

**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 RECOGNIZING
PARTICIPATING PARTIES AND
GRANTING INTERVENTIONS

Procedural Setting:

On January 28, 2015, the Energy Facility Site Evaluation Council (Council) issued an Order Commencing Agency Adjudication and Setting Intervention Petition Deadline. Six Notices of Participation were filed by statutory parties. They are:

Tesoro Savage, LLC (Tesoro Savage)
Assistant Attorney General Matthew R. Kernutt, Counsel for the Environment (CFE)
The Port of Vancouver, Washington (Port)
Clark County, Washington (Clark County)
The City of Vancouver (Vancouver)
The State of Washington Department of Natural Resources (DNR)

The following eight entities jointly filed a Petition for Intervention through Earthjustice (Columbia Riverkeeper et al.):

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

Seven other entities filed individual Petitions for Intervention. They are:

Columbia Waterfront LLC (Columbia Waterfront)
Columbia River Inter-Tribal Fish Commission (CRITFC)
International Longshore Warehouse Union Local 4 (ILWU Local 4)
The City of Spokane (Spokane)

The Confederated Tribes of the Umatilla Indian Reservation (Umatilla Tribes)
The Confederated Tribes and Bands of the Yakama Nation (Yakama Nation)
The City of Washougal (Washougal)

On March 6, 2015, Tesoro Savage filed a Consolidated Response to Petitions for Intervention.

The following entities filed Replies to the Vancouver Energy Response:

Columbia Riverkeeper *et al.* (March 11, 2015)
Columbia Waterfront (March 11, 2015)
Washougal (March 11, 2015)
CRITFC (March 12, 2015)
Umatilla Tribes (March 13, 2015)

Petitions for Intervention:

When any person or entity files an application for certification of an energy facility, the Council is obligated to hold public hearings, including an adjudication. The Attorney General must appoint a counsel for the environment to represent the public and its interest in protecting the quality of the environment. This statutory requirement "...shall not be construed to prevent any person from being heard or represented by counsel in accordance with the other provisions of [the Energy Facilities Site Location laws]." RCW 80.50.080. At the adjudication, "any person shall be entitled to be heard." RCW 80.50.090(3).

On timely application, intervention shall be allowed to any person upon whom a statute confers a right to intervene and to any person having an interest in the subject matter whose ability to protect such interest may be otherwise impaired or impeded. RCW 34.05.443(1), WAC 463-30-091. It is the policy of the Council to allow any intervenor broad procedural latitude, but an intervenor's participation may be conditioned to prevent undue delay in the proceedings or prejudice to the rights of existing parties. Any grant of intervention may be modified at any time. RCW 34.05.443(2) & (3), WAC 463-30-092.

In this proceeding, all petitions to intervene sufficiently identified the petitioners and their contact information. They included detailed statements setting forth each petitioner's interest in the subject matter of this adjudication, and how the petitioner's ability to protect such interest(s) may be impaired or impeded if it is not granted the status of intervenor.

In responding to the petitions for intervention, Tesoro Savage agreed that all intervenors are proper parties provided their involvement will not delay the proceedings or prevent an efficient and effective adjudication. Tesoro Savage makes no claim of delay caused by any petitioner at this time. Tesoro Savage does assert that further inquiry is necessary into the qualifications of some petitioners to become parties in this adjudication and that the participation of intervenors should be limited in various ways.

At this juncture in the adjudication, there is no delay or inefficiency in these proceedings resulting from the participation of any petitioner. Therefore, in deciding on the intervention petitions, EFSEC must resolve two questions: (1) whether each petitioner meets the test for intervention in the adjudication of Tesoro Savage's Application No. 2013-01; and (2) whether any intervenor's participation should be limited or restricted in the manner asserted by Tesoro-Savage.

The EFSEC Standard for Party Participation by Intervention:

As summarized in the Council's Order Commencing Agency Adjudication, EFSEC rules articulate the key requirements for intervention in this adjudication. WAC 463-30-091 and 463-30-092. They are:

- (A) Facts sufficient to establish with particularity that the petitioner has an interest in the subject matter; and
- (B) How the petitioner's ability to protect such interest may be impaired or impeded if the petitioner is not granted the status of intervenor.

The Petitioners:

Columbia Riverkeeper et al.

Membership of the organizations comprising the joint petitioners group, Columbia Riverkeeper et al., includes individuals with expertise on the policy and science of crude oil transportation, as well as individuals who assert that they would be directly affected by the project, both at its site and along the transportation routes. Each entity has participated in the Tesoro Savage application environmental review process and each has voiced their members' and staff's concerns about the project's potential environmental, safety, health, and other impacts. They assert that the project would result in risks of fire, explosion, terrestrial and river oil spills and other catastrophic harms, including significant harmful impacts to air, water, the marine environment, fish and wildlife, economics, public health, culture, and community impacts across the region in which these organizations operate and in which their members and staff live.

