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BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of:
Application No. 2013-01

TESORO SAVAGE, LLC

TESORO SAVAGE DISTRIBUTION
TERMINAL

CASE NO. 15-001

RESPONSE TO COLUMBIA
RIVERKEEPER'S MOTION TO
STRIKE DRAFT SITE
CERTIFICATE SUBMITTED BY
TESORO-SAVAGE

I. Introduction and Summary

Applicant Tesoro Savage Petroleum Terminal LLC, d/b/a Vancouver Energy (“TSPT”) requests that the Energy Facility Site Evaluation Council (“EFSEC”) deny the motion filed by several Project Opponents¹ seeking to strike TSPT’s draft Site Certification Agreement (“Draft SCA”). Contrary to the Opponents’ assertions, the Draft SCA is not “evidence” that is part of the adjudicative record. It is not an *ex parte* communication. Nor does it create an appearance of improper communication or otherwise raise legitimate “concerns” about EFSEC’s independent judgment. If granted, Opponents’ motion would frustrate the larger EFSEC process by inhibiting staff from fulfilling its statutorily defined role pursuant to RCW 80.50.085. It should be denied.

II. The Draft SCA is Not “Evidence” that Must Be Offered into the Adjudication Record

TSPT submitted the Draft SCA for staff’s consideration as one of many sources of information that staff reviews when fulfilling its statutory role set forth in RCW 80.50.085. TSPT prepared the Draft SCA to facilitate staff’s efforts in the event that the

¹ The Intervenor’s filing the motion include: Columbia Riverkeeper et al.; Columbia River Inter-Tribal Fish Commission; and the City of Vancouver. Columbia Waterfront LLC joined the motion on June 27, 2017, but did not add substantive arguments. In this response we refer to the parties that filed and joined the motion as “Opponents.”

1 Council recommends approval and staff is directed to draft an Agreement. TSPT offered
2 the Draft SCA to staff as a proposed approach to document the Applicant’s compliance
3 with regulatory obligations and project commitments.

4 Opponents improperly characterize the Draft SCA as “evidence” required to be
5 submitted as part of the adjudication. They disingenuously suggest that the Draft SCA is
6 comparable to expert testimony or facts that are relevant to the Council’s deliberations,
7 which EFSEC documents in its adjudication order. It is not.

8 Moreover, TSPT was not required to submit it as part of the adjudicative record.
9 The Draft SCA is not intended for EFSEC consideration in its deliberations on the
10 adjudication or for inclusion in the adjudication record. The adjudication and the
11 adjudicative record are only one part of the broader administrative record pertaining to
12 TSPT’s application. As Chairman Lynch previously concluded in his letter on behalf of
13 the Council, “EFSLA requires EFSEC to hold an adjudication as one of many sources of
14 information.” Letter from EFSEC to Opponents dated April 28, 2017, at 2. The
15 culmination of EFSEC’s adjudication is its adjudication order—not the SCA—and
16 EFSEC may only consider the adjudication record in its deliberations and in crafting the
17 resulting adjudication order. *See* RCW 34.05.461(4). *See also* Letter from EFSEC to
18 Opponents dated April 28, 2017, at 2. The Draft SCA is not for consideration by the
19 Council as part of its deliberations, nor will it inform EFSEC’s adjudication order. To the
20 contrary, the Draft SCA includes a placeholder for the adjudication order and pending
21 permit. It requires compliance with those documents but does not independently address
22 the substance of those key documents, which are incomplete.²

23 _____
24 ² Applicant’s cover letter confirms this approach, indicating that TSPT “does not presume to know
25 the outcome of the Energy Facility Site Evaluation Council’s (“EFSEC”) deliberations, the final
form of various permits still under review, or the specifics of the mitigation that will be identified
in the Final Environmental Impact Statement.”

1 Rather, the Draft SCA is part of EFSEC’s broader administrative process, which is
2 not bound by the adjudicative record. As EFSEC previously recognized, the APA
3 restrictions on the adjudication, including the timeframe for submission of documents that
4 are included in the adjudication record, do not extend to the various other facets of
5 EFSEC’s administrative process. *See also* Letter from EFSEC to Opponents dated April
6 28, 2017, at 2.

