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Via Web Portal and U.S. Mail

State of Washington
Energy Facility Site Evaluation Council
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www.efsec.wa.gov/Tesoro-Savage.shtml

RE: Draft Industrial Stormwater National Pollution Discharge Elimination System Permit for Tesoro-Savage d/b/a/ Vancouver Energy

Greetings:

The nation's largest oil-by-rail terminal, proposed over and along the Columbia River by Tesoro Refining & Marketing Company LLC, a subsidiary of Tesoro Corporation, and Savage Companies (hereafter "Tesoro-Savage"), would violate state water quality standards, including the state's Antidegradation Policy. Earthjustice submits the following comments to the Energy Facility Site Evaluation Council ("EFSEC") on behalf of Columbia Riverkeeper, Friends of the Columbia Gorge, Stand, Spokane Riverkeeper, Sierra Club, Washington Environmental Council, Climate Solutions, Fruit Valley Neighborhood Association, Oregon Physicians for Social Responsibility, and Washington Physicians for Social Responsibility. **We urge EFSEC to deny the Industrial Stormwater National Pollution Discharge Elimination System ("NPDES") Permit for Tesoro-Savage.** The project would harm water quality in the Columbia River, threaten designated uses, and violate the state's Antidegradation Policy. Additionally, Tesoro-Savage's proposed project in the Columbia River estuary ignores a multi-billion dollar, multi-decade effort to restore endangered and threatened salmonids. Based on the sweeping impacts of Tesoro-Savage's project, EFSEC's legal authority compels the agency to deny Tesoro-Savage's unprecedented proposal.

Tesoro-Savage proposes handling up to 360,000 barrels of oil per day, seven days per week, 24 hours per day. The terminal would generate up to eight trips by loaded and unloaded trains along rail corridors in Washington and Oregon. In addition, the project would add approximately 365 round-trip tanker transits per year of Panamax vessels carrying crude oil through the Columbia River estuary and along the West Coast.

Scientific evidence, expert testimony, and comments by Tribes, federal and state agencies, non-governmental organizations, and the general public document how Tesoro-Savage's project would harm designated uses, violate narrative and numeric water quality

standards, and conflict with the state's Antidegradation Policy. For the reasons explained below, the draft permit fails to comply with federal and state laws designed to protect water quality and designated uses and, therefore, EFSEC should deny Tesoro-Savage's industrial stormwater permit.

OVERARCHING COMMENTS

I. EFSEC SHOULD NOT ISSUE ANY TESORO-SAVAGE PERMITS WITHOUT THE INFORMATION IN AND GUIDANCE OF THE FINAL ENVIRONMENTAL IMPACT STATEMENT.

The Final Environmental Impact Statement ("FEIS") should inform EFSEC's decision on the draft permit. Although EFSEC anticipates releasing the FEIS later this year, the FEIS is still unfinished and remains unavailable to the public for review. It appears that the FEIS will be completed at the same time permits and decisions at EFSEC will be finalized, meaning the FEIS is of little to no use for the decisions made by the agency and is of no value to the public in participating in any part of this process. The very purpose of a FEIS is a "look before you leap" function designed to ensure that government decision-makers and the public have a full opportunity to know and consider the environmental impacts of a proposed government action BEFORE the government takes that action, including action on matters such as NPDES permits. RCW 43.21C.031(1). Under the State Environmental Policy Act ("SEPA"), a full EIS is required for any action that has a significant effect on the quality of the environment, WAC 197-11-330, and there is no question that Tesoro-Savage has such a significant effect.

As Commenters previously explained in comments on the Draft Environmental Impact Statement ("DEIS"), many of EFSEC's conclusions on the project's impacts run counter to scientific evidence, expert testimony, and comments filed by Tribes, state agencies, local governments, and the general public. Commenters disagree with many of the DEIS's conclusions, and it is uncertain how the FEIS will resolve the critiques of DEIS's analyses and findings. Under SEPA, EFSEC must use the FEIS—not the DEIS—to inform a final decision on the draft permit.

Commenters disagree with EFSEC's conclusion that Appendix A § A.2.3.2 of the DEIS is "appropriate for the SEPA analysis required for issuance of this permit." *See* Fact Sheet at 20. EFSEC must rely on the FEIS for issuance of this permit; nothing in state law authorizes EFSEC to rely on a DEIS to issue a final NPDES permit. Moreover, EFSEC received record-breaking testimony on the deficiencies in the DEIS. These comments, including comments filed by federal, state, and tribal government agencies, underscore the importance of EFSEC relying on the FEIS prior to reaching conclusions on the legality of Tesoro-Savage's proposed industrial stormwater permit.

