BEFORE THE STATE OF WASHINGTON

ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of: Application No. 2013-01 TESORO SAVAGE, LLC VANCOUVER ENERGY DISTRIBUTION TERMINAL	CASE NO. 15-001 ORDER CLARIFYING EFSEC'S PROCESS, MODIFYING DISPOSITIVE MOTION DEADLINE, SUMMARIZING PRELIMINARY ISSUES, AND SETTING HEARING DATES

Procedural Setting:

As required by the Pre-Hearing Order Establishing Procedures and Setting Deadlines for Submittals, with one exception (International Longshore Warehouse Union Local 4), the parties submitted proposed issues and potential witnesses and exhibits. Together, the parties have listed 107 potential issues, 117 potential witnesses (81 expert and apparent expert witnesses), and 383 potential exhibits.

Some parties did not list named witnesses or specific exhibits, but indicated an intention to name witnesses at a later, unspecified time. Although all parties stressed the preliminary nature of their lists, they have provided sufficient information to the other parties for discovery to proceed. With regard to proposed witnesses, as soon as possible, all parties should complete the designation of their listed witnesses as expert witnesses, fact witnesses, or both.

Jurisdictional and Standing Issues:

The EFSEC process is designed to proceed in as timely and efficient a fashion as possible. Five comprehensive jurisdictional issues were listed by Tesoro/Savage. The parties were previously encouraged to bring jurisdictional motions earlier in the process as the Council requires sufficient time to address such issues prior to the intensive pre-hearing events. In light of the number of proposed issues, witnesses, and exhibits listed so far in this compressed adjudication schedule, it is necessary to require motions on issues concerning EFSEC's jurisdiction and authority be brought earlier in the process than was previously ordered. Therefore motions on the following issues are due 90 days before the scheduled hearing, as ordered below.

A. Does EFSEC have jurisdiction to address issues concerning rail transportation or to impose mitigation for impacts associated with rail transportation?

B. Does federal law preempt EFSEC from regulating any aspect of the Vancouver Energy Distribution Terminal (the VEDT) with regard to rail transportation?

C. Does EFSEC have jurisdiction to address issues concerning marine vessel transportation or to impose mitigation for impacts associated with marine vessel transportation?

D. Does federal law preempt EFSEC from regulating any aspect of the VEDT with regard to marine vessel transportation?

E. Does EFSEC have preemptive authority to issue all state and local permits and approvals necessary for construction and operation of the facility, and, if so, how will EFSEC implement such authority?

F. Whether each intervenor in this adjudication met the requirements for standing and intervention in an EFSEC adjudication for each issue they have identified, in accordance with RCW 34.05.443 and WAC 463-30-091 and -092.

Clarification of EFSEC's Process:

Many parties have listed issues that challenge the adequacy and correctness of EFSEC's Draft Environmental Impact Statement (DEIS). They have also indicated an intent to offer the DEIS into evidence. However, EFSEC's adjudication process is separate from its environmental review. It is not an appeal of EFSEC's SEPA process or products. RCW Chapter 43.21C (SEPA) provides that agencies may have either an administrative, internal appeal process or no administrative environmental appeal.

> [A]n entity charged with making SEPA determinations may choose whether or not to provide an internal appeals process for challenging its determinations. *See WAC 197-11-680(2)* ("Agencies may establish procedures for such an appeal, or may eliminate such appeals altogether, by

> rule, ordinance or resolution.") If the entity permits an appeal of the threshold SEPA determination, however, that appeal must be tied to the underlying government action – for example, the government decision to grant or deny a CUP. RCW 43.21C.075; WAC 197-11-680(3)(a)(v). In other words, an agency or local government cannot provide an appeal of only the SEPA threshold determination. State law permits the locality or agency to provide a SEPA appeal procedure only if the locality or agency also provides for a hearing on the action to which the SEPA determination relates.
>
> Moreover, the government entity permitting the SEPA appeal "[s]hall consolidate an appeal of [SEPA] determinations…with a hearing or appeal on the underlying governmental action by providing for a single simultaneous hearing." RCW 43.21C.075 (3)(b).
>
> *Ellensburg Cement Prods., Inc., 179 Wn.2d 737, 744, 317 P.3d 1037 (2014).*

EFSEC's statues and rules do not provide for an administrative appeal of its SEPA process, decisions, products, and ultimate recommendation. And its decisions and recommendation on a proposal are not final decisions from which an appeal may be taken. This is reflected in EFSEC's rules, for example, its rule that forbids subpoena of any of its staff or the independent consultants who typically work on the SEPA process and development of the SEPA studies:

> No subpoena shall be issued or given effect to require the attendance and testimony of, or the production of evidence by, any member of the council or any member of the council staff. For these purposes, the council's independent consultant is deemed a member of the council staff.
>
> WAC 463-30-200(5).

