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BEFORE THE STATE OF WASHINGTON  
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of  
Application No. 2013-01

Docket No. EF-131590

TESORO SAVAGE PETROLEUM  
TERMINAL LLC

APPLICANT TESORO SAVAGE'S  
STATEMENT OF LAND USE  
CONSISTENCY

TESORO SAVAGE VANCOUVER  
ENERGY DISTRIBUTION TERMINAL

**I. INTRODUCTION**

14  
15 With this Statement of Land Use Consistency (“Statement”) Applicant Tesoro Savage  
16 Petroleum Terminal LLC requests that the Washington State Energy Facility Site Evaluation  
17 Council (“Council”) issue a determination pursuant to RCW 80.50.090, and WAC 463-26-  
18 060 that the Tesoro Savage Vancouver Energy Distribution Terminal (the “Project”) is  
19 consistent and in compliance with the City of Vancouver’s (“City”) zoning ordinance and  
20 land use plan. While the Applicant has worked with the City to obtain a certificate of  
21 consistency pursuant to WAC 463-26-090 (“Certificate”), the City has not provided a  
22 Certificate to the Applicant. Accordingly, pursuant to WAC 463-26-100, Applicant offers  
23 this statement in lieu of a Certificate from the City.

24 The question before the Council at the upcoming Land Use Hearing is narrow.  
25 Pursuant to the Energy Facilities Site Location Act, chapter 80.50 RCW (“EFSLA”) the  
26 Council is tasked with determining whether the “site” (as distinguished from the “Project”) is

1 consistent with local land use plans *or* local zoning, but not necessarily both. With specific  
2 respect to the zoning inquiry, EFSEC assesses consistency with the City’s zoning ordinance  
3 and not the full range of the City’s development regulations adopted pursuant to land use  
4 statutes including the Growth Management Act (“GMA”). Similarly, with respect to  
5 consistency with land use plans, the focus is on the land use element of the comprehensive  
6 plan. In this particular situation, the answer to this preliminary and straightforward question  
7 is unequivocally, “yes”; the uses allowed in the heavy industrial zoning district and in the  
8 applicable comprehensive plan designation applied at the site unquestionably include the  
9 proposed use.

10         It is anticipated that the City and Project opponents may ask the Council to review  
11 consistency with *all* City land use codes, including critical area regulations and other  
12 development regulations adopted pursuant to the GMA and Shoreline Management Act  
13 (“SMA”). The City and others have also urged the Council to wait to determine consistency  
14 with these broader land use regulations until the Council completes the environmental review  
15 for the Project. Some may even urge the Council to determine that the Project is inconsistent  
16 with this broader range of development regulations. As demonstrated below, however, the  
17 Project is consistent with or can be conditioned to be consistent with this broader range of  
18 land use regulations. But perhaps more importantly, for purposes of the Land Use Hearing,  
19 the Council is not required to review the Project for consistency with this broader range of  
20 development regulations at this stage in the proceedings. While those broader land use  
21 regulations address important considerations, the issues governed by those broader land use  
22 regulations will be addressed in the Council’s environmental and project review and should  
23 be taken up at the Adjudication pursuant to RCW 80.50.090(3). They need not be answered  
24 at this stage in the proceedings as part of the Land Use Hearing for the Council to determine  
25 that the Project is consistent with zoning ordinance or land use plans.

26



1 300). *Id.* The crude oil will be temporarily stored in the tanks until transferred by pipeline  
2 approximately 5,300 feet to the south to the existing dock at Berths 13 and 14 located at the  
3 Port's terminal 4 where vessel loading operation occurs (Area 400). Marine vessels will  
4 arrive and moor at the existing dock for loading.

5 **B. Applicant's Efforts to Obtain Certificate.**

6 Applicant submitted the ASC to the Council on August 29, 2013. The Council  
7 conducted a preliminary informational public hearing pursuant to RCW 80.50090(1) on  
8 October 28, 2013. Pursuant to WAC 463-26-090, the Applicant worked with the City to  
9 attempt to obtain a certificate from the City attesting to the fact that the proposal is consistent  
10 with land use plans or zoning ordinances.

11 Even prior to submitting the ASC, the Applicant conducted a pre-application  
12 conference with the City on June 27, 2013, to discuss the Project and gather City input.  
13 Exhibit 1, Pre-Application Conference Request, June 2013; Exhibit 7, Pre-Application  
14 Conference Report dated June 27, 2013 ("Pre-App Report"). At that conference, the City  
15 concluded that the proposed use would be consistent with City Heavy Industrial Zoning. *Id.*

16 Because the City does not have a codified process for issuing a certificate of  
17 consistency as anticipated by WAC 463-26-090, the Applicant and the City chose to use the  
18 City's standard Type II (administrative) permit review process as a proxy for evaluating land  
19 use consistency to address this EFSEC question.<sup>2</sup> On September 13, 2013, Applicant  
20 submitted more detailed information to the City planning staff to facilitate its further review  
21 of the Project for a consistency determination. Exhibit 2, Request for Determination of Land  
22 Use Consistency, dated September 13, 2013. The City charged the Applicant review fees in  
23 the amount of \$29,707.08 for its review for consistency under its Type II process. Exhibit 8,

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25 <sup>2</sup> Using the Type II evaluation as a proxy to evaluate the EFSEC land use consistency question does  
26 not mean the City must follow its local Type II permit procedures and actually issue a Type II decision. As  
noted in Section III.D, below, that would be inconsistent with EFSLA.

