BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of Application No. 2013-01:  

TESORO SAVAGE
VANCOUVER ENERGY DISTRIBUTION TERMINAL

COUNCIL ORDER No. 872
ORDER DETERMINING LAND USE CONSISTENCY

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

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

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

¹The Council sent this Notice to all interested persons on the mailing list for the Facility and also to all subscribers to EFSEC’s general minutes and agenda list. Further, the Council purchased advertisements in The Columbian, the local daily newspaper of general circulation; a legal advertisement published on May 14, 2014; and a display advertisement published on May 18, 2014. Finally, the Council issued a media advisory on May 21, 2014.
²WAC 463-26-050.
³RCW 80.50.020(14), which specifies plans adopted under chapters 35.63, 35A.63, 36.70, or 36.70A RCW, or as otherwise designated by chapter 325, Laws of 2007.
pursuant to” specified laws. In this order, the Council will refer to land use plans and zoning ordinances collectively as “land use provisions” and will refer to its decision as pertaining to “land use consistency.”

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

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

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

4 RCW 80.50.020(22), which specifies ordinances adopted pursuant to chapters 35.63, 35A.63, 36.70, or 36.70A RCW or Article XI of the state Constitution, or as otherwise designated by chapter 325, Laws of 2007.
5 In re Whistling Ridge Energy Project, Council Order No. 868 at 9 (October 6, 2011) (Whistling Ridge Order). A determination of land use inconsistency simply results in the Council’s further consideration of whether local land use provisions should be preempted. WAC 463-28-060(1), see also RCW 80.50.110(2) and WAC 463-28-020. If they are preempted, the Council will include in the proposed site certification agreement conditions designed to recognize the purpose of the preempted provisions. WAC 463-28-070.
6 RCW 80.50.090(3), RCW 80.50.040(9), (12), WAC 463-30, WAC 463-47, WAC 463-76, WAC 463-78.
7 The Council received such letters from Friends of the Columbia Gorge (May 15, 2014), Columbia Riverkeeper (May 16, 2014), Columbia Waterfront, LLC (May 20, 2014), and hundreds of form letters and e-mails with substantially the same message from individual members of these organizations or the public.
On May 22, 2014, E. Bronson Potter, Chief Assistant City Attorney for the City of Vancouver, filed with EFSEC a Request to Defer Land Use Consistency Determination and Leave Record Open (City’s Deferral Request). The City’s Deferral Request asked the Council to keep the record open and allow further public participation until all environmental analysis could be completed.9 The City’s Deferral Request also explained the scope of the Vancouver Fire Official’s ongoing inquiry into the Tesoro Savage proposal and the City’s own desire to obtain a complete and final EIS before completing its internal project review.10

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

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

9 City’s Deferral Request at 1.
10 Id. at 2.
11 Liz Green-Taylor (Department of Commerce) was not present but reviewed the transcript of the hearing and examined the written testimony submitted to the Council.
12 Applicant Tesoro Savage’s Statement of Land Use Consistency (Applicant’s Statement).
13 TR at 18-24.
14 City of Vancouver’s Comments Regarding Consistency of Proposal with Land Use Plans and Zoning Regulations (City’s Comments).
15 TR at 26-31. The Port also filed written testimony in the form of a letter from Mr. Coleman dated May 27, 2014 (Port’s Letter)
16 TR at 31-36. The Friends of the Columbia Gorge also filed written testimony in the form of a letter written on behalf of the Friends of the Columbia Gorge, Columbia Riverkeeper, the Northwest Environmental Defense Center, the Sierra Club, and the Center for Biological Diversity dated May 28, 2014 (FOCG Letter).
17 TR at 36-41. Columbia Riverkeeper also signed the FOCG Letter.
18 TR at 41-46. Columbia Waterfront also filed written testimony. Testimony of Matt Grady, AICP on Behalf of Columbia Waterfront LLC (Columbia Waterfront Written Testimony).
19 TR at 48-49. Mr. Steinke also filed written testimony in the form of a picture of the proposed Columbia Waterfront development and associated text.
20 TR at 49-52.
Neighborhood Association; Den Mark Wichar, citizen; Marla Nelson, Northwest Environmental Defense Center; Cathryn Chudy, citizen; Judy Hudson, League of Women Voters, Clark County; Noreen Hine, citizen; Lisa Ross, citizen; and Marc Jander, citizen. Assistant Attorney General Matthew Kernutt, Counsel for the Environment, was present for the land use hearing.

