

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

COLUMBIA WATERFRONT LLC'S  
REPLY TO APPLICANT'S  
CONSOLIDATED RESPONSE TO  
PETITIONS FOR INTERVENTION

1 Pursuant to Prehearing Order Commencing Agency Adjudication and Setting  
2 Intervention Petition Deadline: February 27, 2015, Case No. 15-001, Columbia Waterfront LLC  
3 (“Columbia Waterfront”) submits this REPLY TO APPLICANT’S CONSOLIDATED RESPONSE TO  
4 PETITIONS FOR INTERVENTION.

5 **I. INTRODUCTION**

6 Under the standards for intervention in EFSEC adjudicative proceedings, “petitions to  
7 intervene shall be verified under oath by the petitioner, shall adequately identify the petitioner,  
8 and shall establish with particularity an interest in the subject matter and that the ability to  
9 protect such interest may be otherwise impaired or impeded.” WAC 463-030-091. Columbia  
10 Waterfront’s timely-filed PETITION FOR INTERVENTION (“Petition”) meets this intervention  
11 standard.

12 In its CONSOLIDATED RESPONSE TO PETITIONS FOR INTERVENTION (“Applicant  
13 Response”), Applicant Tesoro-Savage, LLC (“Tesoro-Savage”) states that it “does not oppose  
14 the admission of Petitioners [including Columbia Waterfront] as intervenors, provided their

COLUMBIA WATERFRONT LLC’S REPLY  
TO APPLICANT’S CONSOLIDATED RESPONSE  
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1 involvement will not delay the proceedings and an efficient and effective adjudication can be  
2 achieved.” Applicant Response at 2. As previously indicated in the Petition, Columbia  
3 Waterfront will coordinate its involvement in the adjudication with other intervenors and its  
4 participation will not delay the proceedings or disrupt the Council’s ability to conduct these  
5 proceedings in an orderly fashion. Petition at 8. Tesoro-Savage does not challenge Columbia  
6 Waterfront’s prior representations on these issues. Accordingly, Columbia Waterfront requests  
7 the Council to grant the Petition.

## 8 **II. ARGUMENT**

### 9 **A. The Council should not limit the scope of issues for the adjudication at this initial** 10 **stage of the proceedings.**

11 The Applicant Response states that Tesoro-Savage does not oppose admission of any of  
12 the proposed intervenors, but instead seeks to use the intervention process as a means to limit the  
13 scope of the issues for the adjudication as a whole. In so doing, Tesoro-Savage seeks to raise the  
14 bar for this initial procedural step, arguing that “each Petitioner must clearly articulate the issues  
15 they propose for adjudication.” Applicant Response at 3 (emphasis added). Petitions for  
16 intervention, however, need not “provide enough detail to allow the Council to properly frame  
17 the issues for adjudication.” Applicant Response at 3. Instead, the Council’s rules only require  
18 petitioners to establish an *interest* in the subject matter of the adjudication and the impairment of  
19 that interest in the absence of intervention. WAC 463-30-091. While the Administrative  
20 Procedures Act does permit conditioning intervenors’ participation to issues that implicate  
21 individual intervenors’ particular interests, RCW 34.05.443(2), determining what issues actually  
22 relate to petitioners’ interests first requires knowledge of the full scope of potential issues. In this  
23 case, because the full scope of potential issues cannot be determined prior to issuance of the  
24 DEIS at the very earliest, it is premature to require proposed intervenors to identify all issues for

1 adjudication as part of this initial intervention process. In any event, Columbia Waterfront’s  
2 Petition did, in fact, include a non-exhaustive list of issues relevant to its interests and  
3 specifically requested “the right to add or delete issues following completion of the DEIS.”  
4 Petition at 6. This is more than sufficient at this stage of the proceedings.