Columbia Riverkeeper et al. will present a case highlighting subjects of concern about the proposed project: oil spill risk, the effects the project would have on the surrounding community, impacts at and beyond the terminal site, and effects on minority populations that are immediate project neighbors.

Columbia Riverkeepers et al. is comprised of the following organizations:

Columbia Riverkeeper is a non-profit organization whose approximately 8,000 members

reside or recreate on or near the Columbia River. Its mission is to restore and protect the water quality of the Columbia River. Columbia Riverkeeper's goals include monitoring the enforcement of clean air, clean water, and other environmental laws through an integrated strategy of community-based grassroots organizing, public education, legal action, and hands-on citizen involvement in tangible river protection projects.

Climate Solutions is a Northwest-based non-profit entity whose goal is establishing a clean energy economy. This effort includes accelerating the transition from fossil fuels to a clean energy economy.

ForestEthics is a non-profit environmental group whose goals include protecting North America's forests and wild places, including the wildlife and people depending on them. ForestEthics has opposed crude-by-rail terminals in North America and involved itself in efforts to raise public awareness of the risks in transporting crude oil.

Friends of the Columbia Gorge is a non-profit organization with approximately 5,500 members. It is concerned with protecting and enhancing the resources of the Columbia River Gorge through ensuring strict implementation of the Columbia River Gorge National Scenic Area Act and other laws protecting the Columbia River Gorge region. It accomplishes this through promoting responsible stewardship of Gorge land, air, and waters, encouraging public ownership of sensitive areas, educating the public about the unique natural values of the area and the importance of preserving them.

Fruit Valley Neighborhood Association is a City of Vancouver sanctioned civic organization encompassing approximately 1,200 homes and 100 businesses, an elementary school, five parks and a community center. Its mission is to promote the general welfare of its neighborhood residents and businesses. The Fruit Valley neighborhood contains environmental resources such as the Columbia River Wetland Mitigation Bank, the Ridgefield National Wildlife Refuge, Vancouver Lake, portions of the Columbia River and its shoreline, and the Pacific Flyway. Fruit Valley Neighborhood Association asserts that the project threatens to undermine the rights of neighborhood residents to a clean and healthy environment and disproportionately burden low-income individuals and people of color.

The Sierra Club is a national environmental organization with more than 1 million members and supporters in the United States and Canada, including chapters in the states of Washington and Oregon, including one in Vancouver, Washington. The Sierra Club is devoted to the study and protection of the earth's scenic and ecological resources. As a means of addressing climate change and protecting communities, one Sierra Club campaign involves promoting the reduction in the extraction and use of crude oil product such as those proposed to be shipped to the Vancouver Energy facility. The Sierra Club asserts that it has a concern with the risks to the environment inherent in the movement of volatile hazardous fuels.

Spokane Riverkeeper is a program of the Center for Justice, a non-profit organization whose donors and supporters reside or recreate on or near the Spokane River Watershed. The

organization accomplishes its goals by collaborating, educating and litigating to preserve the Spokane River's health.

The Washington Environmental Council is a non-profit, statewide advocacy organization with approximately 20,000 members, whose mission is to protect, restore, and sustain Washington's environment by working to pass and ensure enforcement of laws such as the State Environmental Policy Act, the State Superfund Law, the Growth Management Act, and the Shoreline Management Act.

All organizations petitioning as Columbia Riverkeeper et al. seek participation in this adjudication to press the Council to address environmental and other impacts including increases in rail and vessel traffic in the region, risks of oil spills, impacts of crude oil extraction, greenhouse gas emissions from transport, and the refinement and combustion of crude oil. Columbia Riverkeeper et al. urge EFSEC's consideration in this adjudication of all direct, indirect and cumulative impacts wherever they may occur. These petitioners assert that they possess unique and extensive expertise in all areas of fact and law that the adjudication will touch on, to an extent that cannot adequately be presented by other parties and petitioners. They contend that denial of their intervention petition would result in the degradation of the resources their organizations are charged with protecting.

Columbia Waterfront LLC (Columbia Waterfront)

Columbia Waterfront is developing a 32-acre mixed-use waterfront community consisting of residential units, office and retail space and hotel rooms in Vancouver, Washington. It is located about two miles east of the proposed Vancouver Energy distribution center and oil terminal, and is immediately adjacent to both the BNSF main line and the Port of Vancouver spur rail lines. Columbia Waterfront worked with the City of Vancouver to develop a master development plan that was ultimately approved by the City Council in December of 2009.