II. THE CLEAN WATER ACT REQUIRES PROTECTION OF U.S. WATERS FROM UNAUTHORIZED POLLUTION.

The Clean Water Act (“CWA”) prohibits any person from discharging pollutants from a point source into waters of the United States except as authorized by a permit issued pursuant to Section 402 or 404 of the Act. 33 U.S.C. § 1311(a). Section 402 of the CWA establishes both the NPDES permitting scheme for discharges of pollutants, and the framework under which discharges of oil and grease, heavy metals, and other pollutants from stormwater are be regulated. Substantively, the NPDES program requires dischargers to meet both technology-based effluent limitations and any more stringent effluent limitations necessary to meet water quality standards. 33 U.S.C. §§1311(b)(1)(a)-(c).¹

Specifically, each discharger must meet minimum technology-based treatment requirements. Section 402 states that all permits must meet all applicable requirements under CWA section 301. 33 U.S.C. § 1342(a)(1). Section 301, in turn, requires all discharges to achieve, at a minimum, best practicable control technology (“BPT”). 33 U.S.C. § 1311(b)(1)(a). Discharges of toxic pollutants must be treated pursuant to the best available technology (“BAT”), 33 U.S.C. § 1311(b)(2)(A), and other pollutant discharges must comply with best conventional technology (“BCT”). 33 U.S.C. § 1311(b)(2)(E). Each of these treatment categories is translated into effluent limitations, which must be reflected in permits as restrictions on rates, quantities, and concentrations of pollutants.

The U.S. Environmental Protection Agency (“EPA”) has primary responsibility for identifying BPT, BCT, and BAT and converting these technology controls into numeric effluent limitation guidelines for particular categories of industrial point sources. *See* 33 U.S.C. § 1314(b). In developing these guidelines, EPA must consider the cost of the application of the particular technology in relation to pollutant reductions that will be achieved, as well as the age of the facilities involved, the processes used, engineering processes, and other relevant factors. *Id.* Once EPA establishes effluent limitation guidelines for a particular industrial point source category, permitting agencies must apply any applicable guidelines to all point source discharges within that category. As a result of this process, certain industrial dischargers benefit from uniform technology-based controls and effluent limitations throughout the country.

EPA has not yet established effluent limitation guidelines for all categories and classes of industrial point sources. Where no such uniform guidelines exist, permitting agencies establish technology-based effluent limitations based on the agency’s “best professional judgment.” *See* 33 U.S.C. § 402(a)(1)(B); 40 C.F.R. § 125.3. As with EPA’s development of effluent limitation guidelines, the establishment of effluent limitations based on BPJ includes a consideration of the

¹ An effluent limitation is “any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters” 33 U.S.C. § 1362(11).

cost of the application of the particular technology in relation to pollutant reductions that will be achieved, as well as the age of the facilities involved, the processes used, engineering processes, and other relevant factors. 40 C.F.R. § 125.3(d). These requirements ensure that facilities are, on a case-by-case basis, subject to the most appropriate treatment controls.

In addition to implementing technology-based controls, each point source discharger must achieve “any more stringent limitation necessary to meet water quality standards, treatment standards, or schedules of compliance, established . . . or required to implement any applicable water quality standard established pursuant to this chapter.” 33 U.S.C. § 1311(b)(1)(C); 33 U.S.C. § 301(b)(1)(C). Water quality standards establish the water quality goals for a water body. 40 C.F.R. § 131.2. They serve as the regulatory basis for the establishment of water quality-based controls over point sources, as required under § 301 and § 306 of the CWA. Water quality standards must include three elements: (1) one or more designated “uses” of a waterway; (2) numeric and narrative “criteria” specifying the water quality conditions, such as maximum amounts of toxic pollutants, maximum temperature levels, and the like, that are necessary to protect the designated uses; and (3) an antidegradation policy and implementation methods that ensure that “[e]xisting instream water uses and the level of water quality to protect the existing uses [will] be maintained and protected” and that high quality waters will be maintained and protected. 33 U.S.C. §§ 1313(c)(2), 1313(d)(4)(B); 40 C.F.R. Part 131, Subpart B. Once water quality standards are established for a particular water body, any NPDES permit authorizing discharges of pollutants into that water body must ensure that the applicable water quality standard will be met.

