

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of:)	CASE NO. 15-001
Application No. 2013-01)	
TESORO SAVAGE, LLC)	MOTION TO STRIKE DRAFT SITE
)	CERTIFICATE SUBMITTED BY
VANCOUVER ENERGY DISTRIBUTION)	TESORO-SAVAGE
TERMINAL)	
_____)	

Intervenors Columbia Riverkeeper *et al.*, Columbia River Inter-Tribal Fish Commission, and the City of Vancouver move to strike the draft Site Certification Agreement submitted by Tesoro-Savage because it is outside the record and contrary to the rules regarding submissions.

INTRODUCTION AND BACKGROUND

On June 9, 2017, EFSEC posted on its website a draft Site Certification Agreement submitted by Tesoro-Savage, LLC. In the accompanying cover letter, Tesoro-Savage stated that the draft agreement was an “example” and would provide “an important perspective about the sequence and timing of Project details and implementation of various commitments.” The draft presumes not only that the Council will recommend approval of the project, but that the requirements of associated permits will be the same as those drafts issued for public comment. It also assumes that the Governor will approve the project. The draft includes substantial information that was the subject of the adjudication.

Submission and consideration of this document, nine months after the adjudication record closed, is improper. It presents information directly related to the adjudication that has not been the subject of public review and input and not tested through cross-examination, opposing testimony, or argument by intervening parties. The draft Site Certification Agreement also creates an impression of approval by EFSEC of Tesoro-Savage's application. For these reasons, Intervenor move to strike the draft Site Certification Agreement and any associated correspondence or documents from the Administrative Record.

ARGUMENT

I. THE DRAFT SITE CERTIFICATION AGREEMENT IS AN IMPROPER ATTEMPT TO SUBMIT EVIDENCE INTO THE RECORD FOR THE ADJUDICATION.

As EFSEC explains on its website, the testimony and exhibits introduced during an adjudication “are the basis for the record the Council refers to when determining whether to recommend project approval or disapproval to the Governor. *Information from these proceedings is also used to determine the SCA's conditions for construction and operation of the project.* The applicant must meet these conditions if the Governor approves the project.”

EFSEC: Siting/Review Process, [http://www.efsec.wa.gov/cert.shtml#1.Application Submittal](http://www.efsec.wa.gov/cert.shtml#1.Application%20Submittal) (last visited June 15, 2017; emphasis added).

The adjudication evidentiary record closed and post-hearing briefing completed, by order of Administrative Law Judge 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. Moreover, the issues addressed in the adjudication were broad and included all aspects of the draft Site Certification Agreement. *See*

also Order Clarifying EFSEC's Process...and Summarizing Issues, February 2016; Columbia Riverkeeper *et al.* Final Joint Statement of Issues, May 31, 2016. The attempt by Tesoro-Savage to submit extra-record evidence and information in the form of the draft Site Certification Agreement and any associated information should be rejected and stricken as improper and outside the rules for adjudications, evidentiary hearings, and the rules of process before EFSEC.

Perhaps aware that submission of a draft Site Certification Agreement would be improper, Tesoro-Savage claims RCW 80.50.085 allows their submission and notes that EFSEC staff have considered draft Site Certification Agreements prepared by other applicants in the past. Neither of these assertions supports Tesoro-Savage's position.

RCW 80.50.085 instructs EFSEC staff to assist applicants in identifying issues presented by the application, RCW 80.50.085(1); to review information and recommend resolutions to issues in dispute, RCW 80.50.085(2); and to make recommendations to the Council on conditions that would allow site approval, RCW 80.50.085 (3). While arguably broad, it does not and can not supplant the adjudication requirements and procedures outlined in WAC 463-30, nor EFSEC's order in this case closing the record on September 6, 2016.

As to whether EFSEC has allowed these improper submissions in the past, a quick review of EFSEC's website shows one other instance of an applicant submitting a draft Site Certification Agreement to EFSEC, yet the difference in timing is striking. For the Desert Claim Wind Project, the applicant submitted a draft Site Certification Agreement *at the same time* as its post-hearing brief and *prior* to post-hearing briefs filed by project opponents. *See* Desert Claim Wind Power Project, Revised, <http://www.efsec.wa.gov/Desert%20Claim.shtml> (last visited June 15, 2017). This timing makes sense, as the draft Site Certification Agreement stems from the

adjudication, not the State Environmental Policy Act (“SEPA”) or other permit processes. The timing of the submission in that case allowed review and potential critique of the draft Site Certification Agreement by project opponents and maintained the clear delineation of the record for the adjudication. Here, those safeguards for procedural fairness are missing.

II. EFSEC MUST PROTECT AGAINST EVEN THE APPEARANCE OF *EX PARTE* OR EXTRA-RECORD COMMUNICATIONS.

RCW 80.50.090 provides that the 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. Under RCW 80.50.030, 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. At a minimum, regardless of whether the submission is ultimately ruled an *ex parte* communication, it is important that EFSEC not give the appearance of allowing or encouraging such communications or attempts at communication and must not allow concerns about EFSEC staff’s or EFSEC’s independent judgment.

Chair Lynch acknowledged concerns about *ex parte* communications in his April 28, 2017 letter response to Columbia Riverkeeper, but noted that not all parts of EFSEC’s application review process proceed under the Administrative Procedure Act (“APA”). While that may be correct, that qualification does not apply here as the adjudication is unquestionably a quasi-judicial APA-governed proceeding, RCW 80.50.090(3), and it is the adjudication that

leads to the Site Certification Agreement. Chair Lynch also found that EFSEC staff could appropriately communicate with Tesoro-Savage, as long as *ex parte* information was not passed on to Council members. In this situation, we must presume that Council members have received the draft Site Certification Agreement, as it is publically posted on the EFSEC website. The cure for this possible breach is to officially strike the document from the record.

CONCLUSION

Tesoro-Savage's submission of the draft Site Certification Agreement is improper as it is outside the record of the adjudication in this case. It is also an improper *ex parte* communication. Intervenors respectfully ask the Council to strike the draft Site Certification Agreement, the associated cover letter, and any other materials that may have been submitted with it from the record and instruct EFSEC staff to delete it from their files and from EFSEC's website.

Respectfully submitted this 23rd day of June, 2017.

s/ Kristen L. Boyles
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