

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of the Petition of)	
)	DOCKET NO. _____
QUINAULT INDIAN NATION)	
)	
For a Declaratory Order Re: Jurisdiction Over)	PETITION FOR DECLARATORY
)	ORDER
WESTWAY TERMINAL COMPANY and)	
IMPERIUM TERMINAL SERVICES.)	
_____)	

1. Name and Address of Petitioning Party:

Quinault Indian Nation
Quinault Business Committee
P.O. Box 189
Taholah, WA 98587
(360) 276-8211 | Phone

2. Statutes, Rules, Orders, or Other Legal Requirements at Issue:

RCW 80.50.020(12)(d)—definition of energy plant
RCW 80.50.020(11)—definition of energy facility
RCW 80.50.060(1)—energy facilities to which chapter applies

INTRODUCTION

1. The Washington State legislature created the Energy Facility Site Evaluation Council (“EFSEC”) because it recognized the need to balance growth in energy demands with public and environmental protection, as well as the need to establish consistent state-wide procedures for selecting and approving energy facility sites. RCW 80.50.010. The legislature found that Washington citizens deserved operational safeguards at least as stringent as federal protections, 80.50.010(1), and that action should be taken “to preserve and protect the quality of the environment; to enhance the public’s opportunity to enjoy the esthetic and recreational

benefits of the air, water and land resources; to promote air cleanliness; and to pursue beneficial changes in the environment,” 80.50.010(2).

2. In line with these overarching policy goals, petitioner Quinault Indian Nation asks for a declaratory order that EFSEC, not the City of Hoquiam or the Washington State Department of Ecology, has jurisdiction over the proposals by Westway Terminal Company and Imperium Terminal Services to build crude-by-rail terminals in Grays Harbor.

3. Crude-by-rail facilities are a relatively recent phenomenon. Instead of building a pipeline to transport crude oil, crude-by-rail envisions mile-and-a-half long trains of crude oil tank cars traveling between drill sites and refineries. The Westway and Imperium proposals add ships and barges to this system, for the crude oil will arrive by train, be transferred to large storage tanks, and then be transferred to barges and ships that will take the crude to other U.S. ports, where it will be transferred yet again to a refinery, or exported internationally.

4. Both the Westway and Imperium projects fall under the statutory definition of “energy plants” over which EFSEC has jurisdiction, RCW 80.50.020(12)(d), as both proposals have the “capacity to receive” over an average of 50,000 barrels of crude oil per day. The statutory term “capacity to receive” must be interpreted to mean maximum constructed physical capacity, not stated intentions of project proponents. For Westway, its capacity is, at a minimum, 52,000 barrels per day; for Imperium, its admitted capacity is 78,000 barrels per day.

5. Equally important, both the Westway and Imperium projects are new crude oil storage facilities, not expanded or enlarged existing facilities. While both sites currently hold large storage tanks for methanol or biodiesel, neither is an “existing energy facility” as defined by the statute, RCW 80.50.020(11), (12), and neither currently receives crude or refined petroleum that has been or will be transported over marine waters. RCW 80.50.020(12)(d). For

this reason, Imperium is not exempt from EFSEC jurisdiction under a “net increase” theory. *See* RCW 80.50.060(1).

FACTUAL BACKGROUND

6. The Westway Terminal Company was the first proposed crude-by-rail facility in Grays Harbor to apply for permits. *See* Exh. 1, Westway 2013 SEPA Checklist. On April 1, 2013, EFSEC staff sent Westway a letter, stating that the staff had determined it did not have statutory jurisdiction over the Westway project. Exh. 2. On April 4, 2013, the City of Hoquiam and the Washington Department of Ecology issued a threshold mitigated determination of nonsignificance (“MDNS”) under the State Environmental Policy Act (“SEPA”) for the Westway proposal; on April 26, 2013, the City of Hoquiam issued Westway a Shoreline Substantial Development Permit. These decisions authorized the construction of a new oil shipping terminal in Grays Harbor and gave Westway the ability to build four large new storage tanks with the capacity to store a total of 800,000 barrels or 33,600,000 gallons of crude oil and to upgrade its rail receiving capacity with a total of 76 unloading bays. At that time, Westway estimated that the terminal would receive an average of 26,300 barrels of oil per day, or 9,600,000 barrels of oil per year, by rail.

