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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
TRIBAL PARTIES'
POST-HEARING BRIEF

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2 **I. INTRODUCTION**

3 The Columbia River Inter-Tribal Fish Commission (“CRITFC”), the Confederated Tribes
4 of the Umatilla Indian Reservation (“Umatilla Tribes”), and the Confederated Tribes and Bands
5 of the Yakama Nation (“Yakama Nation”) (collectively referred to as the “Tribal Parties”)
6 respectfully request that the Energy Facility Site Evaluation Council (“EFSEC”) issue a
7 recommendation to the Governor to reject Tesoro Savage Petroleum Terminal LLC’s
8 Application for Site Certification for the Vancouver Energy Project¹.

9 Based on the information provided through briefs, testimony, and exhibits, the Tribal
10 Parties, together with the other intervening parties, have demonstrated that the State of
11 Washington will not benefit from this project, that this project is not needed to provide abundant
12 energy, that it will not serve the public interest, that it will create substantial risks to the
13 environment, and that the project’s impacts tip the balance in favor of denial.

14 **II. ARGUMENT**

15 **A. EFSEC Must Balance the Broad Interests of the Public.**

16 The Washington State legislature created EFSEC because it recognized the need to
17 “balance the increasing demands for energy facility location and operation in conjunction with
18 the broad interests of the public.” RCW 80.50.010. This balancing of a need for energy in the
19 state with the public’s right to a clean, healthy, and safe environment is the heart of EFSEC’s
20 review of any proposed energy facility. EFSEC has repeatedly recognized the key role it plays
21 in this balancing exercise, noting that it must determine “whether [the proposed] energy facility
22

23 _____
24 ¹ For ease of communication, this brief will refer to “Vancouver Energy Project” as a reference to the project, the
25 applicants, Tesoro and Savage, and, in most cases, the Port of Vancouver. Only where there is a need to specifically
delineate Tesoro, Savage, and/or Port of Vancouver, will any other reference be used.

1 at [this] particular site will produce a net benefit after balancing the legislative directive to
2 provide abundant energy at a reasonable cost with the impact to the environment and the broad
3 interests of the public.” *Desert Claim Wind Power Project*, EFSEC Order 843 at 23 (Nov. 16,
4 2009); *see also BP Cherry Point Cogeneration Project*, EFSEC Order 803 at 12 (Oct. 26, 2004)
5 (“The Council has a comprehensive mandate to balance the need for abundant energy at a
6 reasonable cost with the broad interest of the public.”); *Creston Generating Station*, EFSEC
7 Order 645 at 51-61 (Dec. 13, 1982) (carefully evaluating the forecasted energy needs and
8 potential deficits in Washington, weighing those needs against alternatives to the project, and
9 concluding it was in the public’s interest to supply the energy because no preferable alternative
10 existed).

11 **B. EFSEC Must Consider and Balance All Impacts of the Project’s Operation on**
12 **Public Interests. The Balance Weighs in Favor of Rejecting the Application.**

13 The Vancouver Energy Project will transport volatile and hazardous crude oil via rail
14 through the Columbia River Gorge to an off-loading facility at the Port of Vancouver,
15 transferring that hazardous material to large deep draft vessels to be sent through the Columbia
16 River estuary to refineries elsewhere.

17 The Vancouver Energy Project is composed of three inter-related components; none of
18 which can function without the other piece. The Vancouver Energy Project includes: (1) the rail
19 that will serve the terminal; (2) the terminal itself; and (3) the marine vessels that will carry the
20 product to refiners. It is a transitional, throughput facility that cannot operate but for the rail and
21 marine vessels that serve it. And while EFSEC is preempted by federal statutes and regulations
22 from regulating certain aspects of rail and vessel operations, EFSEC is not prohibited from fully
23 analyzing impacts of all aspects of the facility’s operations, including rail and vessel operations,
24 on the interests of the public.

1 In order for EFSEC to “ensure through available and reasonable methods” that an energy
2 facility will have minimal adverse effects, EFSEC may issue terms and conditions on a permit.
3 RCW 80.50.010(2)-(3). The proponents have repeatedly argued that EFSEC is preempted by
4 federal statutes and regulations from conditioning any aspect of the rail transport and vessel
5 activities of this project. Applicant’s Pre-Hearing Brief at 3, 16, 19, 25, 61, *et seq.* If indeed this
6 is the case, then EFSEC must weigh vessel and rail risks to the human health and the
7 environment without the ability to impose mitigation to reduce these risks.

8 The Vancouver Energy Project will have far-reaching effects. Throughout the hearing,
9 testimony was provided that demonstrated that the risks posed by rail and marine vessel transport
10 are very high and that there are many potential and harmful consequences. The argument that the
11 Vancouver Energy Project is simple and safe fails on its face when the evidence is examined. In
12 reality, the proponent will not have control over most of the high-risk portions of the project;
13 especially for the rail, the marine vessels, but also for the terminal. Mr. Larrabee, the General
14 Manager of the terminal, could not assuage any concerns about the command and control
15 structure of management of the terminal. Transcript at 392-398. The ever-changing care and
16 custody of ownership of the crude oil was also never clearly explained. Transcript at 385-386.
17 The proponents call the project “simple”, and the risks it poses as “tolerable.” However, it is
18 clear that the proponents are narrowly analyzing the risks of the terminal, and understating the
19 risks. For example, their risk expert, Mr. Thomas, analyzed risks at the terminal without
20 contemplating the jail center population that lies in close proximity to the terminal. Transcript at
21 1288, 1291-96. *See also*, Applicant’s Pre-Hearing Brief at 3, 68.

22 Throughout the hearing and in their pre-hearing brief, Vancouver Energy continued to
23 proclaim the mind-bending assertion that adding as many as 32 trains each week to the current
24 rail traffic would not create some impact. Transcript at 138, 1483. *See also* Applicant’s Pre-

1 Hearing Brief at 17, 28, 61. Vancouver Energy also failed to acknowledge that the product which
2 they are transporting is highly volatile, flammable, and hazardous. Vancouver Energy proposes
3 that merely meeting federal standards is enough to protect the environment. Transcript at 138;
4 Applicant’s Pre-Hearing Brief at 16-17. However, accidents happen, even when safety protocols
5 are met. Transcript at 1504-1509. For Mosier, Oregon, the usual rail safety inspections failed to
6 find a weakness in the rail that led to a derailment and fire. Transcript at 2146 (Rhoads); 2310
7 (Appleton); 1547 (Kaitala). *See also*, Ex. 3125. In addition, the train that derailed was travelling
8 below the regulated speed for the area. *See generally* Transcript at 4678, 4699 (Barkan); 2853
9 (Holmes); 2561-2562 (Hildebrand).

10 If there is an accident, at any point along the rail, marine, or terminal route, Vancouver
11 Energy would not be able to cover the cultural and fishing losses that the Tribal Parties would
12 suffer. “Insurance responds to a financial loss. If you can quantify that, which I think would be
13 very difficult to quantify cultural impacts, there would be coverage. But it has to be a financial
14 loss that can be quantified in terms of dollars.” Transcript at 1781-1782.

