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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

VANCOUVER ENERGY
DISTRIBUTION TERMINAL

CASE NO. 15-001

PORT OF VANCOUVER USA'S
POST-HEARING BRIEF

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1 **I. INTRODUCTION**

2 The Port of Vancouver U.S.A.'s location and infrastructure make it uniquely suited
3 for siting Tesoro Savage LLC's proposed Vancouver Energy Distribution Terminal. The
4 proposed project can make the transport of North American crude oil more cost-effective and
5 efficient than current alternatives, providing abundant power at reasonable cost that will
6 benefit Washingtonians. The existing zoning of the Port property is heavy industrial,
7 suitable for uses such as this. The proposed project can be constructed and operated safely,
8 and without displacing any existing Port tenants. Alastair Smith testimony, 273:10-24;
9 David Sawicki Pre-Filed testimony, ¶¶ 28-30, 43; Adjudication testimony, 1324:24-
10 1325:10; 1328:12-21.

11 Siting the proposed project at the Port would allow the Port to continue doing what it
12 is charged by the legislature with, and what it has done successfully for its more than 100-
13 year history: economic development. The Port has a history of generating revenue dedicated
14 to building the Port for the benefit of the local community, the state, and the region, and a
15 proven track record of safe and well-conducted operations, including unit train and marine
16 vessel traffic. Alastair Smith testimony, 238:18-241:9; 245:19-246:25; 251:17-252:15;
17 254:3-7; 259:23-260:20; 264:7-265:9; Exhibits 1018-000001-POR, 1019-000001-POR.

18 The Port does not dispute that the proposed project will have impacts in Vancouver,
19 but those impacts are consistent with the zoning for the Port site, and expected and supported
20 in both the City of Vancouver's long-term planning documents and the subarea plans of the
21 Fruit Valley and Esther Short neighborhoods. Moreover, such impacts are acknowledged
22 and accepted by the legislature. The Energy Facility Site Locations Act (EFSLA) recognizes
23 that the selection of energy facility sites "will have a significant impact on the welfare of the
24 population, the location and growth of industry, and the use of the natural resources of the
25 state." EFSEC Order No. 754, at 9 (2/16/2001). Contrary to the arguments of the project

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1 opponents during the adjudication, the Council is not required to recommend denying this
2 project at this location if all adverse effects of the project cannot be eliminated.

3 The legislature recognized the pressing need for increased energy facilities, and
4 directed EFSEC to weigh this need against the adverse effects of a proposed project, and to
5 recommend siting energy facilities where those impacts can be minimized—not eliminated.
6 “The Council is charged to . . . recommend site approval for power plants where minimal
7 adverse effects on the environment can be achieved.” *Id.*, citing RCW 80.50.010, WAC 463-
8 47-110.; *see, also*, WAC 463-30-300(8); WAC 463-64-020 (draft site certification agreement
9 must include “conditions to protect state or local governmental or community interests
10 affected by the construction or operation of the energy facility”).

11 Indeed, even where the SEPA process identifies significant adverse effects that are
12 not mitigated by provisions of the EFSLA implementing regulations, the outcome is not that
13 the Council must recommend a denial of the project but, rather, that the Council should
14 require additional mitigation. WAC 463-62-010(3).

15 The testimony and evidence offered during the adjudication hearing demonstrated
16 that the property at the Port provides a suitable place through which to move crude oil to
17 meet the needs of West Coast refineries, and that the benefits of siting the project there
18 outweigh the impacts.

19 **II. STANDARDS AND BURDEN OF PERSUASION**

20 The standards for a project proponent’s presentation to EFSEC are set out in chapter
21 463-62 WAC. A project proponent should provide credible information sufficient to support
22 the application against these administrative standards, to address other challenges it knows to
23 exist, and to allow the Council to resolve these issues. EFSEC Order No. 733, at 6
24 (5/19/1999).

25 Tesoro-Savage, as the project proponent, bears the burden of persuasion. “It is . . . a
26 fundamental principle of administrative proceedings that the burden of proof is on the

1 proponent of ... an order or the party asserting the affirmative of an issue.” EFSEC Order
2 No. 733 at 6, fn 12, *quoting* 73A C.J.S. Public Administrative Law and Practice § 128
3 (1983), p. 36. *See also* Washington Admin. Man. Issue 8 (Lexis Law Pub Parker Div 1998)
4 § 9.05.B.3.

5 A court reviewing an agency’s orders in an adjudicative proceeding “**shall grant**
6 relief” if, among other reasons, “[t]he order . . . is in violation of constitutional provisions on
7 its face or as applied;” “[t]he order is outside the statutory authority or jurisdiction of the
8 agency conferred by any provision of law;” or “[t]he agency has erroneously interpreted or
9 applied the law.” RCW 34.05.570(3)(a), (b), and (d) (emphasis added).

10 **III. THE PORT OF VANCOUVER IS A SUITABLE SITE FOR THE**
11 **VANCOUVER ENERGY PROJECT**

12 The Council must decide whether this proposed energy facility, at the proposed site,
13 will produce a net benefit after balancing the availability and costs of energy to consumers
14 and the impact to the environment. EFSEC Order No. 754, at 1.

15 **A. The Vancouver Energy Project Makes Good Economic Sense for the**
16 **Port, the Community, and the Region**

17 It was undisputed during the adjudication that the Port is an economic engine for
18 Vancouver, Clark County, and all of southwestern Washington. A 2014 study of the Port’s
19 economic performance by an outside consultant revealed the following:

- 20 • 20,202 jobs supported by Port activities;
21 • \$2.9 billion of economic activity supported in the region;
22 • \$1.1 billion total personal income/local consumption and related user income; and
23 • \$102.7 million of state and local taxes.

24 Exhibit 1019-000001-POR.

25 Port operating revenues grew from \$37.5 million in 2014 to \$38.2 million in 2015,
26 making 2015 the best revenue year in the Port’s 104 year history. Ex. 1018-000001-POR.

1 All of the revenue that comes from operations and taxes must be reinvested back into the
2 Port and Port infrastructure within the port district. Alastair Smith testimony, transcript at
3 246:13–19.

4 Siting the proposed project on Port property will continue the Port’s excellent record
5 of financial performance, generating up to \$60 million per year in revenue to the Port,
6 through a land lease at market value for the 42 acre footprint of operations, dockage fees for
7 every vessel that comes alongside the loading dock, a wharfage and service fee for every
8 barrel of oil that crosses the dock, rail access fees of \$25 per rail car, and rail maintenance
9 fees. Alastair Smith testimony, 274:12–275:2.

10 The testimony of Columbia Waterfront LLC’s witness, Gerald Johnson, does not and
11 cannot rebut the Port’s evidence. As an initial matter, Mr. Johnson admitted that he had not
12 even read Alastair Smith’s testimony before testifying at the adjudication hearing. Johnson
13 adjudication testimony, at 3485:23–25. Mr. Smith’s testimony rebuts Mr. Johnson’s
14 unsupported assertion that there are alternative uses for the Port property that will be
15 foreclosed by the potential project, “which could have a greater employment density and
16 make more substantial contributions to the local community.” Johnson Pre-Filed Testimony,
17 ¶¶ 10–11. Mr. Johnson testified during the adjudication hearing that he had never even
18 looked at or studied the break-bulk market that he contends is one of the “wide range of
19 marine industrial uses” the Port property could accommodate, but for the commitment of the
20 property to the proposed project. Johnson Pre-Filed Testimony, ¶ 11; transcript at 3482:7–
21 25; 3487:7–19. Yet Mr. Smith testified that the Port is “a breakbulk port, project cargo,
22 automobiles, liquid bulks and dry bulks.” Alastair Smith testimony, transcript at 245:19–20.
23 Indeed, much of the Port’s success is attributable to the fact that it has numerous long-term
24 contracts with the breakbulk carriers, and a tremendous amount of support from the
25 breakbulk community. Alastair Smith testimony, transcript at 245:21–246:2.

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1 In contrast, Todd Schatzki, an expert witness for Tesoro Savage, did review
2 Mr. Smith's hearing testimony, as well as visiting the Port and having discussions with Port
3 staff (including Mr. Smith) long before the adjudication regarding the options and
4 alternatives that might be available for the Port's property. Todd Schatzki testimony,
5 transcript at 1021:13–1024:6.

6 Mr. Johnson's ignorance of the Port's revenue and operations, as well as his
7 demonstrated unfamiliarity with port markets and opportunities, discredits his opinion that
8 there will be limited local benefits from the proposed project, and a potential overall negative
9 economic impact to the State of Washington. Johnson Pre-Filed Testimony, at ¶ 9.

10 **1. The Project Will Allow the Port to Continue to Provide Significant**
11 **Benefits to the Local Community**

12 All of the Port's revenue from the proposed project will be reinvested right back into
13 the Port, the infrastructure, and the community, to create other jobs and more economic
14 benefit. Alastair Smith testimony, transcript at 275:3–7. Three projects at Terminal 1 in
15 particular were highlighted during the adjudication hearing. First, the Port is in negotiations
16 with a hotelier to put in a Marriott hotel. Second, the Port is evaluating development of a
17 mixed-use facility by a local developer, with office space and residential units. Finally, the
18 Port is also studying whether to put its headquarters down on the waterfront, and has signed a
19 lease with a restaurateur that recently opened for business. Alastair Smith testimony,
20 transcript at 275:8–20.

