

[

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)	COLUMBIA RIVERKEEPER <i>ET AL.</i>
)	RESPONSE TO BNSF AMICUS BRIEF
VANCOUVER ENERGY DISTRIBUTION)	
TERMINAL)	
_____)	

INTRODUCTION

The amicus brief submitted by BNSF Railway Company adds nothing to the legal arguments already filed with the Council. At most, the amicus brief submits unsupported opinions as evidence, a particularly galling effort for a brief supporting motions to bar evidence on the issue of rail transportation impacts. Indeed, without intending to, BNSF’s brief supports the positions of Columbia Riverkeeper *et al.* (collectively “CRK”) that (1) the issue of federal preemption does not apply to Tesoro-Savage, as it is not a rail carrier, and (2) any questions of actual regulation of railroads, as opposed to consideration of their impacts under EFSEC’s governing statute, are hypothetical and unripe. CRK offers the following brief points in responses to BNSF’s tardy filing.¹

¹ Customarily, under federal or state rules, a party seeking to be amicus must file shortly after the party it supports in order to give the opposition adequate notice and time to respond. The motions BNSF supports were filed on March 29, 2016; responses to those motions were filed on April 28, 2016. BNSF has known about this adjudication for months; under no set of rules or circumstances is BNSF’s motion timely.

RESPONSES

1. BNSF asserts that its amicus participation is relevant because it has “specialized knowledge” regarding the Interstate Commerce Commission Termination Act (“ICCTA”), Motion at 1, yet the amicus brief itself barely mentions the Act. Similarly, BNSF’s motion invokes federal cases that BNSF claims have given it “knowledge that is not likely held by the parties to this proceeding.” And yet again, in the actual brief to the Council, BNSF fails to discuss or analyze these cases. BNSF Br. at 5, n.5 (“The doctrinal particulars of railroad preemption are thoroughly articulated in the Motions and are not repeated here.”). Instead of supplying its special knowledge, BNSF simply states that Tesoro-Savage and the Port of Vancouver “adequately present the substantive legal authority” necessary for EFSEC to rule. BNSF Br. at 2. On the legal issues before the Council, BNSF makes no actual arguments.

2. Instead, BNSF uses its pages to present several policy-type points, none of which stand up to scrutiny. BNSF discusses the role of federal preemption with respect to railroads, asserting that rail transportation is an area where conduct is exclusively governed by federal law. BNSF Br. at 3-4. But even BNSF admits that such a blanket statement is not true, noting in footnote 3 that certain rail safety and operations issues are, in fact, subject to state regulation. Train horns, one of BNSF’s examples of overarching federal regulation, are in fact one area where state agencies can and do regulate. *See generally* 49 CFR Part 222 (quiet zones can be established at request of state or local public authority).

3. BNSF restates a position that few would quarrel with – that EFSEC cannot regulate railroads by, for example, placing conditions on permits that govern BNSF. But as explained in several of the opposition briefs, consideration of impacts caused by rail transportation during the statutorily mandated review by the Council is wholly different from

hypothetical, future regulation in an unknown permit. At this point in these proceedings, any question of railroad regulation by EFSEC is entirely speculative and unripe.

4. BNSF insists that the federal regulatory scheme for railroads adequately protects the public and the environment. In the specific context of transportation of crude oil by rail and the wealth of recent history, this assertion is unsupported. The U.S. Department of Transportation finally promulgated new safety standards for oil tank cars in May 2015, reacting to a parade of horrific oil train accidents and explosions in the U.S. and Canada in 2013-2015 – years BNSF touts as the safest in U.S. rail freight history. Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains, 80 Fed. Reg. 26,644 (May 8, 2015). The U.S. Department of Transportation issued a series of “nearly 30 actions” in the 19 months prior to May 2015, including emergency orders and safety advisories, all responding to the threat posed to human health and the environment from crude-by-rail transportation. PHMSA Chronology, <http://www.phmsa.dot.gov/hazmat/osd/chronology>. And even after the promulgation of the new rule, the National Transportation Safety Board put “completion of rail safety initiatives” on its “Most Wanted List of Transportation Safety Improvements 2016” list.

