a
6 determination of land use consistency is neither an endorsement nor an approval of the project. The
7 evaluation pertains only to the general siting of categories of uses, taking into account only the Site
8 and not the Facility’s construction and operational conditions. Whether this particular Facility will
9 actually create on- or off-site impacts (including impacts to public safety and the environment) will
10 be considered separately through the State Environmental Policy Act (SEPA), during the Council’s
11 adjudication, and through the environmental permitting processes.⁶ The Council’s ultimate
12 recommendation to the Governor will not be made until after full and thorough consideration of all
13 relevant issues.
14

15 **REQUESTS TO DEFER LAND USE CONSISTENCY DETERMINATION:** In mid-May
16 2014, the Council received letters from a number of interested persons asking that EFSEC postpone
17 or cancel the land use consistency hearing.⁷ These letters generally contended that the Council had
18 not provided the public or the City of Vancouver with sufficient time to review the Tesoro Savage
19 proposal. The letters also cited to SEPA regulations and asked that EFSEC publish an environmental
20 impact statement (EIS) before holding its land use hearing. At least one letter complained that
21 EFSEC failed to specify a method for submitting written testimony. On May 20, 2014, the Applicant
22 sent a letter to EFSEC responding to these arguments and opposing any delay of the scheduled land
23 use consistency hearing.⁸
24

25 On May 21, 2014, the Council Manager sent individual response letters to each organization
26 explaining why EFSEC would not cancel the public hearing scheduled for May 28, 2014. The
27 Council Manager’s letter cited the legal requirements for the land use consistency hearing, reminded
28 the writers that the project application had been filed nearly nine months earlier, and clarified the
29 City of Vancouver’s role in the process. The Manager’s letters also reiterated the limited purpose of
30 the land use hearing and explained that although the Council would receive relevant testimony at the
31 hearing, EFSEC would not otherwise be soliciting or accepting public comment.

⁴ RCW 80.50.020(22), which specifies ordinances adopted pursuant to chapters 35.63, 35A.63, 36.70, or 36.70A RCW or Article XI of the state Constitution, or as otherwise designated by chapter 325, Laws of 2007.

⁵ In re Whistling Ridge Energy Project, Council Order No. 868 at 9 (October 6, 2011) (Whistling Ridge Order). A determination of land use inconsistency simply results in the Council’s further consideration of whether local land use provisions should be preempted. WAC 463-28-060(1), *see also* RCW 80.50.110(2) and WAC 463-28-020. If they are preempted, the Council will include in the proposed site certification agreement conditions designed to recognize the purpose of the preempted provisions. WAC 463-28-070.

⁶ RCW 80.50.090(3), RCW 80.50.040(9), (12), WAC 463-30, WAC 463-47, WAC 463-76, WAC 463-78.

⁷ The Council received such letters from Friends of the Columbia Gorge (May 15, 2014), Columbia Riverkeeper (May 16, 2014), Columbia Waterfront, LLC (May 20, 2014), and hundreds of form letters and e-mails with substantially the same message from individual members of these organizations or the public.

⁸ Letter from Jay P. Derr and Tadas Kisielius, Van Ness Feldman, LLP (May 20, 2014).

1 On May 22, 2014, E. Bronson Potter, Chief Assistant City Attorney for the City of Vancouver, filed
2 with EFSEC a Request to Defer Land Use Consistency Determination and Leave Record Open
3 (City's Deferral Request). The City's Deferral Request asked the Council to keep the record open
4 and allow further public participation until all environmental analysis could be completed.⁹ The
5 City's Deferral Request also explained the scope of the Vancouver Fire Official's ongoing inquiry
6 into the Tesoro Savage proposal and the City's own desire to obtain a complete and final EIS before
7 completing its internal project review.¹⁰

8
9 **COUNCIL PROCESS ON LAND USE CONSISTENCY:** On May 28, 2014, the Council
10 conducted a land use hearing at the Clark County Public Service Center in Vancouver, Washington,
11 to hear testimony regarding whether the Site was consistent and in compliance with the City of
12 Vancouver's local land use provisions. The following EFSEC members were present: Bill Lynch
13 (Chair) Cullen Stephenson (Department of Ecology), Joe Stohr (Department of Fish and Wildlife),
14 Andrew Hayes (Department of Natural Resources), Dennis Moss (Utilities and Transportation
15 Commission), Christina Martinez (Department of Transportation), Bryan Snodgrass (City of
16 Vancouver), Jeff Swanson (Clark County), and Larry Paulson (Port of Vancouver).¹¹ Adam E.
17 Torem, Administrative Law Judge, presided over the hearing.

18
19 Jay P. Derr, Van Ness Feldman, LLP, represented the Applicant.¹² The Applicant also filed written
20 testimony and presented four slides.¹³ Jon Wagner and E. Bronson Potter represented the City of
21 Vancouver,¹⁴ which also filed written testimony.¹⁵ The Council also received testimony from the
22 following persons: Todd Coleman, Port of Vancouver;¹⁶ Nathan Baker, Friends of the Columbia
23 Gorge;¹⁷ Lauren Goldberg, Staff Attorney, Columbia Riverkeeper;¹⁸ Matt Grady, Columbia
24 Waterfront, LLC;¹⁹ Don Steinke, citizen;²⁰ Chris Connolly, citizen;²¹ Karen Axell, Rosemere

⁹ City's Deferral Request at 1.

¹⁰ *Id.* at 2.

¹¹ Liz Green-Taylor (Department of Commerce) was not present but reviewed the transcript of the hearing and examined the written testimony submitted to the Council.

