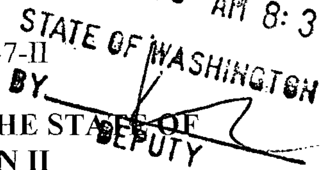

Court of Appeals No. 46130-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION II

COLUMBIA RIVERKEEPER; and NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Appellants,

v.

PORT OF VANCOUVER USA; JERRY OLIVER, Port of Vancouver USA Board of Commissioners President; BRIAN WOLFE, Port of Vancouver USA Board of Commissioners Vice President; and NANCY I. BAKER, Port of Vancouver USA Board of Commissioners Secretary,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR CLARK COUNTY
HONORABLE DAVID E. GREGERSON

BRIEF OF RESPONDENTS

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I. INTRODUCTION

The Port of Vancouver USA (together with the other respondents, the "Port") entered into a contingent ground lease with Tesoro-Savage Joint Venture (the "tenant" or "Tesoro-Savage"), a company proposing to develop the Vancouver Energy Distribution Terminal. The project has the potential to trigger significant investment and economic development in Clark County. It also has generated a good deal of public interest and comment focusing on potential environmental impacts. Conscious of its role in the community and its responsibility to safeguard the environment, the Port engaged the public in a months-long process before approving the lease. When concerns were raised about the approval process, the Port reopened the lease and received additional public comment.

The Port also was careful to include conditions in the lease that make sure that the environmental consequences of the project are fully understood before the project proceeds. The lease does not allow the tenant to break ground until all environmental approvals are received. Because the project is an energy facility, it is subject to a special environmental review framework, where the final decision is made by the Governor. The lease ensures this review process will be fully completed before any construction may begin.

Specifically, the lease does not take full effect until all environmental review is completed, including preparation of an environmental impact statement ("EIS"), adjudication by the Energy Facility Site Evaluation Council ("EFSEC" or "Council"), and a final decision by the Governor. The lease further requires the tenant to obtain the Port's approval for its operation and safety plans, as well as its site design and engineering, before it can begin construction. The tenant must continue to obey all environmental laws, including the conditions of all environmental permits, which are explicitly incorporated into the lease.

EFSEC's enabling statute gives the Council exclusive jurisdiction over the Tesoro-Savage project, and the statute preempts regulation of the project by other state or local governmental entities. Consequently, any actions relating to the project by any other arm of government are exempted from the procedures of the State Environmental Policy Act ("SEPA"). EFSEC is required to engage in a comprehensive, coordinated, and exclusive review process for energy facilities. The Port was educated about the Council process when it considered whether to lease to Tesoro-Savage, and it was assured by the Council that a full environmental impact statement would be prepared. The Council subsequently issued a public notice determining that it would prepare such a statement. Since the

EFSEC statute exempts other agency actions on EFSEC projects from SEPA procedures, the Port did not prepare an EIS before entering into the lease, nor did it issue any "threshold" SEPA determination. The Port's actions were intended to, and did, follow the statutory design of both SEPA and the EFSEC statute.

Despite the Port's careful compliance with the specialized statutory scheme, appellants Columbia Riverkeeper and Northwest Environmental Defense Center (together, "Riverkeeper") seek to impose additional and unnecessary procedures. Riverkeeper claims the Port violated SEPA in two ways by entering into the lease before the Council completed an EIS. First, despite the plain exemption established by the EFSEC statute, Riverkeeper incorrectly argues the Port should have waited for the statement to be completed before the terms of the lease were even negotiated. In support of this argument, Riverkeeper asks this Court to ignore the plain language of the EFSEC statute's exemption and create a new distinction between "proprietary" and "regulatory" government decisions. Riverkeeper's proposed distinction has no basis in Washington law and is contrary to the review structure established by SEPA. The Superior Court correctly rejected Riverkeeper's argument, holding that the

plain language of the EFSEC statute exempted the Port's action from SEPA procedures. This Court should do the same.

Second, Riverkeeper asserts that by entering into the contingent lease, the Port improperly limited the reasonable range of alternatives to be considered by the Council and the Governor in siting the project. Riverkeeper has not identified how the Port can limit the ultimate decision making of the Council or of the Governor. Nor has it identified any public resource that has been irrevocably committed to the project. Instead, the lease is entirely contingent on the outcome of environmental review at both the federal and state levels.

Riverkeeper further alleges that the Port limited the reasonable range of alternatives by giving up discretion to change course if the project receives the Council's and the Governor's approval but still presents unacceptable environmental impacts. To the extent this argument has legal merit, it is based on selective and inaccurate readings of the lease. The lease contains ongoing contingencies relating to the design, construction, and operation of the project. The Superior Court correctly found the contingencies provided enough "outs" to ensure consideration of a reasonable range of alternatives.

Because the Port's execution of the lease complied with SEPA, the EFSEC statute, and implementing regulations, this Court should affirm the judgment of the Superior Court, which entered summary judgment in the Port's favor.

II. RESTATEMENT OF THE ISSUES PRESENTED FOR APPEAL

A. Issue pertaining to the first assignment of error

Did the Superior Court correctly hold that RCW 80.50.180 exempts the execution of a lease contingent on EFSEC review from SEPA's procedural requirements?

B. Issue pertaining to the second assignment of error

Does the execution of a lease contingent on environmental review, and which contains further post-review contingencies, improperly limit the range of reasonable alternatives to be considered during the environmental review?

III. RESTATEMENT OF THE CASE

A. Legal Framework

1. The State Environmental Policy Act.

SEPA is primarily a procedural statute. It constitutes "an environmental full disclosure law." *Norway Hill Pres. & Prot. Ass'n v. King Cnty. Council*, 87 Wn.2d 267, 272, 552 P.2d 674, 677 (1976). "The

basic purpose of SEPA's command for environmental review is to require governments to fully consider environmental and ecological factors when taking actions that significantly affect the quality of the environment." *Pub. Util. Dist. No. 1 of Clark Cnty. v. Pollution Control Hearings Bd.*, 137 Wn. App. 150, 158, 151 P.3d 1067, 1070 (2007). Other laws of this state are to be interpreted in accordance with SEPA policies "to the fullest extent possible . . . ." RCW 43.21C.030.

SEPA requires state and local government agencies to include, in every proposal for an action with likely significant adverse environmental effects, a "detailed statement" by the responsible agency. The detailed statement includes the following elements:

> "(i) the environmental impact of the proposed action;
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;
> (iii) alternatives to the proposed action;
> (iv) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented[.]"

RCW 43.21C.030(2)(c). The "detailed statement" is also called an environmental impact statement or EIS. SEPA regulations also require a

preliminary procedure, called a "threshold determination" or "determination of significance," which establishes whether a full EIS is required.

SEPA does not apply to every single government activity. It applies to "actions" that are not otherwise exempt. "Actions" are defined broadly to include activities "financed, assisted, conducted, regulated, licensed, or approved" by an agency, along with regulatory decisions and legislative proposals. WAC 197-11-704(1). SEPA regulations also classify activities as "project" or "nonproject" actions, which impacts how the ultimate analysis is conducted. A lease of public land is a "project" action. WAC 197-11-704(2)(a)(ii).

Various statutes and regulations create exemptions from SEPA procedures for activities that otherwise would be considered "actions." *See Snohomish Cnty. v. State*, 69 Wn. App. 655, 670, 850 P.2d 546, 555 (1993) (construing statutory exemption for certain forest practices). Both the Department of Ecology, which administers SEPA, and the Council have established lists of actions that are exempt from SEPA review because they do not significantly affect the environment. WAC 197-11-720; WAC 197-11-800 through 197-11-890; WAC 463-47-020. Statutory and regulatory exemptions from SEPA review are generally called

"categorical" exemptions, because they apply to categories of activity, and because they completely exempt the activity from the full range of SEPA procedures. *Id.*; WAC 197-11-720. (App. 20.)

2. The Energy Facilities Site Locations Act

The Energy Facilities Site Locations Act ("EFSLA," "EFSEC statute," or "the Act"), RCW Chapter 80.50, was enacted to "avoid costly duplication in the siting process [for energy facilities] and ensure that decisions are made timely and without unnecessary delay." RCW 80.50.010(5). (App. 17.) In general, a party wishing to develop an energy generation or transmission facility in Washington must apply to EFSEC for a site certification. RCW 80.50.060(1). The parties do not dispute that the facility here is subject to EFSEC review pursuant to RCW 80.50.020(12)(d), which defines subject facilities to include terminals for marine transport of significant quantities of petroleum products.

The Act supersedes all other laws or regulations, RCW 80.50.110(1), and preempts local "regulation and certification" of subject energy facilities. Council regulations state that the Council's certification is "in lieu of any permit, certificate, or similar document" which might be issued by local or state governments. WAC 463-14-050. The Council's specific and exclusive jurisdiction controls over general statutes, like SEPA or the Growth Management Act, even if the general statute is

enacted later. *Residents Opposed to Kittitas Turbines v. EFSEC*, 165 Wn.2d 275, 309, 197 P.3d 1153, 1170 (2008).

The site certification process is described in some detail by the Supreme Court in *Kittitas*. The applicant must pay a $50,000 minimum fee, RCW 80.50.071(1)(a), and the requirements for an application are extensive. The applicant must provide a comprehensive description of the proposal and its design as well as a complete analysis of the natural environment at the site. WAC Chapter 463-60. The Council must hold a public adjudicative hearing, where "any person" is entitled to be heard in support of or in opposition to the project. RCW 80.50.090(3). The Council is made up of representatives from state agencies including the Departments of Ecology, Natural Resources, Health, and Fish & Wildlife. RCW 80.50.030(3). For this project, Clark County and the City of Vancouver each have a voting member, RCW 80.50.030(4), (5), while the Port has a nonvoting representative. RCW 80.50.030(6). The Attorney General also appoints a "counsel for the environment" to participate in every EFSEC review. RCW 80.50.080.

The EFSEC process incorporates and requires SEPA compliance, and the Council has adopted most of Ecology's SEPA rules by reference. WAC 463-47-020. When the Council receives an application, it

determines whether the proposal is an "action" to which SEPA applies, and then follows the standard SEPA process. WAC 463-47-060(1), 463-14-080(3). The Council is responsible for preparing any threshold determination of significance or EIS. WAC 463-47-090(1).

The Act consolidates and expedites review of energy facilities. Therefore, it establishes a SEPA exemption for concurrent or preliminary actions on energy projects by all other state and local agencies. RCW 80.50.180. Agency actions, such as the lease here, are exempt from SEPA procedures so far as the action "approves, authorizes, [or] permits" the "location, financing or construction" of the facility subject to EFSLA. *Id.* The statute is structured so that the Council reviews, in a consolidated and comprehensive manner, the environmental impacts of the proposal and its component actions.

After the Council finishes its review, it must recommend to the Governor an appropriate final decision, and it must submit a draft certificate for the site. RCW 80.50.040(8). The certificate must include conditions that protect governmental or community interests affected by the energy facility, RCW 80.50.100(2), as well as conditions accounting for other laws, such as SEPA, preempted by EFSLA. *Id.* The certificate acts "as a contract between the State and applicant, setting forth the

conditions that must be satisfied for implementation of the project." *Friends of Columbia Gorge, Inc. v. EFSEC*, 178 Wn.2d 320, 329, 310 P.3d 780, 783 (2013).

The Governor may impose additional conditions on the application, approve it, or reject it. *Id.*; *Kittitas, supra*, 165 Wn.2d at 291-92, 197 P.3d at 1161. The Governor's final decision is subject to judicial review in the Thurston County Superior Court and can be certified for plenary expedited review in the Supreme Court. RCW 80.50.140; *Kittitas*, 165 Wn.2d at 300-03, 197 P.3d at 1165-67.

B. Facts and Proceedings

1. The Port executed a contingent lease to Tesoro-Savage only after engaging in an extensive public process.

The Port of Vancouver USA is one of many public port agencies throughout Washington. Public ports were first established by act of the Legislature in 1911, for purposes including the construction of "rail or motor vehicle transfer and terminal facilities." RCW 53.04.010(1). The importance of public ports to economic development was recognized by a constitutional amendment in 1966, which was passed by the Legislature and approved by the voters. Wash. Const. Art. 8 § 8 (authorizing use of port funds to promote industrial development). The Port's commissioners (respondents Oliver, Baker, and Wolfe) are publicly elected.

The Port's mission is to "provide economic benefit to our community through leadership, stewardship and partnership in marine and industrial development." (CP 132.) In keeping with the stewardship component of its mission, the Port has established environmental values of integrated decision making, sustainability, pollution prevention, and compliance. (CP 135.) The Port seeks to incorporate these environmental values into every stage of its business operations. (*Id.*) For example, it conducts regular environmental audits of all tenants. (Lease ¶ 11.D, Riverkeeper "RK"' App. 94.)

As the North American oil shale market has matured in recent years, the Port began to receive inquiries from parties interested in transporting petroleum products through the Port. (CP 116.) In November 2012, the Port obtained statements of interest from companies looking to develop petroleum transport facilities. (*Id.*) The Port selected Tesoro-Savage as the potential tenant and began negotiating the terms of the lease. (*Id.*) The proposed energy terminal could create up to 2,700 jobs in Clark County over 10 years, including 80-120 direct living-wage jobs. (CP 89, 119.)