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

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

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

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

22 Id. at 52-53.
23 Id. at 53-56. Mr. Wichar also filed written testimony. EFSEC Hearing, Vancouver WA, 28 May 2014, Re: Tesoro Savage Energy Distribution Terminal, Proposed for Port of Vancouver.
24 TR at 56-59. The Northwest Environmental Defense Center also signed the FOCG Letter.
26 TR at 62-63.
27 Id. at 63-65.
28 Id. at 65-67.
29 Id. at 67-68.
30 Id. at 24-25.
31 Id. at 12 (referring to id. at 8), 18-19, 22.
32 WAC 463-26-090. In cases where such certificates are obtained, they are regarded as prima facie proof of consistency and compliance with local land use plans and zoning ordinances absent contrary demonstration by anyone present at the hearing.
33 Plan at 1-12 (Figure 1-6); City’s Comments at 5.
34 Id. at 1-13 (Table 1-5).
35 Vancouver Municipal Code (VMC) 20.130.010; VMC 20.130.020; Applicant’s Statement at Exhibit 3 and Exhibit 9 at 7, City’s Comments at 20.
36 VMC 20.440.020(C); City’s Comments at 20-21.
37 Id.
38 VMC 20.160.020(D)(5); City’s Comments at 20-21.
39 TR at 10-18; Applicant’s Statement at 10-15. The Applicant also argued that the Site is consistent and in compliance with the rest of the Plan’s policies and the rest of the City’s pertinent zoning ordinances. Id. at 15-16.
and submitted a matrix illustrating the project Site’s consistency with each pertinent policy contained in the City’s Plan. The Applicant also submitted a draft planning staff report that would have found that “subject to certain concerns and recommended conditions, the applicant has demonstrated the proposal is in compliance with both the land use and development regulations of the City of Vancouver.”

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

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

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

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40 TR at 12-14, Applicant’s Statement at Exhibits 1, 2, 7, 8.
41 Applicant’s Statement at Exhibit 12.
42 Id. at Exhibit 9 (City of Vancouver Staff Determination of Consistency and Compliance with Land Use Plans and Zoning Ordinances (December 16, 2013) (Staff Determination)). The Staff Determination at page 4 (certification determination) and page 69 (decision) separately state the city planning staff’s position that subject to certain recommended conditions contained in the report, the Applicant’s proposal can meet all applicable zoning-related provisions of the Vancouver Land Use and Development Code. The Applicant acknowledged that the City never issued or adopted this staff report. TR 13.
43 City’s Comments at 5.
44 Id. at 20.
45 Id. at 20-22 (subject to review to determine final compliance).
46 Id. at 5-19, 21-78.
47 City’s Deferral Request.
48 TR at 27-28 Port’s Letter at 1-2.
49 Id. at 28-31, Port’s Letter at 3.
50 Id. at 32-36, FOCG Letter at 2-39.
Lauren Goldberg, Staff Attorney for the Columbia Riverkeeper, agreed with Mr. Baker’s testimony and focused attention on alleged geologic hazards and shoreline issues present at the proposed Site.\textsuperscript{51}

Matt Grady of Columbia Waterfront, LLC, contended that the Council did not have sufficient information to make a land use determination.\textsuperscript{52}

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

COUNCIL ACTION AND DISPOSITION:

Preliminary Issues:

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

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

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

\textsuperscript{51} TR at 37-41, see also FOCG Letter at 2-39
\textsuperscript{52} Id. at 42-46, Columbia Waterfront Written Testimony at 1.
\textsuperscript{53} Id. at 48-49.
\textsuperscript{54} Id. at 53, 55, 60, 65.
\textsuperscript{55} Id. at 54-56.
\textsuperscript{56} Id. at 49, 58
\textsuperscript{57} Id. at 52, 54-55, 58-59.
\textsuperscript{58} Id. at 52, 57-58, 60.
\textsuperscript{59} Whistling Ridge Order at 9-10.
that an EIS must precede the City’s consideration of land use consistency. First, EFSEC is the SEPA lead agency for “all governmental actions relating to energy facilities for which certification is required under chapter 80.50 RCW” and RCW 80.50.180 exempts from the requirement of an EIS all local government actions related to EFSEC projects.

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

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

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

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60 WAC 197-11-938(1).
61 WAC 197-11-406. This rule continues that “The statement shall be prepared early enough so it can serve practically as an important contribution to the decision making process and will not be used to rationalize or justify decisions already made.” The EIS will precede both EFSEC’s recommendation and the Governor’s decision.
62 WAC 197-11-055(2) (c).
land use hearing. WAC 197-11-535(1) states that non-SEPA public hearings on a proposal should be open to consideration of environmental impacts together with “any environmental document that is available.” WAC 197-11 is clear that the term “environmental document” means “any written document prepared under [the SEPA rules]” and does not mean only an EIS. WAC 197-11-535(1) is equally clear that consideration of environmental documents at non-SEPA public hearings only applies to documents that are “available.”

