

**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

ORDER DENYING TESORO SAVAGE,
LLC AND PORT OF VANCOUVER
DISPOSITIVE MOTIONS

1 On March 29, 2016, the Port of Vancouver (Port) filed a Motion for Partial Summary
2 Judgment Re: Preemption and a Declaration of Todd Coleman in Support of Motion for
3 Partial Summary Judgment.

4 On March 29, 2016, Tesoro Savage LLC (Tesoro-Savage) filed a Motion to Dismiss
5 Issues 15, 20, 49, 50, 51, 52, 53, 66 and Portions of Issues 7, 12, 14, 18, 19, 39, 45, 64, 67,
6 and 68 (“Rail Operations Issues”).

7 On April 28, 2016, the Port joined in Tesoro-Savage’s Motion to Dismiss Issues.

8 On April 28, 2016, The City of Spokane, The City of Vancouver, The City of Washougal,
9 The Department of Natural Resources, Columbia Riverkeeper, *et al.*, Columbia Waterfront,
10 LLC, the Tribal parties, and the Council for the Environment filed responses with attachments
11 and a Declaration of Susan Drummond in opposition to Tesoro-Savage’s and the Port’s
12 motions.

13
14 On May 5, 2016, Tesoro-Savage filed a Reply supporting its motion and a consolidated
15 reply in support of the Port of Vancouver’s Motion for Partial Summary Judgment.

16 On May 4, 2016, BNSF Railway Company (BNSF) filed a Motion for Leave to File
17 Amicus Brief in Support of Vancouver Energy’s (Tesoro-Savage) Motion to Dismiss Rail
18 Operation Issues and The Port of Vancouver’s Motion for Partial Summary Judgment, along
19 with its Amicus Brief. Columbia Riverkeeper *et al.* and The City of Vancouver filed responses
20 opposing BNSF’s motion to file an amicus brief. On May 16, 2016, the Energy Facility Site
21 Evaluation Council (EFSEC, or Council) issued an Order Granting BNSF Railway Company
22 Leave to File Amicus Brief.

23 The Council has considered the Motion for Partial Summary Judgment and the Motion to
24 Dismiss Issues, and denies them for the reasons set forth in the Discussion and Order below.

1 **DISCUSSION**

2 In its preliminary issues filing, Tesoro-Savage asserted the following four issues it
3 deemed jurisdictional:

- 4 A. Does EFSEC have jurisdiction to address issues concerning rail transportation or to
5 impose mitigation for impacts associated with rail transportation?
- 6 B. Does federal law preempt EFSEC from regulating any aspect of the Vancouver Energy
7 Distribution Terminal (VEDT) with regard to rail transportation?
- 8 C. Does EFSEC have jurisdiction to address issues concerning marine vessel transportation
9 or to impose mitigation for impacts associated with marine vessel transportation?
- 10 D. Does federal law preempt EFSEC from regulating any aspect of the VEDT with regard
11 to marine vessel transportation?

12 Partial Summary Judgment Motion

13 In its motion, the Port seeks a determination that federal law expressly preempts the
14 Council’s imposition of conditions in a site certification agreement that would impact railroad
15 or Columbia River vessel operations. The Port asserts that the Council must, therefore, grant
16 summary judgment as to all adjudication issues concerning rail or vessel traffic. Tesoro-
17 Savage concurs in the Port’s motion, but submits no sworn facts, undisputed or otherwise, in
18 support. The remaining parties oppose the Port’s motion, arguing that it is not ripe because it
19 presupposes the Council will impose unlawful conditions in a site certification agreement, and
20 because granting summary judgment at this time would prevent the Council from doing its
21 statutory duty in this adjudication.

22 A Court may grant summary judgment when, on the basis of the facts before it, a
23 reasonable fact finder could reach only one conclusion. *SentinelC3, Inc. v. Hunt, 181 Wn2d*
24 *127, 140 (2014)*. Summary judgment is appropriate only when the pleadings, affidavits,
25 depositions and admissions on file demonstrate that there is no genuine issue of material fact
26 and the moving party is entitled to judgment as a matter of law. The moving party has the
27 burden of demonstrating there is no issue of material fact. All facts and reasonable inferences
28 from the material facts must be viewed in the light most favorable to the nonmoving party.
29 *SentinelC3 at 140, Folsom v. Burger King, 135 Wn.2d 658, 663(1998)*.