7. The Imperium Terminal Services proposal followed closely on Westway’s heels. *See* Exh. 3, Imperium 2013 SEPA Checklist. On April 1, 2013 EFSEC staff also sent Imperium a letter, stating that staff had determined it did not have statutory jurisdiction over the Imperium project. Exh. 4. On May 2, 2013, the City of Hoquiam and the Washington Department of Ecology issued an MDNS for the Imperium proposal; on June 14, 2013, the City of Hoquiam issued Imperium a Shoreline Substantial Development Permit. These decisions authorized the construction of another new oil shipping terminal in Grays Harbor, with nine large new storage tanks of 80,000 barrels each, with the capacity to store a total of 720,000 barrels or 30,240,000

gallons of crude oil and other fuel products. With a capacity to receive 78,000 barrels per day, Imperium may ship almost 28.5 million barrels of crude oil per year.

8. Quinault Indian Nation and five conservation groups challenged both the Shorelines Permits and the MDNSs for both projects before the Washington State Shorelines Hearings Board, and those challenges were consolidated as *Quinault Indian Nation et al. v. City of Hoquiam et al.*, SHB No. 13-012c. On November 12, 2013, the Washington State Shorelines Hearings Board granted summary judgment almost entirely in favor of Quinault Indian Nation and vacated the Shorelines Permits on the grounds that the MDNSs were invalid. The City of Hoquiam and Washington Department of Ecology are now overseeing the preparation of full environmental impact statements; the public scoping comment period closed May 27, 2014. If EFSEC does not assume jurisdiction, the City of Hoquiam would need to make a second decision on the shorelines permits after the final environmental impact statement is completed.

9. On February 13, 2014, Westway submitted a new Joint Aquatic Resources Permit Application form for its project, and in this form, Westway increased its proposed number of storage tanks to five (over two phases) and increased its proposed number of rail car unloading spots to 80. Exh. 5, Joint Aquatic Resources Permit Application (“JARPA”) (Feb. 13, 2014).

REQUIREMENTS FOR A PETITION FOR A DECLARATORY ORDER:
RCW 34.05.240(1); WAC 463-34-070.

10. Pursuant to state law, any petition for a declaratory order by an agency must show that an uncertainty necessitating resolution exists; that there is an actual controversy arising from the uncertainty and the requested declaratory order will not merely be an advisory opinion; that the identified uncertainty adversely affects the petitioner; and that the harm from the uncertainty outweighs the adverse effect, if any, on others or on the public from the requested order. RCW 34.05.240(1)(a)-(d).

A. Uncertainty Necessitating Resolution

11. There is uncertainty about whether EFSEC has jurisdiction over the Westway and Imperium terminal proposals. In separate letters both dated April 1, 2013, EFSEC staff informed Westway and Imperium that it determined it does not have jurisdiction over the proposals. However, EFSEC itself has made no formal decision on the proposals. Furthermore, the Westway proposal has changed significantly since April 1, 2013. The current proposal increases the number of rail car unloading spots to 80, adds a fifth storage tank, and increases the estimated crude oil through-put to 17,855,000 barrels a year, a full 8,255,000 barrels more per year than was proposed at the time EFSEC staff disclaimed jurisdiction in April 2013. Under this new proposal, Westway claims it plans to receive only an average of 48,918 barrels per day, but to the contrary, Westway's actual daily capacity is at least 52,000 barrels a day, using conservative numbers. These facts and recent developments create substantial uncertainty about EFSEC's jurisdiction over the Westway and Imperium projects. The Shorelines Hearings Board's summary judgment decision and remand back to the City of Hoquiam gives EFSEC a window of opportunity to clarify the ambiguity about EFSEC's jurisdiction.

B. Actual Controversy

12. There is an actual controversy regarding this jurisdictional issue, not just a theoretical dispute. Specifically, the Quinault Indian Nation believes EFSEC has jurisdiction over the proposed terminals, while Westway and Imperium do not. This fundamental dispute has real consequences for the parties because the jurisdictional decision determines the nature of the permitting process for the terminals. If EFSEC assumes jurisdiction over the proposals, the permitting process will be substantively different, and more rigorous, than the City of Hoquiam's permitting process.

C. Uncertainty Adversely Affects Petitioner

13. The Quinault Indian Nation is a signatory to the Treaty of Olympia (1856) in which it reserved a right to take fish at its “usual and accustomed fishing grounds and stations” and the privilege of gathering, among other rights, in exchange for ceding lands it historically roamed freely. Treaty rights are not granted to tribes, but rather are “grants of rights from them—a reservation of those not granted.” *U.S. v. Winans*, 198 U.S. 371, 380-81 (1905). Treaty rights are akin to easements running with the lands or places they burden and include a right of access to those places. *See id.* at 381. As such, treaty rights are property rights within the meaning of the Fifth Amendment and cannot be “taken” without compensation. *Muckleshoot v. Hall*, 698 F. Supp. 1504, 1510 (W.D. Wash. 1988) (citing *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 411 n.12 (1968)).

