

**BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL**

In the Matter of the Petition of

QUINAULT INDIAN NATION

For a Declaratory Order Re: Jurisdiction
Over

WESTWAY TERMINAL COMPANY LLC
and IMPERIUM TERMINAL SERVICES,
INC.

Council Order No. 14-001

ORDER DISMISSING PETITION
FOR DECLARATORY ORDER

1 **Nature of the Proceeding:**

2 Westway Terminal Company LLC (Westway) currently operates a bulk methanol storage
3 terminal on property owned by the Port of Grays Harbor in Hoquiam. Imperium Terminal
4 Services, Inc. (Imperium) currently operates a facility for the production of biodiesel fuel and
5 storage of bulk liquids on property owned by the Port of Grays Harbor adjacent to the Westway
6 facility. *Imperium Objection to Petition, Ex. A.* Both Westway and Imperium seek to expand
7 their facilities to allow for the receipt of crude oil-by-train, which would be unloaded and stored
8 at the site for later shipment by vessel. The Department of Ecology and the City of Hoquiam are
9 acting as co-lead agencies for purposes of implementing the State Environmental Policy Act
10 (SEPA). The City of Hoquiam is processing the permits needed for the expansions.

11 On October 31, 2014, the Quinault Indian Nation (Quinault Nation) filed a Petition for a
12 Declaratory Order (Petition) with the Washington Energy Facility Site Evaluation Council
13 (EFSEC or Council). The Quinault Nation seeks a declaratory order from EFSEC that asserts its
14 jurisdiction over these two separately proposed crude oil-by-train terminals in Grays Harbor
15 County.

1 **Participants:**

2 Kristen L. Boyles of Earthjustice represents Petitioner Quinault Nation. Svend A.
3 Brandt-Erichsen and Meline G. MacCurdy of Marten Law PLLC represent Westway. Jay P.
4 Derr and Tadas A. Kisielius of Van Ness Feldman LLP represent Imperium.

5 **Procedural Setting:**

6 In response to the Petition, the Council established a briefing schedule, which included an
7 early deadline for the filing of any objections to the Petition. In ruling on the Petition, the
8 Council considered the following documents submitted by the parties:

- 9 1. Petition for Declaratory Order by the Quinault Indian Nation (Petition), with attached
10 Exhibits 1-14;
- 11 2. Westway Terminal Company LLC’s Objection to Quinault Indian Nation’s Petition
12 for Declaratory Order (Westway Objection to Petition), with attached Exhibits A – D;
- 13 3. Objection to Quinault Indian Nation’s Petition for Declaratory Order by Imperium
14 Terminal Services, Inc. (Imperium Objection to Petition), with attached Exhibits
15 A – E;
- 16 4. Quinault Indian Nation’s Response to Objections to Petition for Declaratory Order
17 (Quinault Nation Response);
- 18 5. Westway Terminal Company LLC’s Reply in Support of its Objection to Quinault
19 Indian Nation’s Petition for Declaratory Order (Westway Reply); and
- 20 6. Imperium’s Reply in Support of Objection to Quinault Indian Nation’s Petition for
21 Declaratory Order (Imperium Reply).

1 EFSEC held a special meeting and executive session on January 7, 2015 for the purpose
2 of considering the Petition. The Council reconvened the public hearing following the conclusion
3 of the executive session on the same date. After discussing the Petition, the Council voted to
4 issue an order dismissing the petition. As a result of the Council's action on January 7, 2015, the
5 Council hereby issues the following Order and ruling on the Quinault Indian Nation's request for
6 rulemaking:

7 **A. Declaratory Order**

8 The Quinault Nation contends that both the Westway and Imperium terminal proposals
9 should be subject to the EFSEC process for approving energy facility siting contained in chapter
10 80.50 RCW because the facilities will each have a capacity to receive more than an average of
11 50,000 barrels of crude oil per day after the expansions. *Petition at 3-5.* RCW 80.50.020(12)(d)
12 provides EFSEC jurisdiction over:

13 Facilities which will have the capacity to receive more than an average of fifty thousand
14 barrels per day of crude or refined petroleum or liquefied petroleum gas which has been
15 or will be transported over marine waters, except that the provisions of this chapter shall
16 not apply to storage facilities unless occasioned by such new facility construction; . . .

