

August 28, 2015

Stephen Posner
Manager
Energy Facility Site Evaluation Council
1300 S. Evergreen Park Dr. S.W.
PO Box 43172
Olympia, WA 98504-3172

Re: Response to Earthjustice August 18, 2015 Letter regarding Unredacted Lease Provision

Dear Mr. Posner:

This letter is intended to respond to mischaracterizations in Earthjustice's August 18 letter regarding certain lease provisions recently released without redaction. To be clear, the lease provision cited by Earthjustice deals solely with the "exclusive" period and conditions under which Vancouver Energy has the exclusive right to operate a crude oil transloading facility at the Port; it has no bearing on the facility design capacity as described in our pending EFSEC application and does not reflect any party's intent to construct larger or additional capacity beyond that specified in our application documents and subsequent responses to DEIS data requests from EFSEC. As we stated in our application, and reiterated in subsequent communications responding to EFSEC questions and requests for clarification, Vancouver Energy has designed a facility with, and applied for a site certification agreement for, a maximum average capacity of 360,000 bbls per day, not 400,000 bbls per day. The scope of EFSEC's ongoing environmental review is appropriately evaluating the average 360,000 bbls per day project capacity.

The lease paragraph in question ONLY established the operational parameters that would allow Vancouver Energy to have an exclusive right to operate a terminal. The 400,000 bbls per day level recited in the paragraph in question serves merely as the trigger for the Port's option to seek to develop another facility, which in turn would be subject to a right of first opportunity on the part of Vancouver Energy to maintain exclusive use. It does NOT in any way imply directly or indirectly a desire to build or operate a facility at more than the permit application threshold sought of 360,000 bbls per day.

Earthjustice is incorrect when it asserts "the proposed facility's actual maximum capacity under its physical and operation design (which is apparently more than 400,000 barrels per day)". This lease provision does not purport to establish or address physical or operational design capacity of the site. Similarly, Earthjustice's assertion that capacity beyond that contained in the application is a "reasonably foreseeable future action" is not correct, for the same reasons and, therefore, Earthjustice's reliance on *Merkel* is misplaced. Vancouver Energy applied for a maximum average capacity of 360,000 barrels per day. Vancouver Energy expects any EFSEC decision on the application to include those limits.

By way of background, when the Port and Vancouver Energy were initially negotiating the terms of the lease, neither party had fully evaluated site constraints and operational design limitations. The provisions of paragraph 8E of the lease were negotiated to strike an appropriate balance between the

interests of the Port at that time in capitalizing on the opportunity for crude by rail volumes (and corresponding revenues) and the interests of Vancouver Energy which wanted to establish exclusive rights to operate a crude by rail terminal facility at the Port, given the significant up-front investment required to obtain permits and construct the facility. This paragraph does not establish the right to handle 400,000 bbls per day, nor even the reasonable likelihood of handling 400,000 bbls per day. In fact, more detailed site design completed since the lease was negotiated (and shared with EFSEC as part of our application) has confirmed that the Vancouver Energy facility infrastructure is not designed to accommodate a maximum average throughput volume of more than the 360,000 bbls per day contained in the application. For these reasons, it is not likely or reasonable to expect either the Port or Vancouver Energy to seek EFSEC approvals for a second crude by rail project or an expansion of the existing proposal.

We encourage EFSEC to remain focused on the application that has been filed and that is under environmental review and to not use Earthjustice's letter as cause to further delay or to divert project review.

We have enclosed a copy of the unredacted version of Paragraph 8E from the lease, so you can evaluate the language directly, as it was not apparent that Earthjustice has provided you with that information.

Sincerely,



Kelly J. Flint

Encl: Paragraph 8E of unredacted lease

cc:

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Premises for the Permitted Use continuously during the entire term of this Lease, commencing on the Rent Commencement Date, except for: (i) periods of time (not exceeding twelve (12) months) that Lessee is prevented from using the Premises due to Force Majeure or damage or destruction of improvements, so long as following any damage or destruction, Lessee is using diligent efforts to make repairs or restoration of such improvements; or (ii) temporary closures (not exceeding thirty (30) days) as may be necessary for repairs or remodeling or for reasons beyond Lessee's control. Should Lessee use, or permit or suffer the use of, the Premises for any business or purpose other than the Permitted Use without the prior written consent of Lessor, except for temporary closures permitted by this Lease, Lessee shall be deemed in Default under the terms of this Lease. Except for Petroleum Products and those Hazardous Substances listed in Exhibit "H" (as the list may be modified during the Term through the new product approval process described in Exhibit "I"), it is further understood and agreed that the Premises shall not be used to store, distribute or otherwise handle flammable or Hazardous Substances.

B. Lessee agrees that it will not make or permit any unusual disturbance, noise, vibration, dust or other condition in, on or about the Premises, which would tend to create a Nuisance or unreasonably disturb Lessor or any other tenant of Lessor.

C. Lessee shall not use the Premises in such a manner as to increase the rates of insurance to the Premises or adjacent premises, without prior written approval of Lessor, and if permitted, Lessor may charge to Lessee as additional charges the full amount of any resulting premium increases incurred by Lessor or any of its adjacent tenants.

D. No invasive testing (except to the extent expressly approved by Lessor in conjunction with the Baseline Assessment and any approved geotechnical testing) or construction activities shall be conducted at the Premises during the Contingency Period.