5 In seeking to require Petitioners to articulate all issues for adjudication at this initial stage  
6 of the adjudication, Tesoro-Savage attempts to hijack the adjudication process described by the  
7 Council and Administrative Law Judge (“ALJ”) Noble at the January 20, 2015 Council meeting.  
8 As ALJ Noble stated: “Most of the intervention process will follow the commencement of the  
9 adjudication, *and after that*, the parties will need time to line up witnesses, conduct discovery,  
10 *decide on issues*, and begin assembling the evidence that they want to put before the Council.”  
11 Meeting Minutes at 45–46 (emphasis added). Despite ALJ Noble’s clear articulation of an  
12 orderly, measured process for this adjudication, Tesoro-Savage now rushes to limit the scope of  
13 issues as part of the intervention process. As noted above, until the DEIS is issued, it is  
14 premature to require the parties, including intervenors, to identify and thereby limit the range of  
15 potential issues subject to adjudication.

16 Tesoro-Savage’s rush to identify and circumscribe the scope of issues for adjudication is  
17 particularly problematic given the complexity of this case. To limit repetitive briefing on this  
18 issue, Columbia Waterfront adopts by reference the arguments of Columbia Riverkeeper *et al.* in  
19 Sections I and II (pages 2–5) of their Reply to Tesoro-Savage Objections to Intervention.

20 B. Environmental issues addressed in the SEPA process are also subject to  
21 adjudication.

22 As part of EFSEC’s deliberative process, the Council is to “conduct an adjudicative  
23 proceeding for the presentation of evidence on the application.” WAC 463-14-080. Nothing in  
24 the statutes or regulations governing EFSEC adjudications allow the Council to exclude issues

1 from the adjudication simply because they are also addressed in the DEIS. Yet Tesoro-Savage  
2 requests that the Council “[i]dentify issues that are more appropriately addressed in the DEIS  
3 review and public comment process, and remove those issues from the adjudicative process upon  
4 publication of the DEIS,” claiming that excluding such issues from the adjudication would be  
5 “consistent with the Council’s approach to intervention in other proceedings.” Applicant  
6 Response at 5. This is wrong.

7 Tesoro-Savage does not attempt to identify any source of Council legal authority to so  
8 limit the scope of the adjudication, but relies solely on a mischaracterization of past EFSEC  
9 procedures to justify its request. While “the processes for the Environmental Impact Statement  
10 preparation are separate and distinct” from the adjudication, operating under “different laws and  
11 rules,” *In re Whistling Ridge Energy Project LLC*, Council Order No. 851, p. 3 (2010), Tesoro-  
12 Savage “confuses references to the development process of the EIS (independent of the  
13 adjudicative process) with use of the environmental information (appropriately integrated with  
14 the Council’s adjudicative decision process).” *In re Whistling Ridge Energy Project LLC*,  
15 Council Order No. 850, p. 2 (2010) (emphasis added); *see also id.* at 4 (“While the Council  
16 collects and uses the environmental impact *information* to inform it on matters within the  
17 adjudication, it would be improper . . . for the Council to confuse the two processes.”). As the  
18 Council has previously stated:

19 The DFEIS precedes the beginning of the adjudicative hearing. Its information is  
20 public and available. *The environmental record is received in evidence; its*  
21 *information is available to the parties and the public during the adjudicative*  
22 *hearing. . . . At the conclusion of the hearing process, the responsible official*  
23 *issues a FEIS, which may incorporate additional environmental information*  
24 *received in the adjudicative hearing.*

25 *Id.* at 3 (emphasis added).

1 In other words, while the adjudication may not be the appropriate venue to challenge the  
2 SEPA *process*, the *issues* addressed in the SEPA process are still fair game in the adjudication.<sup>1</sup>  
3 As ALJ Noble emphasized at the January 20, 2015 Council meeting, “opening the adjudication at  
4 this point and getting started with the work associated with it does not mean that issues arising  
5 out of the SEPA process but not maybe previously realized cannot be brought into the  
6 adjudication at a later time as the issues evolve and become finalized.” Meeting Minutes at 46.<sup>2</sup>  
7 Thus, issues addressed in DEIS are not outside the scope of the issues that may be raised in the  
8 adjudication.