14. Treaties impose on the government the “highest responsibility” and create a special fiduciary duty and trust responsibility upon all agencies of the United States and states to protect treaty rights, including fishing rights. *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). These rights cannot be abrogated except by explicit Congressional authorization. Federal courts have consistently required the federal agencies and states to keep the treaty promises upon which the Tribes relied when they ceded huge tracts of land by way of the Treaties. *See, e.g., Winans*, 198 U.S. 371; *Confederated Tribes of Umatilla Indian Reservation v. Alexander*, 440 F. Supp. 553 (D. Or. 1977); *United States v. Oregon*, 718 F.2d 299, 304 (9th Cir. 1983); *Muckleshoot*, 698 F. Supp. 1504; *Nw Sea Farms v. U.S. Army Corps of Eng’rs*, 931 F. Supp. 1515 (W.D. Wash. 1996); *United States v. Washington*, 2007 WL 2437166 (W.D. Wash.).

15. In a landmark court case known as the “Boldt decision,” a federal court confirmed that Indian tribes have a right to half of the harvestable fish in state waters and established the

tribes as co-managers of the fisheries resource with the State of Washington. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974). Specific to the Quinault Indian Nation, the Boldt decision affirmed the Quinault usual and accustomed fishing areas include “Grays Harbor and those streams which empty into Grays Harbor.” *Id.* at 374.

16. The Quinault have been called the Canoe people because of the primacy of the ocean, bays, estuaries, and rivers to every aspect of tribal life. *See generally* Jacqueline M. Strom, *Land of the Quinault* (1990). The Quinault Indian Nation’s Division of Natural Resources manages all aspects of its many fisheries, both on and off the reservation. Quinault fishermen catch salmon, sturgeon, steelhead, halibut, cod, crab, oysters, razor clams, and many other species in Grays Harbor.

17. The Chehalis and the Humptulips Rivers and the Grays Harbor estuary into which they flow provide the freshwater and marine habitat that support natural production for chinook, chum, and coho salmon and steelhead of critical importance to the Quinault Nation’s Treaty-protected terminal river fisheries within Grays Harbor, managed jointly by the Quinault Nation and Washington State Department of Fish and Wildlife and governed by seasonal plans and agreements. Grays Harbor nourishes other species of fish important to the Nation’s Treaty-protected fisheries such as White Sturgeon and Dungeness Crab, an economically vital fishery on the coast of Washington. Grays Harbor produces numerous species of invertebrates and finfish that provide important prey to species and stocks utilizing the harbor and adjacent marine areas.

18. Quinault weavers have gathered materials from the Grays Harbor area for many generations. Sweetgrass, cattail, and other grasses and willow gathered from the Bowerman Basin are used by the Quinault as a material in the traditional weaving of baskets and mats, and for ceremonial purposes. Weaving is as integral to contemporary Indian culture as it was in the

past. *See* K. James and V. Martino, Grays Harbor and Native Americans (1986), prepared for the U.S. Army Corps of Engineers (Contract #DACQ67-85-M-0093).

19. Bowerman Basin, located in Grays Harbor to the north of the proposed Westway project, is one of the two major areas remaining in Washington with large sweetgrass populations. Sweetgrass is a key component, and participant, in the highly complex estuarine ecosystem processes. Its loss due to a potential oil spill would significantly impact juvenile salmonid and bird habitats, and estuary function, having huge negative implications for the Quinault.

20. The Quinault Indian Nation has an obvious interest in protecting the fish and fish habitat that it relies on in Grays Harbor to exercise its federally-guaranteed treaty fishing rights, as well as the traditional areas used for gathering plants for traditional cultural use. Additionally, the Quinault Nation's treaty fishing right includes a right of access to its traditional fishing areas and any impact to that right is an unconstitutional taking of a property right. Tribal members have always lived and worked, and continue to live and work, in the Grays Harbor area.

