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**BEFORE THE STATE OF WASHINGTON ENERGY  
FACILITY SITE EVALUATION COUNCIL**

In the Matter of: Application No. 2013-01

CASE NO. 15-001

TESORO SAVAGE, LLC

CITY OF VANCOUVER'S RESPONSE  
TO APPLICANT'S MOTION FOR  
DETERMINATION REGARDING  
ISSUANCE OF INDUSTRIAL WASTE  
DISCHARGE PERMIT

VANCOUVER ENERGY DISTRIBUTION  
TERMINAL

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1 The City of Vancouver, Washington (“Vancouver”) submits this response to the Motion  
2 for Determination Regarding Issuance of Industrial Waste Discharge Permit (“Tesoro Motion”)  
3 submitted in this proceeding on March 29, 2016, by Applicant Tesoro Savage Petroleum  
4 Terminal LLC (“Tesoro”). Vancouver respectfully requests that the Washington Energy Facility  
5 Site Evaluation Council (“EFSEC” or “Council”): (i) deny the Tesoro Motion; (ii) rule that it  
6 lacks authority to issue Tesoro a National Pretreatment Program permit under the Clean Water  
7 Act, 33 U.S.C. § 1251 *et seq.*; and (iii) grant the City of Vancouver’s Motion for Order Ruling  
8 that EFSEC Lacks Authority to Issue Pretreatment Discharge Permit (“Vancouver Motion”) filed  
9 herein on March 29, 2016.

10 Vancouver hereby notifies the Administrative Law Judge (“ALJ”) that Vancouver and  
11 Tesoro have agreed to forego reply briefs and to deem this response and Tesoro’s response to the  
12 Vancouver Motion as the final briefs they will submit with respect to the Tesoro Motion and the  
13 Vancouver Motion, unless the ALJ requests otherwise.

#### 14 I. SUMMARY OF ARGUMENT

15 Tesoro misconstrues state law, which does not confer jurisdiction on EFSEC to issue a  
16 pretreatment permit to Tesoro to discharge nondomestic wastewater to Vancouver’s sewage  
17 treatment plant, defined in the Clean Water Act as a publicly owned treatment work (“POTW”).  
18 Instead, the plain language of Washington’s Water Pollution Control Act, ch. 90.48 RCW  
19 (“WPC Act”), expressly authorizes the Washington State Department of Ecology (“Ecology”) to  
20 issue National Pretreatment Program permits and to delegate this permitting authority to owners  
21 and operators of POTWs, such as Vancouver. The WPC Act’s legislative history serves to  
22 reinforce that Ecology, not EFSEC, has this permitting authority. In addition, EFSEC’s authority  
23 to preempt other state laws does not extend to delegations of federal authority under the Clean  
24

1 Water Act's National Pollutant Discharge Elimination System ("NPDES").

2 The U.S. Environmental Protection Agency ("EPA") implements the Clean Water Act by  
3 delegating federal authority to a state agency to issue NPDES permits in a memorandum of  
4 agreement ("MOA"). EPA has entered into NPDES MOAs with both Ecology and EFSEC.  
5 Ecology's NPDES MOA contains a broad delegation of authority that expressly includes  
6 authority to issue National Pretreatment Program permits. EFSEC's MOA, however, is limited  
7 in scope and does not include pretreatment permitting authority. Rather, EFSEC only has  
8 authority to issue permits for wastewater discharges to "waters of the state." Discharges to  
9 POTWs, which are authorized in pretreatment permits, are explicitly excluded from the  
10 definition of waters of the state. Consequently, EFSEC cannot issue Tesoro a pretreatment  
11 discharge permit.

12 Finally, even if EFSEC has pretreatment program permitting authority, prudential  
13 considerations weight strongly in favor of refraining from exercising such authority, because  
14 doing so would upset an existing permitting program that has been functioning for 30 years, and  
15 replace it with a new program that, as yet, has no rules, procedures, resources or budget.  
16 Vancouver has demonstrated experience and capacity to process Tesoro's pretreatment  
17 application in a timely and appropriate manner, and any prejudice that Tesoro might experience  
18 due to delay has been caused by its own failure to follow EFSEC's instructions.

## 19 II. ARGUMENT

### 20 A. Tesoro Misconstrues State Statutes

21 The WPC Act's plain language explicitly places responsibility for implementation of the  
22 National Pretreatment Program in Washington on Ecology, rather than EFSEC. *See*  
23 RCW 90.48.160; RCW 90.48.165; RCW 90.48.260; RCW 90.48.262. In addition, even  
24

1 assuming for the sake of argument only that these statutory sections were ambiguous, the WPC  
2 Act's legislative history confirms that Ecology has exclusive authority to issue federal  
3 pretreatment permits in Washington for the discharge of nondomestic wastes to POTWs.  
4 EFSEC's preemptive authority is expressly limited to matters of state law and, consequently,  
5 does not apply to Ecology's federally delegated NPDES permitting authority under the National  
6 Pretreatment Program.

7 **1. The WPC Act Plainly Confers Pretreatment Permitting Authority on Ecology**

8 The WPC Act's plain language gives Ecology, not EFSEC, express authority to  
9 implement the National Pretreatment Program in Washington.