17 Westway and Imperium disagree with the calculations used by the Quinault Nation in
18 determining whether the threshold average of 50,000 barrels of oil per day is met. Both
19 Westway and Imperium note that on April 1, 2013, EFSEC staff sent Westway and Imperium
20 separate letters indicating that their respective proposed facility was below the EFSEC
21 jurisdictional threshold. *Westway Objection to Petition at 3; Imperium Objection to Petition at*
22 *2.* These letters also acknowledged that the state Department of Ecology and the City of
23 Hoquiam are co-lead agencies for the purpose of implementing SEPA. *Petition, Exs. 2 and 4.*

1 Furthermore, during a public discussion of the Petition during a Council meeting on November
2 18, 2014, EFSEC staff confirmed that they had reviewed the revised application for the Westway
3 project and again concluded that EFSEC did not have jurisdiction. *Westway Objection to*
4 *Petition at 4.*

5 Westway and Imperium also argue that they are far along in the approval process with the
6 City of Hoquiam and the Department of Ecology, and that the Quinault Nation had numerous
7 prior opportunities to file a petition for a declaratory order with the Council. Westway filed an
8 environmental checklist for its expansion with the City on February 19, 2013. *Petition, Ex. 1.*
9 Likewise, Imperium filed its environmental checklist for its project on February 22, 2013.
10 *Petition, Ex. 2.* On May 16, 2013, the Quinault Nation filed an appeal with the Washington
11 Shorelines Hearings Board (SHB) of shoreline substantial development permits issued by the
12 City of Hoquiam to Westway and Imperium for their expansion projects. The Quinault Nation
13 did not file a petition for a declaratory order with EFSEC at that time. The SHB issued a
14 decision reversing the shoreline permits issued by the City of Hoquiam. The SHB's reversal was
15 based on its determination that the underlying mitigated determinations of non-significance
16 (MDNS) under SEPA for the two projects did not adequately consider all potential impacts. The
17 SHB remanded the matter back to the City for further SEPA analysis consistent with its opinion.
18 *Imperium Objection to Petition, Ex. B; Quinault Indian Nation, et al. v. City of Hoquiam, et al.,*
19 *SHB No. 13-012c (Order on Summary Judgment, as Amended on Reconsideration, Dec. 9,*
20 *2013).* The permitting process for the Westway and Imperium projects continues to move
21 forward under the direction of the City of Hoquiam and Ecology. For example, the shoreline
22 application is complete and the draft environmental impact statement (DEIS) is nearing release
23 for public comment. *Westway Objection to Petition at 5; Imperium Reply at 4.*

1 The Quinault Nation is using the declaratory order process set forth in RCW 34.05.240(1)
2 in an attempt to bring these proposed terminal projects before EFSEC. This statute authorizes
3 any person to petition an agency for a declaratory order with respect to the applicability to
4 specified circumstances of a rule, order, or statute enforceable by the agency. Within 15 days
5 after receiving a petition requesting a declaratory order, the agency must give notice of the
6 petition to all persons to whom notice is required by law, and may give notice to any other
7 person it considers to be appropriate. RCW 34.05.240(3). EFSEC provided notice of the
8 Petition to the Department of Ecology, Westway, Imperium, and the City of Hoquiam.