Safer rail tank cars should also be introduced by industry as soon as possible. In 2015, the NTSB called for an aggressive schedule for replacing or retrofitting the current rail car fleet. The DOT issued new tank car regulations with a generous 2025 implementation deadline. It did not include a performance schedule or transparent completion reporting requirements. ... Each day that passes until our nation’s present tank-car fleet is replaced or upgraded in a day lived with elevated risk. Bottom line: ... we must avoid delays. Safety delayed is safety denied, and any given day without these lifesaving advances might be the day of the next Philadelphia or Lac-Mégantic.

NTSB, Promote Completion of Rail Safety Initiatives, <http://www.nts.gov/safety/mwl/Pages/mwl7-2016.aspx>.

5. BNSF’s statement that there is little to gain from considering the impacts of rail transportation caused by the Tesoro-Savage proposal is as irrelevant to the matters before the Council as it is inaccurate. BNSF Br. at 9. Without support, BNSF asserts that it is a “false assumption” that Tesoro-Savage “will have any appreciable impact on BNSF’s interstate rail system.” BNSF Br. at 9. Of course, the Council’s role here is not to ascertain Tesoro-Savage’s impact on the railroad, but to review and weigh Tesoro-Savage’s impact, including increased rail traffic caused by the terminal, on the health and safety of the people and environment of Washington. *See generally* RCW 80.50.010. Moreover, whether 4 unit trains per day or 8-10 unit trains per day² will result in a traffic increase is a question that must be tested through evidence at the adjudication, not through a late amicus brief on a legal question of federal preemption. BNSF cannot assert that “no credible evidence” indicates that Tesoro-Savage would cause an increase in train traffic anywhere in the state while at the same time supporting motions to limit just that sort of evidence in the adjudicative hearing.

6. BNSF ominously states that there is “significant risk” from considering the impacts of rail transportation, that “there is much to be lost.” BNSF Br. at 9-10. CRK disagrees. Time spent by the Council and the parties fully considering and balancing the direct and indirect risks, harms, and benefits of rail transportation caused by the project will be dutifully used to further the ends of the statute and fulfill the directions of the legislature.

7. BNSF confirms, Motion at 3, that “no other party to this proceeding is a rail carrier.” Nothing more is needed to rule that the provisions of the ICCTA do not apply to Tesoro-Savage.

² “An average of four unit trains would arrive at the proposed Facility each day. Occasionally, a fifth train may arrive within a 24-hour period.” Tesoro-Savage DEIS at 2-1 (Nov. 2015). Trains going into Vancouver loaded with crude oil must also leave Vancouver with unloaded tank cars, leading to more train trips than posited by BNSF.

8. BNSF also understands that the issue of rail regulation (as opposed to consideration of rail impacts) is currently unripe, using the subjunctive to note that efforts “could be squandered by addressing issues over which EFSEC has no jurisdiction.” BNSF Br. at 10 (emphasis added). CRK is confident that the Council will not squander the Council’s or the parties’ time. Evidentiary rulings about relevancy are properly made at the time of hearing, and any challenges to hypothetically overbroad EFSEC permitting decisions must wait until the Council actually makes any such final decisions.

CONCLUSION

For the reasons stated above and in CRK’s opposition brief, Columbia Riverkeeper, *et al.* respectfully ask the Council to deny both Tesoro-Savage and the Port of Vancouver’s motions.

Respectfully submitted this 5th day of May 2016.

s/ Kristen L. Boyles

KRISTEN L. BOYLES

JANETTE K. BRIMMER

ANNA M. SEWELL

Earthjustice

705 Second Avenue, Suite 203

Seattle WA 98104-1711

(206) 343-7340 | Phone

(206) 343-1526 | Fax

kboyles@earthjustice.org

jbrimmer@earthjustice.org

asewell@earthjustice.org

DAVID BRICKLIN
BRYAN TELEGIN
Bricklin & Newman, LLP
1424 Fourth Avenue, Suite 500
Seattle, WA 98101-2258
(206) 264-8600 | Phone
(206) 264-9300 | Fax
bricklin@bnd-law.com
telegin@bnd-law.com

Attorneys for Columbia Riverkeeper, Climate Solutions, ForestEthics, Friends of the Columbia Gorge, Fruit Valley Neighborhood Association, Sierra Club, Spokane Riverkeeper, and Washington Environmental Council

CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. My business address is 705 Second Avenue, Suite 203, Seattle, Washington 98104-1711.