10 The primary objective of any statutory construction inquiry is to ascertain  
11 and carry out the intent of the Legislature. When determining the intent of the  
12 legislature, we first look to the plain language of the statute. If the plain language  
13 is unambiguous, we give the words their common and ordinary meaning. Where  
14 statutory language is plain and unambiguous, courts will not construe the statute  
15 but will glean the legislative intent from the words of the statute itself, regardless  
16 of contrary interpretation by an administrative agency.

17 *Tesoro Ref. & Mktg. Co. v. Dep't of Revenue*, 173 Wn.2d 551, 556, 269 P.3d 1013, 1015 (2012)  
18 (en banc) (citations and internal quotations omitted).

19 RCW 90.48.160 establishes the state law requirement in Washington to obtain a  
20 wastewater discharge permit. Contrary to Tesoro's repeated assertions, this section does not  
21 identify the specific categories of discharges over which Ecology or EFSEC has permitting  
22 authority and, in particular, does not confer permitting authority for energy facilities on EFSEC.  
23 (See, e.g., Tesoro Motion §§ I.B at 3, II.B at 6, IV.B.1 at 8-10, IV.C.3 at 14.) Instead, the first  
24 paragraph of this section broadly requires any person discharging wastes to the waters of the  
state or to a POTW that discharges to the waters of the state to obtain a permit from either  
Ecology or EFSEC, based on each agency's respective authorities specified in other sections of

1 | the WPC Act:

2 |           Any person who conducts a commercial or industrial operation of any type  
3 | which results in the disposal of solid or liquid waste material into the waters of  
4 | the state, including commercial or industrial operators discharging solid or liquid  
5 | waste material into sewerage systems operated by municipalities or public entities  
6 | which discharge into public waters of the state, shall procure a permit from either  
7 | [Ecology] or [EFSEC] as provided in RCW 90.48.262(2) before disposing of such  
8 | waste material ....

9 | RCW 90.48.160. As discussed below, EFSEC’s permitting authority is delineated in  
10 | RCW 90.48.262(2). The second paragraph of RCW 90.48.160 specifically addresses  
11 | pretreatment permitting. This paragraph does not mention EFSEC at all. Instead it authorizes  
12 | Ecology to promulgate rules specifically exempting certain dischargers from the pretreatment  
13 | permitting requirements: “[Ecology] may, through the adoption of rules, eliminate the permit  
14 | requirements for disposing of wastes into [POTWs] ... if [Ecology] determines such permit  
15 | requirements are no longer necessary for the effective implementation of [the WPC Act].” *Id.*

16 |           RCW 90.48.165 expressly authorizes Ecology to delegate authority to issue pretreatment  
17 | permits to POTW operators, including municipalities, and provides in pertinent part:

18 |           Any city, town or municipal corporation operating a sewerage system  
19 | including treatment facilities may be granted authority by the department [of  
20 | ecology] to issue permits for the discharge of wastes to such system provided the  
21 | department ascertains to its satisfaction that the sewerage system and the  
22 | inspection and control program operated and conducted by the city, town or  
23 | municipal corporation will protect the public interest in the quality of the state’s  
24 | waters as provided for in this chapter. .... Persons holding municipal permits to  
25 | discharge into sewerage systems operated by a municipal corporation authorized  
26 | by this section to issue such permits shall not be required to secure a waste  
27 | discharge permit provided for in RCW 90.48.160 as to the wastes discharged into  
28 | such sewerage systems. Authority granted by the department to cities, towns, or  
29 | municipal corporations to issue permits under this section shall be in addition to  
30 | any authority or power now or hereafter granted by law to cities, towns and  
31 | municipal corporations for the regulation of discharges into sewerage systems  
32 | operated by such cities, towns, or municipal corporations. ....

33 | RCW 90.48.165. Unlike RCW 90.48.160, RCW 90.48.165 specifically details Ecology’s

1 authority to implement Washington’s pretreatment program. EFSEC has never been mentioned  
2 in any version of this section. Thus, if EFSEC adopted Tesoro’s construction of the WPC Act as  
3 authorizing EFSEC to issue pretreatment permits, EFSEC would be unable to delegate that  
4 authority to POTWs. (*Accord* Tesoro Motion § IV.C.3 at 14.)

5 RCW 90.48.260(1) designates Ecology “as the state water pollution control agency for all  
6 purposes of the federal clean water act ....” Ecology is empowered with:

7 Complete authority to establish and administer a comprehensive state  
8 point source waste discharge or pollution discharge elimination permit program  
9 which will enable the department [of ecology] to qualify for full participation in  
10 any national waste discharge or pollution discharge elimination permit system and  
11 will allow the department to be the *sole agency issuing permits* required by such  
12 national system operating in the state of Washington subject to the provisions of  
13 RCW 90.48.262(2).

14 RCW 90.48.260(1)(a) (emphasis added). Thus, Ecology is the *sole* authority in Washington for  
15 NPDES permitting except as specified in RCW 90.48.262(2), which provides that “[p]ermits for  
16 energy facilities subject to chapter 80.50 RCW shall be issued by [EFSEC].” RCW 90.48.262(2)  
17 further describes EFSEC’s NPDES permitting authority as including “all powers necessary to  
18 establish and administer *a point source discharge permit program* pertaining to such plants.” *Id.*  
19 (emphasis added). A point source discharge is a discharge “of pollutants *to surface waters of the*  
20 *state* from any point source.” WAC 173-220-030(5). The “waters of the state” do not include  
21 discharges to POTWs.<sup>1</sup>

22 Therefore the WPC Act reserves to Ecology all authority for wastewater discharge  
23 permitting in Washington other than this limited exception in RCW 90.48.262(2), which only  
24 authorizes EFSEC to issue NPDES point source discharge permits, not pretreatment permits. On  
the one hand, Tesoro recognizes that point source discharge permits are issued under a different  
NPDES permitting program than pretreatment permits. (Tesoro Motion § IV.C.2 at 12.) On the

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<sup>1</sup> See section II.B at 14.

