BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of: Application No. 2013-01 TESORO SAVAGE, LLC VANCOUVER ENERGY DISTRIBUTION TERMINAL	CASE NO. 15-001 ORDER 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

On August 29, 2013, Tesoro Savage Petroleum Terminal LLC (Vancouver Energy or Applicant) applied for a site certification with the Energy Facility Site Evaluation Council (EFSEC or Council) to construct and operate a new crude oil terminal. The proposed facility would be located at the Port of Vancouver in the City of Vancouver (City), Washington.

As part of its proposal, Vancouver Energy[1] requested to discharge a maximum monthly average flow[2] of 36,000 gallons per day of industrial wastewater into the City's sewerage system, otherwise known as the City's publicly owned treatment works (POTW).[3] The volume and type of discharge requires Vancouver Energy to obtain an individual wastewater pretreatment discharge permit.[4]

On August 28, 2013, the City notified Vancouver Energy that its POTW has capacity to receive and treat the anticipated discharges from the proposed facility.[5] On August 29, 2013, Vancouver Energy included an application for a state waste discharge permit as part of its application for site certification that was submitted to EFSEC.[6] On February 25, 2014, Vancouver Energy resubmitted its application for an industrial waste discharge permit.[7] On February 19, 2016, EFSEC notified Vancouver Energy that the City is responsible for issuing this permit rather than EFSEC.[8]

This matter comes before EFSEC on cross motions by Vancouver Energy and the City. The purpose of the motions is to establish whether EFSEC or the City is the responsible governmental entity for authorizing a discharge of industrial wastewater into the City's POTW.

[1] References to Vancouver Energy also include consultants working on behalf of Vancouver Energy.
[2] The daily flows are averaged over a month-long period.
[3] Applicant's Motion, Decl. of Carrico, Ex. A.
[4] 40 CFR 403.6; 40 CFR 403.8(f)(1)(iii).
[5] Applicant's Motion, Decl. of Carrico, Ex. A.
[6] Applicant's Motion, Decl. of Carrico, Ex. B.
[7] Applicant's Motion, Decl. of Carrico, Ex. C.
[8] Applicant's Motion, Decl. of Carrico, Ex. D.

The Council reviewed and considered the following documents regarding the Applicant's Motion:

1. [Applicant's] Motion for Determination Regarding Issuance of Industrial Waste Discharge Permit (Applicant's Motion);
2. Declaration of Dale Johnson, with attached Exhibits A and B;
3. Declaration of Brian Carrico, with attached Exhibits A-D;
4. [Intervenors Columbia Riverkeeper, et al.'s] Opposition to Tesoro-Savage's Motion for Determination Regarding Issuance of Industrial Waste Discharge Permit;
5. City of Vancouver's Response to Applicant's Motion for Determination Regarding Issuance of Industrial Waste Discharge Permit (City's Response);
6. Second Affidavit of Frank A. Dick in Opposition to Applicant's Motion for Order Ruling that EFSEC has Authority to Issue Pretreatment Discharge Permit, with Attachments 6-8; and
7. Port of Vancouver USA's Response to City of Vancouver's Motion for Order Ruling that EFSEC Lacks Authority to Issue Pretreatment Discharge Permit and to Vancouver Energy's Motion for Determination Regarding Issuance of Industrial Waste Discharge Permit.

The Council reviewed and considered the following documents regarding the City's Motion:

1. City of Vancouver's Motion for Order Ruling that EFSEC Lacks Authority to Issue Pretreatment Discharge Permit (City's Motion) with Attachments 1-5;
2. Affidavit of Karen L. Reed in Support of City of Vancouver's Motion for Order Ruling that EFSEC Lacks Authority to Issue Pretreatment Discharge Permit;[9]
3. Affidavit of Frank A. Dick in Support of City of Vancouver's Motion for Order Ruling that EFSEC Lacks Authority to Issue Pretreatment Discharge Permit;
4. Vancouver Energy's Response in Opposition to the City of Vancouver's Motion for Order Ruling that EFSEC Lacks Authority to Issue Pretreatment Discharge Permit (Applicant's Response); and
5. Port of Vancouver USA's Response to City of Vancouver's Motion for Order Ruling that EFSEC Lacks Authority to Issue Pretreatment Discharge Permit and to Vancouver Energy's Motion for Determination Regarding Issuance of Industrial Waste Discharge Permit.[10]

The Council has considered Vancouver Energy's and the City's motions and all supporting materials regarding whether EFSEC or the City is the governmental entity responsible for approving Vancouver Energy's discharge of wastewater into the City's POTW. The Council denies Vancouver Energy's motion and grants the City's motion for the reasons set forth in the Discussion below.[11]

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[9] The document identified as Attachment 2 in Ms. Reed's Affidavit is actually Attachment 4. This document is the MOA between EPA and EFSEC regarding the operation of the NPDES permit program.

