

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of:
Application No. 2013-01

TESORO SAVAGE, LLC

TESORO SAVAGE DISTRIBUTION
TERMINAL

CASE No. 15-001

APPLICANT TESORO SAVAGE
PETROLEUM TERMINAL LLC'S
POST-HEARING BRIEF

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I. INTRODUCTION

Applicant Tesoro Savage Petroleum Terminal LLC, d/b/a Vancouver Energy (hereinafter, “TSPT” or the “Applicant”) has demonstrated that the Vancouver Energy Terminal meets the requirements for issuance of site certification set forth in the Energy Facility Site Location Act (“EFSLA”), chapter 80.50 RCW, and its implementing regulations in Title 463 WAC. Under EFSLA, the Energy Facility Site Evaluation Council’s (“EFSEC”) decision on this application must ensure an abundant supply of energy at reasonable cost while minimizing adverse effects. EFSEC must ensure Washington is prepared both today and well into the future to supply the state’s energy needs—in this case petroleum fuel energy needs. Because the evidence demonstrates the need for additional sources of crude oil as feedstock for refined petroleum fuels to support the transportation-dependent sectors of our economy, EFSEC should recommend approval, with conditions that minimize adverse effects, consistent with the regulatory framework established to address those impacts.

In this brief TSPT does not repeat all the legal arguments and discussion of pre-filed testimony included in its Pre-Hearing Brief. Instead, this brief primarily focuses on the evidence presented in the five weeks of hearing. As EFSEC weighs all the evidence, EFSEC must be careful to distinguish objective fact and expert opinion from political or outcome-driven opinions and assertions that are based on pre-determined opposition, without regard for the facts developed through EFSEC’s evaluation. In furthering anti-petroleum political objectives, the Opponents ask EFSEC: to ignore established regulatory frameworks; to apply unprecedented interpretations of City plans and regulations just because EFSEC is a “different” or unique forum; and, in several cases, mischaracterize evidence to overstate problems. EFSEC should reject these ends-oriented arguments. EFSEC must be bound by the facts and the established standards.

1 When considering how to minimize adverse effects, EFSEC must evaluate the
2 evidence regarding risk of those adverse effects. In this case, the Opponents have focused
3 almost singularly on risks of a spill and/or fire. Here the evidence presented by TSPT is
4 in striking contrast to the arguments and assertions offered by Opponents. Risk requires
5 consideration of probability or likelihood, as well as consequence. Opponents ask EFSEC
6 to ignore the evidence connecting probability with consequence and instead assume
7 catastrophic consequence will occur. The only data-supported evidence regarding
8 probability or likelihood was presented by TSPT. That evidence demonstrates that the
9 more likely events are the minor events where design, containment and incident response
10 measures and training are in place and adequate to respond. In contrast, Opponents
11 simply ask EFSEC to assume that the catastrophic consequence will occur, relying on
12 incidents unrelated to the nature of the operations at the Vancouver Energy Terminal, and
13 ignoring the changes in industry and regulatory standards that have occurred and are
14 continuing to occur since the historical incidents they cite. Assumptions rather than facts
15 cannot be the basis for EFSEC's decision-making. When EFSEC examines the incident
16 evidence in detail, EFSEC should recognize that the risk of incident at the Terminal itself
17 is highly unlikely and can be contained and resolved without off-site consequence. The
18 risk of a spill during vessel loading operations can be adequately addressed through design
19 and Terminal-specific operational requirements including those that are required to
20 comply with Washington's rigorous regulations. Risks of significant spill or fire during
21 rail and vessel transport are also of very low probability. The state's planning and
22 response system, including the substantial financial assurance requirements in place to
23 back up that response, are adequate. The evidence regarding incident risk and response
24 support EFSEC conclusions that the risk of adverse effects from a spill are minimized, as
25 required by EFSLA.

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**Van Ness
Feldman** LLP

719 Second Avenue Suite 1150
Seattle, WA 98104
(206) 623-9372

1 Finally, the testimony presented during the adjudication confirmed that the
2 Opponents' primary focus was on rail and vessel transport, not the Terminal design and
3 operations that are EFSEC's responsibility. While elimination of rail and vessel transport
4 would certainly further reduce risk, that is not an option for EFSEC. Because those modes
5 of transport are currently occurring and will continue to be the most flexible and effective
6 modes of crude oil transport into and through the State of Washington, EFSEC should not
7 deny this Terminal based on a hope or expectation that these transport modes will
8 somehow go away. In fact, the evidence demonstrates the contrary—crude by rail is
9 occurring today and will continue because it is necessary to support the energy needs of
10 this state. Washington's economy relies on transportation of people and goods. That
11 transportation is dependent on petroleum fuels produced at our state's petroleum
12 refineries. Those refineries are facing significant declines in crude oil supplies affecting
13 existing sources. There is no other feasible and reliable alternative source of crude oil.
14 EFSEC must acknowledge this need, recognize that the existing regulatory framework is
15 adequate to minimize adverse effects from supplying this energy need, and recommend
16 approval of the Vancouver Energy Terminal site certification.

17 **II. LEGAL FRAMEWORK FOR EFSEC'S EVALUATION OF THE** 18 **TERMINAL**

19 There are several key legal principles that establish the framework and sideboards for
20 EFSEC's evaluation of the application. As explained in further detail below, Opponents
21 advance a theory of the case that asks EFSEC to ignore these key legal principles.
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1 **A. EFSLA Requires Achievement of All Statutory Goals: Energy Need and**
2 **Environmental Protection.**

3 The guiding principle of EFSLA is a recognition of the pressing need for increased
4 energy facilities.¹ Every aspect of EFSEC’s site certification decision must be informed
5 by this principle. Opponents ask the Council to focus on the purported impacts of the
6 Terminal and determine whether those impacts have been eliminated. In their view, RCW
7 80.50.010 requires EFSEC to choose between two goals: accommodation of the abundant
8 need for energy or environmental protection. This is a false construct that is inconsistent
9 with EFSLA. The potential for environmental impacts are not the sole and controlling
10 factors for EFSEC’s consideration. Indeed, EFSLA’s recognition that siting facilities will
11 necessarily present environmental impacts indicates just the opposite² — facilities must
12 be sited despite such impacts. If that were not the case, no energy facility would ever be
13 sited in the State of Washington.

14 Instead, EFSEC’s decision must consider the need for abundant energy and other
15 public interest factors. “[I]t is the policy of the state of Washington to recognize the
16 pressing need for increased energy facilities, *and* to ensure through available and
17 reasonable methods, that the location and operation of such facilities will produce minimal
18 adverse effects on the environment, ecology of the land and its wildlife, and the ecology
19 of state waters and their aquatic life.”³ The word “and” is a conjunctive. It must be read
20 in accordance with its popular meaning and construed according to rules of grammar.⁴ In
21 this context, the use of “and” requires that EFSEC decisions accommodate both the need
22 for energy facilities and the public interest, not select between them. To the extent that

23 _____
24 ¹ RCW 80.50.010.
25 ² RCW 80.50.010.
³ RCW 80.50.010 (emphasis added).
⁴ *State v. Tiffany*, 44 Wash. 602, 603–04, 87 P.3d 932 (1906) (citing Gustav Endlich, *A Commentary on the Interpretation of Statutes* § 2 (1888)).

1 RCW 80.50.010 or its implementing regulations direct EFSEC to “balance” these factors,
2 EFSEC must seek to accommodate them all—including the pressing need for energy—not
3 to pursue one, to the exclusion of the others. As the evidence shows, it is possible to
4 strike such a balance in this case and to recommend approval of this Terminal with
5 appropriate conditions to minimize impacts.

6 **B. EFSEC Implements Its Statutory Directive By Ensuring Compliance with**
7 **Specific Standards Adopted in Chapter 463-62 WAC.**

8 For six specific topics identified in chapter 463-62 WAC, EFSEC has adopted specific
9 criteria that determine whether the proposed Terminal satisfies the legislative objective in
10 RCW 80.50.010.⁵ Chapter 463-62 WAC sets forth specific compliance criteria for
11 seismicity, noise, fish and wildlife, wetlands, water quality, and air quality.⁶ The
12 regulations are explicit – “compliance with the standards within this chapter shall satisfy,
13 in their respective subject areas, the requirements for issuance of a site certificate for
14 construction and operation of energy facilities.”⁷ In the context of this adjudication,
15 EFSEC’s review of the topics identified in chapter 463-62 WAC is limited to these
16 specific standards.⁸ As is discussed in Section IV. below, TSPT has demonstrated
17 compliance with those criteria.

18 ⁵ The chapter’s “purpose is to ‘implement’ the legislative policy found in RCW 80.50.010.” WAC 463-62-010.

19 ⁶ In closing argument, counsel for the City of Vancouver incorrectly identified WAC 463-47-110 as the standards for
20 site certification. Tr. vol. 22, 5132:7–10 [Potter]. In fact, that regulation sets the criteria for conditioning a proposal
21 pursuant to SEPA authority. As the ALJ has concluded, the SEPA process is separate from this adjudicative hearing. As
22 such, the standards Mr. Potter quoted are not relevant to the adjudication criteria.

23 ⁷ WAC 463-62-010(3) (emphasis added).

24 ⁸ The regulations recognize that the Council may consider other restrictions related to that subject matter pursuant to its
25 SEPA authority. However, as discussed in the pre-hearing brief, Applicant’s Pre-Hearing Br. 24–25, that authority is not
unbridled. SEPA allows mitigation for probable significant impacts, but does not allow consideration or mitigation of
speculative or highly unlikely impacts, nor does it require “worst-case” analysis. *Toward Responsible Dev. v. City of
Black Diamond*, 179 Wn. App. 1012, rev. denied, 180 Wn.2d 1017 (2014); *Cheney v. Mountlake Terrace*, 87 Wn.2d
338, 344, 552 P.2d 184 (1976); *West 514, Inc. v. City of Spokane*, 53 Wn. App. 838, 779 P.2d 1065 (1989). See also
WAC 197-11-782 (“probable” means “likely or reasonably likely to occur... Probable is used to distinguish likely
impacts from those that merely have a possibility of occurring, but are remote or speculative.”); WAC 197-11-794
 (“significant,” means “a reasonable likelihood of more than a moderate adverse impact on environmental quality.”).
Mitigation imposed under SEPA must also be consistent with constitutional principles of nexus and rough
proportionality. Further, EFSEC’s SEPA substantive authority must be based on policies it has designated in its SEPA

1 For subject matter outside of those topics covered by chapter 463-62 WAC, an
2 applicant must ensure through “available and reasonable methods”⁹ that the location and
3 operation of such facility is generally in the broad public interest. This more general
4 authority is not, however, unbridled. As discussed above, the evaluation of such issues
5 must be consistent with all the statutory goals, including accommodation of the
6 recognized need for abundant energy. EFSEC’s authority is also accompanied by a
7 statutory acknowledgement that a project will have significant impacts, and a directive to
8 use “reasonable methods” to ensure that facilities “produce minimal adverse effects on the
9 environment.”¹⁰ It is not a license for outright project denial as Opponents suggest.

10 Although chapter 463-60 WAC identifies a broader range of topics than those
11 specifically identified in chapter 463-62 WAC, the purpose of that chapter is to provide
12 “guidelines” for preparation of applications.¹¹ Those guidelines identify a broad range of
13 information for inclusion in an application, some of which is relevant specifically to the
14 Council’s environmental review.¹² Submittal of an application that complies with chapter
15 463-60 WAC is simply “the starting point of a longer process,” including environmental
16 review and the adjudication, that results in EFSEC’s recommendation.¹³ Importantly,
17 however, EFSEC is not required to make any specific factual or legal findings regarding
18 the adequacy of the information provided under chapter 463-60 WAC in its ultimate

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21 regulations, not simply calls for protection or mitigation beyond those identified in adopted SEPA policies. RCW
22 43.21C.060. EFSEC’s substantive SEPA policies are found in (and limited to) WAC 463-47-110. To the extent required
23 by RCW 80.50.140(2), TSPT objects to the Administrative Law Judge’s orders denying admission of the Draft
24 Environmental Impact Statement (“DEIS”), and related documents, and precluding consideration of certain evidence
25 considered pursuant to SEPA review during the adjudication of this matter.

⁹ RCW 80.50.010.

¹⁰ RCW 80.50.010.

¹¹ WAC 463-60-010. See also *Friends of the Columbia Gorge v. State Energy Facility Site Evaluation Council*, 178
Wn.2d 320, 335–36, 310 P.3d 780 (2013). Substantial compliance with these regulations is adequate. *Id.*

¹² WAC 463-60-012(1).

¹³ *Friends of the Columbia Gorge v. State Energy Facility Site Evaluation Council*, 178 Wn.2d 320, 336, 310 P.3d 780
(2013).

1 recommendation.¹⁴ TSPT has satisfied the informational requirements of chapter 463-60
2 WAC through submission of a complete application. For subject matter covered by
3 chapter 463-60 WAC that is not also addressed in chapter 463-62 WAC, the regulations
4 often identify federal and state laws and regulations that set the legal standard for
5 EFSEC's recommendation.¹⁵ TSPT satisfies these identified state and federal standards.
6 When chapter 463-60 WAC does not reference state or federal standards, then EFSEC's
7 consideration of the subject matter is pursuant to RCW 80.50.010, and EFSEC must seek
8 to achieve all of the statutory goals, including the need for abundant energy and other
9 public interest factors.

10 **C. Identified Impacts Should be Minimized Using Available and Reasonable**
11 **Methods, Including Those Contained in Adopted Standards, But Need Not be**
12 **Eliminated.**

12 EFSLA assumes that facilities will have "significant impact."¹⁶ The statute does not
13 require elimination of such impacts, but rather their mitigation. EFSEC's directive is to
14 "ensure through available and reasonable methods" that the location and operation of the
15 Terminal will "produce minimal adverse effects" on the environment.¹⁷ The Supreme
16 Court has held that this statutory directive does not require EFSEC "to impose every
17 mitigation measure so that the impact is objectively minimized," because to do so would
18 reflect "an extreme reading of the statute" and "misunderstands EFSEC's role in
19 balancing competing interests."¹⁸ Therefore, EFSEC has latitude in determining the
20 degree to which impacts are minimized. To the extent that Opponents argue all impacts

21 ¹⁴ *Id.*

22 ¹⁵ *See, e.g.,* WAC 463-60-352.

23 ¹⁶ RCW 80.50.010 ("The legislature recognizes that the selection of sites will have a significant impact upon the welfare
of the population, the location and growth of industry and the use of the natural resources of the state.").

24 ¹⁷ RCW 80.50.010.

25 ¹⁸ *Friends of Columbia Gorge, Inc. v. State Energy Facility Site Evaluation Council*, 178 Wn.2d 320, 344, 310 P.3d 780
(2013). *See also* Sumas Energy 2 Generation Facility, Findings of Fact, Conclusions of Law, and Order Recommending
Denial of Site Certification and Order Denying Motion to Reopen Record, Council Order No. 754, at 14 ("The
balancing of the state's need for energy at a reasonable cost and the need to minimize environmental impacts need not
be a strict cost accounting.") (EFSEC Feb. 2001), <http://www.efsec.wa.gov/Sumas2/order754.pdf>.

1 must be eliminated, or adopted standards are not adequate to eliminate all impacts,¹⁹ that
2 argument is inconsistent with EFSLA and EFSEC regulations.

3 Additionally, because of the statutory focus, the Council must give appropriate weight
4 to impacts based on their likelihood and severity. It would be inconsistent with the
5 guiding principle of the statute to find that speculative or remote impacts must be
6 eliminated before a facility may be sited or to deny the project based on impacts that are
7 reasonably likely to occur, but are adequately mitigated.

8 Finally, the Council may only seek to mitigate impacts attributable to the Terminal.
9 Because of the constitutional principles of nexus and rough proportionality,²⁰ the Council
10 may not base its decision on impacts that previously exist or that will occur in the future,
11 but that are not attributable to the Terminal. There must be “some sort of individualized
12 determination” that a condition “is related both in *nature and extent* to the impact of the
13 proposed development.”²¹ In other words, mitigation must be related and proportionate to
14 Terminal impacts. As explained further below, many of the purported impacts identified
15 by the Opponents already exist and will continue to do so with or without this Terminal,
16 and cannot be attributed to it.

17 **D. APA Standards for Judicial Review of a Site Certification Should Guide**
18 **EFSEC’s Deliberation.**

19 The Administrative Procedures Act, chapter 34.05 RCW, identifies the legal standards
20 that govern EFSEC’s decision, several of which are particularly relevant.²² First, EFSEC

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22 ¹⁹ See, e.g., Tr. vol. 22, 5126 [Kernutt]; Tr. vol. 13, 2995:13–18 [Wartman] (“I think it’s important to recognize that even
with mitigation measures in place, there is no mitigation strategy that is 100 percent foolproof. There will always be
some level of residual risk. That can’t be eliminated, even with careful thought and analysis.”).

23 ²⁰ See *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 837 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 391
(1994).

24 ²¹ *Dolan*, 512 U.S. at 391 (emphasis added).

25 ²² RCW 34.05.570(3); *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165
Wn.2d 275, 303–04, 197 P.3d 1153 (2008) (EFSEC decision-making process is governed by standards set forth by the
Administrative Procedures Act). While these standards apply to a reviewing court, they explain the discretion a court

1 findings of fact must be based on substantial evidence.²³ Substantial evidence is evidence
2 that is sufficient to persuade a fair-minded person of the truth or correctness of the
3 matter.²⁴ Findings of fact are not based on substantial evidence if they are contrary to
4 uncontroverted evidence. Additionally, findings of fact are not based on substantial
5 evidence if they are solely based on bare assertions.²⁵

6 Second, EFSEC's decision will also be reversible if EFSEC erroneously interprets or
7 applies the law. Requiring more than what is required by ESFLA or EFSEC's regulations
8 would constitute a misapplication of the law.

9 Third, EFSEC's decision must be able to pass muster under the arbitrary and
10 capricious standard.²⁶ An agency decision is arbitrary and capricious if it lacks a "rational
11 connection between the facts found and the conclusions made" or the agency "offered an
12 explanation for its decision that runs counter to the evidence before the agency, or is so
13 implausible that it could not be ascribed to a difference in view or the product of agency
14 expertise."²⁷ Thus, where the facts demonstrate that an incident or impact is not possible
15 or highly unlikely to occur, it would be reversible error for EFESC to recommend denial
16 or impose mitigation on those grounds.

17 _____
18 would give and therefore inform the Council's deliberation and recommendation. To ensure that its decision will be
19 upheld by a court, EFSEC should consider these standards when making its decision.

20 ²³ RCW 34.05.570(3)(e).

21 ²⁴ *King Cty. v. Cnt. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000); *Heinmiller v.*
22 *Dep't of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995). *See also Ames v. Washington State Health Dep't Med.*
23 *Quality Health Assurance Comm'n*, 166 Wn.2d 255, 262, 208 P.3d 549 (2009) ("Cases in which the evidence is simply
24 too bare to form a credibly persuasive argument in favor of the [agency's] factual allegations will be vacated under the
25 substantial evidence standard.").

26 ²⁵ *See, e.g., Mitchell v. Washington State Inst. of Pub. Policy*, 153 Wn. App. 803, 819, 225 P.3d 280 (2009) (bare
27 assertion was insufficient to demonstrate that finding of fact was not based on substantial evidence); *Robinson v. Dep't*
28 *of Labor & Indus.*, 181 Wn. App. 415, 430, 326 P.3d 744, *review denied*, 337 P.3d 325 (Wash. 2014) (bare assertion of
29 employment relationship was insufficient to controvert substantial evidence that there was no mutual agreement to an
30 employment relationship).

31 ²⁶ RCW 34.05.570(3)(i).

32 ²⁷ *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). A court will
33 overturn an administrative decision under the arbitrary and capricious standard if it is "willful and unreasoning action
34 taken without regard to or consideration of the facts and circumstances surrounding the action." *Kendall v. Douglas,*
35 *Grant, Lincoln & Okanogan Ctys. Pub. Hosp. Dist. No. 6*, 118 Wn.2d 1, 14, 820 P.2d 497 (1991) (citing *Abbenhaus v.*
City of Yakima, 89 Wn.2d 855, 858, 576 P.2d 888 (1978)).

1 a reduction in flow.³⁴ The ANS pipeline “could become very intermittent or face
2 reliability issues where a corrosion issue shuts it down for a time or some icing up.”³⁵ If
3 ANS supply to refineries becomes erratic, it is problematic for refiners and is disruptive to
4 the market.³⁶

5 Feedstock replacement sources for PADD V (including Washington) refineries are
6 limited. This refinery system is isolated and has limited pipeline connection to the national
7 crude oil transportation infrastructure elsewhere in the United States.³⁷ The limited
8 existing pipeline infrastructure is operating at capacity and it would take a significant
9 amount of time to develop new or expanded pipeline infrastructure to deliver North
10 American crude to PADD V and Washington.³⁸ Given the level of controversy associated
11 with new pipeline siting, it is not certain whether it would even be feasible.³⁹ Available
12 foreign sources, which require increased marine vessel transport, are less reliable and
13 potentially unstable.⁴⁰ Washington refinery production would be put at risk if left only
14 with foreign sources for alternative supply.

15 By contrast, the Terminal utilizes existing rail and marine infrastructure to deliver
16 reliable sources of mid-continent North American crude oil to satisfy near-term need over
17 the 20-year life of the project.⁴¹ Its reliance on existing rail and marine infrastructure
18 stands in contrast to new pipeline construction, which requires a longer lead time, retains a
19

21 ³⁴ Tr. vol. 21, 4982, 4984:2–6 [Roach].

22 ³⁵ Tr. vol. 21, 4985:2–5 [Roach].

23 ³⁶ Tr. vol. 21, 4986:1–10 [Roach]. Additionally, as the ANS supply continues to decline, one company who holds a first
right on ANS crude could choose to exercise that first call and the rest of the refiners, including Tesoro, could see their
source of ANS crude diminish entirely. Tr. vol. 21, 4980:18; 4981:7 [Roach].

24 ³⁷ Pre-filed testimony of Brad Roach at 4:13–6:8, 16:6–20.

25 ³⁸ Tr. vol. 21, 4989:21; 4990:1 [Roach].

³⁹ Tr. vol. 21, 4990:2–5 [Roach].

⁴⁰ Pre-filed Testimony of Brad Roach, at 17:3–22. *See also* Tr. vol. 21, 5031:22–23 [Roach].

⁴¹ Tr. vol. 21, 4995–96 [Roach].

1 more permanent footprint, and involves investment costs that would require much longer-
2 term commitments to justify new construction.⁴²

3 **B. Opponents Focus on the Short-term and on Washington Only, Ignoring the**
4 **Market Realities of the Petroleum Fuel Industrial in Washington.**

5 Opponents raise five flawed arguments assertion that there is no need for, or benefit
6 from, the Terminal. First, Mr. Ian Goodman’s conclusions about this issue were premised
7 on a myopic understanding of the ANS supply. Mr. Goodman only assessed the impacts
8 of the decline in ANS crude until 2025, not over the 20-year life of the project. Mr. Brad
9 Roach took a longer view and concluded “if you continue that decline beyond what Mr.
10 Goodman did and if you continue that decline on through the rest of the Terminal project
11 life, you're looking at a decline of some 55 percent from where we are today in the ANS
12 crude production.”⁴³ The result of such decline is to remove approximately the same
13 amount of crude that Washington refineries use today.⁴⁴

14 Second, Opponents falsely assert that there is no need for the Terminal because crude
15 oil from other sources could be delivered to Washington via the Trans Mountain Pipeline.
16 The Trans Mountain pipeline currently operates at full capacity. Although there are plans
17 to expand this pipeline, those plans are far from guaranteed and would likely be opposed
18 by the same parties to this proceeding.⁴⁵

19 Third, Mr. Goodman relied on an EIA graph showing a national decline in crude by
20 rail to support the mistaken assertion that the Terminal project is outdated because the

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22 ⁴² Pre-filed Testimony of Brad Roach, at 18:20–19:7; Tr. vol. 2, 166:5–19 [Roach].

23 ⁴³ Tr. vol. 21, 4979:3–9 [Roach].

24 ⁴⁴ Tr. vol. 21, 4979:13–17 [Roach].

25 ⁴⁵ Tr. vol. 21, 4989–90 [Roach]; Pre-filed Testimony of Ian Goodman, at 2:5, 3:9. More generally, other opponent witnesses relied on evidence of pipeline spills to try and prove their case, suggesting that they would oppose the risk of either. Pre-Recorded Test. Tr., 10:9–14, 26:19–28:7, 28:24–30:4 [Harvey]. Indeed, evidence confirms that spills from pipelines can be far greater in volume than from incidents that might occur with the project operation because of the time it takes to detect pipeline spills. Tr. vol. 8, 1859:12–1860:23 [Taylor]. See also Tr. vol. 19, 4393:20–4394:5, 4413:23–25 [Taylor].

1 market no longer supports this delivery method.⁴⁶ Although, the graph demonstrates an
2 overall decline in CBR in the United States, it clearly shows that CBR is holding steady in
3 PADD V, a fact Mr. Goodman conveniently downplayed, until forced to specifically
4 acknowledge on cross-examination.⁴⁷ CBR is declining elsewhere because pipelines are
5 now connecting those areas. The graph actually supports Mr. Roach’s characterization of
6 the need for this Terminal. It shows a continued and steady reliance on CBR to PADD V,
7 precisely because there has been no development of pipeline infrastructure as there has
8 been to other areas. Thus, the decline in CBR on the national level is not applicable to
9 Washington or PADD V more generally.

10 Fourth, Opponents argue that the Terminal does not address a need for energy because
11 it is merely a “conduit” or “pass-through facility” rather than an energy production facility
12 such as a power generation plant.⁴⁸ This argument disregards the EFSLA definition of
13 facilities that triggers EFSEC jurisdiction, which include energy transmission facilities,
14 including petroleum and gas pipelines, which do not include production.⁴⁹ Following
15 Opponents’ argument to its logical conclusion, EFSEC would have to deny applications
16 for all facilities that do not generate energy, including transmission facilities and
17 pipelines. This absurd result cannot have been the Legislature’s intent, because the
18 Legislature included transmission facilities within EFSEC’s jurisdiction.

19 Finally, Opponents argue that the project must demonstrate a Washington-specific
20 energy need and further assert that the Terminal does not fulfill such a need.⁵⁰ Both
21 arguments are wrong. An applicant may demonstrate need based on the needs of
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23 ⁴⁶ Tr. vol. 14, 3253:23-3258:25, 3260:21–3261:2 [Goodman].

24 ⁴⁷ Tr. vol. 14, 3257:24–25, 3290:8–17 [Goodman].

25 ⁴⁸ Pre-filed Testimony of Ian Goodman, at 22; Tr. vol. 14, 3244:9–19, 3264:20–3266:11 [Goodman].

⁴⁹ See RCW 80.50.020(11)(“energy facility”); RCW 80.50.020(21)(“transmission facility”); and RCW 80.50.060 (which describes EFSEC jurisdiction over “energy facilities” that include transmission facilities).