1 In support of its motion, the Port submits the Declaration of Todd Coleman. Mr.
2 Coleman discusses the value and operations of the Port of Vancouver in general and he
3 explains how rail or vessel operations benefit the Port's viability. Mr. Coleman describes the
4 history and current operations at the Port, how its operations focus on the flow of freight
5 through the Port, the Port's recent capital improvements, the amount of income the VEDT
6 proposal is expected to generate, the projected benefit to the community if the VEDT is built,
7 and the VEDT's potential for competitive advantage in the marketplace.

8 Mr. Coleman states that the Port and its tenants would be at a competitive disadvantage if
9 conditions were imposed on rail or vessel operations under the Energy Facilities Site
10 Locations law that are inconsistent with what he asserts is uniform and comprehensive federal
11 regulation of rail and vessel traffic. He states his understanding that federal law completely
12 and comprehensively governs railroad and vessel operations nationwide, and that this
13 preempts the Council from imposing conditions in its site certification agreement that would
14 have the effect of regulating railroad or vessel traffic.

15 The Port's factual submittal advocates for its position in this adjudication and is
16 descriptive of Port operations. However, these facts do not support the Port's argument that a
17 significant part of the adjudication be dismissed at this stage in the proceedings. The Port has
18 failed to establish that the Council must grant summary judgment as to issues concerning rail
19 and vessel operations. Nevertheless, the Council will consider the Port's arguments within
20 the context of Tesoro-Savage's Motion to Dismiss Issues.

21 Motion to Dismiss Issues

22 EFSEC was created for "...the selection and utilization of sites for energy facilities and
23 the identification of a state position with respect to each proposed energy site." RCW
24 80.50.010. Under 80.50.040, the Council has various powers to accomplish this, including:

25 (2) To develop and apply environmental and ecological guidelines in
26 relation to the type, design, location, construction, and operational
27 conditions of certification of energy facilities subject to [Chapter 80.50
28 RCW]...

29 (6) To make and contract, when applicable, for independent studies of sites
30 proposed by the applicant...

31 (8) To prepare written reports to the governor which shall include (a) A
32 statement indicating whether the application is in compliance with the
33 council's guidelines, (b) criteria specific to the site and transmission line
34 routing, (c) a council recommendation as to the disposition of the
35 application, and (d) a draft certification agreement when the council
36 recommends approval of the application...

1 The Council’s statutory process consists of four separate components. It conducts a land
2 use hearing (RCW 80.50.090(2), an environmental review under the Washington State
3 Environmental Policy Act (RCW 80.50.180, RCW 43.21C.030), an adjudication (RCW
4 80.50.090(3)), and, as the Council deems necessary, optional “...independent studies to
5 measure the consequences of proposed energy facilities on the environment or any matter that
6 it deems essential to an adequate appraisal of the site.” RCW 80.50.071(1)(b). After the
7 parties have presented their evidence and arguments in the adjudication phase, the Council
8 will issue its adjudication findings and conclusions. After the findings and conclusions are
9 issued, the Council will make its recommendation to the governor in a separate decision that
10 takes into account the results of all its processes, including its land use decision, its final
11 environmental impact statement, the findings and conclusions from the adjudication, and any
12 independent studies it conducts.¹

13 The Council’s fundamental duty is the evaluation of sites proposed for energy facilities.
14 EFSEC’s governing statutes define ‘site’ as “...any proposed or approved location of an
15 energy facility...” RCW 80.50.020(19). The proposed VEDT will be located in Vancouver,
16 and, by its nature, will necessarily involve accepting, storing and shipping crude oil delivered
17 by trains routed from the east and traveling across the State of Washington. As well, it will
18 involve storage and handling crude oil on the Port of Vancouver site, and loading operations
19 for shipment of crude oil over state and international waters to supply refineries.