WAC 463-30-200(5) implements EFSEC's statutory scheme that does not allow for an internal appeal of its SEPA determinations, EISs, or related studies, or of its recommendation to the governor. For these reasons, EFSEC cannot address issues that simply challenge the adequacy of its own EIS or DEIS. EFSEC's separate adjudication is the parties' opportunity to supplement the information the Council receives through its other processes by the presentation of evidence on any relevant topic. This includes environmental subjects that may or may not have been addressed by EFSEC in its environmental impact studies.

Also, for the most part, the parties' articulation of preliminary issues does not lend itself to the adjudication setting, where the Council must make findings and conclusions on the litigated issues. As written, the parties' preliminary adjudication issues are overly broad, multi-subject, or expressed as essentially critiques of the DEIS and the SEPA process. The adjudication not being an appeal of EFSEC's environmental review, or the DEIS the issues have been re-framed to reflect the separate and different structure of the adjudication proceeding.

Procedural Issues:

1. Whether the applicant (Tesoro/Savage) has met all requirements of Chapter 463-60 WAC for an application for site certification for the Vancouver Energy Distribution Terminal (the VEDT).

2. Whether the Tesoro/Savage VEDT application process is consistent with all applicable laws and regulations.

3. Whether Tesoro/Savage has demonstrated that it will meet the construction standards for energy facilities of Chapter 463-62 WAC for the VEDT.

4. Whether Tesoro/Savage has demonstrated that it has the means to be utilized or minimize possible adverse impacts during construction, operation, and decommissioning of the VEDT.

Environmental Impact Issues:

5. Whether the location and operation of the proposed VEDT will produce minimal adverse effects on the environment, the ecology of the land and its wildlife, and the ecology of state waters and their aquatic life, as required by RCW 80.50.010.

6. Whether the proposed VEDT will be an appropriate balance of the statutory factors required by RCW 80.50.010.

7. Whether the proposed VEDT will have direct, indirect and cumulative impacts on the environment with regard to water quality with respect to impacts from diesel emissions and potential oil spills and/or train derailments at the project location and along the rail route and, if so, whether such effects can be adequately mitigated.

8. Whether the proposed VEDT protects the public's interest in protecting the quality of the environment with respect to effects on water quality, streams, rivers, wetlands, and shoreline areas and, if so, whether such effects can be adequately mitigated.

9. Whether the proposed VEDT plans for oil spill response are adequate as to the potential for oil spills in the Columbia River related to the proposal and whether the plans take into account variables associated with the proposal, including the transportation of crude by rail, the nature of crude oil/bitumen being transported to and from the facility, and the conditions on the Columbia River as to how they affect oil spill response planning related to the proposal.

10. Whether the proposed VEDT protects the public's interest in protecting the quality of the environment with respect to the public resources necessary to effectively clean an oil spill in the Columbia River, and whether any such effects can be adequately mitigated.

11. Whether the proposed VEDT will cause oil spill response impacts related to the sources and types of crude oil shipped and their unique properties as to health risks, fire and explosion, spill clean-up, and climate impacts and whether any such impacts can be adequately mitigated.

12. Whether the proposed VEDT will have direct, indirect and cumulative impacts on the environment with regard to air quality and air pollutant emissions related to the VEDT facility, its construction and operation, both at the facility, in the surrounding neighborhoods or "air shed," and along the transportation routes and, if so, whether such impacts can be adequately mitigated.

13. Whether the proposed VEDT protects the public's interest in the quality of the environment with respect to greenhouse gas emissions associated with all aspects of the VEDT, including but not limited to project construction and crude oil transportation, refining, and combustion of oil.

14. Whether the proposed VEDT will cause climate change impacts, including but not limited to impacts from the extraction, processing, and transportation of crude oil to the project, transportation of oil from the project to all potential destinations, oil refining activities, and combustion of oil and refined products and whether any such effects can be adequately mitigated.

15. Whether the proposed VEDT protects the public's interest in protecting the quality of the environment with respect to potential increased wildlife collisions and impacts on wildlife movement/migration as a result of additional rail traffic along the train route and, if so, whether such impacts can be adequately mitigated.