1 Receipt for Review Fees. The City staff prepared a draft Certificate which confirmed not  
2 only that the Project was consistent with zoning ordinances, but that it was consistent with or  
3 could be conditioned and designed to be consistent with the broad range of any applicable  
4 land use development regulations. Exhibit 9, Staff Determination of Consistency and  
5 Compliance with Land Use Plans and Zoning Ordinances, dated December 16, 2013 (“Staff  
6 Determination”). That Staff Determination included recommended conditions. However,  
7 the City never formally issued this Staff Determination. Instead, presumably in response to  
8 public opposition, the City has simply chosen to withhold that conclusion. The City now  
9 argues that the City needs more time to complete its evaluation of the Project’s consistency  
10 with all land use development regulations (which as indicated below, is far beyond the scope  
11 of the Council’s Land Use Hearing), despite the fact that it completed the Staff  
12 Determination addressing that broad question five months ago in which staff found the  
13 Project is consistent.

### 14 III. LEGAL ARGUMENT

#### 15 A. The Council’s Inquiry at the Land Use Hearing is Narrow and Only Includes 16 Review of Consistency with Zoning Ordinances or the Land Use Element of the Comprehensive Plan.

17 Pursuant to RCW 80.50.090(2), the Council shall conduct a public Land Use  
18 Consistency Hearing (“Land Use Hearing”) to determine “whether or not the proposed site is  
19 consistent and in compliance with city, county, or regional land use plans or zoning  
20 ordinances.” This is a limited inquiry. First, as noted in the statute and emphasized by the  
21 Washington Supreme Court, a proposed project need only be consistent with land use plans  
22 or zoning ordinances. *Friends of Columbia River Gorge, Inc. v. State Energy Facility Site*  
23 *Evaluation Council*, 178 Wn.2d 320, 346, 310 P.3d 780 (2013). As the Court observed, the  
24 statute uses a “disjunctive” such that the provision “requires only that the project be  
25 consistent with either ‘land use plans *or* zoning ordinances.’” *Id.* (emphasis in original).

26

1 Where a “use is allowed by the zoning ordinance, it need not be consistent with ‘land use  
2 plans.’” *Id.*

3 Second, the statutory language focuses on the consistency of the “site” with land use  
4 plan or zoning ordinance. EFSLA defines site as the “proposed or approved location” of the  
5 facility, not the project itself. *See* RCW 80.50.090(2); RCW 80.50.020(19); WAC 463-26-  
6 110.

7 Finally, the set of regulations and plans against which the site is to be evaluated is  
8 limited. EFSLA defines both “zoning ordinance” and “land use plans” as narrow subsets of  
9 the full range of land use development regulations and planning documents adopted by the  
10 City. Each is addressed separately in more detail below.

#### 11 **1. “Zoning Ordinance”**

12 EFSLA defines “zoning ordinance” as “an ordinance of a unit of local government  
13 regulating the use of land and adopted pursuant to chapter 35.63, 35A.63, 36.70, or 36.70A  
14 RCW. . .” RCW 80.50.020(22). This definition incorporates the various codes that authorize  
15 local jurisdictions to adopt a wide range of land use regulations including zoning ordinances.  
16 “Zoning ordinance,” as used in those statutory authorities, however, refers to a specific  
17 category of land use regulation by which the City defines and divides the City limits into  
18 districts, identifies uses allowed within those districts, and imposes dimensional restrictions  
19 on development within those districts. *See Cougar Mountain Associates v. King Cnty.*, 111  
20 Wn.2d 742, 756, 765 P.2d 264, 272 (1988) (“The heart of a typical zoning ordinance defines  
21 the various districts and the regulations of use, lot size, site coverage, density, height,  
22 landscaping, parking, signs and other matters.”) (*quoting* R. Settle, *Washington Land Use*  
23 *and Environmental Law and Practice* § 2.3(a) (1983)). Zoning codes have “two basic  
24 functions”:

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1 First, they regulate the *use* of a particular property. Second, they control the  
2 *dimensions* of improvements that can be placed on the property, such as  
height, bulk, and setbacks.

3 Zoning codes have two parts: (1) a map of the community showing how  
4 each piece of property is classified, and (2) a text describing what is or is not  
allowed in each zone. Both the map and the text are enacted by local  
governments for their jurisdictions.