¹² Land Use Public Meeting Transcript (TR) at 10–18 (May 28, 2104).

¹³ Applicant Tesoro Savage's Statement of Land Use Consistency (Applicant's Statement).

¹⁴ TR at 18-24.

¹⁵ City of Vancouver's Comments Regarding Consistency of Proposal with Land Use Plans and Zoning Regulations (City's Comments).

¹⁶ TR at 26-31. The Port also filed written testimony in the form of a letter from Mr. Coleman dated May 27, 2014 (Port's Letter)

¹⁷ TR at 31-36. The Friends of the Columbia Gorge also filed written testimony in the form of a letter written on behalf of the Friends of the Columbia Gorge, Columbia Riverkeeper, the Northwest Environmental Defense Center, the Sierra Club, and the Center for Biological Diversity dated May 28, 2014 (FOCG Letter).

¹⁸ TR at 36-41. Columbia Riverkeeper also signed the FOCG Letter.

¹⁹ TR at 41-46. Columbia Waterfront also filed written testimony. Testimony of Matt Grady, AICP on Behalf of Columbia Waterfront LLC (Columbia Waterfront Written Testimony).

²⁰ TR at 48-49. Mr. Steinke also filed written testimony in the form of a picture of the proposed Columbia Waterfront development and associated text.

²¹ TR at 49-52.

1 Neighborhood Association;²² Den Mark Wichar, citizen;²³ Marla Nelson, Northwest Environmental
2 Defense Center;²⁴ Cathryn Chudy, citizen;²⁵ Judy Hudson, League of Women Voters, Clark
3 County;²⁶ Noreen Hine, citizen;²⁷ Lisa Ross, citizen;²⁸ and Marc Jander, citizen.²⁹ Assistant Attorney
4 General Matthew Kernutt, Counsel for the Environment, was present for the land use hearing.³⁰
5

6 The Applicant did not obtain certificates from local authorities attesting to the land use consistency.³¹
7 Therefore, the Applicant retains the burden of proving the Site is consistent.³²
8

9 The Site is located in an area designated “Industrial” by the City of Vancouver’s Comprehensive
10 Plan 2011-2030 (Plan).³³ Allowable subtypes include “IH Heavy Industrial” that is generally
11 intended for “[i]ntensive industrial manufacturing, service, production or storage often involving
12 heavy truck, rail or marine traffic, or outdoor storage and generating vibration, noise and odors.”³⁴
13

14 Vancouver’s zoning ordinances zone the Site “IH-Heavy Industrial,”³⁵ a designation that allows
15 intensive industrial uses such warehousing, freight movement, and railroad yards.³⁶ Proper activities
16 in the IH zone include the use of raw materials, significant outdoor storage, and heavy rail traffic.³⁷
17 Permitted uses include storage and movement of large quantities of materials or products outdoors
18 and uses associated with significant rail traffic.”³⁸
19

20 The Applicant contended that the Site is consistent with all relevant portions of the City’s land use
21 provisions.³⁹ The Applicant provided a history of its conferences and consultations with the City⁴⁰

²² *Id.* at 52-53.

²³ *Id.* at 53-56. Mr. Wichar also filed written testimony. EFSEC Hearing, Vancouver WA, 28 May 2014, Re: Tesoro Savage Energy Distribution Terminal, Proposed for Port of Vancouver.

²⁴ TR at 56-59. The Northwest Environmental Defense Center also signed the FOCG Letter.

²⁵ TR at 59-61. Ms. Chudy also filed written testimony. Tesoro Savage Oil Terminal Proposal Submitted at the EFSEC hearing in Vancouver, WA May 28, 2014.

²⁶ TR at 62-63.

²⁷ *Id.* at 63-65.

²⁸ *Id.* at 65-67.

²⁹ *Id.* at 67-68.

³⁰ *Id.* at 24-25,

³¹ *Id.* at 12 (referring to *id.* at 8), 18-19, 22.

³² WAC 463-26-090. In cases where such certificates are obtained, they are regarded as *prima facie* proof of consistency and compliance with local land use plans and zoning ordinances absent contrary demonstration by anyone present at the hearing.

³³ Plan at 1-12 (Figure 1-6); City’s Comments at 5.

³⁴ *Id.* at 1-13 (Table 1-5).

³⁵ Vancouver Municipal Code (VMC) 20.130.010; VMC 20.130.020; Applicant’s Statement at Exhibit 3 and Exhibit 9 at 7, City’s Comments at 20.

³⁶ VMC 20.440.020(C); City’s Comments at 20-21.

³⁷ *Id.*

³⁸ VMC 20.160.020(D)(5); City’s Comments at 20-21.

³⁹ TR at 10-18; Applicant’s Statement at 10-15. The Applicant also argued that the Site is consistent and in compliance with the rest of the Plan’s policies and the rest of the City’s pertinent zoning ordinances. *Id.* at 15-16.