[10] The City and Vancouver Energy both agreed to forego reply briefs. City's Response at 5; Applicant's Response at 1, n.1.

[11] For purposes of the discussion, arguments advanced by Vancouver Energy and the Port of Vancouver will be grouped together under "Vancouver Energy". Similarly, arguments advanced by the City of Vancouver and the Environmental Intervenors will be grouped together under "City".

DISCUSSION

Does EFSEC have preemptive authority to issue all state and local permits and approvals necessary for construction and operation of the facility, and if so, how will EFSEC implement such authority?[12]

For the purpose of analyzing these cross-motions, it is helpful to restate this issue as: "Does EFSEC have the authority to issue a permit for the discharge of industrial wastewater from the proposed facility to the City's POTW, when Vancouver already has an approved pretreatment program for its wastewater treatment plants?"

EFSEC does not have the authority to issue a permit for the discharge of industrial wastewater from Vancouver Energy's proposed facility to the City's POTW. The federal and state regulatory schemes for pretreatment of industrial discharges into POTWs, as discussed below, clearly establish that the City is primarily responsible for regulating and enforcing discharges into its POTW because it has an approved pretreatment program. EFSEC does not administer a pretreatment program approved by EPA and has no role to play in authorizing an industrial discharge into the City's POTW.

Background on the Requirement for Pretreatment

In general, POTWs are principally designed to treat domestic sewage before the effluent is discharged into a receiving water body. In some cases, effluent may be applied directly to the land such as a golf course, or it may be reused by an industrial user such as in a boiler. The treatment process produces waste solids known as biosolids or sludge. POTWs are not able to remove many toxic or non-conventional pollutants that are present in industrial waste.

Certain industrial practices can interfere with the operation of POTWs, which can result in discharges of untreated or inadequately treated wastewater into waters of the United States. Some pollutants may cause interference with the operation of the POTW by inhibiting or disrupting the POTW's treatment processes or operations, or its sludge processes, use, or disposal. Other pollutants are not amenable to biological wastewater treatment and pass through the POTW and affect the receiving water resulting in fish kills or other harmful effects. In addition, discharging gases and gas-forming substances can produce harmful fumes or potential explosions, which can jeopardize worker safety.[13]

The federal Clean Water Act was enacted to restore and maintain the integrity of the nation's waters. Direct discharges of pollution into these waters are regulated by National Pollutant Discharge Elimination System (NPDES) permits. Indirect discharges of pollution by industries into POTWs are regulated through the National Pretreatment Program.[14] The U.S. Environmental Protection Agency (EPA) administers the National Pretreatment Program within the federal Clean Water Act.[15]

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[12] Order Clarifying EFSEC's Process, Modifying Dispositive Motion Deadline, Summarizing Preliminary Issues, and Setting Hearing Dates, ¶ E at 2 (Feb. 3, 2016).
[13] U.S. EPA Office of Wastewater Management, EPA-833-B-11-001, Introduction to the National Pretreatment Program iii (June 2011), *available at* https://www3.epa.gov/npdes/pubs/pretreatment_program_intro_2011.pdf.
[14] See 40 CFR 403.3(i).
[15] 33 U.S.C. Sec. 1251 *et seq.*

The National Pretreatment Program was established in order to reduce the risk of pollution to health and the environment by: preventing the introduction of pollutants into POTWs which would interfere with the POTW's operation or contaminate sewage sludge; and preventing the introduction of pollutants into POTWs which will pass through the treatment works into receiving waters or the atmosphere. An additional goal of the program was to improve opportunities to recycle and reclaim wastewaters and sludges after wastewater treatment.[16]

Pretreatment involves the reduction of the amount of pollutants, elimination of pollutants, or the alteration of the nature of pollution properties in wastewater before or in lieu of introducing these pollutants into a POTW.[17]

The National Pretreatment Program is Primarily Implemented by Local Governments

EPA has authorized local governments to directly implement and enforce federal regulations with respect to pretreatment. A local POTW with an approved pretreatment program is defined as the "Control Authority".[18] The Control Authority is the primary entity for developing, administering, and enforcing the federal pretreatment standards under the federal and state regulatory regime, including the development and implementation of an enforcement response plan.[19]

If a state already has a federally approved pretreatment program, then a local government must obtain state approval rather than federal approval for its pretreatment program.

