

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>
)	REPLY TO TESORO-SAVAGE
VANCOUVER ENERGY DISTRIBUTION)	OBJECTIONS TO INTERVENTION
TERMINAL)	
)	
)	

INTRODUCTION

Applicant Tesoro-Savage states in its response to petitions for intervention that it “does not oppose the admission of Petitioners as intervenors, provided their involvement will not delay the proceedings and an efficient and effective adjudication can be achieved.” Tesoro-Savage Response at 2. Despite the clarity of that non-opposition position and despite evidence that shows petitioners are already working together to prevent delays and inefficiencies, Tesoro-Savage continues for several pages, seeking to (1) limit petitioners’ participation; (2) require petitioners’ to submit more information to justify intervention; and (3) condition intervention based on incorrect interpretations of the EFSEC process. All these requests are premature, if not outright incorrect, and the Council should reject Tesoro-Savage’s attempt to assert control over participation in these proceedings. Petitioners Columbia Riverkeeper *et al.* respectfully ask the Council to grant their full intervention.

ARGUMENT

I. TESORO-SAVAGE HAS FAILED TO IDENTIFY REASONS TO LIMIT INTERVENOR PARTICIPATION.

Pursuant to the Council's Order Commencing Adjudication (Jan. 28, 2015) and WAC 463-030-091, the petition of Columbia Riverkeeper, Climate Solutions, ForestEthics, Friends of the Columbia Gorge, Fruit Valley Neighborhood Association, Sierra Club, Spokane Riverkeeper, and Washington Environmental Council (collectively "Columbia Riverkeeper") identified each individual petitioner for contact purposes, described the interests of each petitioner seeking party status, recounted comments and letters already submitted concerning Tesoro-Savage's application, listed in detail the issues of concern to the group of proposed intervenors, and described how their ability to protect their interests "may be impaired or impeded" if intervention is denied. Moreover, the eight conservation and neighborhood groups, recognizing the Council's preference for coordination among aligned parties, joined together in one petition and will continue to participate as a single group, "combin[ing] their presentations of evidence and argument, cross-examination, discovery and other participation in the proceedings." Order Commencing Adjudication at 4. Indeed, several of the separate petitioners (outside of the eight conservation and neighborhoods groups) are already coordinating with each other in order to create efficiencies for themselves and this process. Once intervening parties are finally identified, Columbia Riverkeeper *et al.* will continue to work closely with other parties to avoid repetition and delay.

In its response, Tesoro-Savage has failed to identify specific, cognizable reasons to limit Columbia Riverkeeper's intervention, especially in light of the ongoing coordination between petitioners. Moreover, it is simply too early in the EFSEC adjudicatory process to limit the intervening parties. At the EFSEC meeting where the Council decided to open the adjudication

to intervention, Administrative Law Judge Noble stressed the preliminary nature of the intervention step; Judge Noble noted that “the parties will need time to line up witnesses, conduct discovery, decide on issues, and begin assembling the evidence that they want to put before the Council.” Verbatim Transcript of Monthly Council Meeting Washington State Energy Facility Site Evaluation Council (Jan. 20, 2015) at 46 (emphasis added); *id.* (“I also want to emphasize that opening the adjudication at this point and getting started with the work associated with it does not mean that issues arising out of the SEPA process but not maybe previously realized cannot be brought into the adjudication at a later time as the issues evolve and become finalized.”) (emphasis added). This is not the step where proposed intervenors must present detailed legal issues for adjudication, nor is it the step where the Council should begin to limit itself and the issues it will adjudicate. *See* WAC 463-30-092 (“In general, it is the policy of the council to allow any intervenor broad procedural latitude.”).

Columbia Riverkeeper shares the Council’s desire to achieve a fair and efficient hearing. As recognized by Judge Noble and Chair Lynch, this adjudication will be complex. Transcript at 44 (Ms. Noble: “this adjudication is expected to be more complex than prior EFSEC adjudications”); *id.* at 55 (Chair Lynch: “So knowing that this case is every bit as big as some of the ones I’ve sat on, I really recommend that the Council take action today to initiate the process.”). In a complex proceeding, the time to fully specify and flesh out issues for the Council is during the pre-hearing process and back-and-forth amongst the parties, not as a prerequisite to interested groups becoming parties in the first place. Such a requirement would effectively change EFSEC’s standard for intervention.¹

¹ Additionally, Tesoro-Savage’s application and proposed project has generated a great deal of public interest and controversy. An order by the Council limiting the participation of proposed public-interest intervenors at the very start of this process would send the uncomfortable signal

Finally, the Council need not pre-judge whether participation by intervenors will cause inefficiencies sometime in the future, as the Council may later limit issues or impose conditions on parties. *See* RCW 34.05.443 (conditions on intervenors allowed “either at the time that intervention is granted or at any subsequent time”). Should an issue of duplication or inefficiency arise, the Council retains the discretion to respond as needed, and should not impose any limitations now.