1 and submitted a matrix illustrating the project Site’s consistency with each pertinent policy contained
2 in the City’s Plan.⁴¹ The Applicant also submitted a draft planning staff report that would have
3 found that “subject to certain concerns and recommended conditions, the applicant has demonstrated
4 the proposal is in compliance with both the land use and development regulations of the City of
5 Vancouver.”⁴²

6
7 The City of Vancouver agreed with the Applicant that the Site is in an area designated as heavy
8 industrial in the Plan⁴³ and would be an allowable use in the heavy industrial zone.⁴⁴ The City also
9 agreed that the Applicant’s development plans for the Site would meet all applicable setback
10 provisions.⁴⁵ However, the City asserted that the City either did not yet have sufficient information
11 to approve all aspects of the project (including minimizing interference with surface navigation and,
12 allowing for safe, unobstructed passage of fish and wildlife) or that it had sufficient information but
13 that “further review and approval would be required” (including stormwater and certain engineering
14 reports).⁴⁶ The City also reiterated its request that EFSEC defer its land use consistency
15 determination.⁴⁷

16
17 Todd Coleman, Chief Executive Officer for the Port of Vancouver, reiterated the Port’s heavy
18 industrial zoning and history of handling a wide variety of cargo, including petroleum products, by
19 rail and maritime traffic.⁴⁸ Mr. Coleman testified that the project and related rail expansion at the
20 Port were consistent with the economic development policies set out in the City’s Plan.⁴⁹

21
22 Nathan Baker, Staff Attorney for Friends of the Columbia Gorge, argued for a broad interpretation of
23 the land use provisions that EFSEC must consider as part of its land use consistency determination
24 and asked the Council to delay that determination until an EIS could be completed and more
25 information made available.⁵⁰

⁴⁰ TR at 12-14, Applicant’s Statement at Exhibits 1, 2, 7, 8.

⁴¹ Applicant’s Statement at Exhibit 12.

⁴² *Id.* at Exhibit 9 (City of Vancouver Staff Determination of Consistency and Compliance with Land Use Plans and Zoning Ordinances (December 16, 2013) (Staff Determination)). The Staff Determination at page 4 (certification determination) and page 69 (decision) separately state the city planning staff’s position that subject to certain recommended conditions contained in the report, the Applicant’s proposal can meet all applicable zoning-related provisions of the Vancouver Land Use and Development Code. The Applicant acknowledged that the City never issued or adopted this staff report. TR 13.

⁴³ City’s Comments at 5.

⁴⁴ *Id.* at 20.

⁴⁵ *Id.* at 20-22 (subject to review to determine final compliance).

⁴⁶ *Id.* at 5-19, 21-78.

⁴⁷ City’s Deferral Request.

⁴⁸ TR at 27-28 Port’s Letter at 1-2.

⁴⁹ *Id.* at 28-31, Port’s Letter at 3.

⁵⁰ *Id.* at 32-36, FOCG Letter at 2-39.

1 Lauren Goldberg, Staff Attorney for the Columbia Riverkeeper, agreed with Mr. Baker's testimony
2 and focused attention on alleged geologic hazards and shoreline issues present at the proposed Site.⁵¹

3
4 Matt Grady of Columbia Waterfront, LLC, contended that the Council did not have sufficient
5 information to make a land use determination.⁵²

6
7 Members of the public testified that a major oil terminal would not be compatible with Vancouver's
8 land use plans for urban residential developments along its waterfront,⁵³ presented too much risk of
9 environmental degradation,⁵⁴ was inconsistent with the community goals section of the City's
10 development code,⁵⁵ was unsustainable,⁵⁶ was inconsistent with a broad spectrum of local land use
11 provisions,⁵⁷ and also that the Council should wait for a completed EIS to take action.⁵⁸

12 13 **COUNCIL ACTION AND DISPOSITION:**

14 15 **Preliminary Issues:**

16
17 The Council is not persuaded to defer its land use consistency decision until the SEPA process is
18 complete or for other reasons suggested by those who have requested a delay. Our present task is to
19 determine whether the Site is consistent with the pertinent portions of the City's land use provisions,
20 not to decide whether the City of Vancouver might lawfully allow the terminal under its own
21 authority or whether the Governor should ultimately approve or reject the Application.⁵⁹ At this
22 stage of the EFSEC process, it is not necessary to conduct a complete analysis of all possible
23 environmental or other impacts potentially posed by the Application. Issues pertaining to the
24 construction and operational conditions of the Facility will be addressed later through SEPA, during
25 the adjudication, and through the environmental permitting processes. Our land use consistency
26 determination is a preliminary and very limited step that is proper to take now, based on the limited
27 sort of record that is obtained through the statutorily required public hearing.

28
29 The Council more specifically declines to defer its land use consistency decision for the following
30 reasons:

31
32 **SEPA does not require completion of an EIS prior to the City's consideration of the very**
33 **narrow land use consistency issue before the Council.** The Council disagrees with the contention

⁵¹ TR at 37-41, *see also* FOCG Letter at 2-39

⁵² *Id.* at 42-46, Columbia Waterfront Written Testimony at 1.

⁵³ *Id.* at 48-49.

⁵⁴ *Id.* at 53, 55, 60, 65.

⁵⁵ *Id.* at 54-56.

⁵⁶ *Id.* at 49, 58

⁵⁷ *Id.* at 52, 54-55, 58-59.

⁵⁸ *Id.* at 52, 57-58, 60.

⁵⁹ Whistling Ridge Order at 9-10.

1 that an EIS must precede the City’s consideration of land use consistency. First, EFSEC is the SEPA
2 lead agency for “all governmental actions relating to energy facilities for which certification is
3 required under chapter 80.50 RCW”⁶⁰ and RCW 80.50.180 exempts from the requirement of an EIS
4 all local government actions related to EFSEC projects.

