

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of the Petition of
COLUMBIA RIVERKEEPER
For Declaratory Order Re: Jurisdiction Over
KALAMA METHANOL
MANUFACTURING AND EXPORT
FACILITY

DOCKET NO. _____

NORTHWEST INNOVATION WORKS,
KALAMA, LLC'S AND PORT OF
KALAMA'S JOINT REPLY TO
COLUMBIA RIVERKEEPER'S
RESPONSE TO OBJECTIONS

I. INTRODUCTION

Northwest Innovation Works, Kalama, LLC (“NWIW”) and the Port of Kalama (“Port”) have both filed timely objections to Columbia Riverkeeper’s (“CRK”) petition seeking a declaratory order aimed at voiding two years of public permitting processes and environmental review by state and local agencies with jurisdiction over the Kalama Methanol Manufacturing and Export Facility (“Facility”). NWIW and the Port jointly submit this reply to CRK’s Response to Objections.

With no legal authority to support its argument, and in disregard of EFSEC’s recent decision in *In re Quinault Indian Nation*, No. 14-001, slip op. at 5 (Wash. Energy Facility Site Evaluation Council Feb. 12, 2015), CRK contends that NWIW and the Port have “no legal ‘rights’ as that term is used in RCW 34.05.240(7), to have their applications evaluated by decision-makers other than those mandated by Washington law.” Reply, p. 1. An unsupported argument that EFSEC found to be circular and incorrect in 2015, remains circular and incorrect

NWIW AND PORT OF KALAMA’S JOINT REPLY TO COLUMBIA RIVERKEEPER’S
RESPONSE TO OBJECTIONS - 1

today. CRK offers no reasoning to change EFSEC's view of this issue and for that reason, its petition should be dismissed.

NWIW and the Port do indeed have cognizable legal rights to "have their applications evaluated by decision-makers" with exclusive jurisdiction conferred upon them by Washington law. As recognized in *Quinault*, CRK's argument requires EFSEC to assume CRK is correct that EFSEC has jurisdiction over the Facility and to therefore conclude that NWIW and the Port have no "rights" under RCW 34.05.240(7) to object to this petition for a declaratory ruling regarding whether EFSEC has jurisdiction. CRK provides no legal support or analysis for its narrow reading of this statute and the rights at issue in this proceeding.

NWIW and the Port object to EFSEC asserting jurisdiction over the Facility. Both NWIW and the Port have documented the prejudice from this delayed attempt to change jurisdiction and restart the process in their opening objections filed in this matter. CRK, notably, does not refute any of those arguments in its Response, but rather simply chooses to argue the same circular and unsuccessful argument that failed in *Quinault*. Based on NWIW and the Port's objections, the petition must be dismissed.

II. ARGUMENT

CRK's argument is flawed in two respects. First, CRK mischaracterizes both the type of rights protected under the APA and the rights at issue here. Second, CRK's circular reasoning requires EFSEC to assume jurisdiction in order to rule on objections challenging that very jurisdiction.

CRK's response misconstrues the "rights" protected by the APA. Under RCW 34.05.240(7), "[a]n agency may not enter a declaratory order that would substantially prejudice the *rights* of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding." (Emphasis added.) The Washington legislature neither qualified nor specified what types of rights are protected by the statute, despite CRK's attempt to do so. *See, e.g.*, CRK's Response to Objections at pp. 1-2 (referencing "legal 'rights'" and "legally protected 'rights'").

The agencies entrusted with the duty to adjudicate "rights" have understood these rights to be far broader than CRK would wish. The scope of these rights is so broad in fact that many agencies applying RCW 34.05.240(7) do not focus on this element in their analysis, holding simply that a necessary party to a petition is necessarily substantially prejudiced unless it consents. *See, e.g.*, Order of Dismissal, *Noreen v. City of Burien*, No. 03-006, 2003 WL 1441309, at *1 (Wash. Shorelines Hearings Bd. Mar. 18, 2003) (dismissing a declaratory order under RCW 34.05.240(7) based solely on the lack of necessary party consent, with no mention of the "rights" prejudiced); *Quinault Nation*, slip op. at 5 (stating only that "the Council must determine whether [the permit applicants, as necessary parties,] would be substantially prejudiced" directly, with no mention of "rights"); Order of Dismissal, *Boeing Co. v. Wash. State Bd. of Ecology*, No. 11-050, 2011 WL 3546624, at *3 (Wash. Pollution Control Hearings Bd. Aug. 5, 2011) ("because [a necessary party] has not consented to the entry of a declaratory ruling on any issue . . . , the Board has no authority or jurisdiction to enter the order or ruling requested," absent any mention of "rights" substantially prejudiced).

