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BEFORE THE STATE OF WASHINGTON  
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of: Application No. 2013-01  
TESORO SAVAGE, LLC  
VANCOUVER ENERGY DISTRIBUTION  
TERMINAL

CASE NO. 15-001  
PORT OF VANCOUVER USA'S  
RESPONSE TO CITY OF  
VANCOUVER'S MOTION FOR ORDER  
RULING THAT EFSEC LACKS  
AUTHORITY TO ISSUE  
PRETREATMENT DISCHARGE  
PERMIT AND TO VANCOUVER  
ENERGY'S MOTION FOR  
DETERMINATION REGARDING  
ISSUANCE OF INDUSTRIAL WASTE  
DISCHARGE PERMIT

**I. INTRODUCTION**

The Port of Vancouver USA (Port) files this response to the motion of Tesoro Savage Petroleum Terminal, LLC (Vancouver Energy) and the cross-motion of the City of Vancouver (City). The question presented by both motions is whether the Washington State Energy Facility Site Evaluation Council (EFSEC) or the City has the authority to issue a pretreatment wastewater disposal permit to Vancouver Energy. EFSEC is the proper party to issue the pretreatment wastewater disposal permit for the reasons presented in this motion. The City's motion should be denied, and Vancouver Energy's motion should be granted.

**II. FACTS**

The Port incorporates the facts and history of this application as presented by Vancouver Energy.

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### III. LAW AND ARGUMENT

EFSEC recently articulated the intent of the Washington legislature in creating the Council: to ensure that authority and responsibility for siting energy facilities is given to one entity for the purposes of efficiency and timeliness. EFSEC wrote:

The Legislature intended, as part of the energy facility siting process, for EFSEC to: preserve and protect the quality of the environment, assure that sufficient operational safeguards are in place, and avoid costly duplication in the siting process and ensure that decisions are made in a timely manner.<sup>1</sup>

Here, the City claims to have the only authority to issue one of the necessary permits for an energy facility. Any requirement to piece-meal necessary permits is contrary to the purpose for which EFSEC was created.

**A. EFSEC was created to provide a “one-stop” process.**

“The State of Washington Energy Facility Site Evaluation Council (EFSEC or Council) provides a ‘one-stop’ siting process for major energy facilities in the State of Washington. EFSEC coordinates all evaluation and licensing steps for siting certain energy facilities in Washington.”<sup>2</sup>

This “one-stop” process concept is an extension of our state’s policy to recognize the pressing need for energy facilities and ensure reasonable methods to locate and operate such facilities with minimal adverse effects on the environment.<sup>3</sup> The one-stop process provides significant advantages to the public and the regulated community, and allows EFSEC to quickly and efficiently make recommendations to the Governor. It specifically addresses the legislative intent of avoiding costly duplication in the siting process and ensuring that decisions are made timely and without unnecessary delay.<sup>4</sup> EFSEC coordinates all

<sup>1</sup> EFSEC Policy #16-01, dated March 25, 2016, citing RCW 80.50.010.

<sup>2</sup> <http://www.efsec.wa.gov/default.shtm>.

<sup>3</sup> RCW 80.50.010.

<sup>4</sup> RCW 80.50.010(5).

1 evaluation and licensing steps, specifies the conditions of construction and operation, and  
2 manages the environmental and safety oversight program of facility and site operations.<sup>5</sup>

3 The efficiency of this process encourages the most reasonable method for meeting  
4 our state's energy demands while addressing the broad public interest in energy facilities,  
5 their location, and their operation. To that end, the legislature established EFSEC and that  
6 EFSEC has exclusive authority to grant necessary Clean Water Act permits for energy  
7 facilities in the State of Washington, including industrial wastewater disposal permits.<sup>6</sup> To  
8 ensure that there is only one stop for all evaluation and licensing steps necessary to site and  
9 operate an energy facility, Chapter 80.50 RCW preempts "all matters relating to energy  
10 sites" and EFSEC's authority to certify energy projects "is given in lieu of any permit,  
11 certificate, or similar document which might otherwise be required by state agencies and  
12 local governments."<sup>7</sup>

13 **B. EFSEC has the authority to grant Vancouver Energy a pretreatment waste  
14 disposal permit.**

15 EFSEC's authority to issue wastewater disposal permits for energy facilities  
16 encompasses the responsibility to ensure compliance with pretreatment requirements, as the  
17 following timeline illustrates.

- 18 • **1973:** Region 10 of the Environmental Protection Agency (EPA) granted  
19 Washington State Department of Ecology (Ecology) the primary  
20 responsibility for implementing the NPDES program for Washington.<sup>8</sup> This is  
reflected in the Memorandum of Agreement (MOA) between EPA and

21 <sup>5</sup> <http://www.efsec.wa.gov/default.shtm>

22 <sup>6</sup> RCW 90.48.260(1)(a) (Granting Ecology the authority to establish and administer a waste  
23 discharge permit program subject to EFSEC's authority to issue permits for energy facilities  
under RCW 90.48.262(2)).

