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BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

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

DOCKET NO. _____

PORT OF KALAMA’S OBJECTION
TO COLUMBIA RIVERKEEPER’S
PETITION FOR DECLARATORY
ORDER

I. INTRODUCTION

The Port of Kalama (“Port”) objects to the Columbia Riverkeeper’s (“CRK”) Petition for Declaratory Order (“Petition” or “Pet’r’s Pet.”) requesting that the Energy Facility Site Evaluation Council (“EFSEC” or “Council”) issue a declaratory order pursuant to RCW 34.05.240 over the proposed Kalama Manufacturing and Marine Export Facility (“Project”). The Administrative Procedures Act (“APA”), Chapter 34.05 RCW, requires the Port’s written consent for the Council to consider CRK’s request because the Port is a necessary party whose rights would be substantially prejudiced by determination of the matter by a declaratory order proceeding. As one of the applicants for permits required for the Project that is the subject of CRK’s Petition, and as the land owner for the Project, the Port is a necessary party. Moreover, CRK’s request seeks to subvert and render meaningless nearly two (2) years of ongoing work by the Port and its Leasee, Northwest Innovation Works – Kalama LLC (“NWIW”), on permitting for the Project, and by the Port and its SEPA co-lead agency, Cowlitz County (“County”), on



1 environmental review of the Project. Granting the Petition would unnecessarily impose
2 significant delays and significantly increase the costs associated with the project review
3 and decision-making.

4 The Port contests the merits of CRK's Petition and agrees with EFSEC's prior
5 conclusion that the Project does not fall within the Council's purview.¹ However, it is
6 because of the substantial prejudice resulting from CRK's request that the Port does not
7 consent to the determination of the matter by declaratory order proceeding. CRK filed its
8 Petition more than two (2) years after the Port entered into the lease with NWIW and
9 approximately twenty-one (21) months after the Council determined that EFSEC did not
10 have jurisdiction over the Project. Following EFSEC's determination, the Port and
11 NWIW each proceeded with permitting of the Project. The Port and the County have
12 made substantial progress with environmental review of the Project with a Final
13 Environmental Impact Statement expected to be issued soon. Thus, the Port, NWIW and
14 the County have invested significant time and resources to date. Contrary to CRK's
15 baseless assertions, CRK has had and continues to have adequate opportunity to advocate
16 its interests in the ongoing permitting processes and in the local, state and associated
17 environmental review conducted by the Port and the County. Because the Port does not
18 consent, the Council may not consider CRK's request as a matter of law.

19 II. FACTS

20 On April 9, 2014, the Port executed a Lease and related agreements with NWIW
21 for permitting, environmental review, construction and operation of a new manufacturing
22 facility ("Facility") on the Port's North Port site. Declaration of Mark Wilson in Support
23 of Port of Kalama's Objection to Columbia Riverkeeper's Petition for Declaratory Order

24 _____
25 ¹ The Port has not included in this pleading any substantive response to the merits of CRK's Petition.
NWIW has included a substantive response in its Objection and the Port concurs with such response.

1 (“Wilson Decl.”), at 1:24-2:2. The Facility would convert natural gas into methanol and
2 transport methanol via marine vessels from a new marine terminal (“Terminal”) to global
3 markets, primarily in Asia. Wilson Decl., at 1:20-22.

4 The Facility, proposed to be constructed on an approximately 90-acre site, would
5 consist of two production lines, each with an expected capacity of 5,000 metric tons per
6 day. The Facility would be sited, permitted, constructed and operated by NWIW. The
7 Terminal is proposed to be permitted and constructed by the Port in the Columbia River
8 adjacent to the Facility.

9 In a related action, Northwest Pipeline LLC is proposing to construct and operate
10 the Kalama Lateral Project, a 3.1-mile natural gas, 24-inch pipeline through
11 unincorporated Cowlitz County to transport natural gas to the Facility (“Pipeline”).