In order for a state to obtain approval of its pretreatment program, a state must submit a request for approval to EPA and demonstrate that it meets all necessary elements to administer the program.[20] EPA approves a state's request to administer the pretreatment program through the issuance of a memorandum of agreement (MOA).[21] EPA approved the Washington State Department of Ecology's (Ecology) pretreatment program on September 30, 1986,[22] which made the Director of Ecology the "Approval Authority" for purposes of approving any local POTW pretreatment program within the state of Washington.[23]

Vancouver applied to Ecology for approval of its pretreatment program, which required that the City demonstrate that it met all federal criteria for its pretreatment program.[24] Ecology approved Vancouver's pretreatment program on September 30, 1987.[25] Pursuant to federal law, Vancouver became the "Control Authority" for ensuring that any discharges into its POTW meet all federal criteria for pretreatment. The City is responsible for administering and enforcing the federal program and any state or local standards.

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[16] 43 Fed. Reg. 27736 (1978); 40 CFR 403.2.
[17] 40 CFR 403.3(s); WAC 173-216-030.
[18] 40 CFR 403.3(f)(1).
[19] 40 CFR 403.5(c)(1), 40 CFR 403.8(f)(5).
[20] 40 CFR 403.10(f) and (g).
[21] 40 CFR 123.24.
[22] City's Motion, Attachment 1 (version updated in 1989).
[23] 40 CFR 403.3(f) and (g).
[24] 40 CFR 403.3(d), 40 CFR 403.8 and 403.9.
[25] City's Motion, Attachment 2 (Ecology Order No. DE 87-S188).

When the City's POTW was approved to operate a pretreatment program, Ecology, as the Approval Authority, was required to modify the City's POTW NPDES permit to require implementation of the approved pretreatment program as enforceable conditions of its NPDES permit.[26] Ecology oversees the implementation of the pretreatment program through the receiving of annual POTW reports from the City and conducting periodic audits and inspections. If the City fails to properly implement pretreatment criteria and discharges pollutants into national/state waters in violation of its NPDES Permit, it would be subject to potential sanctions either from Ecology or EPA.

State Regulations Confirm Vancouver has Permitting Responsibility over the Proposed Discharge

Three different chapters of Title 173 of the Washington Administrative Code (WAC) work in concert to address the regulation of the pretreatment program. A municipality that operates a POTW with pretreatment authority is delegated under state regulations the authority to establish a permit program for commercial and industrial discharges into its sewerage system.

Chapter 173-216 WAC implements the state waste discharge permit program, which includes regulation of industries discharging into ground and surface waters of the state and into municipal sewerage systems. WAC 173-216-150 provides that qualified cities, towns, and other municipal corporations who administer a local permit program, such as Vancouver, are required to comply with Chapter 173-208 WAC and 40 C.F.R. Part 403 (the National Pretreatment Program regulations). This chapter also expressly excludes discharges to a municipal sewerage system operating under, and in compliance with, the applicable requirements of a local pretreatment program approved under the federal Clean Water Act and WAC 173-216-150.[27] Because discharges into a POTW with an approved pretreatment program are administered pursuant to a local permit program, no state waste discharge permit is required for such discharges.[28]

Chapter 173-208 WAC establishes the requirements for the locally administered permit program. It authorizes Ecology to grant a municipality operating a POTW the authority to issue permits for discharges of commercial or industrial wastes into the local government sewerage system.[29] A municipality authorized to administer a permit program must adhere to the state or federal pretreatment standards as a minimum requirement for commercial and industrial dischargers. If more stringent pretreatment requirements are needed to meet effluent limits established in the municipality's POTW NPDES permit, then the municipality must impose these requirements.[30] The process of granting or denying the discharges into the sewerage system, the monitoring and inspection of the dischargers, and the taking of appropriate enforcement action are all included within the definition of "permit program" administered by the municipality.[31]

A municipality that administers a permit program for discharges into its POTW is primarily responsible for its effluent quality according to the terms of its NPDES permit, which Ecology

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[26] 40 CFR 403.8(c).
[27] WAC 173-216-050(1)(c). *See also* RCW 90.48.165.
[28] The Council is also cognizant of RCW 80.50.040(10), which empowers EFSEC to "integrate its site evaluation activity with activities of federal agencies having jurisdiction in such matters to avoid unnecessary duplication."
[29] WAC 173-208-010 and 173-208-020.
[30] WAC 173-208-090(3).
[31] WAC 173-208-040(10).