1 other hand, however, it argues that EFSEC's issuance of the former type of permit proves that it  
2 has authority to issue the latter type. (*Id.* § IV.D at 16-17.) That argument misses the mark. The  
3 relevant statutory sections plainly authorize only Ecology to exercise delegated federal authority  
4 under the Clean Water Act to issue pretreatment permits in Washington and to delegate that  
5 authority further to POTWs such as Vancouver to issue pretreatment permits to their users.

6 The Attorney General's memoranda cited by Tesoro, (*see* Tesoro Motion § IV.D at 16-  
7 18), are wholly inapplicable. *See Tesoro Ref. & Mktg. Co.*, 173 Wn.2d at 557-58, 269 P.3d  
8 at 1016 (“[W]e glean legislative intent from the text of the statute, regardless of incidental and  
9 contrary agency interpretations.”) The Morton memorandum was prepared by EFSEC's counsel  
10 to advocate EFSEC's position regarding its NPDES authority. (Decl. of Dale Johnson, Ex. A  
11 (Mem. from Meredith Morton, Senior Counsel, to Rich Heath, Senior Ass't Att'y Gen., re  
12 EFSEC/Ecology Dispute – Federal Clean Water Act Permit (Nov. 4, 1997)).) As discussed in  
13 section II.A.3 at 16, EFSEC cannot establish or expand the scope of its own authority,  
14 particularly when this authority derives from federal laws such as the Clean Water Act. The  
15 Tesoro Motion inappropriately cites this memorandum as speaking for “the Attorney General's  
16 Office” rather than EFSEC.<sup>2</sup> (Tesoro Motion § IV.D at 17-18.) Likewise, the Pharris  
17 memorandum is not an official opinion of the Attorney General, but rather is an informal  
18 memorandum that represented the opinion of “the Solicitor General's Team” within the Attorney  
19 General's office in early 1998. (Decl. of Dale Johnson, Ex. B (Mem. from James Pharris, Senior  
20 Ass't Att'y Gen., to Rich Heath, Gen. Legal Div. Chief, and Jay Manning Ecology Div. Chief, re  
21 Water Quality Certification on Energy Projects (Mar. 16, 1998)).) However, Tesoro claims that  
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23 <sup>2</sup> Washington law requires the Attorney General to provide counsel to EFSEC, *see* RCW 43.10.040, but, as with  
24 all client-attorney relationships, the Attorney General does not automatically endorse all positions taken by its client  
agencies. The Morton memorandum expressed EFSEC's views, not the Attorney General's.

1 this memorandum contains the conclusions of the Attorney General.<sup>3</sup> (Tesoro Motion § IV.D  
2 at 17.)

3 EFSEC would be warranted in disregarding Tesoro's arguments relying on these  
4 memoranda due to Tesoro's misrepresentations of their authority. Even aside from this,  
5 however, the subject matter of these memoranda is not relevant to the issues in this adjudication.  
6 These memoranda addressed which agency had authority to issue a state water quality  
7 certification under Section 401 of the Clean Water Act, 33 U.S.C. § 1341, in connection with the  
8 issuance of a permit (commonly called a "dredge and fill" permit) by the U.S. Army Corps of  
9 Engineers under Section 404 of the Clean Water Act, *id.* § 1344. Neither memorandum  
10 addressed the state's exercise of delegated federal NPDES permitting authority, which arises  
11 under a different statutory section, Section 402 of the Clean Water Act, *id.* § 1342. In fact, the  
12 Pharris memorandum suggested the outcome would have been different if delegated NPDES  
13 permitting authority under Section 402 had been at issue: "Section 401 is not a 'regulatory  
14 authority' assigned to Ecology by federal law. The assignment of a particular agency to carry  
15 out these functions is purely a matter of state law." (Decl. of Dale Johnson, Ex. B at 3.)

## 16 **2. The WPC Act's Legislative History Confirms Ecology's Permitting Authority**

17 As the WPC Act's plain language is clear, there is no need to resort to the legislative  
18 history. Nonetheless, the legislative history unambiguously contradicts Tesoro's argument that  
19 EFSEC had pretreatment permitting authority under state law prior to the state's adoption of the  
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21 <sup>3</sup> The Washington Attorney General specifically forbids citations to informal opinions in this manner:  
Informal opinions are letters that present the considered legal analysis of the Assistant Attorneys  
General who write them. .... They are not personally approved by the Attorney General. ....

22 Informal opinions should not be described or cited as "Attorney General Opinions", since  
23 only formal opinions represent the official view of the Attorney General. An informal opinion  
should be cited as a letter of the attorney who signed the opinion, with a notation of the date and  
the addressee.