The process of establishing effluent limitations that are then incorporated into NPDES permits allows industrial dischargers to have a clear, quantifiable understanding of the pollutant reductions they must achieve. The inclusion of objective, numeric limits also allows for easy enforcement of the CWA.

While the substantive requirements of the NPDES permit system form the heart of the CWA, the Act also establishes a transparent permitting and compliance process that empowers citizens and states to play an active role in protecting their environment. The CWA’s emphasis on disclosure of public information also provides added incentive to industrial dischargers to remain in compliance with the law and to take steps to reduce their pollution.

III. STORMWATER POLLUTION DEGRADES WATER QUALITY AND HARMS SALMON AND OTHER DESIGNATED USES.

Stormwater runoff is one of the leading, if not *the* leading, threats to water quality in Washington state. In addition to carrying “conventional” pollutants (*e.g.* increased temperature, pH, low dissolved oxygen, and turbidity), stormwater runoff also contains large loads of toxic pollutants such as heavy metals, oil and grease, pesticides, and organic compounds. Stormwater runoff from residential, commercial, and industrial areas is responsible for 21 percent of impaired lakes and 45 percent of impaired estuaries in the United States. These impacts are caused by both the types of materials carried in runoff and the quantity of runoff, as a high

volume of flow contributes to erosion and sedimentation, and affects aquatic habitats. Of the eleven pollution source categories listed in EPA's National Water Quality Inventory: 2000 Report to Congress, urban runoff storm sewers were ranked as the fourth leading source of impairment in rivers, third in lakes, and second in estuaries.

Pollution from stormwater runoff degrades water quality, impairs beneficial uses, and damages aquatic ecosystems. Of particular concern in Washington, stormwater runoff from developed areas has been directly linked to recurring, acute mortality events in salmonid populations, the recurrence of which is known as "mortality syndrome" or "urban stream syndrome."² A study on the effects of salmonid exposure to highway stormwater runoff revealed that, regardless of variations rainfall conditions and water chemistry, urban highway runoff was "100% lethal to otherwise healthy adult [salmonids]." *Id.* at 402. Adult salmonids exposed to untreated runoff became symptomatic or died within hours of exposure to unfiltered runoff, and those that survived the initial exposure died within 24 hours. *Id.* at 402-04.

Dissolved copper is "worthy of particular scrutiny" because it is "highly toxic to broad range of aquatic species," including multiple species of fishes and invertebrates.³ In 2012, the National Marine Fisheries Service issued a jeopardy decision under the Endangered Species Act (ESA), finding that Oregon's 2004 chronic aquatic life water quality standard for copper would jeopardize the continued existence of endangered species in Oregon. Copper is commonly introduced to the aquatic ecosystem through runoff containing pollutants from "[v]ehicle emissions and brake pad dust," as well from mining and industrial processes.⁴ Copper pollution is of particular concern to Washington and Oregon's salmon populations because, even at low concentrations, dissolved copper is a "potent neurotoxicant" that causes direct damage to salmonids' sensory functions.⁵ Sensory damage caused by exposure to dissolved copper includes impairment of sensory neurons in the noses of salmonids and of juvenile predator detection and avoidance behaviors.⁶ Copper exposure in salmonids also reduces homing abilities and disrupts both upstream and downstream spawning and migration in both adults and

² Julann A. Spromberg et al., *Coho salmon spawner mortality in western US urban watersheds: biolinfiltration prevents lethal storm water impacts*, 53 J. Applied Ecology 398, 405 (2016).

³ Scott A. Hecht et al., *An overview of sensory effects on juvenile salmonids exposed to dissolved copper: Applying a benchmark concentration approach to evaluate sublethal neurobehavioral toxicity*, 7 (Oct. 2007) [hereinafter *White Paper*] (unpublished technical white paper, prepared by Off. Protected Res., Nat'l Marine Fisheries Serv.) (white paper available at <http://www.ecy.wa.gov/programs/wq/stormwater/industrial/iswgpdraftpubcom/2007/nmfscopper2.pdf>) (attachment to Letter from Steven W. Landino, Wash. St. Dir. Habitat Conservation, Nat'l Marine Fisheries Serv. to Mike Gearhard, Dir., Off. Water and Watersheds, U.S. Env't'l Prot. Agency, Region 10 (May 4, 2007) (letter available at <http://www.ecy.wa.gov/programs/wq/stormwater/industrial/iswgpdraftpubcom/2007/nmfs.pdf>)).