15 EFSEC and Washington State are limited in exercising regulatory oversight over two of
16 the three high-risk components of this project, i.e., the rail and marine transportation. In addition,
17 and as highlighted often by Vancouver Energy, EFSEC and Washington State cannot control or
18 mitigate for the risks that are posed by these components. *See, e.g.*, Transcript at 137 (“It’s
19 important to remember that the applicant does not own, operate or control rail or vessel
20 transportation to or from the facility. That is handled by others.”). This lack of control and
21 oversight should make EFSEC closely consider the risks posed by the project. In light of this
22 lack of oversight, and to avoid the risks posed by this dangerous proposal, EFSEC should
23 recommend denial of the project.

24 **C. The Tribal Parties Have Significant Cultural Interests at Risk.**

1 The Tribal people of the Columbia River have lived along and survived off the Columbia
2 River since time immemorial. Over the last century, there have been many projects and
3 developments that have manipulated the resources of the river, leaving legacy pollution and
4 damage with which the tribal communities have had to contend. From the tribal perspective,
5 these projects rarely benefit the region for more than the short term, if at all. The Tribal Parties,
6 on the other hand, think about the long term, as Kathryn Brigham noted:

7 And as tribal leaders and tribal people, we have been taught more than once to talk about
8 and think about our next seven generations. One of the things that my grandfather said
9 was that you fight real hard for today, but not at the expense of your children, your
10 children's children and their children. That's why we talk about the next seven
11 generations and beyond.

12 Transcript at 3825, lines 5-12. As Vancouver Energy has admitted, the Vancouver Energy
13 Project has a life expectancy of twenty years. Transcript at 198, lines 10-12. This project does
14 not comport with Washington's long-term interests, let alone tribal values and interests.

15 **1. The Tribal Parties Consider Habitat Restoration a Sacred Duty.**

16 As Dr. Zach Penney explained, tribal families have “a deep investment in salmon and
17 steelhead restoration.” Transcript at 4020. The Tribal Parties consider habitat restoration a
18 responsibility, tasked to them by the Creator. Ms. Sanchez noted that the Tribal Parties believe
19 they are “tasked [with] speaking for those things that cannot speak for themselves, protecting the
20 environment . . . It's our belief... that we have to protect the land, and the land will protect us.”

21 Transcript at 3954-3955. “[I]f we don't take care of our foods, they won't take care of us . . . if
22 we're not going to protect them, then we're not Yakama people.” Transcript at 3956. The
23 Columbia River Gorge, where all the trains that will service the Vancouver Energy Project must
24

1 transit, is considered sacred: “It’s not just a scenic area to us, it’s our lifeblood.” Transcript at
2 3956.

3 The Tribal Parties adopted the Wy-Kan-Ush-Mi Wa-Kish-Wit (Spirit of the Salmon Plan)
4 in 1996 and updated it in 2014. Transcript at 4348; Ex. 5219. The Columbia River Basin region
5 is now engaged in one of the largest fish and wildlife restoration efforts in the world. Transcript
6 at 4350. More than \$300 million is being invested annually in this effort. *Id*; see Ex. 5116
7 (\$13.75 billion from 1978 to 2013).

8 There is a flipside, however; habitat improvement as a mitigation concept has significant
9 limitations. Transcript at 3813. The “benefits of habitat improvements are very long term and
10 unfortunately sometimes kind of uncertain... It takes an enormous effort to fix a habitat to where
11 it's fully functioning as a good ecosystem again.” *Id*. Mitigation tends to be costly; where the
12 goals and benefits tend to, “pay out over decades sometimes, rather than right away.” *Id*. For
13 certain groups or subpopulations of fish, “simply rushing to do more habitat restoration than
14 we’re already doing” would not result in any benefits. *Id*.

15 **2. The Tribal Parties’ First Foods Were Provided By The Creator.**

16 The First Foods were given to tribal people by the Creator. Transcript at 4317-19, 4346-
17 47 (Lumley); 3840-41 (Brigham). The First Foods are salmon, game, roots and berries. *Id*. The
18 Tribal Parties’ right to First Foods are explicitly reserved in their treaties. Lumley Prefiled Dir.
19 Test., at 4. The treaties “guaranteed access to our first foods so that we can practice our culture,
20 continue our way of life and plan for the future.” Transcript at 3841.

21 There are many tribal ceremonies “where we are giving thanks to our food returning.”
22 Transcript at 3840. These include the Salmon Feast, Celery Feast, Root Feast and Huckleberry
23 Feast. Transcript at 3839-3840. First Foods are also used for ceremonial purposes in weddings,
24 name-givings, funerals and rejoinings. Transcript at 3840.

1 First Foods have many cultural uses. For instance, the tail of a dried lamprey is used to
2 help babies with teething. Transcript at 3920. The oils sooth the gums and chewing on the tail
3 helps the teeth break through. *Id.* As Mr. Slockish said, lamprey “are very sacred to us.”
4 Transcript at 3922.

5 The Vancouver Energy Project poses a significant risk to the tribal First Foods of the
6 Columbia River Basin and provides no benefits whatsoever. Mitigation for these risks is either
7 not within the control of the project, is expressed only in monetary terms, or occurs after the fact
8 with certain irreparable physical consequences to cultural resources and uncertain biological
9 effectiveness to living resources.

10 **3. Fishing is an Integral Part of Tribal Culture.**

11 Fishing is a fundamental aspect of the Tribal Parties’ identities. It is an activity that their
12 people do for subsistence, economy, culture, and family. For example, the Brigham family of
13 the Umatilla Tribe currently has four generations fishing on the Columbia River. Transcript at
14 3825. “[We] teach our children and their children that this is something we’ve been doing from
15 generation to generation.” Transcript at 3826. Ms. Sanchey testified that the Yakama Nation are
16 river people, “[s]ince time immemorial, we’ve been fisher people . . . that’s the lifeblood of who
17 we are . . . it’s not just commerce. It’s not just something we do because we can. It’s something
18 we have to do . . . It’s in our blood.” Transcript at 3956-3957.

19 For young tribal fishers, their first salmon catch is a very special time, celebrated with a
20 specific ceremony. As Mr. Slockish testified, this is when a child becomes a fisherman:

21 And when we got the first one, it was put aside and then we had a dinner ceremony and
22 that fish was preserved ... and given to an older fisherman in the hopes that his
23 knowledge and his fishing ability would be transferred to the young person that was
24 doing his first fish ceremony.”

1 Transcript at 3917.

2 Fishing is priceless to tribal members; tribal people are intimately connected with the
3 fish. Transcript at 4021. “I can’t place a monetary values on my spiritual being and my cultural
4 awareness and my cultural teachings.” Transcript at 3924. The day before his testimony, Mr.
5 Slockish was passing on his teachings to youth from the Nez Perce, Umatilla, Warm Springs and
6 Yakama tribes. Transcript at 3930-3932. The systematic loss of First Foods makes it harder to
7 pass on these teachings. Transcript at 3932-3933.

