

May 20, 2014

*Via E-Mail and Hand Delivery*

Mr. William Lynch, Chair  
Mr. Stephen Posner, Manager  
EFSEC  
P.O. Box 43172  
Olympia, WA 98504-3172

Re: Tesoro Savage Vancouver Energy Distribution Terminal  
Application No. 2013-01  
Docket No. EF-131590  
Letters requesting cancellation of the May 28 Land Use Hearing

Dear Mr. Lynch and Mr. Posner:

Our firm represents the Tesoro-Savage joint venture, applicant for the above-referenced Energy Distribution Terminal proposed at the Port of Vancouver. We recently learned that Friends of the Columbia Gorge (“Friends”) and Columbia Riverkeeper (“Riverkeeper”) have submitted letters asking EFSEC to cancel the May 28 Land Use Hearing.<sup>1</sup> We urge the Council to reject these requests and proceed with the Land Use Hearing as scheduled. Pursuant to chapter 80.50 RCW (“EFSLA”) and title 463 WAC (“EFSEC Regulations”), and contrary to the assertions in both letters, the Land Use Hearing is not the forum to evaluate all of the project components and purported impacts. Rather, the question before the Council in the Land Use Hearing is whether the proposed project site is consistent with the City’s land use plan or zoning ordinance. RCW 80.50.090(2). No more time or delay is needed to address this straightforward, preliminary question. EFSEC should proceed with the Land Use Hearing, and limit the issues to be discussed to those identified in the statute.

The question before the Council at the Land Use Hearing is narrow. As indicated in EFSLA and confirmed by the state Supreme Court, the site need only be consistent with local land use plans *or* local zoning, but not necessarily both.<sup>2</sup> With specific respect to the zoning inquiry, EFSEC assesses consistency with the City’s zoning ordinance, which includes consistency with the allowed uses within the zoning district and dimensional restrictions on size,

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<sup>1</sup> While Tesoro-Savage, as the applicant, was not copied on these requests, it is interesting to note at the outset that the City Attorney’s office was copied on the correspondence and these letters requesting additional delay correspond with the release of a draft resolution by a sub-committee of the City Council urging denial of the entire proposal without consideration for the EFSEC process and without consideration of any of the information that might be provided in the EIS once completed.

<sup>2</sup> *Friends of Columbia Gorge, Inc. v. State Energy Facility*, 178 Wn.2d 320, 346, 310 P.3d 780 (2013) (affirming EFSEC’s determination of consistency because RCW 80.50.090(2) requires consistency “with either ‘land use plans or zoning ordinances’”; where “the use is allowed by the zoning ordinance, it need not be consistent with ‘land use plans.’”).

bulk, lot coverage and density, but does not include the full range of the City's development regulations adopted pursuant to the GMA.<sup>3</sup> The statute further indicates that the consistency evaluation at the Land Use Hearing is limited to the project "site," defined as the "proposed or approved location" of the facility, not the project itself. *See* RCW 80.50.090(2); RCW 80.50.020(19); WAC 463-26-110. In this particular situation, as will be demonstrated at the Land Use Hearing on May 28, the answer to this preliminary and straightforward question is unequivocally, "yes"; the uses allowed in the heavy industrial zoning district and in the applicable comprehensive plan designation applied at the project site unquestionably include the proposed use.

Friends and Riverkeeper urge the Council to delay the hearing on a number of grounds, none of which have any merit. Their arguments are premised on the assumption that the City needs more time to complete its Type II land use decision pursuant to the process in the City's code. Contrary to the assumptions in the letters, the City does not need to complete a full "Type II" land use permit review process or issue a land use permit. Rather the City is asked to prepare a "certificate," which, if issued, is prima facie evidence of consistency. WAC 463-26-090. Even if the City fails to provide a certificate of consistency, the EFSEC Regulations anticipate that the Council can and should proceed with the land use consistency hearing. *See* WAC 463-26-100. In this case, the City does not have a codified process for issuing a land use certificate. Thus, initially, in September 2013, the applicant and the City agreed to use the Type II (administrative) permit review process as a proxy for evaluating land use consistency to address this EFSEC question. However, using the Type II evaluation as a proxy to evaluate the EFSEC land use consistency question does not mean the City must follow its local Type II permit procedures and actually issue a Type II decision. To do so would be directly contrary to EFSLA which gives EFSEC, and not the City, the exclusive jurisdiction to issue permits for the terminal project.<sup>4</sup> Nor does the public need a separate and additional opportunity through the City's Type II process to provide comments to the City on the land use consistency question, because the public is afforded an opportunity to comment on that limited question before EFSEC. This proposal falls squarely under EFSEC jurisdiction, not City land use jurisdiction.

More generally, the City does not need more time to complete its evaluation of the limited question posed in the Land Use Hearing. In fact, City staff completed a draft Certificate titled "Determination of Consistency and Compliance with Land Use Plans and Zoning Ordinances" in December, 2013, which confirmed that the proposal was, or could be, conditioned and designed to be consistent with all city requirements, should EFSEC decide to recommend approval of the project. That draft decision included recommended conditions. The

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<sup>3</sup> The EFSEC statute specifically uses the phrase "zoning ordinance" as defined in RCW 80.50.020, and not the broader category of land use "development regulations" as used in the Growth Management Act ("GMA"). RCW 80.50.090. "Development regulations" as used in the GMA includes zoning ordinances, but also include a wider range of land use regulations. *See* RCW 36.70A.030; RCW 35A.63.100 (zoning ordinance is the mechanism of "dividing the municipality, or portions thereof, into appropriate zones" which may include location, height, bulk, lot coverage and density limits). *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).