21 **2. The Benefit to the Port Must Be Included in the Analysis of the**
22 **Economic Benefits of the Project**

23 Project opponents argued during the adjudication that the net economic impact of the
24 proposed project could actually be negative because the terminal allegedly would provide
25 relatively few jobs and mainly benefit the sources of crude and refineries (and their
26 investors); that it would allegedly negatively impact property values for current development

1 and planned projects such as the Columbia Waterfront Development, would lead to increased
2 transportation congestion and accidents, and would prevent other profitable uses of the Port’s
3 site. Johnson Pre-Filed Testimony, ¶ 11.

4 Mr. Johnson’s conclusions completely disregard the \$60 million per year in revenue
5 to the Port that would be reinvested in the Port’s infrastructure and the community. And, his
6 unsupported conclusion that the proposed project would prevent other profitable uses of the
7 Port’s property is rebutted by the testimony of Alastair Smith and Tesoro Savage expert
8 witness Todd Schatzki.

9 Mr. Schatzki testified that the expected direct and indirect cumulative primary
10 economic benefits over the assumed 16-year life of the project are approximately \$1.6 billion
11 in labor income, and over \$2.0 billion in economic value added to Clark County and the
12 surrounding area. Schatzki Pre-Filed Testimony at ¶ 28; transcript at 1014:1–1015:11.

13 Mr. Johnson opined that the revenue to the Port was “double-counting” when
14 calculating the benefits of the proposed project. Schatzki testimony, transcript at 1016:24–
15 1017:14; Johnson testimony, transcript at 3455:18–3456:16. In evaluating the economic
16 benefits of the proposed project, the revenue to the Port must be taken into account separate
17 from the project revenue because the Port is a public agency required to reinvest its revenue
18 into infrastructure and the local community. The project opponents failed to account for that,
19 and thus those conclusions should be disregarded.

20 **B. The Project Capitalizes on the Port’s Infrastructure Investments and**
21 **Is Consistent with Statutory Limits on the Port’s Use of its Property**

22 Since 2007, the Port, along with local, state, and federal partners, has made a
23 significant investment in the West Vancouver Freight Access (“WVFA”) rail project, which
24 has increased the efficiency of rail movement into and through the Port, provided Port
25 tenants and customers with a critical transportation advantage, and will help them remain

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1 competitive in the global marketplace. Alastair Smith testimony, transcript at 248:17–250:1;
2 262:11–266:22; 267:14–269:23; 270:24–271:16; Exhibit 1020-000001-POR.

3 Before the proposed project was even a proposal, the Port purchased the Terminal 5
4 property (*see* Exhibit 1012-000001-POR), which allowed it to build the loop track for unit
5 train capabilities at Terminal 5. Alastair Smith testimony, transcript at 271:17–25. The
6 Port’s investment in the loop track and in its rail infrastructure generally, included safety
7 enhancements such as guardrails and high guardrails, concrete railroad ties, continuously
8 welded rails, and welded instead of bolted joints. Larry Guthrie testimony, transcript at
9 1563:20–1567:25; 1569:7–1570:15; 1575:18–1576:22; Exhibits 1043, 1044, 1045.

10 Mr. Guthrie testified that the enhancements the Port invested in has constructed the Port’s
11 industry track to Class 2 to Class 3 standards, which are mainline standards, and it is far
12 superior to anything Mr. Guthrie has seen in any industry track. Larry Guthrie testimony,
13 transcript at 1576:23–1577:16.

14 The layout of the proposed project makes full use of the loop track at Terminal 5,
15 permits the continued use of the area inside the loop track as a laydown area for project cargo
16 such as wind turbines, and allows the Port to shoehorn 40 acres of space into its facilities
17 without affecting any other operations or contracts, and to use what has been underutilized
18 facilities at Berth 13 and 14. Alastair Smith testimony, transcript at 273:5–274:11.

19 The proposed project allow the Port to maximize the use of its property,
20 infrastructure, and facilities within the statutory restrictions on what the Port can do with its
21 property, and how it can use its waterfront property. RCW 53.08.020 (acquisition and
22 operation of facilities); RCW 53.08.080 (permissible purposes and lengths of time for leasing
23 lands, wharves, docks and real and personal property); RCW 53.08.290 (permitting
24 intermodal movement of interstate and foreign cargo).

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1 **C. The Proposed Project Is Consistent with Local Land Use Plans and**
2 **Zoning Ordinances**

3 Project opponents the City of Vancouver, Columbia Riverkeeper, and Columbia
4 Waterfront LLC have argued that the proposed project will conflict with existing and future
5 land uses in the City of Vancouver.

6 David Wechner, a witness for Columbia Riverkeeper, testified that the terminal’s
7 land use impacts will conflict with many of the policies, goals, and regulations that are
8 codified in the city and county comprehensive plans, subarea plans, development code,
9 regional trail and bikeway plan, and shoreline management program. Wechner Pre-Filed
10 testimony, ¶ 4. Mr. Wechner also concluded that “the area is ill-suited to this type of
11 development and the tremendously increased rail traffic that is sure to follow.” *Id.*

12 Mr. Wechner and the project opponents rely on the comprehensive plan and subarea
13 plans to argue that increased rail traffic is an indirect impact of the project that is inconsistent
14 with the plans. However, increased rail traffic was already anticipated, reviewed, and
15 approved under the Final Environmental Impact Statement for the WVFA, with a stated
16 purpose to:

17 [E]xpand port rail capacity and operations within the existing
18 port facility, specifically unit train capacity, to enhance the rail
19 network for future growth and development while minimizing
 disruption to existing port tenants and businesses...

20 Exhibit 0245-000144-TSS, at ix.

21 The WVFA project included significant public outreach and received letters of
22 support from the two neighborhoods nearest the facility: the Fruit Valley Neighborhood
23 Association and the Esther Short Neighborhood Association. Ex. 0244-00100-TSS (July
24 2009) at 37; Appendix A; Appendix B ; Appendix C (letters from the Chairman of the Fruit
25 Valley Neighborhood Association and the President of the Esther Short Neighborhood
26 Association in favor of the West Vancouver Freight Access Project).

1 The City determined that the WVFA, with a stated purpose to increase rail capacity
2 for unit trains, is a permitted land use. The City approved a shoreline substantial
3 development permit, an archaeology permit, a critical areas permit, and a tree removal permit
4 for the WVFA. Exhibit 0245-0144-TSS (May 2011) at 5-2. The City also approved the tree
5 removal permit, the critical areas permit, the substantial shoreline development permit, and
6 the shoreline conditional use permit. *Id.*

7 **1. The Comprehensive Plan Is a Guide Only**

8 A comprehensive plan is intended as a guide, not a restriction on the use of land. *See*
9 *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 873-4, 947 P.2d 1208
10 (“[A] comprehensive plan is a guide and not a document designed for making specific land
11 use decisions...”). The City of Vancouver’s own Comprehensive Plan acknowledges that it
12 contains “policy direction.” Exhibits 3097-000156-VAN and 5903-000156-CRK at iii.
13 Comprehensive plans direct policy but are not intended to direct current project permitting.
14 Council Order No. 872 at 10; Council Order No. 868 at 11 (“[T]he comprehensive plan is by
15 definition a guide to future action (RCW 36.70.020(6)) while the zoning regulation is by
16 definition a current regulatory requirement.”). *See also Whatcom County Fire Dist. No. 21 v.*
17 *Whatcom County*, 171 Wn.2d 421, 427, 256 P.3d 295 (2011) (explaining that comprehensive
18 plans guide and provide a “blueprint” for the implementation of development and zoning
19 regulations).

20 Conflicts regarding the appropriate use of land are resolved in favor of the more
21 restrictive regulation, usually zoning restrictions. *Citizens for Mount Vernon v. City of*
22 *Mount Vernon*, 133 Wn.2d 861, 873-74 (1997). If a project is consistent with zoning but
23 inconsistent with a comprehensive plan’s purpose and/or policies, the project cannot be
24 denied for failure to comply with the comprehensive plan. *Lakeside Indus. v. Thurston*
25 *County*, 119 Wn. App. 886, 890, 83 P.3d 433 (2004). Here, the Council has already
26 determined that the proposed project is consistent with zoning for the property, which is IH-

1 Heavy Industrial, specifically allowing intensive industrial uses such as intensive industrial
2 manufacturing, service, production or storage, often involving heavy truck, rail or marine
3 traffic such as warehousing, freight movement, and railroad yards. Vancouver Municipal
4 Code (VMC) 20.130.010; VMC 20.130.020; Council Order No. 872, at 11 (August 1, 2014).

5 Proper activities in the IH zone include the use of raw materials, significant outdoor
6 storage, and heavy rail traffic. VMC 20.440.020(C). Permitted uses include storage and
7 movement of large quantities of materials, significant outdoor storage, and heavy rail traffic.

8 *Id.*

9 The Council's Order Determining Land Use Consistency establishes *prima facie*
10 proof of consistency and compliance with land use plans and zoning ordinances absent
11 contrary demonstration by anyone present at the hearing. EFSEC Order No. 870, at 4, citing
12 WAC 463-26-090. The City of Vancouver has not rebutted that presumption, and has not
13 shown inconsistency or non-compliance with zoning and land use at the proposed location on
14 the Port's property.