9 C. Federal law does not preempt EFSEC from considering impacts from rail  
10 transportation on intervenors’ interests in the adjudication.

11 Tesoro-Savage’s intimation that the Council lacks “adjudicative jurisdiction” over issues  
12 pertaining to impacts related to rail transportation due to federal preemption is similarly  
13 misplaced. Applicant Response at 4 n. 5, 5. While federal law may arguably preempt state  
14 *regulatory* authority over interstate railroad *operations*, nothing in federal law limits the ability  
15 of the Council to consider impacts from railroad transportation in its adjudicative process. In any  
16 event, resolution of such issues is premature at this initial stage of the proceedings and should  
17 not be resolved through a back-door argument in a response to petitions for intervention.

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<sup>1</sup> The list of issues to which individual parties were limited in the Sagebrush Power Partners proceedings, cited by Applicant Response at 5, further indicates that environmental issues addressed in the SEPA process may also be subject to adjudication. For example, Kittitas County was permitted to address in the adjudication issues including “protection of the lands, waters and environment of Kittitas county; protection of the general health and welfare of the inhabitants of Kittitas county; . . . and assertions dealing with impacts on urban growth, sprawl, transportation, housing, economic development, property rights, natural resources, open space, recreation, environment, public facilities, public services and historical preservation, as they apply in Kittitas county.” *In re Application No. 2003-01 of Sagebrush Power Partners, L.L.C.*, Council Order No. 777, p. 6 (2003).


<sup>2</sup> Similarly, in the Sagebrush Power Partners proceedings, the Council specifically ordered that issues raised by the DEIS could be added to the issues list. *In re Application No. 2003-01 of Sagebrush Power Partners, L.L.C.*, Council Order No. 777, p. 8 (2003).

1 **III. Conclusion**

2 For the foregoing reasons, the Council should grant Columbia Waterfront's Petition.  
3 Further, the Council should not seek to define or limit the scope of issues for individual  
4 intervenors or the adjudication as a whole until the DEIS has been issued. We further request the  
5 ALJ to schedule a prehearing conference to address scheduling of the adjudication process in  
6 coordination with the ongoing SEPA process.

7 Dated this 11th day of March, 2015.

8 MARTEN LAW PLLC

9  
10 By:   
11 Linda R. Larson, WSBA No. 9171  
12 Attorneys for Columbia Waterfront LLC

1 **CERTIFICATE OF FILING**

2 I hereby certify that on March 11, 2015, I filed this COLUMBIA WATERFRONT LLC'S  
3 REPLY TO APPLICANT'S CONSOLIDATED RESPONSE TO PETITIONS FOR INTERVENTION by electronic  
4 mail to the following electronic filing address:

5 EFSEC@utc.wa.gov;

6 and sent a true and correct copy by first class U.S. mail, postage prepaid, to the following  
7 mailing address:

8 Energy Facility Site Evaluation Council  
9 1300 S. Evergreen Park Drive SW  
10 Olympia WA 98504-3172

11 Dated: March 11, 2015

12 

13 Linda R. Larson  
14 Linda R. Larson  
15 Attorney for Proposed-Intervenor  
16 Columbia Waterfront LLC  
17  
18

**CERTIFICATE OF SERVICE**

I hereby certify that on March 11, 2015 I served by authorized method of service pursuant to WAC 463-30-120(3) a true and correct copy of this COLUMBIA WATERFRONT LLC’s REPLY TO APPLICANT’S CONSOLIDATED RESPONSE TO PETITIONS FOR INTERVENTION upon all parties of record as in this proceeding via electronic mail and first class U.S. mail, postage prepaid, to the addresses listed below:

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18 Dated at Seattle, Washington this 11th day of March, 2015.

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