16. Whether the proposed VEDT protects the public's interest with respect to risks from geological or soil hazards, including but not limited to, earthquake, liquefaction, erosion, stability, and landslide risks associated with the proposed VEDT and from the transportation of crude oil to and from the proposed VEDT facility and, if so, whether any such effects can be adequately mitigated.

17. Whether the proposed VEDT will negatively impact plants, fish, and wildlife and their habitat, including any threatened, endangered, and sensitive species and whether any such effects can be adequately mitigated.

18. Whether the proposed VEDT will have noise impacts to surrounding communities and wildlife at the facility and along the transportation routes and whether any such effects can be adequately mitigated.

19. Whether the proposed VEDT will negatively impact recreational and scenic opportunities, including but not limited to, recreational resources in the Columbia River Gorge National Scenic Area, the Columbia River, the City of Vancouver, Glacier National Park, Fort Vancouver National Historic Site, and the Lewis and Clark Greenway Trail.

20. Whether the proposed VEDT will impact local communities as to environmental justice issues, including but not limited to noise, odors, toxic fumes, and rail-related traffic and access issues.

Location-Specific Issues – City of Spokane:

21. Whether all of the proposed VEDT's potential public health, safety, and environmental impacts on the City of Spokane and its urban core caused by the increased rail line transport of crude oil through the City to supply the proposed VEDT have been adequately addressed by Tesoro/Savage.

22. Whether all of the proposed VEDT's potential public health, safety and welfare impacts on the City of Spokane emergency management and fire protection response capabilities caused by the increased rail line transport of crude oil through the City of Spokane to supply the proposed VEDT have been adequately addressed by Tesoro/Savage.

23. Whether all of the proposed VEDT's public health, safety, and environmental impacts on the Spokane Valley-Rathrum Prairie Aquifer, including impacts to the City of Spokane's primary source of drinking water and storm water system caused by the increased rail line transport of crude oil through the City of Spokane to supply the proposed VEDT have been adequately addressed by Tesoro/Savage.

24. Whether all of the proposed VEDT's potential public health, safety, and environmental impacts on the Spokane River and Latah Creek caused by the increased rail line transport of crude oil through the City to supply the proposed VEDT have been adequately addressed by Tesoro/Savage.

Location-Specific Issues – City of Vancouver:

25. Whether the proposed VEDT is consistent with nearby land uses, including, but not limited to downtown Vancouver and the Columbia Waterfront development.

26. Whether the proposed VEDT will create the potential for catastrophic accidents stemming from the transportation and handling of over 15 million gallons of Bakken crude oil and diluted bitumen per day in the heart of the City of Vancouver, the fourth largest city in the State of Washington and whether Tesoro/Savage has included technically sufficient operational safeguards to assure the City's citizens that they are adequately protected.

27. Whether the VEDT presents impacts, risks and costs to the City of Vancouver's citizens, private and public property, environs and infrastructure and emergency response services that are reasonable, given a gap in existing funding to ensure adequate emergency response capability, a gap in adequate financial insurance and other mechanisms to make the City of Vancouver and its citizens whole in the event of a Lac-Megantic style or other catastrophic event and whether any such risks can be adequately mitigated.

28. Whether the proposed VEDT presents special risks and impacts to the City of Vancouver's citizens and urban environment in its City center and the Columbia River environs and whether any such risks and impacts can be adequately mitigated.

29. Whether the proposed VEDT is consistent with the City of Vancouver's vision for its future, as reflected in its land use plans and zoning that accommodate and plan for a heavily populated urban environment with a high quality of life.

30. Whether the proposed VEDT will adversely affect the City of Vancouver's recreational opportunities, including but not limited to the Columbia River, the City of Vancouver Waterfront Park, and the Columbia River Renaissance Trail.

Location-Specific Issues - Clark County:

31. Whether the proposed VEDT presents an unacceptable level of potential impacts to the human health and safety of the inmates or employees at the Clark County Jail Work Center associated with a spill, fire and/or explosion resulting from a variety of potential causes including, but not limited to, human/mechanical error, seismic events, natural disasters, and severe weather events, and whether any such risks can be adequately mitigated.

32. Whether the proposed VEDT presents an unacceptable level of impacts to the human health and safety of the inmates or employees at the Clark County Jail Work Center associated with emissions and particulate matter resulting from construction and operation of the proposed VEDT and whether any such risks can be adequately mitigated.