8 Another witness, Mr. Dick, explained that the “concept of assigning a value to the treaty
9 fishing is very difficult” since “treaty fishing is integral to who we are as a people.” Transcript
10 at 4002. As a comparison, “it would be like asking the average US citizen what kind of value
11 you would put on the right to vote, the right to free speech, the right to freedom of religion[,]” in
12 other words, “the things that are integral that make a US citizen a US citizen.” Transcript at
13 4002. “That’s the level that treaty fishing has for the tribal people.” *Id.*

14 In contrast, Mr. Challenger, who has traveled all over the world acting on behalf of an
15 industry that has spilled oil, testified, “An oil spill is not a good thing. A fishery closure is a
16 good thing.” Transcript at 1937. These contrasting cultural values are at directly at issue when
17 discussing the potential impacts of the Vancouver Energy Project. The Tribal Parties who
18 testified in this proceeding have, for generation upon generation, since time immemorial, fished
19 the Columbia River and its tributaries. The Tesoro and Savage companies are headquartered San
20 Antonio, Texas and Salt Lake City, Utah, respectively. Their cultural ties to the Pacific
21 Northwest are primarily financial. The cultural ties of the Tribal Parties to the Columbia River
22 are inestimably deep. These tribal cultures are part of what defines the Pacific Northwest and the
23 Columbia River. As Ms. Brigham noted:

1 I'm one example of a family that fishes. But out of our family, all of us fish, all of
2 us take care of the fish, all of us are planning for the future and all of us live off
3 that fishing income.

4 Transcript at 3838.

5 **4. Tribal Fisheries are Significantly Important to the Tribal Parties.**

6 There are significant tribal and non-tribal fisheries in the Columbia River. These include
7 commercial, recreational, subsistence and ceremonial fisheries. The Tribal Parties have been
8 fishing on the Columbia River since time immemorial. Transcript at 3827. As the witness, Mr.
9 Ellis, testified, tribal fisheries include those occurring at tribal fishing platforms where dip net
10 and hoop net gear is used. There are about 400 fishing platforms between Bonneville and
11 McNary dams. During the tribes' commercial gillnet season, as many as 750 gillnets may be
12 fished during the peak of the fall Chinook run between Bonneville and McNary dams.

13 Transcript at 3791-3792. The Tribal Parties also have small but important commercial fisheries
14 for sturgeon and shad as well as very important subsistence fisheries for lamprey and smelt.

15 Transcript at 3797.

16 For many tribal members, fishing is an important source of their annual income.
17 Transcript at 3811. Tribal members have invested a significant amount of time and effort to
18 improve the value of their catch. Transcript at 3794.

19 The Tribal Parties' fishing interests are not limited the Zone 6. Ex. 185 at 5, 7, & 8. First,
20 contrary to Vancouver Energy's assumptions, the Tribal Parties' interest are not limited to those
21 in-lieu fishing sites that are located in Zone 6. In-lieu treaty fishing access sites are sites that
22 were built by the U.S. Corps of Engineers to replace tribal fishing villages that were flooded by
23 the construction of the Bonneville Dam. Transcript at 4006. "[T]he in-lieu treaty fishing access
24 sites, they're more like campgrounds, and the tribal members do use them when they're fishing

1 but they're different from a fishing site." Transcript at 4007-4008. Tribal members regularly
2 fish in many areas that are not around an in-lieu treaty fishing access site. Transcript at 4008.
3 Accordingly, the treaty fishing access sites, themselves, are not a good gauge of the location of
4 tribal fishers' fishing sites. *Id.*

5 Further, the Tribal Parties have not given up their claims to fish in other locations in the
6 Columbia River basin. Transcript at 3793, 3809 (Ellis); 4329-4332 (Lumley); 3925 (Slockish);
7 4008-4009 (Dick); 3827-28 (Brigham). For example, the Yakama Nation has not relinquished
8 any of its usual and accustomed fishing areas, which extend over a much larger area than Zone 6.
9 The Yakama Nation has tribal fishers that fish beyond Zone 6, including fishing in the Cowlitz
10 River for smelt and in Willamette Falls for lamprey. Transcript at 4008-4009.

11 Finally, the Tribal Parties' interests are not limited to the harvest of fish. Transcript at
12 4009-4010. In fact, the Yakama Nation is "working to establish co-management . . . we're trying
13 to rebuild the runs." Transcript at 4009-4010. "All aspects of the salmon's life cycle come into
14 play, not just the harvest[,] the Tribal Parties are thinking about many components, including
15 habitat, hydrology, and hatchery. Transcript at 4010. As the salmon lifecycle extends far beyond
16 Zone 6, so do the Tribal Parties' interests.

17 **5. The Columbia River Contains Fish Species of Particular Importance to the** 18 **Tribal Parties.**

19 As discussed above, the Tribal Parties have a significant interest in habitat restoration as
20 they consider it their sacred duty to preserve the First Foods' environments. The Tribal Parties
21 benefit from this management, as it allows them to preserve their cultural practices, including
22 fishing and the use of First Foods in a variety of cultural ceremonies. As discussed below, a
23 wide variety of fish species that are significant and important to the Tribal Parties, live in the
24 Columbia River.

1 **i. Salmon in the Columbia River.**

2 In the last 10 years, Columbia upriver salmon run sizes for salmon runs originating above
3 Bonneville Dam as have averaged as follows:

| | |
|------------------------------------|------------------------|
| 4 Spring chinook | 200,000 |
| 5 Summer chinook | 70,000 |
| 6 Fall chinook | 600,000 |
| 7 Sockeye | 300,000 |
| 8 Steelhead | 300,000 |
| 9 Coho | 120,000 |
| 10 Chum | (below Bonneville Dam) |

11 Transcript at 3782-83. There are twelve different stocks of salmon and steelhead in the
12 Columbia River Basin that are listed under the Endangered Species Act (“ESA”). Transcript at
13 3809-10.

14 Both fall chinook and chum salmon spawn in the main stem of the Columbia River.

15 Transcript at 3783. Hatcheries above Bonneville dam release 95 million smolts per year. At the
16 peak of the juvenile salmon migration, around nine million smolts per day pass Bonneville Dam.

17 Transcript at 3800. The National Marine fisheries Service (NMFS) has estimated that 155
18 million smolts successfully reached the Columbia River estuary in 2014. Transcript at 3785.

19 These juvenile fish are migrating changes throughout the year, but most fish migrate from early
20 spring through the end of summer. *Id.* The Applicant failed to grasp the importance of these
21 numbers, which represent decades of mitigation effort and billions of invested dollars.

22 Maintaining and growing these numbers are of utmost importance to the Tribal Parties.

23 **ii. Other Species of Concern.**

1 While salmon are an iconic species in the Columbia River Basin, where cities like White
2 Salmon and Chinook are important namesakes of the Basin's heritage, other species are at risk
3 from the Vancouver Energy Project, including sturgeon, lamprey and smelt. The Tribal Parties
4 chose to highlight these species in their testimony, among other reasons, to help EFSEC
5 understand the lifecycles of aquatic specie, their place in the Columbia River Basin's
6 environment and the risks that spilled oil represent, In their larval life stages, each of these
7 species have similar characteristics that make them vulnerable to oil spills. Rice Prefiled Dir.
8 Test. at 16.

9 Sturgeon are an ancient fish, as old as the dinosaurs. Transcript at 3893-3894. Sturgeon
10 support important tribal fisheries on the Columbia River. Transcript at 3790. Individually,
11 sturgeon are very long-lived, capable of reaching more than one hundred years of age. Sturgeon
12 feed on the bottom of the River. Transcript at 3885. They may reach sexual maturity after 25
13 years and reproduce infrequently thereafter. Sturgeon above Bonneville Dam no longer migrate
14 to the ocean, rather, their mobility is limited by the dams and they spend their entire life span in
15 the Columbia River. Sturgeon could be exposed to spilled oil persisting at the bottom of the
16 Columbia River through multiple breeding cycles. Transcript at 4101.