20 Tesoro-Savage urges the Council to dismiss all proposed rail transport issues, and not to
21 hear evidence about matters that concern rail operations expected to take place in connection
22 with getting crude oil to, and managing it at, the proposed VEDT.² The Port urges summary
23 judgment on all issues relating to vessel traffic for transshipment of crude oil from the VEDT
24 down the Columbia River to the Pacific Ocean. These motions are based on federal
25 preemption and commerce clause theories. They argue that EFSEC lacks jurisdiction to
26 consider evidence relating to these issues because it may lead the Council to unlawfully
27 condition a site certification agreement on the basis of rail transportation or vessel impacts.
28 BNSF presents similar arguments, asserting that EFSEC cannot and should not consider rail
29 operations issues. It argues that the federal government exercises exclusive jurisdiction over
30 these matters, has already fully addressed any rail-related safety concerns, and therefore the
31 Council should not hear evidence on or decide issues relating to rail operations. BNSF further
32 asserts that there is no need to because there is no credible evidence indicating that the VEDT
33 would cause an actual increase in train traffic anywhere in the State of Washington.³

¹ At this time, EFSEC has not chosen to conduct any independent studies for Application No. 2013-01.

² Yet regardless of its assertion that the Council not hear evidence relating to rail or vessel operations, Tesoro-Savage states that it intends to introduce its own evidence in the adjudication to demonstrate the breadth and adequacy of federal regulations on the transportation of crude by rail. Tesoro-Savage Motion to Dismiss Issues, page 2, lines 4-8.

³ Brief of BNSF, page 10.

1 The parties opposing the Motion to Dismiss Issues and the Motion for Partial Summary
2 Judgment argue that they are premature, and that federal law does not prevent the Council
3 from considering evidence about the proposal’s potential effects relating to rail and vessel
4 operations. The City of Vancouver points out that EFSEC is required to evaluate all proposal
5 impacts and determine whether and how they are addressed.⁴ Columbia Riverkeeper, *et al.*
6 argue that the moving parties are actually asking for evidentiary rulings based on relevance to
7 the Council’s inquiry that should be made in the course of the hearing. It argues that
8 challenges to any effort by EFSEC to apply overbroad conditions to a recommendation to
9 approve the VEDT siting application must be made at the time such a recommendation is
10 being considered. All opposition parties agree that a decision limiting the evidence
11 concerning rail or vessel impacts is not appropriate at this time, and it would prevent the
12 Council from hearing the evidence it is statutorily required to consider.

13 At this point in the proceedings, the Council has heard no evidence beyond the limited
14 facts submitted in connection with these motions. The Council’s recommendation to the
15 Governor about whether the proposed Vancouver site should be approved for a terminal
16 accepting, storing, and shipping crude oil must be founded on objective, fact-based reasons.
17 For this to happen, all relevant evidence relating to the consequences and effects of siting the
18 proposed facility at the Port of Vancouver must be available to the Council.

19 Granting Tesoro-Savage’s motion to dismiss rail issues and the Port’s arguments against
20 vessel-related issues would impair the Council’s ability to perform its primary statutory duty
21 to evaluate the proposed site for the VEDT. Should the Council decide to recommend
22 approval of the VEDT to the governor, it can also recommend conditions of approval be
23 included in the site certification agreement. Once the Council has been able to consider all
24 the relevant facts required to make its recommendation, it then will be the proper time for the
25 Council to determine the extent of its authority as to any conditions relating to rail or vessel
26 operations it deems necessary.

⁴ Brief of the City of Vancouver, page 6, lines 11-12.

1 **ORDER**

2 The Port of Vancouver USA’s Motion for Partial Summary Judgment Re: Preemption is
3 **DENIED.**

4
5 Tesoro-Savage Petroleum Terminal LLC’s Motion to Dismiss Issues 15, 20, 49, 50, 51, 52,
6 53, 66 And Portions of Issues 7, 12, 14, 18, 19, 39, 45, 64, 67, 68 (“Rail Operation Issues”) is
7 **DENIED.**

8 DATED and effective at Olympia, Washington this 6th day of June, 2016.

9 **STATE OF WASHINGTON ENERGY FACILITY SITE EVALUATION COUNCIL**

10 _____/s/_____
11 William Lynch,
EFSEC Chair

_____/s/_____
Dennis Moss,
Utilities & Transportation Commission

12 _____/s/_____
13 Jaime Rossman,
Department of Commerce

_____/s/_____
Dan Siemann,
Department of Natural Resources

14 _____/s/_____
15 Cullen Stephenson,
16 Department of Ecology

_____/s/_____
Joe Stohr,
Department of Fish and Wildlife

17 _____/s/_____
18 Bryan Snodgrass,
19 City of Vancouver

_____/s/_____
Greg Shafer,
Clark County

20 _____/s/_____
21 Kenneth Stone,
22 Department of Transportation

23 _____/s/_____
24 Cassandra Noble
25 Administrative Law Judge