9 The declaratory order process has limitations.

10 An agency may not enter a declaratory order that would substantially prejudice the rights
11 of a person who would be a necessary party and who does not consent in writing to the
12 determination of the matter by a declaratory order proceeding.
13 *RCW 34.05.240(7).*

14 Both Westway and Imperium have filed objections to the Petition. The Quinault Nation
15 concedes that, as the project applicants, Westway and Imperium are necessary parties. However,
16 the Quinault Nation disputes that the rights of either Westway or Imperium would be
17 substantially prejudiced if their proposals were subject to EFSEC jurisdiction. Therefore, the
18 Council must determine whether Westway and Imperium would be substantially prejudiced if the
19 permitting process was removed from the City of Hoquiam and the Department of Ecology and
20 placed before EFSEC.

21 The Quinault Nation makes two separate arguments: (1) it asserts that there would be no
22 significant timing impact if EFSEC obtained jurisdiction over the siting process for these
23 facilities; and (2) the facilities have no right to a permit from an incorrect jurisdiction. *Quinault*
24 *Nation Response at 4-5.* The Quinault Nation also denies that it is trying to disrupt the
25 environmental review. *Id. at 3.*

1 Addressing the second argument advanced by the Quinault Nation first, the Council finds
2 it is circular in nature. It requires the Council to assume it has jurisdiction over the facilities in
3 order to determine whether Westway and Imperium can object to the Council making a decision
4 over whether it has jurisdiction over the facilities. The Council disagrees with the Quinault
5 Nation on this point on how the analysis under RCW 34.05.240(7) is conducted. If Westway and
6 Imperium meet the requirements in RCW 34.05.240(7), then the Council may not issue a
7 declaratory order on the Petition.

8 With respect to whether there would be a significant timing impact, Westway and
9 Imperium argue that the additional time and expense associated with initiating a new process
10 before a different state agency constitutes substantial prejudice. They both observe that
11 decisions by other state agencies have found substantial prejudice with little or no consideration
12 of the nature or expense of those impacts. See, for example, *Noreen v. City of Burien*, SHB No.
13 03-006 (March 18, 2003); *Boeing Company v. Ecology*, PCHB No. 11-050 (Order of Dismissal,
14 August 5, 2011). In addition, Westway and Imperium assert that the Petition amounts to a
15 collateral attack on the current permitting process. *Westway Objection to Petition at 5*;
16 *Imperium Objection to Petition at 8 – 11*; *Westway Reply at 2*; *Imperium Reply at 2-5*.

17 The Council agrees with Westway and Imperium that there would be delays if EFSEC
18 assumed jurisdiction over the proposed facilities. EFSEC would need to hire additional staff,
19 which in turn, would need to familiarize themselves with the proposals. Even though EFSEC
20 would be able to save some steps in its process if it assumed jurisdiction, there are parts of the
21 EFSEC process, such as the adjudication, that are not part of the local government siting process.
22 The Council agrees that the time delays and additional costs associated with the transfer of
23 jurisdiction – particularly so late in the process, would constitute substantial prejudice to

1 Westway and Imperium. The Council agrees with the decisions of other state agencies that it is
2 unnecessary to quantify these costs before making such a finding.

3 Having found that the delays associated with the transfer of jurisdiction of the siting
4 process to EFSEC would substantially prejudice the rights of Westway and Imperium, and that
5 they are necessary parties to this proceeding, the Council concludes that the criteria in RCW
6 34.05.240(7) are met and that dismissal of the Petition is necessary. Having found that dismissal
7 of the Petition is necessary, the Council need not address the other arguments raised by Westway
8 and Imperium.

9 In dismissing the Petition, the Council does not take a position on the merits of the
10 Petition. The Council is simply unable to render a declaratory order under RCW 34.05.240.
11 Given the fact that the Department of Ecology and the City of Hoquiam are far along in the
12 permitting process for these facilities, the Council is unwilling to initiate an adjudication on its
13 own motion to determine if the jurisdictional limit has been exceeded by either facility. An
14 adjudication by the Council would be disruptive to the process, and cost the parties more time
15 and expense. The Council observes that other avenues may exist for the Quinault Nation to
16 bring this matter to Superior Court if they are so inclined.