5 *Sammamish Cmty. Council v. City of Bellevue*, 108 Wn. App. 46, 53, 29 P.3d 728, 731  
6 (2001) (quoting VI Washington State Bar Ass'n, Real Property Deskbook § 97.1, at 97-3 (3d  
7 ed.1996). *See also* RCW 35A.63.100(2) (zoning ordinance is the legislative action of  
8 “[d]ividing the municipality into appropriate zones within which specific standards,  
9 requirements, and conditions may be provided for regulating the use of public and private  
10 land, buildings, and structures, and the location, height, bulk, number of stories, and size of  
11 buildings and structures, size of yards, courts, open spaces, density of population, ratio of  
12 land area to the area of buildings and structures, setbacks, area required for off-street parking,  
13 protection of access to direct sunlight for solar energy systems, and such other standards,  
14 requirements, regulations, and procedures as are appropriately related thereto”).<sup>3</sup>

15 The phrase “zoning ordinance” is consistently identified as only one of the full  
16 panoply of land use development regulations that the City can or has adopted by the statutes  
17 referenced in the definition in RCW 80.50.020(22). While the land use authorities referenced  
18 in RCW 80.50.020(22) broadly authorize location jurisdictions to adopt “development  
19 regulations,” which are the “controls placed on development or land use activities by a  
20 county or city,” RCW 36.70A.030(7), the definition of “development regulations” includes  
21 “zoning ordinances” as a specific subset of the broader category of development regulations.  
22 *See* RCW 36.70A.030. *See also* RCW 35.63.125, RCW 35A.63.105, and RCW 36.70.545  
23 (where each Code Section states, “[D]evelopment regulations” has the same meaning as set  
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25 <sup>3</sup> The clause at the end of this definition of “zoning ordinance” from the optional municipal code is not  
26 expansive or “open-ended.” *Sammamish Cmty. Council*, 108 Wn. App. at 54-55 (“the “such other standards”  
language relates to the specific terms listed earlier in the statute, which describe traditional zoning concepts.”)

1 forth in RCW 36.70A.030.”). Development regulations, more broadly, includes any other  
2 controls on development or land use activities, including, specifically “critical areas  
3 ordinances, shoreline master programs, official controls, planned unit development  
4 ordinances, subdivision ordinances, and binding site plan ordinances.” *Id.* Thus the  
5 reference in RCW 80.50.090 to “zoning ordinance” refers to that specific (and more narrow)  
6 term and does not include the broader range of land use development regulations. *See also*  
7 *Sammamish Cmty. Council*, 108 Wn. App. at 54-55 (ordinance adopting traffic concurrency  
8 and levels of service applied to development projects pursuant to GMA is not a “zoning  
9 ordinance” as the term is used in RCW 35A.63.100). Indeed, in 2006 the legislature  
10 amended the definition of zoning ordinance in RCW 80.50.020(22) to incorporate the  
11 statutory reference to the GMA as an additional authority for adopting zoning ordinances.  
12 Laws of 2006, ch. 196 §1. Had the legislature intended for the Council to review for  
13 consistency with the full range of land use “development regulations” adopted pursuant to  
14 the GMA, it could have revised the statute to require consistency with “development  
15 regulations,” rather than the “zoning ordinances” but it did not.

16 Thus, the Council’s inquiry into consistency with “zoning ordinances” refers solely  
17 and simply to consistency with the zoning district in which the Site is located and any  
18 dimensional restrictions contained therein. It does not require examination of the full range  
19 of development regulations, including but not limited to GMA development regulations,  
20 critical areas regulations, concurrency obligations, building codes, fire codes, shoreline  
21 regulations or other development regulations.

## 22 2. “Land Use Plans”

23 EFLSA defines “Land use plans” to mean “a comprehensive plan *or* land use element  
24 thereof adopted by a unit of local government pursuant to chapter 35.63, 35A.63, 36.70, or  
25 36.70A RCW. . .” RCW 80.50.020(14) (emphasis added). Thus there are two potential  
26 focuses of the inquiry: “comprehensive plan,” generally, or its “land use element,”

1 specifically. The use of the disjunctive denotes that compliance with either satisfies the  
2 consistency requirements. *See, e.g., Friends of Columbia River Gorge*, 178 Wn.2d at 346.

3 The various statutory authorities incorporated into the definition of “land use plans”  
4 (the same that are incorporated in the definition of zoning ordinance) inform and refine the  
5 meaning of the terms “comprehensive plan” and “land use elemnt.” First, based on those  
6 statutory authorities, the term comprehensive plan refers broadly to the “generalized  
7 coordinated land use policy statement of the governing body of a county or city that is  
8 adopted pursuant to this chapter.”<sup>4</sup>

9 The more specific term “land use element” refers to a required component of the  
10 comprehensive plan pursuant to the Planning Enabling Act, the Optional Municipal Code,  
11 and the GMA. RCW 36.70.330; RCW 36.70A.050; RCW 35A.63.061. Under all these  
12 sources of authority, the Land Use Element refers to the specific component of the  
13 Comprehensive Plan that designates location of general categories of land uses throughout  
14 the local jurisdiction and related issues such as allowed population densities and growth  
15 projections. The GMA has further expanded necessary contents of comprehensive plans by  
16 adding other required and optional elements, including housing, utilities, capital facilities,  
17 economic development, transportation, parks, among others, but the land use element  
18 requirement remains as an element that is distinct from these other categories. RCW  
19 36.70A.070.