⁴ *Id.* at 7.

⁵ *Id.*

⁶ *Whitepaper, supra*, app. at 22.

juveniles, resulting in reduced reproductive success.⁷ Further negative effects of salmonid exposure to copper include “decreased immune function and disease resistance, increased susceptibility to stress, liver damage, reduced growth, impaired swimming performance, weakened eggshells, and direct mortality.”⁸ The well-documented impacts of stormwater pollution on ESA-listed species underscores the importance of EFSEC’s role in issuing or denying an industrial stormwater permit for Tesoro-Savage.

DETAILED COMMENTS ON THE DRAFT INDUSTRIAL STORMWATER PERMIT

Commenters offer the following specific comments on EFSEC’s draft NPDES Industrial Stormwater Permit. As drafted, the permit fails to comply with the Clean Water Act and Washington state law, *see* RCW Chapter 90.48. For the reasons explained below, EFSEC should deny the draft permit because water pollution from the proposed project will violate Washington state’s Antidegradation Policy and other water quality standards.

A. The Draft Permit Violates Washington’s Antidegradation Policy.

The draft permit project fails to comply with Washington’s Antidegradation Policy. WAC 173-201A-300 states:

The purpose of the antidegradation policy is to:

- (a) Restore and maintain the highest possible quality of the surface waters of Washington;
- (b) Describe situations under which water quality may be lowered from its current condition;
- (c) Apply to human activities that are likely to have an impact on the water quality of a surface water;
- (d) Ensure that all human activities that are likely to contribute to a lowering of water quality, at a minimum, apply all known, available, and reasonable methods of prevention, control, and treatment (AKART); and
- (e) Apply three levels of protection for surface waters of the state, as generally described below:
 - (i) Tier I is used to ensure existing and designated uses are maintained and protected and applies to all waters and all sources of pollution.
 - (ii) Tier II is used to ensure that waters of a higher quality than the criteria assigned in this chapter are not degraded unless such lowering of water quality is necessary and in the overriding public interest. Tier II applies only to a specific list of polluting activities.
 - (iii) Tier III is used to prevent the degradation of waters formally listed in this chapter as ‘outstanding resource waters,’ and applies to all sources of pollution.

⁷ *Id.* at 25-27.

⁸ *Id.* at 29.

EFSEC must evaluate the applicability of Tier I and II under a pollutant-by-pollutant approach.⁹

Pursuant to WAC 173-201A-300, EFSEC must conduct a Tier II Antidegradation Policy Review for Tesoro-Savage's draft NPDES permit. *See* WAC 173-201A-320(2)(a) ("A Tier II review will only be conducted for new or expanded actions conducted under the following authorizations ... (a) National Pollutant Discharge Elimination System (NPDES) waste discharge permits[.]"); *see also* Fact Sheet at 24 ("EFSEC determined that this facility must meet Tier II requirements."). Tesoro-Savage's oil-by-rail terminal constitutes a "new ... action[.]" within the meaning of WAC 173-201A-320(2)(a)."

Pollution authorized under the Draft Permit would cause a "measureable change" in water quality and, therefore, EFSEC must determine whether "the lowering of water quality is necessary and in the overriding public interest." WAC 173-201A-320(1) states:

Whenever a water quality constituent is of a higher quality than a criterion designated for that water under this chapter, new or expanded actions within the categories identified in subsection (2) of this section that are expected to cause a measurable change in the quality of the water (see subsection (3) of this section) may not be allowed unless the department determines that the lowering of water quality is necessary and in the overriding public interest (see subsection (4) of this section).

WAC 173-201A-320(3) defines "measurable change," stating:

- (3) **Definition of measurable change.** To determine that a lowering of water quality is necessary and in the overriding public interest, an analysis must be conducted for new or expanded actions when the resulting action has the potential to cause a measurable change in the physical, chemical, or biological quality of a water body. Measurable changes will be determined based on an estimated change in water quality at a point outside the source area, after allowing for mixing consistent with WAC 173-201A-400(7). In the context of this regulation, a measurable change includes a:
- (a) Temperature increase of 0.3°C or greater;
 - (b) Dissolved oxygen decrease of 0.2 mg/L or greater;
 - (c) Bacteria level increase of 2 cfu/100 mL or greater;
 - (d) pH change of 0.1 units or greater;
 - (e) Turbidity increase of 0.5 NTU or greater; or
 - (f) Any detectable increase in the concentration of a toxic or radioactive substance.