24 Wash. State Att'y Gen., AGO Opinions, *Are there alternatives to issuing formal opinions?*, <http://www.atg.wa.gov/ago-opinions#alternatives> (last visited Apr. 25, 2016).

1 federal Clean Water Act NPDES program in 1973. (See Tesoro Motion § IV.B.1 at 10.)  
2 Ecology and its predecessor agency, the Pollution Control Commission, were the only permitting  
3 authorities for issuance of pretreatment permits based on state law prior to 1973. In 1973, the  
4 legislature enacted the Clean Water Act enabling provisions, creating the federally delegated  
5 National Pretreatment Program in Washington. Laws of 1973, ch. 155. Thereafter all  
6 wastewater discharge permits in Washington were issued as NPDES permits under the federal  
7 Clean Water Act.

8 RCW 90.48.160 was first enacted in 1955, several years after the federal Clean Water  
9 Act,<sup>4</sup> and required permits only for direct wastewater discharges to waters of the state. Laws of  
10 1955, ch. 71, § 1. The designated permitting authority was the Pollution Control Commission.  
11 *Id.* In 1967, this section was amended to require pretreatment permits, but the Pollution Control  
12 Commission remained the *sole* permitting authority. Laws of 1967, ch. 13, § 13. At the same  
13 time, the legislature enacted RCW 90.48.165, which expressly authorized the commission to  
14 delegate authority to issue pretreatment permits to POTWs. Laws of 1967, ch. 13, § 14.  
15 RCW 90.48.165 remains substantially the same as when originally enacted and has never  
16 included a reference to EFSEC or its predecessor, the Thermal Power Plant Site Evaluation  
17 Council.<sup>5</sup> From 1967 through early 1973, the Pollution Control Commission and then Ecology  
18 managed a pretreatment discharge permitting program under the authority of state law.<sup>6</sup>

19 On October 18, 1972, the federal NPDES was created as Title IV of the Clean Water Act.  
20 Pub. L. No. 92-500, tit. IV, 86 Stat. 816 (1972). Washington was extraordinarily quick to  
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22 <sup>4</sup> The Federal Water Pollution Control Act was adopted in 1948. Pub. L. No. 845, ch. 758, 62 Stat. 1155 (1948).  
It was later renamed the Clean Water Act. Pub. L. No. 95-217, § 2, 91 Stat. 1566, 1566 (1977).

23 <sup>5</sup> The only amendment to RCW 90.48.165 was in 1987, to substitute Ecology for the Pollution Control  
Commission. Laws of 1987, ch. 109, § 135.

24 <sup>6</sup> In 1970, the state legislature created Ecology, Laws of 1970, 1st Ex. Sess., ch. 62, § 2, and the Thermal Power  
Plant Site Evaluation Council, Laws of 1970, ch. 45, § 3.

1 authorize state implementation of the NPDES. Less than six months later, on March 20, 1973,  
2 the governor signed House Bill No. 594, which converted Washington's state water pollution  
3 control permitting program into a state implementation of a federally delegated Clean Water Act  
4 program. The governor's partial veto message leaves no doubt that the state's program was  
5 henceforth subsumed into the NPDES:<sup>7</sup>

6           Actions of the electorate and elected officials over the past several  
7 decades, especially the last six years, have shown the dedication of the State of  
8 Washington to a policy of attaining and retaining high quality for its waters.  
9 Passage of Engrossed House Bill No. 594 continues the state's dedication to the  
10 extinguishment of water pollution from its boundaries by accepting the challenge  
11 of the Federal Water Pollution Control Act Amendments of 1972 which was  
12 passed late last year. I am, therefore, most pleased to sign Engrossed House Bill  
13 No. 594.

14           One of the principal reasons for the passage of Engrossed House Bill No.  
15 594 at this time is to insure that the State of Washington is in a posture which  
16 allows the state to administer the sole waste discharge permit system operating  
17 within its boundaries *through the operation of such a permit program as a part of*  
18 *the National Pollution Discharge Elimination System established by section 402*  
19 *of the new Federal Act.* An examination of that act, as it pertains to the criteria to  
20 be utilized by the administrator of the United States Environmental Protection  
21 Agency in approving requests by states to operate these programs within the  
22 national system reveals an ambiguity in the criteria in respect to problems of  
23 nonpoint sources of pollution. *To eliminate any possibility that Engrossed House*  
24 *Bill No. 594 is deficient in providing statutory authority to state government to*  
*satisfy the criteria for approval of the state permit program under the national*  
*system,* I have determined it advisable to veto section 6 of Engrossed House Bill  
No. 5914 which provides that the act does not authorize the Department of  
Ecology to regulate forest practices on forest lands to protect water quality. ....

18 Laws of 1973, ch. 155 (emphasis added). In fact, the governor was so committed to  
19 accomplishing rapid conversion of the state program that he vetoed a portion of the legislation  
20 which might have been inconsistent with the state obtaining approval from EPA to exercise  
21 delegated authority to administer the federal program. *Id.*

22           This legislation also added the Thermal Power Plant Site Evaluation Council to

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23 <sup>7</sup> The arguments of EFSEC's former attorney and conclusions of former Assistant Attorneys General to the  
24 contrary are of no precedential value. See nn.2-3 and accompanying text.