15 **2. The Proposed Project Is Consistent with the Vancouver**
16 **Comprehensive Plan and Subarea Plans**

17 The Comprehensive Plan designates the Port's property as "heavy industrial," which
18 is defined as: "Intensive industrial manufacturing, service, production or storage often
19 involving heavy truck, rail or marine traffic, or outdoor storage and generating vibration,
20 noise and odors." Exhibits 3097-0156-VAN and 5903-0156-CRK at 1-13 (emphasis
21 added). The plan recognizes that the Port of Vancouver provides significant growth
22 opportunity and that Vancouver's economic growth is linked to outside economies, noting
23 the importance of economic development and industry. *Id.* at 2-5, 2-6. The plan states that
24 the City of Vancouver strives "to protect industrial or other targeted lands from conversion to
25 other development" and that it "supports economic development through provision of roads,
26 utilities, and other infrastructure and services, and by maintaining a high quality of life." *Id.*

1 (“Economic development is one of the cornerstones of the Vancouver Comprehensive
2 Plan.”).

3 The plan clearly supports continued freight, including freight along the rail line,
4 recognizing the potential for future increased freight. In fact, Vancouver Comprehensive
5 Plan Policy PFS-4 recognizes the importance of the transportation system, stating that the
6 City should “[w]ork towards completing and sustaining individual components and programs
7 to ensure success of the entire system.” Exhibits 3097-0156-VAN and 5903-0156-CRK at
8 5-55.

9 3. Rail Serving the Port Is Consistent with Subarea Plans

10 The site of the proposed project is not located within a subarea plan and, therefore, it
11 would not be reviewed for consistency with neighboring plans. Brian Carrico testimony,
12 transcript at 456:11–23. Nonetheless, the project opponents argue that the project’s indirect
13 impacts, particularly the rail impacts, should be reviewed under the subarea plans. This
14 would be an uncommon method of analysis under existing land use regulations. Brian
15 Carrico testimony, transcript at 455:8–18. However, even assuming that rail impacts must be
16 consistent with subarea plans, the increased rail traffic associated with the proposed project
17 meets this burden because the subarea plans recognize the rail line, note the increase in rail,
18 and mitigate for rail impacts. Brian Carrico testimony, transcript at 457:4–19.

19 Fruit Valley Neighborhood has a subarea plan. The Fruit Valley Subarea Plan’s
20 Policy FV-1 is to “[e]ncourage new industry and business to locate in Fruit Valley.” Exhibit
21 5904-0071-CRK, at 19. Rail access is listed as an advantage for new businesses to move to
22 the Fruit Valley Subarea:

23 Fruit Valley’s long and prosperous history of business and
24 industry continues today. Advantages of locating business in
25 the Fruit Valley plan area include access to I-5, rail, and Port
26 facilities, reasonable price of land and buildings, and proximity
to housing.

Exhibit 5904-000071-CRK, at 12.

1 The Fruit Valley Subarea Plan recognizes the potential dangers of freight traffic, but
2 noted that “vigilance will be needed” and that “Fruit Valley’s major features need to be more
3 effectively connected into a cohesive circulation network.” Exhibit 5904-000071-CRK at 7.
4 This statement recognizes that freight will continue and the area will need to accommodate
5 it.

6 In its Vancouver City Center Vision and Subarea Plan (VCCV), the City recognizes
7 the rail line’s continued use, noting that it would advance projects to mitigate impacts from
8 the rail line and work around it to increase connections to the waterfront. The VCCV (and its
9 FEIS) mentioned that it would work to “[o]vercome the barrier like feeling of the BNSF
10 railroad berm between downtown and the waterfront.” Exhibit 0253-000333-TSS, at 26.
11 The plan noted street extensions to the waterfront, which would require construction around
12 the rail line. Regarding the expansion of Esther Street, the City recognized the existence of
13 the rail line, stating that it would “[e]xtend Esther Street south of the BNSF Railroad berm to
14 intersect with new connector street.” *Id.*, at 78.

15 The City’s FEIS for VCCV recognized the likelihood of increased development and
16 rail improvements, stating that “[t]he Port is proposing to construct a rail access project to
17 allow for industrial and economic development.” *Id.*, at 6.

18 The Esther Short Subarea and Redevelopment Plan notes that it is “surrounded by
19 multi-modal facilities,” explaining that the Columbia River is “heavily used to transport
20 goods” and that the Port of Vancouver is the most significant user of the Columbia River in
21 the vicinity. Exhibit 3041-000177-VAN, at 4-16. The Esther Short Subarea and
22 Redevelopment Plan also mentions the importance of rail and supports the continued use of
23 rail:

24 Rail service is a very significant component of the
25 transportation system surrounding the subarea. The Burlington
26 Northern Santa Fe Railroad runs freight service in the subarea
between south of West 3rd Street and to the west of the Amtrak
Station on West 11th Street. The Amtrak station provides

1 passenger rail service daily between Vancouver, British
2 Columbia, and San Diego, California, with connections to
points throughout the USA.

3 *Id.*

4 The Esther Short Plan also mentions mitigation for impacts from the existing rail line.
5 It recognizes the impacts of rail and considers rail impacts in its planning, while also
6 supporting waterfront development. The plan mentions that it will provide “[n]ew access to
7 the riverfront at Esther Street through the railroad berm.” *Id.* at 2, 1-10. The plan also states:
8 “Access limits to the waterfront imposed by the railroad berm should be addressed and
9 options should be identified.” *Id.* at 1-7. Finally, the plan notes that “[t]he improvements to
10 Columbia Street were completed to allow for a connection to the Columbia River Waterfront
11 Trail, which extends from Esther Short Park south along the Columbia River for
12 approximately 3.5 miles.” *Id.* at 4-7.

13 The Central Park Subarea Plan, focusing on land to the east of the City Center and
14 I-5, also accommodates and addresses rail impacts. Central Park Plan Policy CP-8 (C)(6)(c)
15 recognizes that the City will dedicate time and effort to improve safety from the rail lines and
16 street traffic, explaining that it will “[p]rovide enhanced pedestrian crossings to make it safer
17 for people to access the facilities in the Central Park Subarea from the north and the
18 waterfront. These crossings may include active traffic calming, such as raised crossings,
19 speed cushions, raised intersections....” Exhibit 3093-000027-VAN at 19.

20 The Downtown Growth and Transportation Efficiency Center Plan also
21 accommodated the rail line, while creating connections to the waterfront, mentioning the
22 street extension under the BNSF railroad as a future improvement to create connections.
23 3095-0100-VAN) at 46-47, 51. The Downtown Growth and Transportation Efficiency
24 Center Plan stated that heavy industrial property has been “carefully located to minimize
25 impacts on established residential, commercial and light-industrial areas.” *Id.*, at 40. The
26 plan also recognizes that the Port is an industrial site. It notes both that Vancouver’s

1 “riverfront location proximity to Portland have largely shaped its economic history” and that
2 “[i]ndustrial and marine commerce in Vancouver is facilitated by the Port of Vancouver west
3 of the city along the Columbia River.” *Id.*, at 41.

4 **4. Increased Rail Does Not Impact Connections to the Waterfront**

5 Project opponents repeatedly reference Vancouver’s goal of reconnecting downtown
6 with the waterfront and recognize that the railroad divides downtown from the waterfront.
7 Many of the connections to be made that are identified in the VCCV have already been
8 created, with funding and assistance from the Port as part of the WVFA, which had the
9 specific purpose of increasing rail. Alastair Smith testimony, transcript at 265:10–266:22,
10 267:14–269:23; Exhibit 1015-000001-POR. With these Port-facilitated, recently-created
11 connections to the waterfront, pedestrians and vehicles will not be significantly impacted by
12 increased rail in and out of the Port.

13 Eric Holmes, the City Manager for Vancouver, acknowledged that the Port has
14 contributed to the “substantial investments” connecting downtown to the Waterfront, and
15 worked in partnership with the City to construct grade-separated crossings that improved
16 access. Holmes testimony, transcript at 2828:5–24; 2862:6–2864:1; 2899:1–3; 2900:01–
17 2901:16.

18 **5. The Columbia Waterfront Project Considered and Mitigated**
19 **Access Issues Associated with Rail**

20 Columbia Waterfront LLC’s plan fully acknowledged the existence of rail, created
21 connections to the waterfront to overcome rail impacts, mitigated for rail, and planned
22 around rail impacts. The Application for the Waterfront recognized constraints created by
23 the rail line, noting that the site is “severely constrained” by the existing railroad. Exhibit
24 5928-000491-CRK at 97.

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1 Due to the presence of the railroad berm, the Application for the Waterfront found
2 that impacts to the Esther Short neighborhood from the Waterfront Project would be
3 minimal. *Id.*, at 29.

4 A key feature of the Waterfront Proposal was the new gateways to the Waterfront
5 from downtown, traveling through Esther and Grant Streets. *Id.*, at 49. These infrastructure
6 improvements were completed in an effort to overcome the impact of rail. As the Columbia
7 Waterfront Master Plan Application notes, “[e]xtending Grant Street will allow closing
8 existing surface crossings of the rail line, reducing the need for train warnings.” *Id.*, at 41.
9 The project noted that extensions of Grant and Esther streets were “the primary mitigation
10 identified... to offset the transportation impacts.” *Id.*, at 21–22.

