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6 **BEFORE THE STATE OF WASHINGTON ENERGY**
7 **FACILITY SITE EVALUATION COUNCIL**

8 In the Matter of: Application No. 2013-01

CASE NO. 15-001

9 TESORO SAVAGE, LLC

REPLY TO APPLICANT'S RESPONSE
TO MOTION FOR ISSUANCE OF FINAL
EIS PRIOR TO COMMENCEMENT OF
HEARING BY CITY OF VANCOUVER
AND COLUMBIA RIVERKEEPER *ET AL.*

10 VANCOUVER ENERGY DISTRIBUTION
11 TERMINAL

12 The City of Vancouver, Washington ("Vancouver") and Columbia Riverkeeper, *et al.*,
13 ("CRK") (collectively, "Movants") submit this reply to the response ("Response") of Applicant
14 Tesoro Savage, LLC ("Tesoro") to Movants' motion ("Motion") dated May 31, 2016. The
15 Motion requested that the Washington Energy Facility Site Evaluation Council ("EFSEC" or
16 "Council") issue the final environmental impact statement ("EIS") for Tesoro's proposed oil
17 terminal facility ("Project") prior to commencement of the in-person hearing in this matter,
18 currently scheduled to begin on June 27, 2016.

19 **1. Movants Are Not Requesting Delay of In-Person Hearing**

20 As an initial matter, Movants strenuously disagree that the Motion "is tantamount to a
21 request to delay the adjudication." (Response at 1:17-18; *see id.* § II at 7-9.) Movants are not
22 requesting any schedule changes to the adjudication process or the in-person hearing. Rather the
23 Motion requests an adjustment to the schedule for the State Environmental Policy Act ("SEPA")
24

1 process, which is distinct from the adjudication process, (Letter from Cassandra Noble, A.L.J., to
2 adjudication parties 3¹ (June 9, 2016)). The relief Movants seek in the Motion is issuance of the
3 final EIS prior to commencement of the in-person hearing. If this relief is infeasible, then
4 Movants request EFSEC to exercise its discretion to fashion an appropriate remedy that does not
5 involve postponing the in-person hearing. For example, EFSEC could keep the adjudication
6 record open after the in-person hearing pending issuance of the final EIS.

7 **2. Draft EIS Does Not Afford Movants Fair Opportunity to Litigate Project's Impacts**

8 Above all, Tesoro's Response asks EFSEC to elevate form over substance to reach a
9 fundamentally unfair result. However, Vancouver agrees with the Port of Vancouver ("Port")
10 that "SEPA is not a formality but an integral component of the process." Brief of Respondents at
11 45, *Columbia Riverkeeper v. Port of Vancouver USA*, No. 46130-7-II (Wn. Ct. App. Sept. 15,
12 2014). If the draft EIS substantially complied with SEPA and consequently was sufficiently
13 similar to the final EIS, then it could "stand in" for the final EIS during the in-person hearing,
14 because the participants would have fair notice of the proposed action and a meaningful
15 opportunity to present their cases based on the actual proposal and meaningful alternatives
16 analysis. That is not the case in this proceeding. Even Tesoro has significant disagreements with
17 the draft EIS, as detailed in its 326 pages of comments. The thousands of pages of comments
18 submitted reveal that the draft EIS is seriously flawed and is not even close to being legally
19 adequate under SEPA.

20 The legal adequacy of the draft EIS depends in part on its reasonable and demonstrated
21 adherence to both SEPA and to EFSEC's April 2, 2014 scoping decision that approved the
22 EFSEC staff recommendation ("Scoping Decision").² The draft EIS, however, fails to address

23 ¹ The third page of this letter is erroneously labelled as number two.

24 ² Available at <http://www.efsec.wa.gov/Tesoro%20Savage/20140403FinalSepaScope.pdf>.

1 key issues identified in this scoping decision. For example, both SEPA and the scoping decision
2 require analysis of reasonable alternatives in addition to the no-action alternative.

3 Alternatives, including the no action alternative to the Project **will be**
4 **analyzed**. The reasonable alternatives analysis **shall include other actions** that
5 could feasibly attain or approximate the Projects objective. **Analysis of each**
6 **reasonable alternative will be done in a manner to allow a comparative**
7 **evaluation of alternatives to the Project**.

8 (Scoping Decision at 2); *see* WAC 197-11-440(5) (requiring EIS to include analysis of
9 “reasonable alternatives”); WAC 197-11-786 (defining “reasonable alternative”).

10 Yet, no other alternatives, other than a very cursory analysis of potential sites at Kalama
11 and Longview, are assessed in the draft EIS. The draft EIS acknowledges that those two sites are
12 feasible, but devotes only 359 words to analyzing why the sites are not as desirable as the
13 Vancouver site. After this cursory discussion, the draft EIS reaches the unsupported conclusion,
14 with no further explanation or comparisons, that “neither location would provide a lower
15 environmental cost or decreased level of environmental degradation than the Proposed Action.”
16 (Draft EIS § 2.8.2.3 at 2-82.) This cursory analysis cannot allow a comparative evaluation of
17 alternatives, and the draft EIS plainly does not present a reasonable range of alternatives. SEPA
18 requires meaningful analysis.