12 The Project will require the following permits and authorizations: Rivers and
13 Harbor Act Section 10 permit, Clean Water Act (“CWA”) Section 404 permit,
14 Endangered Species Act (“ESA”) Section 7 consultation, incidental harassment
15 authorization under the Marine Mammal Protection Act (“MMPA”), National
16 Environmental Policy Act (“NEPA”) review, private aids to navigation permit, Section
17 106 of the National Historic Preservation Act review, Hydraulic Project Approval from
18 Washington Department of Fish and Wildlife, CWA Section 401 water quality
19 certification from Washington Department of Ecology (“Ecology”), air discharge permit
20 from the Southwest Clean Air Agency, National Pollutant Discharge Elimination System
21 (“NPDES”) industrial water discharge permit from Ecology, shoreline substantial
22 development and conditional use permit, review under the Critical Areas Ordinance, and a
23 floodplain development permit from Cowlitz County. Wilson Decl., at 3:23-4:10.

24 On August 26, 2014, NWIW wrote to EFSEC to request that EFSEC formalize a
25 determination of whether the Project is subject to EFSEC’s jurisdiction. Pet’r’s Pet. Ex. 5.

1 On September 3, 2014, EFSEC provided NWIW with a letter that determined that the
2 proposed facility is not subject to EFSEC jurisdiction. Letter from Stephen Posner,
3 Manager, Energy Facility Site Evaluation Council, to Murray V. Godley III, President,
4 Northwest Innovation Works, Kalama, LLC (September 3, 2014). Pet'r's Pet. Ex. 6.

5 On October 14, 2014, Ecology officially transferred lead agency status for SEPA
6 review of the Project to the Port and the County. Wilson Decl., at 2:3-5. On October 21,
7 2014, the Port and the County entered into a memorandum of understanding ("MOU") to
8 act as co-lead agencies under SEPA in the environmental review of the Project. Wilson
9 Decl., at 2:10-12. On October 31, 2014, the SEPA Responsible Official ("SRO") for Port
10 and the SRO for the County jointly issued a determination of significance ("DS") under
11 SEPA for the Project and a formal request for comments on the scope of the EIS. Wilson
12 Decl., at 2:13-18. The DS and scoping notice was sent to numerous agencies and
13 interested parties. Wilson Decl., at 2:18-19. A scoping period took place between
14 November 7 and December 8, 2014. Wilson Decl., at 2:25. A public scoping meeting
15 was held on November 20, 2014 to obtain additional public input on the scope of the EIS.
16 Wilson Decl., at 2:25-3:2. The Port and County received several written and verbal
17 comments at the scoping meeting and during the scoping period.

18 Following scoping, the Port and the County worked for over a year on preparation
19 of a detailed Draft Environmental Impact Statement ("DEIS") to address the potential
20 environmental impacts from the proposed Project and the comments raised during the
21 scoping period. Wilson Decl., at 3:3-4. On March 3, 2016, the SEPA Responsible
22 Officials from the Port and the County issued the DEIS. Wilson Decl., at 3:4-5.

23 An expanded 45-day public comment period was initiated on March 3, 2016.
24 Wilson Decl., at 3:7-8. In addition to accepting public comments on the DEIS through an
25 on-line website, comments were accepted by mail and in person at a public hearing held

1 on March 22, 2016. Wilson Decl., at 3:8-10. At the close of the public comment period,
2 the co-lead agencies had received an estimated 325 letters, emails, webform submittals,
3 comment cards and verbal hearing statements commenting on the DEIS, and 2,816
4 petitions. Wilson Decl., at 3:16-19.

5 Since the close of the public comment period on the DEIS, the Port and the County
6 have been reviewing the public comments, preparing responses to the public comments
7 and drafting additional analyses to be incorporated into a Final Environmental Impact
8 Statement (“FEIS”). Wilson Decl., at 3:19-21. The FEIS will be issued soon. Wilson
9 Decl., at 3:21-22.

10 Over the last two years, the Port and NWIW have applied for various permits
11 relevant to construction and operation of the Project. Wilson Decl., at 4:11-13. On April
12 24, 2015, the Port submitted its Joint Aquatic Resources Permit Application (“JARPA”)
13 providing notice to federal, state and local agencies of their submitting applications for the
14 shoreline substantial development permit, shoreline conditional use permit, critical areas
15 ordinance permit, floodplain permit, Hydraulic Project Approval, CWA Section 401 water
16 quality certification, CWA Section 404 permit, Rivers and Harbors Act Section 10 permit.
17 Wilson Decl., at 4:15-20. The Port resubmitted the JARPA on August 27, 2015. Wilson
18 Decl., at 4:20.

