Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON
Government Operations Division
PO Box 40108 • Olympia WA 98504-0108 • (360) 586-3636

M E M O R A N D U M

DATE: December 30, 2014

TO: Stephen Posner, Manager, EFSEC
Sonia Bumpus, Siting Specialist, EFSEC

FROM: Ann C. Essko, Senior Counsel

SUBJECT: **Comments on Vancouver Energy Distribution Terminal Preliminary Draft EIS**

This memorandum provides comments on the Preliminary Draft Environmental Impact Statement (PDEIS) prepared by Tesoro Savage Petroleum LLC (Tesoro). Based on a detailed review of Chapters 1 through 4 and a general review of Chapters 5 through 9, this memorandum provides three categories of comments:

- General comments on the entire PDEIS.
- Specific comments about Chapter 1 and Chapter 2 in preparation for an upcoming meeting with CardnoEntrix about the alternatives analysis.
- Citations in the specific comments to attached mark-ups of chapters 1 and 2. Note that a few relatively minor comments are found only in the mark-ups. EFSEC should thus consider this memorandum in concert with the attached mark-ups and not rely on this memorandum alone.

My detailed review of Chapter 1 and Chapter 2 focused on:

- The degree to which the chapters comply with the specific requirements of the State Environmental Policy Act (SEPA) (RCW 43.21C) and the SEPA rules (WAC 197-11).
- Whether, from a legal standpoint, the factual assertions in the chapters are believable, logical, internally consistent, and supportive of the legal proposition for which they are offered. I did not evaluate the technical correctness of the factual assertions.

My more general review of the balance of the PDEIS focused on these same matters, but at a reduced level of detail.

General Comments on the PDEIS

First, the PDEIS fails to demonstrate full compliance with SEPA, the Council's scoping decision, and EFSEC's rules. PDEIS adequacy depends in part on its reasonable and demonstrated adherence to both SEPA and to the Council's April 2, 2014 scoping decision that approved the EFSEC staff recommendation. The PDEIS appears to ignore a number of SEPA requirements and several elements of the Council's scoping decision. For example, the Council's scoping decision required "a [q]ualitative analysis of project data related to crude oil extraction and refining." EFSEC, "Scope of Draft Environmental Impact Statement" (April 2, 2014) (copy attached). The PDEIS appears to omit any analysis at all of this subject. Similarly, the PDEIS also appears to omit analysis of the impacts of the end use of refined petroleum, something the Council discussed and appeared to want to be included in the EIS in some fashion. Transcript (April 2, 2014) at 51-53 (copy attached).

Similarly, the PDEIS also appears to violate the order and content of the Council's list of elements and sub-elements of the environment to be analyzed. While agencies have some flexibility to arrange an EIS in a reasonable fashion, the PDEIS appears to move elements and sub-elements and to omit sub-elements without any stated justification. For example, I could not find a full discussion of "[s]afety, hazards and risk" and climate, which are expressly included in the SEPA rule and the Council's scoping decision. Similarly, the PDEIS changed the name of one required topic from "floods" to "floodplains." These are, of course, two different (although related) things and the change in terminology appears to have resulted in an omission of any discussion of the impact on project infrastructure of sea level rise associated with climate change, a subject that Ecology's SEPA guidance recommends addressing. Because of the way Tesoro structured and defined the environmental elements and sub-elements, topics of great interest are hard to find, sometimes appear to be inappropriately bifurcated, and sometimes appear to be inappropriately missing. If a particular topic is not relevant, the agency should explain why that is the case.

In addition to apparent omissions, the PDEIS also sometimes incorrectly applies SEPA. For example, the statements of purpose and need and the description of the proposed action as public or private are incorrect.

Finally, the Council has promulgated rules regarding the construction and operational conditions of the facility. WAC 463-62. While WAC 463-62 actually applies during the construction and operation of a facility and does not control the current review process, logic and considerations of efficiency warrant at least some level of present consideration of the likelihood that a

proposed facility will be able to comply with the requirements in WAC 463-62. The PDEIS should touch on such compliance.