(emphasis in original). EFSEC did not authorize a mixing zone in the Draft Permit. *See* Fact Sheet at 26. Therefore, EFSEC must evaluate "a measureable change" at the point of discharge.

⁹ Letter from U.S. Environmental Protection Agency to Ecology, "EPA Review of 2003 Water Quality Standards Regulations for Antidegradation" at 5 (May 2, 2007), http://www.ecy.wa.gov/Programs/wq/swqs/epa-antideg_policy_approval.pdf.

EFSEC's Fact Sheet demonstrates that discharges authorized under the permit would cause a "measurable change" in water quality, as defined in WAC 173-201A-320(3)(f). Specifically, the Fact Sheet describes "detectable increase[s] in the concentration of ... toxic ... substance[s]" within the meaning of WAC 173-201A-320(3)(f). The Fact Sheet states:

EFSEC has not authorized a mixing zone in the permit.

Toxic Pollutants--Federal regulations (40 CFR 122.44) require EFSEC to place limits in NPDES permits on toxic chemicals in an effluent whenever there is a reasonable potential for those chemicals to exceed the surface water quality criteria. EFSEC does not exempt facilities with technology-based effluent limits from meeting the surface water quality standards. The permittee predicted that following toxic pollutants are present in the discharge based on wastewater information from a facility with similar operations: copper, zinc, benzene, ethylbenzene and toluene. Based on water quality criteria listed in Section 173-201A WAC and effluent monitoring data from facilities with similar operations, EFSEC determined copper, zinc, benzene and BTEX have the potential to cause violation of water quality and it is necessary to establish effluent limits to protect the receiving water quality. The benzene and BTEX limits in the permit are technology-based limits, as described in the previous section. The water quality based limits for copper and zinc are calculated using an Excel spreadsheet (PermitCalcMarch9-2015) developed by Ecology based on criteria listed in Chapter 173-201A WAC.

Fact Sheet at 26 (emphasis in original). Under WAC 173-201A-320(4), "[o]nce an activity has been determined to cause a measurable lowering in water quality, then an analysis must be conducted to determine if the lowering of water quality is necessary and in the overriding public interest."

EFSEC failed to conduct the WAC 173-201A-320(4) "public interest analysis." Instead, EFSEC concludes:

The permittee had conducted a Tie[r] II analysis (Section 16.2.6 Vancouver Energy Revised Engineering Report dated August 12, 2016) to assess if discharge from the facility will cause measurable impact in the receiving waterbody as defined in Chapter 173- 201A-320 WAC. The Tier II analysis showed that based on the expected treatment levels; discharge from the facility would not cause measurable change in the Columbia River.

EFSEC's conclusion that the facility would not cause a measurable change in water quality is internally inconsistent with the agency's findings on the need for water quality-based effluent limitations. *See* Fact Sheet at 26 (concluding that there is a reasonable potential for copper, zinc, benzene and BTEX to exceed the surface water quality criteria and, therefore, imposing effluent limits). Overall, EFSEC's conclusion that the "discharge from the facility would not cause measurable change in the Columbia River" and, in turn, the agency's decision

not to “determine if the lowering of water quality is necessary and in the overriding public interest” violates WAC 173-201A-320(4).

In summary, EFSEC must conduct the WAC 173-201A-320(4) analysis. For the reasons described in by Columbia Riverkeeper *et al.* in expert testimony and filings in the Tesoro-Savage adjudication—as well as testimony by the Columbia River Inter-Tribal Fish Commission, individual tribes, the Commissioner of Public Lands, the Counsel for the Environment, and many others—EFSEC must conclude that the lowering of water quality is not necessary and in the overriding public interest.

B. The Draft Permit Fails To Address Human Health Criteria.

EFSEC fails to ensure Tesoro-Savage’s industrial stormwater discharges will comply with the state’s human health criteria water quality standards. Washington’s water quality standards include numeric human health-based criteria that EFSEC must consider when writing NPDES permits. EPA recently revised the human health criteria applicable to Washington state. *See* 40 CFR 131.45. EFSEC fails to ensure the permit complies with applicable human health criteria. EFSEC states:

Stormwater discharges are highly intermittent and highly variable in discharge volumes, durations, and pollutant concentrations, both between storms and during a single storm event. Therefore, deriving numeric effluent limits for human health criteria is infeasible. Based on the authority of 40 CFR 122.44(k)(3), this permit should require the implementation of best management practices (BMPs) to control or abate human health pollutants from these discharges. The draft permit will not establish effluent limits based on human health criteria. The permit instead will require will require implementation of BMPs as specified in Special Condition S7.