Furthermore, the entire premise of CRK's response relies, incorrectly, upon the success of the underlying merits. EFSEC has expressly rejected this exact argument previously, based on its circular, and therefore fallacious, logic. See *Quinault Nation*, slip op. at 6. In *Quinault Nation*, the Siting Council dismissed a like petition for a declaratory order despite contentions from the petitioner that the applicants in question "ha[d] no right to a permit from an incorrect jurisdiction." *Id.* at 5. EFSEC found that argument "circular in nature," in that it would have "require[d] the Council to assume it has jurisdiction over the facilities in order to determine whether [the permit applicants] c[ould] object to the Council making a decision over whether it ha[d] jurisdiction over the facilities." *Id.* at 6. Such a backwards approach was not "how the analysis under RCW 34.05.240(7) is conducted." *Id.* Rather, under the appropriate inquiry, "if [permit applicants] meet the requirements in RCW 34.05.240(7), then the Council may not issue a declaratory order on the Petition." *Id.*

Thus, based on the applicable administrative case law, the type of "right" implicated is not in any sense dispositive or even relevant to the RCW 34.05.240(7) analysis. But even if it is, the rights of NWIW and the Port at issue here are concrete and legally cognizable, derived not merely from "the passage of time," as characterized by CRK, but are inherent both in NWIW's property right to develop the property it leases and in the filing of its permit application with the appropriate and jurisdictional decision-makers: the Washington Department of Ecology, the Southwest Washington Clean Air Agency and Cowlitz County. The Port's rights to make public property available for economic development, and to negotiate, seek and pursue all necessary leases, permits and other entitlements, are similarly fundamental and inherent.

It is well established under Washington law that even the filing of an application related

to property development creates vested legal rights. See *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 962, 954 P.2d 250 (1998) (“Mission Springs had a constitutionally cognizable property right in the grading permit it sought. The right to use and enjoy land is a property right.”); *Mangat v. Snohomish County*, No. 112038635, 2011 WL 12557062, at *1 (Wash. May 18, 2011) (“Any vested rights created by the filing of such an application belong to the [party] who has the legal right to develop the property.”). Thus, NWIW possesses not only the legal right to develop the property it leases, but also the right created by its permit application. The latter right also includes the due process right to have that application processed in a timely and efficient manner with predictability and certainty. *Mission Springs*, 134 Wn.2d at 962; see also *W. Main Assocs. v. City of Bellevue*, 106 Wn.2d 47, 51, 720 P.2d 782 (1986) (vested rights are constitutional rights, protected from “fluctuating policy”).

Such rights clearly satisfy even the additional requirements that CRK would impose upon RCW 34.05.240(7), as the rights implicated here are both “legal” and “legally protected.”

III. CONCLUSION

CRK asserts that NWIW has no right to have its application “evaluated by decision-makers other than those mandated by Washington law.” CRK’s Response to Objections at 1. On this point, the parties agree. NWIW and the Port seek to protect their legal rights to have their permit applications evaluated by *only* the decision-makers mandated by Washington law: the Washington Department of Ecology, the Southwest Washington Clean Air Agency and Cowlitz County. EFSEC is *not* one of those decision-makers. See Declaration of Godley; see also Letter of Stephen Posner, Exhibit 6 to CRK’s Petition. As such, NWIW and the Port

respectfully reaffirm their objection to the petition for declaratory order and ask EFSEC to dismiss the petition.

DATED: August 12, 2016.

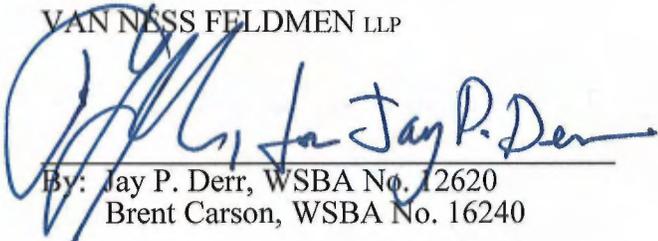
STOEL RIVES LLP



By: Timothy L. McMahan, WSBA No. 16377
tim.mcmahan@stoel.com

Attorneys for Northwest Innovation Works,
Kalama, LLC

VAN NESS FELDMEN LLP



By: Jay P. Derr, WSBA No. 12620
Brent Carson, WSBA No. 16240

Attorneys for Port of Kalama