11 Columbia Waterfront recognized the Port of Vancouver and its impacts on existing
12 transportation and rail activities in its environmental checklist, which is an attachment to
13 Exhibit 5928-00491-CRK. The checklist recognized the recent improvements to the rail line,
14 stating that “the Port recently completed a portion of a planned railroad connection to the
15 Port just north of the project site.” *Id.* at pages 184–85 of the pdf. It also recognized that the
16 Port expanded access to its facilities, explaining that “[t]he Port has constructed the first
17 phase of a rail line to provide greater access to Port facilities. The rail line forms the north
18 boundary of the project site with undercrossings at Grant and Esther streets. The City and
19 BNSF are designing improvements to the BNSF main line and the local street system that
20 would provide additional access to the site.” *Id.* at 12.

21 The Master Plan Application repeatedly mentions that the project design considered
22 the rail line. It explains: “The proposed project has been designed with significant
23 consideration of the adjoining land uses by accentuating the amenities of the site, minimizing
24 the conflicts with the adjoining rail line and nearby industrial uses.” *Id.* at 42, 11–12.

25 Consistent with its recognition of the project site, Columbia Waterfront LLC requested a
26

///

1 variance due to the “unique” location of the site next to the railroad tracks, demonstrating
2 that the project contemplated continued and increased future rail at the site. *Id* at 44.

3 The project opponents argue that the rail line will be a change in use of the rail
4 property because rail traffic will increase. They are mistaken. The Vancouver Zoning Code
5 requires analysis of a project if a building or other structure is “constructed, improved,
6 altered, enlarged or moved” or if “use or occupancy of premises within the city” is
7 commenced or changed.” VMC 20.140.010A. “Use” is defined as “[a]n activity or purpose
8 for which land or premises or a building thereon is designed, arranged or intended, or for
9 which it is occupied or maintained, let or leased.” VMC 20.150.040F.

10 The project will not require any construction, improvement, alteration, enlargement,
11 or movement of the existing rail line. Nor does the project require a change of use in the rail
12 line. “Change in use” is defined as “[a]ny use that differs from the previous use as defined in
13 Chapter 20.160, Use Classifications.” VMC 20.150.040A. The Vancouver Municipal Code
14 contains the following use classification, which does not distinguish the intensity of the rail
15 use or the type of trains transiting the rail line:

16 Rail Lines/Utility Corridors. The regional corridors in public or
17 private ownership dedicated for use by rail lines; above-grade
18 or underground power or communication lines; water, sewer
and storm sewer lines or similar services.

19 VMC 20.160.020E.9.

20 “Rail” is not defined. VMC 20.150.040E. The rail line was *designed, arranged,*
21 *intended, occupied,* and *maintained* for one purpose: rail traffic. The rail line will continue
22 to be used for the same purpose and activity: transporting freight by rail. Project opponents
23 argued during the adjudication that the intensity of the use will increase—up to 28 additional
24 trains per week on this route. However, both Dava Kaitala and Christopher Barkan testified
25 that BNSF manages train traffic on its lines in such a way that adding 28 trains per week to
26 the BNSF system is not a significant increase, and will not necessarily mean that 28 more

1 trains per week will travel through Vancouver. Dava Kaitala testimony, transcript at
2 1482:19–1484:5; Christopher Barkan testimony, transcript at 4662:23–4664:2.

3 Assuming for the sake of argument that, in this context, rail traffic is considered a
4 land “use,” regardless of whether the intensity will increase or not, the use will remain the
5 same and thus there is no change of use; therefore, approval of a change in intensity of rail
6 use is not required under Vancouver’s land use law.

7 While Washington case law has analyzed whether increased intensity can be
8 construed as a “change in use,” those cases are inapposite because they relate only to
9 nonconforming uses. *See e.g. Keller v. City of Bellingham*, 92 Wn.2d 726, 728, 600 P.2d
10 1276 (1979) (providing the test for when intensification of a nonconforming use is
11 impermissible); *Kitsap County v. Kitsap Rifle and Revolver Club*, 184 Wn. App. 252, 337
12 P.3d 328 (2014) (holding that extended hours of a gun club are not an expanded use but the
13 addition of for-profit commercial gun training and explosive use are an expanded use under
14 *Keller*). *See also Meridian Minerals Co. v. King County*, 61 Wn. App. 195, 210, 810 P.2d 31
15 (1991). As Columbia Riverkeeper’s expert witness noted, the proposed project and its
16 associated rail is a conforming use, not a nonconforming use. David Wechner testimony,
17 transcript at 4177:11–15.

18 **6. The Proposed Project Advances Both Local and** 19 **Statewide Interests**

20 The proposed project furthers a statewide interest because Washington has repeatedly
21 recognized the importance of interstate and international trade, the economy, increased
22 energy facilities, and freight mobility. Additionally, the EFSLA recognizes that the siting of
23 energy facilities is a statewide interest. RCW 80.50.010. *See also* WAC 463-14-020.

24 The Vancouver Shoreline Master Program lists the goals and policies for shorelines
25 of statewide significance, which includes the Columbia River shorelines. It states that
26 preference should be given to uses consistent with the statewide interest in the shorelines,

1 which includes uses that recognize and protect the statewide interest over the local interest.
2 Exhibits 3098-000226-VAN and 5920-000226-CRK at 3-1. *See also*, Exhibit 5926-000011-
3 CRK at 13-2.

4 Freight transportation has consistently been recognized as a state interest by the
5 Washington Legislature, which has noted that freight corridors serve international, interstate,
6 and intrastate trade and enhance the state's competitive position in the marketplace. RCW
7 47.06A.001. "As the most trade-dependent state in the nation, per capita, Washington's
8 economy is *highly dependent* on an efficient multimodal transportation network in order to
9 remain competitive." RCW 47.06A.001 (emphasis added).

10 Rail freight is specifically recognized as a state interest as a component in the
11 statewide multimodal transportation plan. RCW 47.06.080 ("The state-interest component of
12 the statewide multimodal transportation plan shall include a state freight rail plan..."). The
13 State also recognized the importance of rail in RCW 47.76.200, which found that a balanced
14 multimodal transportation system is required to maintain the state's commitment to the
15 growing mobility needs and the state's freight rail system is an important element of
16 this multimodal system.

17 The State has identified certain transportation facilities and services to be of statewide
18 significance and "essential public facilities," stating the following:

19 The legislature declares the following transportation facilities
20 and services to be of statewide significance: ... the freight
21 railroad system, the Columbia/Snake navigable river system,
22 marine port facilities and services that are related solely to
23 marine activities affecting international and interstate trade,
24 key freight transportation corridors serving these marine port
25 facilities, and high capacity transportation systems
26 serving regions as defined in RCW 81.104.015.

24 RCW 47.06.140; WAC 365-196-550.

25 The proposed project is a long-term investment in the regional and local economy.
26 Port revenue from the project will be directly invested back into the community. The Port's

1 primary revenue goal in its strategic plan is to “generate and sustain diversified revenues to
2 promote the port’s long-term sustainability and economic base.” Exhibit 1021-000012-POR,
3 at 9. Certainly, a stronger Vancouver is good for the State, so the proposed project advances
4 both state and local interests.

5 City Manager Eric Holmes acknowledged that the Port’s tenants and operations
6 satisfy two policies in the City’s Comprehensive Plan, EC-7 (“Regional Focus. Work with
7 the larger Portland Vancouver region to leverage opportunities, unique site availability, and
8 marketing to promote the region nationally and globally to attract new business.”) and PFS-
9 16 (“Economic Development: In order to support continued economic vitality of Vancouver,
10 major transportation system investments should facilitate freight mobility, job creation,
11 regional competitive position, and revenue growth.”). Eric Holmes testimony, transcript at
12 2686:19–2689:65. Mr. Holmes testified regarding the City’s partnership in and support of
13 the WVFA and its significant investment in rail capacity at the Port, and its recognition of
14 the value of having the Port positioned as it is. Holmes testimony, transcript at 2902:11–22.

15 **D. The Port’s Lease of its Terminals Does Not Require Additional**
16 **Permission from the Department of Natural Resources**

17 During the adjudication hearing, Council Member Sieimann asked Tesoro Savage
18 Expert Witness Brian Carrico whether there was authorization from the Department of
19 Natural Resources for the use of state-owned tidelands under the berths for the proposed
20 project. Adjudication Hearing Transcript, at 469:22–471:2. Under the Port’s Port
21 Management Agreement, no such authorization is required.

22 WAC 332-30-114 provides for management agreements with port districts:

23 By mutual, formal, written agreement the department may
24 authorize a port district to manage some or all of those aquatic
25 lands within the port district meeting the criteria stated in
26 subsection (2) of this section. The port district shall adhere to
the aquatic land management laws and policies of the state as
specified in chapters 79.105 through 79.140 RCW. Port district
management of state aquatic lands shall be consistent with all

1 department regulations contained in chapter 332-30 WAC.
2 These requirements shall govern the port's management of
3 state aquatic lands. The administrative procedures used to carry
out these responsibilities shall be those provided for port
districts under Title 53 RCW.