19 On April 24, 2015, the Port and NWIW submitted a request for review under
20 Section 106 of the NHPA. Wilson Decl., at 4:21-22. On April 24, 2015, the Port
21 submitted a request for an incidental take authorization under Section 101(a)(5) of the
22 MMPA for incidental take of marine mammals associated with piling driving activities for
23 the construction of the terminal portion of the Project. Wilson Decl., at 4:23-5:2.

24 On October 9, 2015, Ecology and the U.S. Army Corps of Engineers (“Corps”)
25 issued a Joint Public Notice regarding the application by the Port for a permit under

1 Section 10 of the Rivers and Harbors Act and Section 404 of the CWA, and for review by
2 Ecology under Section 401 of the CWA. Wilson Decl., at 5:3-6. Following receipt of
3 public comments, the Port prepared responses to public comments and provided those
4 responses to the Corps and Ecology. Wilson Decl., at 5:6-7. On October 15, 2015, the
5 Corps initiated ESA Section 7 consultation. Wilson Decl., at 5:13. The NPDES industrial
6 wastewater discharge permit was submitted to Ecology on December 21, 2015. Wilson
7 Decl., at 5:14-15. The shoreline substantial development and conditional use permit,
8 review under the Critical Areas Ordinance, and a floodplain development permit were
9 submitted to the County on December 4, 2015, and revised on February 25, 2016. Wilson
10 Decl., at 5:16-18. On February 24, 2016, the application for the air discharge permit was
11 filed with the Southwest Clean Air Agency. Wilson Decl., at 5:19-20.

12 CRK has actively participated throughout the SEPA review and permitting process
13 before the Port and the County, but has failed to assert any argument with respect to
14 EFSEC's jurisdiction. CRK submitted comments on the scope of the SEPA
15 environmental review on December 4, 2014. Wilson Decl., Ex. C. Dan Serres,
16 Conservation Director for CRK testified at the March 22, 2016 public hearing providing
17 verbal comments on the DEIS. Wilson Decl. 3:10-12. CRK also submitted written
18 comments on the DEIS on April 18, 2016. Wilson Decl., Ex. E. CRK's Petition now tries
19 to raise an objection that they did not pursue at any time over the last two years, despite
20 their active participation in the environmental and permitting process for the Project.

21 III. ARGUMENT

22 A. The Port objects to CRK's request and does not consent.

23 Pursuant to RCW 34.05.240(7), an agency "may not enter a declaratory order that
24 would substantially prejudice the rights of a person who would be a necessary party and
25 who does not consent in writing to the determination of the matter by a declaratory order

1 proceeding.” The Port is a necessary party and the requested Order would substantially
2 prejudice the Port’s rights. The Port does not consent to determination of the matter by a
3 declaratory order proceeding.

4 1. The Port is a necessary party.

5 The Port is a necessary party as an applicant for specific permits for the Project
6 and as the owner of the land on which the Project is proposed. The Port is responsible for
7 obtaining several of the permits required for the Project. The Port is the applicant on the
8 JARPA, under which the Port requested numerous permits, including a shoreline
9 substantial development permit, shoreline conditional use permit, critical areas ordinance
10 permit, floodplain permit, Hydraulic Project Approval, CWA Section 401 water quality
11 certification, CWA Section 404 permit, Rivers and Harbors Act Section 10 permit, and
12 private aids to navigation permit. Each of these permits are required for the Project that is
13 the subject of the Petition and as a party specifically identified in the Petition, the Port is a
14 “necessary party” to the CRK declaratory order proceedings.² Indeed, EFSEC,³ as well as
15 other agencies,⁴ interpreting RCW 34.05.240(7), have concluded that the applicant of a
16 project that is the subject of a petition for declaratory order is a necessary party.

17
18 ² The APA does not define “necessary party,” but defines “party” to an agency proceeding as:

- 19 (a) A person to whom the agency action is specifically directed; or
20 (b) A person named as a party to the agency proceeding or allowed to intervene or participate as a
21 party in the agency proceeding.