⁵⁰ Columbia Riverkeeper, et al. and Tribal Parties’ Pre-Hearing Br. 3, 29.

1 Washington citizens, needs in other geographic locations, or both. Opponents' position is
2 inconsistent with rules of statutory construction, EFSEC precedent, and the commerce
3 clause of the Constitution. Moreover, even if a Washington specific requirement existed
4 in the statute, TSPT has demonstrated such a need.

5 By interpreting RCW 80.50.010 to require TSTP to demonstrate a Washington
6 specific energy need for the Terminal, Opponents read a requirement into the statute
7 which does not exist and would be illegal if it did. Their interpretation violates basic
8 tenants of statutory construction. As discussed in Section II.A. above, EFSLA's policy
9 statement includes five factors that EFSEC should consider to ensure protection of the
10 broader public interest.⁵¹ The factors include the need to "provide abundant energy at
11 reasonable cost."⁵² This mandate is not limited to a Washington-specific need. By
12 contrast, in the one instance in which the Legislature intended the factor to be
13 Washington-specific, it expressly said so. RCW 80.50.010 directs EFSEC to consider
14 whether sufficient safeguards are in place for the protection and welfare of "Washington
15 state citizens."⁵³ Thus, the Legislature clearly knew how to create Washington-specific
16 requirements, when it intended to do so. The lack of such a requirement with regard to
17 demonstration of need for an energy facility represents the Legislature's deliberate
18 decision not to impose that limitation.⁵⁴ Under tenants of statutory construction, the
19 omission of any reference to Washington citizens in the subsections discussing needs for
20 energy must be read as intentional due to inclusion of those specific references to
21 Washington citizens in other parts of the same section of the statute.⁵⁵

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⁵¹ RCW 80.50.010.

23 ⁵² RCW 80.50.010(3).

24 ⁵³ RCW 80.50.010(1).

25 ⁵⁴ RCW 80.50.010(3).

⁵⁵ When analyzing a statute's text, a statute should be read as a harmonious whole, with its separate parts being interpreted within their broader statutory context. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S. Ct. 1291 (U.S. 2000) (citing *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389, 79 S.Ct. 818

1 Opponents' interpretation that TSPT must demonstrate a Washington-specific need is
2 also inconsistent with EFSEC's past practice. In its recommendation of the Sumas Energy
3 2 project, EFSEC correctly considered the energy needs of the entire Northwest region of
4 the United States, not just the State of Washington, in concluding that the Sumas Energy 2
5 project would meet those needs.⁵⁶

6 Finally, Opponents' interpretation of RCW 80.50.010 as limited to Washington need
7 only also violates the Commerce Clause of the United States Constitution.⁵⁷ An
8 interpretation of a state law violates the Dormant Commerce Clause⁵⁸ if it discriminates
9 against interstate commerce⁵⁹ or if it only indirectly affects interstate commerce but the
10 burden on interstate commerce exceeds local benefits (i.e. an undue burden).⁶⁰ If EFSEC
11 were to deny the Terminal because it served energy needs outside of the State of
12 Washington, EFSEC would effectively be curtailing the movement of crude oil outside
13 Washington and applying RCW 80.50.010 in a discriminatory manner. If EFSEC finds
14 that the Terminal does not satisfy RCW 80.50.010 because crude oil passing through the

15 (1959). *See also Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (“[W]here Congress includes particular
16 language in one section of a statute but omits it in another..., it is generally presumed that Congress acts intentionally
17 and purposely in the disparate inclusion or exclusion.”) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983));
18 *Automobile Drivers & Demonstrators Union Local 882 v. Department of Retirement Sys.*, 92 Wn.2d 415, 421, 598 P.2d
19 379 (1979) (A “court cannot read into a statute that which it may believe the legislature has omitted, be it an intentional
20 or inadvertent omission.”); *Bates v. United States*, 522 U.S. 23, 29 (1997) (inclusion of “intent to defraud” language in
21 one provision and exclusion in a parallel provision); *Bailey v. United States*, 516 U.S. 137, 146 (1995) (distinction in
22 one provision between “used” and “intended to be used” creates implication that related provision’s reliance on “use”
23 alone refers to actual and not intended use).

24 ⁵⁶ Sumas Energy 2 Generation Facility, Findings of Fact, Conclusions of Law, and Order Recommending Approval of
25 Site Certification On Condition, Council Order No. 768, at 25–27 (EFSEC May 2002),
<http://www.efsec.wa.gov/FILES/orders/768.pdf>.

⁵⁷ U.S. Const. art. I, § 8, cl. 3.

⁵⁸ While the Commerce Clause expressly grants power to Congress to regulate interstate commerce, Courts have
concluded that the Clause also has a “‘negative’ aspect that denies the States the power unjustifiably to discriminate
against or burden the interstate flow of articles of commerce.” *Oregon Waste Sys., Inc. v. Dep’t of Env’tl. Quality of
State of Or.*, 511 U.S. 93, 98 (1994) (citing *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992)). That negative converse
that restricts state action is known as the Dormant Commerce Clause.

⁵⁹ A discriminatory law is one that either restricts market participation or curtails the movement of articles of interstate
commerce based on whether a market participant or article of commerce is in-state versus out-of-state, or local versus
non-local. *See, e.g., Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep’t Nat. Res.*, 504 U.S. 353 (1992); *H.P. Hood &
Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949).

⁶⁰ *See S.D. Myers, Inc. v. City & Cty. of San Francisco*, 253 F.3d 461, 466 (9th Cir. 2001) (quoting *Brown-Forman
Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579, 106 S.Ct. 2080 (1986)).

1 facility would be delivered to end users outside Washington, rejection of the application
2 for site certification on these grounds would constitute an undue burden on commerce and
3 a violation of the Dormant Commerce Clause.⁶¹

4 In any event, the evidence demonstrates a substantial need for the Terminal in
5 Washington State and commensurate benefits for its citizens. As Mr. Roach testified,
6 over the life of the project, crude oil passing through the Terminal would go to
7 Washington refineries.⁶² Even if that were not the case, and one was to assume that every
8 drop of crude oil passing through the Terminal were destined for California refineries (as
9 Mr. Goodman asserts would be the case⁶³) there is still a significant energy benefit to
10 Washington citizens because PADD V refineries, including those in Washington, operate
11 as part of a larger system.⁶⁴ Each refinery in the system operates at an optimal level with a
12 slightly different mix of crude oil feedstocks.⁶⁵ The system can optimize quality, quantity
13 and cost of refined product throughout the system of refineries as well as at each
14 individual refinery (including Washington refineries) by moving available crude oil
15 supplies around the system based on availability, price and crude oil characteristics.⁶⁶ As
16 additional crude oil supplies become available (such as the mid-continent North American
17 supplies that would use the Terminal), there is increased opportunity to optimize the entire
18 system. This benefits the system as a whole, and benefits Washington refineries as part of

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⁶¹ See generally, *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Although EFSEC may have a legitimate local public interest in ensuring Washington’s energy demands, such interest is clearly outweighed by the fact that, taken to a logical extreme, single or multiple states could implement laws that effectively prohibit transport of oil and gas resources from the states of origin. *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (“[T]he practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation.”).

⁶² Tr. vol. 21, 4987:23–4988:23, 4993:4–4996:10 [Roach].

⁶³ Tr. vol. 14, 3248:21–25 [Goodman].

⁶⁴ Tr. vol. 21, 4991:18–4993:12 [Roach].

⁶⁵ Tr. vol. 21, 4991:7–4992:3 [Roach].

⁶⁶ Tr. vol. 21, 4991:7–4994:3 [Roach].

1 that system, regardless of which crude oil molecules flow to which refinery in the
2 system.⁶⁷

3 **IV. EVIDENCE DEMONSTRATES THAT THE TERMINAL SATISFIES**
4 **APPROVAL CRITERIA IN CHAPTER 463-62 WAC**

5 TSPT has demonstrated compliance with the specific standards adopted in chapter
6 463-62 WAC. In the case of air and water quality, final confirmation of compliance will
7 be accomplished through the air and water quality permitting processes, and a condition in
8 the site certification that requires those permits is all that is required.

9 The standards in chapter 463-62 WAC apply to the Terminal itself and focus on its
10 impacts.⁶⁸ Potential indirect or secondary impacts from transport to or from the Terminal
11 are not relevant under this chapter and at most, are subject to consideration under SEPA.⁶⁹

12 **A. Air: The Terminal Satisfies Approval Criteria for Air Quality in WAC 463-62-**
13 **070.**

14 WAC 463-62-070 adopts the applicable state and federal air quality laws and
15 regulations that set forth the requirements to receive an air permit.⁷⁰ Therefore,
16 compliance with the air permitting requirements satisfies the air quality requirements for
17 issuance of a site certification for construction and operation of the Terminal.⁷¹ The air
18 permit application, which is under review, is the appropriate vehicle to continue to resolve
19 any remaining technical details. A condition in the site certification that requires a Notice

20 ⁶⁷ See, e.g., Tr. vol. 21, 4993:4-12, 4996:4-10 [Roach].

21 ⁶⁸ Each is a performance standard “associated with site certification for construction and operation of energy
22 facilities...” WAC 463-62-010(1). Additionally, all the individual sections of that chapter address components of the
23 energy facility itself, rather than its indirect impacts. See, e.g., WAC 463-62-020 (the seismic standard specifically
24 applies to the “construction of energy facilities”); WAC 463-62-030 (noise standards indicate that the standards apply to
25 the “energy facilities” themselves); WAC 463-62-040 (fish and wildlife standard applies “in the areas impacted by the
energy development” and define site selection criteria); WAC 463-62-050 (wetland standard designed to address
impacts of site selection and development); WAC 463-62-060 (water quality standard addresses “discharges from
projects”); WAC 463-62-070 (air quality standard addresses “air emissions from energy facilities”).

⁶⁹ Transportation-related topics are discussed in Sections VI. and VII., below.

⁷⁰ WAC 463-62-070.

⁷¹ WAC 463-62-010(3) (2009).

1 of Construction Order of Approval under relevant air permit regulations is all that is
2 required to satisfy this provision.

3 **1. Applicable emissions and air standards.**

4 The Terminal is subject to state and federal emissions standards as well as state and
5 federal ambient air quality standards. Emission standards are designed to limit how much
6 air pollution a facility emits into the air. This is achieved through compliance with
7 applicable federal and state performance standards, as well as Washington’s Best
8 Available Control Technology (“BACT”) requirements as determined on a project
9 specific basis.

10 The federal Clean Air Act imposes specific emissions requirements, known as
11 Prevention of Significant Deterioration (“PSD”) standards for facilities designated as
12 major sources.⁷² A petroleum storage and transfer unit with annual emissions of certain
13 regulated pollutants exceeding 100 tons per year (tpy) is a major source and subject to the
14 federal PSD regulations.⁷³ Facilities that emit less are subject to Washington’s minor
15 source permitting process.⁷⁴ To meet emissions standards, the applicant is responsible for
16 proposing BACT for each emission unit at the facility.⁷⁵ Washington requires BACT for
17 both minor and major emissions sources of regulated pollutants.⁷⁶ Ultimately, the BACT
18 requirements for the Terminal will be established by EFSEC as part of the ongoing air
19 permit application review process.

20 In addition to emissions standards, the Terminal must also comply with ambient air
21 quality standards. These standards govern how much of a given pollutant may be in the
22 air that people breathe. A project applicant must demonstrate that the air emissions from a

23 ⁷² 42 U.S.C. § 7471; 40 C.F.R. § 52.21.
24 ⁷³ Pre-filed Testimony of Eric Hansen, at 5:16–19; 40 C.F.R. § 51.166(b)(1)(i)(a).
25 ⁷⁴ Pre-filed Testimony of Eric Hansen, at 5:24–6:1.
⁷⁵ Pre-filed Testimony of Eric Hansen, at 2:19–21.
⁷⁶ WAC 173-400-113; Pre-filed Testimony of Eric Hansen, at 2:19–21.



1 proposed new stationary source will not cause or contribute to violations of any of the
2 “primary” or “secondary” National Ambient Air Quality Standards (“NAAQS”)⁷⁷ and
3 related regulations promulgated by the EPA. Applicants must also comply with state
4 ambient air quality standards. Washington sets air quality standards for over 400
5 compounds deemed to be Toxic Air Pollutants (“TAPs”).⁷⁸

6 Terminal compliance with air quality standards is determined by comparing a specific
7 pollutant’s emission rate with the small quantity emission rate (“SQER”) set by the
8 Department of Ecology.⁷⁹ If emissions of a given pollutant exceed the SQER, the
9 applicant must conduct computer dispersion modelling to determine if off-site
10 concentrations will exceed the acceptable source impact level (“ASIL”), which establishes
11 the ambient air concentration threshold.⁸⁰ ASILs are conservatively set by Ecology and
12 U.S. EPA to protect human health and only apply to stationary sources.⁸¹ In the case of
13 diesel particulate matter for instance, ASILs do not apply to mobile sources such as
14 automobiles, trains or ships, which are subject to a different regulations.⁸²

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18 ⁷⁷ U.S. EPA is required to establish NAAQS and publish a list of air pollutants subject to “primary” and “secondary”
19 standards. *Primary standards* set limits to protect public health, including the health of “sensitive” populations such as
20 asthmatics, children, and the elderly. 40 C.F.R. § 50.2. *Secondary standards* set limits to protect public welfare,
21 including protection against decreased visibility, damage to animals, crops, vegetation, and buildings. *Id.* These criteria
22 pollutants include nitrogen oxides (“NO_x”), carbon monoxide (“CO”), and sulfur dioxide (“SO₂”), ozone (“O₃”), as well
23 as airborne solids and other chemicals that combine to form particulate matter (“PM”). 40 C.F.R. pt. 50. PM is
24 expressed in terms of PM₁₀ and PM_{2.5}; both are considered inhalable particulate matter and nearly all particulate matter
25 generated by the Terminal will be PM_{2.5}. Washington has established its own ambient air quality standards that mirror
the federal standards, Washington Ambient Air Quality Standards (“WAAQS”), in virtually all respects with the
addition of airborne lead. See chapter 173-476 WAC. EFSEC must find that a project is in compliance with all federal
and state ambient air quality standards before issuing a final air permit approving the Terminal. “Ambient air” is defined
as the “surrounding outside air.” See WAC 173-400-030(6). Washington has established WAAQS that apply throughout
Washington State. Washington State and local standards are *primary standards only*.

⁷⁸ WAC 173-460-150.

⁷⁹ WAC 173-460-050.

⁸⁰ WAC 173-460-080(2)(a).

⁸¹ Tr. vol. 4, 771: 13–14.

⁸² Pre-filed Testimony of Eric Hansen, at 9:1–4.

1 **2. The Terminal meets applicable air permitting standards, and therefore,**
2 **meets the requirements of WAC 463-62-070.**

3 As demonstrated during this adjudication and as further shown in the pending air
4 permit application, the Terminal is properly characterized as a minor source. The
5 Terminal is designed to ensure that emissions will not exceed PSD thresholds.⁸³ As Dr.
6 Ranajit Sahu admitted during his testimony, the source determination is made based on
7 the Terminal’s highest capability to produce emissions, subject to its design, throughput
8 and other permitted and enforceable restrictions.⁸⁴ Accounting for these considerations,
9 TSPT determined that the Terminal is a minor source because emissions are less than 100
10 tpy of any criteria pollutant.⁸⁵ The Terminal is, therefore a minor source, and the PSD
11 regulations do not apply.⁸⁶

12 Even as a minor source, under Washington law the Terminal must implement BACT
13 as determined by EFSEC.⁸⁷ As the pending air permit application shows, TSPT has
14 examined each stationary emission unit at the Terminal site to determine an emission
15 limitation based on the maximum degree of reduction of each pollutant achievable for the
16 Terminal taking into account feasibility, energy, environmental and economic impacts and
17 other relevant factors.⁸⁸

18 The Terminal also meets all applicable ambient air quality standards. TSPT applied
19 an EPA-approved air dispersion model to estimate the off-site concentrations of regulated
20 air pollutants emitted by the Terminal and compared predicted concentrations to ambient
21 air quality standards and toxic air pollutant impact criteria.⁸⁹ Model-predicted

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23 ⁸³ Pre-filed Testimony of Eric Hansen, at 5–6; Tr. vol. 4, 747: 14-18 [Hansen].
24 ⁸⁴ Tr. vol. 15, 3592:14–21[Sahu].
25 ⁸⁵ Pre-filed Testimony of Eric Hansen, at 5:20–24.
⁸⁶ Pre-filed Testimony of Eric Hansen, at 5–6.
⁸⁷ Pre-filed Testimony of Eric Hansen, at 2:18–21.
⁸⁸ Pre-filed Testimony of Eric Hansen, at 2–3.
⁸⁹ Pre-filed Testimony of Eric Hansen, at 4:10–13.

1 concentrations of all pollutants evaluated comply with primary and secondary standards
2 for ambient air quality and TAP criteria at all off-site locations.⁹⁰

3 As reflected in the air permit application, dispersion modeling was conducted for eight
4 TAPs emitted at rates exceeding the SQERs, and then maximum concentrations of these
5 TAP emissions were compared with the appropriate ASILs.⁹¹ Predicted maximum
6 concentrations attributable to the Terminal are less than the Ecology ASILs for all TAPs.⁹²

7 **3. Opponents' arguments that the Terminal does not comply with air**
8 **standards are without merit.**

9 Opponents raise three issues related to compliance with the air permitting standards:
10 (i) major vs. minor source characterization; (ii) vessel loading fugitive emissions; and (iii)
11 total vapor pressure in the storage tanks. None have merit.

12 **i. The Terminal is appropriately characterized as a minor source.**

13 A petroleum storage and transfer unit is only a major source under the Federal
14 Clean Air Act if it has a total storage capacity exceeding 300,000 barrels and the annual
15 emission rate exceeds 100 tpy of any one of certain listed pollutants.⁹³ TSPT has
16 incorporated design modifications and committed to certain emission control measures,
17 which ensure that Terminal-related emissions will remain below 100 tpy for each
18 regulated pollutant.⁹⁴ Despite the Opponent's inferences to the contrary, incorporation of
19 such measures during project design to limit Terminal emissions is consistent with, and
20 certainly not prohibited by, the PSD regulations governing the determination of major
21 sources.⁹⁵ Dr. Sahu admitted during his testimony that the source determination is made
22 based on the Terminal's highest capability to produce emissions, subject to its design,

23 ⁹⁰ Pre-filed Testimony of Eric Hansen, at 5:9–11.

24 ⁹¹ EX-0001-000472-PCE.

25 ⁹² EX-0001-000472-PCE.

⁹³ 40 C.F.R. § 51.166(b)(1)(i)(a).

⁹⁴ Pre-filed Testimony of Eric Hansen, at 5:20–24.

⁹⁵ See e.g., Tr. vol. 4, 746:20–747:18, 748:21-749:4 [Hansen].

1 throughput and other permitted and enforceable restrictions.⁹⁶ There is no basis in fact or
2 law supporting Opponent’s mischaracterization of the Terminal is a major source.⁹⁷

3 **ii. TSPT properly evaluated the potential for fugitive emissions from**
4 **vessels.**

5 Opponents suggest that TSPT incorrectly assumed that vessels calling at the
6 Terminal would not contribute to Terminal related fugitive emissions.⁹⁸ As demonstrated
7 by the testimony of Marc Bayer, this argument is largely rooted in the Opponents’
8 ignorance of vessel requirements related to pressure. Contrary to the assertions of Dr.
9 Ranajit Sahu, a vessel does not have to maintain negative pressure to prevent the release
10 of fugitive emissions.⁹⁹ In fact, Federal law requires tankers to maintain positive
11 pressure.¹⁰⁰ The tankers that will call at the Terminal can be expected to comply with the
12 positive pressure requirements under federal law.¹⁰¹ Moreover, these vessels are vapor
13 tight and are routinely inspected to ensure that crude oil related fugitive vapors are not
14 released.¹⁰² This has been confirmed for Tesoro vessels by independent third-party
15 inspectors using extremely sensitive testing equipment.¹⁰³ TSPT has committed to
16 requiring every vessel calling at the Terminal to be certified vapor tight using similar
17 techniques.¹⁰⁴ Accordingly, it is appropriate to assume that the marine vessel related
18 fugitive emissions asserted by Dr. Sahu will not occur. The ongoing air permit review
19 will confirm that TSPT has properly identified Terminal related fugitive emissions and

20 ⁹⁶ Tr. vol. 15, 3592:14–21 [Sahu].

21 ⁹⁷ Pre-filed Testimony of Eric Hansen, at 5–6.

22 ⁹⁸ Pre-filed Testimony of Ranajit Sahu, at 18.

23 ⁹⁹ Tr. vol. 4, 817–818 [Bayer].

24 ¹⁰⁰ “Each inert gas system must be designed to enable the operator to maintain a gas pressure of 100 millimeters (4
25 inches).” 40 C.F.R. § 32.53-30.

26 ¹⁰¹ 46 C.F.R. § 32.53-30; Tr. vol. 4, 816:2-9 [Bayer].

27 ¹⁰² Tr. vol. 4, 814:20–815:2 [Bayer]. Dr. Sahu assumed that Captain Bayer was using the phrase “vapor tight” to mean
28 that fugitive emissions from the vessels were within the range allowed by regulation. Tr. vol. 15, 3641–3642 [Sahu].
29 However, Captain Bayer clarified on rebuttal that the tests demonstrated that the vessels were not leaking any emissions.
30 Tr. vol. 19, 4551:2–12 [Bayer].

31 ¹⁰³ Tr. vol. 4, 814:20–815:2 [Bayer].

32 ¹⁰⁴ Tr. vol. 4, 819: 3–4 [Bayer].

1 that those emissions do not alter the fundamental assumptions about overall Terminal
2 related crude oil vapor emissions considered in the potential to emit calculation.

3 **iii. Measures to ensure maintenance of proper vapor pressure in the**
4 **storage tanks are adequate.**

5 The Terminal storage tanks are designed to comply with the 40 CFR 60.112b (a),
6 which allows for internal floating roofs with dual seals (among other possible design
7 options). Based on this design, the maximum true vapor pressure (“TVP”) for crude
8 stored in the tanks may not exceed 11.1 PSI on an average monthly temperature basis.¹⁰⁵
9 A higher average TVP would require installation of additional emission control
10 technology.¹⁰⁶ The Opponents allege that TSPT is unable to ensure maintenance of the
11 storage tank TVP threshold.¹⁰⁷ They are wrong.

12 As a practical matter, the crude oil stored at the Terminal is unlikely to ever exceed the
13 TVP threshold. Mr. John Hack testified that crude stored in tanks at Tesoro’s Anacortes
14 refinery have never approached the maximum 11.1 monthly average TVP threshold.¹⁰⁸ As
15 will occur at the Terminal, the Anacortes refinery receives Bakken crude oil delivered by
16 rail. This crude oil is stored in tanks that are subject to the same regulatory threshold
17 applicable to the Terminal.¹⁰⁹ For the past year, testing at the crude oil source and at the
18 Anacortes facility has shown that the true vapor pressure, both at the source and at the
19 Terminal, is well below the limit.¹¹⁰

20 TSPT will implement a testing protocol for the Terminal to ensure that the average
21 monthly temperature TVP limit is not exceeded.¹¹¹ This protocol will be similar to that

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¹⁰⁵ 40 C.F.R. § 60.112b(a) (imposing maximum true vapor pressure of 76.6 kPa, which is equivalent to 11.1 PSI)

23 ¹⁰⁶ 40 C.F.R. § 60.112b(b).

24 ¹⁰⁷ Tr. vol. 15, 3689–3690 [Sahu].

25 ¹⁰⁸ Tr. vol. 7, 1614–1615 [Hack].

¹⁰⁹ Tr. vol. 7, 1614:4–17 [Hack].

¹¹⁰ Tr. vol. 7, 1614–1615 [Hack].

¹¹¹ Tr. vol. 4, 678–679 [Corpron].

1 used at the Anacortes refinery.¹¹² TSPT will require customers to test vapor pressure at
2 the source as tank cars are loaded.¹¹³ This will allow any issue to be addressed before
3 arrival at the Terminal. TSPT will also test the crude oil using grab samples from transfer
4 pipes as the crude oil is transferred to the storage tanks on site.¹¹⁴

5 Notwithstanding this robust testing protocol, the Opponents speculate that an
6 individual tank car, or even an entire unit train, carrying oil exceeding the TVP limit may
7 slip through and cause the contents of a Terminal storage tank to exceed the TVP limit.
8 This ignores both the track record of shipments to the Anacortes refinery and the
9 regulatory requirement, which is based on a monthly average temperature TVP for storage
10 tank contents.¹¹⁵ Because the storage tanks will hold the volume of as many as four unit
11 trains, the contents of an individual car or train is not likely to cause the entire contents of
12 a storage tank to exceed the limit.¹¹⁶ In the unlikely event higher vapor pressure crude oil
13 is mixed with lower vapor pressure crude oil, it is still likely that total storage tank
14 contents will not exceed the TVP threshold.

15 Data from actual experience, together with the regulatory standard that applies to the
16 entire tank contents based on a monthly average refutes Opponents' unfounded
17 speculation that the Terminal might exceed the vapor pressure limits required for the
18 proposed floating roof tank design.¹¹⁷ EFSEC cannot deny the project based on
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21 ¹¹² Tr. vol. 4, 678–679 [Corpron].

22 ¹¹³ Tr. vol. 4, 678–679 [Corpron].

23 ¹¹⁴ Tr. vol. 4, 679:12–15 [Corpron].

24 ¹¹⁵ The TVP of the tank may not exceed 11.1 PSI, as estimated using the highest expected calendar-month average
25 temperature. 40 C.F.R. § 60.112b(a). 11.1 PSI is essentially a limit on the monthly average because the total vapor
pressure is estimated based on the upon the highest expected calendar-month average temperature. 40 C.F.R. § 60.116b
(e)(1)–(2).

¹¹⁶ Tr. vol. 4, 692–693 [Corpron].

¹¹⁷ In the unlikely event that a tank were to exceed the threshold on a monthly average basis, TSPT would be subject to
regulatory enforcement as part of air permit monitoring.

1 Opponents’ unfounded speculation that the Terminal will exceed vapor pressure
2 standards.¹¹⁸

3 **4. Opponents’ remaining claims regarding air quality are not relevant to the**
4 **specific regulatory standard for site certification approval and are**
5 **without merit.**

6 Opponents raise two other claims about air emissions: alleged deficiencies in the
7 Applicant’s greenhouse gas emissions (“GHG”) analysis;¹¹⁹ and the need for further
8 human health studies based on assumed exposures to toxic pollutants such as diesel
9 particulate emissions from mobile sources.¹²⁰ By their own admission, these two concerns
10 are not relevant to the standard adopted by EFSEC for issuance of site certification under
11 WAC 463-62-060.¹²¹ The issues are, therefore, not part of this adjudication and at best
12 subject to consideration under SEPA. In any event, TSPT has adequately addressed these
13 issues.