The plan includes a waterfront park and trail, and outdoor amenities to accommodate farmer's markets, concerts and other public gatherings. Development of facilities and infrastructure to serve the waterfront project have been proceeding for several years, and is financed with a \$45 million public-private investment.

Columbia Waterfront has participated in EFSEC's process, including extensive participation in the SEPA and land use consistency reviews. It asserts that its interests will be impaired by the proposed Tesoro Savage facility operations, construction activities, and the oil trains travelling to the facility at the Port. Columbia Waterfront asserts that the risk of an oil train derailment and catastrophic explosion adjacent to its development is of particular concern and will impair first responder access due to the configuration of the tracks and railroad underpasses on adjacent property. Columbia Waterfront also has concerns about the impact of large marine vessel traffic on the marketability of its riverfront property, and about other potential impacts from the Tesoro Savage project.

Columbia River Inter-Tribal Fish Commission (CRITFC)

CRITFC was created by the four treaty tribes of the Columbia River. It is charged with providing coordination services, technical expertise and legal support in regional, national, and international efforts to ensure that treaty fishing rights and fishery resources are conserved and protected. CRITFC's staff includes fisheries biologists, attorneys, enforcement officers, water specialists and other technical experts.

CRITFC asserts that Tesoro Savage's proposed project poses significant risks to riverine resources, including fish and water quality, air quality, tribal fisheries, safe access to the river, and the use of Treaty Fishing Access Sites. It alleges the project will bring risks relating to the rail transport of volatile and toxic crude oil. CRITFC is responsible for protecting safe access to and use of, the Columbia River, its tributaries, their shorelines and the adjacent lands for tribal fishers. CRITFC also is concerned with the possible impairment of In-Lieu Fishing sites and salmon rebuilding efforts as well as the impairment of the broader Columbia River ecosystem functions of water quality, fish rearing habitat, fish life cycles, and estuarine functions.

CRITFC asserts that its unique interests would be impaired and impeded if its petition for intervention is not granted because of the dangers to people who live and work by the Columbia River, to the Columbia River's ecosystem, and to the tribal people who depend on, live, and fish within that ecosystem.

International Longshore Warehouse Union Local 4 (ILWU Local 4)

ILWU Local 4 is a labor union local that has worked at the Port of Vancouver since 1937. It asserts that, should Tesoro Savage succeed in building and operating its proposed facility, the safety of ILWU Local 4 members at their workplace would be diminished. ILWU has an interest in ensuring the safety of its members' workplace and it contends that its members would be adversely affected by the project. In addition, ILWU Local 4 members live, recreate, hike, view wildlife, and fish in areas that the ILWU Local 4 asserts would be adversely affected by the Tesoro Savage project both through routine operation of the terminal and the possibility of small or catastrophic spills or explosions.

ILWU Local 4 has participated in all stages of EFSEC's review and its representatives have testified at SEPA hearings about the proposed oil terminal at the Port of Vancouver. It asserts that ILWU Local 4 members work daily at the Port of Vancouver and have an exhaustive understanding of port operations and the risks that an oil terminal would bring to workers, the Columbia River, and the residents of Vancouver.

The City of Spokane (Spokane)

Spokane is a municipal corporation located in eastern Washington. It is the location of railroad lines through Spokane that would be used for the rail transport of crude oil if Tesoro

Savage's Vancouver Energy project is approved. Spokane asserts that its regional population of 400,000 people will be subject to public health, safety and environmental impacts and risks. The Spokane rail lines are located in the heart of the city's downtown. The urban core of Spokane includes a range of regional public service facilities, schools, numerous businesses and residences. The rail lines also cross the Spokane River and Latah Creek, and are located on top of the Spokane Valley-Rathdrum Prairie Aquifer, which is Spokane's main source of drinking water.

Spokane city officials have been actively participating in the evaluation and review of the development of crude oil transport through eastern Washington to various ports and they have worked with various state agencies to address concerns related to rail safety, mobility and service. These officials have concluded that approval of the Tesoro Savage project would create public health, safety, and environmental concerns for the City of Spokane that cannot adequately be addressed by the other parties. In addition, Spokane asserts that it is in a unique position due to the direct effects of increased rail traffic coming through the city transporting crude oil. It also asserts that if EFSEC denies Spokane intervention in this process, it would not have the benefit of Spokane's input into the site certification process.

