

**BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL**

In the Matter of Application No. 2013-01
Docket No. EF-131590

CITY OF VANCOUVER'S
REQUEST TO DEFER LAND USE
CONSISTENCY DETERMINATION
AND LEAVE RECORD OPEN

TESORO SAVAGE VANCOUVER
ENERGY DISTRIBUTION TERMINAL

SUMMARY OF REQUEST

The City of Vancouver requests the Energy Facility Site Evaluation Council to defer its determination of whether or not the Tesoro Savage crude by rail oil terminal is consistent and in compliance with the City's comprehensive plan and zoning regulations until after the environmental impact statement is complete. The City further requests that EFSEC keep the record open, including providing the opportunity for further public participation, until the environmental analysis is complete.

REASONS FOR REQUEST

A. Background

On August 29, 2013, Tesoro Savage Petroleum Terminal LLC (Applicant) submitted an application for a Site Certification Agreement to EFSEC to construct and operate an oil terminal at the Port of Vancouver. At full operation the project would be capable of receiving and sending up to 360,000 barrels of crude oil per day transported by an average of eight, and up to twelve unit trains per day (four to six inbound and four to six outbound). Each unit train would be comprised of more than 100 tanker cars and up to three locomotives and would be one and a half miles long. The oil would be temporarily stored on site prior to being loaded onto marine vessels for shipment.

On May 9, 2014, EFSEC issued its notice that it would hold the land use consistency hearing on May 28, 2014. The purpose of the hearing is to determine whether or not the

proposed project is “consistent and in compliance with City, county, or regional land use plans or zoning ordinances.” RCW 80.50.090. A “land use plan” is defined to include a adopted comprehensive plan. RCW 80.50.020(14). A “zoning ordinance” is defined to include ordinances regulating the use of land whether adopted pursuant to the City’s planning commission authority, the Growth Management Act, or the City’s plenary police power. RCW 80.50.020(22).

EFSEC recognizes that the project and its associated transportation of crude oil by rail are “likely to have a significant adverse impact on the environment.”¹ The transportation of crude oil by rail has been marked by repeated derailments, spills and explosions.² These accidents and the inadequacies and failures of the DOT 111 tank car used to transport crude oil have led the National Transportation Safety Board to recommend to the Federal Railroad Administration that regulations be adopted requiring safer tank cars and “where technically feasible, require rerouting to avoid transportation of such hazardous materials through populated and other sensitive areas.”³

As part of the City’s review of the project, the Vancouver Fire Official is undertaking an analysis of the plans for the oil terminal as well as the risks associated with transporting Bakken crude by oil by rail and the capacity or lack of capacity of the Vancouver Fire Department to respond to such risks. This study is being undertaken pursuant to sections 102.9 and 104.7 of the 2012 International Fire Code adopted by the Vancouver Municipal Code. In its scoping comments the City detailed the issues to be addressed in the study.⁴ Without this analysis, the City is unable to determine that the proposed oil terminal is consistent with the fire code.

If the City were permitting the Tesoro Savage development proposal, it would undertake an environmental review of the proposal. For this project, EFSEC is the lead agency and is preparing an environmental impact statement (“EIS”). The EIS is not available at this point. As discussed more fully below, the City is unable to determine the consistency and compliance of the proposal with the City’s comprehensive plan and regulations without the environmental

¹ Determination of Significance Scoping Notice issued October 1, 2013 at page 2.

² See City Exhibits 6 to 11. . “[T]here have been eight significant oil train accidents in the U.S. and Canada in the past year involving trains hauling crude oil, including several that resulted in spectacular fires.” ABC News, CSX Railcar Accident Sparks Calls for Reform, Richard Davies (May 1, 2014).

³ NTSB Safety Recommendation dated January 23, 2014. Exhibit 8 of City’s Exhibits.

⁴ A copy of the City’s scoping comments are at Exhibit 5 of the City’s Exhibits.

analysis.

If the City were permitting the project, it would also include a process for the public to submit comments which would be considered prior to the City making a decision. VMC 20.210.050. In the EFSEC process, the City is preparing these comments for submission at the land use consistency hearing. However, the public will not have an opportunity to comment on the consistency and compliance of the proposal with the City's comprehensive plan and regulations until the hearing scheduled for May 28, 2014. Thus, the City is preparing these comments without the benefit of public comment.

B. SEPA is intended to inform and guide land use decisions.

On April 2, 2014, EFSEC issued its determination of the scope of the draft EIS. According to this document, issues central to the City's consistency analysis will be addressed, including the safety concerns addressed above. As noted in the determination, the purpose of the analysis is to "inform the public and decision makers about the impacts of the proposed project" as well as to "discuss possible mitigation measures where appropriate."⁵

Concurrent with the filing of this request, the City is filing its comments regarding the consistency of the project with the City's comprehensive plan and zoning regulations. In those comments, the City explains that it is unable to make a determination as to whether or not the project is consistent with a significant number of comprehensive plan policies or zoning regulations before the SEPA environmental analysis is completed and public comment provided. Even though the City is not the lead agency for SEPA review, it does consider and use the lead agency's EIS. VMC 20.790.130(c).