20 Thus consistency with the “land use plan” under the Council’s governing statute  
21 indicates that the inquiry is satisfied by consistency with the “land use element” of a

22 <sup>4</sup> RCW 36.70A.030, *accord* RCW 35A.63.010(4) (A “comprehensive plan” means “the policies and  
23 proposals approved by the legislative body as set forth in RCW 35A.63.060 through 35A.63.072 of this chapter  
24 and containing, at least, the elements set forth in RCW 35A.63.061.”); RCW 36.70.020(6) (Comprehensive  
25 plan” means the policies and proposals approved and recommended by the planning agency or initiated by the  
26 board and approved by motion by the board (a) as a beginning step in planning for the physical development of  
the county; (b) as the means for coordinating county programs and services; (c) as a source of reference to aid in  
developing, correlating, and coordinating official regulations and controls; and (d) as a means for promoting the  
general welfare).

1 comprehensive plan. Based on the statutory references, the focus of the land use element is  
2 on the land use designation and policies that are included in the land use element. Although  
3 many comprehensive plans contain several other elements covering a range of topics, those  
4 elements are not the focus of the Council’s evaluation of consistency with “land use plans.”

5 **B. The Project Is Consistent with the City’s Zoning Ordinance and Land Use Element.**

6 When considering the limited set of the City’s regulations and policies that are  
7 applicable to the Council’s inquiry, the Council can and should issue a finding of land use  
8 consistency at this time. Although the Council’s governing statute only requires a showing  
9 of consistency with “land use plans” or “zoning ordinances,” based upon the analysis above,  
10 the Project meets both the City’s “land use plans” and “zoning ordinances.” Specifically, the  
11 proposed use at the site is consistent with the applicable City zoning district and any  
12 restrictions or requirements associated therewith (height, setbacks, lot coverage, parking and  
13 the like), such that it is consistent with the City’s zoning ordinance. Additionally and  
14 alternatively, the proposed use at the site is consistent with the land use designation of the  
15 site in the comprehensive plan and the policies in the “land use element” of the City’s  
16 comprehensive plan.

17 **1. The Project Complies with the City’s Applicable Zoning Requirements**

18 There is little question the Project complies with the City’s applicable zoning  
19 ordinance.<sup>5</sup> As shown on the City’s Zoning Map the site (Areas 200, 300, 400, 500, and 600)  
20 are zoned IH-Heavy Industrial. Exhibit 3, Zoning map. This is undisputed. *See, e.g.,*  
21 Exhibit 7, Pre-App Report at line 129 (the City concluded that the site is zoned “Heavy  
22 Industrial”). The Vancouver Municipal Code (“VMC”) defines the IH zone as:

23 <sup>5</sup> The Zoning Ordinance is codified in parts of title 20 of the Vancouver Municipal Code (“VMC”),  
24 which also includes the full range of all of the City’s development regulations. *See* VMC 20.110.010 (purpose  
25 of title 20 VMC is to implement the “requirements of the Washington State Growth Management Act (GMA)”  
26 and to “Consolidate into Title 20 all regulations affecting development within the Vancouver Municipal Code  
(VMC)”). The zoning ordinance is incorporated in chapters 20.130, 20.160, and portions of 20.170 VMC, as  
well as the various chapters listing descriptions of and allowed uses in the zoning districts.

1 The IH zoning district provides appropriate locations for intensive industrial  
2 uses including industrial service, manufacturing and production, research and  
3 development, warehousing and freight movement, railroad yards, waste-  
4 related and wholesale sales activities. Activities in the IH zone include those  
5 that involve the use of raw materials, require significant outdoor storage and  
6 generate heavy truck and/or rail traffic. Because of these characteristics, IH-  
7 zoned property has been carefully located to minimize impacts on established  
8 residential, commercial and light industrial areas.

6 VMC 20.440.020(C) (emphasis added).

7 VMC 20.440 addresses the uses that are permitted in the IH zone and the zoning  
8 ordinance development standards to be applied to those uses. Among the various uses listed  
9 in the Zoning Ordinance, the Project fits the definition of “Warehouse/Freight Movement”:

10 Uses involved in the storage and movement of large quantities of materials or  
11 products indoors and/or outdoors; associated with significant truck and/or rail traffic.  
12 Examples include free-standing warehouses associated with retail furniture or  
13 appliance outlets; household moving and general freight storage; cold storage  
14 plants/frozen food lockers; weapon and ammunition storage; major wholesale  
15 distribution centers; truck, marine and air freight terminals and dispatch centers; bus  
16 barns; grain terminals; and stockpiling of sand, gravel, bark dust or other aggregate  
17 and landscaping materials.

15 VMC 20.160.020(D)(5). The proposed use satisfies this definition because it involves  
16 “storage and movement of large quantities of materials” and is “associated with significant...  
17 rail traffic.” The Staff concluded in its Pre-App Report and in the Draft Determination that  
18 the proposed use is “Warehouse/Freight Movement.” Exhibit 7, Pre-App Report at line 149  
19 (“The proposal is fits within this use [(referring to Warehouse/Freight Movement)]  
20 classification.”); Exhibit 9, Staff Determination at p. 9 (“All of [the Project] uses fit within  
21 the description of warehouse/freight movement.”).