Second, the PDEIS does not demonstrably support the possible range of recommendations and decisions by EFSEC and the Governor. While the EIS does not mandate any particular ultimate decisions by EFSEC or the Governor, the final chosen action must be within the range of alternatives discussed in the EIS. In addition, because SEPA supplements agency authority, both EFSEC and the Governor are allowed to – and may ultimately choose to -- condition or deny the proposal in order to mitigate the environmental impact described in the EIS pursuant to WAC 197-11-660 and EFSEC's WAC 463-47-110. The PDEIS does not appear to have been developed in consideration of the range of decisions that EFSEC and the Governor may wish to make.

Third, the PDEIS does not demonstrate compliance with SEPA requirements regarding sufficiency of information. The SEPA rules describe how agencies are to address information gaps and costly or speculative information. An agency's compliance with this requirement should be demonstrated in the EIS. Agencies must also obtain and include unknown essential information unless the cost is "exorbitant." WAC 197-11-080(1). Agencies must expressly disclose relevant information gaps and scientific uncertainty. WAC 197-11-080(2). With regard to scientific uncertainty, SEPA case law requires agencies to set forth responsible opposing views and resolve the differences.

The PDEIS falls short of demonstrating compliance with these requirements in several ways. The PDEIS frequently fails to provide certain information about the specifics of the proposal; instead, Tesoro provides information that it describes only as "typical," leaving in doubt to what, if anything, it is actually committing. This lack of specificity seems to occur regardless of whether or not the item in question could bear directly on the likelihood of a significant adverse impact on the environment (i.e., e.g. the model of tank cars that Tesoro will use; specifics about the berm, valves, and pipes; leak detection equipment; and emergency response equipment).

Similarly, based on CardnoEntrix's October 31, 2014 memorandum, there also appear to be a large number of significant additional information gaps that should be addressed in a way that conforms to the rules. In addition, I assume that scientific uncertainty may be an issue with regard to matters such as the impacts (if any) of the project on climate change and the impacts (if any) of post-refinery use of petroleum products. Finally, information gaps would also seem to need to be addressed in order to explain and support the Council's scoping distinctions between levels of analysis (qualitative versus quantitative; detailed versus less-detailed). A defensible EIS would analyze and address these sorts of information gaps and scientific uncertainties in a way that demonstrates compliance with the SEPA rules.

Fourth, the PDEIS does not properly address phased review. The SEPA rules address the deferred analysis that EFSEC has historically utilized when it allows certificate holders to

provide plans and other information for EFSEC's approval throughout the life of the project. The SEPA rules mandate that a single EIS must analyze the dependent or interdependent parts of a proposal. WAC 197-11-060(3)(b), (5)(d). Under the rule of reason, the propriety of a decision to defer analysis depends on the relative social costs and benefits of earlier versus later environmental review. WAC 197-11-060(5)(b). In evaluating the propriety of phased review, courts tend to consider how remote or speculative the future impact is and the causal relationship between the future impact and the immediate action. When review is phased, the agency must expressly so state in its EIS (WAC 197-11-060(5)(e)) and courts have required a spectrum of approaches, from requiring a worst-case analysis to a bare-bones discussion. The PDEIS assumes that numerous decisions will be deferred to future EFSEC review without ever justifying phased review under SEPA or, indeed, disclosing that SEPA review is being phased. This omission should be corrected.

Fifth, if EFSEC issued this PDEIS as an FEIS, that FEIS would be highly unlikely to withstand judicial review. The Supreme Court will review FEIS adequacy based on a rule of reason, requiring reasonably thorough information disclosure and discussion, good data and analysis in support of the document's conclusions, and sufficient information to make a reasoned decision. The amount of required information is proportional to the potential adverse environmental consequences. Based on this standard and the balance of my comments in this memorandum, I think it is highly unlikely that a reviewing court would conclude that the FEIS complies with either the Council's scoping decision or the requirements of SEPA.