13 **i. TSPT has properly addressed the potential impacts of GHGs.**

14 TSPT’s GHG analysis is adequate because it is in accordance with state and federal
15 requirements and applies mitigation measures in excess of Ecology’s 11%
16 recommendation. TSPT analyzed GHG emissions from border-to-border in Washington.¹²²
17 Opponents invent a standard to contest the geographic reach of the GHG analysis. Yet,
18 Dr. Sahu admitted that nothing in the federal Clean Air Act or Washington Clean Air Act
19 requires that an applicant test emissions beyond the boundaries of the state.¹²³

21 ¹¹⁸ Opponents suggest that an API staff analysis (EX-5221-TRB) shows that vapor pressure for Baaken crude is
22 expected to be higher than the storage tank TVP threshold. The evidence establishes otherwise. Tr. vol. 4, 674-675
[Corpron].

22 ¹¹⁹ Pre-filed Testimony of Ranajit Sahu, at 39–42.

23 ¹²⁰ Tr. vol. 15, 3614–3615 [Sahu].

23 ¹²¹ As a preliminary matter, WAC 463-62 imposes no specific requirements pertaining to climate change or GHG
24 emissions and air permitting regulations do not address the topic Tr. vol. 15, 3650–3651 [Sahu]. Similarly, the air
25 permitting regulations do not require consideration of diesel particulate emissions from mobile sources. Tr. vol. 13,
3117–3119 [Fanning].

25 ¹²² Pre-filed Testimony of Eric Hansen, at 19:14–19.

¹²³ Tr. vol. 15, 3653–3654 [Sahu].

1 Opponents also assert that TSPT’s GHG analysis must consider the ultimate
2 combustion of the crude oil.¹²⁴ However, ultimate combustion or consumption of the
3 refined product is not attributable to this project. The crude oil passing through the
4 Terminal will satisfy a feedstock shortfall needed to supply an existing demand and will
5 not increase consumption or combustion of petroleum products, because the Project is not
6 proposing or even facilitating any increase in refining capacity.¹²⁵ Indeed, it is uncontested
7 that foreign sources, though unstable and unreliable, could be used to fill the feedstock
8 shortfall in the absence of this project.¹²⁶ Opponents’ witnesses also concede that
9 Washington refineries have been operating at essentially full capacity without this
10 Terminal.¹²⁷ Therefore, any energy ultimately produced and consumed, cannot be
11 attributed to this project.¹²⁸

12 Furthermore, TSPT has offered mitigation—beyond what is required—to address
13 GHGs. As demonstrated in the revised Application, the configuration of the Terminal was
14 significantly modified between February and August 2014 to reduce emissions, including
15 those from GHGs. The overall reduction in direct GHG emissions from the Terminal was
16 more than 36%, which greatly exceeds Ecology’s reduction target of 11%.¹²⁹ Although
17 not required, TSPT has also offered carbon dioxide mitigation through a payment of
18 \$496,440 to the Climate Trust for the implementation of projects to reduce GHG

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¹²⁴ Tr. vol. 15, 3675:12–19 [Sahu].
¹²⁵ Tr. vol. 21, 4979:3–22 [Roach].
¹²⁶ See Section III.A., *infra*; Pre-filed Testimony of Brad Roach, at 17:3–22; Tr. vol. 21, 5031:22–23 [Roach]. See also Pre-filed Testimony of Ian Goodman, at 18.
¹²⁷ Tr. vol. 14, 3243–3244 [Goodman].
¹²⁸ Tr. vol. 14, 3244:9–19[Goodman]. There are yet other examples of inconsistent opportunistic testimony by Opponents’ witnesses in which they try to “have their cake and eat it, too.” Dr. Sahu would have the Council assume that all of the crude will be refined in Washington for purposes of the GHG analysis, Tr. vol. 15, 3676:1–8, whereas Mr. Goodman assumes that *none* of the crude will be refined in Washington to argue that the Terminal is not an energy producing facility. Tr. vol. 14, 3244:9–19 [Goodman]. Both cannot be true.
¹²⁹ EX-0190-000077-TSS. The Applicant has determined that it will adopt and adhere to the “off-set obligations” established in the Ecology’s SEPA GHG guidance.

1 emissions, applying a formula to Terminal emissions similar to the formula established by
2 state law for power generation facilities.¹³⁰

3 **ii. Further human health impact analysis is not necessary or required.**

4 Opponents highlight the negative health effects of certain air pollutants (primarily
5 diesel particulate matter (“DPM”)), leap to the conclusion that residents living in close
6 proximity to the Terminal will be exposed to harmful levels of these pollutants, and
7 demand further health risk study of such exposure.¹³¹ There is no evidence that such study
8 is necessary or required.

9 The Terminal meets the DPM ASIL for stationary sources, the only regulatory
10 standard that applies to DPM emissions. There is no factual, statutory, or regulatory
11 support for Opponent’s demand for further study based upon a combination of stationary
12 and mobile sources. There is no ASIL or other adopted standard for assessing such
13 combined emissions, and use of the stationary source ASIL for this purpose would be no
14 less than arbitrary.¹³² As explained by Eric Hansen, use of that ASIL to evaluate mobile
15 source emissions is fraught with problems.¹³³ The Opponents’ toxicology witness, Dr.
16 Elinor Fanning, even admitted that without a standard to assess diesel exhaust from
17 mobile sources she has no idea how to address the purported DPM exposure issue.¹³⁴
18 EFSEC cannot deny or condition the Terminal on the basis of a non-existent standard.

19 Moreover, this is largely an issue about existing conditions. It is undisputed that the
20 Terminal itself meets the DPM standard. To the extent there may be DPM issues in the
21 vicinity of the Terminal, they derive not from Terminal construction or operations (the
22 major area of concern, the Fruit Valley Neighborhood, is not even primarily downwind of

23 ¹³⁰ EX-0001-000346-PCE.

24 ¹³¹ See e.g., Pre-filed Testimony of Elinor Fanning.

24 ¹³² Tr. vol. 4, 771–772 [Hansen].

25 ¹³³ Tr. vol. 4, 771–772 [Hansen].

25 ¹³⁴ Tr. vol. 13, 3128:17–19 [Fanning].

1 the Terminal),¹³⁵ but from other DPM sources. As Dr. Fanning acknowledged, such
2 sources, including nearby freeways, major roads, existing railroad, and marine vessel
3 facilities, are located near the Terminal site and surrounding neighborhoods.¹³⁶

4 Opponents admit these significant DPM sources exist.¹³⁷ Accordingly, even assuming
5 DPM impacts may exist, they are a product of a pre-existing regional conditions and not
6 primarily attributable to the Terminal.

7 In the absence of any statutory or regulatory requirement, to require further health
8 studies based upon a non-existent standard to address a largely preexisting problem would
9 be arbitrary and amount to reversible error under the APA for failing to follow agency
10 standards and procedures.

11 **B. Seismic: The Design of the Vancouver Energy Terminal Satisfies EFSEC's**
12 **Seismic Criteria in Chapter 463-62-020 WAC for Approval of Site**
13 **Certification.**

14 WAC 463-62-020 adopts the state building code as the seismicity standard for
15 construction of energy facilities. Therefore, compliance with the state building code,
16 including the applicable seismic design standards, satisfies the seismic requirements for
17 issuance of a site certification for construction and operation of the Vancouver Energy
18 Terminal.¹³⁸ A condition to that effect is all that is required for the site certification.

19 Evidence presented during the adjudication, including the testimony of Mark
20 Rohrbach¹³⁹ and Russ Gibbs,¹⁴⁰ and the unrefuted pre-filed testimony of Norman
21 Bennion¹⁴¹ and Nicholas Nash,¹⁴² confirms that the Terminal will meet or exceed
22 applicable design standards. In fact, the ground improvement design is exceptionally

22 ¹³⁵ Tr. vol. 13, 3124–3125 [Fanning].

23 ¹³⁶ Tr. vol. 13, 3124–3125 [Fanning].

24 ¹³⁷ Tr. vol. 13, 3126 [Fanning].

25 ¹³⁸ WAC 463-62-010(3).

¹³⁹ See e.g., Tr. vol. 5, 1132–1154 [Rohrbach].

¹⁴⁰ See e.g., Tr. vol. 16, 3843–3846 [Gibbs]; see also Pre-filed Testimony of Russ Gibbs, at 7:20–23.

¹⁴¹ Pre-filed Testimony of Norman Bennion, at 2:19–24; 8: 6–13.

¹⁴² Pre-filed Testimony of Nicholas Nash, at 4:6–12.

1 robust.¹⁴³ Opponents simply ignore this, second guess the design team’s approach, and
2 assert that more should be done without any basis in applicable engineering standards.

3 TSPT used the building code and USGS data to identify and evaluate earthquake
4 events that dictated the design standard.¹⁴⁴ TSPT’s design team used USGS information to
5 identify three earthquake events that could impact the Terminal.¹⁴⁵ Consistent with
6 standard practice, the design team then evaluated the probability of exceedance of those
7 events.¹⁴⁶ The opponents’ own seismic expert, Dr. Joseph Wartman, acknowledged the
8 benefits of this approach.¹⁴⁷ The design team’s analysis takes into consideration both
9 earthquake magnitude and peak ground acceleration (PGA).¹⁴⁸ The design earthquake
10 events included a Cascadia subduction zone earthquake, which would occur at a greater
11 distance from the Terminal but with a higher magnitude, and two local earthquakes, that
12 are expected to occur at a lower magnitude but with higher PGA.¹⁴⁹ The Terminal is
13 designed to withstand any of these events.¹⁵⁰

14 As the evidence has established, this is achieved through both structural design that
15 accounts for seismic risk and installation of ground improvements. Ground improvements
16 physically alter the ground so that it behaves in a determined manner when subjected to
17 structural loads and in the event of an earthquake.¹⁵¹ The proposed ground improvements
18 at the Terminal are designed to minimize settlement associated with earthquake induced
19 soil liquefaction and lateral spreading to 2 inches, which is significantly more robust than
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21 ¹⁴³ Tr. vol. 5, 1144:8–16; 1182:3–9 [Rohrbach].

¹⁴⁴ Tr. vol. 5, 1135–1136; 1152 [Rohrbach].

22 ¹⁴⁵ Tr. vol. 5, 1132:12–15 [Rohrbach].

¹⁴⁶ Pre-filed Testimony of Matthew Shanahan, at 14-15.

¹⁴⁷ Tr. vol. 13, 3028:19–23 [Wartman].

23 ¹⁴⁸ Tr. vol. 5, 1134–37 [Rohrbach]. The design addresses both smaller magnitude earthquakes with a .42 PGA as well
24 as larger magnitude events with a .37 PGA. The opponents’ seismic expert acknowledged that the “practical
significance” of the difference between the .37 and .42 PGA “is really not that great.” Tr. vol. 13, 3018:5–11 [Wartman].

¹⁴⁹ Tr. vol. 5, 1132, 1136 [Rohrbach]; EX-0205-000002-TSS.

¹⁵⁰ Tr. vol. 5, 1206 [Shanahan].

25 ¹⁵¹ Tr. vol. 5, 1137:14–19 [Rohrbach].

1 improvements at other comparable port facilities where expected settlement and lateral
2 spreading in areas that have undergone ground improvements can be measured in feet.¹⁵²
3 TSPT’s design team nevertheless chose to apply this aggressive and protective standard
4 because of the commodity being stored at the site that warranted, in their opinion, a safer,
5 more robust design.¹⁵³

6 Opponents raise five primary arguments about Terminal design as it relates to seismic
7 risk. These arguments principally pertain to soil liquefaction risks at various area locations
8 within the Terminal site.¹⁵⁴ None have merit.

9 **1. The engineering for area 200 and the loop track improvements satisfies**
10 **applicable standards.**

11 The unloading facility and loop track design adequately addresses potential settlement
12 of soils due to liquefaction. The rail unloading facility in area 200 will incorporate pipe
13 pile foundations.¹⁵⁵ Uncontroverted testimony establishes that those foundations will
14 reduce settlement to less than 1 inch.¹⁵⁶ Dr. Wartman simply ignored this critical
15 engineering detail when he predicted ground deformation on the order of up to 16 inches
16 in the unloading area.¹⁵⁷ He also mistakenly testified that there will be no secondary
17 containment in that area.¹⁵⁸ In fact, there is secondary and tertiary containment, as well as
18 automatic shutoff systems to minimize spills in the unlikely event that a seismic event
19 would cause cars to tip in the unloading area.¹⁵⁹

20 With respect to the railroad track improvements outside of the unloading area, no
21 ground improvements are needed. To be clear, the Port has already constructed the vast

22 ¹⁵² Tr. vol. 5, 1144, 1182–1183 [Rohrbach].

23 ¹⁵³ Tr. vol. 5, 1171:11–14 [Rohrbach] (“So we are allowing two inches of settlement here because of the nature of the
material being stored. If we were storing lumber, we would probably allow something on the order of a foot.”).

24 ¹⁵⁴ Tr. vol. 13, 2985:6–7 [Wartman] (“My concerns principally pertain to soil liquefaction.”).

25 ¹⁵⁵ Tr. vol. 21, 4896:11–15 [Corpron].

¹⁵⁶ Tr. vol. 21, 4871:4–8 [Corpron]; EX-0001-006468-PCE.

¹⁵⁷ Tr. vol. 13, 2985–86 [Wartman].

¹⁵⁸ Tr. vol. 13, 2989:2–6; 3002–3003 [Wartman].

¹⁵⁹ Tr. vol. 21, 4871:9–15 [Corpron]; Tr. vol. 20, 4659:20–4660:11; 4661:5–12 [Barkan].

1 majority of the track infrastructure on the loop line. TSPT proposes to construct one loop
2 track in addition to those already in place and to realign a small portion of two existing
3 tracks to allow entry into the unloading structure.¹⁶⁰ No ground improvements are
4 proposed in this area because expert testimony establishes that they are not needed. The
5 cap of compacted structural dredge and sand fill at the surface is not susceptible to
6 liquefaction, and because the groundwater in the site is so deep, there is not a risk of a
7 load bearing capacity failure.¹⁶¹ Instead, liquefaction of unimproved soils beneath the cap
8 would be limited to settlement of 10-16 inches during a design seismic event.¹⁶² This
9 amount of differential settlement under the track is acceptable pursuant to the standard
10 adopted by the American Railroad Engineering Maintenance Association (“AREMA”)
11 which governs the engineering design of rail improvements.¹⁶³

12 Dr. Wartman based his assumptions about what might occur in this area in the event of
13 an earthquake exclusively on the amount of expected settlement, but he is not a structural
14 engineer and, therefore, not surprisingly failed to account for the AREMA standard.¹⁶⁴
15 Nor did Dr. Wartman testify to, or profess to have, an understanding of the ability of the
16 track to withstand settlement based on the AREMA standard. Moreover, even if
17 earthquake related settlement were to cause a train to derail and tip, the consequences of
18 such an event when the train is stopped during unloading or traveling at low speed is not
19 likely to cause a breach of the tank car or loss of cargo.¹⁶⁵

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¹⁶⁰ EX-0001-000222-224-PCE; EX-0001-003737-PCE.

¹⁶¹ Tr. vol. 5, 1165:4-12 [Rohrbach]; Tr. vol. 5, 1190: 13-25 [Shanahan].

¹⁶² Tr. vol. 5, 1212:1-10 [Shanahan]; EX-0001-001890-PCE.

¹⁶³ Tr. vol. 21, 4872:7-15 [Corpron].

¹⁶⁴ Tr. vol. 13,3031:16-17 [Wartman] (noting, generally, that impacts to structures from earthquakes is “beyond my domain since I’m not a structural engineer.”)

¹⁶⁵ Tr. vol. 20, 4659:20-4661:12. [Barkan].

1 **2. The containment berm in Area 300 is adequately designed.**

2 After careful review, the design team determined that no ground improvements are
3 necessary immediately underneath the storage tank containment berm because the design
4 earthquake will not impair the berm’s containment function.¹⁶⁶ The berm will be built on
5 20 feet of compact fill and constructed with two-to-one sidewall slopes.¹⁶⁷ In the event of
6 an earthquake any underlying liquefaction soils due to a seismic event would, at most,
7 cause the berm to fail at a two-to-one side slope.¹⁶⁸ Failure at the same slope as the design
8 standard would maintain the berm’s structural integrity and containment function. There
9 is no reason from a geotechnical perspective to expect the berm to fail.¹⁶⁹

10 **3. The stone columns in the tank area do not need to extend through the**
11 **liquefiable layer to the non-liquefiable layer.**¹⁷⁰

12 In a glaring example of Opponents effort to impose requirements on this project that
13 exceed applicable standards, Dr. Wartman suggests that the “industrial nature of the
14 facility” warrants an additional factor of safety that can only be gained by extending stone
15 columns through the liquefiable layer to the non-liquefiable layer.¹⁷¹ There would be no
16 meaningful geotechnical benefit to such an approach.¹⁷² In fact, stone columns do not
17 commonly extend through the liquefiable layer to the non-liquefiable layer.¹⁷³ Here, the
18 ground improvement design includes treatment on a tank-by-tank basis to ensure no more

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¹⁶⁶ Tr. vol. 5, 1145:13–24 [Rohrbach].
¹⁶⁷ Tr. vol. 5, 1145:19–21 [Rohrbach]; Tr. vol. 3, 569:12-16 [Corpron].
¹⁶⁸ Tr. vol. 5, 1145:19–1146:9 [Rohrbach].
¹⁶⁹ Tr. vol. 5, 1145:23–24 [Rohrbach].
¹⁷⁰ Dr. Wartman also testified that the piles in area 500 along the transfer pipeline do not extend through the liquefiable layer to the non liquefiable layer. Tr. vol. 13, 2986:15–18; 2998: 24–25 [Wartman]. Area 500 does not have piles, it has stone columns and deep soil mixing/jet grouting in those areas along the river only. Tr. vol. 5, 1149:14–16 [Rohrbach].
¹⁷¹ Tr. vol. 13, 2987:2–7 [Wartman].
¹⁷² Tr. vol. 5, 1173:4-5 [Rohrbach].
¹⁷³ Tr. vol. 5, 1173:22–1174:17 [Rohrbach].

1 than two inches of settlement.¹⁷⁴ There is no evidence that extending the stone columns
2 further is necessary to achieve that stringent goal.

3 **4. The ground improvements in area 400 are adequate.**

4 Dr. Wartman questioned the adequacy of the ground improvement design for Area 400
5 because columns do not penetrate the liquefiable layer.¹⁷⁵ He is wrong. The stone
6 columns will penetrate to the gravel layer, and as a result will mitigate the risk of soil
7 liquefaction in this area even in Dr. Wartman's view.¹⁷⁶ Furthermore, Dr. Wartman's
8 criticism of the use of deep soil mix panels as ground improvements is unfounded.
9 Contrary to his description, this is a commonly used textbook technique, not the novel
10 approach Dr. Wartman suggests.¹⁷⁷ In fact the evidence shows that all the ground
11 improvements have benefitted from extensive testing and evaluation in the laboratory and
12 through use of physical models such that academia does not question these techniques,
13 generally.¹⁷⁸ Additionally, contrary to Dr. Wartman's assertions, TSPT has completed
14 engineering analysis that relies on an uncommonly robust set of subsurface information.¹⁷⁹
15 This analysis included a safety factor of two and was overly conservative, by tending to
16 overstate the nature of the seismic risk in that area.¹⁸⁰ The analysis supports the proposed
17 approach.¹⁸¹ In any event, TSPT has agreed to complete additional numerical engineering
18 analysis to evaluate and confirm the effectiveness of ground improvements in this area.¹⁸²

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¹⁷⁴ Tr. vol. 5, 1172:21–1173:5 [Rohrbach].

¹⁷⁵ Tr. vol. 13, 2998:18–23 [Wartman].

¹⁷⁶ Tr. vol. 5, 1146:19–24 [Rohrbach].

¹⁷⁷ Tr. vol. 5, 1147:3–11 [Rohrbach].

¹⁷⁸ *See e.g.*, Tr. vol. 5, 1149–1153 [Rohrbach].

¹⁷⁹ Tr. vol. 5, 1148 [Rohrbach].

¹⁸⁰ Tr. vol. 5, 1152 [Rohrbach].

¹⁸¹ Tr. vol. 5, 1148 [Rohrbach].

¹⁸² EX-0362-TSS; Tr. vol. 13, 2993:1–5 [Wartman] (Opponent's expert witness agrees that the modeling would address his concerns and "would provide additional confidence on the ground improvement measures as they've been proposed at the site.").

1 **5. The Terminal is properly classified as a Risk Category 2 structure**
2 **pursuant to ASCE 7-10.**

3 The International Building Code (“IBC”) incorporates the American Society of Civil
4 Engineers (“ASCE”) standard 7-10, as part of its structural provisions.¹⁸³ This ASCE
5 standard establishes design loads for buildings and other structures.¹⁸⁴ ASCE 7-10
6 incorporates a risk category classification to help determine the seismic standard that
7 applies to a facility.¹⁸⁵ Opponents have asserted that the Terminal is a Risk Category III
8 because under ASCE Table 1.5-1 a structure that stores “hazardous fuels” must be
9 designated as such.¹⁸⁶ This is incorrect. The referenced table provides that structures
10 (including, but not limited to, facilities that store hazardous fuels) “containing toxic or
11 explosive substances” should be categorized as Risk Category III.¹⁸⁷ The crude oil to be
12 stored at the Terminal is not defined as a “toxic or explosive substance.”¹⁸⁸ Opponent’s
13 mistaken argument is unsurprising in light of Dr. Wartman’s admission that the proper
14 characterization for purposes of compliance with the building code (the very standard that
15 is at issue) is “not [his] particular expertise.”¹⁸⁹

16 ASCE 7-10 addresses seismic design requirements for petrochemical and industrial
17 tanks by express incorporation and adoption of the seismic requirements in American

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20 ¹⁸³ INT’L BLDG. CODE (“IBC”) § 1613.1; pp. XIV, 591 (INT’L CODE COUNCIL 2012). A copy of an excerpt of the IBC, the
21 applicable legal standard, is attached hereto as **Appendix A** for reference.

22 ¹⁸⁴ Tr. vol. 16,3843:11–15 [Gibbs].

23 ¹⁸⁵ ASCE 7-10 MINIMUM DESIGN LOADS FOR BUILDINGS AND OTHER STRUCTURES, 2, Table 1.5-1 (Am. Soc’y. Of Civil
24 Eng’rs 2010) (“ASCE 7-10”). A copy of an excerpt of ASCE 7-10, the applicable legal standard, is attached hereto as
25 **Appendix B** for reference.

26 ¹⁸⁶ Tr. vol. 13, 2994: 6–9 [Wartman].

27 ¹⁸⁷ ASCE 7-10, TABLE 1.5-1.

28 ¹⁸⁸ ASCE 7-10 defines toxic and explosive substances with reference to 29 CFR 1910.1200 (Appendix A), 40 CFR Part
29 68, and the IBC. See ASCE 7-10, pp. 2, 382, 384-385. Crude oil is not categorized as toxic or explosive under any of
30 these authorities. See 40 CFR Part 355 (Appendix A) (attached hereto as **Appendix C** for reference); 29 CFR 1200
31 (Appendix A), and IBC pp. 19, 382 (attached hereto as Appendix A for reference).

32 ¹⁸⁹ Tr. vol. 13, 3014:4–7 [Wartman] (“My interpretation is that it [building to class 2] would not be compliant with the
33 [international building] code. But I’m going to caution that that’s not my particular expertise...”)

1 Petroleum Institute (“API”) Tank Standard 650.¹⁹⁰ API 650 provides that tanks in
2 facilities with secondary containment and spill protection, such as the Terminal, warrants
3 design under the equivalent of ASCE category 2, not 3.¹⁹¹ The storage tanks are, at a
4 minimum, engineered to meet the requirements of API 650 and ASCE 7-10.¹⁹² In fact, in
5 an abundance of caution, TSPT has designed the tanks with an extra thickness of steel
6 consistent with the higher risk category 3 standard.¹⁹³

7 In essence, Opponents propose that EFSEC force TSPT to incorporate margins of
8 safety into the design that exceed the already stringent requirements of the standard that
9 EFSEC has adopted.¹⁹⁴ Opponents’ more generic inferences about the inability of the
10 Terminal to withstand an earthquake that might exceed the scope of the events that the
11 design reject the adopted standard. Rather they represent a direct challenge to the
12 adequacy of EFSEC’s seismicity standard, based on a general premise that greater design
13 safety is better, regardless of what standards require. EFSEC cannot deny site
14 certification based on Opponents’ speculation about events that are not based upon the
15 kind of sound study and analysis that TSPT’s design team has undertaken. To do so
16 would be simply arbitrary and would amount to reversible error under the APA for failing
17 to follow agency standards and procedures. TSPT’s proposed design meets or exceeds all
18 adopted standards. While the evidence in the record establishes that fact, TSPT has
19 agreed to and is in the process of conducting additional modelling requested by EFSEC

21 ¹⁹⁰ ASCE 7-10 § 15.7.8.1 (“Welded steel petrochemical and industrial tanks and vessels storing liquids under an internal
22 pressure of less than or equal to 2.5 psig (17.2 kpa g) shall be designed in accordance with the seismic requirements of
23 API 650”); *see also* ASCE pp. 139, 149, 233-234; and, 496.

24 ¹⁹¹ Tr. vol. 21, 4870:2–13 [Corpron]. API 650 Welded Tanks for Oil Storage, pp. E-6-E-7; EC-1-EC-3 (Am. Pet. Inst.
25 2013) (“ASCE 7-10”). An excerpt of API 650, the relevant legal standard, is attached hereto as **Appendix D** for
reference.

¹⁹² Pre-filed Testimony of Nicholas Nash, at 4:6–13; Pre-filed Testimony of Russ Gibbs, at 2:8–17; 3: 11–15.

¹⁹³ Tr. vol. 21, 4870:14–22;4890: 2-6 [Corpron].

¹⁹⁴ Tr. vol. 13, 2995, 13–18 [Wartman] (“I think it’s important to recognize that even with mitigation measures in place,
there is no mitigation strategy that is 100 percent foolproof. There will always be some level of residual risk. That can’t
be eliminated, even with careful thought and analysis.”).

1 consultants to confirm the design performance demonstrated by the proposed design.
2 Nothing more is, or can be required, to comply with WAC 463-62-020.

3 **C. Fish and Wildlife: The Terminal Satisfies EFSEC’s Criteria in Chapter 463-62-
4 040 WAC for Protection of Fish and Wildlife**

5 WAC 463-62-040 requires that an applicant demonstrate “no net loss” of fish and
6 wildlife habitat functions and values “in the areas impacted by the energy
7 development.”¹⁹⁵ The regulation encourages selection of a site that avoids impacts to
8 listed or threatened species or habitats¹⁹⁶ and further addresses mitigation preferences if an
9 applicant pursues a site that will impact fish and wildlife.¹⁹⁷ Like the other provisions of
10 chapter 463-62 WAC, this specific section addresses only the construction and operation
11 of the Terminal itself.¹⁹⁸ As indicated below, the evidence demonstrates that TSPT
12 satisfies the standard.

