



April 14, 2017

*Via U.S. Mail*

Chair William H. Lynch  
Energy Facility Site Evaluation Council  
1300 S. Evergreen Park Drive S.W.  
P.O. Box 43172  
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RE: Tesoro-Savage Vancouver Energy Project, EFSEC Case No. 15-00001:  
*Ex Parte* Communications with Project Proponents—Reply of Project Opponents

Dear Chair Lynch:

Please accept this second letter regarding *ex parte* communications, submitted on behalf of intervenors Columbia Riverkeeper, *et al.*, City of Vancouver, Confederated Tribes of the Umatilla Indian Reservation, Confederated Tribes and Bands of the Yakama Nation, and the Columbia River Intertribal Fish Commission (“Project Opponents”). This follows our earlier letter of March 31, 2017, and is in reply to the letter from Project Proponents dated April 4, 2017.

We understand the EFSEC process has several parts, including SEPA compliance through preparation of a Final Environmental Impact Statement (“EIS”), draft air and water permits under the Clean Air Act and Clean Water Act, and the adjudication recommendation itself. It is because of this complexity and EFSEC’s overlapping responsibilities—both for staff and Council members – that paying close attention to potential *ex parte* communications is so vital. Tesoro-Savage’s blithe assurances of no harm and its narrow definition of *ex parte* communications does a disservice to the EFSEC proceedings and could taint a recommendation.

Tesoro-Savage incorrectly asserts that EFSEC staff are not covered by *ex parte* requirements or concerns, even though the regulations plainly recognize that staff are considered part of the Council “where appropriate.” WAC 463-10-10. “EFSLA’s unique statutory framework,” *Friends of the Columbia Gorge v. State Energy Facility Site Evaluation Council*, 178 Wn.2d 320, 334, 310 P.2d 780 (2013), does not override basic requirements of due process and transparent, public decision-making. Nor does it override the basic requirements of contested proceedings, communications with decisions-makers and preparation of a clean record. EFSEC staff appear to be in discussions with interested parties and Project Proponents about proposed mitigation related to rail safety. Substantive discussions that may lead to mitigation measures proposed in a final recommendation from the Council are clearly improper.

Further, the subject of the communications that Project Opponents have seen so far plainly contradicts Tesoro-Savage’s claims that the subject matter of communications with staff

has not been “about the adjudicative record or adjudication deliberations.” In particular, the example of communication from the media reports belies this assertion, as it apparently concerned specific mitigation measures proposed to address rail safety concerns. Indeed, substantive communications between Tesoro-Savage and EFSEC staff will almost all involve adjudication issues, given the breadth of issues before the Council. The issues raised and on which evidence was presented during the adjudication include at least the following:

Construction details; impacts to community from construction, operation, rail and other traffic; impacts to Port workers; air quality impacts from the Project including rail and marine vessels; air quality permitting issues associated with status as major source under Clean Air Act; hazardous air pollution issues; climate impacts; potential spill risk, prevention, and clean up plans and preparedness from marine vessel loading and traffic, from train unloading and traffic; biological impacts, including impacts to fish and aquatic life from any spill; local land use impacts including impacts to property values in Vancouver and the region; need for the project including need for oil within the State of Washington; geology of the project site including earthquake risk, preparedness, and potential impact; rail issues including safety, routing, and car standards; rail hazard response and financial considerations; Native American rights, impacts, and concerns regarding historic sites, and fishing rights and access; environmental justice concerns and considerations related to potential impacts to the Fruit Valley Neighborhood of Vancouver and Columbia River tribes; economic impacts of any spill; infrastructure demands and limitations including firefighting capacity, water availability, utilities, stormwater impacts, residents’ access along rail lines and evacuation issues; corporate and business structure, financial structure of project, governance of project and financial security and/or insurance related to project and rail risks.

*See also*, Order Clarifying EFSEC’s Process...and Summarizing Issues, ALJ Noble, February 2016 and Columbia Riverkeeper et al. Final Joint Statement of Issues, May 31, 2016.

At this point in the adjudication, the case is fully submitted to the Council for final recommendation to the Governor. The record is closed on all of the above issues. Both the Council and Governor are unquestionably subject to *ex parte* communication rules and requirements on any and all issues under consideration and affected by the Council’s and Governor’s expected decisions.

If you determine it is correct that Tesoro-Savage or any other interested party can still communicate with Council staff on these issues, then the Council and staff must absolutely observe and demonstrate a wall in all communications between staff and any member of the Council from the commencement of the contested case adjudication through final decision. The Council and staff must ensure that communications, evidence, and information that are *ex parte* are not somehow “washed” by coming through staff. Further, it must be clear that anything submitted or said to staff is not part of the record in this case and cannot be part of the record and

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cannot be seen, discussed, or considered by the Council or the Governor on any of the issues in the contested case, including those outlined above. Finally, if staff has communicated with the Council or members of the Council since June 27, 2016, and/or any of the material or information obtained from BNSF or project proponents or any other interested party has been seen or made available to a Council member, the procedures outlined in our earlier letter regarding *ex parte* communications must be immediately implemented. These safeguards and cautions must be in place and strictly observed because it would be devastating to the process to introduce a question as to whether any decision was improperly influenced or based upon, purposely or inadvertently, by an *ex parte* communication or piece of evidence, either in whole or in part.

Alternatively, if the staff has been or is to be available to communicate with and advise or consult with the Council on any matter or issue listed above, then staff absolutely cannot communicate with Project Proponents, their representatives, or any other party interested in this matter from June 27, 2016, through a final decision on any matter or issue listed above because to do so is an *ex parte* communication with the decision-maker. Further, to the extent that those communications have occurred, staff and Council must immediately follow the rules applicable to *ex parte* communications set forth in our earlier correspondence.

These are the only two options available under the law. Any other course will put any decision at risk as having been tainted or improperly based, in whole or in part, on extra-record, *ex parte* communications. Project Opponents hope the *ex parte* question can and will be rectified, and we very much look forward to the decision of the Council. Please do not hesitate to contact us should you have questions. Thank you for your continuing assistance.

Sincerely,



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