21. The failure of EFSEC to assert jurisdiction over the Westway and Imperium projects injures the Quinault Indian Nation in several ways. First, construction and operation of these facilities will have adverse impacts on the aquatic environment by harming aquatic species and habitat relied upon by the Quinault Indian Nation to exercise their federally-guaranteed treaty fishing rights. Second, construction and operation of the facilities will result in significant increases in local train and ship traffic with attendant increases in pollution, traffic delays, safety hazards, and greenhouse gas emissions, and it will limit access to usual and accustomed fishing areas. Third, operation of these projects will result in significant increases in Washington State's contribution to global emissions of greenhouse gases and other pollutants. These increases will

occur because operation of the project will result in increased transportation of oil, and increased refining and burning of oil, which in turn contributes to human-induced climate instability that harms the Quinault's commercial, recreational, aesthetic, spiritual, and other interests.

D. There Are No Adverse Effects From the Requested Order.

22. In this case, the adverse effect of the jurisdictional uncertainty on the petitioner “outweighs any adverse effects on others or on the general public that may likely arise from the order requested,” RCW 34.05.240, because there are no adverse effects on others or on the public from an assertion of EFSEC jurisdiction. On the contrary, both the public and the parties in this case will benefit from a clear jurisdiction decision by EFSEC. If EFSEC asserts jurisdiction, the result of that decision will be a thorough, transparent review process followed by a certification decision made by the proper authority.

23. The benefits to the public are several. First, with EFSEC jurisdiction, the level of review will reflect the level of impact—state-wide review for projects impacting the entire state. Second, there will be greater transparency and the opportunity for public comments during the review process, a necessary component of a permitting process with such significant consequences for Washingtonians. RCW 80.50.090. Another important effect of EFSEC jurisdiction would be the appointment of an assistant attorney general as a counsel for the environment. RCW 80.50.080. It is crucial that the environment have a representative during the consideration of this series of unprecedented proposals in Washington. Furthermore, EFSEC jurisdiction will allow the state to balance the cumulative impacts of the three new crude-by-rail proposals in one harbor. As these proposals are being submitted at approximately the same time, for sites in approximately the same place, it is important that a state-wide agency consider the aggregate effects of the increased rail and marine traffic and likelihood of oil spills. Finally, under EFSEC jurisdiction, the certification decision would ultimately be made by the Governor,

a more appropriate decision-maker on this major public issue. RCW 80.50.100. It is in the public's best interest, as well as petitioner's, to have a fair airing of these issues at a state-wide level.

ARGUMENT

I. UNDER THE PLAIN LANGUAGE OF THE STATUTE, THE WESTWAY AND IMPERIUM PROJECTS FALL UNDER EFSEC JURISDICTION PURSUANT TO RCW 80.50.020(12)(D).

24. The State of Washington, through the passage of RCW 80.50, assigned the certification of the construction, reconstruction, or enlargement of specific "energy facilities" to EFSEC. RCW 80.50.060(1). The term "energy facilities" includes "energy plants," RCW 80.50.020 (11), and the statute defines energy plants to include:

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

RCW 80.50.020(12)(d). Both the Westway and Imperium proposals in Grays Harbor meet all requirements under this definition. Additionally, neither proposal is for an expansion of an existing facility pursuant to RCW 80.50.060(1). Therefore, both proposals fall squarely within EFSEC's jurisdiction over the construction of new energy facilities in Washington.

A. Westway and Imperium Will Receive Crude Oil That Will Be Transported Over Marine Waters.

25. There can be no dispute that Westway and Imperium will transport crude oil "over marine waters." Westway anticipates initially 53-64, and then 99-119, tankers or tank barges to transport crude oil from its facility per year. Exh. 5, Westway 2014 JARPA at 5. Imperium estimates that the terminal would add 400 ship/barge transits through Grays Harbor per year, transporting crude oil over marine waters. Exh. 3, Imperium 2013 SEPA Checklist

at 32.

B. Imperium Will Have the “Capacity to Receive,” on Average, More Than 50,000 Barrels of Crude Per Day.

26. Imperium admits to a daily average of 78,000 barrels, well over the 50,000 barrel/day jurisdictional trigger, *see* Exh. 3 at 32, but believes it does not fall under EFSEC jurisdiction because it is proposing an expansion of an existing facility. It is not, for reasons discussed in Part I.D.

C. Westway Will Have the “Capacity to Receive,” on Average, More Than 50,000 Barrels of Crude Per Day.

27. For Westway’s proposal, the jurisdictional question for EFSEC is whether a proposed site has a capacity to receive more than on average 50,000 barrels of oil, not the applicant’s stated intentions about daily oil receipt. The plain language of the statute, legislative history, and practical implications of Westway’s alternative interpretation all dictate this conclusion.

i. The plain language of the Act calls for a determination of capacity, not planned receipt.