7 As part of that broader administrative process, TSPT’s submission of a Draft SCA
8 for staff’s consideration is entirely appropriate pursuant to RCW 80.50.085, which defines
9 staff’s role as assisting applicants throughout the process by reviewing all information
10 submitted and offering recommendations on conditions to the Council. Because the Draft
11 SCA is part of the broader administrative process, it is not part of the adjudication, nor
12 was it “improperly submitted” outside of the close of the adjudication record.

13 **III. The Draft SCA is Not Governed by the Restriction on *Ex Parte***
14 **Communications and Does Not Give an “Appearance of Approval” or**
15 **Purport to Circumvent the Council’s Independent Authority**

16 Communications between EFSEC staff and project applicants pertaining to
17 pending applications are not outright precluded by the doctrine against *ex parte*
18 communications. First, As Chairman Lynch previously concluded in his letter on behalf
19 of the Council, the “APA imposes no limitations on EFSEC staff’s ability to communicate
20 about the VEDT with the Council or with Tesoro Savage.” Letter from EFSEC to
21 Opponents dated April 28, 2017, at 2 (emphasis added). Second, although the APA’s
22 prohibition on *ex parte* communications applies to the adjudication, “nothing in the
23 EFSLA, SEPA, or the APA suggests that the reach of the APA is therefore expanded to
24 cover [EFSEC’s] non-APA processes.” *Id.* As explained above, the Draft SCA is not part
25 of the adjudicative record or the adjudication and therefore the doctrine does not apply.

1 To overcome this, the Opponents simply invent a standard: a requirement to avoid
2 the mere *appearance* of *ex parte* communications that create “concerns about EFSEC
3 staff’s or EFSEC’s independent judgment.” Motion at 4. This fabricated standard is not
4 based on applicable law³ and is inconsistent with EFSEC’s statutory framework, which
5 invites dialogue between the applicant and staff. RCW 80.50.085(2).

6 Moreover, Applicant’s submission of the Draft SCA does not create even the
7 “appearance” of improper communication or otherwise create “concerns” about the
8 Council’s or staff’s “independent judgment.” As explained in the cover letter
9 accompanying the Draft SCA, TSPT does not presume to speak on behalf of the Council
10 or the Governor or know the final form of the permits, project mitigation, or adjudication
11 order:

12 We [TSPT] do not presume to know the outcome of the Energy Facility Site
13 Evaluation Council’s (“EFSEC”) deliberations, the final form of various
14 permits still under review, or the specifics of the mitigation that will be
15 identified in the Final Environmental Impact Statement. Pursuant to its
16 statutory authority, EFSEC is charged with reaching its independent
17 conclusion on these various issues in its recommendation to the Governor.
18 Within that context, we are offering this preliminary draft Agreement to
19 staff as an example of how the Applicant proposes to structure the legal
20 framework of an Agreement that documents the Applicant’s regulatory
21 obligations and Project commitments.

22 The mere fact that the Applicant has prepared a document that would facilitate
23 staff’s work in anticipation of a recommendation of approval is not improper. TSPT
24 prepared and submitted an entire application and supporting documentation in anticipation
25

22 ³ The APA’s codification of the doctrine against *ex parte* communications protects the
23 “appearance of fairness.” *Ferry Cty. v. Concerned Friends of Ferry Cty.*, 121 Wn. App. 850, 858,
24 90 P.3d 698, 703 (2004), *aff’d*, 155 Wn.2d 824, 123 P.3d 102 (2005) (appearance of fairness is
25 “protected by the *ex parte* contact rules” in RCW 34.05.455). Opponents offer no legal support
for their suggestion that agencies must also avoid the mere appearance of *ex parte*
communications, even if the agency otherwise complies with the prohibition against actual *ex*
parte communications.

1 of EFSEC's recommendation of approval. Opponents' assertions about the "appearance
2 of approval" are baseless.