13 **1. The Terminal complies with standards for protection of fish and wildlife
14 because the site is a previously altered Port site that is largely devoid of
15 fish or wildlife habitat.**

16 Uncontroverted evidence demonstrates that the construction and normal operation of
17 the Terminal will result in no net loss of species or habitat at the energy facility site itself.
18 By utilizing an existing industrial site, TSPT accomplishes the regulation’s preferred
19 approach of avoiding impacts to species and habitats. The majority of the site (97%) has
20 operated as an industrial Port for many years, and as such is largely devoid of vegetation
21 and contains no native species.¹⁹⁹ Even the dock improvements, specifically, avoid impact

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23 ¹⁹⁵ WAC 463-62-040.
24 ¹⁹⁶ WAC 463-62-040(1).
25 ¹⁹⁷ WAC 463-62-040(2)(b).
¹⁹⁸ Indeed, the regulation’s express focus is on areas “impacted by the energy development.” WAC 463-62-040. Incidental or secondary impacts associated with transport are addressed pursuant to SEPA and not relevant to this inquiry. TSPT’s substantive response is in Section V. and VI., below.
¹⁹⁹ Pre-filed Testimony of Daniel Roscoe, at 5:1–8; EX-0001-000520-PCE.

1 to fish habitat, because of the limited habitat opportunities at the site and the minor nature
2 of that upgrade.²⁰⁰ Opponents offer no evidence to undermine this description of the site.

3 **2. TSPT addresses the potential impact of a Terminal related spill on fish**
4 **and wildlife through compliance with robust state standards for oil spill**
5 **planning and preparedness.**

6 Opponents' singular concern regarding potential fish and wildlife impacts is the risk of
7 a facility spill. TSPT addresses that concern through compliance with the robust state
8 standards for oil spill planning and prevention. No further mitigation is necessary because
9 those regulatory response measures are adequate to minimize adverse effect, the standard
10 under EFSLA.²⁰¹

11 Evidence conclusively demonstrates that Washington's spill planning requirements are
12 the most stringent in the world.²⁰² Those stringent regulations require the Terminal to be
13 prepared for a worst-case spill, which is defined as the contents of an entire crude oil
14 storage tank (in this case, 380,000 barrels) reaching the river.²⁰³ This is the established
15 planning standard, despite the fact that a spill from the tanks is not likely to reach the river
16 due to containment and the distance between the storage tanks and the river.²⁰⁴ Further,
17 uncontroverted evidence demonstrates the highly unlikely nature of a facility spill of that
18 size. The testimony of Mr. Dennis O'Mara explains the probability and likely spill
19 volumes for a facility spill to the River.²⁰⁵ Mr. O'Mara's analysis and testimony is the

20 ²⁰⁰ EX-00001-000200-PCE (describing the existing dock infrastructure and the lack of shallow water habitat in the vicinity); EX-00001-000254-PCE (describing the dock improvements).

21 ²⁰¹ In fact, EFSEC regulations require an applicant to describe compliance with those standards in the application, anticipating that compliance with those standards will adequately mitigate the potential impacts from a spill. *See* WAC 463-60-205 (requiring an applicant to describe "in general detail" the content of a Spill Prevention, Control and Countermeasure Plan). *See also* WAC 463-60-332 (requiring the applicant to identify potential impacts on fish and wildlife, including those from potential hazardous material spills, as well as the federal approvals required to address those impacts). The Application includes a section describing its compliance with those federal standards and attaches preliminary plans that include detail well beyond what the regulations require, as described below. *See* EX-00001-000299-PCE.

22 ²⁰² Tr. vol. 8, 1808:6-14 [Taylor]; Pre-filed Testimony of Elliott Taylor, at 7:4-6.

23 ²⁰³ Tr. vol. 8, 1826:10-14 [Taylor]; Pre-filed Testimony of Elliott Taylor, at 21:14-18; WAC 173-182.

24 ²⁰⁴ Tr. vol. 8, 1876:5-7 [Taylor]; Tr. vol. 6, 1404:5-22 [Haugstad];

25 ²⁰⁵ Tr. vol. 6, 1347-1348 [O'Mara];

1 only evidence in the record describing the probability of a facility spill and of what size.
2 No other expert challenged his quantification of the probability.²⁰⁶ Mr. O’Mara focused
3 on transfer operations, which are the most likely source of a facility-related spill, in light
4 of the distance between the other elements of the Terminal and the River.²⁰⁷ Mr. O’Mara
5 utilized two different methods to assess the probability of the spill.²⁰⁸ One indicated that
6 the most likely spill (one event every 7 years) would be between 0-50 barrels, while the
7 other method (which did not consider whether the spills reached the water) identified the
8 most likely spill (one event every 8 years) as between 100-500 barrels.²⁰⁹ The frequency
9 of the remaining categories of spill sizes are measured in the hundreds, thousands, and
10 even millions of years. In particular, Mr. O’Mara’s analysis demonstrates that the
11 probability of a transloading spill comparable to a regulatory worst case spill is measured
12 in the tens of thousands or millions of years, depending on the method used.²¹⁰

13 TSPT has prepared preliminary spill prevention control and countermeasures plan and
14 spill contingency plan documents that meet Washington’s rigorous regulatory standard
15 and are based on information known to-date. These documents are attached to the
16 application.²¹¹ It is extremely unusual for a facility to engage in this level of detailed
17 planning at this stage of the permitting process.²¹² In fact, the regulations require simply
18 that the application “describe in general detail the content” of a Spill Prevention, Control
19 and Countermeasures Plan.²¹³ Nevertheless, TSPT’s inclusion in its application of
20 preliminary drafts that include significant detail demonstrate its ability to minimize
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22 ²⁰⁶ Mr. O’Mara’s testimony on vessel-related risks is discussed in Section VII., below.

23 ²⁰⁷ Tr. vol. 6, 1404:5–1406:1 [Haugstad].

24 ²⁰⁸ Pre-filed Testimony of Dennis O’Mara, at 6: 19.

25 ²⁰⁹ EX-0120-000137-TSS.

²¹⁰ Pre-filed Testimony of Dennis O’Mara, at 7.

²¹¹ EX-00001-PCE, App. B.2-B.5.

²¹² Tr. vol. 8, 1809:2–5 [Taylor].

²¹³ WAC 463-60-205.

1 potential impacts from spill. TSPT will update these plans as additional information
2 becomes available prior to operations and regularly thereafter.²¹⁴

3 The preliminary spill plans in the ASC include adequate measures to address spills of
4 that amount as well as spills of crude oil within the API range of crude oils to be handled
5 at the Terminal.²¹⁵

6 The plans describe pre-booming activities to be implemented during vessel loading
7 that are designed to trap and contain spilled crude oil. The plans identify thresholds
8 within which pre-booming activities will be implemented as well as thresholds beyond
9 which transloading activities will cease.²¹⁶

10 More generally, the plans include a list of on-site spill response resources as well as
11 spill response contractors whose resources and personnel would be brought to bear to
12 respond to a facility spill. Dr. Taylor's testimony confirms the miles of boom available on
13 the river to respond to a spill.²¹⁷ The plan also incorporates the broader state-wide
14 response planning for the river, including Geographic Response Plans (GRPs) that would
15 be implemented in the event of a spill. The Department of Ecology developed the GRPs
16 as part of the State's extensive efforts to plan for a possible spill. The GRPs identify
17 specific resources along the River that require protection, locations of spill response
18 equipment, and areas for collection.²¹⁸ In the event of a spill these resources would be
19 utilized. Containment booming and skimming operations will be used to prevent the
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21 ²¹⁴ Tr. vol. 8, 1809:8–12 [Taylor].

22 ²¹⁵ Tr. vol. 8, 1809:13–25 [Taylor].

23 ²¹⁶ WAC 173-180-420(3)(c) (requiring Safe and Effective Threshold to be included in operations manual); WAC 173-
24 180-420(3)(b)(vii)(requiring description of procedures taken regarding unexpected weather and sea conditions and the
25 threshold values developed by the facility which may impact oil transfers to or from vessels). Compliance with these
standards are included in the draft Operations Facility Oil Handling Manual that is attached to the Application.
Specifically, the safe and effective threshold is identified in the Safe and Effective Threshold Determination Report.
EX-0001-003175-PCE. The Plan also identifies unsafe operating conditions during which transfer operations will cease.
EX-0001-003201-PCE.

²¹⁷ Tr. vol. 8, 1835:15–25 [Taylor]; EX-0154-TSS

²¹⁸ Pre-filed Testimony of Elliott Taylor, at 9.

1 spread of crude oil and to remove oil from the water,²¹⁹ particularly in areas such as back
2 sloughs and marshes that may be habitat for fish and wildlife.²²⁰ Importantly, TSPT ran a
3 spill drill that confirmed the adequacy of response capabilities to respond to a regulatory
4 worst-case spill involving two different crude oils (reflective of Bakken crude oil and
5 diluted bitumen).²²¹ TSPT's compliance with robust state spill planning regulations,
6 confirmed in the recent spill drill, ensures that the Terminal will be prepared to address a
7 regulatory worst case spill, and any of the more likely facility spills of smaller sizes.

8 In addition to the spill response capabilities required by state law, TSPT has
9 voluntarily committed to additional mitigation. It has already purchased two "current
10 buster" booms, one of which is positioned at the Terminal site while the other is currently
11 pre-positioned near Portland.²²² This enhances the ability to respond to spills in faster
12 currents.²²³ Additionally, TSPT has voluntarily committed to design changes that would
13 further reduce the risk of a spill entering the water. For example, while federal regulations
14 only require three gallons of containment on the dock, the Terminal will include a sump
15 attached to a return pipe that will be adequate to contain a longer transloading spill.²²⁴
16 The regulatory and voluntary spill mitigation measures are sufficient to mitigate the risks
17 associated with spill from the Terminal.²²⁵ To rule that compliance with these robust state
18 planning standards is insufficient would be arbitrary.

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²¹⁹ Tr. vol. 8, 1809:21–25 [Taylor].

²²⁰ Tr. vol. 8, 1871:16–21 [Taylor].

²²¹ Tr. vol. 8, 1825:1–1828:20 [Taylor].

²²² Tr. vol. 21, 5062:22–5063:13 [Larrabee]. In addition, one of the Oil Spill Response Organizations has one pre-positioned in Astoria while another will be purchasing one to station in Portland, at which point TSPT will move its second boom from Portland to Pasco. *Id.*

²²³ Tr. vol. 8, 1820:6–8 [Taylor].

²²⁴ Tr. vol. 21, 5060:2–13 [Larrabee]; Tr. vol. 4, 691:4–7 [Corpron].

²²⁵ Tr. vol. 8, 1811:14–22 [Taylor].

1 **3. Opponents’ arguments regarding spill risk are without merit.**

2 Opponents’ arguments related to the adequacy of TSPT’s preliminary planning
3 documents are without merit. Ms. Harvey’s testimony regarding the adequacy of spill
4 planning documents was confused by the fact that she was often referring to the January
5 2014 version of the plans, rather than the subsequently revised plans.²²⁶ Many of her
6 criticisms were addressed in the detail included in subsequent revisions. Any purported
7 gaps that remain in the documents are attributable to the early stage of the project and will
8 be addressed upon completion of final construction design and staffing.²²⁷ Ms. Harvey’s
9 allegation that the plans do not address the type of crude oil that could be stored at the
10 Terminal is patently false. Her testimony is based on the fact that the plans did not use the
11 word “dilbit.”²²⁸ However, the plans clearly address the full range of API oil gravity that
12 might be stored at the Terminal, including the API gravity reflective of “dilbit.”²²⁹

13 EFSEC should also reject Opponents’ arguments pertaining to the adequacy of pre-
14 booming protocols. Opponents argue that river currents will regularly exceed the safe and
15 effective threshold when pre-booming can be implemented. That testimony is based on
16 anecdotal observation in various parts of the river, not at the Terminal location.²³⁰
17 Moreover, it is inconsistent with measured monthly averages as well as experiences at the
18 nearby Tesoro facility, where pre-booming regularly occurs.²³¹ More generally, opponents
19 confuse safe and effective thresholds for pre-booming operations with thresholds of
20 weather and sea conditions above which transfer operations must cease.²³² Those different

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22 ²²⁶ Tr. vol. 6, 1396:8–13 [Haugstad].
23 ²²⁷ Tr. vol. 8, 1809:2–12 [Taylor]. Importantly, Ms. Harvey’s contention assumes a level of detail that is not required by
24 EFSEC’s regulations, which, as indicated above, only require general description.
25 ²²⁸ Pre-filed Testimony of Susan Harvey, at 42:6–7.
²²⁹ Tr. vol. 6, 1396:23–1397:10 [Haugstad].
²³⁰ Tr. vol. 18, 4299:15–4302:22 [Hicks]. For example, tribal witnesses described current conditions typical of the
Gorge, not in the vicinity of the Terminal site. Tr. vol. 18, 4301:21–4302:22 [Hicks].
²³¹ Tr. vol. 6, 1331:10-15; 1408:17–1409:6 [Haugstad].
²³² Compare WAC 173-180-420(3)(c) with WAC 173-180-420(3)(b)(vii).



1 thresholds addressing two different concerns. The safe and effective threshold is intended
2 to address the safety of the workers on the boom boat, but does not address the broader
3 question of whether transloading operations should continue.²³³ The threshold of
4 conditions beyond which transfer operations must cease is intended to address risk of
5 spill. To the extent that Opponents are arguing that all transloading operations should be
6 terminated when safe and effective threshold for pre-booming is reached, that is not the
7 regulatory standard, which anticipates that transloading can occur even when pre-booming
8 is not in place, so long as the conditions do not exceed the higher weather threshold at
9 which transfer operations must cease.²³⁴ Opponents also ignore the specific “current
10 buster” booms that are already in place at the Terminal site that can handle stronger
11 currents and would be utilized in the event of a spill, even in higher currents that exceed
12 the safe and effective threshold.²³⁵

13 EFSEC should also reject Opponents’ assertions about the fate and behavior of spilled
14 crude oil. As demonstrated by Dr. Taylor’s testimony, the type of crude oil that will be
15 handled at the Terminal will float.²³⁶ Even if it is submerged, it will resurface. While that
16 crude oil may be expected to eventually sink due to weathering or sedimentation, the
17 processes will take days, during which response and recovery actions will be
18 implemented.²³⁷ Tribal opponents’ evidence about the presence of aquatic vegetation
19 does not change the analysis.²³⁸ Opponents’ attempt to show otherwise by analogizing to

21 ²³³ Tr. vol. 8, 1813:17–1815:7 [Taylor]; WAC 173-180-221.

22 ²³⁴ WAC 173-180-221(3).

23 ²³⁵ Tr. vol. 8, 1819:23–1820:24 [Taylor] (Current Buster being tested at up to 5 knots and can be used at higher currents).

24 ²³⁶ Tr. vol. 8, 1809:20–22 [Taylor].

25 ²³⁷ Tr. vol. 8, 1850:20–1851:9 [Taylor]

²³⁸ Tr. vol. 19, 4377:10–4377:9 [Taylor]. Vegetation can slow the movement of crude oil in the water but will not form oil particulate aggregates. Tr. vol. 19, 4376:21–4378:9 [Taylor]. While detritus from dead vegetation that is suspended in the water column could potentially form a particulate aggregate comparable to sediment suspended in the water column, that would still constitute smaller portion to the overall fate of the spilled crude oil. Tr. vol. 19, 4376:21–4378:9 [Taylor]. Generally, the formation of oil particulate aggregates, whether due to contact with sediment or detritus

1 pipeline or other spills involving late discovery or lack of containment, which
2 significantly decreases the success of the response effort, is unpersuasive.²³⁹ Such
3 conditions are unlikely in the event of a Terminal spill where the spill would be quickly
4 discovered, there would be a rapid and robust spill response, involving cascading
5 resources, starting with those at the Terminal.²⁴⁰

6 Fundamentally Opponents argue that compliance with Washington’s robust spill
7 planning requirements is inadequate. They invite EFSEC to reject state standards that
8 have been thoroughly vetted and adopted by the state to address the spill risk and ensure
9 adequate spill response planning. EFSEC has no basis to do so. At most, Opponents’
10 arguments go to the adequacy of Washington’s spill response regulatory requirements and
11 should be directed at the Department of Ecology, which is charged with promulgating
12 those applicable standards. Conditioning or denying the Terminal based on adequacy of
13 spill response planning that is consistent with adopted state standards would be arbitrary
14 in light of Washington’s robust regulatory regime.

15 **D. Water Quality: The Terminal Satisfies EFSEC’s Criteria in Chapter 463-62-
16 060 WAC for Protection of Water Quality**

17 WAC 463-62-060 adopts the state and federal water quality standards, including state
18 water quality standards, state groundwater quality standards, state sediment management
19 standards, and the federal Clean Water Act. Compliance with the state and federal water
20 quality standards satisfies the requirements for site certification for construction and
21 operation of the Terminal.²⁴¹

23 from plants, requires energy levels in the river that are not present and would only constitute small quantities relative to
24 the total amount of crude oil spilled. Tr. vol. 19, 4376:21–4378:9 [Taylor]; Tr. vol. 8, 1791:15–1794:18; 1797:2 –14
[Taylor].

24 ²³⁹ Tr. vol. 19, 4393:20–4394:22 [Taylor]

25 ²⁴⁰ Tr. vol. 19, 4393:12–19 [Taylor]

²⁴¹ WAC 463-62-010(3).

1 It is largely unrefuted that construction and normal operation of the Terminal will
2 comply with all relevant water quality standards. This will be confirmed with issuance of
3 water quality permits including stormwater permits and a waste discharge permit.²⁴²
4 TSPT has applied for a construction individual permit to address construction storm water
5 run-off and an industrial individual storm water permit and has agreed in its DEIS
6 comment letter to additional stormwater measures identified in the DEIS to address
7 potential impacts.²⁴³ Any remaining design details or additional mitigation measures can
8 and will be identified in that NPDES stormwater permitting process. Similarly, TSPT has
9 applied for a wastewater discharge permit from the City that will confirm that the limited
10 industrial process discharges from the Terminal would meet the City's pretreatment
11 ordinance.²⁴⁴

12 As with protection of fish and wildlife, the Opponents sole concern for water quality is
13 the risk of a Terminal spill. As discussed in more detail in Section IV.C., Opponents'
14 concerns are without merit and the spill prevention and response measures will comply
15 with robust state standards and are adequate to protect water quality from facility spills.

16 **E. Wetlands: The Vancouver Energy Terminal Satisfies EFSEC's Criteria in**
17 **Chapter 463-62-050 WAC for protection of wetlands.**

18 WAC 463-62-050 requires that wetlands impacts shall be avoided wherever possible
19 and sets a goal of no net loss of wetlands. The impacts WAC 463-62-050 aims to avoid

20 ²⁴² Mr. Shafer's uncontroverted testimony demonstrates that the storm water discharges from the Terminal will meet
21 state water quality standards applicable to the Columbia River. Tr. vol. 4, 903:9-11 [Shafer].

22 ²⁴³ EX-0001-000944-PCE; EX0190-00082-TSS. As part of that permitting process, TSPT adopted a construction storm
23 water pollution prevention plan and an operations storm water pollution prevention plan that identify best management
24 practices during construction and operation that will allow Terminal staff to ensure that Terminal is in compliance with
25 the industrial and construction permits. Tr. vol. 4, 902:4-10 [Shafer]. For construction near the water, there is also a
water quality protection and monitoring plan that has been developed. Tr. vol. 4, 902: 21-23 [Shafer]. To the extent
required by RCW 80.50.140(2), TSPT objects to the Order Granting City of Vancouver's Motion for Ruling that EFSEC
Lacks Authority to Issue Pretreatment Discharge Permit, and Denying Vancouver Energy's Motion for Determination
Regarding Issuance of Industrial Waste Discharge Permit, dated August 31, 2016.

²⁴⁴ Tr. vol. 4, 903:11-17 [Shafer]. The City Manager recognized that the City's position with respect to the Terminal will
not impact how the City processes that application. Tr. vol. 12, 2896:8-16 [E. Holmes].

1 are those associated with the construction and operation of the Terminal itself. Each of
2 the WAC 463-62 standards is focused on the Terminal impacts as each is a performance
3 standard “associated with site certification for construction and operation of energy
4 facilities.”²⁴⁵ Compliance with the wetlands standard satisfies the requirements for
5 issuance of site certification for construction and operation of energy facilities.²⁴⁶

6 As explained in more detail in the pre-hearing brief, there are no wetland impacts
7 associated with the construction and operation of the Terminal. There are no wetlands on
8 site that will be filled,²⁴⁷ and although there are three wetlands within the vicinity of the
9 Terminal, all are a sufficient distance and upslope from the Terminal.²⁴⁸ Additionally,
10 these off-site wetlands separated from the Terminal by rail lines and/or roads.²⁴⁹

11 Opponents raised only one issue pertaining to Terminal related wetlands during the
12 hearing: impacts from a potential spill. As the evidence shows and as discussed in more
13 detail in Section IV.C., the spill prevention and response measures are adequate to protect
14 wetlands from Terminal, vessel, and rail spills. Thus, TSPT has satisfied the requirements
15 of WAC 463-62-050 governing wetlands.

16 **F. Noise Standards: The Vancouver Energy Terminal Satisfies EFSEC’s Criteria**
17 **in Chapter 463-62-030 WAC for Noise**

18 WAC 463-62-030 adopts chapter RCW 70.107 and the standards adopted by Ecology
19 pursuant to that statute as the relevant standards for noise.²⁵⁰ The pre-filed testimony
20 demonstrates TSPT’s compliance with the state noise standards for construction and
21 operation of energy facilities.²⁵¹ Opponents did not present any other evidence addressing
22 compliance with noise standards at the hearing. As explained in the pre-hearing brief,

23 ²⁴⁵ WAC 463-62-010(1).

²⁴⁶ WAC 463-62-010(3) .

²⁴⁷ EX-0001-000577-PCE.

²⁴⁸ EX-0001-000578-PCE.

²⁴⁹ EX-0190-0002225-2226-PCE.

²⁵⁰ WAC 463-62-030.

²⁵¹ WAC 463-62-010(3).

1 Opponents' only evidence on this issue is unrelated to compliance with the applicable
2 standards, and is therefore irrelevant to this adjudication.²⁵² Specifically, Opponents argue
3 that the Terminal should be held to a different, more stringent noise standard than the one
4 EFSEC has adopted to address the purported risk.²⁵³ To hold the Terminal to a different
5 standard solely on Opponents' generalized concerns about the adequacy of that standard
6 would be arbitrary and capricious and would be inconsistent with agency standards and
7 procedures.

8 V. OTHER TERMINAL ISSUES

9 Opponents raise a limited number of issues with the Terminal that fall outside of the
10 requirements and standards of chapter 463-62 WAC. As discussed in Section II. above,
11 for these topics the applicant must ensure through available and reasonable methods,
12 including those identified in relevant state and federal regulations, that the location and
13 operation of such facility ensures abundant energy and minimizes adverse effects.

14 A. Terminal Risks: The Risk of an Emergency Incident at the Terminal is Low 15 and Emergency Response Capabilities and Operational Safeguards Will Be Sufficient to Ensure the Welfare and Protection of Washington Citizens.

16 Unlike the specific subject matter identified in chapter 463-62 WAC, EFSEC has not
17 identified specific approval criteria to assess the risk of Terminal incidents.²⁵⁴ WAC 463-
18 60-352 sets forth application requirements for disclosure of risks and mitigation measures,
19 with which the applicant has complied by submitting its complete application and
20 evidence presented during the adjudication. More generally, the statute requires EFSEC
21 to balance the demands for the Terminal and the broader public interest, including
22 consideration of whether "operational safeguards are at least as stringent as the criteria
23 established by the federal government and are technically sufficient for their welfare."

24 ²⁵² Applicant's Pre-Hearing Br. 51.

25 ²⁵³ Pre-filed testimony of James Frank, at 5:6-8.

²⁵⁴ Environmental risk from a Terminal spill is specifically addressed earlier in Section IV.C.

1 RCW 80.50.010(1). There is no question that the project includes operational safeguards
2 to address Terminal risks, that each of those operational safeguards are at least as stringent
3 as any criteria established by the federal government and, therefore, the evidence related
4 to Terminal incidents and response to incidents all support a recommendation of approval.
5 More generally, as explained below, the project includes adequate mitigation to address
6 the very low risk of a Terminal incident.

7 **1. Evidence conclusively demonstrates the extremely low risk of a Terminal**
8 **incident.**

9 Dr. Kelly Thomas provided a comprehensive description of Terminal risk to both on-
10 site and off-site populations. Dr. Thomas's Quantitative Risk Assessment (QRA) looked
11 at all potential risk scenarios to human health and safety based on the equipment and
12 material at the Terminal.²⁵⁵ While there are no U.S. federal, state or local regulations
13 setting thresholds for acceptable levels of risk, Dr. Thomas assessed the risks of these
14 scenarios using standards from other sources that are generally accepted in the field of
15 facility risk assessment, including standards prepared by the U.K.'s Health and Safety
16 Executive and the Dutch government.²⁵⁶ Dr. Thomas conclusively determined that risk to
17 off-site populations is acceptable and well below what risk experts consider to be a
18 tolerable risk even without any further mitigation or prevention actions.²⁵⁷ With respect to
19 on-site populations, Dr. Thomas conclusively determined that the risk is also acceptable
20 and within accepted risk tolerance criteria, but also suggested potential risk reduction
21 measures to lower the risk of flash fires to personnel working in the loading area.²⁵⁸ TSPT

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23 ²⁵⁵ Tr. vol. 6, 1249:9–1251:19, 1252:24–1253:5 [Thomas].

24 ²⁵⁶ Tr. vol. 6, 1245:18–1246:7 [Thomas].

25 ²⁵⁷ Tr. vol. 6, 1242:2–8 [Thomas]; Ex-0118-000003–4-TSS.

²⁵⁸ Tr. vol. 6, 1242:7–11[Thomas]; Tr. vol. 19, 4521:24–4522:18 [Thomas]; EX-0118-000060-TSS; EX-0118-000004-TSS.

1 has confirmed that it is implementing all of the mitigation measures identified by Dr.
2 Thomas to further reduce that risk.²⁵⁹

3 All but one of the Opponents' witnesses neglected to actually evaluate the probability
4 of a Terminal incident. Instead, the vast majority of Opponent witnesses simply assume
5 hypothetical scenarios will occur based solely on their unsubstantiated fears, or on
6 incidents that have occurred at facilities elsewhere, without any assessment of the
7 likelihood of those incidents or whether they are even comparable scenarios.²⁶⁰ As
8 demonstrated in the rebuttal testimony of Dr. Thomas, the handful of specific events that
9 the Opponents' witnesses offered by analogy are not remotely comparable and cannot
10 substitute for the more detailed assessment completed by Dr. Thomas, which reflects both
11 risk science and industry approach.²⁶¹ Not one of the incidents includes the chemical
12 products or Terminal operations that will be present at the proposed Terminal. These
13 factors are crucial in assessing whether the risk of the specific event is credible at the
14 Terminal. It would be arbitrary and gross error to simply assume, as Opponents suggest,
15 that an event involving fertilizer, gasoline or cyclohexane at a completely different type of
16 industrial facility is more reflective of the risk at the Terminal than the risks identified in
17 Dr. Thomas's study.