E. During the MGA Term, so long as Lessee has, by the date that is thirty (30) full months following the Rent Commencement Date (measured, at such time, based on a rolling 6-month average commencing on the second anniversary of the Rent Commencement Date), and each month thereafter, based on a rolling 6-month average, achieved and sustained an average throughput volume of one hundred twenty thousand (120,000) barrels per day of Petroleum Products (such period of time during the MGA Term with sustained throughput over 120,000 bpd being referred to herein as the "Exclusive Period"), Lessor agrees not to lease any premises (other than the Premises that are subject to this Lease) located within the Port to a third party that will be permitted (directly or

indirectly) to operate a crude oil by Rail Facility for Unit Trains (the "Exclusive Use"), it being the intention of the Parties that Lessee shall during the Exclusive Period have the exclusive right in the Port to operate and conduct on the Premises a business for the Exclusive Use. If, thereafter, Lessee fails to maintain such throughput volume for a period of twelve (12) months or longer, the Exclusive Period and the right of first opportunity with respect to the Second PBR Facility (defined below) shall automatically terminate, and the Exclusive Use shall be of no further force and effect.

If the Facility achieves an average throughput volume that exceeds four hundred thousand (400,000) barrels per day (measured on a rolling 12-month basis), and Lessor desires to develop another facility for the Exclusive Use (the "Second PBR Facility"), then Lessee shall have a right of first opportunity to lease additional real property from Lessor for the Second PBR Facility, either by (a) expanding the Premises and thereby adding additional throughput capacity, or (b) adding a facility at the Port that is separate from the Premises. If Lessee achieves an average throughput volume that exceeds four hundred thousand (400,000) barrels per day (measured on a rolling 12-month basis) and Lessor desires to develop a Second PBR Facility, then Lessor shall give written notice to Lessee indicating the same, and Lessee shall have thirty (30) days following receipt of such written notice to accept or decline to enter into negotiations for the Second PBR Facility (the "Exercise Date"). If Lessee timely elects to enter into such negotiations, then Lessor and Lessee shall negotiate diligently and in good faith to reach and enter into a definitive agreement governing the development of the Second PBR Facility. If the Parties are unable to enter into such a definitive agreement within six (6) months following the Exercise Date, or if Lessee elected not to exercise its right of first opportunity (or failed to timely do so), then and only then shall Lessor be permitted to commence negotiations with third parties concerning the Second PBR Facility, and such Second PBR Facility will not be subject to the Exclusive Use. If Lessee has elected not to exercise its right of first opportunity (or failed to timely do so) at any point during the Lease Term, the right of first opportunity shall automatically terminate and be of no further force and effect for the balance of the Lease Term.

In the event that Lessor suffers or permits any use of the Port that is in violation of Lessee's Exclusive Use during a period in which Lessee has achieved and maintained an average throughput volume of one hundred twenty thousand (120,000) barrels per day of crude oil (measured on a rolling 12-month basis), Lessee shall be entitled to all remedies at law or in equity, including, should such violation remain for a period of twelve (12) months or longer in duration, the right to terminate this Lease with reservation of Lessee's remedies at law or at equity.

A portion of the Premises is owned by the DNR and is subject to the Port Management Agreement. Lessee shall be responsible throughout the Term to comply with the terms of the Port Management Agreement insofar as it applies to the Premises.

9. **WATERBORNE COMMODITIES; OPERATIONS AT MARINE TERMINAL AREA:** If applicable, Lessee agrees that throughout the Term of this Lease it will use commercially reasonable efforts, in conjunction with Lessor, to promote and aid the movement of cargo through the Port. Lessee further agrees that movements of Lessee's waterborne commodities, if any, shall be made through Lessor's port facilities if such routing is competitive with other ports.

B. The portion of the Premises described as the "Marine Terminal Area" includes Berths 13 and 14 in Terminal 4 (collectively, the "Berth"). Lessee shall have exclusive use of the Berth, as shown on Exhibit "B-1"/ "B-2" attached hereto, together with the nonexclusive rights of vehicular ingress and egress over and across those areas of the Port designated for driveway usage between the Berth and the balance of the Premises. Lessee shall use the Berth and the Marine Terminal Area solely in conjunction with the operation of the Facility for loading and unloading of Petroleum Products. The use of the Berth is subject to the following terms, conditions and requirements:

(1) Lessee shall be solely responsible for all capital improvements, replacement, maintenance and repair of the docks located in the Berth area, all at Lessee's sole expense.

(2) Lessor shall, at Lessor's sole cost and expense, perform all dredging necessary to provide continuous, safe access to the Berth and the dock located in the Berth area, and shall maintain the Berth's established depth to be the same as or deeper than the federal navigation channel depth plus two feet (2') for vessel under keel clearance.

If at any time during the Term, Lessee conducts or causes to be conducted a hydrographic survey of the Berth, and such survey reveals that the depth of the Berth has not been maintained in accordance with the preceding Paragraph 9.B(2), then Lessor shall, within ninety (90) days after the date on which such hydrographic survey is provided to Lessor, cause dredging to be completed to the required depth at Lessor's sole cost and expense; provided, however, that the period provided for Lessor to complete the dredging shall be extended if, during such 90-day period, dredging is prohibited either by the Army Corps of Engineers or the Washington State Department of Natural Resources.