5
6 Second, the contention is incorrect that VMC 20.790.130(C) and VMC 20.790.620(D) (1) require
7 completion of an EIS prior to the City’s consideration of land use consistency. RCW 80.50.110
8 preempts both provisions of the Vancouver Municipal Code. Moreover, these ordinances do not, by
9 their own terms, require the City to consider an EIS prior to the City’s evaluation of land use
10 consistency. VMC 20.790.130(C) requires the City to consider an EIS before the City makes a
11 “decision” on a “proposal” but under RCW 80.50, the City’s power to make such a decision is
12 preempted and state law controls the decision making process. Only the Governor can approve or
13 reject the Application. As required by state law, the City is simply asked to provide evidence to
14 EFSEC concerning land use consistency, evidence that has no regulatory effect with regard to the
15 Application. Similarly, VMC 20.790.620(D)(1) says that the City “may deny a permit or approval
16 for a proposal on the basis of SEPA,” so long as certain findings are made related to an EIS but
17 under RCW 80.50.100 it is only the Governor – and not the City -- who can deny a permit or
18 approval for the Application.

19
20 **SEPA does not require completion of an EIS prior to EFSEC’s very narrow land use**
21 **consistency decision.** The Council also disagrees with the contention that it must complete an EIS
22 prior to making preliminary decisions such as the land use consistency decision. As discussed above,
23 RCW 80.50.100 provides that only the Governor has the power to make a legally operative decision
24 about the Application. At the end of its evaluation process, EFSEC prepares a recommendation to
25 the Governor addressing all relevant issues. EFSEC will complete its EIS before making its
26 recommendation to the Governor and will provide that EIS to the Governor for his use in making a
27 legally operative decision about the Application. This is consistent with the SEPA rules, which
28 require that the EIS be completed “in time for the final statement to be included in appropriate
29 recommendations or reports on the proposal.”⁶¹ Significantly, the SEPA rules state that
30 “[a]ppropriate consideration of environmental information shall be completed before an agency
31 commits to a particular course of action.”⁶² Here, the land use consistency decision does not commit
32 either EFSEC or the Governor to any particular course of action with regard to the Application and
33 builds no momentum toward approval of that Application.

34
35 The arguments offered to EFSEC about WAC 197-11-535 do not change this conclusion. WAC
36 197-11-535(1) does not require completion of an EIS prior to a non-SEPA public hearing such as the

⁶⁰ WAC 197-11-938(1).

⁶¹ WAC 197-11-406. This rule continues that “The statement shall be prepared early enough so it can serve practically as an important contribution to the decision making process and will not be used to rationalize or justify decisions already made.” The EIS will precede both EFSEC’s recommendation and the Governor’s decision.

⁶² WAC 197-11-055(2) (c).

1 land use hearing. WAC 197-11-535(1) states that non-SEPA public hearings on a proposal should
2 be open to consideration of environmental impacts together with “any environmental document that
3 is available.” WAC 197-11 is clear that the term “environmental document” means “any written
4 document prepared under [the SEPA rules]” and does not mean only an EIS.⁶³ WAC 197-11-535(1)
5 is equally clear that consideration of environmental documents at non-SEPA public hearings only
6 applies to documents that are “available.”⁶⁴

7
8 WAC 197-11-535(4) is similarly inapplicable to the land use hearing because by its own terms the
9 rule applies only to public hearings held under WAC 197, the SEPA rules. WAC 197-11-535(4)
10 states in pertinent part that “[i]f a public hearing is required under [the SEPA rules], it shall be open
11 to discussion of all environmental documents and any written comments that have been received by
12 the land agency prior to the hearing.” EFSEC’s land use hearing is required by RCW 80.50.090(2),
13 not the SEPA rules. Moreover, the rule addresses consideration of “environmental documents”
14 which, as described above, does not mean only an EIS.

15
16 **The record does not support a conclusion that the public had insufficient time to prepare**
17 **comments.** Although some commenters alleged that the public was provided with insufficient time
18 to prepare comments, they have cited no legal authority for the proposition that the time allotted was
19 too short and have offered no evidence that members of the public, in fact were, unable to provide
20 comments on the pertinent issues in the time allowed. Moreover, most – if not all – of the issues
21 about which the public expressed concern at the hearing fall outside the very narrow land use
22 consistency decision currently before the Council. The public will have ample opportunity to
23 comment on other issues of concern through the SEPA process, during the adjudication, and during
24 the environmental permitting processes.

25
26 **The record does not support a conclusion that the City’s VMC Type II process applies to the**
27 **Council’s land use consistency decision or that the City had insufficient time to prepare**
28 **comments.** The record reflects that the Vancouver City Council and planning staff acknowledged
29 that the City’s Type II process is legally inapplicable to the City’s review of the Application.⁶⁵ The
30 City’s land use staff determination stated: “If this were not an EFSEC project the city would have
31 processed the application using the Type II process. However, City Council confirmed at its

⁶³ WAC 197-11-744, *see also* WAC 197-11-500 (“This part provides rules for: (1) notice and public availability of environmental documents, especially environmental impact statements”), WAC 197-11-708 (“Adoption” means an agency’s use of all or part of an existing environmental document ... to prepare an EIS or other environmental document”).

⁶⁴ Moreover, the rule applies only to non-SEPA public hearings on “proposals,” which SEPA defines as proposed actions to license, fund, or undertake any activity that will modify the environment. WAC 197-11-784, WAC 197-11-704. Thus, EFSEC’s very limited land use hearing was not a hearing on the full proposal as that term is defined in SEPA.

⁶⁵ Applicant’s Statement at 4 & n 2, Exhibit 9 at 2. Although the City and the Applicant evidently agreed that as between themselves they would use the process as a means of evaluating land use consistency, Applicant’s Statement at 4, a voluntary agreement reached between parties before EFSEC has no bearing on the actual legal status of the Type II process under RCW 80.50.

