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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

**CITY OF VANCOUVER'S
OPPOSITION TO APPLICANT'S RCW
80.50.140(2) PROCEDURAL
OBJECTIONS**

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1 **1. INTRODUCTION**

2 The City of Vancouver asks EFSEC to simply note the Applicant's objections. The
3 Applicant has not raised any substantiated objections, conceding it "is not currently in a
4 position," to know if there was an error or not.¹ Alternatively, if EFSEC were to reach the
5 merits, these unsubstantiated objections lack any legal basis, so should be denied.

6 The Applicant improperly attempts to link EFSEC Chair statements regarding EFSEC's
7 attorneys, with Counsel for the Environment, or CFE, statements. The Attorney General
8 comments the Applicant raises concerns over were made by the CFE. The CFE is an attorney
9 who represents not EFSEC, but the public interest. Once the CFE realized the project threatened
10 the public interest, as with any attorney, that triggered a duty to protect his client's interests,
11 which is precisely what the CFE did. The Applicant may be upset that opposing counsel
12 objected to its project, but that was the CFE's statutorily assigned job and was consistent with his
13 duties under the RPC.² With respect to the EFSEC Chair's departing comments on EFSEC's
14 counsel, to the extent an agency official may disagree with the advice of his assigned legal
15 counsel, such matters are for the client and counsel to resolve, not an outside litigant.

16 Finally, as the City did not have the benefit of all the records EFSEC produced for the
17 Applicant, copies of same have been requested. The City reserves the right to supplement this
18 response if necessary, once received.

19 **2. ARGUMENT**

20 **2.1. The Counsel for the Environment's Client is not EFSEC, but the Public.**

21 The Applicant relies on CFE statements to make its objections, but the CFE does not
22 represent EFSEC. CFE duties run not to EFSEC, but the public, the statutorily assigned client.

23 After the council has received a site application, the attorney general shall appoint
an assistant attorney general as a counsel for the environment. **The counsel for
the environment shall represent the public and its interest in protecting the
quality of the environment. ... He or she shall be accorded all the rights,**

¹ Applicant's RCW 80.50.140(2) Procedural Objections, p. 2:14-16.

² Rules of Professional Conduct, governing lawyers professional and ethical responsibilities to their clients.

1 **privileges, and responsibilities of an attorney representing a party in a**
2 **formal action.**³

3 The CFE, as an independent party to the EFSEC proceeding,⁴ is "an assistant attorney
4 general or a special assistant attorney general **who shall represent the public** in accordance with
5 RCW 80.50.080."⁵ The CFE "operates independently of EFSEC, other state agencies and parties
6 involved in the site application."⁶

7 The CFE position is a unique component of the EFSEC review process. The position is
8 designed to protect the public from environmental risks. EFSEC's statutory and regulatory
9 structures place extraordinary emphasis on protecting the public's right to a healthful
10 environment ("each person has a fundamental and inalienable right to a healthful environment"),⁷
11 and the CFE is a critical component of these protections. Once the CFE realizes that the public's
12 right to a healthful environment is threatened, the CFE's role is to advocate against those harms.⁸

13 The Supreme Court has "repeated on a few occasions that the attorney general's
14 paramount duty is to protect the interests of the people of the state."⁹ In addressing the CFE's
15 role specifically, the Supreme Court has found that "RCW 80.50.080 must be interpreted as
16 according the Attorney General discretion in the exercise of his duties as counsel for the
17 environment."¹⁰

18 ³ RCW 80.50.080, emphasis added.

19 ⁴ WAC 463-30-060(3) (parties defined as applicant, member agency, and counsel for the environment).

20 ⁵ RCW 80.50.020(9), emphasis added.

21 ⁶ Applicant's RCW 80.50.140(2) Procedural Objections, Ex. C, p. 2.

22 ⁷ WAC 463-47-110(1)(c). See also RCW 80.50.010 (codified legislative findings).

23 ⁸ See e.g., RPC 1.3, cmt. 1 ("A lawyer should pursue a matter on behalf of a client despite opposition,
obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required
to vindicate a client's cause or endeavor.").

⁹ *Goldmark v. McKenna*, 172 Wn.2d 568, 578, 259 P.3d 1095 (2011) (duty to represent state client in appeal);
compare with *City of Seattle v. McKenna*, 172 Wn.2d 551, 259 P.3d 1087 (2010) (city not awarded mandamus
against attorney general to withdraw health care law challenge).

¹⁰ *Blue Sky Advocates v. State*, 107 Wn.2d 112, 119, 727 P.2d 644 (1986) (intervenor had no malpractice or private
attorney general claims against CFE).

1 The CFE properly exercised that discretion here. Once the CFE realized the project
2 jeopardized the public interest, the CFE presented his client's case. This included advocating
3 against the project in closing argument. The Applicant provided a press release summarizing the
4 argument.

5 After weeks of testimony before EFSEC from a variety of parties, Counsel for the
6 Environment concluded that Tesoro Savage has not shown that the need for the
7 project outweighs the potential environmental harms. If the Tesoro Savage facility
8 is completed, according to testimony in the hearings, vessels loaded with crude oil
9 would make 365 trips a year along the Columbia River, and an additional 3,000
oil trains would run through the state annually to service the project. Even if
EFSEC concludes the risk of a worst-case spill or public safety disaster from
those trains and vessel is statistically low, the potential environmental
consequences and impacts to the public of such a spill are massive.¹¹

10 While the Applicant was clearly not pleased the CFE recognized this project threatens the
11 public interest, the CFE was simply doing what attorneys do; protecting the client. There is no
12 basis for a procedural objection simply because a party is concerned with the strength of
opposing counsel's legal arguments.

13 **2.2. The Applicant has not Actually Claimed any Errors Occurred.**

14 The Applicant concedes it **"is not currently in a position to evaluate the extent to**
15 **which the Attorney General's Office activity constituted a substantive or procedural**
16 **error."**¹² Consistent with this concession, the Applicant simply includes a cryptic three point
17 bullet point list, listing three possible bases for objection.¹³ The assertions are not substantiated.

18 Instead of supporting the objections, the Applicant makes incorrect assertions on the
19 CFE's role as addressed above, and identifies EFSEC Chair concerns over the approach of
20 assigned legal counsel. No facts are provided on how such a dispute could possibly implicate the
three bare objections.

21
22 ¹¹ Applicant's RCW 80.50.140(2) Procedural Objections, Ex. C, pg. 1.

23 ¹² Applicant's RCW 80.50.140(2) Procedural Objections, p. 2:14-16, emphasis added. Presumably, the Applicant
was aware that procedural errors must be promptly raised or they will be waived. RCW 80.50.140(2).

¹³ Applicant's RCW 80.50.140(2) Procedural Objections, p. 3:3-6.

1 In any case, a state official's claimed dispute with assigned legal counsel does not give
2 rise to a procedural error claim from a permit applicant. It is up to the attorney and client to
3 resolve their differences. A party before a tribunal does not have a right to utilize such attorney-
4 client disputes in what appears to be an 11th hour attempt to distract from the problems inherent
5 with this project.

6 **3. CONCLUSION**

7 The City asks EFSEC to simply note the Applicant's objections. The objections are not
8 substantiated, as the Applicant concedes, and the Applicant has forgotten that the CFE does not
9 represent EFSEC, but the public.

10 Respectfully submitted, this 21th day of September, 2017.

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