18 The only technical assessment of the probability of an event offered by the Opponents
19 is laden with substantial flaws that Dr. Thomas identified in his testimony at the hearing.
20 Specifically, the County's witness, Dr. Peterson, prepared only a preliminary or "concept
21 level" assessment that used less sophisticated modeling approaches and relied on overly
22 simplified and incorrect assumptions about the Terminal design.²⁶² Collectively, that

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24 ²⁵⁹ Tr. vol. 21, 5067:17–5068:23 [Larrabee].

²⁶⁰ Applicant's Pre-Hearing Brief § III.E.4. *See also* Tr. vol. 16, 3740, 3775:21–3776:23 [Garcia].

²⁶¹ Tr. vol. 19, 4486:5–4491:5, 4501:13–25 [Thomas].

25 ²⁶² Tr. vol. 6, 1248–1285 [Thomas].

1 approach yielded conclusions that were incorrect and created a risk profile that does not
2 accurately reflect the risk.²⁶³ Dr. Peterson’s assessment is unreliable, as revealed when
3 compared to Dr. Thomas’s significantly more accurate and conservative analysis and
4 testimony.²⁶⁴ Notably, Dr. Thomas’s critique of the deficiencies in Dr. Peterson’s study is
5 unrefuted in the record. Dr. Peterson did not appear at the hearing and therefore did not
6 offer responsive testimony or otherwise defend of his study or approach. Similarly,
7 because Dr. Peterson did not appear at the hearing or offer testimony beyond his pre-filed
8 written testimony, Dr. Peterson did not have any opportunity to review or comment on Dr.
9 Thomas’s detailed QRA, which was filed with the Council at the same time. Accordingly,
10 Dr. Thomas’s detailed QRA is unrefuted.²⁶⁵

11 Perhaps because there are no facts or expert opinion in the record that offer a reasoned
12 critique of Dr. Thomas’s work, counsel for Clark County instead grossly mischaracterized
13 or ignored Dr. Thomas’s testimony in his closing statement. Contrary to counsel’s
14 unsubstantiated assertions:

- 15 • Dr. Thomas provided very specific information about all the risks for all off-site
16 buildings,²⁶⁶
- 17 • Dr. Thomas considered the population of the JWC,²⁶⁷

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19 ²⁶³ Tr. vol. 6, 1280:11–16 [Thomas]. Additionally Dr. Thomas fully addressed the County’s concerns about the
20 proximity of Terminal pipelines to an as-yet unconstructed substation. Tr. vol. 6, 1281:15-1282:18. Dr. Thomas
21 assumed in his model that the presence of the substation, when built, would increase ignition probability significantly
(even though that does not reflect Dr. Thomas’s assumptions about the actual increase in ignition probability), but the
resulting risk is still “orders of magnitude below what risk is tolerable.” *Id.*

22 ²⁶⁴ Tr. vol. 6, 1259:23–1260:5, 1280:11–25, 1302, 1368 [Thomas].

23 ²⁶⁵ To the extent Dr. Peterson reviewed any of Dr. Thomas’s work, he only reviewed Dr. Thomas’s qualitative study that
was submitted as part of the DEIS comment letter on January 22, 2016 [EX-0119-TSS]. Pre-filed Testimony of Eric
Peterson, at 2:12-3:2. Dr. Peterson did not have access to Dr. Thomas’s written testimony and QRA when he filed his
written statement and he did not appear at the hearing.

24 ²⁶⁶ Compare Tr. vol. 22, 5146: 4-6 [Halvick], with EX-0118-000059-TSS.

25 ²⁶⁷ Compare Tr. vol. 22, 5146:6–12 [Halvick], with EX-0118-TSS, and Tr. vol. 6, 1290 [Thomas]. At most, the witness
simply indicated that he was unable to recall from his memory alone the exact numbers he used when questioned on the
stand, but that they utilized existing and available data of jail population when completing their study. A witness’s

- 1 • Dr. Thomas’s report reflects the outdoor activities at the JWC, as well as prisoners
2 and staff that could be in JWC buildings that could not leave during the unlikely
3 occurrence of an incident.²⁶⁸

4 In summary, Dr. Thomas’s testimony stands alone in the record as a methodical,
5 accurate and reasoned assessment of potential Terminal risk. It conclusively determines
6 that the risks to both on-site and off-site populations are acceptable. There are no grounds
7 supporting denial of the Terminal or additional mitigation based on the remote nature of
8 this risk.

9 **2. TSPT has adequate mitigation in place to address even the remote risk of
10 an incident.**

11 The record is replete with testimony about the state of the art emergency response
12 planning and prevention for the Terminal. This includes state-of-the-art site design and
13 infrastructure, including seismic sensors and fire detection that trigger automatic Terminal
14 shut-down and fire suppression systems.²⁶⁹ The planning also includes criteria for
15 employee hiring, and robust training programs.²⁷⁰ These planning and prevention
16 measures are described in further detail in testimony and are compiled in detail in the
17 Application (including specifically, the Terminal’s Emergency Response Plan).²⁷¹

18 Opponents present limited evidence challenging the adequacy of mitigation to address
19 the risk, including evidence regarding: the adequacy of the city water system for fire
20 suppression purposes; the ability to evacuate the area in the vicinity of the terminal in the

21 failure to memorize all of the data involved in a detailed QRA when subject to cross-examination is not the same thing
22 as “not accounting” for that data in his study.

23 ²⁶⁸ Compare Tr. vol. 22, 5146:13–21 [Halvick], with Tr. vol. 6, 1269–1270, 1291:4–12 [Thomas].

²⁶⁹ EX-0001-04567-PCE. See also Tr. vol. 3, 571:10–576:13 [Corpron].

²⁷⁰ EX-0001-04567-PCE. See also Tr. vol. 3, 376:17–381:23 [Larrabee].

24 ²⁷¹ EX-0001-04567-PCE. See also Tr. vol. 3, 376:17–381:23 [Larrabee]; Tr. vol. 3, 571:10–576:13 [Corpron]; Tr. vol.
25 6, 1324:21–1328:21 [Sawicki]. Much of the Terminal emergency response design is not even assumed in Dr. Thomas’s
assessment. Tr. vol. 6, 1263–1264 [Sawicki]. To the extent that Dr. Thomas recommended specific mitigation to
address the risk of flash fire, applicant’s plans incorporate the mitigation.

1 event of an incident and the city fire department's capability to respond to a fire incident
2 at the Terminal. None has merit.

3 First, the City's water system can maintain water pressure throughout its system in the
4 event of a large fire at the Terminal, and any potential deficiencies can be addressed
5 through engineering solutions. TSPT proposes to maintain adequate pressure for fire flow
6 through the various pumps installed throughout the Terminal.²⁷² Even the City's witness,
7 Mr. Clary, was not sure that the emergency needs of the Terminal would have an adverse
8 impact on the pressure in the City's water system. Mr. Clary speculated that firefighting at
9 the Terminal could adversely impact water pressure elsewhere in the City.²⁷³ However, he
10 could not testify this will occur; he simply he did not know, and awaits additional testing
11 as part of the review of the water connection.²⁷⁴ Moreover, even if the City could justify
12 its concern that the city might not be able to maintain its water pressure might in an
13 emergency situation at the Terminal when coupled with other extreme coincident
14 circumstances, Mr. Corpron explained several relatively straightforward engineering
15 solutions in his rebuttal testimony that could be implemented in the Terminal design
16 should to address these concerns. Those solutions include enhancement of piping, on-site
17 water storage, and use of water from the Columbia River to respond to that unlikely
18 scenario.²⁷⁵ These engineering solutions can be identified as part of the detailed design
19 review during review of the Terminal connection to the City water system.

20 Second, allegations about evacuation of nearby populations in response to an incident
21 at the terminal are without evidentiary foundation. The evidence demonstrates that the

22 ²⁷² Tr. vol. 4, 894:7-895:21, 896:11-901:6 [Shafar]; Tr. vol. 21, 5064:12-5065:8 [Larrabee]; Tr. vol. 9, 2139:1-21
23 [Rhoads]. While several city witnesses suggested that the City should install two pumps at every location for system
24 redundancy in the event of pump failure during an emergency, expert testimony clarified that the Terminal design
25 incorporates connections that allow the City fire trucks to connect to the system and provide adequate system
redundancy. Tr. vol. 9, 2139:1-21 [Rhoads]. *See also* Pre-filed Testimony of Greg Rhoads, at 32-34.

²⁷³ Tr. vol. 12, 2676:13-19 [Clary].

²⁷⁴ Tr. vol. 12, 2676-2679, 2689, 2691 [Clary].

²⁷⁵ Tr. vol. 21, 4858:13-4859:19 [Corpron].

1 impact of an incident at the Terminal is so small that risks are remote even to the
2 immediately adjacent buildings.²⁷⁶ Moreover, the number of people living within a
3 potential evacuation radius from a facility incident is also very small and does not extend
4 to the closest residential neighborhoods.²⁷⁷ Accordingly, concerns about a potential need
5 to evacuate the Fruit Valley neighborhood are entirely without merit and based on pure
6 speculation and conjecture. With specific respect to the potential for evacuation of the
7 JWC, the County's own witnesses identified no less than four available egress routes.²⁷⁸
8 And, while County law enforcement alleged deficiencies in its own ability to transport the
9 jail population in the event of an evacuation, this was based on their assessment of the
10 resources of the County Sherriff's office, without consideration of the wider range of
11 transportation resources that are planned and could be brought to bear in the event of a
12 Terminal emergency that required a larger-scale evacuation. These include the County
13 regional transportation authority (CTTRAN) and school transportation resources.²⁷⁹

14 Finally, first responder capabilities are adequate to address a potential fire incident at
15 the Terminal. There was substantial testimony about first responder capabilities.
16 However, most, if not all of this testimony related to rail incident response, not terminal
17 incident response. Rail incident response is addressed in Section VI. below. The evidence
18 demonstrates that first responders have adequate capabilities to respond to a Terminal
19 incident, particularly given the significant automatic fire suppression features built into
20 the Terminal design. In fact, emergency response planning for the City and County
21 already anticipate incidents involving hazardous materials at facilities in the County,
22
23

24 ²⁷⁶ See Section V.A.1., above.

25 ²⁷⁷ Tr. vol. 9, 2141–2142 [Rhoads].

²⁷⁸ Pre-filed Testimony of Richard Bishop, at 9–10.

²⁷⁹ EX-0376-000010-TSS. See also EX-0374-TSS.

1 including incidents involving petroleum products.²⁸⁰ That planning is relevant to
2 understanding response capabilities for the proposed Terminal. The Opponent witnesses
3 largely ignored the wider range of public and private resources and assumed that they
4 would be responsible for the entirety of a response to a Terminal incident, notwithstanding
5 existing planning to the contrary. This “evidence” can only be intended to create the
6 illusion of a problem where none exists.

7 Opponents’ testimony about Terminal incident emergency response is particularly
8 confounding, considering that the City Fire Chief even admitted that, despite the City’s
9 purported concerns about a Terminal incident, the City fire department would not accept
10 TSPT’s offers of specific emergency response training because it was not a “priority.”²⁸¹
11 The City cannot have it both ways—it cannot lament the purported lack of preparedness
12 on the one hand, while refusing offers to become better prepared on the other. Indeed this
13 may be symptomatic of the City Manager’s instruction to City employees, including Fire
14 Chief Molina, that they avoid doing anything that might appear to be in support of the
15 Terminal project.²⁸² Ultimately, in light of the Terminal design and emergency response
16 planning, there are adequate measures to mitigate the risk.

17 **B. Land Use Consistency: Evidence Demonstrates That The Terminal Complies**
18 **With Those City Land Use Regulations That Were Not Already Addressed by**
19 **the Order of Land Use Consistency.**

20 **1. Legal framework.**

21 EFSEC has already determined that the proposed site for the Terminal is consistent
22 and in compliance with the City of Vancouver’s “land use plan” and “zoning ordinances,”

23 ²⁸⁰ EX-0374-TSS. The only testimony that raised questions about the adequacy of that emergency response planning
24 pertained to the frequency of rail movement of hazardous materials which does not relate to Terminal specific incidents.
25 Tr. vol. 14, 3171, 3210–3211 [S. Johnson]. There were no concerns expressed regarding the adequacy of those plans to
address Terminal incidents.

²⁸¹ Tr. vol. 12, 2702:18–2703:25 [Molina].

²⁸² Tr. vol. 12, 2870:6–2871:21 [E. Holmes]; Tr. vol 12, 2873:19–22 [E. Holmes].

1 pursuant to RCW 80.50.090(2) and WAC 463-26-110.²⁸³ EFSEC determined that the site
2 is “consistent with the pertinent portions of the Plan and zoning ordinances because
3 neither the pertinent portions of the Plan, nor the pertinent portions of the zoning
4 ordinances, clearly, convincingly and unequivocally prohibit the Site.”²⁸⁴ Thus, the
5 fundamental land use consistency question of whether the Terminal is consistent with the
6 City’s comprehensive plan and zoning ordinances has been decided and is not appropriate
7 for re-argument in the adjudication hearing.

8 In Order No. 872, EFSEC left open the opportunity at the adjudication to consider
9 consistency with other City planning documents and regulations not specifically addressed
10 in the Land Use Consistency determination,²⁸⁵ including the development policies in
11 Chapter 1 and Chapters 2 through 7 of the land use plan and the Shoreline Management
12 Act, chapter 90.58 RCW, and critical area ordinances.²⁸⁶ EFSEC recognized that this
13 subsequent consideration did not re-open the fundamental land use consistency
14 determination and further noted that “some of [the planning policies] are mutually
15 competitive and, therefore, it is “not necessary for development at the Site to advance
16 each of the [comprehensive plan] policies.”²⁸⁷ EFSEC recognized the commonly-
17 acknowledged planning principle that the comprehensive plan is intended as a blueprint or
18 guide for development and does not require strict compliance by each project with each

19
20 ²⁸³ Vancouver Energy Distribution Terminal, Order Determining Land Use Consistency, Council Order No. 872, at 11–
15 (EFSEC Aug. 2014), <http://www.efsec.wa.gov/FILES/orders/872%20-%2020140801TSVEDTLandUseOrder.pdf>;
Pre-filed Testimony of Brian Carrico, at 11–12.

21 ²⁸⁴ *Id.* at 12.

22 ²⁸⁵ Vancouver Energy Distribution Terminal, Order Determining Land Use Consistency, Council Order No. 872, at 14 n.
105 (EFSEC Aug. 2014), <http://www.efsec.wa.gov/FILES/orders/872%20-%2020140801TSVEDTLandUseOrder.pdf>

23 ²⁸⁶ Brian Carrico’s pre-filed testimony regarding compliance with City critical areas regulations and other development
regulations was uncontested during the adjudication. Pre-filed Testimony of Brian Carrico, at 26–28.

24 ²⁸⁷ Vancouver Energy Distribution Terminal, Order Determining Land Use Consistency, Council Order No. 872, at 12
(EFSEC Aug. 2014), <http://www.efsec.wa.gov/FILES/orders/872%20-%2020140801TSVEDTLandUseOrder.pdf> (citing
Quadrant Corporation v. Central Puget Sound Growth Management Hearings Board, 154 Wn.2d 224, 246, 110 P.3d
1132 (2005), and *Spokane County v. Eastern Washington Growth Management Hearings Board*, 173 Wn.App. 310,
333, 293 P.3d 1248 (2013)).

1 plan statement. Comprehensive plan policies do not undermine zoning regulations which
2 establish more specifically what uses may be sited in what locations.²⁸⁸ Comprehensive
3 plans typically include policies that may, on the surface appear to conflict, reflecting a
4 recognition that local planning must balance a range of interests to promote industry,
5 economic development public health and safety and environmental protection.²⁸⁹ The
6 balance between these sometimes conflicting objectives is achieved by choosing where to
7 site uses that might otherwise conflict with other uses or where to site uses that might
8 minimize impacts—the exact siting question that has been addressed in the Land Use
9 Consistency Order.

10 **2. Evidence demonstrates consistency with remaining land use regulations.**

11 Although EFSEC’s land use determination did not address certain land use policies
12 and regulations, Brian Carrico’s testimony (both pre-file and live) demonstrates that the
13 Terminal is consistent with the applicable land use designations, zoning, and other
14 development regulations.²⁹⁰ In the early stages of project review, City staff agreed with
15 this conclusion.²⁹¹ Once the City Council made a political decision to oppose the Terminal
16 project,²⁹² suddenly the City’s interpretation of its plans and regulations changed. In fact,
17 the City’s position admittedly changed to interpretations that the City had never before
18 advanced for any other project.²⁹³ The City admitted that they hoped EFSEC could apply
19 unprecedented interpretations of land use plans and regulations, because EFSEC was a
20

21 ²⁸⁸ *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 873 (1997) (quoting *Cougar Mountain Assocs.*
v. King County, 111 Wn.2d 742, 757, 765 P.2d 264 1988)).

22 ²⁸⁹ Vancouver Energy Distribution Terminal, Order Determining Land Use Consistency, Council Order No. 872, at 12
(EFSEC Aug. 2014), <http://www.efsec.wa.gov/FILES/orders/872%20-%2020140801TSVEDTLandUseOrder.pdf> (citing
23 *Quadrant Corporation v. Central Puget Sound Growth Management Hearings Board*, 154 Wn.2d 224, 246, 110 P.3d
1132 (2005), and *Spokane County v. Eastern Washington Growth Management Hearings Board*, 173 Wn.App. 310,
333, 293 P.3d 1248 (2013)).

24 ²⁹⁰ EX-0161-000035–95-TSS; Pre-filed Testimony of Brian Carrico, at 10–11.

25 ²⁹¹ Pre-filed Testimony of Brian Carrico, at 10–11; EX-0167-TSS.

²⁹² EX-3100-VAN. *See also* Tr. vol. 12, 2870:16–2871:21 [E. Holmes].

²⁹³ Tr. vol. 12, 2875:11–2876:13 [E. Holmes]; Tr. vol 10, 2296:23–2297:1 [Lopossa].

1 unique review forum. There is no authority for EFSEC to apply this approach to local
2 land use plans and regulations and the City’s consistency arguments must be rejected.

3 The project is consistent with the various relevant comprehensive plan polices,
4 shoreline master programs, and zoning ordinances applicable to the project because it is
5 an industrial development in a heavy industrial zone—a zone which has traditionally
6 accommodated similar uses. The Terminal is located in a high intensity industrial
7 shoreline district that specifically permits marine commerce and industrial uses, including
8 the Terminal use.²⁹⁴ The Columbia River is a shoreline of Statewide significance, which
9 allows, if not promotes, water-dependent shoreline uses, such as this marine terminal
10 trans-loading facility.²⁹⁵ Opponents’ arguments that Shorelines of Statewide Significance
11 must give priority to protection of natural shorelines even in locations where marine
12 industrial development already exists ignores the mandates of the statute, which specify
13 that priority shall be given to, among other uses, “ports” and “industrial and commercial
14 developments” which are particularly dependent on a shoreline location.²⁹⁶ There is no
15 question that a marine cargo terminal location within the existing industrial Port of
16 Vancouver meets this priority.

17 Contrary to the Opponents’ assertions, the construction and operation of the Terminal
18 will not require the City to make changes to its plans for City Center or to any other
19 Subarea argued by Opponent witnesses, because the only relationship of the Terminal to
20 those other plans is the use of the existing rail corridor by trains traveling to the Terminal
21 through those planning areas. The rail corridor is preexisting and no improvements or
22 changes to the rail corridor are proposed or required as part of this project.²⁹⁷ In fact,

23

24 ²⁹⁴ EX-0170-000002-TSS; EX-0170-000004-7-TSS; EX-0170-000033-34-TSS.

25 ²⁹⁵ Tr. vol 13, 453-454 [Carrico].

²⁹⁶ RCW 90.58.020.

²⁹⁷ Tr. vol. 3, 450:4-8 [Carrico]; Tr. vol. 3, 539-540 [Carrico].

1 substantial rail improvements were recently made to this rail corridor to increase rail
2 traffic to the port, including unit train traffic, and to increase overall rail traffic
3 efficiencies.²⁹⁸ The testimony of Brian Carrico explained how the City Center Plan, the
4 Fruit Valley Subarea Plan and the Riverview Gateway Subarea Plan all clearly anticipated
5 the existing rail corridor, including potential increases in rail traffic along that corridor.²⁹⁹
6 Additionally, the Columbia Waterfront Development review similarly recognized existing
7 rail lines and increased rail traffic to the Port.³⁰⁰ Rail access to the Port was modified, in
8 part, to accommodate the Columbia Waterfront Development. It is disingenuous to now
9 argue that the presence of the Columbia Waterfront Development should be reason to
10 deny a project dependent on rail traffic. Rail traffic, including unit trains of crude oil,
11 presently travel on those rail lines through the City Center and will continue to do so with
12 or without the Terminal.³⁰¹ Thus any land use plan conflict associated with rail traffic
13 occurs with or without the Terminal project, a fact ultimately acknowledge by Opponent
14 witnesses on cross-examination.³⁰² No improvements are planned for the rail corridor as
15 part of this project.³⁰³ Any inconsistencies between the rail line and land use regulations
16 should have been addressed when the rail corridor was developed or when land use
17 planning choices were made for properties adjacent to the rail corridor, since the rail
18 corridor existed prior to most of the current land use plans and urban development.

19 Opponents also assert that a land use change is occurring on the rail line due to the
20 specific commodity being transported by rail. This argument also is without merit.

21 ²⁹⁸ Tr. vol. 2, 263–265 [Smith]; Tr. vol. 3, 448–449 [Carrico].

22 ²⁹⁹ Pre-filed Testimony of Brian Carrico, at 33:9–24; Tr. vol. 3, 456–457 [Carrico].

23 ³⁰⁰ Pre-filed Testimony of Brian Carrico, at 35–37; Tr. vol. 3, 448–449 [Carrico]. Opponents emphasis on adverse
24 economic impacts are focused on impacts associated with rail transport, not Terminal operation and, more importantly,
25 are dependent on their flawed assumption that a significant derailment, spill and fire will occur. Thus, their assertion of
adverse economic impacts suffers the same flaw as their arguments regarding spill and incident risk generally, described
in Section VI.

³⁰¹ Tr. vol. 9, 2165:7–11 [Rhoads]; Tr. vol. 12, 2881:1–2 [E. Holmes]; Tr. vol. 7, 1649:2–22 [Hack]; EX-3138-VAN.

³⁰² Tr. vol. 12, 2899–2900 [E. Holmes]. *See e.g.*, Tr. vol. 18, 4166:2–4169:19 [Wechner].

³⁰³ Tr. vol. 3, 449:23–25 [Carrico].

1 Hazardous materials, including crude oil, are, and will continue to be, transported on the
2 rail line with or without the Terminal project.³⁰⁴ Similarly, the plans to maximize the
3 Port's use of rail infrastructure was addressed long ago in the plans for the West
4 Vancouver Freight Access Plan.³⁰⁵ Arguments regarding land use inconsistency due to
5 rail traffic generally or hazardous material rail transport specifically fail because those
6 activities have been and will be occurring with or without the Terminal.

7 The City's land use consistency argument is reflective of the City Manager's
8 admission that the City is looking for ways to oppose the Terminal because of the specific
9 commodity.³⁰⁶ The City offers no legal basis to justify its request that EFSEC implement
10 the code differently than the City has in the past. The EFSEC statute and regulations do
11 not give EFSEC the authority to impose tortured interpretations of City plans and
12 regulations simply because the City opposes the energy facility, and, in particular, the
13 commodity it handles. To do so would be arbitrary and capricious. City code
14 interpretation is only entitled to deference if the city can show “. . . that it has adopted and
15 applied such interpretation as a matter of agency policy.”³⁰⁷ The City admits it has never
16 applied its policy in the manner it is suggesting. The City Manager attempted to argue
17 that EFSEC must evaluate this project differently because EFSEC statute treats crude oil
18 differently than other commodity-based proposals.³⁰⁸ Nothing in the EFSEC statute
19 allows the Council to interpret and apply the City's code differently than the City has in
20 the past.³⁰⁹

21

22 ³⁰⁴ Tr. vol. 9, 2165:7–11 [Rhoads]. See also EX-0376-TSS.

23 ³⁰⁵ EX-0244-TSS; EX-0245-TSS.

24 ³⁰⁶ Tr. vol. 12, 2870:6–2871:21 [E. Holmes].

25 ³⁰⁷ *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992).

³⁰⁸ Tr. vol. 12, 2875:18–25 [E. Holmes].

³⁰⁹ Tr. vol. 12, 2876:13 [E. Holmes]. It is clear that Opponent's main concern is that SEPA analysis of off-site impacts. See Tr. vol. 3, 492 [Carrico]. Consideration of off-site impacts as required by SEPA does not change the outcome that the Terminal is consistent with the land use regulations.

1 The City and other Opponents also assert that the Terminal must be consistent with
2 land use planning documents for subareas of the City well beyond the Terminal site. This
3 argument requires a determination that those subarea plans are inconsistent with rail in the
4 first place, since the Terminal itself is not located in any of these planning subareas.³¹⁰
5 Even assuming that the existing rail corridor’s consistency should be revisited as part of
6 this project, the rail corridor is consistent with the subarea plans, and is, in fact, mentioned
7 specifically in those plans.³¹¹ Specifically, with respect to the River Gateway Subarea, the
8 City zoning code for R2 specifically allows rail corridors within or adjacent to single
9 family residential areas as a permitted use.³¹² The Fruit Valley and Vancouver City Center
10 Vision (“VCCV”) subarea plans specifically recognize and acknowledge the presence of
11 the rail corridor.³¹³ Moreover, the WVFA improvements upon which the trains will travel
12 to and from the Terminal, actually moved that train traffic further from Fruit Valley, thus
13 reducing any alleged conflict between project rail traffic and that residential
14 neighborhood.³¹⁴ The Terminal is consistent with the City’s land use plans and
15 regulations. The rail traffic associated with the Terminal use is consistent with the history
16 and use of the existing rail corridor and that rail corridor is recognized in each of the
17 subarea plans argued by opponents. EFSEC should reject the City’s post-hoc
18 rationalizations to the contrary.

19 **C. Financial Assurances: TSPT has Complied with the Financial Assurances**
20 **Requirements Necessary to Obtain Site Certification.**

21 WAC 463-60-075 requires the applicant to propose “insurance, bonding or other
22 arrangements to mitigate for damage or loss to the human environment caused by project

23 ³¹⁰ Tr. vol. 3, 456:11–18 [Carrico].

24 ³¹¹ Tr. vol. 3, 456:24–459:2 [Carrico]; Pre-filed Testimony of Brian Carrico, at 28–36.

24 ³¹² Tr. vol. 3, 458:22–23 [Carrico].

25 ³¹³ Tr. vol. 3, 457:4–19 [Carrico].

25 ³¹⁴ See Tr. vol. 16, 3770 [Garcia].