I HEREBY CERTIFY that on May 5, 2016, I served the following document on the parties listed below:

- 1. *Columbia Riverkeeper, et al. Response to BNSF Amicus Brief*

Kelly J. Flint
Tesoro Savage Petroleum Terminal LLC
110 Columbia Boulevard, Suites 108 & 110
Vancouver, WA 98660
(801) 944-6600 | Phone
kellyf@savageservices.com
Applicant, Tesoro Savage Petroleum Terminal LLC

- via facsimile
- via overnight courier
- via first-class U.S. mail
- via email

Jay P. Derr
Dale N. Johnson
Tadas A. Kisielius
Van Ness Feldman, LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104-1728
(206) 623-9372 | Phone
jpd@vnf.com
dnj@vnf.com
tak@vnf.com
Attorney for Applicant, Tesoro Savage Petroleum Terminal LLC

- via facsimile
- via overnight courier
- via first-class U.S. mail
- via email

Matthew R. Kernutt
Office of the Attorney General
1125 Washington Street S.E.
PO Box 40100
Olympia, WA 98504-0100
(360) 586-0740 | Phone
mattk1@atg.wa.gov
Counsel for the Environment

- via facsimile
- via overnight courier
- via first-class U.S. mail
- via email

Brian Bonlender, Director
Department of Commerce
1011 Plum Street S.E.
Olympia, WA 98504-2525
(360) 725-4021 | Phone
brian.bonlender@commerce.wa.gov
The Department of Commerce

- via facsimile
- via overnight courier
- via first-class U.S. mail
- via email

Maia D. Bellon, Director
Department of Ecology
300 Desmond Drive
Olympia, WA 98504-7600
(360) 407-7001 | Phone
maia.bellon@ecy.wa.gov
The Department of Ecology

- via facsimile
- via overnight courier
- via first-class U.S. mail
- via email

Phil Anderson, Director
Department of Fish and Wildlife
1191 Second Avenue, Suite 2200
Seattle, WA 98101
(360) 902-2720 | Phone
philip.anderson@dfw.wa.gov
The Department of Fish and Wildlife

- via facsimile
- via overnight courier
- via first-class U.S. mail
- via email

Terence A. Pruit
Assistant Attorney General
Natural Resources Division
1125 Washington Street S.E.
P.O. Box 40100
Olympia, WA 98504-0100
(360) 586-0642
terryp@atg.wa.gov
RESOlyEF@atg.wa.gov
*Attorney for the Washington State Department
of Natural Resources*

- via facsimile
- via overnight courier
- via first-class U.S. mail
- via email

David Danner
Utilities and Transportation Commission
1300 S. Evergreen Park Drive S.W.
PO Box 47250
Olympia, WA 98504
(360) 664-1208 | Phone
ddanner@utc.wa.gov
The Utilities and Transportation Commission

- via facsimile
- via overnight courier
- via first-class U.S. mail
- via email

Roger Millar
Lynn Peterson
Department of Transportation
310 Maple Park Avenue S.E.
PO Box 47300
Olympia, WA 98504-7300
(360) 705-7054 | Phone
millarr@wsdot.wa.gov
lynnp@wsdot.wa.gov
The Department of Transportation

- via facsimile
- via overnight courier
- via first-class U.S. mail
- via email

Taylor Hallvik
Deputy Prosecuting Attorney
Clark County Prosecutor's Office
Civil Division
PO Box 5000
Vancouver, WA 98666-5000
taylor.hallvik@clark.wa.gov
Attorney for Clark County

- via facsimile
- via overnight courier
- via first-class U.S. mail
- via email

E. Bronson Potter
Karen Reed
City Attorney
PO Box 1995
Vancouver, WA 98668-1995
(360) 487-8500 | Phone
(360) 487-8501 | Fax
bronson.potter@cityofvancouver.us
karen.reed@cityofvancouver.us
Attorney for the City of Vancouver

- via facsimile
- via overnight courier
- via first-class U.S. mail
- via email

Susan Drummond
Law Office of Susan Elizabeth Drummond
5400 Carillon Pt. Bldg. 5000
Kirkland, WA 98033-7357
(206) 682-0767 | Phone
(425) 576-4040 | Fax
susan@susandrummond.com
Attorney for the City of Vancouver

- via facsimile
- via overnight courier
- via first-class U.S. mail
- via email

David F. Bartz, Jr.
Schwabe, Williamson & Wyatt, P.C.
1211 S.W. Fifth Avenue, Suite 1900
Portland, OR 97204-3795
(503) 796-2907 | Phone
dbartz@schwabe.com
Attorney for the Port of Vancouver