Sixth, the PDEIS contains a number of erroneous or inappropriate statements of law. The PDEIS makes a number of legally incorrect statements about matters such as the EFSEC process, the history of the PDEIS, and the legal status of state and local laws in the context of Chapter RCW 80.50 preemption. Other statements of law in the PDEIS may arguably be legally correct but appear to be inappropriate for inclusion in a DEIS because they pertain to ultimate legal questions that parties to the adjudication have not had an opportunity to address and that EFSEC and the Governor have not had an opportunity to decide. Some of these statements appear to have the effect of waiving the State's legal defenses around matters such as federal statutory preemption, the dormant commerce clause, and the State's ability to mitigate rail or vessel impacts. I do not believe that EFSEC has the unilateral authority to waive such legal defenses. To the contrary, I strongly recommend that the existence and handling of such defenses -- along with decisions about the preparation of a factual record to preserve and support any unwaived defenses –be addressed only through an informed agreement among the affected state entities.

Specific Comments on Chapter 1 (Summary). My specific comments generally follow the layout of Chapter 1 and Chapter 2. To avoid repetition I generally only state a comment once and do not reiterate it every time a particular problem crops up. As a result, some general comments apply across both chapters and some specific comments to Chapter 1 are equally applicable to Chapter 2.

1. **Chapter 1 appears to misrepresent the destination of Tesoro's crude oil.** The PDEIS's repeated statement that Tesoro will ship crude to refineries on the West Coast appears to be misleading, as is its attempt to invoke the nation's energy independence as a justification for the project. As I read the application and PDEIS, Tesoro has not actually committed to ship its crude only to West Coast refineries. To the contrary, it appears to me that Tesoro is preserving its ability to ship Canadian bitumen to foreign refineries and, if the export ban is eliminated, to do the same with US crude. My understanding is that industry is asking Congress to eliminate the export ban for US crude and that the export ban does not apply to tar sands crude from Canada. (Chapter 1: comment A2 (and elsewhere throughout both chapters)) Given that the Council is expecting some discussion of the impacts of refining and end use, clarity on this point would seem to be essential.

2. **Chapter 1 raises concerns about the nature of the crude as it bears on environmental impacts.** It appears to me that Tesoro is not actually committing to transport only crude sourced in the US. To the contrary, Tesoro specifically references Canadian crude. See for example, Chapter 1, section 1.3.7.1, paragraph 2. In addition to the concerns this raises about Tesoro's assertion that its project will assist US energy independence (see preceding comment), it may also mean that the PDEIS must analyze two different sets of possible environmental impacts if – as some assert -- the characteristics and impacts on the environment of Bakken crude and Canadian bitumen are different.

3. **Chapter 1 raises concerns about application sufficiency.** While EFSEC can decide when an application for site certification is sufficient for EFSEC's purposes, legal difficulties will arise if EFSEC releases a DEIS on subjects that overlap with the application, only to have Tesoro later supplement the application with information that bears on the adequacy of the DEIS. Such a course of events makes the DEIS appear to be based on insufficient information. (Chapter 1: comment A3) This problem is exacerbated by the numerous informational and analytic omissions in the PDEIS.

4. **Chapter 1 misrepresents the history of the PDEIS.** The PDEIS mischaracterizes its own history. (Chapter 1: comment A4).

5. **Chapter 1 improperly includes conclusions about non-SEPA legal issues.** The PDEIS makes a number of statements on substantive issues of law that are likely to arise during the adjudication and the likely appeal to the Washington Supreme Court. These statements appear to be intended to bind the Council, and to do so in a way that is against the State's interest. For example, Chapter 1, footnote 1 states that rail and vessel transportation is solely regulated by the federal government. (Chapter 1, footnote 1). This is an incomplete and inaccurate statement of the law. (See also Chapter 1: comments A28, A43, A44)

6. **Chapter 1 incorrectly addresses purpose and need.** The purpose and need discussion contains a somewhat inaccurate statement of what WAC 197-11-440(4) requires (because it

omits any reference to objectives); incorrectly includes EFSEC's purpose and need (which isn't legally relevant); and violates the Council's scoping decision that the EIS treat the application as a public project proposal.