1 construction, operation, abandonment, termination, or when operations cease . . .” As
2 described in the testimony of Michelle Hollingsed, TSPT is committed to obtaining
3 financial assurances in amounts sufficient to cover decommissioning estimates, and in
4 amounts sufficient to address potential losses to the Terminal itself and its operations, risk
5 of property damage, and injury offsite, and pollution liability, including natural resource
6 damages.³¹⁵

7 State law requires financial assurances for costs of a spill pursuant to RCW 88.40.025.
8 Although RCW 88.40.025 authorizes Ecology to set the financial assurance amount for
9 terminals by regulation, Ecology has not yet promulgated such a rule. Nevertheless,
10 TSPT expects EFSEC to impose a condition that will require financial assurances for the
11 Terminal to be determined by conducting a study to identify an appropriate level of
12 financial responsibility for the potential costs of response and cleanup of oil spills, natural
13 resource damages, and costs to state and affected counties and cities for their response
14 actions to reduce the risks and impacts from an oil spill.³¹⁶ This study will consider a
15 reasonable worst-case spill volume; the cost of cleaning up the spilled oil; prevention
16 measures employed by the Terminal that could reduce impact through spill containment,
17 immediate discovery and shutoff times; and the damages that could result from the
18 spill.³¹⁷ Such a condition describes the full scope of the financial assurance assessment,
19 consistent with state law and is, therefore, adequate (and all that EFSEC should require) to
20 satisfy the EFSLA requirements. Indeed it is exactly what EFSEC has already specified in
21 the DEIS.

22 The evidence demonstrates that TSPT can meet the requirements expected from such a
23 financial assurance study. Michelle Hollingsed described the assessment that TSPT has

24 ³¹⁵ Tr. vol. 8, 1715:20–1716:20 [Hollingsed].

25 ³¹⁶ Tr. vol. 8, 1721:24–1722:8 [Hollingsed].

³¹⁷ Tr. vol. 8, 1721:24–1722:8 [Hollingsed].

1 initiated to identify comparable facility coverages, maximum claims in the industry for
2 similar operations and her preliminary evaluation of what level of coverage might be
3 required and the ability of TSPT to obtain that coverage.³¹⁸ Ms. Hollingsed testified that
4 she supported this study approach, which has been identified in the DEIS, and intends to
5 provide the results of her industry assessment to EFSEC or Ecology as part of that
6 study.³¹⁹ Ms. Hollingsed further testified that she expected to obtain coverage for potential
7 natural resource damages in amounts at least as large as estimates provided by the expert
8 witness for the Counsel for the Environment.³²⁰ This evidence and the condition
9 recommended by the DEIS is adequate to address the requirements to “propose” financial
10 assurances to cover Terminal operations.³²¹

11 **1. Financial Responsibility Amount is Appropriately Determined at a Later**
12 **Time.**

13 Opponents wrongly argue that TSPT is obligated to provide a specific amount and
14 method for providing financial assurances prior to EFSEC’s decision in this case. Their
15 argument is directly contrary to Washington case law, which confirms that this
16 information can be provided at a later time, prior to Terminal construction and
17 operation.³²² Even the language of the relevant EFSEC regulation simply requires the
18

19 ³¹⁸ Tr. vol. 8, 1718:9–1719:13; 1722:12–14 [Hollingsed].

20 ³¹⁹ Tr. vol. 8, 1722:12–14 [Hollingsed].

21 ³²⁰ Tr. vol. 8, 1725:14–17;1728:22–1730:3 [Hollingsed].

22 ³²¹ The regulations also require financial assurances to cover the estimated cost of decommissioning. WAC 463-60-
23 075. David Corpron provided unrefuted testimony regarding those cost estimates (EX-0278-TSS; Tr. vol. 3, 596:23–
24 599:2 [Corpron].), and Ms. Hollingsed testified that TSPT could readily obtain a performance bond to cover that
25 amount. Tr. vol. 8, 1733:9–13 [Hollingsed].

26 ³²² *Friends of Columbia Gorge, Inc. v. State Energy Facility Site Evaluation Council*, 178 Wn.2d 320, 336, 310 P.3d
27 781 (2013)(finding that the application requirements of WAC 463-60 are the “starting point of a longer process”);
28 *Quinalt Indian Nation v. Imperium Terminal Servs., LLC*, 190 Wn. App. 696, 707, 360 P.3d 949 (2015)(finding that
29 the applicant need not demonstrate the financial assurance requirement under RCW 88.40.025 until after the shoreline
30 permit and SEPA threshold determination, when they file the oil spill response plans). These two decisions, interpreting
31 EFSEC application requirements under WAC 463-60 and the more specific petroleum terminal financial assurance
32 requirements under RCW 88.40.025, when combined, support the proposed DEIS financial assurance mitigation
33 measure approach and timing.

1 applicant to propose a financial assurance arrangement, but does not require the applicant
2 to acquire the financial assurances as a condition of site certification.³²³

3 **2. TSPT Is Responsible For Terminal Financial Assurances Only.**

4 Opponents, with no legal support, suggest that the Terminal bears financial
5 responsibility for any event that may occur along the supply chain.³²⁴ This is contrary to
6 statutory framework governing liability and financial responsibility, and is inconsistent
7 with how the insurance industry addresses liability and coverage. Financial responsibility
8 is appropriately assigned to the party or parties who are exercising care, custody and
9 control of a product at any point in the supply chain.³²⁵ Supply chain contracts are
10 carefully negotiated to insure no gaps in care, custody and control and therefore clarity
11 regarding financial responsibility.³²⁶ In fact, it may not be possible for one party, such as
12 TSPT to obtain insurance coverage for liability arising out of the actions of other parties,
13 such as the railroad and the marine vessel operators, when TSPT has no ability to oversee
14 or control those operations.³²⁷ The existing spill liability framework and financial
15 assurance requirements obligate all parties in the supply chain to provide complete
16 coverage for their respective responsibilities in the event of a spill. Within that
17 framework, TSPT is only responsible for demonstrating financial assurances related to
18 Terminal operations, based on the requirements found in WAC 463-60-075 and RCW
19 88.40.025.

20 Separate financial assurance requirements for rail, vessel and facilities are established
21 by law. RCW 88.40.020 governs vessel financial responsibility; RCW 88.40.025 governs
22 terminal financial responsibility; and RCW 81.04.560 governs rail financial responsibility.

23 ³²³ WAC 463-60-075.

24 ³²⁴ Tr. vol. 11, 2602:7-12 [Blackburn].

25 ³²⁵ Tr. vol. 8, 1738:2-16 [Hollingsed].

³²⁶ Tr. vol. 9, 2005: 1-13 [Casey].

³²⁷ Tr. vol. 8, 1738:2-16 [Hollingsed].

1 Additional regulations also exist, which govern rail ³²⁸ and vessel financial
2 responsibility.³²⁹ Thus, the State of Washington has already determined the appropriate
3 level of financial responsibility for those elements of the supply chain. Those
4 requirements are not subject to EFSEC’s review.

5 RCW 90.56.370 provides for an additional layer of financial responsibility related to
6 oil spills. This statute imposes strict liability on any person owning oil or having control
7 over oil for damages resulting from injuries to public resources resulting from oil that
8 enters state waters. This owner liability supplements the liability and insurance coverage
9 obligations of those who exercise care, custody and control of oil at the time of an
10 incident. Thus, to the extent Opponents advocate for a single-party overriding
11 responsibility, that rests with the owner of the oil.

12 Owners, operators and transporters are also potentially liable for cleanup costs and
13 natural resource damages (“NRDs”) under a host of state and federal laws that may apply
14 in the event of a spill.³³⁰ The primary purpose of NRDs is restoration of the damaged
15 resources to pre-incident conditions.³³¹ Calculation of NRDs under these authorities
16 follow a similar approach. For example, chapter 173-183 WAC implements the state
17 Water Pollution Control Act.³³² This regulation allows the Department of Ecology to
18 require or take any and all actions necessary to investigate and assess damages from spills
19 into the waters of the state.³³³ In the event of a spill, a Resource Damages Assessment
20 (“RDA”) Committee is formed consisting of representatives from the Department of
21 Ecology and other designated states agencies along with representatives from other state,

22 ³²⁸ WAC 480-62-300.

23 ³²⁹ Chapter 317-50 WAC.

24 ³³⁰ These include the Water Pollution Control Act, chapter 90.48 RCW; the Model Toxics Control Act (“MTCA”),
chapter 70.105D RCW; the Oil Pollution Act (“OPA”), 33 U.S.C. §§ 2701-2762; or, possibly the Comprehensive
Environmental Response Compensation and Liability Act (“CERCLA”), 42 U.S.C., §§9601-9675.

25 ³³¹ RCW 90.48.367; 33 U.S.C. §1006(c), (d); 42 U.S.C. §. 107(a)(4)(C),107(f)(1).

³³² Chapter 90.48 RCW.

³³³ WAC 173-183-030.



1 local or federal agencies or tribal governments.³³⁴ The RDA Committee, like federal
2 trustees under relevant federal law, undertakes a Natural Resource Damage Assessment
3 (“NRDA”) process to determine the scope of natural resource damages, the appropriate
4 restoration methodology, and the cost of restoration or acquisition of equivalent
5 resources.³³⁵ The NRDA process establishes a methodology for valuing resources,
6 including tribal resources, which ensures that adequate funds are devoted to the restoration
7 of such resources.³³⁶ This approach, which involves the active participation of affected
8 tribes, addresses concerns expressed by tribal representatives in this case about the
9 inadequacy of monetary payments alone to compensate for damaged resources.

10 **3. Coverage for Maximum Potential Loss Not Required.**

11 Opponents demand that TSPT demonstrate coverage for maximum potential loss,
12 more coverage than is required by law. It would be inconsistent with the plain meaning of
13 the statute to require coverage for maximum potential loss. RCW 88.40.025 requires a
14 financial assurance amount necessary “to compensate the state and affected counties and
15 cities for damages that might occur during a *reasonable worst case spill* of oil from that
16 facility into the navigable waters of the state,”³³⁷ not a “maximum potential loss.” Ecology
17 has embraced this reasonable worst case spill approach specified in the statute in its
18 support of a condition identified in the DEIS, to which TSPT has agreed.³³⁸

19 Moreover, the Washington Utilities and Transportation Commission (UTC) has
20 interpreted the phrase “reasonable worst case spill” (or “discharge”) as something less
21 than the maximum foreseeable incident advocated by the Opponents. For example, during

22 ³³⁴ WAC 173-183-230. Similarly, under OPA, in the case of natural resource damages related to an oil spill trustees are
23 designated to assess natural resource damages. These trustees include federal, state and tribal entities. 33 U.S.C. §
2706.

24 ³³⁵ For smaller spills chapter 173-183 WAC allows the use of compensation schedules to quantify NRDs. WAC 173-
183-400-710 ; WAC 173-183-830-865.

25 ³³⁶ Chapter 173-183 WAC.

³³⁷ RCW 88.40.025.

³³⁸ Tr. vol. 8, 1722:2–8 [Hollingsed].

1 its recent rule-making for WAC 480-62-300 (crude by rail financial responsibility), the
2 UTC rejected a maximum or worst possible approach:

3 We resolve the inherent conflict between “reasonable” and “worst” by
4 interpreting “reasonable worst case spill” to mean a foreseeable oil spill
5 that, while not as devastating as the worst possible incident, is
6 nevertheless of high consequence and would have a significant impact on
7 the citizens of this state.³³⁹

8 The UTC rejected an argument that Lac Mégantic should be the appropriate
9 measure,³⁴⁰ rejected Columbia Riverkeepers’ comment during rulemaking that Lac
10 Mégantic might not be large enough,³⁴¹ and would certainly reject the five times Lac
11 Mégantic figure advocated by Robert Blackburn during the hearing.³⁴²

12 Similarly, the financial responsibility requirements for vessels are set by statute and
13 regulation.³⁴³ It is not EFSEC’s responsibility to alter this requirement. Nor does the
14 evidence or applicable law support such an approach. In light of the extensive
15 containment, spill prevention, and spill response capabilities at the Terminal, a reasonable
16 worst case spill into the river from a storage tank located in Area 300, which is
17 approximately one-third of a mile from the river, cannot be expected to exceed the scope

18 ³³⁹ *In re Amending & Adopting Rules in WAC 480-62 WAC Relating to Rail Safety*, Order R-584, 2016 WL 556309,
19 at *5 (Util. & Transp. Comm’n Feb. 9, 2016).

20 ³⁴⁰ “They recommend that we use the events in Lac Mégantic as the basis for calculating a reasonable worst case spill.
21 Again, we decline that recommendation. We certainly are aware that Lac Mégantic was the worst oil by rail spill in
22 North America, and that even more disastrous spills are conceivable. The Legislature, however, did not authorize the
23 Commission to gather information on railroad companies’ ability to pay the costs of a worst case spill. Rather, we may
24 only determine what constitutes a *reasonable* worst case spill...”

25 ³⁴¹ *In re Amending & Adopting Rules in WAC 480-62 WAC Relating to Rail Safety*, Order R-584, 2016 WL 556309,
at *6 (Util. & Transp. Comm’n Feb. 9, 2016).

³⁴² Columbia Riverkeeper commented on this directly during the comment period for the rules setting financial
responsibility amounts for rail, explaining that Lac Mégantic, may even represent something less than the worst case
spill scenario. The UTC rejected this position, explaining that:

The Commission was charged with defining a “reasonable” worst case spill. The definition of “reasonable” is
subjective but the Commission believes that if the legislature had intended an absolute worst case spill, then the
quantifier “reasonable” would not have been included. A high consequence event from the PHMSA enhanced tank
car rule was used because it calculated costs, showed potential impacts and predicted possible derailments.

³⁴³ *In re Amending & Adopting Rules in WAC 480- 62 WAC Relating to Rail Safety*, Order R-584, at Appendix A (Util.
& Transp. Comm’n Feb. 9, 2016).

³⁴² Tr. vol. 11, 2580: 9–14 [Blackburn].

³⁴³ RCW 88.40.020; chapter 317-50 WAC.

1 of a reasonable worst case spill into the river from a vessel.³⁴⁴ It would be arbitrary to
2 conclude that the financial assurance requirements for a facility incident should be higher
3 than the amount required for a vessel as established by state legislature.

4 **D. Economic Benefit: The Terminal Creates Substantial Socioeconomic Benefit.**

5 The evidence presented during the hearing demonstrates the Terminal’s substantial
6 positive socioeconomic benefit to the state and local community, and fully addresses the
7 socio-economic issues identified in WAC 463-60-535. WAC 463-60-535 requires that an
8 application for site certification contain an economic impact analysis, including positive
9 and negative impacts on the socioeconomic environment affected by the proposed
10 Terminal. As with each section of chapter 463-60 WAC, this section does not require
11 EFSEC to make any substantive finding about economic benefits.³⁴⁵ Chapter 463-60
12 WAC merely provides “guidelines” as to “what information will be considered” by
13 EFSEC.³⁴⁶ Contrary to Opponents’ assertions, there is no requirement that an applicant
14 must provide a net overall economic benefit in general, and certainly no requirement that
15 an energy facility assess any alleged adverse property value impact. This false claim is
16 the centerpiece of Opponents’ economic impact arguments.

17 Analysis Group, Inc. (AGI) evaluated the economic impacts provided by the Terminal
18 project, utilizing the IMPLAN model.³⁴⁷ This model determined the economic impact of
19 the Terminal’s construction and operations, the indirect effects of the Project’s economic
20 activity, and induced effect as income earned by workers of the Project is spent in the
21 economy.³⁴⁸ AGI evaluated the economic impacts through a comparison between a

22
23 ³⁴⁴ Tr. vol. 6, 1404:5 – 1406:1 [Haugstad]; Tr. vol. 2, 304:3–10 [Larrabee].

24 ³⁴⁵ *Friends of Columbia Gorge, Inc. v. State Energy Facility Site Evaluation Council*, 178 Wn.2d 320, 335, 310 P.3d
780 (2013).

25 ³⁴⁶ *Id.*

³⁴⁷ Tr. vol. 5, 1013:18–25 [Schatzki].

³⁴⁸ Pre-filed Testimony of Todd Schatzki, at 6:6-9.

1 “policy case” in which the project is developed and a “base case” in which the project is
2 not developed to determine its stand-alone impact.³⁴⁹

3 While Opponents raised five primary issues with AGI’s analysis, they have largely
4 conceded two.³⁵⁰ Opponents’ remaining three arguments are without merit. First,
5 Opponents assert that the AGI analysis calculated the benefits of the Terminal, but did not
6 net the benefits against the negative economic impacts.³⁵¹ Opponents assert that, as a
7 result, the analysis does not evaluate the Terminal as a public policy agency would in
8 balancing costs and benefits.³⁵² There is no such requirement in EFSEC regulations.
9 Additionally, the AGI analysis at issue deliberately focused on the benefits analysis,
10 leaving the evaluation of costs associated with an incident and the costs associated with
11 demands placed on public services to other analyses being conducted in the SEPA EIS.
12 AGI additionally completed two evaluations of potential costs or adverse impacts
13 associated with at-grade crossing delays and potential property values impacts, both of
14 which demonstrated those costs likely to be substantially smaller than the projected
15 economic benefits from Terminal construction and operation.³⁵³

16 Second, Opponents argue that the AGI analysis failed to consider alternative uses,
17 which resulted in an analysis that did not consider any opportunity costs associated with
18 the Terminal.³⁵⁴ WAC 463-60-535 does not require any such alternatives comparison.

21 ³⁴⁹ Pre-filed Testimony of Todd Schatzki, at 15:14-16.

22 ³⁵⁰ Opponents argue that the 16-year period assumed for the project was incorrect because only the initial ten-year lease
23 term is guaranteed. Opponents’ witness, Mr. Jerry Johnson, however admits that it was not unreasonable to assume a
24 16-year period and conceded this point during testimony. Tr. vol. 15, 3455:13–16 [J. Johnson]. Opponents also assert
25 that AGI’s analysis double counts certain benefits by counting the rent paid for the Terminal as a new tax benefiting the
Port instead of a payment for an asset. Tr. vol. 15, 3456:18–20 [J. Johnson]. But during testimony, Mr. Johnson
conceded that this “probably doesn’t have an enormous impact on this model.” Tr. vol. 15, 3456:12-13 [J Johnson].

³⁵¹ Tr. vol. 15, 3453:23–3454:7 [J. Johnson].

³⁵² Tr. vol. 15, 3454:3–7 [J. Johnson].

³⁵³ EX-0157-TSS; EX-0158-TSS.

³⁵⁴ Tr., vol. 15, 3454:3–4 [J. Johnson].

1 AGI appropriately compared the benefits of the Terminal with the status quo.³⁵⁵ To the
2 extent that the applicant must consider alternatives as part of the SEPA analysis, this is a
3 SEPA adequacy issue, and the Council has determined that the adequacy of the SEPA
4 environmental assessment is not relevant to this proceeding.³⁵⁶

5 Moreover, when challenging the AGI analysis for failure to consider alternative uses
6 of the property, Opponents' witness failed to properly account for the fact that the
7 Terminal utilizes three separate and disconnected areas that otherwise were not likely to
8 be used together or yield similar economic benefit from any alternative use on each
9 individual area. Jerry Johnson mistakenly compared potential alternative uses of a
10 consolidated 45-acre site, but that does not reflect the potential uses of the various
11 disparate and disjointed Port parcels that make up the Terminal site.³⁵⁷ Thus Johnson's
12 approach significantly overstates the value of potential alternative uses. The difficulty in
13 finding alternative uses for this area is underscored by the underutilization of this facility
14 for many years.³⁵⁸ Therefore, there are no current reasonable alternatives to the
15 Terminal and any possible future alternatives are merely speculative.³⁵⁹ Ultimately,

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17
18

³⁵⁵ Tr. vol. 5, 1027:21–24 [Schatzki].

19 ³⁵⁶ On the merits of that SEPA adequacy argument, Opponents are incorrect. SEPA requires consideration of
20 "reasonable alternatives," which are defined as "an action that could feasibly attain or approximate a proposal's
21 objectives, but at a lower environmental cost or decreased level of environmental degradation." Reasonable alternatives
22 may be those over which an agency with jurisdiction has authority to control impacts, either directly, or indirectly
through requirement of mitigation measures." WAC 197-11-786; *see also* WAC 197-11-792 (three types of alternatives
must be considered in the scope of the EIS: no action, other reasonable courses of action, or mitigation measures).
Reasonable alternatives are not available because any potential alternative that would achieve the purpose of the
Terminal is merely speculative.

23 ³⁵⁷ Tr. vol. 15, 3482:7–3482:11 [J. Johnson]. For example, potential tenants interested in space for marine loading and
unloading typically require an adjacent laydown area, but there is no such area within the leased area for the Terminal
project. Tr. vol. 15, 3482:12–15 [J. Johnson].

24 ³⁵⁸ Tr. vol. 2, 273:10–14 [Smith].

25 ³⁵⁹ Although it is always *possible* that there will be another option for use of this land at the Port, there is no certainty
with respect to those options and whether they would provide sustained economic presence. Tr. vol. 5, 1023:6–24
[Schatzki].

1 Opponents agree that the magnitude of the benefits from any alternative they have
2 presented are lower than that of the Terminal project.³⁶⁰

3 Third, Opponents argue that AGI improperly counted indirect impacts as direct
4 impacts. Testimony at the hearing demonstrates that Opponents' assertion of double
5 counting was based on a misreading of the modeling.³⁶¹

6 Perhaps most central to their objections, Opponents argue that there should be a
7 property value subtraction from the gross benefits of the Terminal because the Terminal
8 will negatively impact property values over time. Opponents assert that the Terminal will
9 therefore also cause a loss in local tax revenue to the local jurisdictions. However,
10 Opponents' argument is not supported by data or any relevant economic study. Instead, it
11 is based on unfounded assertions and failure to recognize the property value impacts
12 associated with rail traffic that will occur regardless of whether the Terminal is built. The
13 sole study on which Opponents rely is of an admittedly significantly different hazardous
14 material—nuclear waste.³⁶² Opponents' own witness, Mr. Jerry Johnson, recognized that
15 impacts of a nuclear waste incident on property values are not analogous to those of the
16 Terminal, yet he applied that study anyway.³⁶³ There is nothing to support Opponents'
17 arguments regarding potential adverse impacts to property values other than mere
18 speculation. At best, the existing economic studies in this area are somewhat
19 inconclusive, suggesting the impact could range anywhere from zero to 1.5%.³⁶⁴ Given
20 the substantial uncertainty and speculation associated with estimating property value
21 impacts from the energy facility, there is not support in the record sufficient to reach any
22 conclusion regarding this impact, nor authority in EFSLA or EFSEC regulations to

23 _____
³⁶⁰ Tr. vol. 5, 1024:3–6 [Schatzki].

24 ³⁶¹ Tr. vol. 5, 1017:4–14 [Schatzki].

³⁶² Tr. vol. 15, 3490:5–12 [J. Johnson].

³⁶³ Tr. vol. 15, 3489:2–5 [J. Johnson].

25 ³⁶⁴ Tr. vol. 5, 1034:23–1035:5 [Schatzki].

1 impose conditions, or based project denial on any sort of calculation of property value
2 impacts. This opposition issue is a red-herring that should not be the basis of EFSEC's
3 decision.

4 Finally, Opponents incorrectly assert that AGI improperly found there would be
5 economic benefits from a spill.³⁶⁵ This misrepresents Mr. Schatzki's testimony. Mr.
6 Schatzki's testimony explicitly stated that there would not be a net economic benefit from
7 a major spill. Instead, he noted that there are some offsetting economic activity that may
8 occur if there is a spill that are associated with remediation.³⁶⁶

9 **VI. THE RAIL AND VESSEL TRANSPORTATION ISSUES RAISED BY**
10 **OPONENTS ARE OUTSIDE EFSEC'S JURISDICTION AND NOT**
11 **SUPPORTED IN THE RECORD**

12 It is clear from the evidence and testimony presented during the adjudication that the
13 vast majority of Opponent arguments and claims pertain to rail and vessel transportation.
14 Those issues are outside of the scope of EFSEC's jurisdiction. Moreover, the evidence
15 demonstrates the limited risk of those incidents and the adequacy of the regulatory and
16 mitigation measures to address those transportation-related issues. Opponents' arguments
17 to the contrary rely on irrational conjecture and ignore standard principles of risk-based
18 decision making that take into consideration probability, as well as the consequence of
19 events.

20 **A. Legal Framework: EFSEC Is Without Authority to Address Opponents'**
21 **Claims Related to Impacts of Rail and Vessel Operations.**

22 As a preliminary matter, it is important to recognize two key legal limitations on
23 EFSEC's authority to address rail- and vessel-related issues. First, whether in the context
24 of the adjudication or when exercising its SEPA substantive authority, it is a well-settled
25 principle that EFSEC is preempted by federal law from taking substantive action to

³⁶⁵ Tr. vol. 15, p. 3529:19–3530:2 [Neimi].

³⁶⁶ Tr. vol. 5, 1073:23–1074:8 [Schatzki].

1 address rail-related issues.³⁶⁷ In response to TSPT’s earlier motion to dismiss only a
2 portion of the rail-related issues in this case, EFSEC concluded that a decision on
3 preemption was premature.³⁶⁸ Now, as EFSEC considers its recommendation including
4 potential for conditions, EFSEC must account for federal preemption in its decision
5 making. In its Pre-Hearing Brief, its Motion to Dismiss Rail Operations Issues, and its
6 Reply on Rail Operations Issues, TSPT addressed the comprehensive federal statutory
7 framework established by the Interstate Commerce Commission Termination Act
8 (“ICCTA”) and the Federal Railroad Safety Act (“FRSA”). As further discussed in those
9 prior pleadings, these federal authorities preempt EFSEC from imposing conditions of
10 approval to address rail-related safety issues and rail operations. EFSEC is similarly
11 preempted from recommending denial on those same grounds.

12 Moreover, EFSLA does not give EFSEC authority in the context of this adjudication
13 to require an applicant to mitigate indirect impacts associated with the operation of the
14 vessel or rail corridors by independent parties.³⁶⁹ EFSEC has authority over the project
15 applicant and its operation of the proposed Terminal, not the incidental transportation to
16 and from the Terminal. To that end, there are no specific EFSEC approval criteria
17 addressing the risk of incidental transportation impacts. At most, and as explained in
18 TSPT’s pre-hearing brief, WAC 463-60-372 sets forth application requirements for

19 ³⁶⁷ See Applicant’s Pre-Hearing Brief at III.A.2; TSPT’s Motion to Dismiss Issues 15, 20, 49, 50, 51, 53, 56, 66 and
20 Portions of Issues 7, 12, 14, 18, 19, 39, 45, 64, 67, 68 (“Motion to Dismiss Rail Issues”); TSPT’S Reply on Motion to
21 Dismiss Issues 15, 20, 49, 50, 51, 53, 56, 66 and Portions of Issues 7, 12, 14, 18, 19, 39, 45, 64, 67, 68 (“Reply on
22 Motion to Dismiss Rail Issues”). See also *City of Auburn v. U.S. Gov’t*, 154 F.3d 1025, 1029 (9th Cir. 1998).