The City believes that it would be inappropriate for it, or EFSEC, to make a determination of the consistency of the project with the City's land use plans and regulations prior to the completion of the EIS. The SEPA rules generally direct that the environmental review process be integrated with agency activities at the earliest possible time to ensure that planning and decisions reflect environmental values. The EIS should actually contribute to the decision-making process rather than be used to rationalize decisions already made. 24 Wash. Prac., Environmental Law And Practice § 17.18 (2d ed.).

⁵ Scope of Draft EIS at page 1.

This position is supported by well-established Washington case law. As noted in *Barrie v. Kitsap Cnty.*, 93 Wn. 2d 843, 854, 613 P.2d 1148, 1154-55 (1980), the policy of SEPA is to “ensure through a detailed environmental impact statement (EIS) the full disclosure of environmental information so that it can be considered during decision making.” The court, in *King Cnty. v. Washington State Boundary Review Bd. for King Cnty.*, 122 Wn. 2d 648, 666, 860 P.2d 1024, 1034 (1993), commented on the need to undertake environmental analysis before making decisions stating, “(t)he point of an EIS is not to evaluate agency decisions after they are made, but rather to provide environmental information to assist with making those decisions.” (Emphasis original.) In *Citizens Alliance To Protect Our Wetlands v. City of Auburn*, 126 Wn. 2d 356, 370, 894 P.2d 1300, 1308 (1995), the court observed that the purpose of the EIS was to provide environmental review “in sufficient detail to make a reasoned decision.”

The timing of the SEPA process is also addressed in WAC 197-11-055⁶ which states:

(1) Integrating SEPA and agency activities. The SEPA process shall be integrated with agency activities at the earliest possible time to ensure that planning and decisions reflect environmental values, to avoid delays later in the process, and to seek to resolve potential problems.

(2) Timing of review of proposals. The lead agency shall prepare its threshold determination and environmental impact statement (EIS), if required, at the earliest possible point in the planning and decision-making process in the planning and decision-making process, when the principal features of a proposal and its environmental impacts can be reasonably identified.

...

(c) Appropriate consideration of environmental information shall be completed before an agency commits to a particular course of action (WAC 197-11-070).

...

(Emphasis added.)

Neither the City nor EFSEC can make a land use consistency determination in the absence of an EIS and have that decision be integrated with the SEPA process in a manner that reflects environmental values. The principal features of the project are known and EFSEC is in the process of drafting a DEIS. This environmental analysis needs to be available to inform the City’s and EFSEC’s decision making.

⁶ EFSEC adopted WAC 197-11-055. See WAC 463-47-020.

The timing of the SEPA process is also addressed in WAC 197-11-406⁷ which is particularly germane because it specifically addresses the need for the EIS prior to making recommendations or reports such as a land use consistency report. It states:

The lead agency shall commence preparation of the environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal, so that preparation can be completed in time for the final statement to be included in appropriate recommendations or reports on the proposal (WAC 197-11-055). 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. EISs may be 'phased' in appropriate situations (WAC 197-11-060(5)). (Emphasis added.)

Another reason to require a completed EIS before making a decision on a project is to avoid "incrementalism". This concept was discussed by our Supreme Court in the King County case cited above. The court observed that "the risk of postponing environmental review is 'a dangerous incrementalism where the obligation to decide is postponed successively while project momentum builds.'" *King County* at 664, (quoting William H. Rodgers, *The Washington Environmental Policy Act*, 60 Wash. L.Rev. 33, 54 (1984)). The court recognized that this "may begin a process of government action which can 'snowball' and acquire virtually unstoppable administrative inertia." *Id.* To avoid this, "decision makers need to be apprised of the environmental consequences *before* the project picks up momentum, not after." *Id.* (Emphasis original.)

While SEPA does not demand a particular substantive result in government decision-making, SEPA does require that "environmental amenities and values be given appropriate consideration in decision making along with economic and technical considerations." *Stempel v. Department of Water Resources*, 82 Wn.2d 109, 118, 508 P.2d 166 (1973). This is to be done before the decision is made and in time to be considered in recommendations or reports on the proposal.

C. The record needs to be kept open.

Once the EIS is complete, the City will be able to complete its review of the project for consistency with its comprehensive plan and zoning ordinances. The City will also give consideration to the public comment received at the land use consistency hearing. After doing

⁷ EFSEC adopted WAC 197-11-406. See WAC 467-47-020.

so, the City will submit additional information to EFSEC. The City and the public have a right to participate in the land use hearing. RCW 80.50.090, WAC 463-26-020, -060 and -100. There needs to be an opportunity for participation after the SEPA environmental analysis is complete.

Conclusion

Both the City and EFSEC will be well served by deferring any decision on land use consistency until after the EIS is prepared. These comments are being submitted in advance of public comment which will occur at the land use consistency hearing. The City should be given the opportunity to complete its review of the proposal for land use consistency with the benefit of the environmental analysis and public comment. The City requests that EFSEC defer its land use consistency determination until after both the City and the public have had an opportunity to consider the EIS. The City further requests that the record remain open to provide further comment.

Respectfully submitted, this 22ND day of May, 2014.

CITY OF VANCOUVER



E, Bronson Potter, Chief Assistant City Attorney