The Port involved the public throughout its negotiations with Tesoro-Savage by conducting multiple public workshops. At one of these

workshops, the then-chairman of EFSEC presented an overview of the Council process. (CP 202.) The chair stated that the Council's purpose is "one stop shopping" for covered projects and that the Council's final decision preempts all other state and local governments. (CP 709.) The chair explained how the Council process would incorporate compliance with SEPA. (CP 202, 716, 722-23.) He also gave an overview of the substantive environmental standards that the Council would use. (CP 702.)

The Commissioners initially approved the lease to Tesoro-Savage at a public meeting on July 23, 2013. (CP 227-32.) At this meeting, the Commissioners referred to and relied upon the environmental review to be conducted by EFSEC. (CP 231-32.) They indicated the importance of full review of the project, describing the lease as a "starting point," and stating that the Council would "scrutinize" the project before the Governor's final decision. (CP 232.)

The Port re-opened the lease for a new vote on October 22, 2013 to make sure the Port's consideration of the lease complied with the Open Public Meetings Act. Tesoro-Savage filed its 872-page application with EFSEC on August 29, including references to the lease. (CP 146-56.) EFSEC issued a Determination of Significance and Scoping Notice on

October 1. (CP 169-71.) This was the "threshold determination" that is the first step of the SEPA process, and it designated EFSEC as the lead agency for SEPA compliance. (CP 170.) It also stated that the Council "has determined that this proposal is likely to have a significant adverse impact on the environment." (*Id.*) The Council declared that an EIS "is required under RCW 43.21C.030(2)(c) and *will be prepared*." (*Id.*, emphasis added.)

In the October 22 public meeting, the Commissioners again were informed of the "rigorous and comprehensive" EFSEC process to come, as well as of a pending federal permit process. (CP 118, 255-257, 267, 269.) A Tesoro-Savage representative spoke at that meeting and acknowledged that "the lease is subject to the robust open EFSEC permitting process and will only be effective if the permits are approved." (CP 265.) The Commissioners indicated, again, they were relying on EFSEC to conduct a thorough environmental review. (CP 267, 269.) After two hours of public comment and an hour of public deliberation, the Commission approved the lease. (CP 269.)

2. The lease is contingent on the Council process and provides additional contingencies after the Council and Governor make their decisions on the project.

The lease that was approved on October 22 is entirely contingent on the outcome of the Council's and the Governor's review. Specifically, paragraph 2.D(1) provides that a condition precedent to the obligations under the lease is that "all necessary licenses, permits and approvals have been obtained. . . ." (RK' App. 79.) The lease explicitly requires that Tesoro-Savage "shall, at its sole cost and expense, comply with all Environmental Laws." (Lease ¶ 11.C, RK App. 94.) The lease is also subject to any permit conditions, as the environmental compliance requirement includes "all permits applicable to the Premises and issued to Lessee." (*Id.*) Thus any conditions issued by the Council, or Governor, or federal reviewers automatically become requirements of the lease. The design and operation of the facility will be reviewed by the Council, which has established construction and operation standards for energy facilities. WAC Chapter 463-62. (*See* CP 147-48.)

Tesoro-Savage must carry $25 million in pollution legal liability insurance, which the Port may require to be increased in some circumstances. (Lease ¶¶ 1.L, 8.C, 15.C, RK' App. 76, 88, 107-08.) Exhibit H to the lease specifically identifies EFSEC and the U.S. Army

Corps of Engineers as permitting authorities. (CP 369; *see also* Lease Exhibit D, RK App. 171, describing the Council process as prerequisite to construction.) Paragraph 1.C of the lease provides that if the conditions precedent, requiring all permits to be obtained, have not been satisfied or waived by a particular date, either party may terminate the lease simply by written notice with, generally, no "further cost or obligation." (RK' App. 72.)

Lease paragraph 3.A states that Tesoro-Savage shall "have and hold the Premises commencing on the Conditions Precedent Expiration Date. . . ." (RK App. 80.) This means Tesoro-Savage is allowed to occupy the site only once the Port agrees that all conditions precedent are satisfied. (*See* Lease Exhibit E, CP 381.) Tesoro-Savage cannot begin construction before all permits are approved. In keeping with its contingent nature, the lease refers to "conceptual[]" descriptions of the project. (Lease ¶ 14.A, RK App. 102.)

The environmental permits are necessary conditions for the effectiveness of the lease, but they are not the end of the process in themselves. Lease paragraph 2.D provides that the parties will, during the contingency period of the lease, "develop and mutually approve milestones and preliminary engineering and construction plans,

specifications, and designs." (RK App. 80.) Tesoro-Savage must submit these plans for the Port's "review and approval." (*Id.*) Paragraph 30 additionally requires that "a final Facility Operation and Safety plan shall be mutually approved prior to operation of the Facility. . . ." (RK App. 128.) If these efforts at mutual approval are ultimately unsuccessful, the lease could be terminated. "Notwithstanding anything to the contrary herein, if [the Port] is not reasonably satisfied on or before the Conditions Precedent Outside Date that Lessee is prepared to, and intends to, commence construction by [a designated time], [the Port] may terminate this lease without any further obligations on the part of either Party. . . ." (Lease ¶ 2.D, RK App. 80.) The Port may make additional rules and regulations governing the use of the property. (Lease ¶ 30, RK App. 128.) Tesoro-Savage's compliance with environmental laws such as SEPA is an ongoing requirement of the lease. (Lease ¶ 11.C, RK App. 94.)

3. The Superior Court granted the Port's motion for summary judgment on the SEPA claims.

Appellants, Columbia Riverkeeper and the Northwest Environmental Defense Center, along with the Sierra Club (which is not participating in this appeal), included two SEPA claims in their Amended Complaint. They alleged that (1) the Port was required to complete a SEPA process prior to execution of the lease and (2) that the Port's

execution of the lease impermissibly limited the range of reasonable alternatives. (CP 2:14-15.)

The Superior Court granted the Port's CR 56(b) motion for summary judgment. The Court found the material facts were undisputed. (RP 33:17-21.) On the first SEPA claim, the Court found that EFSLA did preempt and control the process for approving the energy facility. (RP 33:22-25.) On the second SEPA claim, the Court was satisfied that the lease contained "enough outs" to ensure that there was no limit on the range of reasonable alternatives. (RP 34:3.) In the Court's view, the lease is "basically a confidence building measure" and a necessary component for a major development such as this energy project. (RP 34:3-8.) The Court also found that the lease contained "multiple contingencies and conditions which may or may not ripen," so that the Port retained sufficient control over the project. (RP 34:12-22.) Accordingly, the Court found the contingencies in the lease to be an "appropriate mechanism" to allow the application to the Council to go forward while ensuring the integrity of the environmental review process. (RP 34:9-10.)

The Superior Court's written order found that EFSLA "exempts the execution of the lease . . . from procedures under SEPA," and that "the contingencies contained in the lease ensure that the execution of the lease

does not limit the reasonable range of alternatives . . . ." (CP 1011.) The Court certified the SEPA claims for appeal pursuant to CR 54(b), and this appeal followed. (CP 1015-17, 1006-07.) RAP 2.2(d) provides for appeal of a decision certified under CR 54(b), so the parties seeking review, Columbia Riverkeeper and Northwest Environmental Defense Center, are referred to herein as "appellants" pursuant to RAP 3.4.

IV. STANDARD OF REVIEW

The Superior Court held that there were no genuine disputes of material fact and therefore judgment was appropriate as a matter of law. Orders on summary judgment are reviewed de novo, "engaging in the same inquiry as the trial court and viewing the facts, as well as the reasonable inferences from those facts, in the light most favorable to respondents, the nonmoving parties." *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82, 84 (2005). The purpose of summary judgment is to examine the sufficiency of the evidence behind the plaintiff's allegations "in the hope of avoiding unnecessary trials where no genuine issue as to a material fact exists." *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182, 188 (1989). The Court of Appeals will affirm a summary judgment if the parties have "failed to present to the trial court evidence of a genuine issue of material fact and, further, if the moving party is entitled

to judgment as a matter of law." *Adams v. Thurston Cnty.*, 70 Wn. App. 471, 474-75, 855 P.2d 284, 287 (1993).

The issues in this appeal, statutory and contractual meaning, are issues of law. The meaning of a statute is a question of law reviewed de novo. *State, Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4, 9 (2002). Determining the legal effect of contract clauses, or construing them, is "always a question of law." *Kim v. Moffett*, 156 Wn. App. 689, 697, 234 P.3d 279, 283 (2010). If the court is not looking to extrinsic evidence to determine the intent of the parties, or if there are no factual disputes regarding extrinsic evidence, then interpreting a contract is likewise an issue of law. *Id.* at 697 n.5; *accord Mayer v. Pierce Cnty. Med. Bureau, Inc.*, 80 Wn. App. 416, 420, 909 P.2d 1323, 1326 (1995) (holding that "[i]f a contract is unambiguous, summary judgment is proper even if the parties dispute the legal effect of a certain provision.")

V. SUMMARY OF ARGUMENT

The contingent lease complies with SEPA and the Superior Court correctly entered summary judgment in favor of respondents. The lease is an action that additionally authorizes the location of the energy facility. As such, RCW 80.50.180 exempts the lease from SEPA procedures. Riverkeeper's attempts to divide the EFSLA exemption into "proprietary" and "regulatory" decisions are not supported by statutory text, context, or

structure. The exemption covers all actions relating to an EFSEC project that would otherwise be subject to SEPA.

The lease does not impermissibly limit the range of reasonable alternatives. The Council and the Governor are free to consider and select any or all alternatives. There is no danger that the lease will create expectations, or give this project momentum, that will prevent the Council or Governor from fulfilling SEPA's process and policy. The contingent nature of the lease also allows the Port to respond, if necessary, after the conclusion of the environmental review.

The Port was careful to enter into a lease that gave the tenant enough assurances while making sure that a full environmental review would take place. It intended to and did comply with SEPA at every step. Riverkeeper would have the Court impose procedural steps that are not required by SEPA and which are directly contrary to the consolidated review that the Legislature intended when it established the Council. The judgment of the Superior Court should be affirmed.

VI. ARGUMENT

A. The Superior Court correctly dismissed Riverkeeper's first SEPA claim because EFSLA exempts the decision to approve the lease from a separate SEPA process.

1. The plain language of RCW 80.50.180 exempts the lease decision from SEPA procedures.

The lease from the Port to Tesoro-Savage falls within the exemption established by section 180 of EFSLA, RCW 80.50.180. Because of the exemption, the Port was not required to engage in SEPA procedures before it executed the lease. SEPA does not require the Port to prepare an EIS, nor does it require the Port to make a "threshold determination" of significance. Both these actions are the responsibility of the Council. The Superior Court correctly dismissed Riverkeeper's claim and the first assignment of error should be overruled.

The relevant statutory text is:

> "[A]ll actions of any branch of government of this state, including . . . municipal and public corporations . . . to the extent . . . [the] action involved *approves, authorizes, permits* . . . the *location, financing or construction* of any energy facility subject to certification under chapter 80.50 RCW, *shall be exempt* from the 'detailed statement' required by RCW 43.21C.030. Nothing in this section shall be construed as exempting any action of the council from any provision of chapter 43.21C RCW."

RCW 80.50.180 (emphasis added). On its face, this statute applies to the lease. The lease is a necessary condition for the location and construction of the project. It conditionally approves, authorizes, and permits the location and construction of an energy facility subject to Council certification. If it did none of those things, Riverkeeper would have no reason to oppose the lease or to bring suit. "If a statute's meaning is plain on its face, then [Washington courts] give effect to that plain meaning as an expression of legislative intent." *Snohomish Cnty. Pub. Transp. Ben. Area v. State Pub. Emp't Relations Comm'n*, 173 Wn. App. 504, 516, 294 P.3d 803 (2013). RCW 80.50.180 plainly exempts the lease here from SEPA procedures.

Riverkeeper contends that the lease does not "'approve, authorize, [or] permit[]' the oil terminal within the meaning of EFSLA." (Riverkeeper's ("RK") Br. at 15.) To be sure, the lease does not permit the facility as a whole. But Riverkeeper's argument elides the language of the statute referring to decisions that approve, permit, or authorize the *location* of the project at issue. The lease is a preliminary step to the Council process, so it is the type of action covered by RCW 80.50.180.

The Act's exemption from the "detailed statement" (the EIS requirement) is a complete exemption from SEPA procedures. Thus the

Port had no duty to prepare either an EIS or a threshold determination. Because EFSLA consolidates all SEPA responsibilities with the Council, the threshold determination has been prepared by the Council, and Council will prepare the EIS. (CP 169-71.) WAC 197-11-720. (App. 20.)