7. **Chapter 1 incorrectly categorizes the proposal.** This proposal raises a significant analytic question for EFSEC because my understanding is that the Port did not perform an alternatives analysis when it chose a crude-by-rail project at this site[1] but the Council has decided that the Tesoro's application is to be treated as a public project proposal. When the Port made its choice, the Port's stated objectives are reported to have been to increase revenues, create jobs, make use of underused berths, maximize the WVFA asset, and revitalize a brownfield site. (Chapter 1, page 1-3). Had the Port analyzed alternatives, it would logically have considered a variety of different types of projects and commodity types to achieve its objectives. However, without doing so, the Port issued a Statement of Interest for a crude-by-rail project that elicited the formation of the Tesoro joint venture and the subsequent lease.

   This puts EFSEC in the difficult position of having to analyze what it is treating as a public project proposal based on the Port's general objectives in a real-world context where a private entity has filed an application to EFSEC for a specific facility. In order to do justice to both realities, I suggest EFSEC consider at least one alternative that involves a non-petroleum commodity at the site (to address the Port's objectives) along with alternatives involving petroleum that address both the Port's and Tesoro's objectives. (Chapter 1: comments A8 – A-10).

   A reviewing court will apply a rule of reason to EFSEC's choice of alternatives, so EFSEC should explain its thought process and demonstrate that its choices were a reasonable means of addressing this odd situation.

8. **Chapter 1 improperly omits any mention of the Port lease.** The description of the Port's purpose and need omits any reference to the Port's lease to Tesoro. I recommend that the DEIS mention the lease because silence is not credible. The status of the lease under SEPA is at issue in *Columbia Riverkeeper v. Port of Vancouver,* Clark County No. 13-2-03431-3. In that case, the Cowlitz County Superior Court issued a March 26, 2014 order stating that RCW 80.50.180 exempts lease execution from SEPA and that the lease's terms do not limit the reasonable range of alternatives to be considered in EFSEC's SEPA review. Note that the order is currently under appeal to the Court of Appeals so care should be taken in both the DEIS and FEIS to conform discussion of the lease to the most current judicial decisions. (Chapter 1: comment A16)

[1] If the Port did comply with SEPA or otherwise perform an alternatives analysis when it made its choice, please let me know right away. It also may be that some sort of alternatives analysis was included in the SEPA documents for the WVFA. If this is the case, please let me know right away.

9. **The description of Tesoro's needs in Chapter 1 is legally problematic.** Tesoro's statement of need includes a demand that the site already be developed for unit train circulation; have existing marine dock infrastructure; and be able to serve multiple clients, receive 360,000 bbl. of crude/day, average four unit trains/day and have space for up to six storage tanks. This sort of detailed list of project requirements may conflict with the SEPA rules' suggestion that proposals be defined in ways that encourage consideration of alternatives and that public projects be described in terms of objectives, not preferred solutions. I suggest that EFSEC acknowledge that in the unique circumstances here Tesoro has developed specific desires with regard to the project but that because EFSEC must treat the proposal as a public project proposal, EFSEC is not treating as dispositive Tesoro's entire list of needs.

10. **The inclusion in Chapter 1 of Section 1.3 (Market Considerations) is legally problematic**. The PDEIS's inclusion of Section 1.3 (Market Considerations) raises a variety of potential issues:

    - My recollection is that EFSEC has interpreted its statutes and rules as eliminating any discussion of need for energy from the EFSEC process. WAC 463-14-020. Whether EFSEC will do that in this case is something EFSEC should consider now, lest omission of the subject in the EIS be contrary to EFSEC's ultimate choice or lest inclusion of the subject now be deemed a waiver of EFSEC's ultimate right to exclude the issue.
    - The neutrality and relevance of some the information is very questionable. (Chapter 1: comments A25, A26. A28)
    - The section seems needlessly long and needlessly detailed.
    - Citations to the Governor should be deleted because he is the ultimate decision maker and, thus, should not be relying on evidence he himself provided. (Chapter 1: comments A27 and A40).
    - The Council's April 2, 2014 decision requires the DEIS to include an "[a]nalysis of project impacts on socioeconomic resources including employment, tax revenue and economic conditions." (Chapter 1: comment A28) Is this addressed adequately?
    - Some of the information in Section 1.3 may be needed with regard to the proper analysis of alternatives (Chapter 1: comment A30, A31, A32), transportation, or preemption and the dormant commerce clause. See last bullet below.
    - The statewide policy statement at Section 1.3.7.3 is problematic for a variety of reasons. Although I have not located and read the material that is cited, I'm highly dubious that whatever subset of the Department of Commerce issued the cited reports actually has the authority to make statewide policy. I am confident that regulators in New York and California do not make Washington policy. Moreover, in the EFSEC context, it is EFSEC, not the Department of Commerce, that makes recommendations to the Governor, and it is the Governor who makes statewide policy with regard to the Tesoro proposal. (Chapter 1: comments A37 through A44).

- Some of the information in Section 1.3 -- along with additional information – appears to be necessary to support and preserve some of the State's legal defenses. I do not believe that EFSEC has the unilateral authority to waive such defenses and - even if it did have such authority – a DEIS or EIS would not be the appropriate place to do so. A complete analysis of this issue falls outside the scope of this memorandum, but here is a brief outline of what the State will have to be prepared to address to defend a gubernatorial choice to deny or condition the project based on rail or vessel impacts:

    - Has Congress preempted the Governor's action?
        - Interstate Commerce Commission Termination Act of 1995
            - Is the Governor's decision "economic" regulation of railroads? (If yes, the action is preempted)
        - Federal Railroad Safety Act
            - Is the Governor's decision operating in a gap in federal regulations? (If yes, the action is not preempted, proceed to dormant commerce clause analysis below; if no, proceed to next bullet)
            - If the Governor's decision is not operating in a gap in federal regulations, is it nonetheless a response to local situations not capable of being adequately encompassed within uniform national standards? (If yes, the action is not preempted but proceed to dormant commerce clause analysis below)

    - If Congress hasn't preempted the Governor's action, does the Governor's action nonetheless violate the Dormant Commerce Clause?
        - Does the Governor's action discriminate against interstate commerce on its face, in its purpose, or in its effect (for example, is it economic protectionism)?
            - If no, go to *Pike* Test below.
            - If yes, does the Governor's action serve a legitimate state purpose that cannot be achieved through less discriminatory means? (If no, action not allowed; if yes, go to *Pike* Test below).
        - *Pike* Test: Does the Governor's action impose burdens on interstate commerce that are clearly excessive compared to the benefits of the action? (If yes, the Governor's action not allowed; if no, the Governor's action is allowed unless there's an extra-territoriality problem, go to next step).
        - Does the Governor's action seek to control activities occurring in another state? (If yes, the action not allowed; if no the action is allowed).

Note that the answers to these legal questions must be based on evidence contained in EFSEC's record. So the questions for EFSEC are: (1) whether it wishes to pursue a waiver of the State's defenses so that it does not have to address these legal and factual issues, and (2) if it has not obtained such a waiver, where in the administrative record it wishes to develop

and preserve this information. Tesoro evidently put some of its own information on these issues in the PDEIS. (See Chapter 1: footnote 1, comment A28; Chapter 3, pages 3-35 through 3-40.)

11. **Chapter 1 inaccurately addresses RCW 80.50 preemption.** In several places, the PDEIS fails to take into account that RCW 80.50 supersedes all state and local regulatory laws and rules. One place this occurs is with regard to RCW 47.76.200. (Chapter 1, Comment A42). These sorts of errors should be corrected lest EFSEC be deemed to have waived its legal defenses.

12. **Chapter 1 misrepresents its place within the EFSEC process.** The PDEIS statement that the EIS will provide sufficient information to allow EFSEC to make an informed decision is legally incorrect. EFSEC relies on multiple sources of information including the adjudication and the permits. Whether the EIS will ultimately be a "sufficient" source of information for EFSEC is both dubious and remains to be seen. (Chapter 1: comment A45).

