

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

In the Matter of:  
Application No. 2013-01

TESORO SAVAGE, LLC

VANCOUVER ENERGY DISTRIBUTION  
TERMINAL

CASE NO. 15-001

ORDER DENYING MOTION TO STRIKE  
DRAFT SITE CERTIFICATE  
SUBMITTED BY TESORO-SAVAGE

1                   In a letter dated June 5, 2017, the Applicant Vancouver Energy (Applicant) sent Energy  
2 Facility Site Evaluation Council (EFSEC) Manager Stephen Posner a draft Site Certification  
3 Agreement (SCA) for the staff's consideration. The Applicant sent the draft SCA pursuant to  
4 RCW 80.50.085 to help EFSEC staff to develop a SCA in the event the Council recommended  
5 approval of the proposed project. The Applicant described the draft SCA as "an example of how  
6 the Applicant proposes to structure the legal framework of an Agreement that documents the  
7 Applicant's regulatory obligations and Project commitments." The Applicant noted that because  
8 the draft SCA addresses topics that are also governed by the Applicant's lease with the Port of  
9 Vancouver, the draft SCA also contains proposed terms that would comply with the Applicant's  
10 obligations under this lease.

12                  On June 9, 2017, EFSEC staff posted the draft SCA on its public website.

13                  On June 23, 2017, Intervenors Columbia Riverkeeper et al., Columbia River Inter-Tribal  
14 Fish Commission, and the City of Vancouver filed a Motion to Strike Draft Site Certificate  
15 Submitted by Tesoro-Savage (Motion to Strike). Columbia Waterfront LLC joined the Motion to  
16 Strike on June 27, 2017.<sup>1</sup>

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<sup>1</sup> For purposes of this order, all of these parties supporting the Motion to Strike are referred to as "Intervenors."

1           On June 29, 2017, the Applicant filed a Response to Columbia Riverkeeper's Motion to  
2 Strike Draft Site Certificate Submitted by Tesoro-Savage (Response).

3           **Discussion**

4           The Intervenors contend that the draft SCA submitted by the Applicant is outside the  
5 rules for adjudication, evidentiary hearings, and EFSEC's procedural rules because it presents  
6 information directly related to the adjudication after the evidentiary record and post-hearing  
7 briefing has closed. The Intervenors characterize the draft SCA as extra-record evidence, which  
8 should be stricken as improper because it has not been tested through cross-examination,  
9 opposing testimony, or argument by the Intervenors, and has not been subject to public review or  
10 input. The Intervenors contend that RCW 80.50.085 does not supplant the adjudication process  
11 and that the receipt and posting of the draft SCA on EFSEC's public website is an improper *ex*  
12 *parte* communication. In addition, the Intervenors ask EFSEC to strike the draft SCA in order to  
13 protect against the appearance that *ex parte* communications are allowed.

14           On April 28, 2017, the EFSEC Chair sent a letter to the parties in response to a March 31,  
15 2017 letter from many of the Intervenors, along with the Confederated Tribes of the Umatilla  
16 Indian Reservation and the Confederated Tribes and Bands of the Yakama Nation, expressing  
17 concern about ongoing communications between the Applicant and EFSEC staff following the  
18 adjudication. *See attached* copy of April 28, 2017, letter. The April 28, 2017 letter provided a  
19 detailed analysis of the duties of EFSEC's staff and Council under the Administrative Procedures  
20 Act (APA, RCW 34.05), EFSEC statutes and regulations (RCW 80.50 and WAC 463), the State  
21 Environmental Policy Act (SEPA, RCW 43.21C), and other statutes. As the Applicant observes  
22 in its Response, much of the analysis from the April 28, 2017 letter is also applicable to the  
23 current Motion to Strike.

1       The Council agrees with the Applicant's Response that the draft SCA is not evidence that  
2       must be offered as part of the adjudicative proceeding. As the Chair's April 28, 2017 letter  
3       stated, EFSEC obtains information from a variety of statutorily designated sources, including  
4       two or more non-APA public hearings (RCW 80.50.090(1), (2), and (4)); one APA adjudication  
5       (RCW 80.50.090(3)); independent contractor reports (RCW 80.50.040(6)); a SEPA  
6       Environmental Statement (EIS) (RCW 43.21C.030; WAC 197-11-938(1)); the application for  
7       site certification (RCW 80.50.060(6)); and environmental permitting processes (RCW  
8       80.50.040(12); RCW 90.48.262(2)).

9       Only one of these sources of information, the adjudicative proceeding, is a quasi-judicial  
10      proceeding governed by the APA. Pursuant to RCW 34.05.461(3), the adjudication order must  
11      contain findings of fact and conclusions of law, and the reasons and basis for them, on all  
12      material issues of fact and law presented during the proceeding and the findings of fact must "be  
13      based exclusively on the evidence of record in the adjudicative proceeding. . . ." RCW  
14      34.05.461(4). Only evidence admitted during the adjudication may inform the Council's  
15      adjudication order. If the Council's order was to rely on evidence outside the adjudicative  
16      proceeding, it would be apparent because there would be no citation to the record for that finding  
17      of fact. Regardless of the timing of the submission of the draft SCA, it will not be used as part of  
18      Council deliberations in developing its adjudication order. The Council is aware of its  
19      responsibilities for developing an adjudication order under the law and will not consider the draft  
20      SCA in developing this order.