21 ³⁶⁸ Order Denying Tesoro Savage, LLC and Port of Vancouver Dispositive Motions (Energy Facilities Site Evaluation
22 Council June 6, 2016). To the extent required by RCW 80.50.140(2), TSPT reiterates its objection to EFSEC’s exercise
23 of jurisdiction over any matter preempted by federal law or regulation.

22 ³⁶⁹ While the authority under SEPA to identify and consider indirect impacts might be broader, that is also not
23 unbounded authority, as discussed in footnote 8. Additionally, as described above, whether under SEPA or other statute,
24 the exercise of regulatory authority over rail-related issues is preempted. Authority over subject matter that is not
25 otherwise preempted must be based on the agencies adopted substantive SEPA policies. RCW 43.21C.060 (1983) (“Any
governmental action may be conditioned or denied pursuant to this chapter: PROVIDED, that such conditions or denials
shall be based upon policies identified by the appropriate governmental authority and incorporated into regulations,
plans, or codes which are formally designated by the agency (or appropriate legislative body, in the case of local
government) as possible bases for the exercise of authority pursuant to this chapter.”).

1 disclosure of rail and vessel transportation corridors, with a focus on identifying the needs
2 for access to those corridors, standards for construction of that access, and plans for
3 maintenance of that access. TSPT has complied with this requirement by submitting its
4 complete application and testimony presented in the adjudication related to the rail
5 infrastructure planned for the Terminal site and dock improvements. There is nothing else
6 in the statute or regulations that authorize EFSEC's regulation of rail and vessel
7 transportation to and from the Terminal. While Opponents have pointed to the general
8 policy statement in RCW 80.50.010,³⁷⁰ the focus of even that general language is on the
9 impacts associated with TSPT's construction and operation of the Terminal. To hold
10 otherwise would assume that EFSEC can impose conditions on TSPT that purport to
11 govern railroad and vessel operations, when the parties conducting those operations are
12 not parties to the proceeding and TSPT has no control over those operations that are
13 regulated by federal law.³⁷¹

14 **B. Compliance with Regulations and Additional Mitigation Are Sufficient to**
15 **Address the Risk of a Rail Incident.**

16 Despite the restrictions on EFSEC's substantive authority over rail issues, TSPT
17 nevertheless presented evidence during this proceeding that demonstrated the remote and
18 speculative nature the risks of rail transportation and the adequacy of the federal
19 regulatory requirements, emergency response planning and preparedness, and other
20 mitigation measures to address that risk. Not only must EFSEC defer to those regulatory
21 requirements, but the evidence demonstrates that EFSEC can be confident that those

22 _____
23 ³⁷⁰ See, e.g., Columbia Riverkeeper et. al. Opp'n to Tesoro-Savage and Port of Vancouver Mot. at 5.
24 ³⁷¹ To the extent that the shippers with which TSPT will contract control tank car selection, TSPT has voluntarily agreed
25 to require the use of specific tank cars as voluntary mitigation. Tr. Vol. 7, 1628:20–1629:19 [Hack]. Voluntarily
working with partners to agree to mitigation is not preempted. Moreover, that specific voluntary mitigation is only
achievable because it governs shippers with whom the Terminal will contract, not the carrier, and because it specifically
selects from the range of tank car options available under the federal rules for the specific product in question. Tr. vol.
7, 1525:17–1526:11 [Kaitala]; Tr. Vol. 7, 1678:4—14 [Hack].

1 regulations (some of which are newly revised and continue to be revised³⁷²) appropriately
2 address the risk and response in the context of also promoting vital interstate commerce
3 by rail and vessel carriers.

4 **1. TSPT has presented the only credible evidence related to the probability**
5 **of a rail incident, which Opponents ask EFSEC to ignore.**

6 Dr. Christopher Barkan was the sole witness to credibly explain the likelihood or
7 probability of potential rail-related incidents. Probability of an event is a key component
8 of understanding its risk.³⁷³ Dr. Barkan’s analysis explains the probabilities for a range of
9 potential rail events, from those that could occur with greater frequency, but would result
10 in lower consequence, (for example derailments, with or without a spill) to those that have
11 higher potential consequences, but are remote and speculative (larger derailment, spill and
12 fire events).³⁷⁴ Dr. Barkan also expressed these probabilities both as the likelihood of the
13 event occurring anywhere along the rail route in Washington, as well as the much lower
14 probability that the event would occur in a given location along the route.³⁷⁵

15 Dr. Barkan’s testimony and analysis stands alone in the record as the sole testimony
16 about the probability of an incident along this specific rail route. No opponent witnesses
17 assessed the probability of a rail incident along the route.³⁷⁶ Instead the Opponents
18 obfuscate Dr. Barkan’s analysis and ask the Council to ignore distinctions between the
19 probability of these various categories of events:

- 20 • The Opponents would have the Council ignore the distinctions between the
21 probabilities of various events and simply assume that the worst-case scenarios

22 ³⁷² For example, Ecology recently adopted on August 24, 2016, regulations establishing reporting standards for facilities
23 that receive crude by rail. See chapter 173-185 WAC. Additionally, on August 31, 2016, Ecology adopted a new rule
24 requiring railroads to develop oil spill contingency plans as well as related spill drill and equipment verification
25 requirements. See chapter 173-186 WAC

³⁷³ Tr. vol. 20, 4571–4572 [Barkan]; Tr. vol. 6, 1247:14–1248:6 [Thomas]; Tr. vol. 6, 1340:23–1341:5 [O’Mara].

³⁷⁴ Pre-filed Testimony of Christopher Barkan, at 2–3.

³⁷⁵ Tr. vol. 20, 4575:9–4576:4 [Barkan].

³⁷⁶ Tr. vol. 10, 2424:4–9 [Chipkevich]; Tr. vol. 11, 2543:6–13 [Hildebrand].

1 they present can, and will, occur in a location of their specification, such as
2 downtown Vancouver or Spokane.³⁷⁷ Opponents ignore the extremely low
3 probability of such events occurring in those specific locations.³⁷⁸ When those
4 factors are considered, the probabilities of the events they describe occurring at a
5 given location is measured in the thousands and tens-of-thousands of years.³⁷⁹
6 That level of risk is remote.

- 7 • Opponents also ignore key factors that are necessary to assess whether the specific
8 incidents on which they rely are representative of the risk at a location in
9 Washington, such as track class, train speed, and tank car type.³⁸⁰ They simply
10 assume, without any further analysis, that those incidents can and will occur,
11 despite those differences. For example, evidence demonstrates that the factors
12 contributing to the incident at Lac Mégantic, including topography, track layout,
13 and rail road operations, are not present in Vancouver or Washington such that the
14 Council should reject Opponents' flawed assumptions that an event of that scale
15 will necessarily occur.³⁸¹
- 16 • At other times, Opponents simply mischaracterize Dr. Barkan's testimony. For
17 example, in closing, counsel for Columbia Riverkeeper conflated the probability of
18 a derailment, whether with or without spill, to that with a spill, thereby drastically
19 overstating the risk of a more significant event.³⁸²
- 20 • Alternatively, Opponents invite the Council to conclude that the risk of the low-
21 probability, but higher consequence, events is intolerable because the probability

22 ³⁷⁷ Tr. vol. 10, 2363–2367 [Chipkevich]; Tr. vol. 11, 2493–2494; 2543–2544 [Hildebrand].

23 ³⁷⁸ Tr. vol. 11, 2543:6–2544:6 [Hildebrand]; Tr. vol. 10, 2423:193–2424:2422 [Chipkevich].

24 ³⁷⁹ Tr. vol. 20, 4605–4615 [Barkan].

25 ³⁸⁰ Tr. vol. 11, 2547:10–2548:7 [Hildebrand]; Tr. vol. 10, 2418:1–6; 2420–2422 [Chipkevich].

³⁸¹ Tr. vol. 9, 2126–2132 [Rhoads]. Conversely, when a response to a serious incident is successful, as most opponent witnesses conceded was the case in Mosier, the Opponents ask the Council to ignore those successes and instead assume that Mosier's success was due to sheer "luck." Tr. vol. 16, 3765:20–22 [Garcia].

³⁸² Tr. vol. 22, 5174:13–15 [Boyles].

1 of that risk cannot be completely eliminated.³⁸³ That theory is fatally flawed
2 because it adopts an arbitrary standard of approval and ignores principles of risk
3 science and risk-based decision making, which require consideration of
4 probability.³⁸⁴ Moreover, it is inconsistent with EFSEC’s statutory authority,
5 which does not envision, nor require, that the applicant completely eliminate risks
6 or impacts.³⁸⁵

7 The Council must assess the nature of the risk, including the probability of that risk,
8 rather than simply assuming that the event will occur at the time, place, and scope that
9 Opponents’ speculate.

10 **2. The railroad’s compliance with evolving federal regulations, preparedness**
11 **of first responders, and additional Applicant mitigation are adequate to**
12 **address the risk of rail incident.**

13 Various federal regulations govern transportation of hazardous materials that ensure
14 safe transport and protect the public.³⁸⁶ As indicated at the hearing and in the revised
15 application, TSPT has committed to advancing the safety measures introduced in the
16 recently revised federal tank car rule by accepting only those cars that meet the federal
17 standards upon commencement of operations, in advance of the timeframe that is
18 otherwise allowed by the federal rule.³⁸⁷ This is a significant commitment that narrows
19 the range of packaging options for crude oil otherwise available under federal law. By
20 contrast, Opponents largely ignore the improvements offered by this commitment to the
21 new tank car design standard, simply asserting that the measure is insufficient because it

21 ³⁸³ See, e.g., Tr. vol. 22, 5126–5131 [Kernutt].

22 ³⁸⁴ Tr. vol. 20, 4669–4670 [Barkan].

23 ³⁸⁵ See Section II.B., *infra*. See also Applicant’s Pre-Hearing Br. 1–2; RCW 80.50.010 (statute recognizes potential for
“significant impact” of facilities, and directs Council to use “available and reasonable methods” to ensure that the
operation of the Terminal “will produce minimal impacts”).

24 ³⁸⁶ Tr. vol 7, 1605–1651 [Hack].

25 ³⁸⁷ Tr. vol. 3, 418:20–23 [Larrabee]. Voluntary concessions of this type, however, do not open the door for EFSEC to
impose conditions related to rail. Although TSPT can make voluntary concessions related to rail as it pertains to
arrangements with shippers, EFSEC is preempted from imposing any regulatory condition. Project denial on the basis
of rail impacts is therefore preempted.

1 does not eliminate all derailment risks.³⁸⁸ As indicated above, EFSLA does not require
2 complete elimination of risk when siting energy facilities. Moreover, any other effort by
3 EFSEC to impose tank car specifications would be clearly preempted.³⁸⁹

4 There is significant evidence demonstrating that first responders are, or can be,
5 capable of responding to a rail-related incident.³⁹⁰ The wide range of first responder
6 resources that would be brought to bear in the event of an incident involve public and
7 private responding entities, including railroad hazardous materials teams that the
8 Opponents own witnesses described as “extremely capable,” “very brave,” and integral to
9 the operation.³⁹¹

10 In an attempt to manufacture flaws, Opponents invent non-existent standards to
11 measure first responder preparedness for rail incidents that are not reflective of what is
12 necessary for successful outcomes, and are not generally accepted, in some cases even by
13 the Opponents’ own experts.³⁹² The City, in particular, concocts a standard for first
14 responder preparedness, suggesting that preparedness should be measured by three
15 criteria: (1) a fire department’s ability to handle a hazardous materials incident entirely on
16 its own; (2) the department’s ability to extinguish the fire within one hour using offensive
17 fire-fighting techniques; and (3) an invented ratio of resources necessary to manage an
18 evacuation to the size of population that must be evacuated.³⁹³ However, as described

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20 ³⁸⁸ See, e.g., Tr. vol. 22, 5137:18–25 [Kernutt].

21 ³⁸⁹ As described in footnote 371, above, TSPT’s voluntary commitment to contract with shippers and select from the
22 range of tank car options available under the federal rules for the specific product in question does not violate federal
23 preemption.

24 ³⁹⁰ See, e.g., Pre-filed Testimony of Greg Rhoads, at 46:21-22; Tr. vol. 10, 2322:1–3 [Appleton] (“It’s not like I’m not
25 prepared for an oil fire.”).

26 ³⁹¹ See Tr. vol. 11, 2553:24–2554:14 [Hildebrand] (“In fact, the railroads have some extremely capable HAZMAT
27 responders and teams. In the UP response to the Mosier incident, in some cases that team was a game changer.”). See
28 also Tr. vol. 10, 2321:19–23 [Appleton] (“And all of that is very basic firefighting, and the only two people that actually
29 engaged the fire were two very brave guys from the Union Pacific who were the only people to actually handle the
30 equipment that put out the fire. The rest of us were there just to support them.”).

31 ³⁹² Tr. vol. 11, 2548:8–2548:5 [Hildebrand].

32 ³⁹³ Tr. vol. 12, 2707:5– 12 [Molina]; Tr. vol. 13, 3058-3060 [Lester].

1 below, their own expert admitted that the first two standards are not required for
2 successful outcomes, nor are they the measure of first responder preparedness.³⁹⁴ As
3 explained below, the third standard is not generally accepted in the field and ignores the
4 City's emergency planning on the same topic. In any event, proper evacuation is
5 achievable given existing response resources.

6 The ability of a single department to handle a hazardous materials incident is not a
7 necessary measure of preparedness. Opponents' own expert unequivocally acknowledged
8 that no single agency can effectively manage a large hazardous materials incident.³⁹⁵ Thus
9 the City deliberately proposes an unachievable standard. Instead, large hazardous
10 materials incidents require response by multiple entities, both public and private, playing
11 different roles in the response effort.³⁹⁶ This is managed, in part, through mutual aid
12 agreements among public entities.³⁹⁷ It also includes use of private resources that can be
13 brought to bear including, for example, railroad hazardous materials team.³⁹⁸ In fact,
14 BNSF hazardous response teams are located in the City of Vancouver and in Spokane.³⁹⁹
15 Those industry resources, including their equipment, can be brought to bear on an incident
16 throughout the state.⁴⁰⁰ It also includes private spill response contractors and public spill
17 resources, should any oil reach the river.⁴⁰¹ The emergency planning for the City and
18 County envision precisely this kind of multiple agency response for hazardous materials

19 ³⁹⁴ Tr. vol. 11, 2548:8–2548:5 [Hildebrand]; Pre-filed Testimony of Michael Hildebrand, at 26:3–11.

20 ³⁹⁵ Tr. vol. 11, 2552:19–23 [Hildebrand].

21 ³⁹⁶ Tr. vol. 9, 2096:11–2097:24 [Rhoads].

22 ³⁹⁷ Tr. vol. 9, 2097:7–24 [Rhoads].

23 ³⁹⁸ Most of Opponents' experts agree on the importance of railroad resources. *See, e.g.*, Tr. vol. 12, 2767:14–23
24 [Molina]; Tr. vol. 11, 2553:24–2554:14 [Hildebrand]; Tr. vol. 10, 2321:19–23 [Appleton]. One exception is a Tribal
25 witness whose testimony standards in stark contrast, is without merit and is contradicted by even Opponent expert
testimony. Tr. vol. 17, 3959:25–3960:11 [Sanchez].

³⁹⁹ Tr. vol. 9, 2017–17 [Rhoads]; Tr. vol. 12, 2767:14–23 [Molina].

⁴⁰⁰ Tr. vol. 7, 1496:19–1500:16 [Kaitala]; Tr. vol. 9, 2096:11–2097:2 [Rhoads].

⁴⁰¹ Tr. vol. 8, 1824:5–11. [Taylor]. The Geographic Response Plans are in place along the length of the Columbia River
and can be implemented upon a spill to protect resources and to contain and recover oil. Pre-filed Testimony of Eric
Taylor, at 9:1–11; Tr. vol. 8, 1827:1–17; 1871:9–25 [Taylor]; EX-0001-002700-002712-PCE. These plans are part of
the most rigorous oil spill planning requirements in the world and include access to literally miles of boom that can be
brought to bear, in cascading fashion in the vicinity of a spill.

1 incidents.⁴⁰² Indeed, hazardous material related incidents of the magnitude envisioned by
2 the Opponents are so infrequent that it typically does not make sense for one department
3 to maintain all the resources that might be needed in an incident.⁴⁰³ A multiple department
4 response using private and public resources is precisely what occurred successfully in
5 Mosier and in other incidents.⁴⁰⁴ Simply put, a department need not be prepared to handle
6 an incident entirely on its own.⁴⁰⁵ To do so sets an impossible measure, by Opponents'
7 expert's own admission, that is not required for successful outcomes.

8 Second, contrary to the City's assertion, the ability to extinguish a fire through
9 offensive strategies in the first hour is not a measure of preparedness.⁴⁰⁶ While the City's
10 witness's on this topic, Mr. Hildebrand, concluded that the only opportunity to extinguish
11 fire from a crude oil rail incident using offensive strategies expires in the first hour after
12 an derailment fire, he did not suggest that approach is required for a successful outcome.⁴⁰⁷
13 To the contrary, he conceded that defensive strategies are always preferable to offensive
14 strategies if they can deliver the same outcome.⁴⁰⁸ Importantly, defensive strategies are
15 not the same as "doing nothing."⁴⁰⁹ Defensive strategies involve containment of the event
16 until it is safer to utilize offensive strategies to eventually extinguish the fire.⁴¹⁰ This
17 strategy is preferable precisely because it avoids unnecessarily jeopardizing first

18 ⁴⁰² EX-0374-000133-TSS.

19 ⁴⁰³ Tr. vol. 9, 2096:11–2097:24; 2100:23–2101:3 [Rhoads].

20 ⁴⁰⁴ Tr. vol. 9, 2102:2–9 [Rhoads].

21 ⁴⁰⁵ It is important for Council to parse through the specific testimony of the expert witness from the arguments of the
22 City's lawyers. While the City's expert indicated that the City fire department is incapable to a large event entirely on
23 its own, he also conceded that no agency can handle such an event entirely on its own. Tr. vol. 11, 2552:13–23
24 [Hildebrand]. Mr. Hildebrand did not argue that was the standard by which preparedness should be measured. The
25 City's lawyers did.

⁴⁰⁶ Tr. vol. 9, 2094:7–2096:5 [Rhoads].

⁴⁰⁷ Tr. vol. 11, 2548:8–2549:10 [Hildebrand].

⁴⁰⁸ Tr. vol. 11, 2550:22–2551:14 [Hildebrand].

⁴⁰⁹ Pre-filed Testimony of Greg Rhoads, at 29:11; Tr. vol. 9, 2094–2096; 2178: 10–24 [Rhoads].

⁴¹⁰ See Tr. vol. 11, 2521:3–6 [Hildebrand]; Tr. vol. 9, 2095:4–14; 2159:19–2160:1 [Rhoads]. Defensive strategies are
not the same as non-intervention strategies, which involve doing nothing at all. See Tr. vol. 11, 2521:3–14
[Hildebrand]; Tr. vol. 9, 2159:19–2160:1 [Rhoads]. Defensive and non-intervention strategies can be contrasted with
offensive strategies, which involve attacking, extinguishing and suppressing the fire. See Tr. vol. 11, 2558:23–2559:3
[Hildebrand].

1 responder safety that would be put at risk by forcing an offensive approach when the fire
2 can be controlled and contained until it can be extinguished.⁴¹¹ Again, this precise
3 defensive strategy worked effectively in Mosier.⁴¹² To hold a department to a different
4 standard is a litigation position invented by the City to try to manufacture a deficiency
5 with which even their experts do not agree.

6 Finally, the City’s proposed standard for evacuation in the event of an incident for this
7 Terminal is completely manufactured and has never been applied by the City before. The
8 City asks EFSEC to rely on a crowd control standard the witness found online while
9 preparing for this litigation that is specific to University of California campus concert
10 events and sets staffing needs based on a ratio of police to a post-concert audience.⁴¹³ The
11 City has never used this standard before, nor is there any evidence in the record that this is
12 the standard accepted or endorsed by emergency response planning agencies generally.⁴¹⁴
13 Additionally, the City has trumped up informal and anecdotal input from a retired State
14 Patrol officer as a “standard” for staffing needs.⁴¹⁵

15 Importantly, the evidence demonstrates that the City can meet even these standards for
16 an incident along the rail route. The population within an evacuation radius for a rail
17 event on the rail corridor would not exceed the City’s resources.⁴¹⁶ While the City’s initial
18 written testimony suggested otherwise, even its subsequent “corrected” testimony and
19 mapping confirm this. In pursuit of its strategy to demonstrate a wholesale inability to

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⁴¹¹ Tr. vol. 11, 2560:1–12 [Hildebrand]; Tr. vol. 9, 2094: 23–2096:5 [Rhoads].
⁴¹² Tr. vol. 10, 2321:4–9 [Appleton]; Tr. vol. 11, 2521:18–24 [Hildebrand]; Tr. vol. 9, 2101–2102 [Rhoads].
⁴¹³ Pre-filed Testimony of Michael Lester, at 6:14-19; Tr. vol. 13, 3058-3060 [Lester].
⁴¹⁴ Tr. vol. 14, 3222:1–8 [S. Johnson].
⁴¹⁵ Compare Pre-filed Testimony of Scott Lester, at 6–7 (“For the third function, traffic control, an estimated 45 to 60 officers per 10,000 residents are needed, according to the Washington State Patrol, assuming a moderate disaster, as described in the Prefiled Testimony of Scott Johnson”) with Tr. vol. 14, 3201:11–15 [S. Johnson]. (“I contacted two retired Washington State Patrol troopers who work in Clark County in positions of public safety and asked them about their experience as Washington Statetroopers. They told me that having served on wildfire evacuation, that it was not uncommon for 46 to 60 troopers to be assigned to evacuate a population of 10,000 people for large-scale wildfires.”)
⁴¹⁶ Tr. vol. 9, 2107:8–2108:22 [Rhoads]; Tr. vol. 14, 3193:15–3194:2 [S. Johnson].



1 respond to a large scale emergency for the purpose of convincing the Council to
2 recommend denial, the City “corrected” its testimony to adopt a wider radius than that
3 recommended by the Emergency Response Guidebook.⁴¹⁷ In an effort to support larger
4 evacuation claims, it also pointed to rail incidents on the north-south rail line in the
5 vicinity of the BNSF rail yard, where loaded project trains will not travel, that have denser
6 populations. That location, by the City’s own admission, is not representative of an area
7 where an incident involving a project train might occur.⁴¹⁸ While the City witness’
8 evolving testimony tended to increase the population figures, the figures he ultimately
9 provided are not representative of the population that could fall within an evacuation
10 radius as defined by the ERG for an incident involving a train traveling to the Terminal.
11 The City’s testimony regarding evacuation from rail incidents demonstrate the City’s
12 outcome-oriented position and must be rejected.

13 More generally, outside of the City and along the rail route, resources are adequate to
14 address a response. The relative proximity of an incident to populations might inform the
15 strategies responders will implement,⁴¹⁹ but the same incident command structure that
16 presides over multiple responding entities, both public and private, will be utilized in an
17 incident in a remote location.⁴²⁰ In particular, the BNSF has extensive response
18 equipment, including fire trailers that are prepositioned along the length of the route and
19 fire suppression trains that are filled with water to help bring water for fire suppression to
20 areas that are not easily accessed by road.⁴²¹ These BNSF resources can be brought to an
21 incident anywhere along the route. More generally, even in those areas without nearby

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23 ⁴¹⁷ Tr. vol. 14, 3168:10–16 [S. Johnson].

⁴¹⁸ Tr. vol. 14, 3213:3–16 [S. Johnson].

24 ⁴¹⁹ Pre-filed Testimony of Greg Rhoads, at 47, para. 127 (“Adopting an aggressive fire suppression or tank cooling
effort is not a sound risk reward decision if the incident is located far from population centers or other life safety
exposures.”)

25 ⁴²⁰ Tr. vol. 21, 4828: 17–4829:10 [Rhoads];

⁴²¹ Tr. vol. 7, 1497:3–1498:18 [Kaitala]; EX-00110-000149-TSS.

1 public water supplies, water can be made available from natural sources, as was done in
2 Mosier.⁴²²

3 Ultimately, even if the Opponents were correct about response resources (they are not)
4 these arguments, at best, identify existing deficiencies. The potential for a rail incident
5 involving hazardous materials exists today, whether the hazardous material is crude oil or
6 any of the many other hazardous materials that are shipped by rail through the City.⁴²³ If
7 Opponents are correct that they need more resources to address potential hazardous
8 material rail incidents, they have that same need today, without the Terminal. TSPT has
9 offered, and continues to offer, to help assess any gaps in City response capabilities that
10 are directly and proportionately attributable to the Terminal, using generally accepted
11 standards, rather than standards developed as part of a litigation position or a mere “wish
12 list” of additional resources.⁴²⁴ For example, TSPT has committed to running three
13 emergency response drills in cooperation with BNSF that might identify gaps in response
14 strategies or capabilities, and if any are identified that are attributable to the Terminal,
15 could be addressed at that time.⁴²⁵ Additionally, at the close of the adjudication, TSPT
16 offered to fund backfill pay to cover replacement staffing for first responders participating
17 in TSPT sponsored training, in addition to the funding already offered to cover the costs
18 of such training, even though this training addresses an existing need and not just a new
19 Terminal impact.⁴²⁶ This is the type of specific gap assessment and mitigation that can
20 and should be addressed in EFSEC’s recommendation for site certification—not the

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⁴²² Tr. vol. 10, 2319:7-10 [Appleton] (describing how water was provided from a nearby lake, rather than using public water systems). Notably, Ecology does not require a water right or authorization for water used to contain, suppress and extinguish a fire in these types of emergency situations. Ecology POL-2015.

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⁴²³ Tr. vol. 14, 3169:18–3170:5 [S. Johnson]; EX-0376-000010-TSS; EX-0375-000012-TSS.

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⁴²⁴ Tr. vol. 11, 2533:4–2534:13 [Hildebrand].

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⁴²⁵ Tr. vol. 21, 5061:17–5063:3 [Larrabee].

⁴²⁶ Tr. vol. 21, 5064:1–12 [Larrabee].

1 unsubstantiated and unrealistic demands or wish lists offered by the City based its
2 declared determination to do what is necessary to oppose the Terminal.

3 In summary, the Opponents' aggressive litigation position is outcome oriented and, in
4 many respects, is not supported by even their own experts. In their hurry to manufacture a
5 project deficiency, the Opponents have, at most, identified deficiencies in their ability to
6 respond to existing risks. It is doubtful that the City is as woefully unprepared as it asserts
7 in this case; however, a true gap analysis can and should be completed as part of the EIS
8 process to identify any additional gaps that are attributed to the Terminal and should be
9 included in conditions of approval.

10 **3. Opponents' non-incident related concerns are also without merit**

11 To the extent that Opponents raise rail-related issues that do not involve derailment
12 incidents, those impacts exist, with or without this Terminal, and are therefore not
13 attributable to it. Many of these were highlighted in Section III.C. of TSPT's pre-hearing
14 brief and are not repeated here.