1 Nov. 4, 2013, workshop, staff was to review whether the applicant could meet city standards
2 administratively.”⁶⁶ Indeed, the Type II process does not, by its own terms, apply here because the
3 Application is not “subject to review under ... the Vancouver Municipal Code” and the City will not
4 be “determining whether [this] development [application is, or can be] approved or conditionally
5 approved....”⁶⁷ Moreover, even if the City attempted to make the Type II process binding in this
6 proceeding, RCW 80.50.110 preempts the City’s processing procedures and RCW 80.50.010(5)
7 requires the avoidance of duplicative processes.

8
9 Finally, the City had eleven months between June 2013 and the May 2014 land use hearing to
10 evaluate the Site for consistency and compliance with local land use provisions.⁶⁸ While the City
11 now argues that it needs additional information and time for its review, the substantive areas that the
12 City alleges need additional review fall outside of the narrow scope of the Council’s land use
13 consistency decision and the Council is deferring consideration of these substantive areas to a later
14 date. With regard to the issues that are within the scope of the Council’s current land use consistency
15 decision, the City has alleged no need for additional time and, as indicated in more detail below, has
16 confirmed that the Site is consistent and in compliance with local land use provisions.

17
18 **The hearing notice was not defective.** The Council disagrees with the contention that the land use
19 hearing notice was defective because it did not specify a mailing or email address for submitting
20 written testimony or state whether the Council would accept written testimony after the hearing. In
21 accordance with RCW 80.50.090 and WAC 463-26-060, the purpose of the land use hearing was to
22 take public testimony at the hearing. There is no legal requirement for the Council to accept written
23 testimony by mail or email separate from the hearing or to accept written testimony after the hearing.
24 As a result, there was no reason for the hearing notice to address written submission separate from
25 the public hearing.⁶⁹

26
27 **Land Use:**

28
29 **RCW 80.50.090(2).** RCW 80.50.090(2) requires the Council to determine whether the Site is
30 “consistent and in compliance” with the portions of the City of Vancouver’s land use provisions that
31 meet the statutory definitions of the terms “land use plans” and “zoning ordinances” RCW
32 80.50.020.

33
34 **Definitions of “Land Use Plan” and “Zoning Ordinances.”** The term “land use plan” is defined
35 by statute as a “comprehensive plan or land use element thereof adopted ... pursuant to” one of the

⁶⁶ Applicant’s Statement at Exhibit 9 at 2.

⁶⁷ VMC 20.210.010(B), (C).

⁶⁸ Applicant’s Statement at 4, Exhibit 1 (Pre-Application Conference Request from June 2013), Exhibit 7 (Pre-Application Conference Report dated June 27, 2013); Exhibit 9 (Staff Determination).

⁶⁹ In any event, the notice stated EFSEC’s mailing address and its website (which shows EFSEC’s email address on the first page).

1 listed planning statutes.⁷⁰ EFSEC interprets this definition as referring to the portions of a
2 comprehensive plan that outline proposals for an area’s development, typically by assigning general
3 uses (such as housing) to land segments and specifying desired concentrations and design goals.⁷¹
4 Comprehensive plan elements and provisions that do not meet this definition are outside of the scope
5 of the Council’s land use consistency analysis.

6
7 The term “zoning ordinances” is defined by statute as those ordinances “regulating the use of land
8 and adopted pursuant to” one of the listed planning statutes.⁷² EFSEC has interpreted this definition
9 as referring to those ordinances that regulate land use by creating districts and restricting uses in the
10 districts (i.e., number, size, location, type of structures, lot size) to promote compatible uses.⁷³
11 Ordinances that do not meet this definition are outside of the scope of the Council’s land use
12 analysis.

13
14 EFSEC has defined the phrase “consistent and in compliance” based on settled principles of land use
15 law: “Zoning ordinances require compliance; they are regulatory provisions that mandate
16 performance. Comprehensive plan provisions, however, are guides rather than mandates and seek
17 consistency.”⁷⁴

18
19 **Legislative History.** The legislative history regarding EFSEC’s land use consistency determination
20 also supports a narrow construction of the statutes defining “land use plan” and “zoning ordinances.”
21 RCW 80.50.090 originally required the Council to conduct a public hearing in the county of a
22 proposed site within 60 days of receipt of an application for site certification. EFSEC was required
23 to determine at this initial public hearing whether the proposed site was consistent with local land
24 use plans or zoning determinations. On December 15, 2000, the Work Group of the Joint Legislative
25 Task Force on Energy Facility Siting issued its report to the Legislature and the Governor (JLARC
26 Report). The JLARC Report included a recommendation to establish an informational hearing for
27 the public prior to the land-use consistency hearing, and to eliminate the 60-day requirement for
28 holding the land use consistency hearing.⁷⁵ The Legislature enacted this proposed recommendation
29 during the 2001 legislative session.⁷⁶

30
31 The fact that the land use consistency hearing was conducted so early in the EFSEC process prior to
32 the 2001 amendment demonstrates that the Council was only required to take a high-level view of
33 the local government’s “land use plan” and “zoning ordinances.” A hearing that would have

⁷⁰ RCW 80.50.020(14).

⁷¹ In re Northern Tier Pipeline, Council Order No. 579 (Northern Tier Pipeline Order) at 9 (November 26, 1979).

⁷² RCW 80.50.020(22).

⁷³ Northern Tier Pipeline Order at 10.

⁷⁴ Whistling Ridge Order at 10 n 15.