22 RCW 34.05.020. The Port satisfies the APA definition of “party” because the EFSEC declaratory order
23 would be “specifically directed” to the Port, as a project applicant.

24 ³ Quinault Indian Nation, EFSEC No. 14-001, Order Dismissing Petition for Declaratory Order, 4 Feb. 12,
25 2015).

26 ⁴ See, e.g., Letter from Ecology to Center for Environmental Law and Policy dated Jan. 8, 2009 regarding
27 “Petition for Declaratory Order on Stock Watering Purposes Exemption,” available at
28 http://www.ecy.wa.gov/programs/wr/wrac/images/pdf/010909celp_swresponse.pdf (“CELP” Letter)
29 (concluding that property owner and proponent of project to develop a new feedlot is a “necessary party”
30 when the project is the focus of a request for declaratory order); *Noreen, et al., v. Burien, et al.*, SHB No.
31 03-006, Order of Dismissal (Mar. 18, 2003), 2003 WL 1441309 at *1. See also *The Boeing Company v.*
32 *Ecology*, PCHB No. 11-050, Order of Dismissal (Aug. 5, 2011), 2011 WL 3546624 at *3 (relying on

1 This approach is consistent with the use of the term “necessary party” in the
2 superior court context when determining whether a party must be joined to a civil action
3 pursuant to CR 19. In that context, courts have recognized that a project developer whose
4 proposal is the subject of a complaint is a necessary party to the proceeding. *See National*
5 *Homeowners v. City of Seattle*, 82 Wn.App. 640, 919 P.2d 615 (1996) (court dismissed
6 lawsuit challenging City’s approval of mobile home park relocation plan that had been
7 prepared by project developer where Plaintiff homeowners association failed to name
8 project developer that had “invested considerable time and money in designing, planning,
9 and obtaining permits for the project.”). Thus, there can be no credible argument that the
10 Port, as the applicant for permits necessary for the Project that is the subject of this
11 Petition, is not a necessary party.

12 Additionally, the Port is a necessary party because it owns the land on which the
13 Project is to be constructed. The ability of the Port to use its property to pursue this
14 Project will be affected by any permitting decision, including any decision by EFSEC. In
15 the context of CR 19, “[n]umerous Washington decisions hold that the owner of property
16 directly affected by a land use decision or a person with an interest in the property which
17 is the subject of the land use decision is a party to be joined in proceedings involving that
18 decision.” *Crosby v. Cty. of Spokane*, 137 Wash. 2d 296, 305, 971 P.2d 32, 38 (1999)
19 (citations omitted).⁵

20
21 interpretation of RCW 34.05.240(7) by other administrative boards as requiring consent of the regulated
entity before accepting a petition for declaratory order).

22 ⁵ See also *South Hollywood Hills Citizens Ass’n v. King County*, 101 Wash.2d 68, 70, 677 P.2d 114
23 (1984) (property owners in a plat dispute); *Cathcart–Maltby–Clearview Community Council v. Snohomish*
24 *County*, 96 Wash.2d 201, 207, 634 P.2d 853 (1981) (property owners affected by rezoning);
25 *National Homeowners Ass’n v. City of Seattle*, 82 Wash.App. 640, 643–44, 919 P.2d 615 (1996) (property
purchaser and project developer); *Woodward v. City of Spokane*, 51 Wash.App. 900, 903, 756 P.2d 156
(1988)(same); *Coastal Bldg. Corp. v. City of Seattle*, 65 Wash.App. 1, 5, 828 P.2d 7 (1992) (neighboring lot
owner who had legal right to park on affected lot); *Veradale Valley Citizens’ Planning Comm. v. Board of*
County Commr’s, 22 Wash.App. 229, 232–33, 588 P.2d 750 (1978) (successful property owner-applicant);

1 2. The Port would be substantially prejudiced.