24 <sup>7</sup> RCW 80.50.120; WAC 463-14-050 ("Chapter 80.50 RCW operates as a **state preemption**  
25 **of all matters** relating to energy facility sites. **Chapter 80.50 RCW certification is given in**  
26 **lieu of any permit, certificate, or similar document which might otherwise be required**  
**by state agencies and local governments**")(emphasis added).

<sup>8</sup> City of Vancouver's Motion, Attachment 1, Memorandum of Agreement (MOA) between  
EPA and Ecology, at p. 1.

1 Ecology (1973 Ecology MOA).

- 2 • **1973:** EPA promulgated 40 CFR Part 128 establishing general prohibitions  
3 against treatment plant interference and pass through and setting pretreatment  
4 standards for the discharge of incompatible pollutants from specific industrial  
5 categories.<sup>9</sup>
- 6 • **1978:** EPA promulgated General Pretreatment Regulations at 40 CFR Part  
7 403, replacing the 40 CFR Part 128 requirements.<sup>10</sup> The General Pretreatment  
8 Regulations establish responsibilities among federal, state, and local  
9 government; industry; and the public to implement pretreatment standards to  
10 control pollutants that pass through or interfere with POTW treatment  
11 processes or that can contaminate sewage sludge.<sup>11</sup>
- 12 • **1979:** As reflected in the MOA between EPA and EFSEC (EFSEC MOA)  
13 EPA delegated responsibility for operation of the NPDES program for energy  
14 facility-related waste discharge permits to EFSEC: “Adequate implementation  
15 of the objectives of **chapter 80.50 RCW, chapter 90.48 RCW**, and the  
16 Federal Clean Water Act **require EFSEC to issue and to revise waste**  
17 **discharge permits** for discharges to the public waters of the State of  
18 Washington and to conduct a firm and vigorous enforcement program.”<sup>12</sup>
- 19 • **1986:** Washington’s authority to regulate its Pretreatment Program was  
20 approved by the EPA.<sup>13</sup>
- 21 • **1989:** MOA between EPA and Ecology replaces the 1973 Ecology MOA.<sup>14</sup>

22 The CWA National Pretreatment Program regulations were first promulgated in  
23 1973, prior to the grant of authority to EFSEC for CWA permitting in the EFSEC MOA.  
24 These regulations were replaced by new General Pretreatment Regulations in 1978. The  
25 1979 EFSEC MOA specifically references Chapter 90.48 RCW, which in turn provides:  
26 “Permits for energy facilities subject to chapter 80.50 RCW shall be issued by the energy

27 <sup>9</sup> Introduction to the National Pretreatment Program, available online at:  
28 [https://www.epa.gov/sites/production/files/2015-](https://www.epa.gov/sites/production/files/2015-10/documents/pretreatment_program_intro_2011.pdf)  
29 [10/documents/pretreatment\\_program\\_intro\\_2011.pdf](https://www.epa.gov/sites/production/files/2015-10/documents/pretreatment_program_intro_2011.pdf), at p.2-1.

30 <sup>10</sup> *Id.*

31 <sup>11</sup> *Id.*

32 <sup>12</sup> City of Vancouver’s Motion, Attachment 4, MOA between EPA and EFSEC, at p. 2,  
33 (emphasis added).

34 <sup>13</sup> <https://www.epa.gov/npdes/npdes-state-program-information#tab-2>; *see also* City of  
35 Vancouver’s Motion, Attachment 1, MOA between EPA and Ecology, at p. 1.

36 <sup>14</sup> City of Vancouver’s Motion, Attachment 1, MOA between EPA and Ecology, at p. 1.

1 facility site evaluation council.”<sup>15</sup> Chapter 80.50 RCW contains the express preemption of  
2 any other state laws, rules or regulations regarding regulation and certification of energy  
3 facilities.<sup>16</sup>

4 The EFSEC MOA reflects the MOA parties’ intent of a broad delegation of authority  
5 from EPA to EFSEC:

6 The Regional Administer recognizes that in approving EFSEC’s program to  
7 conduct the NPDES for specific energy facilities, an implied degree of trust  
8 and confidence is placed in EFSEC to administer properly its program and to  
coordinate its actives with those State agencies with a direct interest in  
NPDES matters.<sup>17</sup>

9 There is nothing in the EFSEC MOA that would indicate EFSEC had authority to  
10 issue all permits for energy facilities under its jurisdiction *except* pretreatment wastewater  
11 disposal permits. The National Pretreatment Program was already a component of the  
12 NPDES program and contemplated by the parties at the time of their agreement. The EPA  
13 did not place any limitations regarding the pretreatment program or in any way preclude  
14 EFSEC from issuing pretreatment permits in the EFSEC MOA. Instead, the agreement  
15 reflects the trust and confidence it placed in EFSEC to administer waste disposal permits and  
16 to conduct a “firm and rigorous” enforcement program. There is no legal basis for a belief  
17 that the EPA meant to preclude EFSEC from granting pretreatment wastewater disposal  
18 permits.