oversees under the terms of the municipality's POTW NPDES permit.[32]
Chapter 173-220 WAC establishes the state individual NPDES permit program. All discharges must be consistent with the terms and conditions of the NPDES permit.[33] Pursuant to WAC 173-220-150(3), the NPDES permit "for a municipality which has received full local pretreatment program approval must include:

(a) Granting of authority to issue permits under chapter 173-208 WAC;
(b) A requirement to develop, adopt, and enforce a program that is at least as stringent as the department's program under chapter 173-216 WAC; and
(c) A requirement to report to the department at a specified frequency on the status of its implementation."

The state regulatory scheme mirrors the federal regulatory scheme in that a municipality with an approved pretreatment program directly implements and enforces federal and state regulations with respect to pretreatment. This system of regulation acknowledges that the industrial dischargers are not discharging into federal or state waters, but rather into the POTW. The municipality, as the operator of the POTW, controls the amounts and types of effluent it receives into its sewerage system through a separately operated permit system, which must be at least as stringent as Ecology's program. Ecology ensures the municipality complies with all of the pretreatment criteria through oversight of the municipality's POTW NPDES permit.

Consistent with state regulations, Vancouver operates its own permit system for discharges into its POTW and is responsible for authorizing the industrial discharge from the proposed facility. As a condition of approval, Ecology required Vancouver to "fulfill all the requirements of WAC 173-216 relating to the permit program."[34] The City's NPDES POTW permit devotes an entire section to implementation of the industrial pretreatment program.[35] Ecology, as the issuer of the City's POTW NPDES permit,[36] oversees that Vancouver remains in compliance with its permit. Although EFSEC may issue NPDES permits for energy facilities, it is not authorized to issue a NPDES permit for a POTW.[37] EFSEC has no authority to administer a POTW's NPDES permit.

EPA has Not Given EFSEC Approval to Administer a Pretreatment Program

Vancouver Energy argues that EFSEC has exclusive jurisdiction to issue industrial waste discharge permits for energy facilities. Vancouver Energy cites the preemption authority provided to EFSEC under RCW 80.50.110, the permitting authority provided to Ecology and EFSEC under RCW 90.48.160, and the language in RCW 90.48.262 stating that permits for energy facilities subject to chapter 80.50 RCW shall be issued by EFSEC. Vancouver Energy contends that when EPA approved Washington State's program to implement the National Pretreatment Program, EPA was aware that state statutes would confer this authority regarding pretreatment to EFSEC for energy facilities. Vancouver Energy advances these arguments while acknowledging that the NPDES permitting program and the National Pretreatment Program are separate programs.[38]

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[32] WAC 173-208-030(3), 173-208-090(4).
[33] WAC 173-220-150(1)(a).
[34] City's Motion, Attachment 2, at page 3 of 3.
[35] City's Motion, Attachment 3, Section S6 beginning at 14.
[36] WAC 173-220-040.
[37] WAC 173-220-240.
[38] Applicant's Motion at 12.

EPA delegated authority to EFSEC to issue NPDES permits for discharges to waters of the state in a Memorandum of Agreement in 1979.[39] EFSEC and Ecology therefore share NPDES permitting authority in Washington. A discharge into a POTW, however, is not a discharge into waters of the state. Therefore, when EPA delegated authority to EFSEC to issue NPDES permits, discharges to POTWs were not included as part of this delegation because an NPDES permit cannot be used to authorize a discharge into a POTW. The discharge into the City's POTW is governed by the City's local permit program authorized under Chapter 173-208 WAC. The discharge from the POTW is a discharge to waters of the state and requires the City to have an NPDES permit, which is overseen by Ecology.

As described earlier, a state agency must submit a request for approval to EPA and demonstrate that it meets all necessary elements to administer a pretreatment program before approval of a pretreatment program can be obtained. EFSEC never requested, and was never granted, federal authority to permit discharges pursuant to the federal pretreatment program.

EPA has expressly notified EFSEC by letter that EPA has not approved EFSEC to administer a pretreatment program. The letter specifically noted the absence of any reference to pretreatment:

> During the April 20 meeting, you pointed out that the NPDES permit program for energy related facilities was delegated to the Energy Facility Site Evaluation Council (EFSEC) on August 15, 1979. In neither the application for delegation nor in the Memorandum of Agreement between EFSEC and EPA was there any attempt to satisfy the requirements of 40 CFR §403.10, which sets forth the required process and submittals for the application for pretreatment delegation. Since there was no reference to pretreatment, we conclude that the NPDES delegation to EFSEC did not include the pretreatment program.

