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April 17, 2015

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Dear Counsel: Re: Vancouver Energy Distribution Terminal, EFSEC No. 15-001

Thank you to those who responded to our April 10, 2015 letter, requesting a telephone conference among the parties and intervenors in this case. Based on the responses we received, it appears that some of the parties see no value in convening a conference; some parties did not respond; and others have scheduling conflicts. Due to the limited number of parties willing or able to participate before the scheduled April 24 pre-hearing conference, we have decided to forego the call. Hopefully, we can still have a relatively efficient discussion of the significant number of issues identified in Administrative Law Judge Noble's (ALJ) notice at the pre-hearing conference.

To clarify, it was not our intent to replicate the pre-hearing conference during this call, nor was it our intent to schedule a three-or-four-hour phone call. (Those were blocks of time offered for scheduling purposes.) However, there are several somewhat complicated issues that we had hoped to discuss in advance, if not to reach some agreement, to reduce the need for discussion or debate on April 24, or to focus our areas of disagreement to assist the ALJ in making decisions or guiding further discussion.

As noted in our April 10th letter, we are particularly interested in a fuller discussion of what the intervenors intend regarding the timing and scope of discovery and the breadth of the issues they intend to raise during the adjudication. While we recognize that Judge Noble has reserved final issue identification until after publication of the DEIS, it is our position that there is no reason for the parties to delay clarification of issues presently known and intended for adjudication. For example, a number of intervenors raised specific issues in their motions to intervene, some of which potentially raise questions, in our view, about standing or EFSEC jurisdiction. Once these issues are better defined, the applicant can then make a judgment about whether preliminary dispositive motions are appropriate. In our view, it potentially wastes everyone's time bringing pre-hearing motions, and is more efficient if the issues can be better focused and defined to avoid or minimize those objections. Then, once any pre-hearing motions are decided by the ALJ, all parties to the adjudication can better focus their preparation for the hearing.

By way of example only, we believe the parties and intervenors should be able to confirm their intent to adjudicate issues such as the following:

- Tank car standards, or other rail operational requirements;
- Geographic Response Plans, currently undergoing updates by Ecology and associated spill response planning;
- Requirements to pre-condition Bakken crude prior to transport; and
- Extent to which the Council will be asked to consider (and therefore understand) derailments or incidents concerning other crude-by-rail operations.

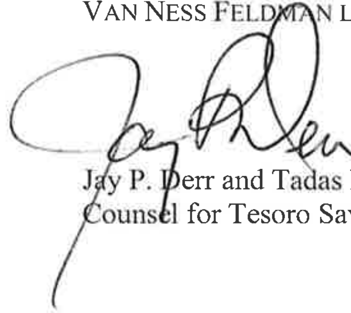
These are just a few examples of issues that could potentially expand the scope of the adjudication well beyond the proposed terminal facility and the EFSEC criteria for decision-making and could exceed EFSEC's jurisdiction. EFSEC's clarification of whether or not to what extent it will consider these and other issues identified by the parties and intervenors will then allow the parties to make better assessments about the appropriate scope and extent of any discovery necessary for the adjudication, and will allow all parties and intervenors to focus on preparation of evidence and testimony appropriate for the adjudication, rather than for rulemaking or other policy debate forums. Additionally, EFSEC's determination about its intent to consider such issues will allow the parties to engage in productive discussions concerning factual stipulations, settlement, and dispositive motions. Without prompt and clear guidance about the scope of the adjudication, it is more difficult for the parties (and the Council, for that matter), to meaningfully prepare for the Adjudication.

Given some of the intervenors proclivity to seek delay whenever possible, as evidenced by prior requests for delay of the land use certification proceeding, prior requests to delay commencement of the adjudication proceedings, and, most recently, a request to extend the DEIS public comment period well beyond the maximum permitted by state law, we remain concerned that some intervenors' unwillingness to meet to define issues or discuss pre-hearing matters is simply another effort to delay project review. Recognizing that an adjudication with the number of participants in this case can be cumbersome, we certainly hope, and will continue to ask that all participants find ways to facilitate as much up-front clarity, if not agreement, as possible so that each party can efficiently and effectively participate in the adjudication.

While we are disappointed that we have missed an opportunity to gain clarity about some of these issues in advance of the pre-hearing conference, by this letter, we are providing notice to all regarding our intent to raise them during the April 24, 2015, conference, and to ask the ALJ to include them in the agenda for that meeting. In the meantime, if any of you would like to explore these issues individually, please do not hesitate to call.

Very truly yours,

VAN NESS FELDMAN LLP



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