19 The question of EFSEC’s authority to issue pretreatment permits pertaining to energy  
20 facilities under EFSEC jurisdiction has already been addressed and answered. As was  
21 presented in Vancouver Energy’s motion, the analogous issue of whether EFSEC can issue  
22 water quality certifications under CWA § 401 was put before the Attorney General Office  
23 (AGO) many years ago, and the AGO’s reasoning and analysis in deciding that question

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25 <sup>15</sup> RCW 90.48.262(2).

26 <sup>16</sup> RCW 80.50.110.

<sup>17</sup> City of Vancouver’s Motion, Attachment 4, MOA between EPA and EFSEC, at p. 12.

1 remains compelling and instructive here.<sup>18</sup> In 1997, Ecology argued that the EFSEC  
2 preemption only applies to state law and not the federal CWA; therefore, Ecology had the  
3 sole authority to issue water quality certifications under the CWA.<sup>19</sup> The Attorney General  
4 did not agree, noting that assignment of a particular agency to carry out functions under  
5 Section 401 is purely a matter of state law and that the preemption provisions of Chapter  
6 80.50 RCW were applicable.<sup>20</sup>

7 Here, the City makes some of the same arguments, namely that pretreatment  
8 discharge permits are issued pursuant to federal law and, therefore, EFSEC's preemptive  
9 authority does not include pretreatment permits under Section 403. This argument  
10 presumably fails for the same reasons it did in 1997.<sup>21</sup> "The federal-state relationship  
11 established under 33 U.S.C. § 1342 . . . creates a separate and independent State authority to  
12 administer the NPDES pollution controls."<sup>22</sup> Both Ecology and EFSEC's authority to issue  
13 waste discharge permits is a function of Washington, not federal, law.<sup>23</sup>

14 In its determination that EFSEC, and not Ecology, has the authority to issue Section  
15 401 water quality certifications for any project within its jurisdiction, the AGO also pointed  
16 out that the lack of explicit reference to water quality permits in RCW 90.48.262 was not  
17 particularly significant given the given the broad authority granted EFSEC in Chapter 90.48  
18 RCW and Chapter 80.50 RCW.<sup>24</sup> Such analysis also applies here. Lack of specific reference  
19 to the National Pretreatment Program under Section 403, in the EFSEC MOA or Chapter  
20 90.48 RCW, is not particularly significant. The broad authority given to EFSEC to grant

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22 <sup>18</sup> See Vancouver Energy's Motion, § IV(D); Declaration of Dale Johnson and its Exhibits.

23 <sup>19</sup> *Id.*

24 <sup>20</sup> *Id.*

25 <sup>21</sup> City's Motion at p. 7.

26 <sup>22</sup> *Shell Oil Co. v. Train*, 585 F.2d 408, 410 (9<sup>th</sup> Cir. 1978).

<sup>23</sup> RCW 90.48.260, RCW 90.48.262.

<sup>24</sup> *Id.*

1 waste disposal permits to energy facilities is logically, and legally, inclusive of the authority  
2 to grant pretreatment waste disposal permits.

3 **C. Express delegation of authority from the EPA is not required under the National**  
4 **Pretreatment Program.**

5 The explicit delegation of authority from the EPA to EFSEC to grant pretreatment  
6 permits is not required in any case. The National Pretreatment Program is charged with  
7 controlling toxic, conventional, and nonconventional pollutants from nondomestic sources  
8 that discharge into sewer systems, as described in CWA Section 307(a).<sup>25</sup> Unlike other  
9 environmental programs, the National Pretreatment Program does not rely on federal or state  
10 governments to implement and enforce specific requirements.<sup>26</sup> Instead, the EPA will  
11 approve a state program that ensures compliance with applicable pretreatment standards via  
12 permit, order, or similar means.<sup>27</sup> States have the flexibility to choose a permit system.  
13 Washington relies upon its waste disposal permit system.<sup>28</sup> Thus, under Washington law, the  
14 National Pretreatment Program requires permitting by Ecology or by EFSEC if EFSEC has  
15 jurisdiction over the energy facility.<sup>29</sup>

16 **D. EFSEC is the appropriate entity to issue the pretreatment discharge permit.**

17 EFSEC has the proper authority and expertise to issue a pretreatment waste disposal  
18 permit to Vancouver Energy as part of the site certification process. Under Washington law,

19 <sup>25</sup> Introduction to the National Pretreatment Program, available online at:  
20 [https://www.epa.gov/sites/production/files/2015-10/documents/pretreatment\\_program\\_intro\\_2011.pdf](https://www.epa.gov/sites/production/files/2015-10/documents/pretreatment_program_intro_2011.pdf), at p.1-4.