28. The plain language of the statute states that EFSEC has jurisdiction over the construction of “[f]acilities which will have the capacity to receive more than an average of fifty thousand barrels per day of crude or refined petroleum or liquefied petroleum gas.” RCW 80.50.020(12)(d) (emphasis added). Because the word “capacity” is not defined in the statute, we must turn to the word’s ordinary meaning. *State v. Johnson*, 247 P.3d 11, 13 (Wash. Ct. App. 2011) (“When a statutory term is undefined, absent a contrary legislative intent, we give the words of a statute their ordinary meaning, and we may look to a dictionary for such meaning.”). Merriam-Webster’s first two dictionary definitions for the word “capacity” are: (1) “the ability to hold or contain people or things” and (2) “the largest amount or number that can be held or

contained.” Merriam-Webster, <http://www.merriam-webster.com/dictionary/capacity> (last visited Oct. 8, 2014). The plain meaning of the word “capacity” is the potential or ability to contain, not the planned or actual receipt.

ii. *The legislative history of the Act confirms this interpretation.*

29. The legislative history of the current statutory language in RCW 80.50.020(12)(d) confirms that the term “capacity” means physical operational potential of a facility, not actual operational results. In fact, over 35 years ago, the Washington State Legislature specifically changed the definition of a petroleum storage energy facility to its current form in order to address the situation where a project’s capacity could differ from its operational intentions.

30. In the 1975-76 Second Extraordinary Session, the Washington State Legislature extensively amended RCW 80.50, with the result that the Energy Facility Site Locations Act covered not only thermal generating facilities, but also transmission facilities, energy transmission corridors, and energy plants. Exh. 6, Energy Facility Site Locations Act, RCW 80.50.020, Washington Laws, 1975-76 2nd Ex. Sess. Ch. 108, Sec. 30, Sec. 2, p. 362, *available at* <http://www.leg.wa.gov/CodeReviser/documents/sessionlaw/1976pam1.pdf>. This amendment created the basic outline of the Act that we still have today.

31. On January 11, 1977, the Office of the Attorney General (Slade Gorton) issued a letter opinion analyzing the meaning of the term “energy plant” under those amendments, specifically the section on petroleum storage facilities. Exh. 7, Wash. AGLO 1977 No. 2, 1977 WL 25970. At that time, the statute defined covered facilities as “[f]acilities which will result in the receipt of more than an average of fifty thousand barrels per day of crude or refined petroleum....” RCW 80.50.020(17)(c) (emphasis added). The Attorney General was asked whether a set of hypothetical facts would make a particular facility fall under EFSEC jurisdiction. The Attorney General demurred, stating that, unlike other provisions that discussed

a facility's capacity, "it is in the case of the petroleum refining facility or a marine terminal facility not the project's capacity which is determinative of its legal status but, instead, it is its resulting operational use. *Id.* at *2 (emphasis in original). Because of that language, "there remains ... a necessity to wait for the results before determining the applicability of the law to that facility." *Id.*

32. The Attorney General continued:

[H]ad the legislature truly intended to make "capacity" rather than "result" the test ... it could easily have used the same terminology in subparts (b), (c) and (e) of RCW 80.50.020, *supra*, as it did in the case of thermal power plants and natural gas reservoirs in subparts (a) and (d) of the same statute. Perhaps, upon reflection, the legislature might now desire to do just that.

Id. at *3 (emphasis added). In the letter opinion, the Attorney General proposed replacing the "which will result in the receipt of" language with "which will have the capacity to receive." *Id.*

33. Less than six months later, that is precisely what the Washington Legislature did. Exh. 8, Energy Facility Site Locations Act, RCW 80.50.020, Washington Laws, 1977 1st Ex. Sess. Ch. 371, Sec. 2, p. 1697, *available at* <http://www.leg.wa.gov/CodeReviser/documents/sessionlaw/1977pam1.pdf> (changing the statutory language from "facilities which will result in the receipt of more than an average of fifty thousand barrels per day" to "facilities which will have the capacity to receive more than an average of fifty thousand barrels per day") (emphasis added).

34. This legislative history and Attorney General opinion support the position that the relevant jurisdictional threshold is the maximum capacity of any given facility to receive and store crude and/or refined oil, not any facilities' stated intentions or resulting operational use.