22 The proposed warehousing/freight movement use is consistent with the zone. First,  
23 it is specifically mentioned in the definition of the IH zone as an appropriate use within the  
24 zone. Additionally, pursuant to the use table in the zoning ordinance, the use is outright  
25 permitted in the IH zone. Table 20.440.030-1 at VMC 20.440.030(B).

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1 The City has previously acknowledged this consistency in the Pre-App report: “The  
 2 proposal fits within this use classification.” Exhibit 7, Pre-App Report at line 149. The Pre-  
 3 App Report also notes that Warehouse/Freight Movement is an outright allowable use in the  
 4 IH zone. Exhibit 7, Pre-App Report at line 151 (citing Table 20.440.030-1 in the VMC), *See*  
 5 *also*, Exhibit 9, Staff Determination at p. 9 (“The proposal includes the use of a marine  
 6 terminal, rail access and large volumes of storage. All of these uses fit within the description  
 7 of warehouse/freight movement.”). Therefore, the Project is a permitted use within the IH  
 8 zone.

9 The Project also complies with the development restrictions for the IH zone imposed  
 10 by the City’s zoning ordinance. Specifically, Table 20.440.040-1 establishes certain  
 11 minimum and maximum development requirements within the IH zone. In the Applicant’s  
 12 Project Narrative that was included in the Request for Determination of Land Use  
 13 Consistency, Exhibit 2, the Applicant provided the following table indicating how the Project  
 14 complies with each of the development requirements identified in Table 20.440.040-1.

| Development Criteria                                  | IH Zone   | Proposed   |
|---|---|--|
| Minimum Lot Size                                      | None  | N/A  |
| Maximum Lot Coverage                                  | 100%  | Approximately 70%  |
| Minimum Lot Width                                     | None  | N/A  |
| Minimum Lot Depth                                     | None  | N/A  |
| Minimum Setbacks and Screening Standards*             | Pursuant to buffering and screening standards contained in VMC Tables 20.925.030-1 and 20.925.030-2. 10 feet with L2 landscaping, along SR 501, 5 foot setback from west and east property lines with L1 landscaping, and 0 foot setback for water dependent uses along the Columbia River. | Proposed setbacks are 60 feet from SR 501 to the nearest fuel storage tank, with at least 5 foot setbacks from the west and east property line. Landscaping includes trees and shrubs consistent with the L2 standard. |
| Maximum Height  | None  | Approximately 50 feet (rail unloading)   |
| Minimum Landscaping Requirement (% of total net area) | 0%  | ≤5%; Pursuant to buffering and screening standards contained in VMC Tables 20.925.030-1 and 20.925.030-2. 10% landscaping buffer in parking area of Area 200.  |

\*According to the pre-application report (lines 156-165), minimum setback requirements are not appropriate within the Port. However, the portions of the proposal that border on property not owned by the Port, or have frontage on a public street, will meet applicable landscaping/setback requirements. The landscaping standards will apply to the boundary of Area 300 along NW Lower River Road (SR 501) and between areas 300/500 (Parcel 1A) and Farwest Steel.

1 As such, there is little question that the Project complies with the zoning ordinance because it  
2 is an outright permitted use within the IH zone and is consistent with the dimensional  
3 requirements associated with that zoning district.

4 Staff agreed in its Pre-App Report and in the Staff Determination. Exhibit 7, Pre-App  
5 Report at lines 151-52; Exhibit 9, Staff Determination at p. 9-10. Additionally, the  
6 conclusion is reinforced by earlier staff conclusions related to a similar project in the same  
7 zoning district. The City previously determined that similar facilities located on the Port of  
8 Vancouver's property, were consistent with zoning ordinances, including: a facility that  
9 stores petroleum products, methanol/ethanol, and other bulk materials in above-ground  
10 storage tanks and transports of these products via pipeline, rail, truck and marine vessel; and  
11 a liquefied propane gas storage and transfer facility that receives propane via rail and  
12 transfers to storage tanks and ships to wholesale users via truck. *See*, Exhibit 10, Excerpts of  
13 NuStar/Valero Main Terminal Permitting Documents, including Staff Report and Decision,  
14 PRJ2006-01854/PSR2006-00058, Feb. 16, 2007, at p. 4 ("This proposal use fits within the  
15 definition of warehouse and freight movement."); Exhibit 11, Excerpts of NGL/Keyera  
16 Vancouver Terminal Permitting Documents, including Staff Report and Decision, PRJ2009-  
17 01316/PSR2009-0006, Apr. 16, 2010, at p. 7 (the proposed liquefied propane gas storage and  
18 transfer facility is "classified as warehouse/freight movement" and is "permitted outright in  
19 the IH zone.").

20 Accordingly, the Council can and should conclude that the Project is consistent and in  
21 compliance with the City's Zoning Ordinance. A determination of consistency with the  
22 City's zoning ordinance independently satisfies the requirements of RCW 80.50.090(2) and  
23 WAC 463-26-110.