May 18, 2000 letter from EPA.[40]

This same May 18, 2000 letter from EPA also referenced the delegation of the pretreatment program to Ecology on September 30, 1986. EPA observed that Ecology met the necessary requirements in its application for delegation, and that only Ecology's staffing, resources, and expertise were evaluated in making the determination to approve delegation of the pretreatment program to Ecology. EPA concluded that the delegation of the pretreatment program "was made solely to Ecology, not to EFSEC."

A comparison between EPA's MOA with Ecology and EPA's MOA with EFSEC supports EPA's conclusion because there are significant differences between these two documents.[41] Pretreatment is never mentioned in EFSEC's MOA. Ecology's MOA, however, contains an entire section which address the pretreatment permitting program for the state. EPA specifically recognized the authority for Ecology to administer the pretreatment program on behalf of the state. The lack of similar language in EFSEC's MOA can only be construed as EPA failing to recognize EFSEC as having any role with respect to a pretreatment program. It does not make sense that EPA would dictate responsibilities to Ecology as part of a specific authorization to administer a program, and somehow imply that EFSEC would also have authority over a

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[39] City's Motion, Attachment 4.

[40] At the time of filing the motions in this case, the parties did not have this letter in their possession. *See* Applicant's Motion at 13 n.7. This letter was subsequently provided to the parties and is attached to this order.

[41] *Compare* City Motion, Attachments 1 and 4.

program by remaining silent.

Vancouver Energy also asserts that EFSEC's past interpretation of its jurisdiction supports EFSEC's jurisdiction over discharges into a POTW with pretreatment authority. In particular, Vancouver Energy refers to a 1998 memorandum from the Attorney General's Office which concluded that EFSEC had jurisdiction to issue Section 401 water quality certifications.[42] Vancouver Energy contends that there is no real distinction between authorizing a 401 certification and approving a pretreatment program. However, the May 18, 2000 letter from EPA to EFSEC directly found that EFSEC was without authority to issue the necessary discharge permit to the proposed Chehalis Generation Facility. EFSEC decided it would not assert jurisdiction over the pretreatment discharge permit for the Chehalis Generation Facility based upon this letter from EPA.[43] In that case, EPA issued the necessary discharge permit because the state of Washington had not approved a pretreatment program for the City of Chehalis.

The Council concludes that Vancouver Energy's arguments fail because the National Pretreatment Program is a federal program governed by federal law, under which EPA exclusively authorizes which state agencies may oversee a pretreatment program. State statutes cannot confer authority to administer federal laws and programs when specific federal authorization is required, and EFSEC's preemptive authority does not extend to federal law. EFSEC does not have the necessary federal authority to implement any pretreatment requirements. EFSEC can only preempt state laws if it has the requisite authority to act in the first instance.

The Council further concludes that the objectives of the federal and state regulatory schemes regarding implementation of the National Pretreatment Program are met by the City of Vancouver issuing the permit for the discharge from the proposed facility into the City's POTW consistent with its state approved pretreatment program.

Finally, the Council is aware that it would be potentially disruptive to the operation of the City's POTW if EFSEC was somehow able to assert jurisdiction over the proposed discharge. If EFSEC directed the City to accept a discharge, the City could potentially be out of compliance with its NPDES permit and be subject to sanction if it was unable to properly process the effluent. The federal and state regulatory schemes do not contemplate a third party inserting itself between the "control authority" and the "approval authority". The City would find itself subject to two potentially inconsistent directives. Furthermore, it is not at all clear what forum could be used to address a dispute between EFSEC, Ecology, and the City if a disagreement arose regarding pretreatment.

[42] Applicant's Motion, Johnson Decl., Exs. A and B.
[43] EFSEC Order No. 745 at 3 (May 26, 2000).

ORDER

The City of Vancouver's Motion for Order Ruling that EFSEC Lacks Authority to Issue Pretreatment Discharge Permit is **GRANTED**.

Tesoro-Savage Petroleum Terminal LLC's Motion for Determination Regarding Issuance of Industrial Waste Discharge Permit is **DENIED**.

DATED and effective at Olympia, Washington this __31_ day of August, 2016.

STATE OF WASHINGTON ENERGY SITE EVALUATION COUNCIL

[redacted]

William Lynch, EFSEC Chair

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Dennis Moss, Utilities & Transportation Commission

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