EFSEC cites no authority in the Clean Water Act, EPA implementing regulations, or state law to support its reasoning that human health criteria do not apply to “highly intermittent and highly variable discharge volumes.” Nor does EFSEC analyze, based on rain data or discharge monitoring report records from other industrial facilities at the Port of Vancouver, the factual validity of its statement that stormwater discharges are “highly intermittent and highly variable” in Vancouver, Washington.

The only legal authority EFSEC cites, 40 CFR 122.44(k)(3), does not override EFSEC’s duty to ensure compliance with human health criteria water quality standards. In particular, EFSEC cites 40 CFR 122.44(k)(3) to demonstrate the agency’s authority to require the implementation of best management practices (“BMPs”) for stormwater discharges. However, the authority to require BMPs does not override the applicability of 40 CFR 122.44(a) – (j) or the agency’s duty to ensure compliance with all state water quality standards, including human health criteria. Overall, EFSEC fails to cite any authority for the proposition that a state agency can require BMPs as a substitute for ensuring compliance with human health criteria water quality standards in an NPDES permit. Accordingly, EFSEC must revise the draft permit.

C. The Draft Permit Ignores Temperature Impacts.

The Columbia River suffers from elevated water temperatures that threaten salmon and other aquatic life. Yet the draft permit fails to ensure the facility complies with temperature water quality standards and protects designated uses harmed by stormwater runoff from Tesoro-Savage's 47.4-acre industrial site.

Studies document that stormwater discharges contribute to high temperatures in receiving waterways.¹⁰ The draft permit, however, does not analyze whether the facility would cause or contribute to violations of temperature water quality standards or harm designated uses. In addition, the draft permit fails to analyze whether a new discharger of temperature pollution is allowed in a waterbody listed on the state's 303(d) list or establish effluent limitations—or even benchmarks—for temperature. In short, EFSEC ignores temperature in the draft permit and, in so doing, violates federal and state law.

EFSEC's rationale for ignoring temperature pollution from Tesoro-Savage's facility runs counter to scientific evidence on the impact of industrial stormwater on temperature and EFSEC's duty to ensure compliance with water quality standards, including protection of designated uses. The Fact Sheet states:

EFSEC determined that temperature is not a significant stormwater pollutant parameter. Therefore, the proposed permit does not include a temperature limit and it does not require the facility to monitor temperature in the stormwater discharges. EFSEC may elect to develop procedures and guidance for regulating the effects of stormwater to comply with temperature water quality criteria in the future.

¹⁰ See U.S. General Accounting Office, *Water Quality: Better Data and Evaluation of Urban Runoff Programs Needed To Assess Effectiveness* Report to Congress at 19 (June 2001). See also U.S. EPA, *Urban Stormwater Preliminary Data Summary* (undated), https://www.epa.gov/sites/production/files/2015-10/documents/usw_b.pdf (“The temperature of urban waters is often affected directly by urban runoff. Urban runoff can be heated as it flows over rooftops, parking lots and roadways. When it reaches urban waterways it can cause a temporary fluctuation in the in-stream water temperature. Other factors that tend to increase summer water temperature in urban waters include the removal of vegetation from stream banks, reduced ground water baseflow, and discharges from storm water facilities with elevated water temperature. Frequent fluctuations in stream temperature stress the aquatic ecosystem, and make it difficult for temperature-sensitive species to survive.”); R.J. Winston *et al.*, *Thermal Mitigation of Urban Storm Water by Level Spreader-Vegetative Strips*, *Journal of Env'tl Engr'g*, 707 – 716 (Aug. 2011), <http://www.webpages.uidaho.edu/ce431/Articles/Winston-ASCE-2011.pdf> (describing research on elevated temperature from urban stormwater and BMPs to reduce temperature impacts).

This is impermissible, particularly since the Columbia River is impaired due to high temperatures.

Commenters request that EFSEC address the following questions:

1. How did EFSEC “determine that temperature is not a significant stormwater pollutant parameter” given copious scientific evidence linking urban stormwater pollution, including industrial stormwater pollution, to elevated temperatures?
2. EFSEC determines it will not evaluate temperature as pollutant parameter in the draft permit because temperature is not a “significant stormwater pollutant parameter.” What statutory or regulatory authority does EFSEC rely on to conclude this is the legal test to determine whether to account for temperature in the draft permit?

