

1 **BEFORE THE STATE OF WASHINGTON**
2 **ENERGY FACILITY SITE EVALUATION COUNCIL**

3 In the Matter of
4 Application No. 2013-01

CASE NO. 15-001

5 TESORO SAVAGE PETROLEUM
6 TERMINAL LLC

APPLICANT'S CONSOLIDATED
RESPONSE TO PETITIONS FOR
INTERVENTION

VANCOUVER ENERGY
DISTRIBUTION TERMINAL

7 The Applicant, Tesoro Savage Petroleum Terminal LLC ("Vancouver Energy"),
8 by and through its undersigned counsel, submits this Consolidated Response to Petitions
9 for Intervention ("Response").

10 **I. INTRODUCTION**

11 Fifteen entities ("Petitioners") have filed petitions for full and unlimited
12 participation as intervenors in the adjudication of the Vancouver Energy Distribution
13 Terminal (the "Project").¹ They are:

- 14 • City of Washougal;
- 15 • Columbia Riverkeeper, Climate Solutions, ForestEthics, Friends of the
16 Columbia Gorge, Fruit Valley Neighborhood Association, Sierra Club,
17 Spokane Riverkeeper, and Washington Environmental Council;²
- 18 • International Longshore Warehouse Union Local 4;
- 19 • Columbia River Inter-Tribal Fish Commission;
- 20 • Columbia Waterfront LLC;
- 21 • City of Spokane;
- 22 • Confederated Tribes and Bands of the Yakama Nation; and

23 ¹ Additionally, four governmental entities, "deemed parties" pursuant to WAC 463-30-050 and
24 WAC 463-30-060(2), have filed notices of party participation indicating they wish to actively
25 participate in the adjudication. They are: the Department of Natural Resources, Clark County, the
City of Vancouver, and the Port of Vancouver. Vancouver Energy does not object to their
admission as parties to the adjudication.

² These organizations moved to intervene in a consolidated petition.

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- Confederated Tribes of the Umatilla Indian Reservation.

Vancouver Energy does not oppose the admission of Petitioners as intervenors, provided their involvement will not delay the proceedings and an efficient and effective adjudication can be achieved. Accordingly, Vancouver Energy reserves the right to object to the Council's consideration of issues proposed by Petitioners for adjudication. This Response does not constitute a waiver of any claim, defense, or legal position available to Vancouver Energy. Moreover, Vancouver Energy requests that the Council exercise its discretion to impose reasonable conditions and limitations on Petitioners' participation, such as a requirement that Petitioners coordinate and consolidate their participation, to allow for timely and efficient adjudication of the pending application. Finally, Vancouver Energy requests that the Administrative Law Judge ("ALJ") convene a prehearing conference at the earliest opportunity to address the matters raised in this Response, to discuss coordination of State Environmental Policy Act ("SEPA") review and adjudication procedures, and to address additional procedural issues.

II. ARGUMENT

A. The Council may limit Petitioners' participation in the adjudication.

"The Council has an obligation to its own administrative processes, to the applicant, to all participants, to the Council members, and to the public to maintain a process that not only fairly and legally allows it to reach a decision, but also does so effectively and efficiently." *See In re Application No. 94-1 of Washington Public Power Supply System*, Council Order No. 676, Appx. A, p. 2 (1995). Although Vancouver Energy does not object to the Petitioners' admission as intervenors, it urges the Council to exercise its discretion to reasonably condition and limit the Petitioners' participation in the interest of achieving a fair and efficient hearing. *Id.* Appx. A, pp. 5-6.

1 The Council's regulations and precedent do not require unlimited participation in
2 the adjudicative process by any and all interested persons. "Both the APA and EFSEC's
3 rules authorize the Council to impose limits on those who participate in the proceeding via
4 intervention." *In re Application No. 2004-1 of Wind Ridge Power Partners, L.L.C.*,
5 Council Order 804, p. 4 (2004). The Council has clear authority to condition and limit the
6 Petitioners' participation in the pending adjudication. "The statute permits the imposition
7 of conditions upon intervenors, and it permits the agency to impose those conditions at
8 any time. The statute also allows the agency to impose limitations as to the issues an
9 intervenor may address; limitations on the use of discovery, cross examination, and other
10 procedures to promote the prompt and orderly conduct of the hearing, and may require
11 two or more intervenors to combine their participation." Order No. 676, Appx. A, p. 3
12 (emphasis in original). *See also* RCW 34.05.443(2); WAC 463-30-092.

13 B. The Council should require Petitioners to identify the specific issues proposed for
14 adjudication.

15 In order to identify appropriate conditions and limitations for the Petitioners'
16 participation, each Petitioner must clearly articulate the issues they propose for
17 adjudication. In most instances Petitioners' petitions for intervention fail to provide
18 enough detail to allow the Council to properly frame the issues for adjudication. Without
19 this specificity, it is not possible to evaluate whether each Petitioner meets the standards
20 for intervention: that is, whether each Petitioner has established its interest in the issues
21 raised with particularity and shown that the interest could be adversely affected by the
22 Project in a direct and substantial way.³ In the case of environmental and other public
23 interest groups, each Petitioner must also demonstrate that the organization has special

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25 ³ RCW 34.05.443 and WAC 463-30-091; *see also In re Application No. 96-1 of Olympic Pipe
Line Company*, Council Order No. 701, p. 3 (1996); Council Order No. 804, p. 5.