1 RCW 90.48.160 as another permitting authority under the new federal program and updated that  
2 section by substituting Ecology for the Pollution Control Commission, which no longer existed:

3 “Any person ... shall procure a permit from either<sup>8</sup> the (~~pollution control~~  
4 ~~commission~~) department [of ecology] or the thermal power plant site evaluation  
5 council as provided in section 5(2) of this act [RCW 90.48.262(2)] before  
6 disposing of such waste material ....”

7 Laws of 1973, ch. 155, § 3. Notably, although the Thermal Power Plant Site Evaluation Council  
8 had been in existence since 1970, it did not receive express wastewater permitting authority until  
9 Washington adopted the NPDES in 1973. In addition, rather than specifying the scope of the  
10 council’s newly created wastewater permitting authority, as Tesoro asserts, RCW 90.48.160 was  
11 amended to refer to RCW 90.48.262(2),<sup>9</sup> which Tesoro admits “governs state implementation of  
12 the [Clean Water Act] at energy facilities.” (Tesoro Motion § IV.B.1 at 9.) At the same time,  
13 the second paragraph of RCW 90.48.160 was added, which authorized Ecology to promulgate  
14 rules specifically exempting certain dischargers from the pretreatment permitting requirements.  
15 Laws of 1973, ch. 155, § 3. EFSEC has never been given similar rulemaking authority, which  
16 further confirms that EFSEC’s Clean Water Act permitting authority does not include  
17 pretreatment permitting.

18 Both the plain meaning of the WPC Act and its legislative history support the conclusion  
19 that EFSEC has never had independent authority to issue wastewater discharge permits under  
20 state law. Rather it is only authorized to issue NPDES point source discharge permits for energy  
21 facilities under its jurisdiction. Pretreatment permits do not fall within the category of point  
22 source discharge permits and thus are not within EFSEC’s jurisdiction.

23 <sup>8</sup> In the Statute Law Committee’s official printed version of this amendment, this word is not underlined to  
24 indicate an addition, but that appears to be erroneous, since it does not appear in earlier versions.

<sup>9</sup> See section II.A.1 at 5.

1           **3. EFSEC’s Preemptive Authority Does Not Affect the Federal NPDES Program**

2           Tesoro advances several radical arguments in its fruitless attempt to establish that  
3           EFSEC’s authority to preempt other state laws gives it permitting authority under the National  
4           Pretreatment Program. (*See, e.g.*, Tesoro Motion §§ I.B at 3, I.C at 3-4, IV.A at 7, IV.B.1 at 10,  
5           IV.D at 16-18.) RCW 80.50.110 expressly preempts any other inconsistent state statute or rule  
6           regarding “the regulation and certification of the location, construction, and operational  
7           conditions of certification of ... energy facilities.” While this preemptive authority is admittedly  
8           broad, it is not as limitless as Tesoro suggests. For example, the Tesoro Motion claims, without  
9           qualification, that EFSEC has “broad powers” to “preempt[] other entity’s permitting authority”  
10          over energy facilities, (Tesoro Motion § IV.B.1 at 10), even though EFSEC’s preemption  
11          authority does not extend to federal laws and programs, such as the Clean Water Act and the  
12          National Pretreatment Program.

13          Likewise, Tesoro asserts that the state legislature intended for EFSEC to “exercise  
14          *exclusive* jurisdiction over industrial waste discharge review and permitting at energy facilities”  
15          and that “EFSEC is the *sole* agency that may issue Vancouver Energy a permit to discharge  
16          effluent to ... Vancouver’s POTW.” (*Id.* § IV.B.1 at 10 (emphasis added).) Tesoro fails to  
17          mention that all National Pretreatment Program permitting authority originates with EPA  
18          pursuant to federal law and that EPA could resolve all state jurisdictional disputes by  
19          withdrawing NPDES program delegations. From that perspective, only EPA has exclusive  
20          jurisdiction because only it can exclude all other agencies from issuing a National Pretreatment  
21          Program wastewater discharge permit to Tesoro. Similarly, if EFSEC were to accept Tesoro’s  
22          argument that Vancouver does not have authority to issue a pretreatment permit, then only EPA

1 would have that authority, since EPA has not delegated that authority to EFSEC.<sup>10</sup>

2 Tesoro even argues that EFSEC's rules give EFSEC pretreatment permitting authority.  
3 (Tesoro Motion § II.C at 6.) This argument violates a bedrock principle of administrative law  
4 that an agency cannot establish or expand the scope of its own authority. *Davidson Serles &*  
5 *Assocs. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 159 Wn. App. 148, 155, 244 P.3d  
6 1003, 1006 (2010). Furthermore, this argument makes no sense. The rules provide that an  
7 application to EFSEC "for site certification must *include*: [f]or any proposed discharge to  
8 publicly owned treatment works (POTW) and/or groundwater of the state of Washington, a state  
9 waste discharge application." WAC 463-60-537(2). Tesoro misleadingly interprets this rule to  
10 mean: "For energy facilities, an application seeking a permit to discharge an industrial effluent  
11 to a POTW must instead be *filed* with EFSEC." (Tesoro Motion § IV.C.3 at 14 (emphasis  
12 added).)