3 **IV. Conclusion**

4 For the foregoing reasons, TSPT requests that EFSEC deny Opponents' motion.

5 Respectfully submitted this 29th day of June, 2017.

6 VAN NESS FELDMAN LLP

7 

8
9 _____
10 Jay P. Derr, WSBA #12620
11 Tadas A. Kisielius, WSBA #28734
12 Dale N. Johnson, WSBA #26629

13 *Attorneys for Applicant Tesoro Savage Petroleum*
14 *Terminal LLC*

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CERTIFICATE OF SERVICE

I, Amanda Kleiss, declare as follows:

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

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

- 1. Response to Columbia Riverkeepers’ Motion to Strike Draft Site Certificate; and this
- 2. Certificate of Service.

and that on June 29th, 2017, I addressed said documents and deposited them for delivery as follows:

VIA E-MAIL & FIRST CLASS U.S. MAIL:

Energy Facility Site Evaluation Council
PO Box 43172
Olympia, WA 98504-3172
efsec@utc.wa.gov

Assistant Attorney General for EFSEC
Ann C. Essko, AAG
WA State Attorney General’s Office
Government Operations Division
PO Box 40108
Olympia, WA 98504-0108
anne@atg.wa.gov

Energy Facility Site Evaluation Council
Stephen Posner, Manager
Energy Facility Site Evaluation Council
Utilities & Transportation Commission
P.O. Box 43172
Olympia, WA 98504-3172
sposner@utc.wa.gov

1 VIA E-MAIL:

2 **Clark County Board of Commissioners**

3 Taylor Hallvik
4 Deputy Prosecuting Attorney
5 Clark County Board of Commissioners
6 Civil Division
7 PO Box 5000
8 Vancouver, WA 98666-5000
9 taylor.hallvik@clark.wa.gov;
10 nicole.davis@clark.wa.gov

7 **City of Vancouver**

8 E. Bronson Potter
9 Karen L. Reed
10 City of Vancouver
11 PO Box 1995
12 Vancouver, WA 98668-1995
13 Bronson.potter@cityofvancouver.us;
14 karen.reed@cityofvancouver.us;
15 tammy.zurn@cityofvancouver.us;
16 Deborah.Hartsoch@cityofvancouver.us

13 **Columbia Waterfront LLC**

14 Linda R. Larson
15 Nossaman LLP
16 801 Second Avenue, Suite 800
17 Seattle, WA 98104
18 llarson@nossaman.com;
19 ebradbee@nossaman.com

17 **Columbia Riverkeeper, et al; Climate Solutions; ForestEthics; Friends of the
Columbia Gorge; Fruit Valley Neighborhood Association; Sierra Club; Spokane
Riverkeeper, and Washington Environmental Council**

18 Kristen L. Boyles
19 Janette K. Brimmer
20 Anna Sewell
21 Earthjustice
22 705 Second Avenue, Suite 203
23 Seattle, WA 98104
24 kboyles@earthjustice.org;
25 jbrimmer@earthjustice.org;
asewell@earthjustice.org;
epowell@earthjustice.org

Counsel for the Environment

Matthew R. Kernutt, AAG
Office of the Attorney General
PO Box 40100
Olympia, WA 98504-0100
Mattk1@atg.wa.gov;
MeaghanK@atg.wa.gov

City of Vancouver

Susan Drummond
Counsel for the City of Vancouver
Law Office of Susan Elizabeth Drummond
5400 Carillon Pt., Bldg. 5000
Kirkland, WA 98033-7357
susan@susandrummond.com

David Bricklin
Bryan Telegin
Bricklin & Newman, LLP
1424 Fourth Avenue, Suite 500
Seattle, WA 98101
bricklin@bnd-law.com;
telegin@bnd-law.com;
cahill@bnd-law.com;
miller@bnd-law.com

CERTIFICATE OF SERVICE - 7

1 **International Longshore Warehouse**
2 **Union Local 4**

3 Cager Clabaugh
4 Jared Smith
5 International Longshore Warehouse Union
6 Local 4
7 1205 Ingalls Road
8 Vancouver WA 98660
9 cagerclabaugh@aol.com;
10 mithared@yahoo.com