15 Evidence demonstrates that rail traffic volumes are dynamic, and not static.⁴²⁷ It is a
16 gross oversimplification to simply assert that because four trains may travel to the
17 Terminal on a daily basis there will be a net increase in rail traffic of four daily trains.
18 Generally speaking the Railroad manages traffic to maximize use of its capacity.⁴²⁸
19 Accordingly, whether the Terminal is built or not, the traffic volumes over time are likely
20 to be the same as projected.⁴²⁹ Moreover, rail traffic fluctuates seasonally in an amount
21 much more significant than four trains.⁴³⁰ Accordingly, any purported impacts from rail
22 traffic volume generally are not specific to the Terminal.

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24 ⁴²⁷ Tr. vol. 20, 4663:5–4664:2 [Barkan]; Tr. vol. 7, 1483:16–1484:5 [Kaitala].

⁴²⁸ Tr. vol. 7, 1482:21–1483:1 [Kaitala].

⁴²⁹ Pre-filed Testimony of Dave Kaitala, at 7–8.

25 ⁴³⁰ Tr. vol. 7, 1483:16–22 [Kaitala].

1 Several of the specific traffic and crossing-related issues raised by the Opponents
2 suffer from the same flaws. For example, while the City argues that rail traffic and
3 crossing impacts interfere with current land uses, the crossing impacts exist today and the
4 rail line pre-dates these land uses. More generally, Opponents apply level of service
5 (“LOS”) standards to rail crossing delays, even though they have never applied LOS to
6 other at-grade crossings, and even though the impacts from a project train would be no
7 different than the impacts from any other train—unit train or manifest train. Mr. Lopossa
8 testified that the project is the first time he had been asked to do a rail crossing level of
9 service analysis.⁴³¹ Opponents admit that directing EFSEC to do this type of analysis is
10 different than the analysis that the City would conduct on its own.⁴³² Because the City
11 does not require a level of service analyses for at grade crossing for other projects, it
12 cannot advocate such an approach in this case.

13 **C. Testimony Demonstrates the Remote and Speculative Nature of Vessel Risks**
14 **and Adequate Mitigation Measures that Will Ensure Minimal Impact in the**
15 **Unlikely Event of an Incident.**

16 Despite EFSEC’s limited authority to address Opponents’ far ranging claims about
17 vessel traffic, TSPT nevertheless presented evidence that demonstrated the remote nature
18 of vessel related risk and the adequacy of state regulatory requirements, spill response
19 planning and preparedness, and other mitigation to address that risk.

20 **1. Concerns over non-spill related vessel impacts are without merit and are**
21 **unsupported in the record.**

22 The evidence presented at the hearing focused on spill related risk from a vessel
23 incident on the river. Opponents largely abandoned other vessel related issues. With
24 respect to purported impacts from wakes of vessels, the TSPT’s pre-filed testimony is

25 ⁴³¹ Tr. vol. 10, 2296:23–2297:1 [Lopossa].

⁴³² Tr. vol. 12, 2876:7–13 [E. Holmes].

1 uncontroverted by any technical or scientific assessment.⁴³³ No Opponent witnesses
2 conducted any independent studies or technical assessments of the issue.

3 The only other non-spill related concern raised by the Opponents is the possibility of
4 impacts from ballast water due to potential introduction of non-native invasive species.⁴³⁴
5 However, ballast water is governed by federal law, compliance with which is adequate to
6 address the risk.⁴³⁵ Indeed, even the Opponents' expert witness described the federal
7 regulations as "pretty good" at addressing the risk of invasive species, though "not
8 perfect" because the measures might not be 100% effective at controlling invasive
9 species.⁴³⁶ That testimony is not adequate to support Opponents' claims that the federal
10 ballast water regulations (to which all other existing vessel traffic is held) is deficient for
11 purposes of this project. Even if EFSLA gave EFSEC the authority to regulate vessel
12 traffic (it does not), it does not require mitigation that eliminates a risk and is "perfect."

13 **2. Testimony demonstrates that the risk of vessel spills are remote and that**
14 **mitigation is adequate to address the risk.**

15 With respect to spill issues, TSPT has demonstrated the limited nature of the risk and
16 adequate mitigation to respond in the unlikely event of a vessel spill. Dennis O'Mara
17 explained the low probability of a vessel-related spill. As with rail, the probability of a
18 vessel-related event is a key component of understanding the risk.⁴³⁷ Mr. O'Mara's
19 testimony and analysis is the exclusive testimony in the record describing the probability
20 of a vessel incident.⁴³⁸ Mr. O'Mara considered impacts of a collision or grounding.⁴³⁹ As

21 ⁴³³ Applicant's Pre-Hearing Br. 63-65.
22 ⁴³⁴ Tr. vol. 16, 3873:17-3876:12 [Parker].
23 ⁴³⁵ Specifically, Nonindigenous Aquatic Nuisance Prevention and Control Act (NANPCA), 16 U.S.C. §§ 4701-4751,
24 and regulations issued thereunder regulate ship ballast water discharges.
25 ⁴³⁶ Tr. vol. 16, 3875:16-21 [Parker].
⁴³⁷ Tr. vol. 6, 1382-1385 [O'Mara].
⁴³⁸ As explained below, Ms. Harvey did not consider probability and admitted she was not an expert in navigation risks.
Pre-Recorded Test. Tr., 41:11-15 [Harvey].
⁴³⁹ Mr. O'Mara's testimony also looked at potential issues from a strike while at berth. Tr. vol. 6, 1341-1342 [O'Mara];
EX-0120-000116-TSS. No other testimony was offered that addresses that specific risk. Mr. O'Mara's analysis

1 explained in his pre-filed testimony those risks are unlikely during the life of the project.
2 Mr. O’Mara’s testimony also identified the potential outcomes in terms of potential
3 quantity of spilled crude. His focus on spills is appropriate because they are the only
4 conceivable negative environmental impact resulting from possible collision or
5 grounding.⁴⁴⁰

6 Moreover, the regulatory requirements and voluntary measures are adequate to
7 mitigate that impact. As explained in further detail in Section IV.C.2., above, evidence
8 conclusively demonstrates that Washington’s spill planning requirements are the most
9 stringent in the world.⁴⁴¹ As with facilities, vessels are required to plan to respond to a
10 worst-case discharge that is defined by regulation.⁴⁴² Most vessels on the Columbia River
11 address that requirement by participating in an “umbrella” plan offered by Maritime Fire
12 and Safety Association (“MFSA”). That entity ensures response resources and contractors
13 are available along the length of the river to respond to a vessel spill.⁴⁴³ Additionally, the
14 GRPs described above are the products of the Department of Ecology’s extensive pre-
15 planning for the unlikely event of a spill.⁴⁴⁴ These regulations are adequate to address the
16 risk of a spill.

17 TSPT has voluntarily committed to requiring tug escorts for laden vessels calling at
18 the Terminal because evidence demonstrates that this additional measure will further

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20 demonstrates the extremely remote nature of that risk. Tr. vol. 6, 1342:9–14 [O’Mara]. Additionally, there are specific
21 response capabilities to address that risk provided by FPAAC, a consortium of 12 departments with marine firefighting
capabilities that would be brought to bear on a maritime incident. Tr. vol. 12, 2755–2757 [Molina]; EX-0292-000057-
000058-TSS. That entity just received a significant new grant to update its planning for marine fire incidents. Tr. vol.
21, 4826:24–4827:8 [Rhoads].

22 ⁴⁴⁰ Mr. O’Mara’s testimony also explored the risk of fire on a vessel and concluded those were extremely unlikely.

23 ⁴⁴¹ Tr. vol. 8, 1808:6–14 [Taylor]; Pre-filed Testimony of Elliott Taylor, at 7:4–8.

24 ⁴⁴² Tr. vol. 8, 1840:1–10 [Taylor]; WAC 173-182-030(67) .

25 ⁴⁴³ EX-0206-000167-TSS; Tr. vol. 6, 1434:19 [Haugstad]. As indicated in testimony, that plan also sets forth the limit
of oil that can be carried. Currently that limit is set to 300,000 bbls. Tr. vol. 6, 1410–1411 [Haugstad]. Applicant plans
to seek Ecology approval to extend that amount to 600,000 bbls. Tr.vol. 6, 1415:2–19 [Haugstad]; Tr. vol. 4, 849:20–
851:25 [Bayer]; Tr. vol. 4, 884–885 [Bayer]. Until Ecology approves the proposal, TSPT is limited to loading vessels
consistent with the 300,000 bbl limit. Tr. vol. 4, 849:20–851:25 [Bayer]; Tr. vol. 4, 884–885 [Bayer].

⁴⁴⁴ Pre-Filed Testimony of Elliott Taylor, at 9.

1 reduce likelihood of a significant incident on the river involving a project vessel, even if
2 tug assist is not required by any existing plan or regulation. Even the Opponents' experts
3 acknowledge the significance of this commitment.⁴⁴⁵

4 **3. Opponents' testimony does not support their claims that spill risk justifies**
5 **project denial.**

6 As a preliminary matter, no Opponent witnesses assessed the probability of a vessel-
7 related incident along the route. Much like they did with rail, the Opponents simply
8 ignore the distinctions between the probabilities of various events and point to a historical
9 event as "evidence" of the risk, without any analysis of the factors that led to the event.
10 Most notably, the Opponent witnesses focused on a MobilOil spill that occurred in 1984
11 and argue that it is representative of the likelihood and consequences of a future spill.⁴⁴⁶
12 However, they ignore the circumstances involved in that spill, which are relevant to
13 determining whether it is an accurate or relevant comparison for purposes of assessing the
14 risk of a spill from a vessel traveling from the proposed Terminal. For example, the
15 Opponents ignore the type of oil spilled in the MobilOil event.⁴⁴⁷ All of the oil involved in
16 that spill (including some as low as 5.5 API gravity) was of an API Gravity that is heavier
17 than the types that will be handled at the Terminal. This is not representative of oil that
18 will be stored at the Terminal.⁴⁴⁸ Opponents also ignore advancements in vessel design
19 and operational requirements that have been implemented since the time of the MobilOil
20 spill. These factors significantly decrease the likelihood of a similar incident and enhance
21 vessel performance in the event of an incident.⁴⁴⁹ And Opponents ignore the spill
22 response capabilities that have improved significantly since the time of the MobilOil spill

23 ⁴⁴⁵ Pre-Recorded Test. Tr., 14:17–20 [Harvey].

24 ⁴⁴⁶ Pre-Recorded Test. Tr., 20:3–19 [Harvey].

⁴⁴⁷ Pre-Recorded Test. Tr., 20:3–19 [Harvey]; Tr. vol. 8, 1837-1839 [Taylor].

⁴⁴⁸ Tr. vol. 8, 1837–1839 [Taylor].

25 ⁴⁴⁹ Tr. vol. 4, 843:15–849:19 [Bayer].

1 that would have significantly decreased the impacts of that particular event had they been
2 in place.⁴⁵⁰ In short, the MobilOil spill is not a good indicator of the risk of spill from
3 vessels traveling from the proposed Terminal.

4 Ms. Harvey's testimony about vessel related issues is also flawed. Ms. Harvey
5 asserted several concerns about navigability at certain points of the River based on her
6 measurements on Google Maps. She offered this testimony despite her own
7 acknowledgement that she is not an expert in navigation.⁴⁵¹ As explained by Captain
8 Bayer, her concerns are uninformed and entirely without basis because they are premised
9 on a false assumption about the manner in which River vessel traffic operates.⁴⁵² To the
10 extent Opponents argue that the risk for vessel spill, like that of rail spill, is intolerable
11 because the probability of that risk cannot be completely eliminated, their claims are
12 without recourse. Their theory advances an arbitrary standard of approval and ignores
13 principles of risk science and risk-based decision making, which require consideration of
14 probability.⁴⁵³

15 As with rail risk, EFSEC should be skeptical of Opponents' unsupported assertions
16 regarding the size and nature of an incident that might occur on the river. Instead, EFSEC
17 should recognize the evidence regarding probability of various sizes of incidents when
18 assessing potential impacts associated with risk of vessel transit. Additionally, given the
19 stringent spill response planning requirements and existing substantial financial assurance
20 requirements for marine vessel transport required in Washington, EFSEC should conclude
21 that risks associated with vessel traffic incident are more than adequately covered by those
22 existing requirements and no further Terminal conditions or mitigation measures are

23

24 ⁴⁵⁰ Tr. vol. 8, 1839:7–1840:22 [Taylor].
⁴⁵¹ Pre-Recorded Test. Tr., 41:11–15 [Harvey].
⁴⁵² Tr. vol. 4, 872:2–873:22 [Bayer].
25 ⁴⁵³ Tr. vol. 20, 4669–4670 [Barkan].

1 warranted. The potential adverse effects are adequately minimized. The EFSLA standard
2 is not.

3 **VII. THE TERMINAL AND ITS OPERATION DOES NOT INTERFERE WITH**
4 **TRIBAL TREATY RIGHTS**

5 The Terminal is located well outside and downriver of tribal fishing in usual and
6 accustomed grounds and stations (“U&A areas”). Specifically, the Terminal is downriver
7 of what is known as “Zone 6.” Zone 6 is located above Bonneville Dam. This area is the
8 location in which Treaty Tribes⁴⁵⁴ have exercised their treaty fishing rights pursuant to
9 court orders in the *U.S. v. Oregon*⁴⁵⁵ litigation.

10 To the extent that any Tribal Parties contend that a potential spill downriver of Zone 6
11 could impact fish that might eventually return to Zone 6, TSPT has responded to those
12 claims elsewhere in the brief. As explained in Sections V.C., and VI., above, the risk is
13 remote and compliance with Washington’s strict spill planning and response regulations is
14 adequate to address the risk.

15 To the extent that any Tribal Parties claim that their tribal treaty rights extend beyond
16 Zone 6, throughout the River, they have no recourse for their allegations in this venue.⁴⁵⁶

17 ⁴⁵⁴ There are four Indian Tribes that have treaty fishing rights on the Columbia River below the Snake River confluence:
18 the Yakama Nation, the Confederated Tribes of the Warm Springs Reservation, the Confederated Tribes of the Umatilla
19 Reservation, and the Nez Perce Tribe (collectively referred to as “Treaty Tribes”). The Treaty Tribes negotiated and
20 signed separate treaties with the United States in the 1850s. Treaty with the Yakama, June 9, 1855, 12 Stat. 951;
21 Cayuse, Umatilla, Walla Walla Treaty, June 9, 1855, 12 Stat. 945; Treaty with the Tribes of Middle Oregon, June 25,
22 1855, 12 Stat. 963; Treaty with the Nez Perce, June 11, 1855, 12 Stat. 957.

23 ⁴⁵⁵ *United States v. Oregon*, 302 F. Supp. 899, 904 (D. Or. 1969). *United States v. Oregon* adopts the management plans
24 that allocate fishing areas between Treaty Tribe fisheries and non-treaty commercial fisheries. *United States v. State of*
25 *Or.*, 666 F. Supp. 1461, 1463 (D. Or. 1987). These management plans have carried forward the Bonneville Dam line as
the line separating Treaty Tribe and non-treaty commercial fisheries, beginning with the 1977 five-year plan. Under the
management plans, the commercial fishery upstream of Bonneville Dam is open only to Treaty Tribes. The non-treaty
commercial fishery is downstream of Bonneville Dam. No special Treaty Tribe fishery downstream of the Bonneville
Dam has been recognized in the management agreements. Indeed, in determining whether to provide an exclusive
Treaty Tribe fishing area in Zone 6, Oregon Department of Fish and Wildlife relied on the fact that the Treaty Tribes do
not have U&A areas below Bonneville Dam. Letter from Oregon Department of Fish and Wildlife to Richard Halfmoon
(Mar. 7, 1972).

⁴⁵⁶ For example, several Tribal witnesses contested the limited characterization of their rights and claimed to be able to
fish anywhere from Montana to the Pacific Ocean. Tr. vol. 16, 3827:15–3828:2 [Brigham]; *see also* Tr. vol. 18, 4329:7–
4331:10 [Lumley].

1 Jurisdiction to adjudicate treaty fishing rights belongs exclusively with the federal courts.
2 There is a federal process for adjudicating tribal fishing rights. Tribal fishing rights on the
3 Columbia River have been the subject of adjudication since 1969 in the consolidated cases
4 of *U.S. v. Oregon/Sohappy v. Smith*.⁴⁵⁷ If the Treaty Tribes seek to assert fishing rights
5 outside of Zone 6 or seek to prevent action based on such fishing rights, they must
6 adjudicate those fishing rights as part of *U.S. v. Oregon* as the ongoing federal court
7 proceeding that enforces and implements the Columbia River treaty tribes' reserved fishing
8 rights.⁴⁵⁸ EFSEC does not have jurisdiction to determine fishing rights. Moreover,
9 EFSEC may not rely on the conclusory assertion of non-adjudicated fishing rights as a
10 basis for denial of this Terminal.

11 **VIII. CONCLUSION**

12 For the foregoing reasons, EFSEC should recommend approval of the Terminal with
13 conditions. The Vancouver Energy Terminal site is an appropriate location to address the
14 pressing need for petroleum fuels while minimizing adverse impacts. Opponents ignore
15 the robust regulatory system with which the Terminal will comply (and, in many cases,
16 exceed). EFSEC has adopted many of those regulations and standards as exclusive
17 criteria for approval. That regulatory regime specifically addresses the very concerns
18 Opponents raise. Accordingly, EFSEC should reject Opponents' argument that
19 compliance with these adopted and robust standards is somehow
20 insufficient. Additionally, Opponents ask this Council to ignore standard principles of
21 risk analysis and simply assume that the very worst case Opponents can imagine will
22 occur despite the careful planning of the Terminal and the regulatory, operational and
23 infrastructure design improvements that have been developed over the years to address

24 _____
25 ⁴⁵⁷ *Sohappy v. Smith*, 302 F. Supp. 899, 904 (D. Or. 1969).

⁴⁵⁸ *Id.* at 911.

1 those risks. Those standards continue to be revised and strengthened on an ongoing basis
2 in response to new incidents and new information. While Opponents point to historical
3 incidents in an effort to nominally support their case, they have not prepared any analysis
4 supporting their claim that similar scale incidents could occur in the context of this
5 specific Terminal. In fact, Opponents downplay or ignore incidents where the facts are
6 more similar to the Terminal project and the incident response was effective and instead
7 as EFSEC to focus exclusively on the most significant event highly unlikely to occur with
8 this Project and then assume it will occur with even greater consequence. EFSEC should
9 not adopt this approach to risk evaluation and project review. To do so would be arbitrary
10 decision-making. Finally, Opponents' primary focus on rail and vessel transportation is
11 outside the scope of EFSEC's statutory charge and is preempted by federal laws. Because
12 TSPT's Terminal addresses a pressing need for energy and employs reasonable and
13 available methods to minimize adverse effects of the Terminal, EFSEC should
14 recommend approval.

15 DATED this 6th day of September, 2016.

16 VAN NESS FELDMAN LLP

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20


21 Jay P. Derr, WSBA No. 12620
22 Tadas A. Kisielius, WSBA No. 28734
23 Dale N. Johnson, WSBA No. 26629

24 *Attorneys for Applicant Tesoro Savage*
25 *Petroleum Terminal LLC*

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3
4
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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

TESORO SAVAGE DISTRIBUTION
TERMINAL

CASE NO. 15-001

CERTIFICATE OF SERVICE

I, Amanda Kleiss, declare as follows:

That I am over the age of 18 years, not a party to this action, and competent to be a witness herein:

That I, as a legal assistant in the office of Van Ness Feldman, caused true and correct copies of the following documents to be delivered as set forth below:

1. Applicant Tesoro Savage Petroleum Terminal LLC's Post-Hearing Brief; and this
2. Certificate of Service.

and that on September 6, 2016, I addressed said documents and deposited them for delivery as follows:

VIA E-MAIL & FIRST CLASS U.S. MAIL:

Energy Facility Site Evaluation Council
PO Box 43172
Olympia, WA 98504-3172
E: efsec@utc.wa.gov

Assistant Attorney General for EFSEC
Ann C. Essko, AAG
WA State Attorney General's Office
Government Operations Division
PO Box 40108
Olympia, WA 98504-0108
anne@atg.wa.gov

Energy Facility Site Evaluation Council
Stephen Posner, Manager
Energy Facility Site Evaluation Council
Utilities & Transportation Commission
P.O. Box 43172
Olympia, WA 98504-3172
E: sposner@utc.wa.gov

CERTIFICATE OF SERVICE - 1

1 VIA E-MAIL:

2 **Clark County Board of Commissioners**

3 Taylor Hallvik
4 Deputy Prosecuting Attorney
5 Clark County Board of Commissioners
6 Civil Division
7 PO Box 5000
8 Vancouver, WA 98666-5000
9 E: taylor.hallvik@clark.wa.gov;
10 LA: nicole.davis@clark.wa.gov

7 **City of Vancouver**

8 E. Bronson Potter
9 Karen L. Reed
10 City of Vancouver
11 PO Box 1995
12 Vancouver, WA 98668-1995
13 E: Bronson.potter@cityofvancouver.us
14 karen.reed@cityofvancouver.us
15 LA: tammy.zurn@cityofvancouver.us;
16 Deborah.Hartsoch@cityofvancouver.us

13 **Columbia Waterfront LLC**

14 Linda R. Larson
15 Marten Law, PLLC
16 1191 Second Avenue, Suite 2200
17 Seattle, WA 98101
18 E: llarson@martenlaw.com
19 LA: eherlihy@martenlaw.com

17 **Columbia Riverkeeper, et al; Climate Solutions; ForestEthics; Friends of the
18 Columbia Gorge; Fruit Valley Neighborhood Association; Sierra Club; Spokane
19 Riverkeeper, and Washington Environmental Council**

20 Kristen L. Boyles
21 Janette K. Brimmer
22 Anna Sewell
23 Earthjustice
24 705 Second Avenue, Suite 203
25 Seattle, WA 98104
E: kboyles@earthjustice.org;
jbrimmer@earthjustice.org;
asewell@earthjustice.org;
LA: epowell@earthjustice.org

Counsel for the Environment

Matthew R. Kernutt, AAG
Office of the Attorney General
PO Box 40100
Olympia, WA 98504-0100
E: Mattk1@atg.wa.gov
LA: MeaghanK@atg.wa.gov

City of Vancouver

Susan Drummond
Counsel for the City of Vancouver
Law Office of Susan Elizabeth Drummond
5400 Carillon Pt., Bldg. 5000
Kirkland, WA 98033-7357
E: susan@susandrummond.com

Columbia Waterfront LLC

Daniel Timmons
Marten Law, PLLC
1001 SW Fifth Avenue, Suite 2150
Portland, OR 97204
E: dtimmons@martenlaw.com

David Bricklin
Bryan Telegin
Bricklin & Newman, LLP
1424 Fourth Avenue, Suite 500
Seattle, WA 98101
E: bricklin@bnd-law.com
telegin@bnd-law.com
LA: cahill@bnd-law.com
miller@bnd-law.com

CERTIFICATE OF SERVICE - 2

70962

**Van Ness
Feldman** LLP

719 Second Avenue Suite 1150
Seattle, WA 98104
(206) 623-9372

1 **International Longshore Warehouse**
2 **Union Local 4**
3 Cager Clabaugh
4 Jared Smith
5 International Longshore Warehouse Union
6 Local 4
7 1205 Ingalls Road
8 Vancouver WA 98660
9 E: cagerclabaugh@aol.com;
10 mithared@yahoo.com

11 **City of Spokane**
12 Michael J. Piccolo, Asst City Attorney
13 Nathaniel Odle, Asst City Attorney
14 Office of the City Attorney
15 5th Floor Municipal Building
16 W. 808 Spokane Falls Blvd.
17 Spokane, WA 99201-3326
18 E: mpiccolo@spokanecity.org;
19 nisserlis@spokanecity.org;
20 nodle@spokanecity.org
21 LA: rimus@spokanecity.org

22 **Port of Vancouver, USA**
23 Connie Sue Martin
24 Schwabe, Williamson & Wyatt, P.C.
25 1420 – 5th Avenue, Suite 3400
Seattle, WA 98101
E: csmartin@schwabe.com
LA: bbratton@schwabe.com

Confederated Tribes of the Umatilla
Indian Reservation
Brent H. Hall
Office of Legal Counsel
Confederated Tribes of the Umatilla Indian
Reservation
46411 Timine Way
Pendleton, OR 97801
E: brenthall@ctuir.org

City of Washougal
Scott Russon
John Karpinski
English & Marshall, PLLC
12204 SE Mill Plain, Suite 200
Vancouver, WA 98684
E: English@elmbv.com;
russon@elmbv.com;
karpjd@comcast.net

Port of Vancouver, USA
David F. Bartz, Jr.
Alicia L. (“Lisa”) Lowe
Schwabe, Williamson & Wyatt, P.C.
1211 SW 5th Avenue, Suite 1900
Portland, OR 97204-3795
E: dbartz@schwabe.com;
alowe@schwabe.com

Port of Vancouver, USA
Kelly M. Walsh
Schwabe, Williamson & Wyatt, P.C.
700 Washington Street Suite 701
Vancouver, WA 98660
E: kwalsh@schwabe.com

Columbia River Inter-Tribal Fish
Commission (CRITFC)
Julie A. Carter
Robert C. Lothrop
CRITFC
700 NE Multnomah Street, Suite 1200
Portland, OR 97213
E: carj@critfc.org;
lotr@critfc.org

1 **Confederated Tribes and Bands of the**
2 **Yakama Nation**

3 Joe Sexton
4 Amber Penn-Roco
5 Galanda Broadman PLLC
6 8606 – 35th Avenue NE, Suite L1
7 PO Box 15146
8 Seattle, WA 98115
9 E: joe@galandabroadman.com
10 amber@galandabroadman.com
11 LA: molly@galandabroadman.com

12 **Department of Commerce**

13 Brian Bonlender, Director
14 Department of Commerce
15 1011 Plum Street SE
16 Olympia, WA 98504-2525
17 E: brian.bonlender@commerce.wa.gov

18 **Utilities & Transportation Commission**

19 David Danner
20 Utilities & Transportation Commission
21 PO Box 47250
22 Olympia, WA 98504-7250
23 E: ddanner@utc.wa.gov

24 **WA Department of Fish and Wildlife**

25 Jim Unsworth, Director
Director of Fish and Wildlife
600 Capitol Way N
Olympia, WA 98501-1091
E: director@dfw.wa.gov

WA State Department of Natural
Resources

Robert W. Ferguson, AG
Terence A. Pruitt, AAG
Natural Resources Division
PO Box 40100
Olympia, WA 98504-0100
E: terryp@atg.wa.gov;
resolyef@atg.wa.gov;
kims2@atg.wa.gov

Department of Ecology

Maia D. Bellon, Director
Department of Ecology
PO Box 47600
Olympia, WA 98504-7600
E: maia.bellon@ecy.wa.gov

Department of Transportation

Megan White
Department of Transportation
PO Box 47300
Olympia, WA 98504-7300
E: whitem@wsdot.wa.gov

18 I hereby certify that I have this day served the foregoing document upon all parties
19 of record in this proceeding, by authorized method of service pursuant to WAC 463-30-
20 120(3).

21 EXECUTED at Seattle, Washington on this 6th day of September, 2016.

22
23 /s/ Amanda Kleiss
24 Declarant
25