II. PETITIONERS NEED NOT SUBMIT FURTHER INFORMATION.

Although Tesoro-Savage states that it does not oppose interventions, it requests additional information from petitioners to allow that unopposed intervention. This passive-aggressive position penalizes Columbia Riverkeeper *et al.*, as they have already consciously joined together to participate in these proceedings. It is also a barely masked attempt to have the Council hastily address substantive questions, such as what issues are within EFSEC’s jurisdiction, during the initial intervention process.

Tesoro-Savage’s request that public interest groups “demonstrate that each organization has special expertise in each issue that might not otherwise be available through the participation of another party,” Tesoro-Savage Response at 4, actively seeks to undo the efficiencies advanced by the eight conservation and neighborhood groups that have moved to intervene and participate together. The combined petition described the interests of each group and included a detailed, non-exhaustive list of overall issues; the Council’s rules do not require more. Tesoro-Savage’s request for more information from individual public interest groups is simply an attempt to burden these groups and create inefficiencies in this process despite its stated concern for delay.

Additionally, in its response, Tesoro-Savage (at 4) asks that legal issues be defined in

that the Council is closing the door to full public participation and input even for groups whose members will be directly affected by the outcome of these proceedings.

order to allow EFSEC to determine whether the issues are within its jurisdiction. To the contrary, a decision on petitions to intervene is not the place to decide far-reaching questions of EFSEC jurisdiction. For example, Tesoro-Savage raises the question of federal preemption with respect to rail transportation in a footnote, as if merely mentioning a federal law is enough to invoke this legal doctrine. It is not. On the substance of the issue, federal preemption is a red-herring; EFSEC will not, through this process, assert regulatory authority over railroad operations. However, the issue of federal preemption, even if relevant, requires full briefing and discussion once the parties have been identified. The Council should not, through an argument about intervention, decide important legal issues that frame its ultimate recommendation.

The Council was clear at its January meeting that by opening the adjudication up for intervention, it was not rushing to decide substantive issues:

[B]y no means are we rushing this process at all. It [] is just queuing up things for the—so that when we do start taking evidence, start hearing from witnesses, that we would have gotten a lot of these preliminary matters out of the way in the first place.

Chair Lynch, Transcript at 47.

And I think a concern was that you would be sitting hearing the evidence before the draft EIS was out and the public comment was taken and your comment was taken. That's not going to happen, so I just want those who are listening and yourselves to know that that is not the plan.

Judge Noble, Transcript at 52-53; *id.* at 55 (“And, if I may, the parties need time to talk to each other about various kinds of agreements that they can make, and we need to establish things that are somewhat prosaic: service methodology, to start thinking about the electronic record, exhibit organization, and all of that. Parties need to be talking to each other. They need to know who the other parties are so those kinds of things can get started so that once the draft EIS is issued and the comment is taken, we’ll be able to proceed on with the process....”). The Council’s clear

statements that intervention marks the beginning of a longer, more detailed process counters Tesoro-Savage's attempt to turn intervention into a battle of substantive issues.

III. THE COUNCIL SHOULD REJECT TESORO-SAVAGE'S PROPOSED CONDITIONS ON INTERVENTION.

Echoing its request for additional information, Tesoro-Savage asks the Council to condition and limit each petitioner's intervention. Again, this request comes too early and without evidence of any need for limitation. Moreover, Tesoro-Savage's request that the Council remove issues from the adjudication that are "more appropriately addressed in the DEIS review" is entirely incorrect. EFSEC must "conduct an adjudicative proceeding for the presentation of evidence on the application." WAC 463-14-080. Nothing in the statutes or regulations governing EFSEC adjudications allow the Council to exclude issues from the adjudication simply because they are also addressed in the DEIS. To avoid repetitive briefing, petitioners here adopt and incorporate by reference the argument of Columbia Waterfront LLC at 3-5 in its Reply to Applicant's Consolidated Response to Petitions for Intervention.

CONCLUSION

For the reasons discussed above and in their initial joint petition for intervention, Columbia Riverkeeper *et al.* respectfully ask the Council to grant them unlimited intervenor status.

Respectfully submitted this 11th day of March, 2015.



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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.

I HEREBY CERTIFY that on March 11, 2015, I served the following documents on the following parties:

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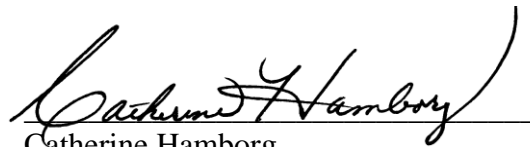
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I, Catherine Hamborg, declare under penalty of perjury that the foregoing is true and correct. Executed this 11th day of March, 2015, at Seattle, Washington.


Catherine Hamborg