Once an activity is determined to fit within a categorical exemption, the court's inquiry is at an end, absent a challenge to the validity of the exemption itself. *Dioxin/Organochlorine Ctr. v. Pollution Control Hearings Bd.*, 131 Wn.2d 345, 363, 932 P.2d 158, 166 (1997). The Court does not examine the effects of the individual action because to do so would undermine the purpose of the exemption. *Id.* Here, because the tenant is prohibited both by contract and statute from beginning construction before to the Council's certification, there can be no concern that giving effect to the statute would lead to adverse environmental impacts.

In *Snohomish Cnty. v. State*, 69 Wn. App. 655, 850 P.2d 546 (1993), Division I construed a statute, RCW 76.09.050(1)(d), which, similarly to EFSLA, provided that certain forest practices were "exempt from the requirements for preparation of a detailed statement under the state environmental policy act." The court rejected the argument that a threshold determination of significance was required. Since the practices

were "generally exempt from preparation of an EIS, it logically follows that no intermediate steps need be taken." 69 Wn. App. at 670, 850 P.2d at 555. *Snohomish* reasoned that the very purpose of the preliminary steps (the threshold determination of significance) was to facilitate the preparation of an EIS, so when a statute exempted the practice from an EIS, the threshold determination would be pointless. The same is true here. The Council has made the threshold determination and will produce the EIS, as anticipated by the statute and by the Port's action in approving the lease.

2. Riverkeeper's proposed distinction between "regulatory" and "proprietary" decisions is not supported by the statutory text, context, or structure.

Riverkeeper does not seriously contest that if RCW 80.50.180 applies to the Port's action, it exempts the Port from all SEPA procedures, which includes both the threshold determination and the environmental impact statement. Instead, they attempt to create a distinction between "proprietary" and "regulatory" actions that has no support in the statutory or regulatory scheme of EFSLA or SEPA. Under this artificial distinction, they argue that RCW 80.50.180 only applies to "regulatory" actions. Riverkeeper's argument is not supported by the plain meaning of the two statutes. Riverkeeper contends that regulatory actions would consist of

plan approvals, legislation, or permits, and should be contrasted from "proprietary" actions where an agency is selling or leasing public property. Riverkepper has fabricated this distinction in order to escape the clear statutory mandate that all concurrent actions on a facility subject to EFSEC are exempt from SEPA. The Council should prepare the one and only EIS on the facility, just as any other lead agency under SEPA would prepare the single EIS for each project under its jurisdiction.

When interpreting statutes, "[t]he court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *State, Dep't of Ecology v. Campbell & Gwinn*, 146 Wn.2d at 9-10, 43 P.3d at 9. Plain meaning of a statute is not simply the isolated word or phrase in question. Plain meaning may be gleaned "from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Ellensburg Cement Prods., Inc. v. Kittitas Cnty.*, 179 Wn.2d 737, 743, 317 P.3d 1037, 1041 (2014). In its plain language analysis, the court "must remain careful to avoid 'unlikely, absurd or strained' results." *Berrocal*, 155 Wn.2d 585 at 590, 121 P.3d at 84. To the extent necessary on appeal, the court may take judicial notice of

legislative facts, "those facts which enable the court to interpret the law." *In re Marriage of Campbell*, 37 Wn. App. 840, 845, 683 P.2d 604, 608 (1984).

The text of the statute does not distinguish between "regulatory" and "proprietary" actions. Instead, it is written expansively, to encapsulate decisions by "any branch of government of this state." RCW 80.50.180. It includes decisions that authorize not just location or construction, but financing of a subject facility as well. *Id.* It is easy to imagine financing decisions that could be characterized as proprietary; for example, a local government was the sponsor of a project and sought to issue bonds or directly expend funds on a project. Riverkeeper's reading of section .180 would exclude any facility with some agency involvement from the statute's scope since that agency activity could arguably be characterized as "proprietary."

Riverkeeper's reading would thus require at least two SEPA processes for any facility involving a public body. This is contrary to one of the central purposes of the Council, which is "[t]o avoid costly duplication in the siting process and ensure that decisions are made timely and without unnecessary delay." RCW 80.50.010(5). (App. 17.) "The legislature passed EFSLA as an expedited and centralized process for

reviewing potential energy sites in Washington." *Friends of Columbia Gorge*, 178 Wn.2d at 328, 310 P.3d at 783. As Council regulations state, "RCW 80.50.010 requires the council 'to recognize the pressing need for increased energy facilities.'" WAC 463-14-020. (App. 21.) Riverkeeper's interpretation is contrary to these aims of the statute.

Riverkeeper's interpretation, by requiring multiple SEPA processes, conflicts with SEPA too. SEPA requires one EIS for each project, which is prepared by the lead agency. WAC 197-11-060(3)(b). SEPA policies strongly disfavor "segmentation" or "piecemealing" of review because of the risk that environmental effects could be overlooked if pieces of a project are reviewed only in isolation. *E. Cnty. Reclamation Co. v. Bjornsen*, 125 Wn. App. 432, 441, 105 P.3d 94, 99 (2005). By placing, and consolidating, SEPA responsibilities with the Council, EFSLA fulfills the important SEPA policy favoring comprehensive environmental review.

The session law that enacted what became RCW 80.50.180 indicates the Legislature intended the Council to have lead and exclusive SEPA responsibilities. The court "may examine the legislative declaration of purpose to assist in determining that the plain meaning as we ascertain it is consistent with that declared purpose." *N. Coast Air Servs., Ltd. v.*

Grumman Corp., 111 Wn.2d 315, 321, 759 P.2d 405, 407 (1988). The Legislature stated that "[i]t is the intent of [the bill] . . . to minimize duplication of effort in conducting studies of and preparing environmental impact statements relating to such sites . . . and to provide for a single detailed statement in accordance with RCW 43.21C.030 (c)." Laws of 1974, 1st Ex. Sess., ch. 110, § 1 (Engrossed Substitute Senate Bill 3229). (App. 18.) So, as here, the Council will prepare the EIS on the Tesoro-Savage facility. The Port's lease execution is exempt from the EIS requirement because the duty to prepare the EIS has been placed with EFSEC. Riverkeeper's contrary reading is diametrically opposed to the intent of the Legislature.

RCW 80.50.180, enacted four years after EFSLA and three years after SEPA, harmonized the two statutes. It made sure the Council could continue to carry out its mission of consolidated and expedited review of energy facilities, while still ensuring appropriate environmental review occurs. Thus, any interpretation of RCW 80.50.180 must minimize duplication of SEPA procedures to carry out the intent of the Legislature. Riverkeeper's interpretation would undo this harmonization and undermine the intent of the Legislature as expressed in RCW 80.50.010 and Senate Bill 3329. (App. 18.)

Read together, the statutory structures of SEPA and EFSLA show that section .180's exemption is intended to "cover the waterfront" of actions that potentially could be subject to SEPA. SEPA applies to "proposals for legislation and other major actions." RCW 43.21C.030(2)(c). Similarly, section .180 applies to "all proposals for legislation and other actions . . . ." RCW 80.50.180.

SEPA regulations have established a distinction between "project" and "nonproject" actions. WAC 197-11-704. RCW 80.50.180 is structured to encompass both project and nonproject actions. It includes actions that approve, authorize, or permit a specific facility or location. Similarly, the project actions listed in WAC 197-11-704(b)(2)(a) include licensing, funding, or undertaking an activity, and actions such as selling or leasing public land.

Section .180 also applies to actions which "establish[] procedures solely for approving, authorizing or permitting" projects. This is similar to the nonproject actions described in WAC 197-11-704(b)(2)(b), including legislation, regulations, policies, plans, or programs. Because the ultimate purpose of section .180 is to place SEPA responsibilities on the Council, it makes sense that it is written to cover all activities that might otherwise be subject to SEPA.

Applying the exemption here is also consistent with the way SEPA concentrates authority and responsibility in the "lead" agency on a proposal. WAC 197-11-050(2) says the lead agency is the one with "main responsibility" for SEPA's procedural requirements and "*the only agency*" responsible for the threshold determination or EIS. (Emphasis added.) The Council assumed lead agency status on the Vancouver terminal and made the threshold determination of significance. (CP 170.) Thus, under both EFSLA and SEPA regulations, compliance with SEPA's procedures is the Council's responsibility.

The most natural reading of section .180 is that it exempts any action on a subject facility that would otherwise be subject to SEPA. Riverkeeper claims that local government decisions about the sale or lease of public lands are not contemplated by section .180 because those decisions are not "regulatory" decisions. In essence, Riverkeeper's argument is that any EFSEC project on public land is subject to additional requirements that are not found in the statute. There is no basis in SEPA or EFSLA for creating a new classification system from whole cloth, when the SEPA regulations have already classified government actions according to the mandates of the statute.

The Council itself has issued a ruling interpreting the statute consistent with the Port's position. *In re Tesoro Savage Vancouver Energy Distribution Terminal*, EFSEC Order No. 872 (Aug. 1, 2014). (App. 1-16.) The Council held a public hearing pursuant to RCW 80.50.090(2) to determine whether the Tesoro-Savage proposal is consistent with local land use plans and zoning ordinances. (Order at 1, App. 1.) An initial step in that process is for the City to make its own land use consistency determination. WAC 463-26-100. Various parties requested the Council postpone the land use consistency determination, arguing that it would violate SEPA for the City to review consistency of the use with its zoning ordinances prior to the Council publishing the EIS. (Order at 2, App. 2.)

The Council declined to defer its determination, stating that it "disagrees with the contention that an EIS must precede the City's consideration of land use consistency." (Order at 6-7, App. 6-7.) It further stated that "RCW 80.50.180 exempts from the requirement of an EIS *all local government actions related* to EFSEC projects." (Order at 7, App. 7 (emphasis added).) The Council interprets section .180 broadly, so as to encompass all local actions that might be subject to SEPA, including the City's zoning review. As an EIS need not precede the City's

consideration of land use consistency for an EFSEC project, neither must it precede the Port's decision to execute a lease for the same project. As the agency charged with exercising special expertise to evaluate energy facilities, the Council is entitled to deference in interpreting EFSLA so long as its determination is consistent with the statute. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091, 1094 (1998). The Council's view furthers the centralization of SEPA review with the Council. Thus it is most consistent with the intent of the Legislature and so should be granted "substantial weight:". *Id.*

Riverkeeper claims the Court should read the scope of section .180 narrowly for consistency with section .110(2), which provides that the state, via EFSLA, "preempts the regulation and certification of the location, construction, and operational conditions of certification of the energy facilities. . . ." RCW 80.50.110(2). (RK Br. at 16-17.) Their argument is that since Council preemption is limited to "regulation and certification," the SEPA exemption should be similarly limited. The argument is not consistent with the statutory text or structure. The Legislature could have used "regulate and certify" instead of "authorizes, approves, [or] permits," but it did not. "[T]he legislature is deemed to intend a different meaning when it uses different terms." *State v.*

Roggenkamp, 153 Wn.2d 614, 625, 106 P.3d 196, 201 (2005). Logically, it makes sense for the exemption to be broader than the preemption power. The preemption power involves the state permanently overriding local laws or plans in which there is a strong local interest. The SEPA exemption does not permanently override anything. Instead, it consolidates SEPA review with the Council.

The text, context, and structure of EFSLA and SEPA show that the Port's lease approval was exempt from SEPA procedures. Thus, the Port was not required to wait until completion of an EIS before approving the contingent lease.

3. Public agencies are permitted to act while an EIS is being prepared, so long as they do not take action to foreclose the range of reasonable alternatives.

Since the statute exempts the lease from SEPA procedures, the Court's inquiry on Riverkeeper's first claim should be at an end. However, in a fallback argument, Riverkeeper claims its position is supported by the policies underlying SEPA, which favor review early in the decisional process. (RK Br. at 17-20.) As such, Riverkeeper argues, an early EIS can be a base for public commentary. (RK Br at 20.) At minimum, they contend, SEPA required the Port to wait until the EIS was

complete before negotiating or entering into the lease. Their argument is wrong.

Specifically, SEPA does not prohibit preliminary actions to take place before an EIS is complete, so long as the preliminary actions do not have adverse environmental impact or limit the choice of reasonable alternatives. WAC 197-11-070(1). As the U.S. Supreme Court has described, "[e]ven if a particular agency proposal requires an EIS, applicable regulations allow the agency to take at least some action in furtherance of that proposal while the EIS is being prepared." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 145, 130 S. Ct. 2743, 2750, 177 L. Ed. 2d 461 (2010). The contingent lease is a preliminary action consistent with these principles.

Nevertheless, Riverkeeper claims that SEPA's underlying policy imposes additional, undefined restrictions on agency action. SEPA's underlying policies do no such thing. Instead, those policies ensure that agencies like the Port are conscious of their environmental responsibilities and SEPA obligations throughout their operations and decisions. The Port followed those policies here, acting on the understanding that the Council would conduct a rigorous review and conditioning the lease on that process.