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1           **2. The Project Also Complies with the City’s Land Use Element of its**  
2           **Comprehensive Plan**

3           The Project also complies with the land use element of the City’s comprehensive  
4 plan. The City’s “Community Development” chapter of its Comprehensive Plan is the Land  
5 Use element.<sup>6</sup> The City’s comprehensive plan map that is part of the “Community  
6 Development Chapter” designates the Port’s property as “industrial.” Exhibit 6,  
7 Comprehensive Plan at Fig. 1-6. The comprehensive plan notes that the “industrial”  
8 classification includes several sub-types. The proposed Project site is categorized under the  
9 IH – Heavy Industrial sub-type. Exhibit 6, Comprehensive Plan at p. 1-12, 1-23, Fig. 1-6,  
10 and Table 1-5; Exhibit 7, Pre-App Report at line 106. The IH zone under the comprehensive  
11 plan is intended to include “Intensive industrial manufacturing, service, production or storage  
12 often involving heavy truck, rail or marine traffic, or outdoor storage and generating  
13 vibration, noise and odors.” Exhibit 6, Comprehensive Plan at Table 1-5. As described  
14 above, the proposed use is consistent with this comprehensive plan designation.

15           The Project is also consistent with the City’s community development policies in the  
16 land use element, only some of which apply to non-residential development. The community  
17 development policies encourage efficient development resulting in compatible and  
18 complementary uses being located near each other. *See*, Comprehensive Plan, Community  
19 Development Policies CD-2 (Efficient Development Patterns); CD-9 (Compatible Uses); and  
20

21  
22           <sup>6</sup> While the chapter is not specifically titled the “Land Use Element,” it is the chapter that seeks to  
23 satisfy the requirement in the GMA for a land use element. The chapter “describes the vision for land use and  
24 development of the built environment” and includes the growth capacity, population estimates, the  
25 comprehensive plan land use designations and map and associated policies. The components in this chapter of  
26 the comprehensive plan therefore address the requirements of the “land use element” in the GMA, which  
include the need to identify “the proposed general distribution and general location and extent of the uses of  
land” and provide “population densities, building intensities, and estimates of future population growth.” RCW  
36.70A.070(1). By contrast, the other chapters of the comprehensive plan address other GMA requirements,  
such as the housing element, capital facilities and utilities elements, and economic development element.

1 CD-10 (Complementary Uses). Given that the adjacent zoning is also largely IH, the Project  
2 satisfies these broad goals of the comprehensive plan.<sup>7</sup>

3 Therefore, because the Project is located on the Port's property and is surrounded by  
4 IH-zoned properties, and because the facility's operations fall within a use permitted within  
5 the IH zone, the Project clearly meets the "land use element" of the City's comprehensive  
6 plan.

7 C. **While Beyond the Scope of the Council's Narrow Inquiry, the Project Also**  
8 **Complies and is Consistent with The Full Range of City Development**  
9 **Regulations and Comprehensive Plan Policies.**

10 In its filing on May 23, 2014, the City argues that the Council cannot issue a  
11 determination of consistency until the City, and then the Council, review the full range of  
12 potential environmental impacts and all of the City's comprehensive plan and development  
13 regulations adopted pursuant to the GMA, as well as the fire code. As indicated above, that  
14 level of review of City development regulations is unnecessary at this stage of the  
15 proceedings. The Land Use Hearing is not the appropriate forum. Instead, as required by its  
16 governing statute, the Council should limit its determination of consistency to the land use  
17 element of the comprehensive plan or its "zoning ordinance."

18 Nevertheless, the Project complies or can be conditioned to comply, even with this  
19 broader set of regulations and comprehensive plan policies. Exhibit 2, Request for  
20 Determination of Land Use Consistency, dated September 13, 2013, describes, in detail, how  
21 the Project will comply with all of the City's applicable development regulations. In addition  
22 to the material provided in the Request for Determination, Applicant has prepared and  
23 attached to this submittal a chart summarizing how the Project complies or can be

24 <sup>7</sup> While not part of the land use "element" of the City's comprehensive plan, the Project also complies  
25 with the economic development policies, which state that the City is committed to "Provid[ing] an adequate  
26 supply of industrial and/or business park areas with opportunities for family-wage employment and revenue  
generation." Comprehensive Plan, Economic Development Policies EC-4 (Industrial and Business Park  
Sanctuaries). The Project also meets this "element" of the comprehensive plan because it is located in an  
industrial area and will produce many family-wage jobs. Project Narrative at § 3.1.

1 conditioned to comply with the broader comprehensive plan policies, beyond the land use  
2 element and comprehensive plan designation. Exhibit 12, Chart Showing Consistency with  
3 Comp Plan Policies. Based on these materials, the Project either currently satisfies, or will  
4 satisfy, all of the City's development regulations that would be applicable to the Project if  
5 reviewed under the City's Type II permit review process. Any impacts from the proposed  
6 Project, as will be identified in the draft EIS, that do not currently comply with the City's  
7 regulations or policies, will be avoided or mitigated during the State Environmental Policy  
8 Act ("SEPA") review process.

