

**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

PRE-HEARING ORDER
ESTABLISHING PROCEDURES
AND SETTING DEADLINES FOR
SUBMITTALS

On April 24, 2015, The Energy Facility Site Evaluation Council (EFSEC), through its Administrative Law Judge, Cassandra Noble, (the ALJ) held an informal pre-hearing conference with the parties in Olympia, Washington. The purpose of this conference was to discuss procedures for the adjudication of Application No. 2013-01. Following the conference, some procedures can be put in place immediately, and some will be the subject of subsequent orders.

The following parties participated in the conference through their representatives: Jay Derr and Tadas K. Kisielius for Applicant Tesoro Savage, LLC, Assistant Attorney General Matthew R. Kernutt, Counsel for the Environment, David F. Bartz, Jr., Alicia L. Lowe and Connie Sue Martin for the Port of Vancouver, Taylor Hallvik for Clark County, Washington, Kristen L. Boyles for Columbia Riverkeeper et al., Julie A. Carter and Robert C. Lothrop for the Columbia River Inter-Tribal Fish Commission, Linda R. Larson for Columbia Waterfront, LLC, Brent Hall for the Confederated Tribes of the Umatilla Indian Reservation, Joe Sexton for the Confederated Tribes and Bands of the Yakama Nation, Assistant City Attorney Michael J. Piccolo for the City of Spokane, City Attorney E. Bronson Potter for the City of Vancouver, and Assistant Attorney General Terence Pruit for the Washington State Department of Natural Resources.

The parties were given an opportunity to respond to the ALJ regarding general organization of the adjudication, the form and timing of adjudication submittals, requirements for contacting the ALJ and other parties, pre-hearing adjudication preparation, discovery, motion practice, issue formulation, preparation and presentation of evidence including written and oral testimony and exhibits, hearing briefing and hearing procedures. Having addressed these matters with the parties, the following pre-hearing order is entered:

Discovery Practice:

Pursuant to WAC 463-30-190 and RCW 34.05.446, parties are encouraged to utilize informal discovery methods. Any party seeking to be permitted to conduct formal discovery must file a motion so requesting showing good cause.

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With regard to subpoenas, parties shall be guided by WAC 463-30-200 and the Washington Superior Court Civil Rules.

Parties are reminded that “[n]o subpoena shall be issued or given effect to require the attendance and testimony of, or the production of evidence by, any member of the council or any member of the council staff. For these purposes, the council’s independent consultant is deemed a member of the council staff.” WAC 463-30-200(5).

Submittals

Parties shall submit all pleadings plus other documents, including proposed exhibits electronically and mail one paper original and one paper copy to the Energy Facility Site Evaluation Council (EFSEC) at the address provided in the Order Commencing Agency Adjudication issued in this matter, with copies to all other parties.

Parties shall keep their email and postal addresses current with EFSEC for electronic communications between the EFSEC staff, and the parties, and for procedural communications with the ALJ.

Issues

Parties shall file preliminary lists of their adjudication issues within **45 days**¹ after the publication of the Draft Environmental Impact Statement (DEIS) for Application No. 2013-01.

The date(s) for the adjudication hearing in this matter will be set in a subsequent pre-hearing order. Final lists of issues must be filed **30 days** prior to the first day of the adjudication hearing. For efficiency of proof and elimination of duplication, these lists will be consolidated into one list in a pre-hearing order by the ALJ. The issues listed in the pre-hearing order will control the subsequent course of the proceedings unless the issues list is modified for good cause by a later pre-hearing order.

In the interim between the development of the preliminary and final issues lists, the parties may file stipulations of fact to resolve outstanding issues that can be agreed upon. See WAC 463-30-250.

Motion Practice

Except for extraordinary circumstances, non-dispositive motions shall be filed at least **30 days** prior to the commencement of the adjudication hearing.

Responses to non-dispositive motions must be filed within **7 days** of the filing of the motion.

¹ All references to days are to calendar days.

Replies may be filed within **4 days** of the filing of response(s). At this time, no page limit is established for motions, but it may be at a later time should the need arise.

Unless a specific request is made and good cause is shown, all non-dispositive motions will be decided without oral argument unless the motion involves substantive issues that must be decided by the Council, in which case, oral argument may be scheduled by the ALJ.

Dispositive motions must be filed at least **60 days** prior to the commencement of the adjudication hearing. Responses to dispositive motions must be filed within **30 days** of the filing of the dispositive motion, and any replies must be filed within **7 days** of the filing of the response.

Exhibits

Parties shall file a preliminary list of proposed exhibits **45 days** after the publication of the DEIS.

Parties shall file final lists of exhibits **14 days** prior to the first day of the adjudication.

Proposed exhibits shall be submitted in the same way as other documents. Dimensionally oversized exhibits shall be hand delivered to EFSEC and also electronically filed and provided to all other parties.