The policies underlying EFSLA also weigh against Riverkeeper's argument. The Act preempts SEPA to the extent they are inconsistent. RCW 80.50.110(2); *see Kittitas*, *supra*. Riverkeeper's claim would frustrate the Council's purpose by breaking apart the consolidated process instituted by its statute. The Legislature has established that the policies favoring expedited review of energy facilities are of paramount importance and cannot be ignored. *See* WAC 463-14-020. (App. 21.) At the same time, the Council strives to minimize the adverse environmental impact of permitted facilities. *Id.* at .020(1). EFSLA section .180 harmonizes the two statutes and gives effect to both statutes' policies. The Council should, and will, conduct extensive environmental review of this project.

Riverkeeper's argument has practical problems as well. As the Superior Court recognized, "[i]t would be hard to imagine any possible lessees getting serious about a major development such as this unless they had some sort of guarantee of exclusivity from an owner such as the Port." (RP 34:3-8.) Although the lease is conditioned on the completion and outcome of the SEPA review, it at least assures Tesoro-Savage that the Port will refrain from developing something else on that land during the time it takes to complete review. Given the expense and length of the

permitting process, even as expedited under the Act, coupled with the need for large projects for economic development, such an assurance is reasonable and complies with SEPA.

If an applicant had no possible way to assure access to the site other than to hope it could negotiate terms after years of environmental review, the application process could easily become duplicative or wasteful, which is exactly the outcome EFSLA is designed to avoid. This outcome would also frustrate EFSLA's purpose of enabling timely review of energy projects that the Legislature has determined serve a public need.

The Port's execution of the lease was subject to a statutory exemption under EFSLA section .180, so SEPA procedures were not required. The Superior Court correctly dismissed Riverkeeper's first SEPA claim.

B. The Port's approval of the lease does not limit the range of reasonable alternatives.

1. The lease does not coerce any particular outcome of the Council process or Governor's review.

Riverkeeper's second SEPA claim alleges that the Port's approval of the Tesoro-Savage lease violates regulations that prohibit any agency from taking action prior to issuance of an EIS if the action would "[l]imit the choice of reasonable alternatives." WAC 197-11-070(1)(b). (App. 20.) The lease does not limit the range of reasonable alternatives because

it is conditioned on, rather than constrains or coerces, the Council's and Governor's ultimate SEPA review, and because the Port retains post-review discretion.

A "reasonable alternative" is an alternative to a proposal that would meet the objective of the proposal, "but at a lower environmental cost or decreased level of environmental degradation." WAC 197-11-786. "The word 'reasonable' is intended to limit the number and range of alternatives, as well as the amount of detailed analysis for each alternative." *Cascade Bicycle Club v. Puget Sound Reg'l Council*, 175 Wn. App. 494, 510, 306 P.3d 1031, 1038 (2013) (quoting WAC 197-11-440(5)(b)(i)).

An action limits the range of reasonable alternatives if it "coerces" a specific final outcome prior to the completion of SEPA review. *Pub. Util. Dist. No. 1 of Clark Cnty. v. Pollution Control Hearings Board*, 137 Wn. App. 150, 162, 151 P.3d 1067, 1072 (2007) ("*Clark PUD*"). This does not mean that an agency or applicant cannot propose a specific course of action, but only that the final decision must not be predetermined. "Early designation of a preferred alternative in no way restricts the lead agency's final decisions." (Wash. Dep't of Ecol., *SEPA Handbook* § 3.3.2.2., App. 22-23.)

The lease does not go into effect until both the Council and the Port are satisfied with the SEPA review. Completion of environmental review is an express condition precedent. (Lease ¶¶ 2.D(1), 11.C, RK App. 79, 94.) The lease does not transfer possession of the property until all permits are obtained and the Port is satisfied that construction may begin. (Lease ¶ 3.A, RK App. 80.) The lease requires Tesoro-Savage and the Port mutually agree on site design and engineering and on a safety and operations plan. (Lease ¶¶ 2.D, 30, RK App. 79-80, 128.) Because of these contingencies, the Port will be able to use these mechanisms to respond appropriately to the results of the Council and federal permit processes. (Lease ¶ 3.A, App. 80.)

The contingent nature of the lease is underscored by the postponement of possession until after the Port is satisfied with the environmental permitting. "The fundamental right delivered in a lease is possession." 1 M. Friedman on Leases § 4:2, at 4-12 (5th ed. 2005 & supp.). And "[a] landlord-tenant relationship exists only if the landlord transfers the right to possession of the leased property." Restatement (Second) of Property, Land. & Ten. § 1.2 (1977). In traditional contract terms, the tenant does not obtain the fundamental rights under this lease

unless the permitting process, including an impact statement, is completed to the Port's satisfaction.

This Court held in *Clark PUD* that an action does not limit the range of reasonable alternatives if it does not "coerce" the final outcome of the process. 137 Wn. App. at 162, 151 P.3d at 1072. There is not a plausible mechanism by which the Port's approval of the lease could limit the range of alternatives to be considered by the Council and the Governor, much less coerce the final result. Perhaps recognizing this fact, Riverkeeper does not attempt to distinguish *Clark PUD*, where this Court held that issuing a permit to drill test wells did not foreclose the ultimate application process for a wellfield. *Clark PUD* is instructive and controlling. There, the plaintiffs argued that issuance of an exploratory well permit, and the PUD's expenditure of funds on exploratory drilling, would limit reasonable alternative sites for a wellfield. *Id.* This Court disagreed because the permit grant did not have any bearing on whether Ecology would eventually grant a wellfield permit. *Id.* Here, the case against coercion is stronger, since the Port is a separate agency from the Council and the Governor, whereas both processes in *Clark PUD* were administered by Ecology. The lease does not restrict full consideration of

the proposal, including other sites, by the Council or the Governor. It simply frames the proposal for environmental review.

Because the lease establishes procedures for the Port to respond to environmental review, it has similarities to the memorandum held not to limit alternatives by Division I in *Int'l Longshore and Warehouse Union, Local 19 v. City of Seattle*, 176 Wn. App. 512, 309 P.3d 654 (2013). That memorandum conditioned further action, including possible expenditure of $200 million in public funds, upon the completion of SEPA review and determinations by the government bodies "whether it is appropriate to proceed with or without additional or revised conditions based on the SEPA review. . . ." 176 Wn. App. at 517-18, 309 P.3d at 657. Division I held that these conditions meant that "[t]he city and county remain free to change course" after the completion of environmental review, and there was no SEPA violation.

The same is true here. The lease is conditioned on the outcome of SEPA review, as well as federal environmental review, and the Port reserves discretion after that review ends. The Port must be satisfied that the condition precedent, obtaining all applicable permits, has been met. (Lease ¶ 2.D, RK App. 79.) The Port also has authority to review and approve design specifications and the operations and safety plan. (Lease

¶¶ 2.D, 30, RK App. 80, 128.) The Port also has the ongoing authority, after SEPA review, to terminate the lease if Tesoro-Savage fails to comply with all environmental laws and permits, which is an express lease requirement. (Lease ¶ 11.C, RK App. 94.) Like the city and county in *International Longshore*, the Port can change course if the SEPA review suggests it should.

Riverkeeper attempts to rewrite the lease to make it more constraining than it is. They argue the lease predetermines the design of the facility and of the amount of liability insurance. (RK Br. at 34-36.) Yet they ignore the broader contingencies discussed above as well as the conditions placed both specific clauses. With regard to design, the parties are to work diligently and in good faith during the contingency period. But nothing is settled either on the structure or the timing of the design. And SEPA "does not preclude developing plans or designs" before completion of review. WAC 197-11-070(4). The liability insurance clauses allow for adjustment if appropriate. (Lease ¶¶ 8.C, 15.C., RK App. 88, 107-08.).

The lease is conditioned on the outcome of the environmental review process and preserves discretion for the Port to respond to review.

The Port's execution of the contingent lease did not limit the range of reasonable alternatives.

2. The lease does not create inertia in the project's favor.

Riverkeeper argues that the lease creates a danger of "snowballing" or otherwise building unstoppable momentum in favor of the terminal project. (RK Br. at 37.) This argument again fails because of the conditional nature of the lease. By conditioning the lease on Tesoro-Savage obtaining all necessary certifications, the Port made SEPA review a condition of the project and preserved the no-action alternative as well as other alternatives that the Council and Governor may consider.

In contrast with this case, courts are concerned about "snowballing" where "the inertia generated by the initial government decisions (made without environmental impact statements) may carry the project forward regardless." *King Cnty. v. Washington State Boundary Review Bd. for King Cnty.*, 122 Wn.2d 648, 664, 860 P.2d 1024, 1033 (1993). Riverkeeper does not suggest, much less show, that the "inertia" granted by the signing of the lease could carry the project through a decision by a Council made up of all the state's environmental agencies and a final decision by its highest official. The structure of EFSLA and the Council seems designed to insulate the ultimate decision from any

impact from local inertia. Riverkeeper fails to overcome this structural issue, a failure that is fatal to their second SEPA claim.

Moreover, the snowballing cases are distinguishable on their facts. *King County* held that an annexation can "induce expectations of environmentally significant development which future decision makers may be reluctant to disappoint." *Id.* at 688, 860 P.2d at 1046. Here, there can be no expectations that the Port would continue with the project in the absence of approval by EFSEC and the Governor. And Tesoro-Savage has no such expectations, stating publicly that it understands the lease is conditional on the completion of the Council process. (CP 265.)

Similarly, *Lands Council v. Wash. State Parks & Rec. Comm'n*, 176 Wn. App. 787, 807, 309 P.3d 734, 744 (2013), found that the agency had inappropriately created a "snowball effect" when it "effectively approved a specific proposal" by a classification decision. The agency retained no ability to condition the decision on the outcome of a SEPA process, treating SEPA as a mere formality. *Id.* Here, the Port's lease is conditioned on the outcome of the EFSEC certification and the Port retains absolute authority to terminate the lease if the permits are not obtained. (Lease ¶¶ 1.C, 2.D, RK App. 72, 79.) The lease has not "effectively approved" the facility but awaits the result of the Council's

and Governor's review. SEPA is not a formality but an integral component of the process.

In the same vein, Riverkeeper erroneously relies on *Magnolia Neighborhood Planning Council v. City of Seattle*, 155 Wn. App. 305, 308-09, 317, 230 P.3d 190, 191 (2010). *Magnolia* did not address whether a decision limited the range of reasonable alternatives, because no SEPA process was going to be undertaken with regard to a land use decision. The City of Seattle argued that no "action" triggering SEPA had occurred since the decision was conditional. 155 Wn. App. at 316, 230 P.3d at 195. The court disagreed because the decision was not actually conditional. *Id.* Here, the issue whether the Port's lease approval is an "action" triggering SEPA is not under review. This case is not like *Magnolia* because the lease is explicitly conditioned on SEPA review, and reserves discretion with the Port.

Finally, Riverkeeper's argument that some contingency fee payments to the Port create inertia is not well-taken. (RK Br. at 40.) These payments merely compensate the Port for the option value of the land. Nothing in the record suggests the Port has taken any action based on expectations regarding these payments.

3. NEPA case law supports a finding that the lease does not limit the range of alternatives.

Federal authorities support finding that the lease did not limit the range of reasonable alternatives. Federal authorities are helpful because SEPA was modeled after its federal counterpart (NEPA) and because the NEPA regulations include a provision (40 C.F.R. § 1506.1, App. 19) very similar to WAC 197-11-070.

Some of the federal cases equate a limitation of reasonable alternatives with an irreversible or irretrievable commitment of resources. *WildWest Inst. v. Bull*, 547 F.3d 1162 (9th Cir. 2008); *Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000). However the question is framed, these cases show that the Port did not limit the range of reasonable alternatives.

Riverkeeper attempts to equate the lease here with the agreement at issue in *Metcalf*. In *Metcalf*, "[a]lthough it could have, [the agency] did not make its promise to seek a quota . . . and to participate in the harvest conditional upon a NEPA determination that the Makah whaling proposal would not significantly affect the environment." *Id.* at 1144. This failure to condition the contract caused the NEPA violation. But here the lease is conditional on successful completion of the SEPA process.

In a closely analogous case, the Tenth Circuit in *Lee v. U.S. Air Force*, 354 F.3d 1229 (10th Cir. 2004), approved an agreement that was

conditional on completion of NEPA requirements. The court held that the conditional agreement did not limit the range of reasonable alternatives because there was "no indication here that the U.S. Air Force prejudged the NEPA issues." *Id.* at 1240. Here, neither the Port, the Council, nor the Governor have prejudged SEPA issues. This lease will not go into effect until after completion of all SEPA requirements.

The lease is also like the "no surface occupancy" leases approved in *Conner v. Burford,* 848 F.2d 1441 (9th Cir. 1988). Tesoro-Savage is not allowed to occupy the premises until the completion of environmental review. In *Conner,* the tenants signed leases that did not allow them to "occupy[] or us[e] the surface of the leased land" prior to additional agency approval, which would include environmental review. 848 F.2d at 1447. The Ninth Circuit held that these leases "cannot be considered the go/no go point of commitment at which an EIS is required. What the lessee really acquires . . . is a right of first refusal, a priority right much like the one granted in *Sierra Club* [*v. Fed. Energy Reg. Comm'n*, 754 F.2d 1506 (9th Cir. 1985)]. This does not constitute an irretrievable commitment of resources." *Id.* at 1448. Nor does the Port's lease to Tesoro-Savage.