9       The City staff issued a draft Determination agreeing that the Project complies and is  
10 consistent with this broader set of development regulations. Exhibit 9, Staff Determination at  
11 p. 5 ("As indicated in this report, staff has determined, if this project were subject to city  
12 review, the project would be approved subject to conditions. The applicant has demonstrated  
13 the proposal is in compliance with the development regulations of the city of Vancouver.").  
14 The City's conclusion in the Staff Determination is consistent with prior City permitting  
15 decisions in which the City has previously approved other similar bulk liquid transfer and  
16 storage facilities that transfer products from rail and store in tanks. *See* Exhibit 10, Excerpts  
17 of NuStar/Valero Main Terminal Permitting Documents; Exhibit 11, Excerpts of  
18 NGL/Keyera Vancouver Terminal Permitting Documents. In those decisions, the City  
19 concluded that those facilities are consistent not only with zoning ordinances, but with the  
20 entire range of City development regulations.

21       Thus, even if the Council were to accept the City's arguments regarding the scope of  
22 the inquiry at the Land Use Hearing, the Council should find consistency using the same  
23 reasoning employed by staff in the Staff Determination that the Project either is, or can be  
24 designed and conditioned to be consistent with all City plans and regulations.

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1 **D. The Council Should Not Delay its Determination of Land Use Consistency.**

2 In addition to suggesting that the Council must evaluate the full range of City  
3 development regulations and comprehensive plan policies beyond just the zoning ordinance  
4 and land use element, the City and others (including Columbia Riverkeeper and Friends of  
5 the Columbia Gorge), also urge the Council to delay its consideration of land use  
6 consistency. The City's arguments (like those of Riverkeeper, Friends; and Columbia  
7 Waterfront LLC) are premised on the mistaken assumption that the City needs to complete a  
8 Type II process, consider all of its land use development regulations, take public comment,  
9 and review the EIS before issuing a Certificate. The Applicant has already responded to  
10 these arguments in a letter to the Council dated May 20, 2014, and incorporates by reference  
11 the letter into this submittal. Exhibit 13, Applicant Letter to Council, dated May 20, 2014.

12 **1. The City Does Not Need to Complete a Type II Process or Defer**  
13 **Issuance of a Certificate Until SEPA is Complete.**

14 As indicated in the Applicant's May 20 Letter, the City does not need to complete a  
15 full "Type II" land use permit review process or issue a land use permit. To do so would be  
16 directly contrary to EFSLA which gives EFSEC, and not the City, the exclusive jurisdiction  
17 to issue permits for the terminal Project.<sup>8</sup> Rather, the City is asked to prepare a Certificate,  
18 which, if issued, is *prima facie* evidence of consistency upon which EFSEC will rely in  
19 making its determination. WAC 463-26-090.

20 Nor is the City required to wait until SEPA is complete before issuing a Certificate.  
21 As noted above, the Certificate of Consistency is not a land use permit, but is evidence  
22 provided to EFSEC, the issuance of which does not trigger SEPA. WAC 463-26-110. But,  
23 even if the Certificate of Consistency was considered an "action" under SEPA, then EFSLA  
24 expressly exempts from EIS review any "actions" by the City pertaining to the approval,

25 <sup>8</sup> See RCW 80.50.120 ("The issuance of a [site] certification shall be in lieu of any permit, certificate  
26 or similar document required by any department, agency, division, bureau, commission, board, or political  
subdivision of this state, whether a member of the council or not").

1 authorization or permitting of a facility governed by EFSEC. RCW 80.50.180. Moreover, as  
2 noted below, an interpretation that would require completion of environmental review prior  
3 to City issuance of a Certificate is directly contrary to the governing EFSEC regulations.  
4 Therefore, the City is not required to wait for completion of an EIS to issue a Certificate.

5 **2. The Council Does Not Need to Complete its EIS before Making a**  
6 **Consistency Determination.**

7 While it is now increasingly apparent that the City will not issue a Certificate in  
8 advance of the Land Use Hearing, EFSEC Regulations anticipate that the Council can and  
9 should proceed with the land use consistency hearing and issue a determination even in the  
10 absence of a Certificate. *See* WAC 463-26-100. Contrary to the City’s arguments (and those  
11 of Riverkeeper and Friends), the Council does not need to wait until the EIS is complete to  
12 make its determination of consistency. In fact, to delay the determination of land use  
13 consistency until completion of the EIS is directly contrary to SEPA and EFSEC regulations.

14 In this EFSEC process in which the Council is the lead agency,<sup>9</sup> the “action” before  
15 which SEPA review must be completed is the substantive decision on the proposal pursuant  
16 to EFSLA, not EFSEC’s preliminary determination of consistency or the City’s issuance of a  
17 certificate of consistency. *See* RCW 80.50.100; WAC 463-47-060. SEPA does not require  
18 EFSEC to have completed environmental review before taking preliminary steps in its  
19 project review (such as the land use consistency determination) any more than SEPA requires  
20 completion of environmental review before the City takes preliminary steps in its analogous  
21 project review of land use decisions within its exclusive jurisdiction (such as a notice of  
22 complete application).