Voluminous exhibits may be filed electronically through a File Transfer Protocol (FTP) site or submitted by thumb drive or compact disc plus one original and one paper copy. Should the parties chose to file submittals through an FTP, they must contact EFSEC staff with access to server instructions.

Parties should meet and confer on proposed exhibits to eliminate duplication and agree as much as possible on their admissibility. Agreed exhibits will be admitted at the commencement of the adjudication and provided to councilmembers.

Parties are encouraged to utilize the procedure described in ER 904(b) as an available tool to streamline the process and avoid unnecessary proof as to the genuineness of documents.

The protocol for exhibit numbering will be established in a subsequent pre-hearing order. In the meantime, the parties should work together to attempt to agree on a numbering protocol that identifies the offering party and organizes the exhibits for the Council's efficient reference. The protocol should allow for additional exhibits offered in the course of the proceedings. If the parties are successful in this effort, they shall communicate the numbering protocol they have been able to work out together to the ALJ at least **30 days** prior to the adjudication hearing.

Parties should work together and with the ALJ on the preparation of an index of exhibits and their admission status in the adjudication. During the adjudication, this index will be

provided to councilmembers and also used to conduct a daily reconciliation with the parties' checklists to ensure an accurate adjudication record.

Witnesses:

Parties shall file a preliminary list of witnesses **45 days** after the publication of the DEIS.

Parties shall file final lists of witnesses **14 days** prior to the first day of the adjudication.

The parties may consolidate the examination of certain neutral fact witnesses sponsored by more than one party where there is no controversy as to the content of the testimony.

Parties are encouraged to inform the other parties of the identity of their proposed expert witnesses as soon as possible.

As much as possible, parties should stipulate as to the qualifications of expert witnesses and offer resumes as exhibits in lieu of taking time in the adjudication hearing for testimony about expert qualifications. In the event there arises an issue as to the qualifications of an expert witness, it will be resolved prior to the adjudication hearing. The objecting party shall file a written objection, which will be heard on an expedited basis as a motion with oral argument. In that hearing, the witness' sponsoring party shall make the witness available for testimony as to his or her qualifications in advance of the adjudication hearing. Argument on the qualifications objection and the expert witness' testimony may be heard by telephone.

Pre-Filed Direct Testimony:

Pre-filed direct testimony of expert witnesses is encouraged. Pre-filed direct testimony that has been admitted into evidence will be provided to councilmembers prior to the adjudication hearing for advance review prior to cross-examination.

Parties shall file and provide to all other parties any written direct testimony at least **45 days** prior to the adjudication. Any objections to the testimony or portions of the testimony shall be filed within **14 days** of the filing of the testimony. Responses to any objections shall be filed within **7 days** of the filing of any objections. A hearing to rule on the objections to pre-filed testimony will be held in Olympia prior to the commencement of the adjudication. The ALJ will rule on each objection at the hearing unless the ruling must be reserved pending the presentation of additional evidence.

Stipulations and Admissions of Fact:

To conserve adjudication time, parties are encouraged to avoid unnecessary expenditure of hearing time through agreements and stipulations on uncontested facts. Written stipulations should be provided to councilmembers prior to or as early as possible in the adjudication hearing to allow for councilmember review prior to the presentation of related testimony.

Adjudication Hearing:

Parties are encouraged, but not required, to file hearing briefs. If filed, pre-hearing briefs should be filed **7 days** prior to the adjudication hearing. If it becomes necessary, the ALJ will set a page limit for pre-hearing briefs and communicate that to parties sufficiently in advance of the deadline for filing them.

The Order of the adjudication hearing will be as follows: Applicant's case in chief, followed by opponents' case(s). Rebuttal testimony will be allowed to the extent it is necessary for full disclosure of all the relevant facts and issues. RCW 35-05-449(2). A request for rebuttal testimony must be made by a motion showing necessity.

The use of a time-keeping device will be an option should inefficiencies become a problem in the adjudication hearing, or if any party uses more than its fair and appropriate share of time.

EFSEC plans to hold its adjudication hearing in this matter in Vancouver, Washington at a facility to be determined.

Should any party determine that there are any hearing venue facilities or accommodations or interpreters needed, that party shall notify EFSEC staff at least **30 days** prior to the scheduled commencement of the hearing.

Notice to Parties: Unless modified, this prehearing order shall control all further proceedings in this matter. In accordance with WAC 463-30-270(3), any objections to this order must be filed with EFSEC and served on all other parties within **10 days** after the date of mailing of this order.

DATED and effective at Olympia, Washington this 5th day of May, 2015.

STATE OF WASHINGTON ENERGY SITE EVALUATION COUNCIL

_____/s/_____
Cassandra Noble
Administrative Law Judge