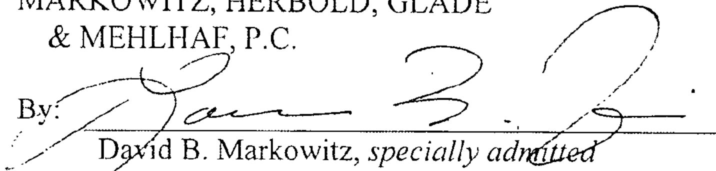
The lease does not coerce or prejudge the final outcome of the Council process, on which the lease's effectiveness is conditioned, nor does it irretrievably dedicate public resources. The Port retains sufficient discretion to act in response to SEPA review. There is no danger of snowballing. Thus the lease does not limit the range of reasonable alternatives and Riverkeeper's second SEPA claim fails as a matter of law.

C. The Court should award RAP 14.3 costs.

RAP 14.2 provides that a substantially prevailing party on review is entitled to costs. RAP 14.3 enumerates the eligible costs. Because the Court should find in favor of the Port, it should award the Port's eligible costs, which the Port will submit in its cost bill pursuant to RAP 14.4.

DATED this 12th day of September, 2014.

MARKOWITZ, HERBOLD, GLADE
& MEHLHAF, P.C.



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DECLARATION OF SERVICE

I, Lawson E. Fite, declare under penalty of perjury under the laws of the State of Washington that I am an attorney employed by Markowitz Herbold Glade & Mehlhaf, P.C. and that on September 12, 2014, I have made service of the foregoing BRIEF OF RESPONDENTS on the parties listed below in the manner indicated:

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DATED this 12th day of September, 2014, at Portland, Oregon

MARKOWITZ, HERBOLD, GLADE & MEHLHAF, P.C.

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1
2
3 BEFORE THE STATE OF WASHINGTON
4 ENERGY FACILITY SITE EVALUATION COUNCIL
5
6

In the Matter of Application No. 2013-01:	COUNCIL ORDER No. 872
TESORO SAVAGE	ORDER DETERMINING LAND USE CONSISTENCY
VANCOUVER ENERGY DISTRIBUTION TERMINAL	

7
8 **NATURE OF THE PROCEEDINGS:** This matter involves an application (Application) filed on
9 August 29, 2013, by Tesoro Savage Petroleum Terminal LLC (Applicant) for a site certification
10 agreement to build and operate the Vancouver Energy Distribution Terminal (Facility) at the Port of
11 Vancouver (Site) in Vancouver, Washington. The Applicant's plans call for the Facility to be
12 capable of receiving up to an average of 360,000 barrels of crude oil per day by rail, storing this oil
13 on-site, and then loading the oil onto marine vessels for delivery to domestic refineries primarily
14 located on the West Coast of the United States.
15
16 **LAND USE CONSISTENCY:** RCW 80.50.090(2) requires the Energy Facility Site Evaluation
17 Council (EFSEC or Council) to "conduct a public hearing to determine whether or not the proposed
18 site is consistent and in compliance with city, county, or regional land use plans or zoning
19 ordinances." On May 9, 2014, EFSEC issued a Notice of Land Use Consistency Hearing and
20 scheduled the required public hearing in Vancouver, Washington for 6:00 p.m. on Wednesday, May
21 28, 2014.[1]
22
23 The purpose of the land use hearing is "to determine whether at the time of application the proposed
24 facility was consistent and in compliance with land use plans and zoning ordinances."[2] EFSEC's
25 governing statute defines a "land use plan" as "a comprehensive plan or land use element thereof
26 adopted by a unit of local government" under specified laws.[3] The statute further defines a "zoning
27 ordinance" as "an ordinance of a unit of local government regulating the use of land and adopted

[1] The Council sent this Notice to all interested persons on the mailing list for the Facility and also to all subscribers to EFSEC's general minutes and agenda list. Further, the Council purchased advertisements in The Columbian, the local daily newspaper of general circulation; a legal advertisement published on May 14, 2014; and a display advertisement published on May 18, 2014. Finally, the Council issued a media advisory on May 21, 2014.
[2] WAC 463-26-050.
[3] RCW 80.50.020(14), which specifies plans adopted under chapters 35.63, 35A.63, 36.70, or 36.70A RCW, or as otherwise designated by chapter 325, Laws of 2007.

pursuant to" specified laws.[4] In this order, the Council will refer to land use plans and zoning ordinances collectively as "land use provisions" and will refer to its decision as pertaining to "land use consistency."

The Council's evaluation of land use consistency is not dispositive of the Application[5] and a determination of land use consistency is neither an endorsement nor an approval of the project. The evaluation pertains only to the general siting of categories of uses, taking into account only the Site and not the Facility's construction and operational conditions. Whether this particular Facility will actually create on- or off-site impacts (including impacts to public safety and the environment) will be considered separately through the State Environmental Policy Act (SEPA), during the Council's adjudication, and through the environmental permitting processes.[6] The Council's ultimate recommendation to the Governor will not be made until after full and thorough consideration of all relevant issues.

REQUESTS TO DEFER LAND USE CONSISTENCY DETERMINATION: In mid-May 2014, the Council received letters from a number of interested persons asking that EFSEC postpone or cancel the land use consistency hearing.[7] These letters generally contended that the Council had not provided the public or the City of Vancouver with sufficient time to review the Tesoro Savage proposal. The letters also cited to SEPA regulations and asked that EFSEC publish an environmental impact statement (EIS) before holding its land use hearing. At least one letter complained that EFSEC failed to specify a method for submitting written testimony. On May 20, 2014, the Applicant sent a letter to EFSEC responding to these arguments and opposing any delay of the scheduled land use consistency hearing.[8]

On May 21, 2014, the Council Manager sent individual response letters to each organization explaining why EFSEC would not cancel the public hearing scheduled for May 28, 2014. The Council Manager's letter cited the legal requirements for the land use consistency hearing, reminded the writers that the project application had been filed nearly nine months earlier, and clarified the City of Vancouver's role in the process. The Manager's letters also reiterated the limited purpose of the land use hearing and explained that although the Council would receive relevant testimony at the hearing, EFSEC would not otherwise be soliciting or accepting public comment.

[4] RCW 80.50.020(22), which specifies ordinances adopted pursuant to chapters 35.63, 35A.63, 36.70, or 36.70A RCW or Article XI of the state Constitution, or as otherwise designated by chapter 325, Laws of 2007.

[5] In re Whistling Ridge Energy Project, Council Order No. 868 at 9 (October 6, 2011) (Whistling Ridge Order). A determination of land use inconsistency simply results in the Council's further consideration of whether local land use provisions should be preempted. WAC 463-28-060(1), *see also* RCW 80.50.110(2) and WAC 463-28-020 If they are preempted, the Council will include in the proposed site certification agreement conditions designed to recognize the purpose of the preempted provisions. WAC 463-28-070.

[6] RCW 80.50.090(3), RCW 80.50.040(9), (12), WAC 463-30, WAC 463-47, WAC 463-76, WAC 463-78.

[7] The Council received such letters from Friends of the Columbia Gorge (May 15, 2014), Columbia Riverkeeper (May 16, 2014), Columbia Waterfront, LLC (May 20, 2014), and hundreds of form letters and e-mails with substantially the same message from individual members of these organizations or the public.

[8] Letter from Jay P. Derr and Tadas Kisielius, Van Ness Feldman, LLP (May 20, 2014).

1 On May 22, 2014, E. Bronson Potter, Chief Assistant City Attorney for the City of Vancouver, filed
2 with EFSEC a Request to Defer Land Use Consistency Determination and Leave Record Open
3 (City's Deferral Request). The City's Deferral Request asked the Council to keep the record open
4 and allow further public participation until all environmental analysis could be completed.[9] The
5 City's Deferral Request also explained the scope of the Vancouver Fire Official's ongoing inquiry
6 into the Tesoro Savage proposal and the City's own desire to obtain a complete and final EIS before
7 completing its internal project review.[10]
8
9 **COUNCIL PROCESS ON LAND USE CONSISTENCY:** On May 28, 2014, the Council
10 conducted a land use hearing at the Clark County Public Service Center in Vancouver, Washington,
11 to hear testimony regarding whether the Site was consistent and in compliance with the City of
12 Vancouver's local land use provisions. The following EFSEC members were present: Bill Lynch
13 (Chair) Cullen Stephenson (Department of Ecology), Joe Stohr (Department of Fish and Wildlife),
14 Andrew Hayes (Department of Natural Resources), Dennis Moss (Utilities and Transportation
15 Commission), Christina Martinez (Department of Transportation), Bryan Snodgrass (City of
16 Vancouver), Jeff Swanson (Clark County), and Larry Paulson (Port of Vancouver).[11] Adam E.
17 Torem, Administrative Law Judge, presided over the hearing.
18
19 Jay P. Derr, Van Ness Feldman, LLP, represented the Applicant.[12] The Applicant also filed written
20 testimony and presented four slides.[13] Jon Wagner and E. Bronson Potter represented the City of
21 Vancouver,[14] which also filed written testimony.[15] The Council also received testimony from the
22 following persons: Todd Coleman, Port of Vancouver;[16] Nathan Baker, Friends of the Columbia
23 Gorge;[17] Lauren Goldberg, Staff Attorney, Columbia Riverkeeper;[18] Matt Grady, Columbia
24 Waterfront, LLC;[19] Don Steinke, citizen;[20] Chris Connolly, citizen;[21] Karen Axell, Rosemere

[9] City's Deferral Request at 1.
[10] *Id.* at 2.
[11] Liz Green-Taylor (Department of Commerce) was not present but reviewed the transcript of the hearing and examined the written testimony submitted to the Council.
[12] Land Use Public Meeting Transcript (TR) at 10–18 (May 28. 2104).
[13] Applicant Tesoro Savage's Statement of Land Use Consistency (Applicant's Statement).
[14] TR at 18-24.
[15] City of Vancouver's Comments Regarding Consistency of Proposal with Land Use Plans and Zoning Regulations (City's Comments).
[16] TR at 26-31. The Port also filed written testimony in the form of a letter from Mr. Coleman dated May 27, 2014 (Port's Letter)
[17] TR at 31-36. The Friends of the Columbia Gorge also filed written testimony in the form of a letter written on behalf of the Friends of the Columbia Gorge, Columbia Riverkeeper, the Northwest Environmental Defense Center, the Sierra Club, and the Center for Biological Diversity dated May 28, 2014 (FOCG Letter).
[18] TR at 36-41. Columbia Riverkeeper also signed the FOCG Letter.
[19] TR at 41-46. Columbia Waterfront also filed written testimony. Testimony of Matt Grady, AICP on Behalf of Columbia Waterfront LLC (Columbia Waterfront Written Testimony).
[20] TR at 48-49. Mr. Steinke also filed written testimony in the form of a picture of the proposed Columbia Waterfront development and associated text.
[21] TR at 49-52.

1 Neighborhood Association;[22] Den Mark Wichar, citizen;[23] Marla Nelson, Northwest Environmental
2 Defense Center;[24] Cathryn Chudy, citizen;[25] Judy Hudson, League of Women Voters, Clark
3 County;[26] Noreen Hine, citizen;[27] Lisa Ross, citizen;[28] and Marc Jander, citizen.[29] Assistant Attorney
4 General Matthew Kernutt, Counsel for the Environment, was present for the land use hearing.[30]
5
6 The Applicant did not obtain certificates from local authorities attesting to the land use consistency.[31]
7 Therefore, the Applicant retains the burden of proving the Site is consistent.[32]
8
9 The Site is located in an area designated "Industrial" by the City of Vancouver's Comprehensive
10 Plan 2011-2030 (Plan).[33] Allowable subtypes include "IH Heavy Industrial" that is generally
11 intended for "[i]ntensive industrial manufacturing, service, production or storage often involving
12 heavy truck, rail or marine traffic, or outdoor storage and generating vibration, noise and odors."[34]
13
14 Vancouver's zoning ordinances zone the Site "IH-Heavy Industrial,"[35] a designation that allows
15 intensive industrial uses such warehousing, freight movement, and railroad yards.[36] Proper activities
16 in the IH zone include the use of raw materials, significant outdoor storage, and heavy rail traffic.[37]
17 Permitted uses include storage and movement of large quantities of materials or products outdoors
18 and uses associated with significant rail traffic."[38]
19
20 The Applicant contended that the Site is consistent with all relevant portions of the City's land use
21 provisions.[39] The Applicant provided a history of its conferences and consultations with the City[40]

[22] *Id.* at 52-53.
[23] *Id.* at 53-56. Mr. Wichar also filed written testimony. EFSEC Hearing, Vancouver WA, 28 May 2014, Re: Tesoro Savage Energy Distribution Terminal, Proposed for Port of Vancouver.
[24] TR at 56-59. The Northwest Environmental Defense Center also signed the FOCG Letter.
[25] TR at 59-61. Ms. Chudy also filed written testimony. Tesoro Savage Oil Terminal Proposal Submitted at the EFSEC hearing in Vancouver, WA May 28, 2014.
[26] TR at 62-63.
[27] *Id.* at 63-65.
[28] *Id.* at 65-67.
[29] *Id.* at 67-68.
[30] *Id.* at 24-25,
[31] *Id.* at 12 (referring to *id.* at 8), 18-19, 22.
[32] WAC 463-26-090. In cases where such certificates are obtained, they are regarded as *prima facie* proof of consistency and compliance with local land use plans and zoning ordinances absent contrary demonstration by anyone present at the hearing.
[33] Plan at 1-12 (Figure 1-6); City's Comments at 5.
[34] *Id.* at 1-13 (Table 1-5).
[35] Vancouver Muncipal Code (VMC) 20.130.010; VMC 20.130.020; Applicant's Statement at Exhibit 3 and Exhibit 9 at 7, City's Comments at 20.
[36] VMC 20.440.020(C); City's Comments at 20-21.
[37] *Id.*
[38] VMC 20.160.020(D)(5); City's Comments at 20-21.
[39] TR at 10-18; Applicant's Statement at 10-15. The Applicant also argued that the Site is consistent and in compliance with the rest of the Plan's policies and the rest of the City's pertinent zoning ordinances. *Id.* at 15-16.