17 Pacific Lamprey, as a species, are even older than sturgeon dating back 450 million years
18 in the fossil records. Ex. 5109 at 11. Pacific Lamprey in the Columbia River Basin have been in
19 a steep decline. *Id.* At the same time, Pacific Lamprey are still a vitally important cultural food
20 source to tribal people. *Id.*, Transcript at 3919-3920, 3922. The lamprey's lifecycle is unusual.
21 Once the larval lamprey hatch, they spend up to seven years burrowed in the fine sediments of
22 freshwater streams and rivers. The juvenile lamprey ammocoetes then migrate to the ocean
23 where they spend one and one-half to three years before returning to freshwater to spawn. Ex.
24 5109 at 10. Transcript at 3877-3880.

1 Smelt, or Eulachon, also provide for important tribal fisheries. Compared to sturgeon and
2 Pacific Lamprey, smelt spend only a short time in freshwater, where they return to spawn.
3 Transcript at 3877-3879. Columbia River smelt are listed as threatened under the Endangered
4 Species Act (ESA).

5 Overall, the Tribal Parties are concerned about the project's impact on a wide variety of
6 sensitive fish species. It is important that the Tribal Parties' interests and efforts, as co-managers,
7 be recognized and protected.

8 **D. The Public Interests Impacted by the Terminal, the Rail and Marine Vessels That**
9 **Will Service the Terminal, Tips the Balance in Favor of Rejecting the Application.**

10 **1. The Rail Transport of Crude, Necessary for This Project, Increases Risks to**
11 **Tribal Resources.**

12 The Vancouver Energy Project will add four to five unit trains to the current daily rail
13 traffic that transits the Columbia River Gorge. These trains will be carrying crude oil, a highly
14 volatile, hazardous, and flammable product.

15 Unit trains generally are long and heavy, and require a higher level of care and attention.
16 Mr. Holmes testified that since crude has been transported by rail, there has been over twenty
17 four derailments, which comes to an average of one derailment per 2.6 months. Transcript at
18 2852-2853. During the public comment session on the final day of the hearing, one commenter,
19 Mr. Herb Krohn, a railroad trainman started his comments by highlighting that he was the "only
20 person testifying who has actually worked on-board one of these trains." Transcript at 5271. He
21 testified as a supporter of the Vancouver Energy Project, yet even he admitted that there are
22 unique safety considerations for unit trains. As he stated: "the dynamics [of unit versus mixed
23 commodity trains] are different because of the sheer weight of 100-plus-filled full tank cars;
24 longer, heavier trains are harder to control, slow, or stop." *Id.* He further noted that even though
25 trains have carried crude before, the difference is now the length of trains are doubled: "In the

1 past, these trains were limited to no more than fifty cars. Accidents were unheard of.” Transcript
2 at 5272. He later notes that “shorter trains are safer trains” and that the reason for the industry
3 use of longer trains is for “lower cost” but that the flip side is “less operational control.” *Id.*
4 During the hearing, Ms. Kaitala, who works for BNSF pointed out that trains can be very
5 vulnerable to damage or changes on the rail line: “[Trains] are very sensitive to track geometry,
6 which is why we inspect so often.” Transcript at 1511. In Mosier, a regular (non-walking) rail
7 inspection did not prevent a major derailment. Transcript at 2146, 2310, 1547. *See also*, Ex.
8 3125. As Chief Appleton testified: “the volume of risk is to me such a transparently clear issue
9 that by having a unit train, you're just increasing your exposure to the law of averages, and [an
10 accident is]going to be sooner or later. And I think our regulatory system needs to not encourage
11 things that attract that level of risk. Transcript at 2343.

12 Fire management along the Columbia River is a concern for management of the tribal In
13 Lieu and Treaty Fishing Access Sites. Fire occurs regularly along the Columbia River. It is
14 often wind driven and may travel 12 miles in as many hours. The firefighting capabilities are
15 very limited for protecting the In Lieu and Treaty Fishing Access Sites. Broncheau/Hicks
16 Prefiled Test. at 6-7; Transcript at 4269-4271. The Vancouver Energy project would impose
17 additional unacceptable fire risk due to crude-by-rail transportation along the Columbia River.

18 EFSEC should consider the risk of increased train traffic and increased risk of fire, taking
19 into account the types of substances that will be transported and the equipment used to transport.
20 These risks plus increases risks to tribal fishers, tribal fishing sites, and cultural resources, along
21 with the consequences of train derailments and any resulting oil spill, are discussed below. In
22 sum, the Tribal Parties believe these substantial risks and impacts, when weighed against any
23 potential benefit of the Vancouver Energy Project, tip the balance strongly in favor of denial.

1 **2. The Project Will Increase The Risk of Injury and Death For Tribal Fishers At**
2 **Rail Crossings.**

3 For many tribal fishing sites, “the railroad tracks run along the river and the tribal
4 members have to cross the tracks in a lot of cases to access their fishing sites.” Transcript at
5 3999. This means that train traffic has an impact on both access to tribal fishing sites and safety.
6 *Id.* For tribal fishers in remote areas, there are almost no warnings of coming trains. Transcript
7 at 4013-4014. “When the tribal fishers get out into the more remote areas to access sites, a lot of
8 times there’s really nothing. They’re just going along the tracks and then crossing where they
9 need to, that type of thing. So there could be really no safety apparatus at all.” Transcript at
10 4014.

11 “Every time a tribal fisherman crosses a train track, they are subjecting themselves to the
12 risk of injury or death.” Prefiled Direct Testimony of Roger Dick, Jr., at 4. “Over the years,
13 there have been a number of fatalities due to train strikes.” *Id.* The Yakama Nation Fisheries
14 have had employees get hit by trains when trying to access fishing sites. *Id.*

15 Further, tribal members have lost their lives to railroad crossings. As Ms. Brigham:
16 Just within my family, I've lost three members to the railroad crossing and all of
17 them were fishermen and it was in the spring of each year. I lost a nephew. He
18 was a very young man and he was going to the in lieu site after fishing, and later
19 lost his sister, and that was in 2006. And then in 2008, lost my niece, who is also
20 fishing on the Columbia River. Then in 2010, I lost my cousin who is fishing up
21 at all today, and he was crossing the tracks with his boat and trailer and he got hit
22 by the train as well.

23 Transcript at 3828-29. The risk of injury and death is significant to tribal fishers, who are
24 already exposed to these risks, resulting in devastating losses. Any increase in train traffic will

1 result in an increased risk of injury and death. EFSEC must consider the Tribal Parties' interest
2 in the safety of their members.

3 **3. The Project Threatens Fishing Sites Along The Columbia River.**

4 Historically, tribal fishers have endured the loss of traditional fishing places due to
5 development of the Columbia River and toxic spills. The loss of more fishing sites due to an oil
6 spill, train derailment or other mishap associated with the effects of the project would place an
7 unacceptable cumulative burden of loss on tribal peoples.

8 Celilo Falls was inundated by The Dalles Dam in 1957. Mr. Slockish's family primarily
9 fished in the Klickitat River Basin after losing their fishing places at Celilo Falls when it was
10 buried behind The Dalles Dam. Transcript at p 3916-3917. Mr. Slockish fished for salmon and
11 lamprey in the Klickitat Basin. Eventually, lamprey numbers declined very dramatically in the
12 Klickitat Basin due to agricultural water related changes. Transcript at 3919. After that decline,
13 he fished for lamprey at Fifteen Mile Creek in Oregon near The Dalles Dam. That fishery,
14 however, was closed after a chemical spill and Mr. Slockish has not returned to gather lamprey at
15 that fishing site. Transcript at 3920. More than a decade after the spill, the chemical spilled
16 (oxyflourofen), was still present in juvenile lamprey sampled from Fifteen Mile Creek.
17 Transcript at 3881. Loss of fishing imposes metal, physical and spiritual stress to tribal people.
18 Transcript at 3925. Mr. Slockish is one of many tribal people who have endured multiple losses
19 of their fishing places.