- iii. *Westway's interpretation invites companies to manipulate their numbers to avoid EFSEC jurisdiction.*

35. Westway's ever-changing intentions illustrate the wisdom of using a true capacity interpretation. In 2013, Westway initially planned for two storage tanks, but later doubled its plan to four storage tanks. When asked whether this doubling of storage capacity brought the proposal into EFSEC jurisdiction, Westway took the position that "the EFSEC rules will still not apply to the facilities receipt capabilities ... the design is to receive an average of 26,300 barrels per day, which is less than the applicability threshold of an average of 50,000 barrels per day. The change from two to four tanks is being made to provide additional storage capacity so that the terminal can continue to receive product in the event vessels/barges are delayed in arriving at the terminal." Exh. 9, Letter from Ken Shoemake, Westway, to Sally Toteff, DOE, and Jim LaSpina, EFSEC (Dec. 4, 2012).

36. Documents provided by Westway during the pending appeal of its permit before the Shorelines Hearings Board make it clear that Westway planned to use all four tanks for active shipping, not merely extra storage capacity—doubling the annual oil through-put from 9.6 million barrels to 19.2 million barrels, or from an average of 26,300 barrels per day to an average of 52,600 barrels per day. Westway does not deny this; in fact, in a letter to EFSEC, attorneys for Westway wrote that "Westway did consider whether it could serve two customers using up to five storage tanks by more efficiently scheduling vessel calls and maximizing rail unloading, potentially even doubling the Project's capacity." Exh. 10, Letter from Svend Brandt-Erichsen to Stephen Posner (Sept. 3, 2013). Westway's explanation that it was unable to reach agreements with potential customers does nothing to undermine the fact that, with the four-tank, 76 rail car unloading bay design, Westway could and was trying to double its crude oil through-put capacity without officially changing its intended 26,300 daily barrel average.

37. On January 31, 2013, Westway leadership wrote of potential customers that wanted “to secure the whole 9.6 million barrels of thru put with two tanks,” as they had “70,000 bbls a day of Bakken locked up right now.” Exh. 11, Letter from Quinault Indian Nation to Stephen Posner (Aug. 28, 2013), Attachment: Email from Gene McClain, President, Westway Terminal Company, Re: Grays Harbor Engineering status (Jan. 31, 2013).

38. Two months later, Mr. Johnson continued to discuss doubling the amount of crude oil to be shipped through the Westway facility (9.6 million barrels per year for each of two unnamed customers), in addition to a future expansion:

I think we should offer them 9,600,000 bbl thru put per year, which is the permit amount for 2 tanks That would allow [redacted] to have 9,600,000 bbl for their 2 tanks and we could apply for additional thru put with DOE at any time to increase [redacted] expansion potential. ... [T]he overall 5 tank projects cost will go down substantially due to shared infrastructure and economy of scale. Real substantially! Grays Harbor Cash Cow substantially!

Exh. 11, Attachment: Email from Robbie Johnson, Re: [redacted] Cold Lake crude estimate (Mar. 24, 2013).

39. In an email discussing the appeal of its Shorelines Permit, Geoff Roberts, SuperOx Holdings LLC, noted that the appeals would affect the company’s future expansion plans and asked whether Westway should take steps to go forward with crude oil shipment without any further regulatory review:

Anything we do now, will be the starting point on the next expansion unless we can somehow tie them up on a future expansion with something here. ... If the conversion of 2 tanks existing Methanol tanks can be done without a shoreline permit, can we/should we move forward on that option as both a hedge as well as additional leverage against the intervenors and retain the option for [redacted].

Exh. 11, Attachment: Email from Geoff Roberts, SuperOx Holdings LLC, Re: Grays Harbor Shoreline permit appeals—silver lining? (May 22, 2013) (emphasis in original).

40. More recently, Westway again changed its intentions about the scope of its terminal. In its newest application, Westway officially proposed a terminal with five storage tanks, increasing its storage capacity to 1,000,000 barrels of oil. Exh. 5 at 5. Westway also announced its intent to increase the number of rail car unloading spots to 80 (an increase from the 2013 plan of 76 spots). *Id.* Finally, Westway officially increased its daily receipt intentions for the first time, stating that it now plans to receive an average of 48,918 barrels of oil per day, almost a doubling of its initial plan to receive only 26,300 barrels per day.

41. Not only is this daily intended average just below EFSEC's jurisdictional threshold, Westway attempts to diminish these new numbers by outlining the plan in "two phases." As EFSEC staff Mr. Stephen Posner warned in an April 23, 2013 letter to David Vensel of Kinder Morgan Terminals (Exh. 12), "[t]he State Environmental Policy Act (SEPA) does not allow phased review of a proposed project to avoid discussion of all project impacts, including cumulative impacts (Washington Administrative Code 197-11-060 (5)(d)(ii and iii))."