1 and submitted a matrix illustrating the project Site's consistency with each pertinent policy contained
2 in the City's Plan.[41] The Applicant also submitted a draft planning staff report that would have
3 found that "subject to certain concerns and recommended conditions, the applicant has demonstrated
4 the proposal is in compliance with both the land use and development regulations of the City of
5 Vancouver."[42]
6
7 The City of Vancouver agreed with the Applicant that the Site is in an area designated as heavy
8 industrial in the Plan[43] and would be an allowable use in the heavy industrial zone.[44] The City also
9 agreed that the Applicant's development plans for the Site would meet all applicable setback
10 provisions.[45] However, the City asserted that the City either did not yet have sufficient information
11 to approve all aspects of the project (including minimizing interference with surface navigation and,
12 allowing for safe, unobstructed passage of fish and wildlife) or that it had sufficient information but
13 that "further review and approval would be required" (including stormwater and certain engineering
14 reports).[46] The City also reiterated its request that EFSEC defer its land use consistency
15 determination.[47]
16
17 Todd Coleman, Chief Executive Officer for the Port of Vancouver, reiterated the Port's heavy
18 industrial zoning and history of handling a wide variety of cargo, including petroleum products, by
19 rail and maritime traffic.[48] Mr. Coleman testified that the project and related rail expansion at the
20 Port were consistent with the economic development policies set out in the City's Plan.[49]
21
22 Nathan Baker, Staff Attorney for Friends of the Columbia Gorge, argued for a broad interpretation of
23 the land use provisions that EFSEC must consider as part of its land use consistency determination
24 and asked the Council to delay that determination until an EIS could be completed and more
25 information made available.[50]
26

[40] TR at 12-14, Applicant's Statement at Exhibits 1, 2, 7, 8.
[41] Applicant's Statement at Exhibit 12.
[42] *Id.* at Exhibit 9 (City of Vancouver Staff Determination of Consistency and Compliance with Land Use Plans and Zoning Ordinances (December 16, 2013) (Staff Determination)). The Staff Determination at page 4 (certification determination) and page 69 (decision) separately state the city planning staff's position that subject to certain recommended conditions contained in the report, the Applicant's proposal can meet all applicable zoning-related provisions of the Vancouver Land Use and Development Code. The Applicant acknowledged that the City never issued or adopted this staff report. TR 13.
[43] City's Comments at 5.
[44] *Id.* at 20.
[45] *Id.* at 20-22 (subject to review to determine final compliance).
[46] *Id.* at 5-19, 21-78.
[47] City's Deferral Request.
[48] TR at 27-28 Port's Letter at 1-2.
[49] *Id.* at 28-31, Port's Letter at 3.
[50] *Id.* at 32-36, FOCG Letter at 2-39.

Lauren Goldberg, Staff Attorney for the Columbia Riverkeeper, agreed with Mr. Baker's testimony and focused attention on alleged geologic hazards and shoreline issues present at the proposed Site.[51]

Matt Grady of Columbia Waterfront, LLC, contended that the Council did not have sufficient information to make a land use determination.[52]

Members of the public testified that a major oil terminal would not be compatible with Vancouver's land use plans for urban residential developments along its waterfront,[53] presented too much risk of environmental degradation,[54] was inconsistent with the community goals section of the City's development code,[55] was unsustainable,[56] was inconsistent with a broad spectrum of local land use provisions,[57] and also that the Council should wait for a completed EIS to take action.[58]

COUNCIL ACTION AND DISPOSITION:

Preliminary Issues:

The Council is not persuaded to defer its land use consistency decision until the SEPA process is complete or for other reasons suggested by those who have requested a delay. Our present task is to determine whether the Site is consistent with the pertinent portions of the City's land use provisions, not to decide whether the City of Vancouver might lawfully allow the terminal under its own authority or whether the Governor should ultimately approve or reject the Application.[59] At this stage of the EFSEC process, it is not necessary to conduct a complete analysis of all possible environmental or other impacts potentially posed by the Application. Issues pertaining to the construction and operational conditions of the Facility will be addressed later through SEPA, during the adjudication, and through the environmental permitting processes. Our land use consistency determination is a preliminary and very limited step that is proper to take now, based on the limited sort of record that is obtained through the statutorily required public hearing.

The Council more specifically declines to defer its land use consistency decision for the following reasons:

SEPA does not require completion of an EIS prior to the City's consideration of the very narrow land use consistency issue before the Council. The Council disagrees with the contention

[51] TR at 37-41, *see also* FOCG Letter at 2-39
[52] *Id.* at 42-46, Columbia Waterfront Written Testimony at 1.
[53] *Id.* at 48-49.
[54] *Id.* at 53, 55, 60. 65.
[55] *Id.* at 54-56.
[56] *Id.* at 49, 58
[57] *Id.* at 52, 54-55, 58-59.
[58] *Id.* at 52, 57-58, 60.
[59] Whistling Ridge Order at 9-10.

1 that an EIS must precede the City's consideration of land use consistency. First, EFSEC is the SEPA
2 lead agency for "all governmental actions relating to energy facilities for which certification is
3 required under chapter 80.50 RCW"[60] and RCW 80.50.180 exempts from the requirement of an EIS
4 all local government actions related to EFSEC projects.
5
6 Second, the contention is incorrect that VMC 20.790.130(C) and VMC 20.790.620(D) (1) require
7 completion of an EIS prior to the City's consideration of land use consistency. RCW 80.50.110
8 preempts both provisions of the Vancouver Municipal Code. Moreover, these ordinances do not, by
9 their own terms, require the City to consider an EIS prior to the City's evaluation of land use
10 consistency. VMC 20.790.130(C) requires the City to consider an EIS before the City makes a
11 "decision" on a "proposal" but under RCW 80.50, the City's power to make such a decision is
12 preempted and state law controls the decision making process. Only the Governor can approve or
13 reject the Application. As required by state law, the City is simply asked to provide evidence to
14 EFSEC concerning land use consistency, evidence that has no regulatory effect with regard to the
15 Application. Similarly, VMC 20.790.620(D)(1) says that the City "may deny a permit or approval
16 for a proposal on the basis of SEPA," so long as certain findings are made related to an EIS but
17 under RCW 80.50.100 it is only the Governor – and not the City -- who can deny a permit or
18 approval for the Application.
19
20 **SEPA does not require completion of an EIS prior to EFSEC's very narrow land use**
21 **consistency decision.** The Council also disagrees with the contention that it must complete an EIS
22 prior to making preliminary decisions such as the land use consistency decision. As discussed above,
23 RCW 80.50.100 provides that only the Governor has the power to make a legally operative decision
24 about the Application. At the end of its evaluation process, EFSEC prepares a recommendation to
25 the Governor addressing all relevant issues. EFSEC will complete its EIS before making its
26 recommendation to the Governor and will provide that EIS to the Governor for his use in making a
27 legally operative decision about the Application. This is consistent with the SEPA rules, which
28 require that the EIS be completed "in time for the final statement to be included in appropriate
29 recommendations or reports on the proposal."[61] Significantly, the SEPA rules state that
30 "[a]ppropriate consideration of environmental information shall be completed before an agency
31 commits to a particular course of action."[62] Here, the land use consistency decision does not commit
32 either EFSEC or the Governor to any particular course of action with regard to the Application and
33 builds no momentum toward approval of that Application.
34
35 The arguments offered to EFSEC about WAC 197-11-535 do not change this conclusion. WAC
36 197-11-535(1) does not require completion of an EIS prior to a non-SEPA public hearing such as the

[60] WAC 197-11-938(1).
[61] WAC 197-11-406. This rule continues that "The statement shall be prepared early enough so it can serve practically as an important contribution to the decision making process and will not be used to rationalize or justify decisions already made." The EIS will precede both EFSEC's recommendation and the Governor's decision.
[62] WAC 197-11-055(2) (c).

land use hearing. WAC 197-11-535(1) states that non-SEPA public hearings on a proposal should be open to consideration of environmental impacts together with "any environmental document that is available." WAC 197-11 is clear that the term "environmental document" means "any written document prepared under [the SEPA rules]" and does not mean only an EIS.[63] WAC 197-11-535(1) is equally clear that consideration of environmental documents at non-SEPA public hearings only applies to documents that are "available."[64]

WAC 197-11-535(4) is similarly inapplicable to the land use hearing because by its own terms the rule applies only to public hearings held under WAC 197, the SEPA rules. WAC 197-11-535(4) states in pertinent part that "[i]f a public hearing is required under [the SEPA rules], it shall be open to discussion of all environmental documents and any written comments that have been received by the land agency prior to the hearing." EFSEC's land use hearing is required by RCW 80.50.090(2), not the SEPA rules. Moreover, the rule addresses consideration of "environmental documents" which, as described above, does not mean only an EIS.

The record does not support a conclusion that the public had insufficient time to prepare comments. Although some commenters alleged that the public was provided with insufficient time to prepare comments, they have cited no legal authority for the proposition that the time allotted was too short and have offered no evidence that members of the public, in fact were, unable to provide comments on the pertinent issues in the time allowed. Moreover, most – if not all – of the issues about which the public expressed concern at the hearing fall outside the very narrow land use consistency decision currently before the Council. The public will have ample opportunity to comment on other issues of concern through the SEPA process, during the adjudication, and during the environmental permitting processes.

The record does not support a conclusion that the City's VMC Type II process applies to the Council's land use consistency decision or that the City had insufficient time to prepare comments. The record reflects that the Vancouver City Council and planning staff acknowledged that the City's Type II process is legally inapplicable to the City's review of the Application.[65] The City's land use staff determination stated: "If this were not an EFSEC project the city would have processed the application using the Type II process. However, City Council confirmed at its

[63] WAC 197-11-744, *see also* WAC 197-11-500 ("This part provides rules for: (1) notice and public availability of environmental documents, especially environmental impact statements"), WAC 197-11-708 ("Adoption" means an agency's use of all or part of an existing environmental document ... to prepare an EIS or other environmental document").

[64] Moreover, the rule applies only to non-SEPA public hearings on "proposals," which SEPA defines as proposed actions to license, fund, or undertake any activity that will modify the environment. WAC 197-11-784, WAC 197-11-704. Thus, EFSEC's very limited land use hearing was not a hearing on the full proposal as that term is defined in SEPA.

[65] Applicant's Statement at 4 & n 2, Exhibit 9 at 2. Although the City and the Applicant evidently agreed that as between themselves they would use the process as a means of evaluating land use consistency, Applicant's Statement at 4, a voluntary agreement reached between parties before EFSEC has no bearing on the actual legal status of the Type II process under RCW 80.50.

Nov. 4, 2013, workshop, staff was to review whether the applicant could meet city standards administratively."[66] Indeed, the Type II process does not, by its own terms, apply here because the Application is not "subject to review under ... the Vancouver Municipal Code" and the City will not be "determining whether [this] development [application is, or can be] approved or conditionally approved...."[67] Moreover, even if the City attempted to make the Type II process binding in this proceeding, RCW 80.50.110 preempts the City's processing procedures and RCW 80.50.010(5) requires the avoidance of duplicative processes.

Finally, the City had eleven months between June 2013 and the May 2014 land use hearing to evaluate the Site for consistency and compliance with local land use provisions.[68] While the City now argues that it needs additional information and time for its review, the substantive areas that the City alleges need additional review fall outside of the narrow scope of the Council's land use consistency decision and the Council is deferring consideration of these substantive areas to a later date. With regard to the issues that are within the scope of the Council's current land use consistency decision, the City has alleged no need for additional time and, as indicated in more detail below, has confirmed that the Site is consistent and in compliance with local land use provisions.