20 Some tribal fishers lost their platforms to the Fifteen Mile Creek spill. Transcript at
21 3978. As a result of losing their platforms, they tried to move upriver and fish from a boat with
22 gillnets and unfortunately drowned. Transcript at 3978-79. The reality is that if you had to
23 move your fishing place you would be in somebody else's spot or somewhere where the fishing
24

1 is not as good. Transcript at 3817. The risk of displacement from oil spill is very real.

2 Transcript at 3817.

3 It is very difficult for tribal fishers to change the location of their fishing places.
4 “[T]ribal members develop and establish their fishing at very specific sites, every specific
5 locations.” Transcript at 4000. “[T]ribal fishers establish their sites, based on where they could
6 have the best catch rates” this is based on a multitude of factors, such as “water depth, the flow
7 of the water.” Transcript at 4001. In other words, “you can’t just go anywhere along the river . . .
8 there’s very specific conditions.” Transcript at 4000. Accordingly, tribal fishers cannot move
9 their fishing platforms without a great deal of effort.

10 Further, that assumes there is a place to move the platform to. The Yakama Nation
11 registers all commercial gillnet fishing sites. Transcript at 4000. Further, tribal fishers are very
12 territorial. Transcript at 4000. While some fishing platforms that are not officially registered
13 “they’re established through the traditional means of recognized usage” the “sites are associated
14 with – either with an individual or a family.” Transcript at 4000. As most fishing sites are
15 registered or traditionally reserved, most of the productive fishing sites “have already been
16 taken.” *Id.* Therefore, “it’s a long and difficult process” to acquire a new fishing site.
17 Transcript at 4001. “[I]f there were an area to be closed and fishers had to relocate, it’s not as
18 simple as just picking up and going to a different area.” Transcript at 4000.

19 It can be very difficult for tribal fishers to obtain compensation for the closure of a
20 fishing site. Transcript at 4002-4005. There are two primary reasons. Transcript at 4003. First,
21 tribal fishers have difficulty providing the necessary documentation. *Id.* There is documentation
22 for commercial fishers, for fish sold directly to wholesale buyers; these receipts are typically
23 referred to as fish tickets. *Id.* However, many fish sales come from buyers that do not issue fish
24 tickets; the fish are “sold directly to retailers, restaurants, casinos . . . directly to the public.”

1 Transcript at 4003. For those sales, “a lot of times there won’t be a receipt of documentation of
2 any kind.” *Id.* Further, for fishing done for subsistence or ceremonial purposes there is usually
3 no documentation. *Id.*

4 Second, for many tribal fishers there is a negative connotation to the idea of selling their
5 treaty rights. Transcript at 4004-4005. Most tribal fishers are “told a lot that it’s really bad to
6 take compensation in lieu of fishing.” Transcript at 4005. Mr. Dick believes that this may stem
7 from historical interactions, such as the Dalles Dam payment; when those payments were
8 distributed to tribal members they learned a lesson, that “the value of the money . . . it’s really
9 small compared to what is actually lost to the tribal people.” Transcript at 4005.

10 The Vancouver Energy Project poses a significant risk to tribal fishing sites. These
11 fishing sites have both a cultural and an economic value. These risks have been largely ignored
12 or summarily dismissed by the proponents. The Tribal Parties urge EFSEC to consider this risk
13 and recommend denial of the project.

14 **4. The Project Threatens Extensive Cultural Resources Along The Columbia**
15 **River.**

16 “She Who Watches” is one of the most famous petroglyphs in North America.



1 Ex. 5332. She is located approximately 120 feet from the Burlington Northern Railroad tracks
2 near Columbia Hills State Park, along the Columbia River just upstream from The Dalles Dam.
3 She Who Watches and other important archeological resources would be at risk from increased
4 crude-by-rail traffic. As Mr. Huber testified, “I don’t know of any burning train that will
5 respond to an engineer structural or a stop work order.” Transcript at 3856. Tribal, federal and
6 state laws for good reason protect cultural and archeological resources for good reason. As Mr.
7 Huber testified:

8 Cultural resources represent the concrete, physical evidence of the tribes’
9 presence and the relationship to their tribal ancestors here. These are the sites that
10 represent the cultural record of the tribes being here since time immemorial him.
11 These are the tribal members’ sensitive place. This is where they’ve been. This is
12 where their ancestors did the same things they did; gathering food, hunting,
13 providing for their families. Rock images, specifically, often convey a sacred
14 nature to members, but archaeological sites themselves are that physical
15 connection to the way that they can see where their ancestors were and what they
16 did.

17 Transcript at 3859.

18 There are thousands of archaeological research sites up and down the Columbia River.
19 For instance, in Klickitat County, there are over 500 sites that have recorded within a half-mile
20 of the Burlington Northern Railroad line. Transcript at 3853. This archaeological record
21 documents one of the most continuously occupied sites in North America; 10,000 years of
22 occupancy. Transcript at 3854. These archaeological sites are at risk to oil spills and burning
23 trains. In fact, current railroad operations are impacting cultural resource sites along the
24 Columbia River due to grading and other operations. Transcript at 3857.

1 Oil spills and fires can be damaging to archeological resources. Huber 3860-61.

2 Archaeological resources are unique priceless and irreplaceable. They cannot be restored in the
3 event that a site is excavated. The best mitigation can do is provide data recovery, and that takes
4 the materials away from the ground, the in situ presence of the archeological resources that tribal
5 members can view and see when it comes to their connection to this spot. Transcript at 3861.

6 Further, as Ms. Sanchez noted, tribes don't publish the location of sites to protect them
7 from potential looting or damage. Transcript at 3959. There are "sites throughout that we, as
8 Indian people are aware of, that aren't on maps that Department of Archaeology doesn't know
9 about. [J]ust because on the map there were no sites, doesn't mean there wasn't anything there."
10 Transcript at 3958-3959.

11 The significance of these cultural resources cannot be understated. The Vancouver
12 Energy Project poses significant risks to these cultural resources. This risk must be considered
13 and weighed against any benefit the project may bring.

14 **5. The Project Will Impact the Estuary and the Columbia River.**

15 **i. The Estuary is Key to Restoring Salmonids.**

16 The Lower Columbia River Estuary ("Estuary") is an important component to the
17 lifecycle of the salmonid and is critical habitat for numerous other aquatic life. The NMFS 2011
18 Recovery Plan ("Estuary Plan") for the Estuary notes that every juvenile salmonid must use the
19 habitats of the Estuary to complete its lifecycle. Ex 5211. In fact the Estuary supports over 150
20 distinct salmon & steelhead populations at various seasons and time of the year. *id.* at 2-1.
21 Witnesses Ellis, Penney, and Lumley noted that all anadromous fish that are part of the tribal
22 treaty fisheries must pass, and may rear, in the Estuary. Transcript at 4332-4333

23 Human development has altered the Estuary, and estuarine restoration is part of the
24 billions of dollars in regional efforts to improve habitat for salmonids. The Estuary Plan calls for

1 an overall reduction in over-water structures in Estuary, reduced impacts from ship ballast,
2 reduce effects of vessel wakes, protect remaining high quality habitat & intact riparian areas and
3 restore degraded riparian areas. Ex 5211, at 3-2, 3-10, 4-16, 5-3. The Vancouver Energy Project
4 will add additional burden to the Estuary by adding more deep draft vessel trips to the system.
5 Furthermore, these vessels will be carrying a high risk product that, if an accident occurred,
6 would cause devastating and potentially long-term effects.