13 However, the rule plainly requires the application to EFSEC to *include* a state discharge  
14 application. Tesoro did just that when it included an application to Vancouver for a pretreatment  
15 permit in its site certification application to EFSEC. (Appl. No. 2013-01 § 5.2 (Aug. 2013).) At  
16 that time Tesoro understood that WAC 463-60-537(2) did not require the pretreatment  
17 application to be *filed* with EFSEC, and it acknowledged that Vancouver was the proper  
18 permitting authority. Now Tesoro argues that WAC 463-60-537(2) does not mean what it says,  
19 even though if Tesoro's interpretation of this rule were correct, then its site certification  
20 application would be incomplete, because it does not contain a pretreatment permit application  
21 filed with EFSEC.

## 22 **B. EPA Delegated National Pretreatment Program Permitting Authority to Ecology**

23 The National Pretreatment Program, which is a nationwide federal program, is

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24 <sup>10</sup> See section II.B at 14.

1 nonetheless designed to be implemented at the local level. This implementation is accomplished  
2 through a two-step process: (i) EPA expressly delegates pretreatment permitting authority to the  
3 state pursuant to an MOA, *see* 40 C.F.R. § 123.24; and (ii) the state reviews and approves a  
4 municipality's or other POTW's pretreatment program to ensure compliance with the CWA and  
5 all applicable state and local water quality standards, *see* ch. 173-208 WAC. Washington has a  
6 fully delegated NPDES program pursuant to these authorities. EPA however retains oversight  
7 and control of this program, including the power to withdraw the delegation of permitting and  
8 enforcement authority from Washington for violations of the NPDES standards. 40 C.F.R.  
9 § 123.63 (enumerating criteria for EPA withdrawal of a state's NPDES authority).

10 As discussed above, in March 1973, the state legislature converted the existing state  
11 water quality permitting program into a federally authorized and governed NPDES program  
12 under the Clean Water Act. Ecology acted rapidly in accordance with its mandate to implement  
13 the NPDES program in Washington by executing an MOA with EPA later that year in  
14 November. That MOA has since been replaced by a revised MOA between Ecology and EPA  
15 dated January 9, 1990 ("Ecology MOA"), which is attached to the Vancouver Motion as  
16 Attachment 1. The Ecology MOA delegates comprehensive authority to Ecology to implement  
17 and manage all of the state's NPDES programs. (Ecology MOA § I at 1.) Section V of the  
18 Ecology MOA expressly gives Ecology primary authority over all aspects of the state's  
19 pretreatment program. (*Id.* § V at 11-14.) As the second step in the delegation process, Ecology  
20 issued an order ("NPP Order"), which is attached to the Vancouver Motion as Attachment 2,  
21 approving Vancouver's pretreatment program on September 30, 1987. For nearly 30 years  
22 Vancouver has been issuing pretreatment permits under the NPP Order for indirect discharges of  
23 nondomestic wastewater to its POTWs.  
24

1 EFSEC's MOA with EPA ("EFSEC MOA"), which is attached to the Vancouver Motion  
2 as Attachment 4, was executed approximately one year after EPA issued the National  
3 Pretreatment Program regulations establishing the delegation process, 43 Fed. Reg. 27,736  
4 (June 26, 1978), but does not mention pretreatment permitting. Instead, the EFSEC MOA  
5 delegated authority to EFSEC to issue NPDES permits for discharges to *waters of the state* by  
6 energy facilities. Pretreatment permits do not authorize discharges to the waters of the state.  
7 Instead, they authorize indirect discharges to POTWs, and POTWs' waste treatment waters are  
8 expressly excluded from the definition of waters of the state. EFSEC's rules define "waters of  
9 the state" as "all waters defined as 'waters of the United States' in 40 C.F.R. 122.2 that are  
10 within the boundaries of the state of Washington." WAC 463-76-010(34). The federal rules  
11 expressly exclude POTW treatment waters from the definition of "waters of the United States."  
12 40 C.F.R. § 122.2. As a result, indirect discharges to POTWs are not within the scope of the  
13 EFSEC MOA.

14 The EFSEC MOA demonstrably does not confer federally delegated authority to EFSEC  
15 to issue pretreatment permits or conduct pretreatment monitoring and enforcement. Indeed, if  
16 EFSEC asserts pretreatment permitting authority and EPA determines that, in doing so, EFSEC  
17 has violated the provisions of the EFSEC MOA, EPA can withdraw all of EFSEC's authority  
18 thereunder, leaving EFSEC unable to issue any NPDES permits, including permits for point  
19 source discharges by energy facilities to waters of the state. *See* 40 C.F.R. § 123.63(a)(4). In  
20 contrast, Ecology has had explicit National Pretreatment Program authority since September 30,  
21 1986, (*see* Ecology MOA § 1 at 1 (referencing "pretreatment MOA")), and only one year later  
22 delegated authority to Vancouver, which has been operating a fully functioning pretreatment  
23 program ever since.

1 **C. EFSEC Should Refrain from Exercising Pretreatment Permitting Authority**

2 Even assuming that EFSEC has pretreatment permitting authority, it should refrain from  
3 exercising it. First, doing so would impose unreasonable and unnecessary burdens on EFSEC.  
4 (*See* Vancouver Motion § V.D. at 16-19.) As noted above, if EFSEC asserted pretreatment  
5 permitting authority, it would be unable to delegate that authority to POTWs and consequently  
6 would be required to issue all pretreatment permits needed by energy facilities within its  
7 jurisdiction.<sup>11</sup> As a practical matter, EFSEC has no rules, policies, procedures, forms or fiscal or  
8 human resources in place for pretreatment permitting. Tesoro concedes that EFSEC cannot  
9 delegate NPDES permitting authority, (*see* Tesoro Motion § IV.C.3 at 14), but fails to mention  
10 EFSEC’s lack of resources for issuing pretreatment permits itself.