4 . . .

5 (2) Criteria for inclusion. State-owned parcels of aquatic lands,
6 including those under lease or which may come under lease to
7 a port, abutting port district uplands may be included in a
8 management agreement if criteria set forth in RCW 79.105.420
are met and if there is documentation of ownership, a lease in
good standing, or agreement for operating management, in the
name of the port district for the upland parcel.

9 The DNR and the Port first entered into Port Management Agreement No. 20-080008
10 on October 1, 1984 (PMA). It has been amended several times, in 1988, 1989, 1993, 2008,
11 and 2009. *See* Ex-1047-000036-POR.

12 Under the PMA, the DNR gave a broad delegation of its management authority to the
13 Port:

14 DNR hereby delegates management to the Port, and the Port
15 hereby accepts the delegation and agrees to manage the parcels
16 of state-owned aquatic lands listed on Exhibit A, which are
17 attached hereto and incorporated by reference, (hereinafter
18 referred to as the "Property") as of the date of this
19 Management Agreement in accordance with the provisions
20 hereof. The parties intend that this Management Agreement
21 encompass all authority required for the Port to effectively
22 manage the Property as contemplated by Chapter 221, Laws of
23 1984. However, if future circumstances indicate that additional
24 authority is required to effectively manage the Property, the
25 Port may request such authority from DNR, which approval
26 shall not be unreasonably withheld. The Port is hereby granted
exclusive authority to enter into leases or other use
authorization, including leases or use authorizations to itself,
for the Property or portions thereof, except as otherwise
provided herein. All such agreements shall be subject to this
Management Agreement and shall have a copy of the
Management Agreement attached thereto. Said leases shall
survive this Management Agreement; PROVIDED, that any
such lease by the Port shall contain a clause which states that
upon termination of the Management Agreement, or removal
of the leased property therefrom, the lessor of said lease shall
become DNR. The Port shall furnish a copy of any lease to
DNR upon request.

1 1984 PMA. ¶ 2.

2 Under the PMA, the Port “may use the Property for port purposes as authorized in
3 Title 53 RCW so long as said use is consistent with the Washington State Constitution and
4 laws of the State of Washington.” 1984 PMA, ¶ 7.

5 The original form of PMA did not require the Port to seek or obtain the DNR’s
6 permission for long-term leases of property contained in the PMA unless:

7 the Port contemplates the possible lease or use of that portion
8 of the Property for nonwater-dependent uses, it shall give DNR
9 notice of its intentions at the earliest practicable time. DNR
10 shall promptly meet with the Port to review the proposal for its
consistency with the aquatic land policies of Chapters 79.90
through 79.96 RCW, as amended, and the implementing
regulations adopted by DNR.

11 1984 PMA, ¶ 10.

12 Beginning with the 2008 amendment, the PMA added language requiring that the
13 Port give notice to DNR of any “[c]hanges in planned or actual uses of PMA property.”
14 2008 Amendment, ¶ 5(b); 2009 Amendment, ¶ 6(b). Thus, rather than only being required to
15 provide notice of the DNR of changes from water-dependent to non-water-dependent uses,
16 the Port is required to provide notice of any planned or actual changes to the use of PMA-
17 covered lands.

18 The terminal area of Vancouver Energy’s leasehold is Area 400, which includes the
19 Port’s Berths 13 and 14. Berths 14 and 13 were constructed in 1993, and have been used for
20 marine terminal purposes off and on since that time. Under WAC 332-30-106(71) a
21 “terminal” is “a point of interchange between land and water carriers, such as a pier, wharf,
22 or group of such, equipped with facilities for care and handling of cargo and/or passengers
23 (RCW 79.105.060(21)).”

24 On October 3, 2013, the Port provided written notice to the DNR of the executed
25 Tesoro-Savage Ground Lease and Tesoro Savage’s planned use of Berths 13 and 14. *See*
26 Ex-1048-000003-POR. No approval from DNR is required, because the planned use by

1 Tesoro Savage does not change a water-dependent use to a non-water-dependent use. The
2 Port has complied with its obligations under the PMA. No use authorization permit is
3 required for the Port's lease to Tesoro-Savage of tidelands covered by its PMA.

4 **IV. EFSEC HAS NO JURISDICTION TO IMPOSE CONDITIONS ON THE PROPOSED**
5 **PROJECT THAT WOULD REGULATE RAILROAD OPERATIONS AND VESSEL TRAFFIC**
6 **ON THE COLUMBIA RIVER**

7 EFSEC's power to require conditions in the draft site certification agreement is
8 subject to the specific delegation of authority from the Washington legislature, RCW
9 80.50.040(2). If the legislature does not possess authority, it cannot delegate it to EFSEC.
10 That is the case with the regulation of vessel traffic on the Columbia River. Congress has
11 expressly preempted state law as it pertains to the regulation of transportation by maritime
12 vessels. *United States v. Locke*, 529 U.S. 89, 120 S. Ct. 1135, 146 L. Ed.2d 69 (2000); *Ray*
13 *v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Kelly v. Washington ex rel Foss Co.*, 302 U.S.
14 1 (1937); *Moran v. New Orleans*, 112 U.S. 69 (1884); *Sinnot v. Davenport*, 63 U.S. (22
15 How.) 227 (1859); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Those express
16 preemptions preclude the Council's imposing conditions in a site certification agreement that
17 would impose conditions on Columbia River vessel traffic.

18 The United States Coast Guard has jurisdiction over vessel traffic on the Columbia
19 River. *See, e.g.*, 33 U.S.C. §§ 1223,1225,1228,1232; 33 U.S.C. Chapter 40 ("OPA 90"); 46
20 USC § 70101 *et seq*; 33 C.F.R. § 162.225; 33 CFR Part 6. The Coast Guard determines
21 when and how vessels may transit the Columbia, and at what speeds. Alastair Smith
22 testimony, 277:6–10.

23 Testimony and evidence introduced by the project opponents during the adjudication
24 hearing included assertions that project-related vessel traffic would cause unacceptable
25 impacts on the river, including interference with tribal fishing and wake-stranding of
26 salmonids. *See, e.g.*, transcript, at 3927:20–3928:3 (safety concerns for fishers in small boats
because of large vessel traffic); 4050:1–21 (habitat effects from wakes of large vessels);

1 Exhibit 5208-000044-TRB at 18–21 (impacts from adding more deep draft vessels to the
2 river).

3 Acknowledging such evidence, Chair Lynch inquired of Captain Marc Bayer whether
4 a reduction in vessel speed through areas where wake-stranding was thought to occur would
5 have a positive effect on fish. Transcript, 4549:18–4550:14.

6 And, although the EFSEC Draft Environmental Impact Statement (“DEIS”) was not a
7 hearing exhibit, its contents informed and influenced the testimony of the parties. With
8 regard to vessel traffic impacts, the DEIS recommended that EFSEC include conditions in
9 the Site Certification Agreement including, “[r]educe vessel transit speeds in areas that are
10 more susceptible to wake stranding of juvenile fish due to shoreline geomorphology (e.g.,
11 near Sauvie Island; ENTRIX 2008).” [DEIS, page 3-57, § 3.6.5] and “work with Indian
12 tribes to obtain information on particularly sensitive fishing windows . . . This information
13 will be used to assess whether . . . vessel timing restrictions could be or should
14 be implemented . . .” [DEIS, page 3.13-19, § 3.13.5].

15 As the Port noted in its Motion for Partial Summary Judgment re: Preemption and its
16 Pre-Hearing Brief, federal courts consistently have upheld and reinforced the preemptive
17 effect of federal regulations for maritime vessels. *Locke*, 529 U.S. 89 (striking down
18 Washington laws regulating oil tanker design, equipment, reporting, and operating
19 requirements); *Ray*, 435 U.S. 151 (striking down portions of a Washington law regulating the
20 design, size, and movement of oil tankers on Puget Sound); *Kelly*, 302 U.S. 1; *Moran*, 112
21 U.S. 69; *Sinnot*, 63 U. S. (22 How.) 227; *Gibbons*, 22 U. S., (9 Wheat.) 1.

22 “The federal acts and regulations with respect to vessels on the navigable waters of
23 the United States are elaborate.” *Kelly*, 302 U.S. at 4. Congress has bestowed broad
24 authority, including the authority to preempt state law, upon the Coast Guard. The “power
25 delegated to the [Coast Guard] plainly comprises authority to regulate” vessels navigating in

26 ///

1 United States waterways. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699, 104 S. Ct.
2 2694, 81 L. Ed.2d 580 (1984).

3 Congress has also granted to the Coast Guard broad authority to promulgate
4 regulations to control vessel traffic, to enhance vessel safety and to decrease environmental
5 hazards. *United States v. Massachusetts*, 724 F. Supp.2d 170, 181 (D. Mass. 2008).

6 The questioning by the Council, together with the recommendations from the DEIS,
7 suggest that the Council may consider including as conditions to the Site Certification
8 Agreement limits on vessel speed, or vessel timing restrictions. Alastair Smith testified the
9 United States Coast Guard is responsible for the conduct of maritime cargo ships on the
10 Columbia River shipping channel. Alastair Smith testimony, transcript at 277:3–5.
11 Mr. Smith testified that the Coast Guard sets the speed limits and determined when and how
12 ships travel on that channel. Alastair Smith testimony, transcript at 277:6–10.