7 During the public comment session, Michael O’Leary, representing the Association of
8 Northwest Steelheaders, discussed issues of safety and wake stranding. He noted that the
9 *Sparna*, a bulk carrier ship, had run aground in the Estuary during 2016. “A big boat hit the
10 rocks in the river. It’s not just a sandbox. It happens. We got lucky.” Transcript at 5240. He then
11 went on to describe his concerns about wake stranding “When a big cargo vessel goes by, the
12 smelts that are on the small edges of the river on gently sloping beaches, of which there are
13 many, wash up with the waves and get trapped.” Transcript at 5241. Further, Mr. O’leary noted
14 that the project has the potential to impact recreational and tribal fisheries as commercial
15 fisheries. Vancouver Energy’s economic analyses failed to take any of these impacts into
16 account. *See, e.g.*, Transcript at 1075-1079, 1089-1090.

17 Here, the risk to the Estuary, and the resulting potential negative impact on the restoration
18 of the salmonid population, must be considered. The benefits of the Vancouver Energy Project
19 must also be weighed against the risk to the Estuary, including the potential to stifle or reverse
20 the restoration of the Estuary.

21 **ii. Effectiveness of Booms.**

22 There was extensive discussion of the use of booms, for both response and as a
23 precaution. As Dr. Rice explained: “The responders should do everything they can to minimize
24

1 that spill, but to depend on them, to think that they're going to be protective of the river on a
2 large scale basis is, I think, not appropriate thinking there.” Transcript at 4098.

3 Booming at the 1984 *MobilOil* spill at Warrior Rock on the Columbia River just
4 downstream from Vancouver did not prevent oil from contaminating the Columbia River bottom,
5 mouths of sturgeon, ocean beaches in Oregon and Washington or reaching Grey’s Harbor. Ex.
6 5063 at 11-12, 22-28. The oil recovery rate for the DeepWater Horizon spill did not exceed ten
7 percent, even though an “armada” of booms and oil collection vessels had been deployed.
8 Transcript at 4009. After booming the 2014 *Barge E2MS 303* spill in the lower Mississippi
9 Rivers, responders were able to recover three-tenths of one percent of the spilled Bakken crude
10 oil. Ex. 5027; Transcript at 4098-4099. Though occurring thirty years after the 1984 *MobilOil*
11 incident and presumably following numerous advancements in oil collection technology, weather
12 conditions (heavy fog) on day two of the *Barge E3MS 303* incident delayed oil recovery at this
13 spill. NOAA and other first responders at this incident observed that the Bakken crude oil spread
14 very rapidly, recoverable amounts might persist for only 4-8 hours, and oil quickly adhered to
15 suspended solids in the water column. Ex. 5027 at 11-13.

16 Despite Vancouver Energy witness, Mr. Haugstead’s claims, the Tribal Parties’
17 emergency response official, Chief Mitch Hicks, who has decades of experience with the
18 currents, wind and wave conditions on the Columbia River, was dubious that the “Current
19 Buster” booming technology would operate effectively in the Columbia River Gorge and
20 upstream to McNary Dam. Transcript at 1402-1403 (Haugstead); 4299-4303 (Hicks).

21 Peak wind gusts may reach 60 miles an hour in the Columbia River Gorge in the winter
22 and summer. Transcript at 3804 (Ellis); 3872 (Parker). Then, “the waves are really being ripped
23 apart by the wind. It’s very, very difficult to even keep your footing in the boat.” Parker 3872.
24 The spray from the River reaches the highways. Transcript at 4298. The experience needed to

1 navigate the waves on the Columbia River is comparable to experience needed to navigate the
2 rapids in the Hells Canyon section of the Snake River. Transcript at 4296.

3 **iii. Invasive Species**

4 The Columbia River is currently an ecosystem in peril from invasive species. Invasive
5 species change and reduce the overall vitality of the river. In the simplest terms, the Columbia
6 River does not need to suffer the introduction of any more invasive species. The ships that
7 would transport this crude oil would discharge their ballast water to the Columbia River. There
8 are measures to prevent invasive species from being transferred via ballast water discharges.
9 Federal ballast water exchange rules, however, are not perfect allowing a residual of ten
10 organisms per cubic meter of ballast water. Transcript at 3875-76. And, not everybody performs
11 a ballast water exchange. Transcript at 3902. And even with ballast water exchange, there are
12 opportunities for the organisms to persist and be transported and released. Transcript at 3903.
13 EFSEC, then, must consider, and weigh, an increased risk of invasive species and the resulting
14 impact to the Columbia River ecosystem.

15 **E. The Tribal Parties Will Bear The Consequences of an Oil Spill.**

16 **1. Effects of an Oil Spill.**

17 The two types of crude oil that will be shipped to the Vancouver Energy Project, Bakken
18 crude and Dilbit, are at opposite ends of the spectrum in terms of their viscosity. Bakken crude is
19 one of the thinnest crude oils. Its viscosity makes it analogous to fuel oil. Dilbit, on the other
20 hand, is analogous to the very heaviest of crude oils. These two types of crude oil are among the
21 most persistent in the environment for different reasons. Spills of the very heavy crudes last
22 longer because they do not readily break down. Spills of the lighter crudes are persistent
23 because they penetrate into sediments. Dr. Rice differed with Mr. Challenger's interpretation of
24 the chart prepared by Michel and Rutherford showing recovery times for estuaries impacted by

1 crude oil spills. Ex. 108. Dr. Rice noted that some of the longest estuary recovery times shown
2 by Michel and Rutherford were for spills of very light and very heavy crude oils. Transcript at
3 4070-74.

4 Mr. Taylor testified about oil particle aggregates, which form when oil clings to particles,
5 such as sediment or organic matter, in the water column. Taylor Pre-filed Test. at 18. Mr. Taylor
6 and Mr. Challenger both testified that *sediment* load in the Columbia River is such that they
7 doubt that oil particle aggregates form in combination with the sediment loads in the Columbia
8 River. *E.g.* Transcript at 1792-1798 (Taylor); 1792-1793 (Challenger). However, their
9 testimony makes no mention of the tremendous amount of aquatic vegetation or organic matter
10 in the Columbia River. *Id.*

11 Several tribal witnesses testified about the substantial amounts of aquatic vegetation that
12 are present in the Columbia River pose challenges for tribal fishers. Transcript at 3804 (Ellis);
13 3831-3835 (Brigham); 3887-3890 (Parker); 4298-4299 (Hicks). They described instances when
14 fishers have to remove their nets from the river, sometimes on a daily basis, to clean them for
15 them to fish effectively. Transcript at 3805, 3831-34. Tribal witnesses expressed concern that
16 spilled oil could get bound up in this aquatic vegetation. Transcript at 3835; 3892-93. If oil is
17 bound up with the aquatic vegetation and subsides to the benthic zone at the bottom of the River
18 it would put a new contaminant in a portion of the River's ecosystem. Transcript at 3885-3886.
19 Oil can linger at the bottom of the River for years exposing sturgeon and other fish that feed at
20 the bottom of the River. For sturgeon, who may not reach sexual maturity for 25 years and
21 reproduce infrequently, there is the potential for long term exposure and effects on their
22 productivity. Transcript at 4101-02.