42. The ever-evolving nature of Westway's plans reveal the importance that EFSEC examine the proposed terminal's actual daily receipt capacity. If EFSEC instead adopts Westway's interpretation, that "capacity" means planned usage, EFSEC would be adopting an interpretation that is contrary to the statutory language and its legislative history and one that invites companies to intentionally underestimate daily average receipt.

iv. Using Westway's proposed numbers, it has the actual design capacity to receive more than an average of 50,000 barrels of crude oil per day.

43. While Westway has stated that it plans to receive 48,918 barrels of crude oil a day, that is not the relevant question. The statute requires EFSEC to investigate the capacity of the proposed facility, not its planned receipt. Three aspects of Westway's proposed project indicate that it will have the capacity to receive more than 50,000 barrels of oil per day: (1) total

on-site storage, (2) number of rail car unloading bays, and (3) estimated barrels of crude oil per tank car.

44. With respect to total storage capacity, if capacity to receive simply means capacity to store, Westway's capacity is 20 times greater than the jurisdictional "capacity to receive" threshold set by statute (Westway will have the capacity to store one million barrels of crude oil). Westway's claim that storage capacity is irrelevant to the jurisdictional threshold is not supported by the statute because the exception for storage facilities in RCW 80.50.020(d) does not apply to Westway, a crude-by-rail terminal which will receive and transport oil, not merely store it.

45. For the second metric, Westway proposes to expand its facility to a total of 80 rail car unloading spots, which using Westway's conservative estimate of 650 barrels per tank car leads to a capacity to receive and unload at least 52,000 barrels per day (18,980,000 barrels per year), triggering EFSEC jurisdiction.

46. Third, Westway's tank car volume estimate is quite low. Westway began its permitting process with an even lower figure of 595.2 barrels per tank car, as outlined in the GHG emission calculations in its 2013 SEPA Checklist (Exh. 1, Appendix B), and then raised this estimate to 650 barrels per tank car for its 2014 application. Exh. 9. Both of these figures are well below other industry estimates for barrels per tank car,¹ and using a higher estimate would only further cement EFSEC jurisdiction. Indeed, Imperium estimates an average of 743 barrels per tank car in its calculations. See Exh. 13, Letter from John Plaza, Imperium, to Stephen Posner, EFSEC (Mar. 19, 2013). U.S Development (another crude-by-rail applicant in

¹ The Association of American Railroads estimates 30,000 to 32,000 gallons per tank car (714-761 barrels). *Moving Crude Petroleum by Rail* (Dec. 2012), available at <https://www.aar.org/KeyIssues/Background-Papers/Moving%20Crude%20Petroleum%20by%20Rail.pdf>.

Grays Harbor) uses 720 barrels per tank car as its estimate. *See* Exh. 14, Letter from Kevin E. LaBorne, Grays Harbor Rail Terminal, to Stephen Posner, EFSEC (June 7, 2013).

D. Westway and Imperium Propose to Construct New Crude Oil Storage Facilities, Not Expansions of Existing Facilities.

47. There can be no disagreement that Westway and Imperium do not now receive, ship, or store crude oil, and that the construction of five new crude oil storage tanks at Westway and nine new crude oil storage tanks at Imperium constitutes new facility construction. For this reason, the exception embodied in RCW 80.50.020(12)(d) (“except that the provisions of this chapter shall not apply to storage facilities unless occasioned by such new facility construction”) does not apply to these projects, and the different jurisdictional threshold for expansions of existing energy facilities in RCW 80.50.060(1) (“The provisions of this chapter apply to . . . the reconstruction or enlargement of existing energy facilities where the net increase in physical capacity . . . meets or exceeds those capacities or dimensions set forth in RCW 80.50.020 [(12)]”) does not apply to these projects.

48. This is admittedly the case for Westway, which currently handles only methanol in its existing bulk liquid facility. Imperium, however, has argued that it does not meet the requirements for EFSEC jurisdiction because its project is an expansion of an existing facility, and although its ultimate capacity to receive crude oil will be greater than 50,000 barrels per day, its “incremental capacity to receive [is] approximately 30,500 barrels daily.” Exh. 13. Imperium states that because its proposed project is an enlargement of its existing biodiesel production facility, “jurisdiction depends on the ‘net increase in physical capacity . . . resulting from such . . . enlargement’ rather than the aggregate capacity after the enlargement is completed.” *Id.*, citing RCW 80.50.060(1) (emphasis omitted).

