BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of the Petition of	)	
	)	
QUINAULT INDIAN NATION	)	QUINAULT INDIAN NATION
	)	RESPONSE TO OBJECTIONS
For a Declaratory Order Re: Jurisdiction Over	)	TO PETITION FOR DECLARATORY
	)	ORDER
WESTWAY TERMINAL COMPANY and	)	
IMPERIUM TERMINAL SERVICES.	)	
	)	

INTRODUCTION

Westway Terminal Company and Imperium Terminal Services object to Energy Facility Site Evaluation Council ("EFSEC" or "Council") consideration of Quinault Indian Nation's Petition for a Declaratory Order regarding the Council's jurisdiction. It is clear that the companies want to avoid any scrutiny of jurisdiction by the Council. The objections, however, do not show that the Council's consideration of the petition would "substantially prejudice the rights" of Westway and Imperium. "Substantially prejudice" must mean something more than aversion or inconvenience; petitioner Quinault Indian Nation asks the Council to find that Westway's and Imperium's rights are not substantially prejudiced by consideration of the petition and to set a briefing schedule on the substantive issues raised in the petition.

ARGUMENT

I. QUINAULT HAS MET THE FACTORS REQUIRED FOR A DECLARATORY ORDER.

On October 31, 2014, Quinault submitted a petition asking the Council to issue a declaratory order finding that it had jurisdiction over both the Westway and Imperium proposed

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crude oil shipping terminals in Grays Harbor as new energy plants under RCW 80.50.020(12)(d). Pursuant to Washington law, any person may petition an agency for a declaratory order if she can show that (a) uncertainty exists, (b) from an actual controversy, (c) that adversely affects the petitioner, (d) more than others or the general public. RCW 34.05.240(1)(a)-(d). Quinault's petition with respect to the Westway and Imperium proposed facilities met all required factors. There is uncertainty about whether the Council has jurisdiction over the Westway and Imperium terminal proposals; there is an actual controversy between the parties such that a decision by the Council will not be an advisory opinion; the uncertainty affects Quinault; and the benefits of a decision in the correct forum—state-wide review for projects with state-wide impacts—outweigh adverse effects, if any. Quinault Petition at 4-10. In fact, neither Westway nor Imperium raise any arguments as to those factors.

II. WESTWAY AND IMPERIUM FAIL TO SHOW SUBSTANTIAL PREJUDICE OF THEIR RIGHTS.

At the same time, RCW 34.05.240 states that an agency may not enter a declaratory order that (1) "would substantially prejudice the rights of a person," (2) "who would be a necessary party," (3) who does not consent in writing. RCW 34.05.240(7). There is no argument about the second factor: Westway and Imperium are necessary parties, and Quinault independently served them with all papers associated with its petition. Westway and Imperium do not consent in writing, satisfying the third factor. Yet both companies fail to adequately show that consideration of Quinault's petition would "substantially prejudice" their "rights." On this second factor, the Council should overrule their objections.

Both companies raise similar arguments for substantial prejudice, most of which are variants of a timeliness objection. *See* Westway Objection at 3; Imperium Objection at 9-10. These timeliness objections do not rise to the level of substantial prejudice of rights.

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Westway and Imperium assert that EFSEC should not consider Quinault's petition because Quinault should have brought it earlier. Westway Objection at 3; Imperium Objection at 9-10. The timing arguments of Westway and Imperium do not withstand scrutiny. The companies contend that Quinault should have brought this petition as early as spring 2013, even though Westway's current permit application—the one EFSEC would assert jurisdiction over—was filed in February 2014. Quinault Petition for Declaratory Order Exh. 5. Westway and Imperium also assert that Quinault should have sought EFSEC jurisdiction before Shorelines Hearings Board in its appeal of the original MDNS. Westway Objection at 4; Imperium Objection at 9. Not so, as the Quinault Indian Nation believes the Council should determine its jurisdiction in the first instance, not the Shorelines Hearings Board.

Both companies cast aspersions on Quinault's motives, stating that the petition is "transparently timed" to disrupt current environmental review (Westway Objection at 3) or that Quinault should not be permitted to "lie in wait" to seek EFSEC jurisdiction (Imperium Objection at 10). Such hyperbole does not serve either company. Both Westway and Imperium acknowledge that Quinault has pressed the argument for EFSEC jurisdiction with the City of Hoquiam, the Department of Ecology, and EFSEC staff several times before, all in an effort to avoid the need to file this type of petition or state court judicial review. Quinault has hardly been "lying in wait" to spring this argument on the parties; instead, Quinault has steadily sought to resolve the jurisdictional issue without formal proceedings. Moreover, Quinault is a sovereign nation that does not take resort to agency petitions or the courts lightly. Quinault cannot be faulted for first engaging in more informal efforts to persuade EFSEC and other agencies to follow the law, even if those efforts took time.