The hearing notice was not defective. The Council disagrees with the contention that the land use hearing notice was defective because it did not specify a mailing or email address for submitting written testimony or state whether the Council would accept written testimony after the hearing. In accordance with RCW 80.50.090 and WAC 463-26-060, the purpose of the land use hearing was to take public testimony at the hearing. There is no legal requirement for the Council to accept written testimony by mail or email separate from the hearing or to accept written testimony after the hearing. As a result, there was no reason for the hearing notice to address written submission separate from the public hearing.[69]

<u>Land Use:</u>

RCW 80.50.090(2). RCW 80.50.090(2) requires the Council to determine whether the Site is "consistent and in compliance" with the portions of the City of Vancouver's land use provisions that meet the statutory definitions of the terms "land use plans" and "zoning ordinances" RCW 80.50.020.

Definitions of "Land Use Plan" and "Zoning Ordinances." The term "land use plan" is defined by statute as a "comprehensive plan or land use element thereof adopted ...pursuant to" one of the

[66] Applicant's Statement at Exhibit 9 at 2.
[67] VMC 20.210.010(B), (C).
[68] Applicant's Statement at 4, Exhibit 1 (Pre-Application Conference Request from June 2013), Exhibit 7 (Pre-Application Conference Report dated June 27, 2013); Exhibit 9 (Staff Determination).
[69] In any event, the notice stated EFSEC's mailing address and its website (which shows EFSEC's email address on the first page).

listed planning statutes.[70] EFSEC interprets this definition as referring to the portions of a comprehensive plan that outline proposals for an area's development, typically by assigning general uses (such as housing) to land segments and specifying desired concentrations and design goals.[71] Comprehensive plan elements and provisions that do not meet this definition are outside of the scope of the Council's land use consistency analysis.

The term "zoning ordinances" is defined by statute as those ordinances "regulating the use of land and adopted pursuant to" one of the listed planning statutes.[72] EFSEC has interpreted this definition as referring to those ordinances that regulate land use by creating districts and restricting uses in the districts (i.e., number, size, location, type of structures, lot size) to promote compatible uses.[73] Ordinances that do not meet this definition are outside of the scope of the Council's land use analysis.

EFSEC has defined the phrase "consistent and in compliance" based on settled principles of land use law: "Zoning ordinances require compliance; they are regulatory provisions that mandate performance. Comprehensive plan provisions, however, are guides rather than mandates and seek consistency."[74]

Legislative History. The legislative history regarding EFSEC's land use consistency determination also supports a narrow construction of the statutes defining "land use plan" and "zoning ordinances." RCW 80.50.090 originally required the Council to conduct a public hearing in the county of a proposed site within 60 days of receipt of an application for site certification. EFSEC was required to determine at this initial public hearing whether the proposed site was consistent with local land use plans or zoning determinations. On December 15, 2000, the Work Group of the Joint Legislative Task Force on Energy Facility Siting issued its report to the Legislature and the Governor (JLARC Report). The JLARC Report included a recommendation to establish an informational hearing for the public prior to the land-use consistency hearing, and to eliminate the 60-day requirement for holding the land use consistency hearing.[75] The Legislature enacted this proposed recommendation during the 2001 legislative session.[76]

The fact that the land use consistency hearing was conducted so early in the EFSEC process prior to the 2001 amendment demonstrates that the Council was only required to take a high-level view of the local government's "land use plan" and "zoning ordinances." A hearing that would have

[70] RCW 80.50.020(14).
[71] In re Northern Tier Pipeline, Council Order No. 579 (Northern Tier Pipeline Order) at 9 (November 26, 1979).
[72] RCW 80.50.020(22).
[73] Northern Tier Pipeline Order at 10.
[74] Whistling Ridge Order at 10 n 15.
[75] The JLARC Report is set forth in its entirety on the EFSEC web page at: http://www.efsec.wa.gov/taskforce/default.shtm#finrep. This recommendation is found on p. 15 of the JLARC Report.
[76] Engrossed House Bill 2247, Section 7, Chapter 214, Laws of 2001.

1 considered all the potential impacts and the appropriate levels of mitigation for a proposed project
2 would not have been feasible. Nothing in the legislation indicated that the scope of the land use
3 consistency hearing was changed by simply removing the 60-day requirement for holding the
4 hearing.
5
6 In 2006, the Legislature added statutory references to the Growth Management Act (GMA) to the
7 definitions of "land use plan" and "zoning ordinances."[77] Nothing in the legislative history indicates
8 that the Legislature intended EFSEC to expand the scope of its land use consistency review to
9 include such items as shoreline master programs or critical area ordinances. By adding references to
10 Chapter 36.70A RCW, the Legislature simply recognized that some jurisdictions were now planning
11 under GMA.
12
13 Although it appears that EFSEC may have included the Shoreline Management Act, chapter 90.58
14 RCW, or critical area ordinances as part of its land use consistency deliberations on occasion,
15 EFSEC expressly rejects this approach in this opinion. As EFSEC has previously recognized: the
16 definitions of "land use plans" and "zoning ordinances" do not refer to chapter 90.58 RCW as
17 authority; and shoreline master programs are subject to administrative review at the state level.[78]
18 The legislative history does not support an expanded review of what constitutes a "land use plan" or
19 "zoning ordinances". Furthermore, a restricted reading of these definitions is consistent with the
20 Washington Courts' determination that the Growth Management Act is not to be liberally
21 construed.[79]
22
23 **The City's Land Use Plan.** The portions of the Plan that meet the statutory definition are within
24 Chapter 1 (Community Development). That chapter defines itself as "[e]nsuring that different land
25 uses work together to form compatible and cohesive neighborhoods, business districts and
26 subareas..." and as describing current land uses and directing how future development should
27 occur.[80] The specific portions of Chapter 1 that meet EFSEC's definition are the land use map and
28 the associated definitions. The land use map "officially designates the type and intensity of land uses
29 allowed on individual properties...."[81] . The map designates the area of the Site as "Industrial."[82]
30 Associated definitions allow subtypes within such Industrial areas, including "IH Heavy Industrial"
31 which are generally intended for "[i]ntensive industrial manufacturing, service, production or storage
32 often involving heavy truck, rail or marine traffic, or outdoor storage and generating vibration, noise
33 and odors."[83]

[77] RCW 80.50.020(16), (17); Engrossed Substitute House Bill 1020, Section 1, Chapter 196, Laws of 2006; Substitute House Bill 2402, Section 1, Chapter 205, Laws of 2006.
[78] Northern Tier Pipeline Order at 10-11.
[79] *Spokane County vs. Eastern Washington Growth Management Hearings Board*, 173 Wn. App. 310, 337, 293 P.3d 1248 (2013).
[80] Plan at 1-1, *see also id.* at iii (the City's vision for land use and development is in Chapter 1).
[81] *Id.* at 1-11.
[82] *Id.* at 1-12 (Figure 1-6).
[83] *Id.* at 1-13 (Table 1-5).

1 The development policies in Chapter 1 fall outside of EFSEC's definition of a land use plan that it
2 must consider because these policies do not assign uses to land segments.[84] The balance of the Plan
3 (Chapters 2 through 7) also fall outside of EFSEC's definition of land use plan because, as the Plan
4 itself indicates, only Chapter 1 addresses the "use" of land by assigning general uses to land
5 segments and Chapters 2 through 7 do not.[85] The Council observes that with respect to the county-
6 wide planning policies listed by the Legislature to guide comprehensive planning, the Washington
7 Courts have recognized that "some of them are mutually competitive".[86] So even if the Council did
8 examine all of the policies in Chapters 2 through 7, it is not necessary for development at the Site to
9 advance each of the policies.
10
11 **The City's Zoning Ordinances.** The portions of the City's zoning ordinances that meet the
12 statutory definition are the City's zoning map, development restrictions, and associated definitions.
13 The Site is zoned "IH-Heavy Industrial" on the zoning map.[87] The IH-Heavy Industrial zone is an
14 appropriate location for intensive industrial uses including warehousing and freight movement,
15 railroad yards, with allowable activities in the IH zone including those that use raw materials, require
16 significant outdoor storage, and generate heavy truck and/or rail traffic.[88] Uses permitted within the
17 IH zone include "storage and movement of large quantities of materials or products indoors and/or
18 outdoors; associated with significant truck and/or rail traffic."[89] VMC 20.440.030(B) defines uses
19 that are permitted in the IH zone, including "Warehouse/Freight Movement."[90] VMC 20.440.040
20 establishes development restrictions associated with the IH-Heavy Industrial zone.[91]
21
22 **The Test for Consistency and Compliance.** Under the test previously established by the Council,
23 the Council considers whether the pertinent local land use provisions "prohibit" the Site "expressly
24 or by operation clearly, convincingly and unequivocally."[92] If the Site is permitted either outright or
25 conditionally, it is consistent and in compliance with the local land use provisions.[93]
26
27 The Site is consistent with the pertinent portions of the Plan and zoning ordinances because neither
28 the pertinent portions of the Plan nor the pertinent portions of the zoning ordinances clearly,
29 convincingly and unequivocally prohibit the Site. To the contrary, the Plan specifically allows the

[84] *Id.* at 1-14 – 1-16,

[85] *Id* at iii ("Chapter 1, Community Development describes the vision for land use and development of the built environment").

[86] *Quadrant Corporation v. Central Puget Sound Growth Management Hearings Board*, 154 Wn.2d 224, 246, 110 P.3d 1132 (2005) (*quoting* Richard L. Settle, *Washington's Growth Management Revolution Goes to Court*, 23 Seattle U L. Rev. 5, 11 (1999)); *Spokane County v. Eastern Washington Growth Management Hearings Board*, 173 Wn. App. 310, 333, 293 P.3d 1248 (2013).

[87] VMC 20.130.010; VMC 20.130.020; Applicant's Statement at Exhibit 3 and Exhibit 9 at 7, City's Comments at 20.

[88] VMC 20.440.020(C), City's Comments at 20-21.

[89] VMC 20.160.020(D)(5) City's Comments at 20-21.

[90] Table 20.440.030-1.

[91] Table 20.440.040-1.

[92] In re TransMountain Pipeline, Council Order 616 at 3 (May 26, 1981).

[93] *Id.*

1 proposed use in the area where the Site is located.[94] The Plan designates that area as "Industrial" [95]
2 and allows within it the "IH Heavy Industrial" subtype, which is generally intended for "[i]ntensive
3 industrial manufacturing, service, production or storage often involving heavy truck, rail or marine
4 traffic, or outdoor storage and generating vibration, noise and odors."[96]
5
6 Similarly, the pertinent zoning ordinances do not clearly, convincingly and unequivocally prohibit
7 the Site. The Site is zoned "IH-Heavy Industrial,"[97] which is designated as appropriate for intensive
8 industrial uses such warehousing, freight movement, and railroad yards.[98] Proper activities in the IH
9 zone include the use of raw materials, significant outdoor storage, and heavy rail traffic.[99] Permitted
10 uses include storage and movement of large quantities of materials or products outdoors and uses
11 associated with significant rail traffic.[100] The Site is permitted outright in the IH zone.[101] The Site
12 also meets the development standards associated with the IH-Heavy Industrial zone.[102]
13
14 It follows that under the minimal threshold for determining land use consistency, the Site is
15 consistent and in compliance with the City's land use provisions. As noted by the Applicant, the
16 City, and several others presenting testimony, the Supreme Court's recent decision in *Friends v.*
17 *EFSEC*[103] establishes that the land use consistency determination is one in which EFSEC may only
18 find a site inconsistent if the Site is contrary to *both* the land use plan and the zoning ordinances.
19
20 Thus, *Friends* has no impact on our land use consistency evaluation because the Site is both
21 consistent with the pertinent portions of the Plan and in compliance with the pertinent zoning
22 ordinances.[104]
23
24 Having fully considered all testimony and evidence offered at the hearing, the Council determines
25 under RCW 80.50.090(2) and WAC 463-26-110 that the Applicant's proposed Site for the Facility is

[94] City's Comments at 5 ("The proposed site of the Oil Terminal is in an area designated as industrial by the comprehensive plan. Comment: The development of the proposed oil terminal is consistent with this designation.")
[95] Plan at 1-12 (Figure 1-6).
[96] *Id.* at 1-13 (Table 1-5).
[97] VMC 20.130.010; VMC 20.130.020; Applicant's Statement at Exhibit 3 and Exhibit 9 at 7, City's Comments at 20.
[98] VMC 20.440.020(C); City's Comments at 20-21.
[99] VMC 20.440.020(C); City's Comments at 20-21.
[100] VMC 20.160.020(D)(5); City's Comments at 20-21.
[101] VMC 20.440.030(B) (Table 20.440.030-1), City's Comments at 21.
[102] VMC 20.440.040 (Table 20.440.040-1), Applicant's Statement at Exhibit 2 at 46, Exhibit 7 at lines 155-165, Exhibit 9 at 708, *see also* City's Comments at 21-22.
[103] *Friends of the Columbia Gorge v. Energy Facility Site Evaluation Council*, 178 Wn.2d 320, 344-46, 310 P.3d 780 (2013).
[104] Because the Council is holding that the Site is consistent with both of the City's land use provisions, rather than consistent with the Plan but not the zoning ordinances, or vice versa, we need not reach the City's arguments focusing on the proper interpretation of the word "or" in RCW 80.50.090(2) and the *Friends* decision. City of Vancouver's Response to Applicant's Argument on Statutory Interpretation (July 14, 2014). For this same reason, the Council does not address Applicant Tesoro Savage's Motion to Strike (July 15, 2014), nor the City of Vancouver's Response to Applicant's Motion to Strike (July 15, 2014).

consistent and in compliance with the portions of the City of Vancouver's land use plan and zoning ordinances that meet the statutory definitions of those terms found in RCW Chapter 80.50.