11 The absence of such resources is not surprising, because EFSEC agrees with Vancouver  
12 that it lacks pretreatment permitting authority. (*See, e.g.*, Letter from Stephen Posner, EFSEC  
13 Manager, to Kelly Flint, Tesoro Sr. Vice Pres. and Gen. Counsel (Feb. 19, 2016), Ex. D to  
14 Declaration of Brian Carrico (stating that a pretreatment permit issued by Vancouver “is required  
15 to discharge industrial wastewater”).) National Pretreatment Program permits can be issued only  
16 by an approved federally delegated program authority. Because EFSEC does not have an  
17 approved pretreatment plan, Tesoro would have to obtain its pretreatment permit from EPA.

18 Second, EFSEC should refrain from unnecessarily creating conflicts with the existing  
19 state and municipal programs. EFSEC’s assertion of authority would undo “three years of  
20 collaborative effort” between Ecology and Vancouver to revise and update Vancouver’s  
21 pretreatment permitting program, including the incorporation of changes designed to streamline  
22 the permitting process. (*See* Vancouver Motion, Attach. 5 (Letter from Ecology to EPA  
23 describing process resulting in revisions to Vancouver’s Industrial Pretreatment Program Manual

24 <sup>11</sup> Section II.A.1 at 5.

1 (Aug. 18, 2010)).) Moreover, EFSEC’s assertion of permitting authority may cause Vancouver’s  
2 entire pretreatment program to be out of compliance with the Clean Water Act, because, contrary  
3 to the pretreatment program description submitted to and approved by Ecology and EPA,  
4 Vancouver would no longer be the sole permitting, enforcement and rulemaking authority for  
5 nondomestic discharges to its POTWs.

6 A POTW must obtain approval “whenever there is a *significant change* in the operation  
7 of a POTW Pretreatment Program that differs from the information in the POTW’s submission.”  
8 40 C.F.R. § 403.18(a) (emphasis added). If a significant change constitutes a “substantial  
9 modification” to the program, then a public notice and comment process is required prior to  
10 approval and the modification taking effect. *Id.* § 403.18(c). Changing the identity of the  
11 permitting authority undoubtedly would constitute a substantial modification. *See id.*  
12 § 403.18(b)(3). So accepting Tesoro’s argument could result in Vancouver’s pretreatment  
13 program falling out of compliance with the NPDES, which can have serious consequences,  
14 including EPA revoking program delegation. *See* 40 C.F.R. § 123.64(b) (prescribing process for  
15 involuntary withdraw by EPA of state delegated NPDES authority).

#### 16 **D. Tesoro Has Caused Any Potential Delays Due to Pretreatment Permitting**

17 The Tesoro Motion as a whole is premised on assumptions that Vancouver would act  
18 improperly or too slowly, or both, in processing Tesoro’s pretreatment permit application and  
19 that, as a result, Tesoro would be prejudiced. (*See, e.g.,* Tesoro Motion § 1 at 2 (“... Vancouver  
20 will frustrate EFSEC’s primary purpose to streamline and expedite permitting of energy  
21 facilities ....”).) Tesoro offers no evidence to support this baseless, unjustifiable allegation. To  
22 the contrary, Vancouver demonstrably has operated an efficient and effective pretreatment  
23 program for nearly 30 years. Moreover, Tesoro has failed to act reasonably and responsibly to  
24

1 advance its own interests and has caused any prejudice itself by refusing to file a pretreatment  
2 permit application with Vancouver, even when EFSEC directed it to do so.<sup>12</sup>

3 The process for obtaining an individual wastewater pretreatment discharge permit from  
4 Vancouver is set forth at VMC 14.10.160-.240 and further described in Section 4.5 of  
5 Vancouver's Industrial Pretreatment Program Manual, which is attached to this response as  
6 Attachment 6.<sup>13</sup> (Second Affidavit of Frank A. Dick ("Second Dick Aff.") ¶ 4, at 1-2.)

7 Vancouver's pretreatment program is designed so that permit applications will be processed in  
8 four months or less from the date of submission, as reflected on the New or Renewal Permit  
9 Preparation Timeline and Checklist attached hereto as Attachment 7. (*Id.* ¶ 5, at 2.)

10 Consequently, pretreatment discharge permit applications must be filed at least 120 days prior to  
11 the desired date of discharge. VMC 14.10.180. This timeframe has been consistent with actual  
12 experience.

13 Frank A. Dick is the Sewer and Wastewater Engineering Supervisor for Vancouver's  
14 Public Works Division and supervises Vancouver's processing and issuance of pretreatment  
15 permits. Mr. Dick oversaw preparation of the table attached to this response as Attachment 8.  
16 (Second Dick Aff. ¶ 6, at 2.) This table shows Vancouver's pretreatment program permit  
17 application processing times from April 2011 through February 2016, for both new and renewal  
18 applications. (*Id.* ¶ 7, at 2.) The highlighted rows represent new (first-time) applications, and  
19 the remainder represent permit renewal applications. (*Id.*)

20 The mean and median of the entire list are both a little less than three and a half months.  
21 (*Id.* ¶ 8, at 2.) For new permit applications, the processing time was slightly longer, but the mean  
22

23 <sup>12</sup> See section II.C at 15.