23 In the Columbia River Basin, context is important. The Estuary has lost approximately
24 70% of its wetlands to human-caused impacts. This makes the remaining estuarine wetland

1 habitat very important from an ecological perspective. Transcript at 4043. In fact, a great deal of
2 effort is going into restoring wetlands in the Columbia River estuary. Ex. 5077. The Applicant
3 does not address the massive regional effort that is going into restoring the Columbia River
4 Basin's ecosystem, including its estuary wetlands.

5 Oil spills affect more than wetlands, they affect fish and fish populations. Pink salmon
6 populations in Prince William Sound Alaska declined significantly in the four years following
7 the Exxon Valdez spill. Testimony at 4081-4083

8 It is very important to note, contrary to the Applicant's testimony, that adverse effects of
9 oil on fish have been repeatedly demonstrated at concentrations measured at less than 50 parts
10 per billion. The Tribal Parties submitted more than 80 scientific journal articles documenting
11 these effects. Exs. 5002 – 5183.

12 Dr. Rice and Dr. Penney discussed how oil and stress affect fish survival. In neither case
13 is oil or stress likely to cause high levels direct or acute mortality. Rather it is the secondary
14 effects in these cases, such as decreased mobility, susceptibility to predation, and diminished
15 resistance to disease, that kill fish. Testimony at 4030-4041, 4058-4060. Fish encounter many
16 stressors in the Columbia River Basin already. In 2015, high water temperatures reduced the
17 survival of upstream migrating sockeye to something like 10%, whereas normal survival would
18 be approximately 50%. Testimony at 4030-4032. An oil spill would certainly add stressing
19 conditions when water temperatures are high. Testimony at 4041.

20 For tribal fishers, there are many ways an oil spill will impact a fishing site. The most
21 immediate effect would be the closure of an area, making the area inaccessible for fishing.
22 Transcript at 4005. Also, any residual oil at a fishing site may make it so the fish avoid the area;
23 this would negatively impact the catch rate at the fishing site. Testimony at 4005-4006. Further,
24 among tribal fishers a spill may result in stigmatism; many tribal fishers are "really leery, really

1 cautious of going back into the area to fish again.” Testimony at 4006. In sum, an oil spill may
2 impact both the catch rates and the fishing efforts at a fishing site. The potential impact of the
3 loss of a fishing site and the difficulties associated with moving to a different fishing site are
4 explored in greater depth below.

5 Crude oil can affect water quality in substantial ways, as was described on several
6 accounts during the hearing. *See, e.g.*, Transcript at 4062-4112 (Testimony of Dr. Rice). In
7 Mosier, which was a relatively small spill, the crude ended up contaminating the groundwater.
8 Transcript at 2960-2961(Oregon DEQ memo indicates that groundwater has elevated levels of
9 benzene and other volatile organic compounds, which come from Bakken Crude). *See also* Ex.
10 5629. However, Vancouver Energy’s witnesses seem to downplay the potential for this harm.
11 After Councilman Stone asked a general question about groundwater contamination after delays
12 in oil cleanup at a site, Mr. Ames remarked: “It’s possible, but likely not probable. It depends on
13 the amount of petroleum spilled... [and] the depth to groundwater.” Transcript at 1686-1687.

14 **2. The Geographic Response Plans Will Not Protect Tribal Interests.**

15 The shoreline of the Columbia River is composed of riprap and large rocks along
16 substantial portions of the reservoirs. Transcript at 3803, 4272-4273. The Columbia River
17 surface elevations fluctuate as much as seven feet or more in The Dalles Reservoir and more in
18 other places. Transcript at 3802. In the rocky shorelines of Prince William Sound, oil spilled
19 from the Exxon Valdez tanker has persisted for decades. Transcript at 4073.

20 The Applicant would rely heavily on the Geographic Response Plans (GRPs) in the event
21 that oil was spilled into the Columbia River. *E.g.*, Taylor Pre-Filed Test. at 9. The GRPs,
22 however, do not reflect the tribes’ input nor protect their important interests. Mr. Broncheau
23 testified about how the GRPs would direct booming operations to collect oil at the In Lieu and
24

1 Treaty Fishing Access Sites, such as Cooks Landing. Mr. Broncheau enumerated problems
2 associated with such measures:

- 3 • The GRPs did not reflect tribal input that the In Lieu and Treaty Fishing Access
4 Sites should not be used for oil collection operations;
- 5 • Many In Lieu Treaty Fishing Access Sites, such as Cooks Landing, were located
6 at ancient tribal villages;
- 7 • Tribal fishing platforms are located at the booming sites that would be
8 contaminated by oil collection operations;
- 9 • It would be difficult to clean the rocky berms protecting the In Lieu and Treaty
10 Fishing Access Sites and the impacts could last for years;
- 11 • The In Lieu Sites have residents living there year around; and
- 12 • Many tribal residents at places like Cooks Landing have nowhere else to live.

13 Transcript at 4266, 4274-4277. Contrary to the Applicant's assertions, the GRPs have serious
14 flaws that would exacerbate, not mitigate, the tribes' treaty secured interests.

15 **3. Persistence Of Oil Spilled.**

16 Once a habitat is contaminated, however, the persistence in shorelines, particularly
17 wetlands, will be quite significant. Oil in contaminated wetlands from the *Florida Barge* spill at
18 West Falmouth Massachusetts has been thoroughly document and persisted more than three
19 decades. Rice Prefiled Test. at 7-8; Ex. 5085 (*The West Falmouth Oil Spill after Thirty Years:*
20 *The Persistence of Petroleum Hydrocarbons in Marsh Sediments*). Oil from the Exxon Valdez
21 spill continues to persist in contaminated beaches after 25 years. Testimony at 4073.

22 **4. The Tribal Parties are Forced to Cleanup Spills on Tribal Lands.**

23 The Tribal Parties have a vested interest in the prevention of oil spills; and are actively
24 involved in spill response and cleanup. For example, Ms. Sanchey serves as the Hazmat Lead

1 for the Yakama Nation. The Hazmat Team is broadly tasked with responding to and cleaning up
2 hazardous waste spills “from the beginning to the very end” of spill cleanup. Testimony at 3944.
3 The Hazmat Team responds to spills that occur on the Yakama Nation’s reservation, ceded lands,
4 reserved rights areas or usual and accustomed areas. Testimony at 3944. The Hazmat Team
5 typically responds to ten to twelve spills a month, and coordinates its efforts with the
6 Washington State Department of Ecology, the Oregon State Department of Environmental
7 Quality, and the Environmental Protection Agency. Testimony at 3941. The Yakama Nation is
8 also on the Northwest Area Committee, Region 10 Response Team. Testimony at 3942.

9 Unfortunately, the Yakama Nation is very familiar with the threat of hazardous waste
10 spills. The Hazmat Team responded to the hazardous waste spill at Sulfur Creek, in 2015.
11 Testimony at 3946. There, oil from a used motor oil holding tank traveled fourteen miles,
12 through an irrigation system to a natural creek, and then out to the Yakima River (which is a
13 tributary of the Columbia River). Testimony at 3946. The cleanup took two weeks, as there was
14 an extensive amount of natural vegetation damage. Testimony at 3946.