1 expertise in the issues raised that would provide the Council with guidance that might not
2 otherwise be available through the participation of other parties.⁴

3 Parties may participate in the EFSEC process in several ways even if they cannot
4 meet the standard for intervention regarding a specific issue. First, under RCW
5 80.50.080, the Counsel for the Environment represents “the public and its interest in
6 protecting the quality of the environment.” Second, RCW 80.50.090(3) affords an
7 opportunity for members of the public to present testimony at the hearing without having
8 to intervene formally. Third, the public has the opportunity to participate in the
9 environmental review portion of the Council’s process through comments on the Draft
10 Environmental Impact Statement (“DEIS”). Accordingly, it may not be appropriate for
11 every Petitioner to be an intervenor regarding every issue.

12 Vancouver Energy therefore requests that the Council promptly require each
13 Petitioner to:

- 14 (1) Submit a list of legal issues proposed for adjudication. Each proposed issue
15 should be defined with a level of specificity to allow the Council to determine
16 whether the issues are within EFSEC’s adjudicative jurisdiction;⁵ and
17 (2) Establish the Petitioner’s standing to raise such issues by demonstrating a
18 specific and particular interest in each issue that is not adequately represented
19 by another party and, in the case of the public interest groups, demonstrating
20 that the organization has special expertise in each issue that might not
21 otherwise be available through the participation of another party.

19 C. The Council should appropriately condition and limit each Petitioner’s
20 participation in the adjudication.

21 The Council should impose the following conditions and limitations based upon

22 ⁴ See *In re Application No. 99-1 of Sumas Energy 2, Inc.*, Council Order No. 743, p. 7 (2000);
23 Order No. 804, p. 5.

24 ⁵ For example, Vancouver Energy notes that several of the Petitioners are located a great distance
25 from the Project site and these Petitioners have stated an interest in raising issues related to rail
transportation. Many, if not all, of these issues may be preempted by federal law and, therefore,
outside the scope of EFSEC’s adjudicative jurisdiction.

1 each Petitioner's specific issues proposed for adjudication:

- 2 (1) Limit each Petitioner's participation to designated issues in which they have
3 demonstrated a particular interest or special expertise;
- 4 (2) Limit duplicate representation of similar issues and interests by requiring
5 consolidated presentation of evidence, briefing, discovery (if any), witness
6 examination, and argument;
- 7 (3) Identify issues that are more appropriately addressed in the DEIS review and
8 public comment process, and remove those issues from the adjudicative
9 process upon publication of the DEIS; and
- 10 (4) Impose other conditions or limitations that will allow for a fair and efficient
11 hearing.

12 This is consistent with the Council's approach to intervention in other proceedings. *See,*
13 *e.g., In re Application No. 2009-01 of Whistling Ridge Energy Project LLC, Council*
14 *Order No. 842 (2009); In re Application No. 2003-01 of Sagebrush Power Partners,*
15 *L.L.C., Council Order No. 777 (2003).*

16 D. Vancouver Energy reserves the right to object to any issue proposed for
17 adjudication and to any Petitioner's participation in any particular issue in the
18 adjudication.

19 Vancouver Energy reserves its right to raise all factual, legal, and procedural
20 arguments during the adjudication, including but not limited to the following:

- 21 (1) The need to address specific issues in the context of the SEPA review process,
22 which is separate from the adjudication. *See In re Application No. 2009-01 of*
23 *Whistling Ridge Energy Project LLC, Council Order No. 853, p. 2 (2010);*
- 24 (2) Pre-emption of specific issues by federal law, and/or dismissal of issues not
25 otherwise within EFSEC's adjudicative jurisdiction;
- (3) Clarification or dismissal of proposed issues that are vague, overbroad, or
inadequately stated;
- (4) Consolidation of issues that are adequately represented by participating
governmental agencies, Counsel for the Environment, or both;
- (5) Limitation of issues that are beyond the established interest or expertise of a
particular party;
- (6) Limitation of a party's participation based on duplication, redundancy, or delay

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of the adjudicative process that will impair the orderly and prompt conduct of the hearing or will impair the rights of existing parties;

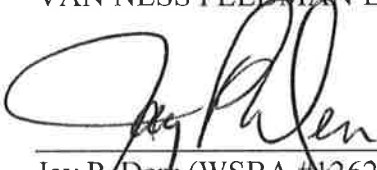
- (7) Limitation of discovery (if any) to avoid unnecessary burden, expense, or delay; or
- (8) Objection based on violation of EFSEC’s rules of process or procedure.

E. The ALJ should promptly schedule a prehearing conference.

Vancouver Energy requests that the ALJ schedule a prehearing conference at the earliest opportunity to address the issues raised in this Response and to provide further clarity regarding the procedures to be used throughout the prehearing phase of this adjudication. This conference should, at a minimum, address the parties’ proposals pertaining to hearing guidelines, a prehearing and hearing schedule, and discovery issues.⁶

Dated: March 6, 2015.

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⁶ Vancouver Energy also requests clarification of service requirements, and notes that many of the petitions for intervention failed to comply with EFSEC’s regulations governing proper service of documents.

1 **CERTIFICATE OF SERVICE**

2 I, Amanda Kleiss, declare as follows:

3 That I am over the age of 18 years, not a party to this action, and competent to be a
4 witness herein;

5 That I, as a legal assistant in the office of Van Ness Feldman, caused true and
6 correct copies of the following documents to be delivered as set forth below:

- 7 1. Applicant's Consolidated Response to Petitions for Intervention;
8 2. Certificate of Service.

9 and that on March 6, 2015, I addressed said documents and deposited them for delivery as
10 follows:

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60602-7

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I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by authorized method of service pursuant to WAC 463-30-120(3).

EXECUTED at Seattle, Washington on this 6th day of March, 2015.


Amanda Kleiss, Declarant