21       As discussed earlier, EFSEC obtains information from multiple sources to inform its  
22      ultimate recommendation to the Governor. The draft SCA is part of the broader non-APA  
23      administrative processes that require the EFSEC staff to work with the Applicant in "identifying

1 issues presented by the application”, reviewing “all information submitted”, and to “make  
2 recommendations to the council on conditions that would allow site approval” pursuant to RCW  
3 80.50.085. Nothing in EFSEC’s governing statutes suggests that the APA transforms  
4 information that is received by EFSEC staff outside the adjudicative proceeding into adjudicative  
5 evidence that must be received before the record in the adjudicative proceeding closes. Because  
6 the draft SCA is part of the broader EFSEC administrative processes, it is not evidence that was  
7 improperly submitted after the close of the adjudicative record.

8         The Intervenors attempt to distinguish the present situation from instances in the past  
9 when an applicant has submitted a draft SCA to staff, by noting that at least with respect to the  
10 Desert Claim Wind Project, the draft SCA was presented at the same time as the applicant’s  
11 post-hearing brief and prior to the opponents’ post-hearing brief. The Intervenors state that this  
12 timing makes sense “as the draft Site Certification Agreement stems from the adjudication, not  
13 the State Environmental Policy Act . . . or other permit processes.” However, SCAs developed  
14 for other projects do expressly stem, in part, from “other permit processes.” See for example the  
15 SCA between the State and Grays Harbor Energy LLC at 19<sup>2</sup> (attaching by reference a “National  
16 Pollution Discharge Elimination System Permit”, a “Final Approval Notice of Construction and  
17 Prevention of Significant Deterioration Application for Units 1 and 2”, and a “Final Approval  
18 Notice of Construction and Prevention of Significant Deterioration Application for Units 3 and  
19 4”), and the SCA between the State and Chehalis Power Generating at 23<sup>3</sup> (attaching by  
20 reference “Approval of Notice of Construction and Prevention of Significant Deterioration  
21 Application”). Moreover, the Council may base its recommendation to the governor on multiple

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<sup>2</sup>

<http://www.efsec.wa.gov/Satsop/Final%20Approved%20Documents/SCA%20%20with%20ERRATA%20sheet%20final%202-15-11.pdf>

<sup>3</sup> <http://www.efsec.wa.gov/Chehalis/chehalisfinalsca2001.pdf>

1 sources of information, including a final proposed SCA if the Council recommends project  
2 approval. The fact that a past applicant submitted a draft SCA as part of the adjudication process  
3 does not mean that all applicants must submit draft SCAs as part of the adjudication process.

4 EFSEC derives information for the Council's consideration using different parallel  
5 processes that often take place at the same time. Information derived from the development and  
6 preparation of a permit, for example, may differ from the information developed in the course of  
7 the adjudication on that same issue. The applicant may also have submitted information pursuant  
8 to RCW 80.50.085. In those situations, the Council keeps facts developed during the permitting  
9 process or information received under RCW 80.50.085 apart from the facts developed during the  
10 adjudication. The adjudication order must be based only on the record developed from the  
11 adjudicative proceeding. Additional information obtained through the permitting process or  
12 through the preparation of the EIS is reconciled by the Council when it prepares the  
13 recommendation to the Governor. If members of the Council did see the draft SCA on the public  
14 website, it would have been legally permissible.

15 As previously discussed in the letter dated April 28, 2017, communications between  
16 EFSEC staff and project applicants are not *ex parte* communications because EFSEC staff is not  
17 a presiding officer. The restrictions against *ex parte* communications also do not apply to non-  
18 APA statutory processes such as the required receipt of information under RCW 80.50.085.

19 The Intervenors also argue that the draft SCA should be stricken in order to avoid the  
20 appearance that *ex parte* communications are allowed. In stark contrast, EFSEC believes that  
21 posting the draft SCA assists the public because it makes the process more transparent. If the  
22 proposed project is approved, and if a portion of the draft SCA is used as a basis for the project  
23 approval, due process is provided to the Intervenors and others opposing the project through the

1 reconsideration process. Having the information from the draft SCA earlier, rather than later, will  
2 assist opponents to the proposed project develop any arguments they wish to rebut the  
3 information in the draft SCA.

## ORDER

5 The Intervenors' Motion to Strike Draft Site Certificate Submitted by Tesoro-Savage is  
6 **DENIED.**

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8 DATED and effective at Olympia, Washington this 4th day of August, 2017.

## **STATE OF WASHINGTON ENERGY SITE EVALUATION COUNCIL**

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