21 <sup>26</sup> *Id.* at p. 2-4.

22 <sup>27</sup> 40 CFR 403.8(1).

23 <sup>28</sup> RCW 90.48.160.

24 <sup>29</sup> *Id.* (Any person who conducts a commercial or industrial operation of any type which  
25 results in the disposal of solid or liquid waste material into the waters of the state, including  
26 commercial or industrial operators discharging solid or liquid waste material into sewerage  
systems operated by municipalities or public entities which discharge into public waters of  
the state, **shall procure a permit from either the department or the [energy facility site  
evaluation council] as provided in RCW 90.48.262(2)** before disposing of such waste  
material: PROVIDED, That this section shall not apply to any person discharging domestic  
sewage only into a sewerage system.) (emphasis added).

1 an energy facility site certification applicant that proposes “any discharge to publicly owned  
2 treatment works (POTW)” must submit its state waste discharge application to EFSEC.<sup>30</sup>  
3 Vancouver Energy properly submitted its wastewater discharge permit application to EFSEC  
4 pursuant to this regulation. EFSEC has the proper authority and expertise to issue a  
5 pretreatment waste disposal permit to Vancouver Energy as part of the site certification  
6 process.

7 The EPA trusts EFSEC to administer CWA programs properly, and to work with  
8 other state agencies on NPDES matters, including the National Pretreatment Program.  
9 EFSEC as well-equipped to administer and monitor this CWA permit as it is with all other  
10 CWA permits it grants.

11 Conversely, allowing the City to grant this one permit is detrimental to the  
12 legislature’s goal of creating EFSEC for “one-stop” site certification. Allowing EFSEC to  
13 grant most permits, but not all permits, necessary under the CWA will only serve to offend  
14 the legislature’s goal of efficiency, timeliness and the promotion of the policies and goals the  
15 legislature intended in enacting Chapter 80.50 RCW. It would grant a local municipality  
16 veto power over an energy project, which is directly contrary to the legislature’s intent.<sup>31</sup>  
17 EFSEC should acknowledge its authority to grant all CWA waste discharge permits for  
18 energy facilities pursuant to Chapter 90.48. RCW, grant Vancouver Energy’s motion, and

19 <sup>30</sup> WAC 463-60-537, which provides:

20 **Wastewater/storm water discharge permit applications.** The application for site  
21 certification shall include:

- 22 (1) A completed National Pollutant Discharge Elimination System (NPDES) permit  
23 application, for any proposed discharge to surface waters of the state of Washington,  
24 pursuant to the requirements of WAC 463-76-031; or
- 25 (2) For **any** proposed discharge to publicly owned treatment works (POTW) and/or  
26 groundwater of the state of Washington, a state waste discharge application;
- (3) A notice of intent to be covered under any applicable statewide general permit for  
storm water discharge.

(emphasis added).

<sup>31</sup> RCW 80.50.110.



1 deny the City of Vancouver's motion.

2 **IV. REQUESTED RELIEF**

3 The Port joins in Vancouver Energy's motion, opposes the City of Vancouver's  
4 motion, and respectfully requests a determination that EFSEC has exclusive jurisdiction to  
5 issue the required permit to allow the proposed Vancouver Energy Terminal to discharge  
6 effluent to the City of Vancouver's POTW. The City's motion should be denied.

7 Dated this 28<sup>th</sup> day of April, 2016.

8 SCHWABE, WILLIAMSON & WYATT, P.C.

9  
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1 CERTIFICATE OF SERVICE

2 The undersigned declares under penalty of perjury, under the laws of the State of  
3 Washington, that the following is true and correct:

4 That on the 28<sup>th</sup> day of April, 2016, I arranged for service of the foregoing PORT OF  
5 VANCOUVER, USA'S RESPONSE TO CITY OF VANCOUVER'S MOTION FOR  
6 ORDER RULING THAT EFSEC LACKS AUTHORITY TO ISSUE PRETREATMENT  
7 DISCHARGE PERMIT AND RESPONSE TO VANCOUVER ENERGY'S MOTION FOR  
8 DETERMINATION REGARDING ISSUANCE OF INDUSTRIAL WASTE DISCHARGE  
9 PERMIT to the parties to this action as follows:

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