⁷⁵ The JLARC Report is set forth in its entirety on the EFSEC web page at:

<http://www.efsec.wa.gov/taskforce/default.shtm#finrep>. This recommendation is found on p. 15 of the JLARC Report.

⁷⁶ Engrossed House Bill 2247, Section 7, Chapter 214, Laws of 2001.

1 considered all the potential impacts and the appropriate levels of mitigation for a proposed project
2 would not have been feasible. Nothing in the legislation indicated that the scope of the land use
3 consistency hearing was changed by simply removing the 60-day requirement for holding the
4 hearing.

5
6 In 2006, the Legislature added statutory references to the Growth Management Act (GMA) to the
7 definitions of “land use plan” and “zoning ordinances.”⁷⁷ Nothing in the legislative history indicates
8 that the Legislature intended EFSEC to expand the scope of its land use consistency review to
9 include such items as shoreline master programs or critical area ordinances. By adding references to
10 Chapter 36.70A RCW, the Legislature simply recognized that some jurisdictions were now planning
11 under GMA.

12
13 Although it appears that EFSEC may have included the Shoreline Management Act, chapter 90.58
14 RCW, or critical area ordinances as part of its land use consistency deliberations on occasion,
15 EFSEC expressly rejects this approach in this opinion. As EFSEC has previously recognized: the
16 definitions of “land use plans” and “zoning ordinances” do not refer to chapter 90.58 RCW as
17 authority; and shoreline master programs are subject to administrative review at the state level.⁷⁸
18 The legislative history does not support an expanded review of what constitutes a “land use plan” or
19 “zoning ordinances”. Furthermore, a restricted reading of these definitions is consistent with the
20 Washington Courts’ determination that the Growth Management Act is not to be liberally
21 construed.⁷⁹

22
23 **The City’s Land Use Plan.** The portions of the Plan that meet the statutory definition are within
24 Chapter 1 (Community Development). That chapter defines itself as “[e]nsuring that different land
25 uses work together to form compatible and cohesive neighborhoods, business districts and
26 subareas...” and as describing current land uses and directing how future development should
27 occur.⁸⁰ The specific portions of Chapter 1 that meet EFSEC’s definition are the land use map and
28 the associated definitions. The land use map “officially designates the type and intensity of land uses
29 allowed on individual properties...”⁸¹ The map designates the area of the Site as “Industrial.”⁸²
30 Associated definitions allow subtypes within such Industrial areas, including “IH Heavy Industrial”
31 which are generally intended for “[i]ntensive industrial manufacturing, service, production or storage
32 often involving heavy truck, rail or marine traffic, or outdoor storage and generating vibration, noise
33 and odors.”⁸³

⁷⁷ RCW 80.50.020(16), (17); Engrossed Substitute House Bill 1020, Section 1, Chapter 196, Laws of 2006; Substitute House Bill 2402, Section 1, Chapter 205, Laws of 2006.

⁷⁸ Northern Tier Pipeline Order at 10-11.

⁷⁹ *Spokane County vs. Eastern Washington Growth Management Hearings Board*, 173 Wn. App. 310, 337, 293 P.3d 1248 (2013).

⁸⁰ Plan at 1-1, *see also id.* at iii (the City’s vision for land use and development is in Chapter 1).

⁸¹ *Id.* at 1-11.

⁸² *Id.* at 1-12 (Figure 1-6).

⁸³ *Id.* at 1-13 (Table 1-5).

1 The development policies in Chapter 1 fall outside of EFSEC’s definition of a land use plan that it
2 must consider because these policies do not assign uses to land segments.⁸⁴ The balance of the Plan
3 (Chapters 2 through 7) also fall outside of EFSEC’s definition of land use plan because, as the Plan
4 itself indicates, only Chapter 1 addresses the “use” of land by assigning general uses to land
5 segments and Chapters 2 through 7 do not.⁸⁵ The Council observes that with respect to the county-
6 wide planning policies listed by the Legislature to guide comprehensive planning, the Washington
7 Courts have recognized that “some of them are mutually competitive”.⁸⁶ So even if the Council did
8 examine all of the policies in Chapters 2 through 7, it is not necessary for development at the Site to
9 advance each of the policies.

10
11 **The City’s Zoning Ordinances.** The portions of the City’s zoning ordinances that meet the
12 statutory definition are the City’s zoning map, development restrictions, and associated definitions.
13 The Site is zoned “IH-Heavy Industrial” on the zoning map.⁸⁷ The IH-Heavy Industrial zone is an
14 appropriate location for intensive industrial uses including warehousing and freight movement,
15 railroad yards, with allowable activities in the IH zone including those that use raw materials, require
16 significant outdoor storage, and generate heavy truck and/or rail traffic.⁸⁸ Uses permitted within the
17 IH zone include “storage and movement of large quantities of materials or products indoors and/or
18 outdoors; associated with significant truck and/or rail traffic.”⁸⁹ VMC 20.440.030(B) defines uses
19 that are permitted in the IH zone, including “Warehouse/Freight Movement.”⁹⁰ VMC 20.440.040
20 establishes development restrictions associated with the IH-Heavy Industrial zone.⁹¹

21
22 **The Test for Consistency and Compliance.** Under the test previously established by the Council,
23 the Council considers whether the pertinent local land use provisions “prohibit” the Site “expressly
24 or by operation clearly, convincingly and unequivocally.”⁹² If the Site is permitted either outright or
25 conditionally, it is consistent and in compliance with the local land use provisions.⁹³

26
27 The Site is consistent with the pertinent portions of the Plan and zoning ordinances because neither
28 the pertinent portions of the Plan nor the pertinent portions of the zoning ordinances clearly,
29 convincingly and unequivocally prohibit the Site. To the contrary, the Plan specifically allows the

⁸⁴ *Id.* at 1-14 – 1-16,

⁸⁵ *Id.* at iii (“Chapter 1, Community Development describes the vision for land use and development of the built environment”).