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24 <sup>9</sup> WAC 197-11-980 (“For all governmental actions relating to energy facilities for which certification  
25 is required under chapter 80.50 RCW, the lead agency shall be the energy facility site evaluation council  
26 (EFSEC”). *See also Friends of Columbia Gorge*, 178 Wn.2d at 347 (local government’s ordinance addressing  
SEPA process is not “zoning ordinance” that is considered as part of the land use certification, and, even if it  
was, consistency with local SEPA Ordinance is not required because EFSEC is lead agency).

1 The suggestion that the Council must complete SEPA review before issuing a  
2 determination of consistency is also inconsistent with EFSLA and its implementing  
3 regulations which anticipate that EFSEC will make a land use determination before the EIS is  
4 complete. According to EFSLA and EFSEC regulations, the Council conducts the Land Use  
5 Hearing pursuant to RCW 80.50.090(2) in advance of the more general Adjudication  
6 pursuant to RCW 80.50.090(3).<sup>10</sup> Further, the Council's regulations authorize the Council to  
7 initiate its Adjudication *before* completion of an EIS. WAC 463-47-060. Thus, the rules  
8 expressly envision that the Council can and should complete its land use consistency review,  
9 which is a precursor to the Adjudication, well in advance of the completion of its  
10 environmental review.

11 This procedural sequence further supports the narrow scope of EFSEC's land use  
12 determination as described in section II.A, above. The Council addresses at the Adjudication  
13 and in its environmental review the very issues the City argues must be addressed in this  
14 preliminary land use consistency determination. Thus, from a practical standpoint, if the  
15 Council adopts the City's interpretation and defers its land use consistency determination  
16 until it considers the wide range of issues that will be addressed in the Adjudication and the  
17 EIS, Council would seemingly be required to defer consistency determinations in all of its  
18 matters until the Adjudication, which is inconsistent with the process identified in the EFSEC  
19 rules.

20 Thus, the City's arguments for more delay are misguided. The Council can and  
21 should proceed with the land use hearing and appropriately limit its inquiry to consistency  
22 with the land use element of the comprehensive plan or zoning.

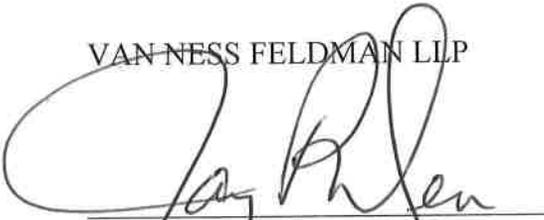
23 <sup>10</sup> This sequence of events is further reinforced by the process when EFSEC determines that a project  
24 is inconsistent with zoning ordinances and land use plans. In that circumstance, the Council will schedule an  
25 adjudicative hearing to consider preemption of the zoning ordinance and land use plans which "may be  
26 combined or scheduled concurrent with the adjudicative proceeding held under RCW 80.50.090(3)." WAC  
463-28-060(2). This process clearly envisions that the land use consistency determination precedes the  
adjudication.

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**IV. CONCLUSION**

For the foregoing reasons, the Applicant requests that the Council issue a determination of consistency with the City’s “land use plans” or “zoning ordinances” following the conclusion of the Land Use Hearing, as required by RCW 80.50.090(2) and WAC 463-26-100. The Council should reject arguments to defer consideration of the consistency determination. The Council will review the wide range of issues asserted by the City and others in the Adjudication where Council and the public will have the benefit of a full EIS. In any event, the concerns raised by the City are beyond the scope of the Land Use Hearing. The Council’s inquiry at the Land Use Hearing is narrow and straightforward and should result in a determination that the Project is consistent with both the City’s land use element and its zoning ordinance.

DATED this 27<sup>th</sup> day of May, 2014.

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Attorneys for Applicant

**TABLE OF EXHIBITS**

| Exhibit No. | EXHIBIT   |  |
|-------------|---|--|
| 1.          | Pre-Application Conference Request, June 2013   |  |
| 2.          | Request for Determination of Land Use Consistency, dated September 13, 2013   |  |
| 3.          | City Zoning Map   |  |
| 4.          | Comprehensive Plan Map  |  |
| 5.          | Zoning Code Excerpts  |  |
| 6.          | Comprehensive Plan Excerpts   |  |
| 7.          | Pre-Application Conference Report, dated June 27, 2013 ("Pre-App Report")   |  |
| 8.          | Receipt for Review Fees, dated September 13, 2013   |  |
| 9.          | Staff Determination of Consistency and Compliance with Land Use Plans and Zoning Ordinances, dated December 16, 2013 ("Staff Determination")                        |  |
| 10.         | Excerpts of NuStar/Valero Main Terminal Permitting Documents (including Valero Main Terminal Staff Report and Decision, PRJ2006-01854/PSR2006-00058, Feb. 16, 2007) |  |
| 11.         | Excerpts of NGL/Keyera Vancouver Terminal Permitting Documents, including Staff Report and Decision, PRJ2009-01316/PSR2009-0006 (Apr. 16, 2010)                     |  |
| 12.         | Chart Showing Consistency with Comp Plan Policies   |  |
| 13.         | Applicant Letter to Council, dated May 20, 2014   |  |