- via facsimile
- via overnight courier
- via first-class U.S. mail
- via email

Alicia L. Lowe
Schwabe, Williamson & Wyatt, P.C.
Vancouver Center
700 Washington Street, Suite 701
Vancouver, WA 98660
(360) 905-1427 | Phone
alowe@schwabe.com
Attorney for the Port of Vancouver

- via facsimile
- via overnight courier
- via first-class U.S. mail
- via email

Connie Sue M. Martin
Schwabe, Williamson & Wyatt, P.C.
1420 Fifth Ave., Suite 3400
Seattle, WA 98101-4010
(206) 407-1556 | Phone
(206) 292-0460 | FAX
csmartin@schwabe.com
Attorney for the Port of Vancouver

- via facsimile
- via overnight courier
- via first-class U.S. mail
- via email

Donald L. English
Scott Russon
12204 S.E. Mill Plain Blvd., Suite 200
Vancouver, WA 98684
(360) 449-6100 | Phone
(360) 449-6111 | Fax
english@elmbv.com
russon@elmbv.com
Attorneys for City of Washougal

- via facsimile
- via overnight courier
- via first-class U.S. mail
- via email

Cager Clabaugh
Jared Smith
International Longshore Warehouse Union Local 4
1205 Ingalls Road
Vancouver, WA 98660
(360) 903-7678 | Phone
(360) 241-0314 | Phone
cagerclabaugh@aol.com
mithared@yahoo.com
Members of ILWU Local 4

- via facsimile
- via overnight courier
- via first-class U.S. mail
- via email

Julie A. Carter
Robert C. Lothrop
Columbia River Inter-Tribal Fish Commission
700 N.E. Multnomah Street, Suite 1200
Portland, OR 97213
(503) 238-0667 | Phone
(503) 235-4228 | Fax
carj@critfc.org
lotr@critfc.org
*Attorneys for Columbia River Inter-Tribal
Fish Commission*

- via facsimile
- via overnight courier
- via first-class U.S. mail
- via email

Linda R. Larson
Marten Law, PLLC
1191 Second Avenue, Suite 2200
Seattle, WA 98101
(206) 292-2600 | Phone
(206) 292-2601 | Fax
llarson@martenlaw.com
Attorney for Columbia Waterfront LLC

- via facsimile
- via overnight courier
- via first-class U.S. mail
- via email

Daniel Timmons
Marten Law, PLLC
1001 S.W. Fifth Avenue, Suite 1500
Portland, OR 97217
(503) 243-2200 | Phone
(503) 243-2202 | Fax
dtimmons@martenlaw.com
Attorney for Columbia Waterfront LLC

- via facsimile
- via overnight courier
- via first-class U.S. mail
- via email

Nancy Isserlis, City Attorney
Michael J. Piccolo, Assistant City Attorney
Office of the City Attorney
5th Floor Municipal Building
W. 808 Spokane Falls Blvd.
Spokane, WA 99201
(509) 625-6225 | Phone
nisserlis@spokanecity.org
mpiccolo@spokanecity.org
Attorneys for City of Spokane

- via facsimile
- via overnight courier
- via first-class U.S. mail
- via email

Brent H. Hall
Office of Legal Counsel
Confederated Tribes of the Umatilla Indian Reservation
46411 Timine Way
Pendleton, OR 97801
(541) 429-7407 | Phone, Fax
brenthall@ctuir.org
*Attorney for Confederated Tribes of the
Umatilla Indian Reservation*

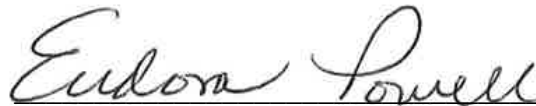
- via facsimile
- via overnight courier
- via first-class U.S. mail
- via email

R. Joseph Sexton
Amber Penn-Roco
Galanda Broadman PLLC
8606 – 35th Avenue N.E., Suite L1
P.O. Box 15146
Seattle, WA 98115
(206) 557-7509 | Phone
(206) 229-7690 | Fax
joe@galandabroadman.com
amber@galandabroadman.com
*Attorney for Confederated Tribes and Bands
of the Yakama Nation*

- via facsimile
- via overnight courier
- via first-class U.S. mail
- via email

I, Eudora Powell, declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Executed this 5th day of May, 2016, at Seattle, Washington.


EUDORA POWELL