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

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

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

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

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

65 Applicant’s Statement at 4 & n 2, Exhibit 9 at 2. Although the City and the Applicant evidently agreed that as between themselves they would use the process as a means of evaluating land use consistency, Applicant’s Statement at 4, a voluntary agreement reached between parties before EFSEC has no bearing on the actual legal status of the Type II process under RCW 80.50.
Nov. 4, 2013, workshop, staff was to review whether the applicant could meet city standards administratively. 66 Indeed, the Type II process does not, by its own terms, apply here because the Application is not “subject to review under … the Vancouver Municipal Code” and the City will not be “determining whether [this] development [application is, or can be] approved or conditionally approved.”67 Moreover, even if the City attempted to make the Type II process binding in this proceeding, RCW 80.50.110 preempts the City’s processing procedures and RCW 80.50.010(5) requires the avoidance of duplicative processes.

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

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

Land Use:

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

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

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66 Applicant’s Statement at Exhibit 9 at 2.
67 VMC 20.210.010(B), (C).
68 Applicant’s Statement at 4, Exhibit 1 (Pre-Application Conference Request from June 2013), Exhibit 7 (Pre-Application Conference Report dated June 27, 2013); Exhibit 9 (Staff Determination).
69 In any event, the notice stated EFSEC’s mailing address and its website (which shows EFSEC’s email address on the first page).
listed planning statutes.\textsuperscript{70} EFSEC interprets this definition as referring to the portions of a comprehensive plan that outline proposals for an area’s development, typically by assigning general uses (such as housing) to land segments and specifying desired concentrations and design goals.\textsuperscript{71} Comprehensive plan elements and provisions that do not meet this definition are outside of the scope of the Council’s land use consistency analysis.

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

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

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

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

\textsuperscript{70} RCW 80.50.020(14).
\textsuperscript{71} In re Northern Tier Pipeline, Council Order No. 579 (Northern Tier Pipeline Order) at 9 (November 26, 1979).
\textsuperscript{72} RCW 80.50.020(22).
\textsuperscript{73} Northern Tier Pipeline Order at 10.
\textsuperscript{74} Whistling Ridge Order at 10 n 15.
\textsuperscript{75} The JLARC Report is set forth in its entirety on the EFSEC web page at: http://www.efsec.wa.gov/taskforce/default.shtm#finrep. This recommendation is found on p. 15 of the JLARC Report.
\textsuperscript{76} Engrossed House Bill 2247, Section 7, Chapter 214, Laws of 2001.
considered all the potential impacts and the appropriate levels of mitigation for a proposed project
would not have been feasible. Nothing in the legislation indicated that the scope of the land use
consistency hearing was changed by simply removing the 60-day requirement for holding the
hearing.

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

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

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

77 RCW 80.50.020(16), (17); Engrossed Substitute House Bill 1020, Section 1, Chapter 196, Laws of 2006; Substitute
House Bill 2402, Section 1, Chapter 205, Laws of 2006.
78 Northern Tier Pipeline Order at 10-11.
79 Spokane County vs. Eastern Washington Growth Management Hearings Board, 173 Wn. App. 310, 337, 293 P.3d
1248 (2013).
80 Plan at 1-1, see also id. at iii (the City’s vision for land use and development is in Chapter 1).
81 Id. at 1-11.
82 Id. at 1-12 (Figure 1-6).
83 Id. at 1-13 (Table 1-5).
The development policies in Chapter 1 fall outside of EFSEC’s definition of a land use plan that it must consider because these policies do not assign uses to land segments. The balance of the Plan (Chapters 2 through 7) also fall outside of EFSEC’s definition of land use plan because, as the Plan itself indicates, only Chapter 1 addresses the “use” of land by assigning general uses to land segments and Chapters 2 through 7 do not. The Council observes that with respect to the county-wide planning policies listed by the Legislature to guide comprehensive planning, the Washington Courts have recognized that “some of them are mutually competitive.” So even if the Council did examine all of the policies in Chapters 2 through 7, it is not necessary for development at the Site to advance each of the policies.