The Confederated Tribes of the Umatilla Indian Reservation (Umatilla Tribes)

Under its Treaty of June 9, 1855, the Umatilla Tribe reserved for itself and its members the right to take fish at all usual and accustomed areas. Tribal culture reveres salmon, which is one of the First Foods, and is an integral component of longhouse ceremonies and feasts. The Tribes point out that thirteen different Columbia River Basin salmon or steelhead stocks are listed as either threatened or endangered under the Endangered Species Act. 16 U.S.C. §1531 *et seq.* The Umatilla Tribes participate in numerous activities relating to the protection and restoration of both anadromous and resident fish stocks in the Columbia River Basin and the ecosystems upon which they depend. Trains traveling daily along the Columbia River through the Columbia River Gorge National Scenic Area will pass through a region where members of the Umatilla Tribes have fished since time immemorial.

The Umatilla Tribes assert that the Tesoro Savage project will result in the transport of an unprecedented volume of volatile fossil fuels, posing grave risks to the exercise of its constitutionally-protected treaty fishing rights, the safety of tribal fishers and fish and wildlife ecosystems that the Umatilla Tribe, in concert with co-managers throughout the Northwest, have worked for generations to protect and restore. They allege that the Tesoro Savage project would threaten their interests through operations at and crude oil shipments to and from the Terminal. The Umatilla Tribes allege that rail traffic will also threaten Traditional Cultural Properties and areas of cultural or religious significance to the Tribes.

The Umatilla Tribes seek intervention to protect those interests particular to them. They ask to participate as a party to share and convey their unique position as a sovereign in defense of their legally recognized and protected treaty rights and interests. They assert that no party to this proceeding shares the Umatilla Tribe's unique perspective and knowledge, and that other

parties have broader or different interests.

The Confederated Tribes and Bands of the Yakama Nation (Yakama Nation)

The Yakama Nation is a federally recognized sovereign Nation, as reflected in the Treaty with the Yakama of 1855, entered into with the United States of America. 12 Stat. 951 (1859). The Treaty reserves for Yakama Nation members certain rights and resources necessary to maintain the Yakama Nation and its people's way of life, customs and traditions, economic well-being, and cultural and natural resources. Among these rights is the right to fish at all usual and accustomed places, including the Columbia River, and the right to hunt and gather traditional foods, roots and medicine.

The Yakama Nation employs fisheries biologists and other technical experts who work to protect these interests. The Yakama Nation alleges that the proposed Tesoro Savage project presents the potential for devastation in the transport of crude oil from spills, threatening fires, explosions and potential releases of toxic or hazardous materials affecting Tribal Lands and interests. The Yakama Nation is concerned about the Tesoro Savage project's impacts to geology and soils at the proposed project site and along transport corridors that pass through Yakama Nation ceded lands, particularly those of cultural significance, over which it retains rights to vegetation, to protected fish and wildlife, and to air and water quality. It also asserts that the proposed Tesoro Savage project will likely add to the cumulative impacts of climate change, which would compromise Treaty rights in Yakama Nation lands, waters and cultural and natural resources.

To protect its Treaty-reserved and inherent sovereign rights, the Yakama Nation seeks intervention because it is the only entity with the capacity to legally protect the Yakama Nation's interests and the interests of its membership.

The City of Washougal (Washougal)

The City of Washougal is a municipal corporation of the State of Washington. The Tesoro Savage project site lies less than 20 miles to the west of the city. Washougal is located at the eastern end of a continuous urban area along the Columbia River that includes the project site on the west end. Washougal's primary concern is the increase in train traffic carrying volatile Bakken crude oil through the city, as well as the increase in train traffic generally. Washougal asserts that any significant increase in long slow trains will cut off the vast majority of Washougal citizens who live on the north side of the tracks and impede connections to the city's fire and police stations and State Route 14, which is the primary access into the City.

Washougal has specific concerns about the availability of sufficient safety equipment and training, and satisfying its emergency response obligations should there be a derailment of a train carrying oil through or near the city. It asserts that Washougal must present the case for the necessity of an incident response plan for Washougal in the event of a derailment, and the

need for mitigation of safety risks and traffic impacts. It calls for the elimination of at-grade crossings and replacement of grade-separated crossings. The city asserts that no other party will be knowledgeable or concerned about the specific risks of danger and impacts to Washougal from the proposed project, or would be in a position to articulate Washougal's case to EFSEC about those impacts and necessary mitigations.