49. Imperium's assertion, however, is based on a faulty foundation—Imperium does not now operate an “energy facility” as defined by the Act, as primarily evidenced by the fact that it did not undergo an EFSEC permitting process when it built its biodiesel plant in 2006.

50. Nor is Imperium now operating a petroleum storage facility (RCW 80.50.020(12)(d)); Imperium “produces the world’s highest quality B100 biodiesel, refined from a variety of oils such as canola, soy, and other commercially available vegetable oils.” *Id.* Biodiesel, while a fuel, is not petroleum. Petroleum is a naturally occurring liquid mixture of hydrocarbons and other organic compounds found in geologic formations beneath the Earth’s surface. Bates, Robert L. and Julia A. Jackson, eds., *Dictionary of Geological Terms* (Third Ed. 1984). The word “petroleum” comes from the Greek words for “rock” and “oil.” <http://en.wikipedia.org/wiki/Petroleum>. Biodiesel, by contrast, refers to a vegetable oil- or animal fat-based diesel fuel consisting of long-chain mono-alkyl esters. <http://www.biodiesel.org/what-is-biodiesel/biodiesel-basics>. Imperium currently stores biodiesel, but it does not receive any “crude or refined petroleum.”

51. Nor is Imperium currently operating a facility that processes more than 25,000 barrels per day of biofuel. RCW 80.50.020(12)(f). Because Imperium is not currently operating an energy facility, petroleum storage facility, or biofuel processing facility, it is not currently operating an existing energy facility within the meaning of the Act, and its current crude-by-rail proposal is not for the “reconstruction or enlargement of existing energy facilities.” RCW 80.50.060(1). Instead, Imperium proposes a new facility that has the capacity to receive an average of over 50,000 barrels of crude oil per day; jurisdiction over Imperium lies with EFSEC.

II. EFSEC SHOULD ESTABLISH COMMON STANDARDS AND DEFINITIONS FOR CRUDE-BY-RAIL PROJECTS.

52. Ready or not, crude-by-rail is coming to Washington. Under EFSEC's current ad hoc position, proposed projects can manipulate the calculations for capacity in order to avoid EFSEC jurisdiction. EFSEC would be served by setting common standards and regulatory definitions for several crude-by-rail common elements, including (1) estimated amount of oil per tank car (Westway estimates 595.2 or 650 barrels per car; Imperium estimates 743 barrels per car; US Development estimates 720 barrels per car; the Association of American Railroads estimates 714-761 barrels per car); (2) number of tank cars per unit train (Westway estimates 120 tank cars, Imperium estimates 105 tank cars); (3) unloading rate from rail car to storage tank (Westway states 8,000 gallons per minute (11,429 barrels per hour); Imperium states entire unit train in one day ($105 \times 743 = 78,015$ barrels per day); and (4) unloading rate from storage tank to marine vessel (Westway states 15,000 barrels per hour; Imperium states 25,000 barrels per hour).

53. It is clear that EFSEC is already concerned about segmentation and phased review of proposed projects, as well as how companies calculate their capacity to receive. Questions that must be asked of project proponents include explanations of calculations of average daily capacity, details of improvements necessary for proposed projects to accept more frequent trains, and the planning horizons for proponent's stated intentions about their facilities. Clear regulatory standards or definitions about how companies must prove their capacity to receive assertions will decrease jurisdictional confusion over future crude-by-rail proposals.

CONCLUSION

54. For the reasons discussed above, petitioner Quinault Indian Nation asks the Council to issue a declaratory order that it has jurisdiction over both the Westway and Imperium

proposed crude-by-rail projects in Grays Harbor, as both are new energy plants as defined by RCW 80.50.020(12)(d).

Respectfully submitted this 31st day of October, 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 October 31, 2014, I served the following documents on the following parties:

1. Petition for Declaratory Order; and
2. Exhibits in Support of Petition for Declaratory Order.

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- ☒ courtesy copy via email

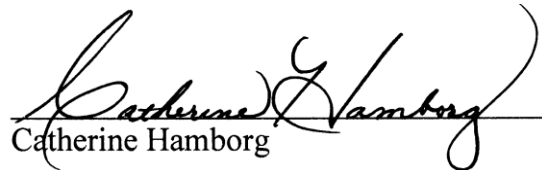
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I, Catherine Hamborg, declare under penalty of perjury that the foregoing is true and correct. Executed this 31st day of October, 2014, at Seattle, Washington.


Catherine Hamborg