11 **City of Spokane**

12 Michael J. Piccolo, Asst City Attorney
13 Nathaniel Odle, Asst City Attorney
14 Office of the City Attorney
15 5th Floor Municipal Building
16 W. 808 Spokane Falls Blvd.
17 Spokane, WA 99201-3326
18 mpiccolo@spokanecity.org;
19 nodle@spokanecity.org;
20 rimus@spokanecity.org

21 **Port of Vancouver, USA**

22 Connie Sue Martin
23 Schwabe, Williamson & Wyatt, P.C.
24 1420 – 5th Avenue, Suite 3400
25 Seattle, WA 98101
csmartin@schwabe.com
bbratton@schwabe.com

Confederated Tribes of the Umatilla
Indian Reservation

Brent H. Hall
Office of Legal Counsel
Confederated Tribes of the Umatilla Indian
Reservation
46411 Timine Way
Pendleton, OR 97801
brenthall@ctuir.org;
bhh@karnopp.com

City of Washougal

Scott Russon
John Karpinski
English & Marshall, PLLC
12204 SE Mill Plain, Suite 200
Vancouver, WA 98684
English@elmbstv.com;
russon@elmbstv.com;
karpjd@comcast.net

Port of Vancouver, USA

David F. Bartz, Jr.
Alicia L. (“Lisa”) Lowe
Schwabe, Williamson & Wyatt, P.C.
1211 SW 5th Avenue, Suite 1900
Portland, OR 97204-3795
dbartz@schwabe.com;
alowe@schwabe.com

Port of Vancouver, USA

Kelly M. Walsh
Schwabe, Williamson & Wyatt, P.C.
700 Washington Street Suite 701
Vancouver, WA 98660
kwalsh@schwabe.com

Columbia River Inter-Tribal Fish
Commission (CRITFC)

Julie A. Carter
Robert C. Lothrop
CRITFC
700 NE Multnomah Street, Suite 1200
Portland, OR 97213
carj@critfc.org;
lotr@critfc.org

1 **Confederated Tribes and Bands of the**
2 **Yakama Nation**

3 Joe Sexton
4 Amber Penn-Roco
5 Galanda Broadman PLLC
6 8606 – 35th Avenue NE, Suite L1
7 PO Box 15146
8 Seattle, WA 98115
9 joe@galandabroadman.com;
10 amber@galandabroadman.com;
11 molly@galandabroadman.com

12 **Department of Commerce**

13 Brian Bonlender, Director
14 Department of Commerce
15 1011 Plum Street SE
16 Olympia, WA 98504-2525
17 E: brian.bonlender@commerce.wa.gov

18 **Utilities & Transportation Commission**

19 David Danner
20 Utilities & Transportation Commission
21 PO Box 47250
22 Olympia, WA 98504-7250
23 E: ddanner@utc.wa.gov

24 **WA Department of Fish and Wildlife**

25 Jim Unsworth, Director
Director of Fish and Wildlife
600 Capitol Way N
Olympia, WA 98501-1091
E: director@dfw.wa.gov

WA State Department of Natural
Resources

Robert W. Ferguson, AG
Terence A. Pruitt, AAG
Natural Resources Division
PO Box 40100
Olympia, WA 98504-0100
terryp@atg.wa.gov;
resolyef@atg.wa.gov;
kims2@atg.wa.gov

Department of Ecology

Maia D. Bellon, Director
Department of Ecology
PO Box 47600
Olympia, WA 98504-7600
E: maia.bellon@ecy.wa.gov

Department of Transportation

Megan White
Department of Transportation
PO Box 47300
Olympia, WA 98504-7300
E: whitem@wsdot.wa.gov

18 I hereby certify that I have this day served the foregoing document upon all parties
19 of record in this proceeding, by authorized method of service pursuant to WAC 463-30-
20 120(3).

21 EXECUTED at Seattle, Washington on this 29th day June, 2017.

22 

23
24
25 Amanda Kleiss, Declarant