We note that this Council Order is limited to the statutorily mandated land use consistency determination set out in RCW 80.50.090(2). This Council Order does not preclude the Council's future consideration of other issues[105] during the SEPA process, environmental permitting, or the adjudication to be held pursuant to RCW 80.50.090(3).

FINDINGS OF FACT

(1) The Council conducted a land use hearing on May 28, 2014, in Vancouver, Washington, pursuant to RCW 80.50.090(2). The Council received testimony from the Applicant, the City of Vancouver, and all others who wished to be heard on the issue of land use consistency for the Vancouver Energy Distribution Terminal.

(2) The Applicant did not present certificates from local authorities attesting to the proposed project's consistency or compliance with local land use plans and zoning ordinances.

(3) The proposed Site is located in the City of Vancouver, Clark County, Washington.

(4) The City of Vancouver's Comprehensive Plan classifies the proposed Site as "industrial." The subtype "heavy industrial" is intended to include intense industrial storage involving rail or marine traffic, or outdoor storage.[106]

(5) The City of Vancouver's zoning code designates the proposed Site as "heavy industrial." The heavy industrial designation allows intensive industrial uses such as warehousing, freight movement, and railroad yards. Permitted activities in this zone include significant outdoor storage and heavy rail traffic. Permitted uses include storage and movement of large quantities of products outdoors and uses associated with significant rail traffic.[107]

(6) The Port of Vancouver has a history of handling petroleum products by rail and marine traffic within its heavy industrial zone.

(7) Although the City of Vancouver and others expressed concerns regarding the Application, no one submitted information indicating the comprehensive plan or zoning ordinances prohibit the site either expressly or by operation, clearly, convincingly or unequivocally.

[105] Potential issues not addressed by this land use consistency determination include, but are not limited to, potential on- or off-site impacts to public safety and the environment (including but not limited to shoreline and stormwater management, critical areas ordinances, fire and spill response and impacts to neighborhoods)
[106] Plan at 1-1, 1-11, 1-12 (Figure 1-6), and 1-13 (Table 1-5).
[107] VMC 20 130.010, 20.130.020, 20.440.020(C), 20.160.020(D)(5), Table 20.440.030-1, and Table 20.440.040-1.

1 **CONCLUSIONS OF LAW**
2
3 (1) A narrow reading of the Council's land use consistency process under RCW 80.50.090(2) is
4 warranted based upon the legislative history of this statute and EFSEC's past practices.
5
6 (2) The Council is not required to defer acting on a land use consistency determination until an
7 environmental impact statement is completed, or to wait as if the City of Vancouver was
8 undertaking review of the Application under its own review process.
9
10 (3) The Council provided adequate notice to interested parties, and the Council has adequate
11 information to render a land use consistency decision.
12
13 (4) The proposed Site for the Vancouver Energy Distribution Terminal is consistent with the
14 City of Vancouver's Comprehensive Plan.
15
16 (5) The proposed Site for the Vancouver Energy Distribution Terminal is in compliance with the
17 City of Vancouver's zoning ordinances.
18
19 **DETERMINATION AND ORDER:** Based upon these Findings of Fact and Conclusions of Law,
20 and as further discussed in the body of this Council order, the Council determines that the
21 Applicant's proposed Site is consistent and in compliance with the City of Vancouver's
22 Comprehensive Plan 2011-2030 and the City of Vancouver's applicable zoning ordinances.
23
24 Nothing in this Order precludes parties from raising issues during the adjudication, the process of
25 adopting an environmental impact statement, or the issuance of permits with respect to on-site or off-
26 site impacts, or the mitigation of those impacts, including but not limited to issues regarding
27 shoreline management, critical area ordinances, stormwater, service availability, spills or fires.
28
29 **ORDER**
30
31 THE COUNCIL THEREFORE ORDERS that:
32
33 (1) In accordance with WAC 463-26-110, the Vancouver Energy Distribution Terminal Site is
34 consistent and in compliance with local land use plans and ordinances.
35
36 (2) The Applicant has met its burden of proof of demonstrating that the Site is consistent with
37 and in compliance with the City of Vancouver's Comprehensive Plan and applicable zoning
38 ordinances.
39
40 (3) In accordance with RCW 80.50.090(2), the City of Vancouver shall not alter its land use
41 plans or zoning ordinances so as to affect the proposed Site during the pendency of the
42 Application.

DATED at Olympia, Washington and effective on this 1st day of August, 2014.

WASHINGTON STATE
ENERGY FACILITY SITE EVALUATION COUNCIL

_______________/s/_______________
Bill Lynch, Chair

Concurring Opinion of Bryan Snodgrass, City of Vancouver representative to Council.

I fully support my colleagues' intent with this order. However, given the ambiguity of EFSEC's applicable land use consistency statute and rule, I believe further clarity is needed to ensure EFSEC's recommendations are properly understood in the event of future challenges. Council deliberation and the staff recommendation that preceded it make clear that this determination of land use consistency is based solely on a finding that the proposed use is an allowed use or conditional use in the City of Vancouver's Heavy Industrial zoning district. The motion approved at the Council's regular monthly meeting of July 15, 2014, should not be interpreted to mean anything more.

RCW 80.50.010
Legislative finding — Policy — Intent.

The legislature finds that the present and predicted growth in energy demands in the state of Washington requires the development of a procedure for the selection and utilization of sites for energy facilities and the identification of a state position with respect to each proposed site. The legislature recognizes that the selection of sites will have a significant impact upon the welfare of the population, the location and growth of industry and the use of the natural resources of the state.

It is the policy of the state of Washington to recognize the pressing need for increased energy facilities, and to ensure through available and reasonable methods, that the location and operation of such facilities will produce minimal adverse effects on the environment, ecology of the land and its wildlife, and the ecology of state waters and their aquatic life.

It is the intent to seek courses of action that will balance the increasing demands for energy facility location and operation in conjunction with the broad interests of the public. Such action will be based on these premises:

(1) To assure Washington state citizens that, where applicable, operational safeguards are at least as stringent as the criteria established by the federal government and are technically sufficient for their welfare and protection.

(2) To preserve and protect the quality of the environment; to enhance the public's opportunity to enjoy the esthetic and recreational benefits of the air, water and land resources; to promote air cleanliness; and to pursue beneficial changes in the environment.

(3) To provide abundant energy at reasonable cost.

(4) To avoid costs of complete site restoration and demolition of improvements and infrastructure at unfinished nuclear energy sites, and to use unfinished nuclear energy facilities for public uses, including economic development, under the regulatory and management control of local governments and port districts.

(5) To avoid costly duplication in the siting process and ensure that decisions are made timely and without unnecessary delay.

CHAPTER 110

(Engrossed Substitute senate Bill No. 3329] THERMAL POWER PLANT SITE STUDIES--

ENVIRONMENTAL IMPACT STATEMENTS

AN ACT Relating to studies of sites for thermal power plants and associated transmission lines; adding new sections to chapter 45, Laws of 1970 ex. sess. and to chapter 80.50 RCW; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

New Section. Section 1. There is added to chapter 45, Laws of 1970 ex. sess. and to chapter 80.50 RCW a new section to read as follows:

It is the intent of section 2 of this 1974 act to expedite the certification of sites for thermal power plants and associated transmission lines, to minimize duplication of effort in conducting studies of and preparing environmental impact statements relating to such sites, to authorize and encourage cooperation between the council and counties, other governmental agencies, and municipal or public corporations in connection with such sites, and to provide for a single detailed statement in accordance with RCW 43.21C.030 (c) where any proposed thermal power plants and associated transmission lines are subject to certification pursuant to chapter 80.50 RCW, and to further the development of power generation facilities to meet pressing needs: PROVIDED, That it is the intent of the Legislature that appropriate consideration will be given to protecting and preserving the quality of the environment.

NEW SECTION. Sec. 2. There is added to chapter 45, Laws of 1970 ex. sess. and to chapter 80.50 RCW, a new section to read as follows:

(1) In addition to all other powers conferred on the council under this chapter, the council shall have the powers set forth in this section.

(2) The council, upon request of any potential applicant, is authorized, as provided in this section, to conduct a study of any potential site prior to receipt of an application for site certification. A fee of ten thousand dollars for each potential site, to be applied toward the cost of any study agreed upon pursuant to subsection (3) of this section, shall accompany the request and shall be a condition precedent to any action on the request by the council.

(3) After receiving a request to study a potential site, the council shall commission its own independent consultant to study matters relative to the potential site. The study shall include, but

40 CFR 1506.1 - Limitations on actions during NEPA process.

§ 1506.1 Limitations on actions during NEPA process.

(a) Until an agency issues a record of decision as provided in § 1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would:
(1) Have an adverse environmental impact; or
(2) Limit the choice of reasonable alternatives.
(b) If any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.
(c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:
(1) Is justified independently of the program;
(2) Is itself accompanied by an adequate environmental impact statement; and
(3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.
(d) This section does not preclude development by applicants of plans or designs or performance of other work necessary to support an application for Federal, State or local permits or assistance. Nothing in this section shall preclude Rural Electrification Administration approval of minimal expenditures not affecting the environment (e.g. long leadtime equipment and purchase options) made by non-governmental entities seeking loan guarantees from the Administration.

WAC 197-11-720
Categorical exemption.

"Categorical exemption" means a type of action, specified in these rules, which does not significantly affect the environment (RCW 43.21C.110 (1)(a)); categorical exemptions are found in Part Nine of these rules. Neither a threshold determination nor any environmental document, including an environmental checklist or environmental impact statement, is required for any categorically exempt action (RCW 43.21C.031). These rules provide for those circumstances in which a specific action that would fit within a categorical exemption shall not be considered categorically exempt (WAC 197-11-305).

WAC 463-14-020
Need for energy facilities—Legislative intent binding.

RCW 80.50.010 requires the council "to recognize the pressing need for increased energy facilities." In acting upon any application for certification, the council action will be based on the policies and premises set forth in RCW 80.50.010 including, but not limited to:

(1) Ensuring through available and reasonable methods that the location and operation of such facilities will produce minimal adverse effects on the environment, ecology of the land and its wildlife, and the ecology of state waters and their aquatic life;

(2) Enhancing the public's opportunity to enjoy the esthetic and recreational benefits of the air, water and land resources; and

(3) Providing abundant power at reasonable cost.

[Statutory Authority: RCW 80.50.040 (1) and (12). WSR 04-21-013, § 463-14-020, filed 10/11/04, effective 11/11/04; Order 104, § 463-14-020, filed 11/4/76.]

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timberland to residential development eliminates the possible use of the site for future timber production, conversion to farmland, etc.).

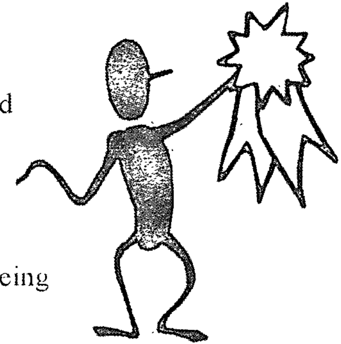
3.3.2.1. No-Action Alternative

SEPA requires the evaluation of the no-action alternative, which at times may be more environmentally costly than the proposal, or may not be considered "reasonable" by other criteria. Still, it provides a benchmark from which the other alternatives can be compared.

The identification of a no-action alternative can sometimes be difficult. It is typically defined as what would be most likely to happen if the proposal did not occur. If a rezone is proposed, what is the most likely development on the site under existing zoning? If the proposal involves conversion of forestland to another use, this can be compared to the impacts of continued use of the site for timber production.

There are other methods of defining the no-action alternative, such as "no new government action," or the "lock the gate and walk away" scenario where all current activities are also ceased. As the SEPA Rules do not define what the no-action alternative must look like, the lead agency has some discretion in its design.

3.3.2.2. Preferred Alternative



SEPA does not require the designation of a "preferred alternative" in an EIS. By identifying a preferred alternative, reviewers are made aware of which alternative the lead agency feels is best or appears most likely to be approved. This can be particularly helpful for agency proposals when what is actually being proposed may otherwise not be clear.

Identifying a preferred alternative may also have disadvantages. The public may feel that the decision has already been made, which can cause frustration with the process. Also, comments received may be limited to arguments against the agency "decision," with supporters of the preferred alternative not bothering to respond at all. This may result in a lack of feedback both on the problems related to other "non-preferred" alternatives and on the benefits of the preferred alternative.

If used, the preferred alternative can be identified at any time in the EIS process-scoping, draft EIS, or final EIS. When designated early in the process, it should be expected that changes are likely to occur to the preferred alternative prior to issuing the final EIS. Early designation of a preferred alternative in no way restricts the lead agency's final decisions.