⁸⁶ *Quadrant Corporation v. Central Puget Sound Growth Management Hearings Board*, 154 Wn.2d 224, 246, 110 P.3d 1132 (2005) (quoting Richard L. Settle, *Washington’s Growth Management Revolution Goes to Court*, 23 Seattle U. L. Rev. 5, 11 (1999)); *Spokane County v. Eastern Washington Growth Management Hearings Board*, 173 Wn. App. 310, 333, 293 P.3d 1248 (2013).

⁸⁷ VMC 20.130.010; VMC 20.130.020; Applicant’s Statement at Exhibit 3 and Exhibit 9 at 7, City’s Comments at 20.

⁸⁸ VMC 20.440.020(C), City’s Comments at 20-21.

⁸⁹ VMC 20.160.020(D)(5) City’s Comments at 20-21.

⁹⁰ Table 20.440.030-1.

⁹¹ Table 20.440.040-1.

⁹² *In re TransMountain Pipeline*, Council Order 616 at 3 (May 26, 1981).

⁹³ *Id.*

1 proposed use in the area where the Site is located.⁹⁴ The Plan designates that area as “Industrial”⁹⁵
2 and allows within it the “IH Heavy Industrial” subtype, which is generally intended for “[i]ntensive
3 industrial manufacturing, service, production or storage often involving heavy truck, rail or marine
4 traffic, or outdoor storage and generating vibration, noise and odors.”⁹⁶
5

6 Similarly, the pertinent zoning ordinances do not clearly, convincingly and unequivocally prohibit
7 the Site. The Site is zoned “IH-Heavy Industrial,”⁹⁷ which is designated as appropriate for intensive
8 industrial uses such warehousing, freight movement, and railroad yards.⁹⁸ Proper activities in the IH
9 zone include the use of raw materials, significant outdoor storage, and heavy rail traffic.⁹⁹ Permitted
10 uses include storage and movement of large quantities of materials or products outdoors and uses
11 associated with significant rail traffic.¹⁰⁰ The Site is permitted outright in the IH zone.¹⁰¹ The Site
12 also meets the development standards associated with the IH-Heavy Industrial zone.¹⁰²
13

14 It follows that under the minimal threshold for determining land use consistency, the Site is
15 consistent and in compliance with the City’s land use provisions. As noted by the Applicant, the
16 City, and several others presenting testimony, the Supreme Court’s recent decision in *Friends v.*
17 *EFSEC*¹⁰³ establishes that the land use consistency determination is one in which EFSEC may only
18 find a site inconsistent if the Site is contrary to *both* the land use plan and the zoning ordinances.
19

20 Thus, *Friends* has no impact on our land use consistency evaluation because the Site is both
21 consistent with the pertinent portions of the Plan and in compliance with the pertinent zoning
22 ordinances.¹⁰⁴
23

24 Having fully considered all testimony and evidence offered at the hearing, the Council determines
25 under RCW 80.50.090(2) and WAC 463-26-110 that the Applicant’s proposed Site for the Facility is

⁹⁴ City’s Comments at 5 (“The proposed site of the Oil Terminal is in an area designated as industrial by the comprehensive plan. Comment: The development of the proposed oil terminal is consistent with this designation.”)

⁹⁵ Plan at 1-12 (Figure 1-6).

⁹⁶ *Id.* at 1-13 (Table 1-5).

⁹⁷ VMC 20.130.010; VMC 20.130.020; Applicant’s Statement at Exhibit 3 and Exhibit 9 at 7, City’s Comments at 20.

⁹⁸ VMC 20.440.020(C); City’s Comments at 20-21.

⁹⁹ VMC 20.440.020(C); City’s Comments at 20-21.

¹⁰⁰ VMC 20.160.020(D)(5); City’s Comments at 20-21.

¹⁰¹ VMC 20.440.030(B) (Table 20.440.030-1), City’s Comments at 21.

¹⁰² VMC 20.440.040 (Table 20.440.040-1), Applicant’s Statement at Exhibit 2 at 46, Exhibit 7 at lines 155-165, Exhibit 9 at 708, *see also* City’s Comments at 21-22.

¹⁰³ *Friends of the Columbia Gorge v. Energy Facility Site Evaluation Council*, 178 Wn.2d 320, 344-46, 310 P.3d 780 (2013).

¹⁰⁴ Because the Council is holding that the Site is consistent with both of the City’s land use provisions, rather than consistent with the Plan but not the zoning ordinances, or vice versa, we need not reach the City’s arguments focusing on the proper interpretation of the word “or” in RCW 80.50.090(2) and the *Friends* decision. City of Vancouver’s Response to Applicant’s Argument on Statutory Interpretation (July 14, 2014). For this same reason, the Council does not address Applicant Tesoro Savage’s Motion to Strike (July 15, 2014), nor the City of Vancouver’s Response to Applicant’s Motion to Strike (July 15, 2014).

1 consistent and in compliance with the portions of the City of Vancouver’s land use plan and zoning
2 ordinances that meet the statutory definitions of those terms found in RCW Chapter 80.50.

3
4 We note that this Council Order is limited to the statutorily mandated land use consistency
5 determination set out in RCW 80.50.090(2). This Council Order does not preclude the Council’s
6 future consideration of other issues¹⁰⁵ during the SEPA process, environmental permitting, or the
7 adjudication to be held pursuant to RCW 80.50.090(3).