More importantly, neither Westway nor Imperium adequately explain how consideration

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and the potential granting of this petition would substantially prejudice their rights. There is no reason why EFSEC jurisdiction should disrupt the ongoing environmental review schedule for these proposed projects. As the Council knows, the environmental impact statement process takes place on a parallel track to an EFSEC adjudication. *See* EFSEC Generalized Siting Process Flow Chart, *available at* http://www.efsec.wa.gov/20140717EFSECProcess.pdf. The environmental impact statement process that has already begun can continue unaffected by a switch in jurisdiction.[1] Upon completion of the environmental impact statement, the Council's recommendation process would continue in place of the permitting process undertaken by the City of Hoquiam. There need be no significant timing impact, and the companies would participate in EFSEC proceedings with full opportunity to be heard at every turn.

Nor does either company explain how its rights are substantially prejudiced. Westway and Imperium have no right to a permit from the incorrect jurisdiction. If the Council asserted jurisdiction after briefing on Quinault's petition, there would still be an environmental impact statement, there would still be a process for granting or denying necessary permits, and the companies would still have full opportunity to participate in and challenge any final decision. Nothing about the petition takes away from the companies' current rights. What the companies do not have is a right to avoid the appropriate EFSEC jurisdiction because they would prefer a different decision-maker.

The companies also complain that they have already spent money on the current permitting process. Again, money spent on the environmental impact statements will not be wasted, as discussed above. Additionally, the most costly delay in the permits occurred when

[1] Westway (at 5) suggests that the draft environmental impact statement will be issued for public comment in March 2015. No one has informed Quinault of such an estimated release date; nor has Quinault brought its petition to the Council with such an estimated date in mind.

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Westway and Imperium failed to fully comply with the State Environmental Policy Act the first time they submitted permit applications. The costs associated with that delay are entirely unrelated to any request for EFSEC jurisdiction. Indeed, the companies have known for over a year that Quinault believed jurisdiction lay with the Council. The more substantial waste of time and money would come from Quinault waiting until new permits were issued to challenge jurisdiction. Westway's protestation that "Quinault will have ample opportunity to raise their concerns during the public comment process on the Draft EIS," Westway at 6, rings hollow given that it follows the arguments chiding Quinault for delay. It seems more likely that any argument by Quinault for EFSEC jurisdiction in the current environmental review process will be ignored or objected to as untimely again.[2]

III. EFSEC NEEDS TO ADOPT STANDARDS AND DEFINITIONS FOR CRUDE-BY-RAIL PROJECTS TO AVOID CASE-BY-CASE JURISDICTIONAL BATTLES.

As set forth in Quinault's petition, the Council does not currently have a set of common standards and regulatory definitions that allow it to accurately assess when proposed facilities have the "capacity to receive" over an average of 50,000 barrels of crude oil per day. RCW 80.50.020(12)(d). In order to prevent future disagreements about EFSEC jurisdiction over crude-by-rail proposals, regardless of what decision the Council makes on the Quinault's petition, standardized definitions should be adopted. At a minimum, these standards should include (1) the average number of barrels of oil per tank car to be used in capacity calculations;

[2] The laundry list of doctrines recited by Imperium (at 9, n.23) of res judicata, collateral estoppel, laches, and equitable estoppel do not apply to a petition for declaratory order. Additionally, Quinault is plainly not challenging Imperium's prior permit here—a permit that has been vacated and remanded by the Shorelines Hearings Board. Instead, Quinault asks the Council to assert jurisdiction over the ongoing permitting process. Similarly, Imperium's discussion (at 10) of *State ex rel. Peninsula Neighborhood Ass'n v. Wash. State Dep't of Transp.*, 142 Wn.2d 328, 340, 12 P.3d 134, 141 (2000) is irrelevant, as that case did not address agency declaratory orders at all. If anything, *Peninsula Neighborhood's* laches holding undercuts Westway's argument that Quinault should wait to raise its concerns until the draft environmental impact statement public comment process.

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(2) the average number of tank cars per unit train to be used in capacity calculations; (3) the unloading rate in barrels per hour from rail car to storage tank; and (4) the unloading rate in barrels per hour from storage tank to marine vessel. Until such standards are in place, proposed facilities will be able to manipulate their calculations of "capacity to receive" to avoid EFSEC jurisdiction.

CONCLUSION

For the reasons stated above and in Quinault's Petition for Declaratory Order, the Quinault Indian Nation asks the Council to (1) find that the rights of Westway and Imperium are not substantially prejudiced by consideration of this petition, and (2) set a schedule for substantive briefing. If the Council declines to consider the substance of the petition, Quinault asks the Council to begin a rulemaking process to adopt standards and definitions to prevent the type of forum shopping based on differing calculations of capacity that is evident here.

Respectfully submitted this 17th day of December, 2014.

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CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. My business address is 705 Second Avenue, Suite 203, Seattle, Washington 98104.

I HEREBY CERTIFY that on December 17, 2014, I served the following documents on the following parties:

1. Quinault Indian Nation Response to Objections to Petition for Declaratory Order.

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I, Catherine Hamborg, declare under penalty of perjury that the foregoing is true and correct. Executed this 17th day of December, 2014, at Seattle, Washington.

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