24 <sup>13</sup> To avoid confusion, attachments to this response are numbered consecutively following the attachments to Vancouver's Motion.

1 and median are still less than four months each.<sup>14</sup> (*Id.* ¶ 9, at 2-3.) The longest processing time  
2 was eight months, but that permit had unique issues and likely represents an outlier. (*Id.* ¶ 10,  
3 at 3.) The second longest time was six and a half months, which is probably a better estimate of  
4 the maximum duration for Vancouver's pretreatment permit processing. (*Id.* ¶ 11, at 3.) Thus, if  
5 Tesoro submitted a pretreatment permit application to Vancouver now, Tesoro would be  
6 practically assured of receiving a final decision on its application well before March 31, 2017,  
7 the deadline in Tesoro's lease with the Port of Vancouver for obtaining necessary permits.

8 When examined in context with actual experience, Tesoro's argument that obtaining a  
9 pretreatment permit from Vancouver would be too time-consuming evaporates. Instead, the  
10 evidence presented demonstrates that Vancouver has acted promptly in accordance with  
11 applicable deadlines to ensure timely processing of pretreatment permit applications. Thus,  
12 Tesoro is left with its bare allegation that Vancouver would act unfairly in processing Tesoro's  
13 pretreatment permit application, even though Tesoro does not present any evidence that  
14 Vancouver has in fact been prejudicial or acted contrary to law in processing any pretreatment  
15 program application.

16 Vancouver has detailed standards for processing and issuance of pretreatment permits. In  
17 addition to Vancouver's ordinance, VMC 14.10.160-.240, Vancouver has a four-volume  
18 Industrial Pretreatment Program Manual that has been approved by Ecology and EPA. (*See*  
19 Vancouver Motion, Attach. 5.) These standards minimize the risk that Vancouver would make a  
20 decision that is arbitrary and capricious, an abuse of discretion or motivated by improper  
21 considerations. In addition, Vancouver's pretreatment program is subject to oversight by  
22 Ecology and EPA and must meet state and federal standards and requirements.

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23 <sup>14</sup> The additional processing time is at least partially attributable to the 30-day public notice and comment period  
24 required for all new permits and for renewal permits proposing the discharge of a new pollutant or an increase in the  
volumetric discharge of wastewater or an existing pollutant. VMC 14.10.070(G).

1           Lastly, EFSEC should reject Tesoro’s ill-conceived invitation to presume that Vancouver  
2 would act contrary to law. Under more compelling circumstances, the Washington Court of  
3 Appeals nonetheless held that a private party could not obtain judicial relief based on a belief  
4 that a municipality would deny a permit application. *See Rosen v. City of Tacoma*, 24 Wn.  
5 App. 735, 603 P.2d 846 (1979). In *Rosen*, contractors retained by property owners met with a  
6 city building inspector to inspect a building damaged by adverse weather conditions, and then  
7 the head of the city’s building division sent a letter to the property owners “to confirm” that  
8 specified repairs would be required. *Id.* at 736-37, 603 P.2d at 848. The specified repairs were  
9 incompatible with the repairs that the property owners intended to propose in their permit  
10 application, and the owners believed that the repairs specified in the city’s letter were  
11 unreasonable. *Id.* Consequently, the owners decided to sell the property in its damaged  
12 condition at a loss, rather than fight with the city. *Id.* The new owners immediately submitted  
13 an application to the city for a permit to make substantially the same repairs as the prior owners  
14 had intended to propose, and the city issued the permit. *Id.* at 737-38, 603 P.2d at 848-49. The  
15 trial court found that city’s letter “was an arbitrary, capricious and negligent action that was the  
16 proximate cause of plaintiffs’ economic loss.” *Id.* at 738, 603 P.2d at 849. However, the court  
17 of appeals reversed, concluding “that the decision of the plaintiffs to sell their property at a loss  
18 instead of pursuing administrative remedies to obtain approval of their repair plan was merely a  
19 business decision for which the city has no legal liability.” *Id.* at 741, 603 P.2d at 850.

20           In this case, Tesoro admits that, in its informal preapplication communications with  
21 Vancouver, Vancouver indicated that its POTW has capacity to receive and treat the anticipated  
22 discharges from the proposed facility. (Tesoro Motion § II.C at 6.) Although this  
23 communication does not guarantee that Vancouver would approve Tesoro’s pretreatment permit  
24

1 application, it does indicate that Vancouver would make the decision based on appropriate  
2 considerations, such as system capacity, rather than inappropriate ones, such as Vancouver's  
3 policy positions on Tesoro's application before EFSEC. In this context, Tesoro's insistence that  
4 Vancouver would not be fair is not only unwarranted but also offensive.

### 5 III. CONCLUSION

6 For all of the foregoing reasons, Vancouver respectfully requests that EFSEC deny the  
7 Tesoro Motion, grant the Vancouver Motion and rule that it lacks authority to issue Tesoro a  
8 pretreatment program permit to discharge nondomestic wastewater to Vancouver's POTW.

9 Dated: April 28, 2016

10 Respectfully Submitted,  
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