2 As the applicant for specific permits required for the Project that is the subject of
3 the Petition and as the owner of the property on which the Project would be located, the
4 Port's rights would be substantially prejudiced by Council consideration and
5 determination of the matter by declaratory order proceeding. The Council was previously
6 faced with a similar issue in determining whether it could issue a declaratory order
7 asserting jurisdiction over two projects without the consent of the project applicants, West
8 Terminal Company LLC ("Westway") and Imperium Terminal Services, Inc.
9 ("Imperium"). Quinault Indian Nation, EFSEC No. 14-001, Order Dismissing Petition for
10 Declaratory Order, 6-7 (February 12, 2015). EFSEC found substantial prejudice to the
11 applicants, which EFSEC determined were necessary parties, where the petition for
12 jurisdiction was filed after the parties submitted their environmental checklists, completed
13 the applications for shoreline substantial development permits, and had begun the process
14 of preparing a Draft Environmental Impact Statement. *Id.* at 4. In particular, EFSEC
15 noted that delay would be caused by EFSEC's need to familiarize itself with the proposal
16 and conduct an adjudication that is not part of the local government siting process. *Id.* at 6.
17 EFSEC found that it was unnecessary to quantify the costs before determining that delays
18 associated with the transfer of jurisdiction to EFSEC would substantially prejudice the
19 rights of Westway and Imperium. *Id.* EFSEC, therefore, dismissed the petition for
20 declaratory order to assert jurisdiction over the projects.

21 Additionally, other agencies interpreting this statutory provision have required a
22 minimal showing of "substantial prejudice," with some agencies simply assuming,

23
24 *Andrus v. Snohomish County*, 8 Wash.App. 502, 503, 507 P.2D 898 (1973) (grantee of conditional use
25 permit)).

1 without relying on any factual showing at all, that a necessary party to a petition would be
2 substantially prejudiced unless they consent. CELP Letter; *Noreen.*, SHB No. 03-006,
3 Order of Dismissal (March 18, 2003), 2003 WL 1441309 at *1; *The Boeing Company v.*
4 *Ecology*, PCHB No. 11-050, Order of Dismissal (August 5, 2011), 2011 WL 3546624
5 at *3.

6 In this case, the substantial prejudice to the Port exceeds that minimal showing to
7 support the Port's objection. The Port has invested significant time and money pursuing
8 its necessary approvals for the Terminal and conducting the environmental review as a
9 SEPA co-lead agency. The EIS scoping is complete; the scoping comment period closed
10 almost nineteen (19) months ago; the DEIS was issued more than four (4) months ago; the
11 public comment period on the DEIS is closed, and now, the Port and the County, as Co-
12 Lead Agencies, are carefully reviewing the DEIS public comments and are nearing
13 completion of a FEIS. To stop that process now and initiate a new proceeding before a
14 new state agency under a different statutory process, as requested by Petitioner, would
15 result in significant delays and costs that constitute substantial prejudice to the Port.

16 Additionally, applications have already been filed for various state and local
17 permits including a Hydraulic Project Approval, Section 401 Water Quality Certification,
18 shoreline substantial development permit, shoreline conditional use permit, among others.
19 Wilson Decl., at 4:11-14. Ecology and the Corps have issued Joint Public Notice
20 regarding the application by the Port for a permit under Section 10 of the Rivers and
21 Harbors Act and Section 404 of the CWA, and for review by Ecology under Section 401
22 of the CWA and the Port has responded to public comments filed in response to the
23 Corps/Ecology Joint Public Notice. Wilson Decl., at 5:3-12.

24 As the Council is aware, the EFSEC process requires several formal steps
25 including filing an application for site certification, consistent with EFSEC's statutory

1 requirements, notice, initial public hearings, a land use consistency determination and
2 environmental review conducted by EFSEC as the lead. All these steps would need to be
3 conducted in duplication and/or replacement of the process already initiated by the co-
4 leads for the permits sought for the Project. The EFSEC application requirements and
5 procedural steps are different than for the permits being sought, such as the shoreline
6 permits, not to mention overseen by different agency staff and decision makers. In
7 essence, the Port would be starting over on a different permitting process almost two (2)
8 years after it began the environmental review of the project and approximately a year
9 since filing its JARPA. The time added, alone, constitutes substantial prejudice, as does
10 the significant cost that would be associated with starting a new process.