13 If the State of Washington, acting through EFSEC, prescribed a time of use for the
14 channel or a speed limit for vessel traffic, it would conflict with the uniform set of laws
15 established under federal law and create the confusion that the preemption doctrine is
16 intended to prevent. Alastair Smith testimony, transcript at 277:14–278:1. Whenever there
17 is a conflict between state law and federal laws and regulations, the state law must fail.
18 *Kelly*, 302 U.S. 1.

19 The power of EFSEC to impose conditions in a site certification agreement on
20 Columbia River vessel traffic “to control vessel traffic, to enhance vessel safety and to
21 decrease environmental hazards” are preempted by federal law. *See Massachusetts*, 724 F.
22 Supp.2d at 181.¹

23 ¹ Even if EFSEC had the authority to impose speed and timing restrictions on
24 Columbia River vessel traffic to prevent wake stranding, the evidence does not support a
25 need for such restriction. As the unopposed testimony of Port witness Dr. Christopher Earle
26 established, “impacts from vessel wakes are and, under the Vancouver Energy Project would
remain, uncommon and minor. These impacts would not significantly affect the status of
the sensitive resources represented by juvenile salmon, native vegetation communities,
and archeological sites.” Dr. Christopher Earle Pre-Filed Testimony, ¶ 30.

1 **V. THE COUNCIL SHOULD BE SKEPTICAL OF ADVOCATES OFFERED UNDER THE**
2 **GUISE OF EXPERT WITNESSES**

3 Rule of Evidence 702 limits expert testimony to “scientific, technical, or other
4 specialized knowledge” that “will assist the trier of fact to understand the evidence or to
5 determine a fact in issue[.]” Wash. R. Evid. 702. The rule also requires that the expert
6 witness be “qualified as an expert by knowledge, skill, experience, training, or education[.]”
7 *Id.* An additional consideration under Rule 702 is whether expert testimony proffered in the
8 case is sufficiently tied to the facts of the case that it will aid the finder of fact in resolving a
9 factual dispute. *United States v. Downing*, 753 F.2d 1224, 1242 (3rd Cir. 1985).

10 Expert testimony aids the court in reaching “an objective, rather than subjective,
11 evaluation of the issue.” *In re Stell*, 56 Wn. App. 356, 368, 783 P.2d 615 (1989), quoting *In*
12 *re Woffinden*, 33 Wn. App. 326, 330 n.3, 654 P.2d 1219 (1982), review denied, 99 Wn. 2d
13 1001 (1983).

14 In evaluating the credibility of witnesses, and the weight to afford witness testimony,
15 the Council should take into account the personal interests or biases of witnesses who present
16 themselves as independent expert witnesses, but who actually have underlying agendas or
17 biases, because such witnesses fail to assist the Council in reaching an objective evaluation
18 of the issues before it.

19 “Bias” is a term used to describe the relationship between a party and a witness which
20 might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or
21 against a party. *United States v. Abel*, 469 U.S. 45, 52, 105 S. Ct. 465, 83 L. Ed. 2d 450
22 (1984); see also *United States v. Greenwood*, 796 F.2d 49, 54 (4th Cir. 1986) (“Bias, defined
23 as ‘emotional partiality,’ *United States v. Robinson*, 174 U.S. App. D.C. 224, 530 F.2d 1076,
24 1079 (D.C. Cir. 1976), is not a collateral issue”); *United States v. Harvey*, 547 F.2d 720, 722
25 (2nd Cir. 1976). The point of a bias inquiry is to expose the witness’s motives, by revealing
26 facts such as interest in the outcome of the trial, see *United States v. Gambler*, 213 U.S. App.

1 D.C. 278, 662 F.2d 834, 837 (D.C. Cir. 1981), or personal animosity or favoritism toward the
2 defendant. *See Abel*, 469 U.S. at 50; *United States v. Bamblor*, 662 F.2d. 834, 837 (D.C. Cir.
3 1981).

4 Witness bias is a common ground for impeachment and may be proved using direct
5 examination, cross-examination, or extrinsic evidence. *State v. Gunderson*, 181 Wn.2d 916,
6 930, 337 P.3d 1090 (2014), *citing* Roger Park & Tom Lininger, *THE NEW WIGMORE:*
7 *A TREATISE ON EVIDENCE: IMPEACHMENT AND REHABILITATION* § 6.1, at 243–46 (2012);
8 *State v. Whyde*, 30 Wn. App. 162, 166, 632 P.2d 913 (1981) (“Bias and interest are relevant
9 to the credibility of a witness.”); *Abel*, 469 U.S. at 52, (“Proof of bias is almost always
10 relevant because the jury, as finder of fact and weigher of credibility, has historically been
11 entitled to assess all evidence which might bear on the accuracy and truth of a witness’s
12 testimony.”); *United States v. Abonce-Barrera*, 257 F.3d 959, 965 (9th Cir. 2001) (evidence
13 of bias goes toward the credibility of a witness).

14 When an expert witness feels the need to advocate for a particular position in his or
15 her testimony, or if he or she regularly testifies for a particular party, that testimony may be
16 biased and should be viewed skeptically. *See Brown v. Spokane County Fire Prot. Dist.*
17 *No. 1*, 100 Wn.2d 188, 203, 668 P.2d 571 (1983) (bias of an expert witness who testified for
18 a party on numerous occasions, and consistently testified only for the defense).

19 **A. Susan Harvey**

20 Ms. Harvey is a consultant who provides technical and regulatory compliance advice.
21 Exhibit 5517-000001-CRK. Ms. Harvey previously worked at the Alaska Department of
22 Environmental Conservation in the Division of Spill Prevention and Response, and has held
23 engineering and supervisory positions at petroleum companies Arco and BP. *Id.*
24 Ms. Harvey holds a Master of Science degree in Environmental Engineering and a Bachelor
25 of Science degree in Petroleum Engineering. *Id.* Ms. Harvey undeniably has experience in
26 oil spill response and planning. However, Ms. Harvey has never been to the Oregon-

1 Washington area, never transited the Columbia River, and never spoken with anyone like
2 Capt. Bayer who has navigated the river. She did not speak with the Marine Fire and Safety
3 Association (“MFSA”) or any of the people associated with the MFSA’s spill response and
4 planning on the Columbia—a system which experts on both sides of this case admitted is one
5 of the best, and most stringent response programs anywhere.

6 Ms. Harvey’s bias is demonstrated by her unsupported and erroneous conclusions
7 regarding navigation risks and supposed inadequacies about the MFSA response plan about
8 which she has neither knowledge, training, nor experience. Her navigation risk testimony
9 was ably rebutted by Captain Marc Bayer. Captain Marc Bayer testimony, transcript at
10 829:16–842:17.

11 Ms. Harvey’s bias is also demonstrated through her testimony regarding supposed
12 inadequacies about the MFSA response plan about which she has neither knowledge,
13 training, nor experience; and in particular her testimony that the MFSA response capability
14 does not include the Pacific Ocean. Susan Harvey Pre-Filed testimony, ¶ 138. In fact, the
15 MFSA Area of Coverage includes the mouth of the Columbia River extending 3 miles into
16 the Pacific Ocean. Exhibit 5513-000187-CRK, Chapter 1 at page 6 of 8 and page 8 of 8.

17 For a spill that happens outside that 3 mile Area of Coverage of the Ocean Zone, the
18 spill response is covered under the vessel’s Federal Vessel Response Plan, which all vessels
19 are required to have under federal law. Exhibit 5513-000187-CRK, Appendix K, page 5 of
20 10. That plan is triggered, and an Ocean Zone Oil Spill Response Organization is activated,
21 for coverage in the Ocean Zone. That is a specific component of the MFSA Plan and
22 satisfies a covered vessel’s planning standard requirements under Oregon and Washington
23 law. Exhibit 5513-000187-CRK, Chapter 6, page 5 of 8.

24 Ms. Harvey’s erroneous and unsupported conclusions regarding the capacity of the
25 MFSA was rebutted by Eric Haugstad. Eric Haugstad testimony, transcript at 1410:21–
26 1416:7.

1 **B. Dr. Ranajit Sahu**

2 Dr. Sahu’s bias is evidenced by the fact that he is a “hired gun” expert witness who
3 has testified for environmental groups (specifically, the Sierra Club or Earthjustice) 78 out of
4 118 times. Dr. Ranajit Sahu testimony, transcript at 3686:22–3687:5. His testimony
5 consistently advocates for higher emission rate calculations—that is, calculations that would
6 purport to show that a facility is emitting more pollutants than an applicant’s or an agency’s
7 model shows.

8 Dr. Sahu conceded on cross-examination that he tried to establish the same elevated
9 emission factors that he advocated before the Council here, in a United States District Court
10 case in Oregon to defeat another crude oil-by-rail project. In that case, the agency and the
11 federal court rejected Dr. Sahu’s testimony and concluded that he was not employing the
12 correct methodology. Dr. Ranajit Sahu testimony, transcript at 3678:9–3680:3.

