



March 31, 2017

Via U.S. Mail

Chair William H. Lynch
Energy Facility Site Evaluation Council
1300 S. Evergreen Park Dr. S.W.
P.O. Box 43172
Olympia, WA 98504-3172

RE: Tesoro-Savage Vancouver Energy Project, EFSEC Case No. 15-00001:
Ex Parte Communications with Project Proponents

Greetings:

This letter is submitted on behalf of adjudication intervenors Columbia Riverkeeper, *et al.*, the City of Vancouver, Confederated Tribes of the Umatilla Indian Reservation, and the Confederated Tribes and Bands of the Yakama Nation (“Project Opponents”). It recently came to our attention, through a media story in the *Vancouver Business Journal*, that there have been substantive communications between the Energy Facility Site Evaluation Council (“EFSEC”) staff, Burlington Northern Santa Fe (“BNSF”), and Tesoro-Savage as recently as early 2017. *See* <https://www.vbjusa.com/news/top-stories/bnsf-beefs-safety-measures-ahead-efsec-ruling/> (Feb. 10, 2017). At least one of the letters referenced in the article identifies earlier communications between Tesoro-Savage and EFSEC staff.

This *ex parte* communication is of significant concern to the Project Opponents. Early in the Tesoro-Savage adjudication process, Administrative Law Judge Noble reminded the parties to avoid *ex parte* contacts for the duration of the EFSEC process:

I ask all parties to avoid any *ex parte* contacts to decision makers for the duration of the EFSEC process. I also want to reiterate that copies of all communications that relate in any way to the Vancouver Energy Distribution Terminal project adjudication and recommendation decision process be contemporaneously provided to all other parties in the adjudication.

Letter from ALJ Noble to All Parties (July 22, 2015). The letters and information reported in the *Vancouver Business Journal* pertain to mitigation measures proposed by Tesoro-Savage and BNSF; mitigation was an issue directly addressed in the adjudication, and yet the reported letters were not provided to Project Opponents or the public.

The adjudication evidentiary record closed, by order of ALJ Noble, on September 6, 2016. Since then, EFSEC, as a quasi-judicial body, has been charged with deliberation involving findings of fact, conclusions of law, and a formal recommendation to the Governor concerning

the siting and permitting of the proposed Tesoro-Savage oil shipping terminal. Communications between EFSEC (which includes EFSEC staff) and any party to or witness for the adjudication is subject to rules for *ex parte* communications.

We object to all letters, materials, evidence, or similar post-adjudication communications by or on behalf of Tesoro-Savage or the Port of Vancouver with EFSEC; these cannot be considered as part of EFSEC's adjudication of, and decision on, this project.¹ We request that the post-hearing materials and communications be clearly stricken from any record or files and disregarded. *See* RCW 34.05.476 (definition of adjudicative proceeding record). We also request that care be taken to avoid these kinds of improper communications in the future.

We obviously do not have complete information on the number of, subject, or participants in communications between EFSEC and Tesoro-Savage or parties acting in coordination with Tesoro-Savage. As described in the *Vancouver Business Journal* story, the *ex parte* communications include issues of rail safety and mitigation. This type of information is plainly relevant to and may be part of the recommendation to be made by EFSEC. EFSEC staff may be having additional conversations with Tesoro-Savage representatives and others given the statements in the press made by Tesoro-Savage General Manager, Mr. Larrabee.²

The applicable statutes and regulations make clear that these are prohibited *ex parte* communications, even if they are through EFSEC staff. RCW 80.50.090 provides that the public contested case hearing here is conducted as an adjudicative proceeding under RCW 34.05. RCW 34.05.455 references limitations on communications between an agency and the decision-maker. Subpart (1)(b) provides that any presiding officer may receive aid from legal counsel, or from staff assistants who are subject to the presiding officer's supervision. Here, RCW 80.50.020 defines the "council," as the decision-maker, to include all nine members of the council. RCW 80.50.030 provides that the UTC provides all administrative and staff support for the council. WAC 463-10-010 similarly defines the council but adds that the council, where appropriate, includes the staff of the council. WAC 463-10-010(6) defines "council manager" to be the person who handles day-to-day administration for the council, administers the decisions of the council, and directs the staff that supports the council. Subpart (3) of RCW 34.05.455

¹ RCW 34.05.455(5) provides that where a presiding officer receives an *ex parte* communication in violation of this section, she or he shall place on the record all written communication received, all written responses, and a memorandum stating the substance of all oral communications received, responses made and the identity of each person from whom the presiding officer received the communication. The officer shall advise all parties of the placement on the record, and upon request made within 10 days of that notice, any party desiring to rebut the communication shall be allowed to place a written rebuttal in the record. Portions of the record pertaining to *ex parte* communications or rebuttal statements do not constitute evidence of any fact at issue in the matter unless a party moves the admission of any portion of the record for purposes of establishing a fact and issues and that portion is admitted pursuant to RCW 34.05.452. (Emphasis added.)

² Four post-adjudication letters from EFSEC about adjudication subjects have been posted on EFSEC's website: a letter to BNSF re: rail impact meeting (10/24/16), a letter to Mr. Larrabee (10/24/16), a letter to Kelly Flint re: stormwater permit (10/24/16), and a letter to Mr. Flint re: seismic studies (10/27/16). There has been no opportunity for Project Opponents to fully review, much less respond to, the information in these communications, and EFSEC staff are mistaken in advocating for further meetings to develop rail mitigation measures for EFSEC's consideration. These letters and all associated communications and materials are *ex parte* and cannot be part of the record.

provides that the presiding officer (and here that must necessarily include the members of EFSEC) cannot communicate with the parties (or employees of the agency that are involved in the matter in some way) absent notice and opportunity for all parties to participate (i.e., the basic *ex parte* prohibition). All of these provisions, read together, make clear that EFSEC and staff for EFSEC are bound by the *ex parte* rules.

While we recognize that the Environmental Impact Statement is not final and the draft air and water permits are not yet proposed, that fact does not excuse prohibited communications. The information regarding air, water, and other environmental impacts was part of the adjudication. The council heard testimony and received written evidence on these matters. They were and continue to be hotly contested issues for the proposed terminal and permitting associated with it. *Ex parte* and extra-record communications and information cannot be allowed simply by putting it under one subject heading or another when all of the same issues were part of the adjudication.³

Post-adjudication communications between Tesoro-Savage and EFSEC staff are prohibited *ex parte* communications. EFSEC must follow the requirements of RCW 34.05.455(5) to ensure that the communications are not considered as part of the record. Tesoro-Savage had over two years to prepare its case, with a five-week adjudication. The record is closed and final—any other treatment presents EFSEC and the public with a perpetually moving target and violates basic notions of due process.

We very much appreciate the significant time and resources expended by EFSEC and staff on this important matter and look forward to the recommendation of the Council.

Sincerely,



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³ RCW 80.50.085(2) requires staff to review all information submitted and recommend resolution to issues in dispute that would allow site approval, but this cannot be read to allow *ex parte* communications. Once issues are joined and the matter goes to an adjudication, presided over by an ALJ with full record and conducted in accordance with evidentiary rules and standards applied by the ALJ, the matter is in the hands of the judicial body and the issues that were joined are still in dispute and must be decided with no *ex parte* communications allowed. Any other treatment violates basic due process requirements.

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