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

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

The Site is consistent with the pertinent portions of the Plan and zoning ordinances because neither the pertinent portions of the Plan nor the pertinent portions of the zoning ordinances clearly, convincingly and unequivocally prohibit the Site. To the contrary, the Plan specifically allows the...
proposed use in the area where the Site is located.\textsuperscript{94} The Plan designates that area as “Industrial” \textsuperscript{95} and allows within it the “IH Heavy Industrial” subtype, which is generally intended for “[i]ntensive industrial manufacturing, service, production or storage often involving heavy truck, rail or marine traffic, or outdoor storage and generating vibration, noise and odors.”\textsuperscript{96}

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

It follows that under the minimal threshold for determining land use consistency, the Site is consistent and in compliance with the City’s land use provisions. As noted by the Applicant, the City, and several others presenting testimony, the Supreme Court’s recent decision in \textit{Friends v. EFSEC}\textsuperscript{103} establishes that the land use consistency determination is one in which EFSEC may only find a site inconsistent if the Site is contrary to \textit{both} the land use plan and the zoning ordinances.\textsuperscript{104}

Thus, \textit{Friends} has no impact on our land use consistency evaluation because the Site is both consistent with the pertinent portions of the Plan and in compliance with the pertinent zoning ordinances.\textsuperscript{105}

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

\begin{footnotesize}
\begin{enumerate}
\item City’s Comments at 5 (“The proposed site of the Oil Terminal is in an area designated as industrial by the comprehensive plan. Comment: The development of the proposed oil terminal is consistent with this designation.”)
\item Plan at 1-12 (Figure 1-6).
\item Id. at 1-13 (Table 1-5).
\item VMC 20.130.010; VMC 20.130.020; Applicant’s Statement at Exhibit 3 and Exhibit 9 at 7, City’s Comments at 20.
\item VMC 20.440.020(C); City’s Comments at 20-21.
\item VMC 20.440.020(C); City’s Comments at 20-21.
\item VMC 20.160.020(D)(5); City’s Comments at 20-21.
\item VMC 20.440.030(B) (Table 20.440.030-1), City’s Comments at 21.
\item VMC 20.440.040 (Table 20.440.040-1), Applicant’s Statement at Exhibit 2 at 46, Exhibit 7 at lines 155-165, Exhibit 9 at 708, see also City’s Comments at 21-22.
\item Because the Council is holding that the Site is consistent with both of the City’s land use provisions, rather than consistent with the Plan but not the zoning ordinances, or vice versa, we need not reach the City’s arguments focusing on the proper interpretation of the word “or” in RCW 80.50.090(2) and the \textit{Friends} decision. City of Vancouver’s Response to Applicant’s Argument on Statutory Interpretation (July 14, 2014). For this same reason, the Council does not address Applicant Tesoro Savage’s Motion to Strike (July 15, 2014), nor the City of Vancouver’s Response to Applicant’s Motion to Strike (July 15, 2014).
\end{enumerate}
\end{footnotesize}
consistent and in compliance with the portions of the City of Vancouver’s land use plan and zoning ordinances that meet the statutory definitions of those terms found in RCW Chapter 80.50.

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

**FINDINGS OF FACT**

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

(1) A narrow reading of the Council’s land use consistency process under RCW 80.50.090(2) is warranted based upon the legislative history of this statute and EFSEC’s past practices.

(2) The Council is not required to defer acting on a land use consistency determination until an environmental impact statement is completed, or to wait as if the City of Vancouver was undertaking review of the Application under its own review process.

(3) The Council provided adequate notice to interested parties, and the Council has adequate information to render a land use consistency decision.

(4) The proposed Site for the Vancouver Energy Distribution Terminal is consistent with the City of Vancouver’s Comprehensive Plan.

(5) The proposed Site for the Vancouver Energy Distribution Terminal is in compliance with the City of Vancouver’s zoning ordinances.

DETERMINATION AND ORDER: Based upon these Findings of Fact and Conclusions of Law, and as further discussed in the body of this Council order, the Council determines that the Applicant’s proposed Site is consistent and in compliance with the City of Vancouver’s Comprehensive Plan 2011-2030 and the City of Vancouver’s applicable zoning ordinances.

Nothing in this Order precludes parties from raising issues during the adjudication, the process of adopting an environmental impact statement, or the issuance of permits with respect to on-site or off-site impacts, or the mitigation of those impacts, including but not limited to issues regarding shoreline management, critical area ordinances, stormwater, service availability, spills or fires.

ORDER

THE COUNCIL THEREFORE ORDERS that:

(1) In accordance with WAC 463-26-110, the Vancouver Energy Distribution Terminal Site is consistent and in compliance with local land use plans and ordinances.

(2) The Applicant has met its burden of proof of demonstrating that the Site is consistent with and in compliance with the City of Vancouver’s Comprehensive Plan and applicable zoning ordinances.

(3) In accordance with RCW 80.50.090(2), the City of Vancouver shall not alter its land use plans or zoning ordinances so as to affect the proposed Site during the pendency of the Application.
DATED at Olympia, Washington and effective on this 1st day of August, 2014.

WASHINGTON STATE
ENERGY FACILITY SITE EVALUATION COUNCIL

__________________________
/s/ _________________________

Bill Lynch, Chair

Concurring Opinion of Bryan Snodgrass, City of Vancouver representative to Council.

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