13 Similarly, in a case called *Sierra Club v. Mosier and the State of Kansas*, Dr. Sahu
14 unsuccessfully advocated for a more stringent emission rate than what the applicant had
15 proposed and what the regulatory agency had approved. Dr. Ranajit Sahu testimony,
16 transcript at 3681:9–3682:6. *See Brown*, 100 Wn.2d at 203 (bias of an expert witness
17 demonstrated because he testified for a party on numerous occasions, and consistently
18 testified only for the defense side).

19 **C. Dr. Elinor Fanning**

20 In weighing Dr. Fanning’s testimony, the Council should be mindful that her opinions
21 are not sufficiently tied to the facts of the case and, therefore, will not assist the Council in
22 resolving a factual dispute about whether or not air impacts associated with the proposed
23 project, as well as existing Port operations, are disproportionately impacting the Fruit Valley
24 Neighborhood. *Downing*, 753 F.2d at 1242.

25 First, Dr. Fanning testified that the outside air that each of us breathes in Vancouver
26 causes cancer. Dr. Elinor Fanning Pre-Filed testimony, ¶ 27. If that is true, it is true even

1 without the proposed project being built. That is, outdoor air is carcinogenic, but it is
2 carcinogenic regardless of whether or not the proposed project is built, and regardless of
3 where a citizen of Vancouver resides. Such a conclusion does little to resolve the questions
4 presented to the Council.

5 Dr. Fanning also testified that the residents of the Fruit Valley Neighborhood would
6 be disproportionately impacted by emissions from three pollutant-creating facilities to the
7 east. Dr. Elinor Fanning Pre-Filed testimony, ¶ 31. Dr. Fanning got her geography wrong:
8 “So in paragraph 31, I don’t know how that got past me, but on line 19, the port lies to the
9 west of the community, not to the east. I think we’re mostly aware of that.” Dr. Elinor
10 Fanning testimony, transcript at 3081:6–9.

11 According to the Pearson Field Airport Windrose, Exhibit 0001-008233-PCE at page
12 470, demonstrates that the majority of surface winds in the area of the Port and the proposed
13 project are from the northwest and the east-southeast. Exhibit 0001-008233-PCE at page
14 469. Given those facts, and that evidence, it is clear that the wind will actually blow air
15 pollutants emitted at the proposed project away from the Fruit Valley neighborhood, not
16 toward it. Thus, Dr. Fanning’s testimony regarding disproportionate impacts is simply
17 wrong, and should not be credited by the Council.

18 Dr. Fanning also concludes that Fruit Valley Neighborhood residents are impacted by
19 Diesel Particulate Matter (“DPM”) from train locomotives from the tracks leading into the
20 Port, the mainline tracks that travel north, and diesel engines on the I-5 highway to the east.
21 Dr. Elinor Fanning testimony, transcript at 3125:23–3127:8. Those sources are presently in
22 existence, and will continue to emit diesel particulate regardless of whether or not the
23 proposed project is built. In addition, the evidence and testimony at the adjudication hearing
24 established that trains departing from the proposed project may not use the mainline tracks
25 that travel north. Alastair Smith testimony, transcript at 285:17–286:2; Carrico testimony,
26 transcript at 523:5–25; 538:3–538:13; Todd Schatzki testimony, transcript at 1065:14–20;

1 Council Member Snodgrass question, transcript at 4015:6–13; Christopher Barkan testimony,
2 transcript at 4776:5–25; Exhibit 0245-000144-TSS at 29.

3 Dr. Fanning advocates for an evaluation of DPM from all sources—including
4 stationary source emissions from the proposed project, existing stationary sources outside the
5 proposed project, and mobile source emissions including trains and vessels. Dr. Elinor
6 Fanning testimony, transcript at 3118:5–17. However, Dr. Fanning concedes that there is no
7 ambient air quality standard for DPM, and mobile sources are not required to be considered
8 when obtaining a permit from a facility. Dr. Elinor Fanning testimony, transcript at
9 3117:11–21; 3118:18–3119:7.

10 Dr. Fanning testified that “[t]here are adverse health effects [from diesel emissions]
11 that occur at any level of pollution exposure; there is no threshold below which effects will
12 not occur.” Dr. Elinor Fanning Pre-Filed Testimony, at ¶ 33. When asked on cross-
13 examination how Tesoro Savage is to address impacts for which there is no threshold,
14 Dr. Fanning responded, “I don’t know.” Dr. Elinor Fanning testimony, transcript at
15 3128:10–19.

16 Clearly, Dr. Fanning’s testimony comes from a position of a toxicologist with public
17 health interests—an advocate for public health, where any adverse impact, regardless of
18 whether there are thresholds or air quality standards, must be prevented. Her bias is against
19 pollution-causing sources. Dr. Fanning’s testimony is, therefore, not that of an unbiased
20 scientific expert whose testimony will assist the Council in making objective evaluations, as
21 the evidentiary rules require. *In re Stell*, 56 Wn. App. at 368. Dr. Fanning’s testimony must
22 be evaluated in light of her bias, and discounted accordingly.

23 **D. Michael Hildebrand**

24 The City of Vancouver relied on the testimony of Mr. Hildebrand to provide a
25 plausible worst-case derailment scenario in downtown Vancouver. Under that scenario,
26 seven cars derailed on the Esther Street overpass at 3:35 p.m. on a weekday, and three of

1 those derailed cars fell off the overpass on the interior or north side of the railway berm
2 (away from the Columbia River). Mr. Hildebrand's scenario also included a release of
3 48,000 gallons of oil. 30,000 gallons spill onto the roadway which flows into storm drainage
4 under the overpass, which makes its way to the Columbia River. The oil ignites from an
5 unknown source, resulting in a fire which eventually ignites an additional 60,000 gallons of
6 oil. Michael Hildebrand Pre-Filed testimony, at 19:2–20:11.

7 As with Dr. Fanning's testimony, Mr. Hildebrand's scenario is based on erroneous
8 facts. First, that rail cars could derail and leave the track at the Esther Street Overpass—a
9 location where the Port has installed guardrails which, as Port witness Larry Guthrie testified
10 based on his nearly 50 years of experience in the rail industry, would prevent such an
11 occurrence. Larry Guthrie testimony, transcript at 1571:1–1572:11.

12 The second erroneous fact on which Mr. Hildebrand's scenario is based is that a
13 release from an oil tank car that rolls off the overpass, toward City Hall can find its way past
14 the berm and into the river. Geographically and structurally, that is not possible. The berm
15 would prevent the movement of oil over the surface of the ground to the river. And between
16 City Hall and the river will be the waterfront development with storm drains and catch
17 basins, which will redirect the flow and prevent it from reaching the Columbia River.

18 In addition to the disconnection between the facts and his conclusions,
19 Mr. Hildebrand testified that his apocryphal scenario was not actually a likely scenario;
20 rather, he wrote the scenario because it would be challenging and good for training purposes.
21 Michael Hildebrand testimony, transcript at 2495:14–19.

22 **VI. THE COUNCIL SHOULD NOT BE SWAYED BY THE LAC-MÉGANTIC DERAILMENT OR**
23 **THE TEXAS CITY REFINERY EXPLOSION**

24 The events at Lac-Mégantic were referenced 63 times during the adjudication
25 hearing, starting with the opening statement of the City of Vancouver. Transcript, at 146:24.
26 The project opponents referenced Lac-Mégantic as frequently as possible, in an effort to

1 paint a vivid picture of a nightmare scenario and inflame the Council's passions against the
2 proposed project. An essential function of the Council as fact finder is to discount theories
3 or scenarios which it determines are unreasonable. The finder of fact is the sole and
4 exclusive judge of the evidence, the weight to be given to the evidence, and the credibility of
5 witnesses. *State v. Snider*, 70 Wn.2d 326, 327, 422 P.2d 816 (1967).

6 It is unreasonable to conclude that a Lac-Mégantic-type event could occur at the Port,
7 and the testimony of Tesoro Savage witness Greg Rhoads during the adjudication
8 demonstrated that. The Transportation Safety Board of Canada's Railway Investigation
9 Report made 18 findings regarding the cause of the accident. Exhibit 3032-000191-VAN, at
10 pages 129–130. There was no evidence offered during the adjudication that any of the events
11 described in the findings could or would happen in the U.S. railroad system under the
12 regulatory authority of the Federal Railroad Administration, or with a BNSF train and crew.
13 Indeed, there was testimony and evidence offered to the contrary. *See, e.g.*, Dava Kaitala
14 testimony, transcript at 1486:3–1496:16; Exhibit 113-000027-TSS.

15 First, the Lac-Mégantic train was left parked on the mainline, unmanned. Here,
16 operationally, BNSF would not leave a train unattended on the mainline for any length of
17 time. Greg Rhoads testimony, transcript at 2126:14–2128:12. Moreover, an emergency
18 order issued after (and to prevent a recurrence of) Lac-Mégantic by the Federal Railroad
19 Administration, FRA Emergency Order 28, prohibits highly hazardous flammable unit trains
20 from being unattended outside of the rail yard in any location. Greg Rhoads testimony,
21 transcript at 2128:13–19; Exhibit 0246-000007-TSS.

22 The track grade from where the locomotive was parked into the center of the town of
23 Lac-Mégantic was a steep grade, over 1% in some places. Greg Rhoads testimony, transcript
24 at 2130:5–15; Exhibit 3032-000191-VAN at p. 5, Figure 2. Grades of approximately 1.00%
25 are considered steep for railway purposes. Exhibit 3032-000191-VAN at p. 8, fn 9. As the
26 Council saw when it toured the Port, there is no steep grade leading into, or inside the Port.