11 Indeed, the prejudice is exacerbated given the time CRK has taken to file its
12 Petition. EFSEC staff considered and determined that they did not have jurisdiction on
13 September 3, 2014. CRK could have acted at that time, but did not. Additionally, CRK
14 has had numerous opportunities to raise the argument that EFSEC has jurisdiction,
15 including throughout its participation in the SEPA process. CRK could have challenged
16 the SEPA lead agency decision on the grounds that the Council should have been the lead
17 agency, not the Port and County. CRK did not raise this challenge in any of its comments
18 during the SEPA process.⁶ CRK should not be permitted to lie in wait and raise this issue
19 at this late stage in the current environmental review and permitting process, after the
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22 ⁶ By failing to raise the challenge for almost two (2) years after EFSEC initially determined that it did not
23 have jurisdiction, CRK is barred from challenging the process by the doctrines of laches, and equitable
24 estoppel. *State ex rel. Peninsula Neighborhood Ass'n v. Washington State Dept of Transp.*, 142 Wn. 2d
25 328, 340, 12 P.3d 134, 141 (2000) (applying doctrine of laches); *Lybbert v. Grant Cnty.*, 93 Wn. App. 627,
633, 969 P.2d 1112 (1999) (equitable estoppel proper where there is (1) an admission, statement or act
inconsistent with a claim afterward asserted, (2) action by another in reasonable reliance on that act,
statement, or admission, and (3) injury to the party who relied on the admission, statement or act if the court
allows the first party to contradict or repudiate the prior act, statement, or admission).

1 Port, NWIW and the County have invested substantial time and resources in the SEPA
2 process, as well as the processes for the permits required for the Project.

3 In an analogous factual situation, a court barred an action filed by a “dilatory”
4 plaintiff when the plaintiff could have pursued the action sooner and before the other
5 parties had invested time and effort pursuing and implementing the challenged action.
6 *State ex rel. Peninsula Neighborhood Association*, 142 Wn. 2d 328, 340, 12 P.3d 134, 141
7 (2000). In *Peninsula Neighborhood Association*, the Court concluded a petitioner’s APA
8 challenge to an implementing rule and an advisory election were barred by laches where
9 that claim was raised two years after the rule was adopted and eight (8) months after an
10 advisory election.⁷ In reaching its conclusion, the Court noted that the parties relied on the
11 challenged actions in the time between the dated of the advisory election and the date of
12 the plaintiff’s lawsuit. Similarly, here, in the time between when CRK was first aware of
13 the issue and the time they have asked EFSEC to issue a declaratory order on the same
14 issue, the Port has proceeded with permitting and environmental review, which CRK now
15 disputes. Like in *Peninsula Neighborhood Association*, the delay and lost time that would
16 result if EFSEC were to now assume authority to review this project would substantially
17 prejudice the Port.

18 IV. CONCLUSION

19 For the foregoing reasons, the Port does not consent to CRK’s request for
20 declaratory order. Because the Port is a necessary party whose rights would be
21 substantially prejudiced, the Council may not proceed with CRK’s request. Substantively,

22 _____
23 ⁷ *State ex rel. Peninsula Neighborhood Ass’n*, 142 Wn. 2d 328, 340, 12 P.3d 134, 141 (2000). While that
24 case did not address the APA provision governing agency declaratory orders in RCW 34.05.240, the court’s
25 assessment for what constitutes “substantial prejudice” for purposes of the equitable doctrine of laches is
informative. Where CRK’s dilatory pursuit of an administrative remedy would inflict substantial prejudice
sufficient to bar prosecution of their claim under a theory of laches, the same prejudice should certainly be
sufficient to require the Port’s consent pursuant to RCW 34.05.240.

1 the Port contests the merits of the CRK's claim and concurs in the argument presented in
2 NWIW's Objection to CRK's Petition. CRK is precluded from pursuing its substantive
3 claims related to the permitting process because of equitable estoppel and laches. The
4 Port does not consent to this process because of the substantial prejudice and the delay and
5 cost associated with CRK's Petition.

6
7 RESPECTFULLY SUBMITTED this 2nd day of August, 2016.

8 VAN NESS FELDMAN LLP

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