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7 **ENERGY FACILITY SITE EVALUATION COUNCIL**
8 **STATE OF WASHINGTON**

9 In the Matter of:

NO. 15-001

10 Application No. 2013-01

THE COUNSEL FOR THE
ENVIRONMENT'S RESPONSE TO
APPLICANT'S RCW 80.50.140(2)
PROCEDURAL OBJECTIONS

11 TESORO-SAVAGE, LLC

12 VANCOUNVER ENERGY
13 DISTRIBUTION TERMINAL

14 The Attorney General and appointed Counsel for the Environment (collectively
15 hereinafter the "CFE") did not engage in any conduct or ex parte communications that would
16 support Vancouver Energy's procedural objection to the proceedings in this matter. Any
17 suggestion to the contrary is factually and legally baseless.

18 The legislature charged the Energy Facility Site Evaluation Council (EFSEC) with the
19 responsibility to preserve and guard the quality of Washington's environment during the
20 review of energy facility sittings. RCW 80.50.010. The CFE plays a critical statutory role in
21 representing the public's interest in the environment regarding the development of energy
22 facilities. *See* RCW 80.50.080. The role of the CFE is independent and separate from EFSEC,
23 its members, the facility applicant, and other parties to the proceeding.

24 Like all state agencies, boards and commissions, EFSEC is assigned an Assistant
25 Attorney General as legal counsel. CFE is not EFSEC's counsel and does not advise EFSEC or
26 its members. That function is performed by another division of the Attorney General's Office,

1 and the functions of the CFE and the legal advisors to EFSEC are screened from each other.
2 The AGO is well versed in maintaining proper screening between the roles of advisors to
3 boards and commissions and representation of parties before those boards. In the case of
4 EFSEC, the Assistant Attorney General who advises the Board is screened not only from CFE
5 but also from any Assistant Attorney General representing another state agency appearing
6 before the Commission. Moreover, Attorney General Bob Ferguson recuses himself from
7 client advice to EFSEC when the CFE participates in an EFSEC proceeding on a project.


8 Vancouver Energy bases its objections on statements made by former EFSEC Chair
9 Bill Lynch in his letter resigning from the Commission. The substance of those statements
10 have been redacted as attorney-client privileged. We can infer from the letter that the former
11 Chair personally disagreed with legal advice he received, but we do not know the content of
12 that advice or whether his viewpoint was shared by the Commission. Regardless, it is not the
13 role of a legal advisor to provide a client only advice the client agrees with. In any case, what
14 we do know is that the redacted information does not relate to the conduct of or
15 communications from CFE because CFE does not have a privileged relationship with EFSEC
16 or its members.

17 Besides there being no factual basis for Vancouver Energy's objection, there is no legal
18 basis. CFE did not and cannot violate the appearance of fairness doctrine. This legal doctrine
19 requires decision-makers to conduct legal proceedings in a way that is fair and unbiased in
20 both appearance and fact. *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 245, 821 P.2d 1204
21 (1992). The doctrine requires that (1) a hearing itself be procedurally fair; and (2) a hearing be
22 conducted by impartial decision-makers. *Id.* This doctrine applies to the decision making body.
23 As CFE is a party to the proceedings before EFSEC, rather than part of the decision making
24 entity, CFE cannot violate the appearance of fairness doctrine. Similarly, CFE cannot violate
25 EFSEC's deliberative duties or decision-making authority obligations. Only EFSEC, not any of
26 the parties appearing before it, may fulfill or violate these requirements.

1 The objection raised by Vancouver Energy does not in any way relate to CFE. CFE has
2 acted only within the legislative framework as the advocate for the environment and the people
3 of Washington. Any allegations or inferences that CFE has acted inappropriately are
4 completely inaccurate and unsupported.

5 DATED this 27th day of September 2017.

7 ROBERT W. FERGUSON
8 Attorney General

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11 MATTHEW KERNUTT, WSBA# 35702
12 Assistant Attorney General
13 Counsel for the Environment
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