33. Whether the proposed VEDT presents an unacceptable level of risk to human health and safety to those incarcerated or working at the Clark County Jail Work Center, including but not limited to risks associated with a spill, fire, and/or explosion resulting from a variety of potential causes including emissions and particulate matter resulting from construction and operation of the proposed VEDT and whether any such risks can be adequately mitigated.

34. In the event of an emergency caused by the proposed VEDT, whether there is sufficient emergency preparation and response capability in Clark County to protect human health and safety of those incarcerated or working at the Clark County Jail Work Center.

35. Whether the proposed VEDT presents potential cumulative and secondary impacts to the City of Vancouver involving the operations of the Clark County Jail Work Center, including but not limited to risk management and operational disruption impacts, associated with construction, operations and/or an emergency at the proposed VEDT.

36. Whether there will be impacts on the environmental health and wellbeing of those living and working in proximity to the proposed VEDT, including but not limited to workers and those incarcerated at the Clark County Jail Work Center.

37. Whether there are, or can be, sufficient mitigation measures to address the VEDT's potential impacts on Clark County.

Tribal Issues:

38. Whether the proposed VEDT will impact and, if so, is adequately mitigated as to Native American hunting, fishing and gathering rights, including, but not limited to, impediments to access to any usual and accustomed places.

39. Whether the proposed VEDT will impact and, if so, is adequately mitigated as to geology and soils at the proposed VEDT site and along the transport corridor, including, but not limited to, any impact to those lands ceded to the Umatilla Tribe or the Yakama Nation.

40. Whether the proposed VEDT will impact and, if so, is adequately mitigated as to vegetation, including those of particular cultural significance or to the Umatilla Tribes or the Yakama Nation.

41. Whether the proposed VEDT will impact and, if so, is adequately mitigated as to fish and wildlife, including, but not limited to, those fish and wildlife protected by virtue of the Umatilla Tribes' or the Yakama Nation's reserved rights.

42. Whether the proposed VEDT will have impacts and, if so, is adequately mitigated as to water and air quality impacts to tribal members living along the Columbia River, tribal members exercising their hunting, fishing, and gathering rights, and to fish and wildlife that serve as resources to the Umatilla Tribes or the Yakama Nation.

43. Whether the proposed VEDT will impact and, if so, is adequately mitigated as to cumulative impact to climate change, which, in turn, threatens tribal waters, lands, cultural resources and natural resources.

44. Whether the proposed VEDT will impact and, if so, is adequately mitigated as to public health and safety, including, but not limited to, the potential increase in the discharge of air pollutants, risk of deadly and environmentally devastating spills, derailments, threatening fires, explosions, and the potential release of toxic or hazardous materials, in transit, or at the proposed VEDT site.

45. Whether the proposed VEDT will impact and, if so, is adequately mitigated as to historic and cultural resources, including, but not limited to, tribal cultural properties and sites along the transportation corridor and on the proposed project site.

46. Whether the proposed VEDT will impact and, if so, is adequately mitigated as to tribal public health and safety related to rail tank car safety.

47. Whether the proposed VEDT will impact and, if so, is adequately mitigated as to oil spills and other related hazards, including, but not limited to, impacts to tribal members living along the Columbia River, providing first responders in the Columbia River Gorge with necessary resources so that they are prepared to handle these hazards.

48. Whether the proposed VEDT will impact tribal interests as to oil spills on water quality and aquatic and wildlife ecosystems and, if so, whether any such impacts can be adequately mitigated.

49. Whether the proposed VEDT will impact and, if so, is adequately mitigated as to public health and safety, including, but not limited to, an increase in rail-crossing related risks for tribal fishers.

50. Whether the proposed VEDT will impact and, if so, is adequately mitigated as to the potential impact of increased traffic at rail crossings and associated delays.

51. Whether the proposed VEDT will impact and, if so, is adequately mitigated as to increased rail traffic, including but not limited to, increased diesel particulate air pollution.

52. Whether the proposed VEDT will impact and, if so, is adequately mitigated as to the rail expansion necessary to meet the increase in rail traffic, including but not limited to, rail expansion in the Gorge.

53. Whether the proposed VEDT will impact and, if so, is adequately mitigated as to an increase in rail traffic, including but not limited to, an increased potential for land subsidence.

54. Whether the proposed VEDT will impact and, if so, is adequately mitigated as to the potential for a spill on tribal fishers.