Discussion:

EFSEC's rules provide that intervention is proper when a party can show facts sufficient to establish with particularity that the petitioner has an interest in the subject matter and how the petitioner's ability to protect such interest may be impaired or impeded if the petitioner is not granted intervenor status. WAC 463-30-091. EFSEC must conduct its adjudicative proceeding under the Administrative Procedure Act (APA), chapter 34.05 RCW. RCW 80.50.090(3). The APA allows for intervention to all who qualify under any provision of law and when "...the intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings." RCW 34.05.443(1). The Washington Court Rules express the same general direction. Upon timely application, anyone shall be permitted to intervene as a matter of right in an action "...when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest unless the applicant's interest is adequately represented by existing parties." CR 24(a). The court rule on joinder of persons needed for just adjudication is similar. Persons to be joined in litigation shall be joined as parties if (1) in their absence, complete relief cannot be accorded among those already parties, or (2) the party claims an interest relating to the subject of the action and is so situated that the disposition of the action in the party's absence may, as a practical matter, impair or impede their ability to protect that interest or would leave any of the existing parties subject to a substantial risk of incurring multiple or otherwise inconsistent obligations by reason of the claimed interest. CR 19(a). In Washington, the law's requirements for intervention pertaining to the term 'interest' should be broadly, rather than narrowly construed in favor of intervention, so that the issues of fact and law may be framed and tried in the clearest possible light. *Fritz v. Gorton*, 8 Wn.App. 658, 660, 509 P.2d 83 (1973).

In this case, all of the petitioners have shown a significant interest in this adjudication. They have also shown that they each have distinct and unique interests that could not adequately be protected by any other party, and that could be impaired or impeded if they are not granted intervenor status. The Columbia Riverkeeper parties have some, but not all, interests that generally converge, but they are not identical interests. Each of the Columbia Riverkeeper parties has a particular frame of reference and set of concerns, and each can present evidence not available from the other parties and petitioners. In addition, they have filed a joint petition. Thus any issue of duplication or repetitious evidence is resolved by their consolidation. All of the petitioners qualify for participation under both CR 24 and CR 19 and no showing has been made that their participation would impair the orderly and prompt conduct of the proceedings. The 15 intervenors having shown that they each qualify as

intervenors under EFSEC's rules as well as the APA, it is appropriate and in the interests of justice to grant intervenor status to each petitioner.

Tesoro Savage has asserted that the intervention of the parties should be limited as to what issues they could assert, or that the intervening parties should be restricted as to their participation. At this time, there has been no showing that any such limitations or restrictions are necessary or appropriate to ensure the orderly and prompt conduct of these proceedings. Therefore all parties shall be allowed to participate as co-equals.

The intervention of the petitioners will not delay the proceedings or prejudice the rights of any existing parties. Therefore all intervening parties have met the Council's requirements for intervention. Although the Council retains the authority to impose conditions on interventions at any time, there has been no showing of a need to condition any party's intervention at this time. That being the case, they should be allowed to participate as co-equal parties.

Certain parties have set forth proposed issues. The establishment of issues at this time is premature because the environmental review has not reached the stage at which the Draft Environmental Impact Statement can be released. When that step is accomplished in EFSEC's process, the parties will be invited to submit a proposed preliminary list of issues.

Having considered the Notices of Participation and the Petitions for Intervention in these proceedings, the Council makes the following

Order:

The following entities are proper statutory parties to this adjudication:

Tesoro Savage, LLC (Vancouver Energy)
Assistant Attorney General Matthew R. Kernutt, Counsel for the Environment (CFE)
The Port of Vancouver, Washington (Port)
Clark County, Washington (Clark County)
The City of Vancouver (Vancouver)
The State of Washington Department of Natural Resources (DNR)

The intervention petitions of the following petitioners (Including those petitioning jointly) are hereby granted without condition or restriction:

Climate Solutions (Columbia Riverkeeper et al.)
Columbia Riverkeeper (Columbia Riverkeeper et al.)
Columbia Waterfront LLC (Columbia Waterfront)
Columbia River Inter-Tribal Fish Commission (CRITFC)
ForestEthics (Columbia Riverkeeper et al.)
Friends of the Columbia Gorge (Columbia Riverkeeper et al.)
Fruit Valley Neighborhood Association (Columbia Riverkeeper et al.)

International Longshore Warehouse Union Local 4 (ILWU Local 4)
Sierra Club (Columbia Riverkeeper et al.)
The City of Spokane (Spokane)
Spokane Riverkeeper (Columbia Riverkeeper et al.)
The Confederated Tribes of the Umatilla Indian Reservation (Umatilla Tribes)
The Confederated Tribes and Bands of the Yakama Nation (Yakama Nation)
Washington Environmental Council (Columbia Riverkeeper et al.)
The City of Washougal (Washougal)

DATED and effective at Olympia, Washington, this 25th day of March, 2015.

_____/s/_____
Cassandra Noble
Administrative Law Judge