13. **The summary of alternatives in Chapter 1 is legally problematic.** Section 1.5 (Description of Alternatives) is legally problematic because it:

- Summarizes information in Chapter 2 and elsewhere that is itself legally flawed or provides an inaccurate summary of that information (Chapter 1: comments A47, A49, A51, A53 - A55, A57, A62 - A71, A76)
- Sets out a methodology for selecting and analyzing alternatives that does not actually appear to have been use in Chapter 2. (Chapter 1: comments A47)
- Fails to include the used of rail and vessel transport as part of the project proposal by treating them as something the PDEIS calls "interrelated and interdependent actions." These terms are either not found in SEPA or do not apply in this context. I see no support in SEPA for this approach. The impacts of the rail and vessel transport portions of the proposal may properly be defined as "indirect" impacts under SEPA, but that does not mean that the rail and vessel portions of the proposal are somehow not parts of the proposed action. (Chapter 1: comment 58).
- Makes unsupported assumptions such as stating that the proposed action does not require any construction related to the rail lines. (Chapter 1: comment 59). While the State may not have the legal authority to order a railroad to upgrade its tracks (see last part of #10 above), the PDEIS provides no factual support for the proposition that the rail lines are in fact entirely safe in their current condition or that additional rail construction will not be needed to mitigate potential adverse impacts. As written, the statement waives the State's defenses and could preclude actions that the Governor may wish to take.
- Highlights the lack of specificity in the proposal by stating that it is Tesoro's customers, not Tesoro, who would be shipping crude from the facility. (Chapter 1: comment 60).

14. **The Summary misses sections that the SEPA rules require.** The Summary as a whole appears to be missing a number of sections that are either referenced in the document itself (i.e., Table 1.8-1) or which are required by the SEPA rules at WAC 197-11-440(4) (i.e., significant adverse impacts that cannot be mitigated; major conclusions; and significant areas of controversy or uncertainty).

Specific Comments on Chapter 2 (Proposed Action and Alternatives)

1. **The description of the EFSEC process in Chapter 2 is incorrect.** Chapter 2 misrepresents EFSEC's process. (Chapter 2: comment A3).

2. **The description of the scoping process in Chapter 2 is inaccurate.** Chapter 2 does not accurately describe the decisions reached by the Council at its April 2, 2014 meeting and does not accurately implement those decisions. (Chapter 2: comment A6).

3. **The list of elements of the environment in Chapter 2 is confusing and incorrect.** The list of elements of the environment to be analyzed does not follow the SEPA rules or the Council's April 2, 2014 decision. (Chapter 2: comments A8 – A20) This has the effect of obscuring or omitting important elements of the analysis that are required by SEPA and that the Council is expecting to see.

4. **The description of the proposal is significantly incomplete.** While Tesoro describes various areas of the project site, the uses it intends to make of those areas, and the systems associated with those uses, Tesoro does not really commit to specific configurations, equipment or materials. Instead, it appears to proffer only what it refers to as information about "typical" configurations, equipment or materials. Surprisingly, it does not identify the type of tanker car it intends to use, an omission that is surprising given what I recall are its public commitment to upgrade its entire fleet of tank cars to exclude DOT-111 cars. (Chapter 2: comment A21, 25-A30, A32-A39). As discussed above under General Comments, omission of information and phased review is only allowed if in conformance to the requirements of SEPA. Tesoro does not appear to have addressed those legal requirements and this portion of the PDEIS is simply not credible. In addition, as discussed above under Chapter 1, comment #13, the treatment of the rail and vessel transport portions of the project as something other than elements of the proposal is not justified under SEPA. (Chapter 2: comment 22).