17 **B. Request for Rulemaking**

18 In its Petition, the Quinault Nation suggests EFSEC should establish common standards
19 and regulatory definitions for several crude-by-rail elements. *Quinault Nation Petition at 20.* In
20 its Response to Objections, the Quinault Nation specifically asks EFSEC to begin a rulemaking
21 process to adopt standards and definitions to avoid case-by-case jurisdictional determinations
22 regarding EFSEC jurisdiction over crude-by-rail projects.

1 The Quinault Nation focuses its concern over the lack of regulatory definitions on the
2 phrase “capacity to receive” as used in RCW 80.50.020(12)(d). RCW 80.50.020(12)(a) – (f) list
3 the different types of energy plants over which EFSEC has jurisdiction. RCW 80.50.020(12)(d)
4 provides that an “energy plant” includes:

5 Facilities which will have the *capacity to receive* more than an average of fifty thousand
6 barrels per day of crude or refined petroleum or liquefied petroleum gas which has been
7 or will be transported over marine waters, except that the provisions of this chapter shall
8 not apply to storage facilities unless occasioned by such new facility construction;
9 *Emphasis added.*

10 The Quinault Nation asserts that without a standard definition for “capacity to receive”,
11 the facilities will be able to manipulate their calculations to avoid EFSEC jurisdiction and lists
12 different factors that EFSEC should include as part of the standards used to determine a facility’s
13 “capacity to receive.” *Quinault Nation Response at 5-6.*

14 Imperium contends that the Petitioner should use the separate process for requesting
15 agency rulemaking that is provided in the Administrative Procedures Act (APA), chapter 34.05
16 RCW, rather than asking for this relief as part of a petition for a declaratory order. *Imperium*
17 *Reply at 9.* Westway did not address the Quinault Nation’s request for a rulemaking.

18 The APA authorizes any person to “petition an agency requesting the adoption,
19 amendment, or repeal of any rule.” RCW 34.05.330(1). This same statute directs the Office of
20 Financial Management to prescribe by rule the format for such petitions and the process for how
21 these petitions are submitted, considered, and disposed. The Office of Financial Management
22 adopted Chapter 82-05 WAC to describe the requirements and process for petitioning an agency
23 to adopt, repeal, or amend a rule under RCW 34.05.330. WAC 82-05.020(1) lists the
24 information that must be included within a petition, as well as information the petitioner is
25 encouraged to address in the petition. Furthermore, WAC 82-05-020(2) specifies certain

1 information that should be included in a, depending upon whether the petitioner is proposing a
2 new rule, requesting the amendment of an existing rule, or requesting the appeal of an existing
3 rule. In the present case, the Petitioner is proposing the adoption of a new rule. Under these
4 circumstances, WAC 82-05-020(2) provides that the petition should include the text of the
5 proposed rule or a description of its provisions.

6 The Council agrees with Imperium’s position that the Quinault Nation should use the
7 rulemaking petition process set forth in RCW 34.05.330 and Chapter 82-05 WAC if it wishes
8 EFSEC to initiate rulemaking in this area. The Council is not unsympathetic to the Quinault
9 Nation’s observation that without standardized definitions for some statutory terms, particularly
10 “capacity to receive” as used in RCW 80.50.020(12)(d), there is confusion regarding what
11 factors are used to determine whether EFSEC’s statutory threshold is reached. However, the
12 proposed rulemaking suggested by the Quinault Nation is not appropriately presented in the
13 context of a petition for a declaratory order. Although the Quinault Nation has set forth some
14 factors that should be considered as part of a rulemaking, it should follow the procedure required
15 by RCW 34.05.330(1) by submitting a detailed proposal accompanying its request for
16 rulemaking under the process established in WAC 82-05-020. The Council denies the request
17 for rulemaking contained in the Petition.

18 DATED and effective at Olympia, Washington, the 12 day of February, 2015.

_____/s/_____
William H. Lynch, EFSEC Chairman

CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing document to be serviced on all parties or their counsel of record on February 12, 2015 as follows:

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