55. Whether the proposed VEDT will impact and, if so, is adequately mitigated as to cultural resources.

56. Whether the proposed VEDT will impact and, if so, is adequately mitigated as to increased vessel traffic in an estuary, including but not limited to, wake stranding, shoreline erosion, fish entrainment, and other estuarine habitat impacts.

57. Whether the proposed VEDT will impact tribal fishers and others and, if so, is adequately mitigated as to the construction and operation of docks.

58. Whether the proposed VEDT will impact and, if so, is adequately mitigated as to flood and the subsequent impact of a flood.

59. Whether the proposed VEDT will impact and, if so, is adequately mitigated as to economic impact to tribal economies.

General Safety Issues:

60. Whether the proposed VEDT protects the public's interest in protecting the quality of the environment with respect to public safety, including but not limited to train safety at the project location and along the rail route and crude oil explosion risk.

61. Whether the proposed VEDT presents additional wildfire risk upon its implementation, including in connection with the transportation of crude oil by rail to the proposed facility

and whether and how such wildfire risk is affected by the nature of the crude oil/bitumen, the timing of such shipments, geography, and other variables.

62. Whether the proposed VEDT includes adequate plans and preparedness levels to combat associated additional wildfires.

63. Whether the proposed VEDT will cause increased vessel traffic, increased large vessel traffic, and increased risk of vessel collisions, groundings, and other accidents.

64. Whether the proposed VEDT will cause public health and safety risks along the rail route, in the Columbia River, and in the Pacific Ocean.

65. Whether the operators of the proposed VEDT will have the capacity to respond to natural disasters or catastrophic accidents, including but not limited to earthquake of any magnitude, floods, windstorms, tank fires, oil spills, train derailments, and other disaster scenarios.

66. Whether the proposed VEDT will cause impacts from construction, modification, and use of roads and rail lines.

Economic Impact Issues:

67. Whether the proposed VEDT will involve economic impacts and benefits, including impacts to the Columbia Waterfront development, downtown Vancouver, and other communities along the rail corridor, agriculture, tourism, and rail freight capacity.

68. Whether the proposed VEDT will cause negative economic impacts including impacts to agriculture, tourism, property values, and rail freight capacity or issues involving the economic viability of the project, including likely future taxes on carbon and the potential decreasing economic benefits over the life of the project associated with potential shifts in markets to other forms of energy.

69. Whether the proposed VEDT will cause longer-term land use impacts, such as clean-up and decommissioning after cessation of operation, extended oil clean-up and continued urban blight following decline and decommissioning of the proposed VEDT.

Other Issues:

70. Whether the proposed VEDT will create additional crude oil demand resulting in the incentivizing potential for additional crude oil extraction in North Dakota, the Alberta tar sands region, and other potential source areas.

71. Whether the proposed VEDT has adequate plans for decommissioning of the facility in the event of a financial misfortune, natural disaster, and/or the conclusion of the project's life cycle.

The parties having submitted their preliminary lists of issues, witnesses and exhibits, the following order is entered:

ORDER

As previously ordered, the parties' final lists of issues are due **30 days** prior to the first day of the commencement of the adjudication. In their final issues lists, the parties shall eliminate any issue upon which no evidence will be presented in the adjudication.

The Pre-Hearing Order Establishing Procedures and Setting Deadlines for Submittals is hereby MODIFIED as follows: Dispositive motions concerning EFSEC's jurisdiction and authority shall be filed no later than **March 29, 2016**.

The adjudication hearing will be held **June 27, 2016 at 9:00 a.m. through July 29, 2016 Monday through Thursday of each week**. The first and last weeks of hearing will be held in Vancouver, Washington, and the intervening weeks will be held in Olympia, Washington. All adjudication proceedings will be open to the public and also made available electronically.

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

DATED and effective at Olympia, Washington this 3rd day of February, 2016.

STATE OF WASHINGTON ENERGY SITE EVALUATION COUNCIL

Cassandra Noble
Administrative Law Judge

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CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. My business address is 1300 S. Evergreen Park Drive S.W., Olympia, Washington 98504.

I HEREBY CERTIFY that on February 3, 2016 I served the following document on the following parties:

I, Kali Wraspir, hereby certify under penalty of perjury under the law of the state of Washington that the foregoing is true and correct. I served the following documents upon each person designated on the official service list in the proceeding.

DATED this 3rd day of February, 2016, at Olympia, Washington.

KALI WRASPIR, Secretary Senior