19 Moreover, the Port has obviated any argument that its prior actions have foreclosed other
20 viable alternative locations for the Project. The Port stated in an appellate brief to the
21 Washington Court of Appeals: “The lease [with Tesoro] does not restrict full consideration of
22 the [Project], **including other sites**, by the Council or the Governor.” Brief of Respondents at
23 40-41, *Columbia Riverkeeper v. Port of Vancouver USA, supra* (emphasis added). Instead the
24 Port asserts that it “preserved the no-action alternative as well as other alternatives that the
Council or Governor may consider.” *Id.* at 43.

1 Similarly, the draft EIS was to include an analysis of emergency responders' current
2 capabilities, the capabilities required for responding to incidents at the Project and along the rail
3 route, and how to close the gap between the two. The Scoping Decision required:

- 4 • Detailed analysis of project site emergency response capabilities,
5 including hazmat response to incidents involving crude oil transported by
6 rail car[; and]
- 7 • Analysis of emergency response capabilities including hazmat response to
8 incidents involving crude oil, transported along the rail route within
9 Washington[.]

10 (Scoping Decision at 3.) However, the draft EIS's treatment of the capabilities, gaps and
11 mitigation for first responder services is superficial at best and, as it relates to Vancouver, simply
12 regurgitates information and concerns that the Vancouver Fire Department provided. (Motion,
13 Ex. A § 5.1 (detailing draft EIS's failure to analyze emergency response resource shortfalls).)

14 These examples of deficiencies in the draft EIS are provided not to reargue the specific
15 issues but rather to demonstrate that the substantial revisions required for EFSEC to issue a
16 SEPA-compliant final EIS will result in severe prejudice to Movants in the form of a denial of
17 their due process rights, unless the final EIS is issued prior to the in-person hearing.
18 Consequently, the Motion and this reply are consistent with EFSEC's direction that the
19 adjudication will not litigate the sufficiency of the EIS. *See, e.g.,* Order Clarifying EFSEC's
20 Process 2-3 (Feb. 3, 2016) ("Clarifying Order").³ Rather, the Motion elucidates that, under the
21 circumstances of this case, use of the draft EIS during the in-person hearing would deprive
22 Movants of a fair opportunity to provide meaningful input into the decision making process. *See*
23 *Chrobuck v. Snohomish Cnty.*, 78 Wn.2d 858, 870-71, 480 P.2d 489, 496 (1971) (applying
24 principles of due process to administrative hearing). Tesoro's argument that Movants have failed

³ Available at <http://www.efsec.wa.gov/Tesoro%20Savage/Adjudication/20160203TESORO%20Issue%20Consolidation%20Order%20-%20ES.pdf>.

1 to demonstrate any prejudice is completely unavailing. (*See* Response § III at 9-10.)

2 Instead of addressing the issues of fundamental fairness raised in the Motion, Tesoro's
3 Response urges a hyper-technical approach, arguing for crabbed constructions of SEPA and the
4 EFSEC decision making process. For example, Tesoro argues that WAC 197-11-055(3)(a) does
5 not require issuance of a final EIS prior to an in-person hearing solely because it contains the
6 modifier "normally." (Response § I.A at 3.) Thus, Tesoro would have EFSEC completely
7 ignore the procedure that is normally required to be used, *i.e.*, issuance of a final EIS prior to the
8 in-person hearing, simply because it would allow for exceptions in unusual circumstances.
9 Tesoro completely fails, however, to explain what circumstances would justify deviation from
10 the normal requirements. Conversely, Movants present a compelling case for adherence to the
11 normal procedure and issuance of the final EIS prior to the in-person hearing.

12 Likewise Tesoro argues that EFSEC should completely ignore repeated judicial approval
13 of other administrative bodies' issuance of a final EIS prior to the in-person hearing simply
14 because these administrative bodies issued final, appealable decisions, whereas EFSEC will issue
15 a recommendation to the governor. (Response § I.A at 3-4.) Tesoro fails to cite any authority
16 supporting this distinction without a difference. Movants' only opportunity to provide
17 meaningful input is during EFSEC's process. There is no further public input after EFSEC
18 issues its recommendation to the governor. The fact that EFSEC issues a recommendation rather
19 than a decision is irrelevant, because a denial of Movants' due process rights now cannot be
20 remedied later in this process.