<sup>4</sup> *See* RCW 80.50.120 ("The issuance of a [site] certification shall be in lieu of any permit, certificate 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").

City staff's evaluation is complete. However, presumably in response to public opposition, the City has simply chosen to withhold that conclusion. Now these project opponents seek further delay.<sup>5</sup> The months of delay that have occurred since the City staff prepared the draft land use consistency evaluation should not be further exacerbated with an unwarranted request to further delay the Land Use Hearing. The delay is directly contrary to one of the main purposes of EFSLA. Specifically, EFSEC's process is designed to "avoid costly duplication in the siting process and ensure that decisions are made timely and without unnecessary delay." RCW 80.50.010(5).

The Council should also reject Friends' and Riverkeeper's concerns about the adequacy of the notice for the Land Use Hearing. These project opponents do not cite to any public notice requirements in EFSEC Regulations or EFSLA supporting their claims, and assert only that the public and the City will not have ample time to prepare for the Land Use Hearing. Contrary to their assertions, the amount of notice is adequate for the limited question before the Council. In fact, EFSEC Regulations require only 24 hours notice for special meetings like the Land Use Hearing. WAC 463-18-050. The 19 days given in advance of the hearing provides more than ample notice. Moreover, in addition to Council's nineteen day notice, the City has had over eight months to consider the limited question of site consistency. Similarly, there is no merit to Riverkeeper's allegations of purported deficiencies in EFSEC's notice regarding written comments. The notice includes the docket number and mailing address, so any confusion regarding the address to which comments may be mailed is invented.

There is also no merit to Friends' and Riverkeeper's suggestion that the City should not issue a certificate until the EIS is complete. Their argument confuses the purpose of the Land Use Hearing and is directly contrary to EFSEC and SEPA regulations. SEPA regulations specify that EFSEC, not the City, is the lead agency for SEPA purposes.<sup>6</sup> Thus, the specific City SEPA regulations upon which Riverkeeper and Friends rely do not apply to this EFSEC review. More generally, the broad range of topics and impacts to be addressed in the EIS are not properly the subject of the Land Use Hearing. All of the issues related to the potential environmental impacts of the proposed terminal should be deferred to the Adjudication, when the draft environmental impact statement has been completed and released for full public review and comment. This sequence is identified in EFSLA and EFSEC Regulations, which specify that the Council conducts the Land Use Hearing pursuant to RCW 80.50.090(2) in advance of the more general Adjudication pursuant to RCW 80.50.090(3) at which the Council considers the EIS and the more general project impacts and mitigation. If at the end of the Land Use Hearing, the Council determines that the proposed site is inconsistent with zoning or land use plans, the Council will

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<sup>5</sup> A draft resolution prepared by a subcommittee of the City Council urges outright denial, without completion of any of the environmental review, without regard for the EFSEC procedures and without recognition of EFSEC authority. It is ironic, if not worse, that Friends, Riverkeeper and, presumably some representatives of the City urge delay in the Land Use Hearing because the EIS is not complete, and yet those involved City representatives appear ready to rush to judgment on the entire project, by urging denial before this same EIS is available on which to base any decision.

<sup>6</sup> WAC 197-11-980 ("For all governmental actions relating to energy facilities for which certification is required under chapter 80.50 RCW, the lead agency shall be the energy facility site evaluation council (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).

schedule an adjudicative hearing to consider preemption of the zoning ordinance and land use plans which “may be combined or scheduled concurrent with the adjudicative proceeding held under RCW 80.50.090(3).” WAC 463-28-060(2). Even in that circumstance, the Council still addresses land use consistency questions separately from issues related to project impacts and sufficiency of mitigation, further underscoring the limited nature of the land use inquiry. WAC 463-30-300.

While Friends and Riverkeeper’s suggestion that the EIS is needed for the Land Use Hearing is unfounded, their arguments reinforce the need to move forward expeditiously with the schedule for environmental review. The sooner that analysis can be completed and distributed for public review, the sooner all parties will be able to engage fully in the facts and merits of the project. Currently, project opponents are waging rhetorical battles. As reflected in the City’s draft resolution, some are even urging a rush to denial before all project information is available to the public and the decision makers. Accordingly, Tesoro-Savage urges EFSEC not only to proceed with the Land Use Hearing to address the limited questions at issue in that hearing, but further urges EFSEC to issue its decision regarding the scope of the draft EIS, so the EIS can be completed and circulated for public review, and the Applicant can then begin to engage on that fact-based impact analysis, rather than responding to arguments based on assumptions, assertions, and political rhetoric.

The EFSLA envisions a typical one-year process for energy facility review, including EIS preparation. RCW 80.50.100. Tesoro-Savage recognizes and appreciates that this project is one of unusual public interest and concern and has expressed willingness to expand the scope of the environmental review to include consideration of rail and marine vessel transportation impacts at an appropriate level of review given those transportation routes already exist and the project is not modifying any of that transportation infrastructure. However, this complexity and level of public concern should not be the basis to delay indefinitely the EFSEC review process, as urged by Friends and Riverkeeper. It has been five months since the extended scoping comment period ended. EFSEC issued a “Scope of Draft Environmental Impact Statement” on April 2, 2014. However, we are still waiting for EFSEC’s final scoping instructions. These letters and the City’s draft resolution demonstrate the need to finalize the EIS scope so that the draft document can be completed and circulated for review and comment.

Very truly yours,

VAN NESS FELDMAN LLP



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