5. **The discussion of the leased area is unclear.** Chapter 2 states that the Facility would be constructed on approximately 45 acres but does not clearly distinguish between what portions would be under the exclusive control of Tesoro and what portions would be used in common with others. (Chapter 2: comments A23, A24)

6. **Chapter 2 makes the incorrect assumption that the existence of a regulatory regime justifies omission of SEPA analysis.** Chapter 2 points to the existence of federal and state regulations regarding hazardous material and crude oil handling and transfer as justifying the omission of related SEPA analysis. (Chapter 2: comment A40). I am aware of no provision of SEPA that would allow such an omission. In addition, Tesoro refers to applicable state regulations in this regard, evidently under the assumption that state regulations other than EFSEC's rules apply to the project. Given that RCW 80.50 supersedes all state regulatory laws and rules, this assumption is in most cases incorrect. (Chapter 2: comment A40, A42-A45, and A48).

7. **The discussion of decommissioning in Chapter 2 contains unjustified and inaccurate statements.** Chapter 2 contains a discussion of decommissioning that largely and needlessly restates EFSEC rules, and does so inaccurately and sometimes based on unjustified assumptions about the legal relationship between requirements of the lease and any site certification agreement. While the potential conflicts between the lease and any agreement should be addressed and resolved by EFSEC prior to issuance of its recommendation (if the recommendation is for project approval) the DEIS is an inappropriate place to address the problem. (Chapter 2: comments A49 – A53).

8. **The alternatives analysis in Chapter 2 is does not demonstrate that it is credible or that is will support EFSEC's recommendation or the Governor's ultimate decision.** As discussed above under General Comment, EFSEC's and the Governor's ultimate decisions should be within the range of alternatives discussed in the EIS. I'm very dubious that the range of alternatives in the PDEIS meets this standard. (Chapter 2: comment A57) In addition, the discussion of alternatives in Chapter 2 appears to be have multiple legal problems:

    - Does not appear to apply the methodology described in Chapter 1.
    - Appears to be based on unduly bare-bones information, even with regard to highly significant impacts.
    - Is based on a list of environmental elements that does not comply with either the SEPA rules or the Council's April 2, 2014 decision. (Chapter 2: comment A60).
    - Rejects alternatives on the basis of information that appears to be conclusory, internally inconsistent, or not credible. For example, I started reading the section on the pipeline alternative with a pre-existing notion that the alternative would not be feasible because of siting and environmental impact problems. However, by the time I was done, I suspected that the alternative might be feasible because the text did not lay out a credible argument or supporting evidence. (Chapter 2: comment A61 – A80). I found rejection of the tanker truck option to be similarly unpersuasive. For example, I did not see any discussion of the trade-off between more air impacts from trucks but lower risk of a catastrophic spill, and I found the justification for rejection

of the alternative to be not credible. (Chapter 2: comments A81, A85-89).The discussion of the facility site selection option appeared to lack key pieces of information and to include a number of unsupported assumptions. I was not persuaded that Kalama, Longview, Anacortes, Bellingham, Everett, or Tacoma are truly infeasible (Chapter 2: comments A90 – A103, A107). The alternative designs section wasn't so much a discussion of an actual alternative as it was a justification for the existing configuration of the facility. (Chapter 2: comments A104 – A105).

- Doesn't contain a discussion of all hazard reduction differences among the rejected and retained alternatives. (Chapter 2: comment 106).
- Seems to unjustifiably exclude a variety of other possible alternatives such as using tanker cars other than DOT-111s; treating the crude in North Dakota to reduce its flammability, tank pressure, etc; working with the railroad to improve track safety, response capability, etc; reducing the size of the project, etc. (Chapter 2: comment A106). While, as discussed above, the State may not be able to order BNSF to carry out these actions, it seems that these options reasonably bear on legitimate possible alternatives.
- Discusses the retained alternative in way that is not credible. (Chapter 2: comments A108-A114).

9. **The discussion of the No Action Alternatives in Chapter 2 does not demonstrate that either alternative is the likely outcome of rejection of the application.** First, as discussed above at Comment #1 to Chapter 1, transportation of crude from the facility is not actually restricted to the West Coast. (Chapter 2, comment A115) Second, the discussion of both alternatives seems to be based on assumptions that the text does not demonstrate to be true. (Chapter 2, comments A116 – A122).