1 The tank cars at Lac-Mégantic were DOT-111s. Exhibit 3032-00191-VAN at p. 48. The
2 tank cars that will be unloaded at the Port will be DOT-117 standard tank cars. John Hack
3 testimony, transcript at 1628:20–23; Keith Casey testimony, transcript at 2103:6–8. The
4 tracks were not constructed or maintained to the standards that the Port’s tracks are
5 maintained, and lacked the safety enhancements the Port’s tracks have. Exhibit 3032-00191-
6 VAN at pages 4, 9, 33; *see, also*, Larry Guthrie testimony, transcript at 1560:14–1577:18. In
7 Mr. Rhoads’ expert opinion, a Lac-Mégantic-type event is “exceedingly improbable” to
8 occur here. Greg Rhoads testimony, transcript at 2131:9–12.

9 Similarly, the Port will not be another Texas City disaster, because Texas City was
10 not a crude oil storage incident. Linda Garcia testimony, transcript at 3740:7–18; 3776:8–23;
11 3778:12–14. The Texas City event that occurred in the 1940s was not the biggest oil storage
12 facility disaster in this country, and tanks that held approximately the same amount of oil as
13 the proposed project will hold did not explode and level everything within a three mile
14 radius. Rather, that event was a “classic case study of ammonium nitrate fertilizer
15 explosions.” Dr. Kelly Thomas testimony, transcript at 4471:23–4472:19.

16 According to textbooks referenced by Dr. Kelly, in 1947 the ship the *Grandcamp* was
17 docked at the Texas City port facility and was being loaded with approximately 2,200 tons of
18 ammonium nitrate² and other cargo when a fire broke out in one of the holds of the ship. The
19 ammonium nitrate eventually exploded, knocking two airplanes out of the sky, throwing
20 pieces of the ship approximately three miles, damaging everything in the vicinity and causing
21 nearby storage tanks containing oil to catch on fire. Those tanks did not explode, however.
22 Dr. Kelly Thomas testimony, transcript at 4472:21–4474:7.

23 Like Lac-Mégantic, Texas City is not a good comparison for understanding the risks
24 of the proposed project on the Port’s property. Nor is the Texas City event evidence that an

25 ² By way of comparison, the ammonium nitrate bomb that Timothy McVeigh used to
26 destroy the Murrah Building in Oklahoma City, Oklahoma in 1995 weighed only 1.5–3 tons.
United States v. McVeigh, 153 F.3d 1166, 1177 (10th Cir. 1998).

1 explosion at the proposed project's tanks would level the Fruit Valley Neighborhood.
2 Dr. Kelly Thomas testimony, transcript at 4474:8–20. The Council should disregard
3 evidence and testimony relating to events like Lac-Mégantic and Texas City that will not be
4 replicated at the Port in determining the impacts of the proposed projects at its location on
5 Port property.

6 **VII. BALLAST WATER IS HEAVILY REGULATED TO PREVENT INVASIVE SPECIES AND**
7 **THERE IS NO EVIDENCE THOSE REGULATIONS ARE INADEQUATE TO PROTECT THE**
8 **COLUMBIA RIVER**

9 Project opponent witness Blaine Parker testified that increased shipping traffic will
10 increase by 50% the volume of ballast water released into the Columbia River, bringing with
11 it a variety of invasive, nonnative species. Blaine Parker Pre-Filed Testimony, at 7:10–15;
12 transcript at 3868:17–3869:7. Mr. Parker testified that the methods used to prevent the
13 introduction of invasive species in ballast water are imperfect, and can result in thousands of
14 organisms released per ship. Blaine Parker testimony, transcript at 3875:14–3876:2.

15 In response to Council questions, Mr. Parker acknowledged that Washington and
16 Oregon have stepped up their ballast monitoring programs and, as a result, vessels have been
17 “pretty good” about ballast water exchanges in the ocean for flushing. Blaine Parker
18 testimony, transcript at 3902:24–3903:7.

19 Ballast water discharge is regulated under stringent federal and state requirements
20 to prevent the spread of aquatic non-indigenous species. All vessels calling at the proposed
21 project must comply with, at a minimum, the EPA vessel general permit and Washington's
22 ballast water regulations, Chapter 77.120 RCW; Chapter 220-150 WAC.

23 Current regulations require that all vessels discharging ballast water either conduct
24 open-ocean exchange or implement approved technology requirements treatment systems to
25 meet numeric water quality standards. While current regulations are increasingly requiring
26 vessels to install and use approved treatment technologies that must meet strict numeric
technology-based effluent limitations, other vessels constructed before 2013 must conduct

1 open-ocean ballast exchange, which has been found to be over 99% effective at removing
2 high-risk invasive species.

3 Mr. Parker offered no evidence to support his contention that the comprehensive
4 ballast water regulations are insufficient to protect the Columbia River from invasive species
5 that may be carried in vessels visiting the proposed project. His testimony regarding ballast
6 water risks should be disregarded.

7 **VIII. THE USE OF TETHERED TUGS MAY BE OFFERED BY TESORO-SAVAGE, BUT**
8 **SHOULD NOT BE REQUIRED BECAUSE THEY ARE UNNECESSARY**

9 Tesoro Savage witness Dennis O'Mara testified regarding his work modeling the
10 benefit of a tethered tug escort of laden vessels. Dennis O'Mara testimony, transcript at
11 1353:24–1354:16. Mr. O'Mara testified that he had performed the assessment and modeling
12 at Tesoro Savage's request, and concluded that the overall risk reduction of both collision
13 and grounding through the use of tethered tugs ranges from 21–47%. *Id.* When all other
14 potential causes of oil spills from vessels are removed from the assessment, Mr. O'Mara
15 concluded that tethered tugs would be able to save a vessel from drift grounding
16 approximately 90% of the time. *Id.*

17 Thus, it is not accurate to conclude that a tethered tug will reduce the risk of an oil
18 spill by 90%, because the 90% figure applies to only one mitigation measure (tethered tugs)
19 for one outcome (drift grounding), without any prediction of the likelihood that any
20 grounding results in an oil spill. Therefore, one cannot conclude that tethered tugs are a cost-
21 effective mitigation measure for reduce the risk of oil spills.

22 Similarly, it is not accurate to conclude that it is an appropriate condition of site
23 certification to require that tethered tugs be used with all laden vessels. Although it may be
24 appropriate for Tesoro Savage to commit to that condition voluntarily, requiring tethered
25 tugs has the potential to create precedent for requiring every laden vessel departing the Port,
26 regardless of cargo, to have a tethered tug escort, which would vastly increase the costs of

1 transit, detrimentally impact Port tenants who use vessels to transport cargo, and could have
2 a chilling effect on interstate commerce.

3 It is also likely that such a requirement would exceed the Council's authority, because
4 it would have the effect of regulating vessel traffic, to enhance vessel safety and to decrease
5 environmental hazards, which is authority held solely by the Coast Guard. *Massachusetts*,
6 724 F. Supp. 2d at 181.

7 **IX. CONCLUSION**

8 The Energy Facility Site Locations Act recognizes the pressing need for increased
9 energy facilities, like this one. The Council is charged with evaluating whether this proposed
10 energy project will create a net benefit, after considering the impacts. There is no
11 requirement that the Council reject the proposed project unless the proponents can
12 demonstrate that there will be no adverse effects on the environment, ecology of the land and
13 its wildlife, and the ecology of state waters and their aquatic life. Indeed, such a requirement
14 would be inconsistent with the Legislature's recognition, in adopting the Act, that the
15 selection of sites will have a significant impact upon the welfare of the population, the
16 location and growth of industry and the use of the natural resources of the state. RCW
17 80.50.010.

18 During the adjudication, the Port offered evidence clearly demonstrating the safety
19 and suitability of the proposed site at the Port. David Sawicki Pre-Filed testimony, ¶¶ 28–30,
20 43; Adjudication testimony, transcript at 1324:24–1325:10; 1328:12–21.

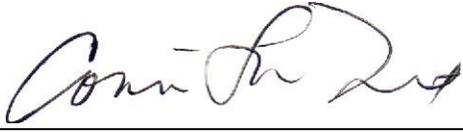
21 The Port offered un rebutted evidence demonstrating the public benefits provided by
22 the Port, and evidence of the public benefits associated with siting the proposed project at the
23 Port. Alastair Smith testimony, transcript at 238:18–241:9; 245:19–246:25; 251:17–252:15;
24 254:3–7; 259:23–260:20; 264:7–265:9; 274:12–275:2; Exhibits 1018-000001-POR, 1019-
25 000001-POR.

26 ///

1 The Port urges the Council in its deliberations to keep these benefits in mind, and to
2 allow the Port to retain the structures and practices that will enable it to continue to provide
3 significant benefits to the local community, the State and the region as it has for more than
4 100 years.

5 Dated this 6th day of September, 2016.

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1 **CERTIFICATE OF SERVICE**

2 The undersigned declares under penalty of perjury, under the laws of the State of
3 Washington, that the following is true and correct:

4 That on this 6th day of September, 2016, I arranged for service of the foregoing PORT
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