Tesoro-Savage will discharge industrial stormwater pollutant from a 47.4 acre area covered by impervious surfaces (*i.e.*, concrete, roads, massive oil tanks, and piping). EFSEC’s rationale for ignoring the serious issue of temperature in the Columbia River is divorced from the Clean Water Act, state water quality laws, and the Endangered Species Act, which prohibits adverse modification of ESA-listed species’ critical habitat, among other things. Commenters urge EFSEC to modify the permit to ensure Tesoro-Savage’s discharges comply with narrative and numeric water quality standards and protect designated uses, including ESA-listed salmon and other aquatic life.

D. EFSEC Failed To Explain How It Derived All Technology-Based Effluent Limits.

EFSEC determined copper, zinc, benzene, and BTEX have the potential to cause violations of water quality and, therefore, the draft permit proposes effluent limits for those parameters. The benzene and BTEX limits in the permit are technology-based limits. The Fact Sheet notes, “EFSEC must ensure that facilities provide all known, available, and reasonable methods of prevention, control, and treatment (AKART) when it issues a permit.” Fact Sheet at 22. Technology-based limitations are set by regulation in the federal effluent guidelines or on a case-by-case basis using Best Professional Judgment (“BPJ”) when no effluent guidelines exist for an industrial category.

EFSEC relies on BPJ to develop technology-based effluent limitations in the draft permit; however, EFSEC fails to explain how it derived BPJ technology-based limits. The Fact Sheet states: “Technology-based limits represent the best treatment a facility can achieve consistent with the economic means of the industry as a whole (in this case effluent guidelines) or of the specific facility being permitted (in the case of BPJ).” Here, EFSEC proposes a technology-based effluent limit for benzene based on EPA drinking water standards and treatability database. EFSEC fails to explain how EPA’s drinking water standard and treatability database are grounds for a BPJ determination.

E. Tesoro-Savage's Spill Control Plan Must Be Produced Prior To Permit Issuance.

EFSEC must evaluate and offer the opportunity for public comment on Tesoro-Savage's Spill Control Plan before issuing the permit. As noted above, Tesoro-Savage proposes the nation's largest oil-by-rail terminal in the Columbia River estuary—an area at the center of a multi-billion dollar effort to restore endangered and threatened salmonids. EFSEC has received considerable expert and other testimony on how oil spills caused by the proposed terminal would threaten salmon, water quality, the economy, cultural resources, and other valued resources and rights. The Spill Control Plan is a critical component of the draft permit and cuts to the heart of how EFSEC will protect the Columbia River in the event the project moves forward. Yet EFSEC proposes that Tesoro-Savage will submit the Spill Control Plan at an undetermined date in the future. *See* Draft Permit at 18; Fact Sheet at 29. This is unacceptable. EFSEC must afford Tribes, municipalities, state agencies, businesses, and the general public the ability to review and comment on Tesoro-Savage's Spill Control Plan prior to issuing the draft permit.

Notably, EFSEC received critical expert testimony on the Spill Control Plan during the adjudication. *See generally* Pre-filed Testimony of Susan L. Harvey (May 10, 2016). This testimony underscores the importance of offering public comment on the Plan to ensure the Plan complies with state law.

F. The Draft Permit Overlooks Industrial Stormwater from Berths 13 and 14.

The Fact Sheet and Draft Permit omit discussion of industrial stormwater from Berths 13 and 14. Industrial processes would occur at Berths 13 and 14. EFSEC cannot ignore these industrial areas in developing the draft permit. Commenters request that EFSEC revise the draft permit to account for industrial stormwater discharges from Berths 13 and 14.

CONCLUSION

For the reasons stated above, Commenters urge EFSEC to deny Tesoro-Savage's Industrial Stormwater NPDES Permit. Thank you for considering Commenters input on water pollution from Tesoro-Savage's proposed oil-by-rail terminal.

Sincerely,



Kristen L. Boyles

Attorney for Columbia Riverkeeper, Friends of the Columbia Gorge, Stand, Spokane Riverkeeper, Sierra Club, Washington Environmental Council, Climate Solutions, Fruit Valley Neighborhood Association, Oregon Physicians for Social Responsibility, and Washington Physicians for Social Responsibility

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