8
9 **FINDINGS OF FACT**

10
11 (1) The Council conducted a land use hearing on May 28, 2014, in Vancouver, Washington,
12 pursuant to RCW 80.50.090(2). The Council received testimony from the Applicant, the
13 City of Vancouver, and all others who wished to be heard on the issue of land use
14 consistency for the Vancouver Energy Distribution Terminal.

15
16 (2) The Applicant did not present certificates from local authorities attesting to the proposed
17 project’s consistency or compliance with local land use plans and zoning ordinances.

18
19 (3) The proposed Site is located in the City of Vancouver, Clark County, Washington.

20
21 (4) The City of Vancouver’s Comprehensive Plan classifies the proposed Site as “industrial.”
22 The subtype “heavy industrial” is intended to include intense industrial storage involving rail
23 or marine traffic, or outdoor storage.¹⁰⁶

24
25 (5) The City of Vancouver’s zoning code designates the proposed Site as “heavy industrial.”
26 The heavy industrial designation allows intensive industrial uses such as warehousing, freight
27 movement, and railroad yards. Permitted activities in this zone include significant outdoor
28 storage and heavy rail traffic. Permitted uses include storage and movement of large
29 quantities of products outdoors and uses associated with significant rail traffic.¹⁰⁷

30
31 (6) The Port of Vancouver has a history of handling petroleum products by rail and marine
32 traffic within its heavy industrial zone.

33
34 (7) Although the City of Vancouver and others expressed concerns regarding the Application, no
35 one submitted information indicating the comprehensive plan or zoning ordinances prohibit
36 the site either expressly or by operation, clearly, convincingly or unequivocally.

¹⁰⁵ Potential issues not addressed by this land use consistency determination include, but are not limited to, potential on- or off-site impacts to public safety and the environment (including but not limited to shoreline and stormwater management, critical areas ordinances, fire and spill response and impacts to neighborhoods)

¹⁰⁶ Plan at 1-1, 1-11, 1-12 (Figure 1-6), and 1-13 (Table 1-5).

¹⁰⁷ VMC 20.130.010, 20.130.020, 20.440.020(C), 20.160.020(D)(5), Table 20.440.030-1, and Table 20.440.040-1.

1 **CONCLUSIONS OF LAW**

- 2
- 3 (1) A narrow reading of the Council’s land use consistency process under RCW 80.50.090(2) is
- 4 warranted based upon the legislative history of this statute and EFSEC’s past practices.
- 5
- 6 (2) The Council is not required to defer acting on a land use consistency determination until an
- 7 environmental impact statement is completed, or to wait as if the City of Vancouver was
- 8 undertaking review of the Application under its own review process.
- 9
- 10 (3) The Council provided adequate notice to interested parties, and the Council has adequate
- 11 information to render a land use consistency decision.
- 12
- 13 (4) The proposed Site for the Vancouver Energy Distribution Terminal is consistent with the
- 14 City of Vancouver’s Comprehensive Plan.
- 15
- 16 (5) The proposed Site for the Vancouver Energy Distribution Terminal is in compliance with the
- 17 City of Vancouver’s zoning ordinances.
- 18

19 **DETERMINATION AND ORDER:** Based upon these Findings of Fact and Conclusions of Law,

20 and as further discussed in the body of this Council order, the Council determines that the

21 Applicant’s proposed Site is consistent and in compliance with the City of Vancouver’s

22 Comprehensive Plan 2011-2030 and the City of Vancouver’s applicable zoning ordinances.

23

24 Nothing in this Order precludes parties from raising issues during the adjudication, the process of

25 adopting an environmental impact statement, or the issuance of permits with respect to on-site or off-

26 site impacts, or the mitigation of those impacts, including but not limited to issues regarding

27 shoreline management, critical area ordinances, stormwater, service availability, spills or fires.

28

29 **ORDER**

30

31 THE COUNCIL THEREFORE ORDERS that:

32

- 33 (1) In accordance with WAC 463-26-110, the Vancouver Energy Distribution Terminal Site is
- 34 consistent and in compliance with local land use plans and ordinances.
- 35
- 36 (2) The Applicant has met its burden of proof of demonstrating that the Site is consistent with
- 37 and in compliance with the City of Vancouver’s Comprehensive Plan and applicable zoning
- 38 ordinances.
- 39
- 40 (3) In accordance with RCW 80.50.090(2), the City of Vancouver shall not alter its land use
- 41 plans or zoning ordinances so as to affect the proposed Site during the pendency of the
- 42 Application.

1 DATED at Olympia, Washington and effective on this 1st day of August, 2014.

2
3 WASHINGTON STATE
4 ENERGY FACILITY SITE EVALUATION COUNCIL
5

6
7
8 _____/s/_____
9 Bill Lynch, Chair
10

11
12
13
14
15 *Concurring Opinion of Bryan Snodgrass, City of Vancouver representative to Council.*
16

17 I fully support my colleagues' intent with this order. However, given the ambiguity of EFSEC's
18 applicable land use consistency statute and rule, I believe further clarity is needed to ensure EFSEC's
19 recommendations are properly understood in the event of future challenges. Council deliberation
20 and the staff recommendation that preceded it make clear that this determination of land use
21 consistency is based solely on a finding that the proposed use is an allowed use or conditional use in
22 the City of Vancouver's Heavy Industrial zoning district. The motion approved at the Council's
23 regular monthly meeting of July 15, 2014, should not be interpreted to mean anything more.