15 The Hazmat also responded the to the hazardous waste spill caused by a Burlington
16 Northern train by McNary Dam. Testimony at 3947. In that matter, a boulder punctured the
17 train’s diesel tank. Testimony at 3947. After the puncture, the train continued for 15 miles,
18 leaking diesel fluid; the train continued after the puncture, because the train could only stop
19 where it could be serviced. Testimony at 3947. When the train finally stopped, it lost 300
20 gallons of diesel. *Id.* During cleanup, they were not able to locate all of the diesel on the bank of
21 the river. *Id.*

22 Finally, Ms. Sanchey also responded to the Mosier train derailment. Testimony at 3948.
23 Mosier is on the bank of the Columbia River, in the reserved area for the Yakama Nation.
24 Testimony at 3948. “[T]raffic delayed the response to the incident.” Testimony at 3950.

1 “Traffic was backed up for miles bumper to bumper” it was “an absolute nightmare.” Testimony
2 at 3949. Ms. Sanchey remarked that it “was probably one of the most difficult responses I’ve
3 ever been involved in.” Testimony at 3950. Once Ms. Sanchey arrived in Mosier, she saw a
4 “huge cloud of just black smoke, flames.” Testimony at 3950. There “was a change in
5 temperature, probably 10 to 15 degrees.” *Id.* The scene was “apocalyptic,” it was “absolute
6 chaos.” Testimony at 3951. Overall, Ms. Sanchey spent approximately two weeks at Mosier.
7 Testimony at 3953. The tribes were concerned about the salmon and the lamprey; “oil was
8 reaching the river, it was coming through an outflow pipe from the wastewater treatment plant . .
9 . oil bubbled up, it bubbled up eight feet offshore.” Testimony at 3955-3956.

10 During the Mosier incident, the “water’s not moving, people aren’t catching fish. And so
11 there was . . . a subsistence impact and there was an economic impact.” Testimony at 3957. Mr.
12 Settler, a tribal fisherman, was camping and fishing nearby when the Mosier train derailment
13 occurred. Testimony at 3981-3984. He witnessed “a considerable amount of smoke . . .
14 billowing out and it was black.” Testimony at 3984. Ex. 5300, 5302. He said the air “taste[d]
15 like a burning tire” and that he could feel a residue on his skin, “almost like a flake that was
16 coming down on your skin.” Testimony at 3985-3986. Later that evening, Mr. Settler developed
17 a cough and a sore throat that persisted three days. Testimony at 3987. Because of the train
18 derailment, Mr. Settler stopped fishing in the area; multiple other fishers followed suit and
19 abandoned the area. Testimony at 3985-3987. Mr. Settler estimates that he suffered a direct
20 economic impact, because he lost two days of fishing. Testimony at 3988-3989. He estimates
21 that he lost \$1500 in sales. Testimony at 3988. Afterwards, the the tribes held a healing
22 ceremony, a religious ceremony, cleansing the area. Testimony at 3954-3955.

23 Overall, the Tribal Parties will bear the costs associated with an oil spill. In addition to
24 the risk to fishing sites and cultural resources, the Tribal Parties will have to expend a significant

1 amount of resources in dealing with the consequences of the Vancouver Energy Project. The
2 increased risk of oil spills will have a direct impact on the Tribal Parties. It is important that
3 these risks be considered by EFSEC, when weighing the benefits and risks of the project.

4 **F. The Proponents Understate the Risks of the Project.**

5 After several weeks of testimony, it is clear that Vancouver Energy is willing to take
6 short cuts in safety; they avoid true liability through a complex business structure that is vague
7 on management control and liability, their risk assessments neglect to examine risks even within
8 their project boundaries, and they're satisfied with designing their terminal structures at lower
9 standards than risk practices should allow. Witnesses for Vancouver Energy admitted that they
10 could build this terminal to safer standards. Transcript at 1171-1172; 3846. Other witnesses
11 testified that the facilities have been developed to Risk Category II of the American Society of
12 Civil Engineers, *Minimum Design Loads for Buildings and Other Structures 7-10* (ASCE 7-10).
13 *See, e.g.*, testimony at 1171 (Rohrbach); 3845 (Gibbs); 3013-3014 (Wartman).

14 The Washington Building Code relies on the International Building Code. RCW §
15 19.27.031 (1)(a); WAC 51-50-0312. The International Building Code relies on ASCE 7-10.
16 Gibbs, Like ASCE 7-10, Section 1604.5 of the International Building Code describes Risk
17 Categories for structural design. And like ASCE 7-10, the key factor under the International
18 Building Code that distinguishes risk category III from lower risk categories, including Risk
19 Category II, is whether the structure “represent[s] a substantial risk to human life in the event of
20 structural failure.” International Building Code § 1604.5.² If so, the structure should be
21 designed to Risk Category III. In so doing, the structure would be designed to more robust

23 ² ASCE 7-10 Risk Category III is intended for “structures the failure of which could pose a substantial risk to human
24 life” including facilities that handle “hazardous fuels.” ASCE 7-10, Table 1.5-1. Perhaps reflecting the fundamental
importance of risk determinations, ASCE treats this topic extensively in its first chapter.
ftp://ftp.consrv.ca.gov/pub/oil/SB4DEIR/docs/GEO_ASCE_2010.pdf.

1 standards by an importance factor of 1.25. That is, if built to Risk Category III instead of Risk
2 Category II, the facility would be built to be 25% more robust. Testimony at 3012-3014.

3 Numerous witnesses testified how about the risk to human life posed by the multiple
4 facilities to be located at the Vancouver Energy terminal. *See, e.g.*, Transcript at 1292-1296. It is
5 abundantly clear to the tribes that Vancouver Energy regards its project as just another Class II
6 industrial facility. The Vancouver Energy Terminal adds more unacceptable risk burden to an
7 ecosystem that is under repair.

8 III. CONCLUSION

9 The Tribal Parties incorporate by reference and hereby preserve all issues previously
10 raised in this proceeding in their filings. For the reasons set forth above, the Tribal Parties
11 respectfully request that the Council issue a recommendation to the Governor, to reject Tesoro
12 Savage's Application for Site Certification.

13 Respectfully submitted this 6th day of September, 2016.

14
15 

16 _____
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1 **CERTIFICATE OF SERVICE**

2 I certify that on the date provided below, I sent a true and correct copy, via e-mail, of
3 the foregoing documents, to all parties or their counsel of record, as listed below:

4 Energy Facility Site Evaluation Council [] Via Hand Delivery
PO Box 43172 [X] Via E-Mail
5 Olympia, WA 98504-3172 [] Via First Class Mail/Postage Prepaid
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6 Kelly J. Flint [] Via Hand Delivery
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9 *Applicant*

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23 *Washington State Attorney General’s Office*

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| 4 | <i>City of Spokane</i> | |
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| | Scott Russon | <input checked="" type="checkbox"/> Via E-Mail |
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| 20 | <i>Department of Fish and Wildlife</i> | |
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| | David Danner, Chairman | <input type="checkbox"/> Via Hand Delivery |
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| 24 | <i>Utilities and Transportation Commission</i> | |

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7
8 I declare under penalty of perjury under the laws of the State of Washington that the
9 foregoing is true and correct.

10 Executed this 6th day of September, 2016, in Portland, OR.

11 

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