21 Lastly, Tesoro argues that EFSEC's rules and practices provide for issuance of a final
22 EIS after the in-person hearing. (Response § I.B at 5-7.) It is axiomatic that EFSEC lacks
23 authority to promulgate rules or adopt practices that are inconsistent with SEPA. *Hillis v. State*,

1 131 Wash.2d 373, 932 P.2d 139 (1997) (en banc) (invalidating informal agency practices for
2 failure to comply with Administrative Procedure Act). As discussed above and in the Motion,
3 SEPA expressly addresses the timing for issuance of a final EIS and requires EFSEC to issue it
4 before commencing the in-person hearing. *See* WAC 197-11-055(3)(a).

5 Nonetheless, Tesoro asserts that EFSEC's rules allow it complete flexibility to issue the
6 final EIS after the in-person hearing. (Response § I.B at 5.) In support of this assertion, Tesoro
7 cites WAC 463-47-060(2), which provides that EFSEC "may initiate an adjudicative proceeding
8 ... prior to completion of the draft EIS." However, Tesoro misreads this rule, which is
9 completely consistent with SEPA. Initiation of an adjudicative proceeding occurs well before
10 the commencement of the in-person hearing. *See* WAC 463-30-080 ("Adjudicative proceedings
11 shall commence upon issuance of a formal notice of hearing or prehearing conference."). In this
12 case, the adjudicative proceeding was initiated on January 28, 2015. (Order Commencing
13 Agency Adjudication 2 (Jan. 28, 2015) ("By this order, the Council commences the adjudicative
14 hearing related to Application No. 2013-01."))⁴

15 Under the circumstances of this case, commencing the in-person hearing prior to issuance
16 of the final EIS will deprive the Movants of both notice regarding the Project and its probable
17 impacts to the human and natural environments and a fair opportunity to litigate whether the
18 Project's potential benefits outweigh its adverse impacts. This deprivation is prejudicial to
19 Movants and contrary to SEPA and other established law, and it undermines the important SEPA
20 policies of ensuring full disclosure of environmental impacts before irrevocable commitment of
21 public resources and promoting public involvement in the underlying governmental decision
22 making processes.

23 ⁴ Available at <http://www.efsec.wa.gov/Tesoro%20Savage/Adjudication/20150128ORDERCOMMENCING>
24 [ADJPROElectronicS.pdf](#).

1 **3. The Motion Is Timely**

2 Tesoro’s complaint that the Motion is untimely is wholly without merit. (*See* Response
3 § II at 7-9.) Tesoro cannot claim surprise, as it acknowledges that it has had notice of
4 Vancouver’s objection for over five months since at least January 8, 2016. (*Id.* at 7:17-19.)
5 Additionally, Vancouver did not waive its due process rights by failing to object to the Clarifying
6 Order. First, all the participants, including Tesoro, recognized that the list of adjudication issues
7 was preliminary. (Clarifying Order at 1.) Second, Vancouver’s due process issue was not
8 excluded from the list of adjudication issues in the Clarifying Order. The Clarifying Order
9 “reframed” the issues, (*id.* at 3), but did not indicate that any of the issues the parties submitted
10 were being disallowed or excluded from the hearing. Instead Vancouver’s due process argument
11 was preserved in the first and second issues listed, which were categorized as procedural:

- 12 1. Whether the applicant (Tesoro/Savage) has met all requirements of
13 Chapter 463-60 WAC for an application for site certification for the
14 Vancouver Energy Distribution Terminal (the VEDT).
- 15 2. Whether the Tesoro/Savage VEDT application process is consistent with
16 all applicable laws and regulations.

17 (*Id.* at 4.) Nothing in the Clarifying Order put Vancouver on notice that it was being precluded
18 from raising any of its issues, such that it needed to submit an objection.

19 Likewise, Movants adhered to EFSEC’s schedule by submitting the Motion, which is
20 nondispositive, on May 31, 2016. (Pre-Hearing Order Establishing Procedures at 2 (May 5,
21 2015).)⁵ Furthermore Tesoro fails to identify any actual prejudice resulting from the Motion,
22 other than delay of the in-person hearing, which is not the relief Movants seek. (*See supra* § 1 at
23 1-2.) In fact, Tesoro admits that it has no objection to issuance of the final EIS prior to the in-
24 person hearing, so long as the in-person hearing is not delayed. (Response at 1 n.1.) Finally,

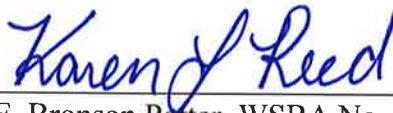
⁵ Available at <http://www.efsec.wa.gov/Tesoro%20Savage/Adjudication/20150505TESOROFIRSTPRE-HEARINGORDER%20-%20S.pdf>.

1 Tesoro's attempt to distinguish between Vancouver and CRK fails, (*see id.* § II at 8-9), as neither
2 Vancouver nor CRK is seeking to change adjudication schedule or delay the in-person hearing.

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4 For all of the foregoing reasons, Movants respectfully request that EFSEC grant the
5 Motion and issue the final EIS in this matter prior to commencing the in-person hearing.

6 Dated: June 13, 2016


7 Respectfully Submitted,
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