



Quinault Indian Nation

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September 7, 2016

Maia Bellon, Director
Washington State Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600

Via Email and U.S. Mail

Hoquiam City Council
Jasmine Dickhoff, Mayor
Brian Shay, City Administrator
City of Hoquiam
609 8th Street, Hoquiam
Washington, 98550

Re: Westway and REG Oil Terminal Projects

Dear Director Bellon, City Council Members, Mayor Dickoff, and Administrator Shay:

On behalf of the Quinault Indian Nation (QIN), I write to summarize our prior communications to you regarding the Environmental Impact Statements and pending shoreline substantial development permit applications for the Westway Terminal Co. LLC and Renewable Energy Group, Inc. (formerly Imperium Terminal Services) for two crude-by-rail terminal projects proposed in Grays Harbor. I again urge you to adopt the No Action Alternative in the Final EISs and deny the pending shoreline substantial development permit applications.

We are disappointed that Mayor Dickhoff and City Administrator Shay refused to meet with us on a government-to-government basis in response to our request by letter of July 21, 2016. Because these pending shoreline permit applications are considered under City authority delegated by the state Shoreline Management Act, there is an implicit duty to engage in meaningful dialogue with affected Indian tribes under the Centennial Accord signed by the State of Washington. Additionally, the Shoreline Management Act encourages local implementing jurisdictions to coordinate with affected tribes. Though we have provided multiple letters outlining our position, we have not been afforded a meaningful discussion with the City and have no indication that the City understands the magnitude of the decision before it. We are aware of public statements by City officials expressing an opinion that the City must issue these permits or risk being sued by the project proponents. We question the validity of any such claims. We

take this opportunity to summarize the legal grounds you have for denying these applications, which also provide the basis for claims challenging permit issuance.

First, the State Environmental Policy Act (SEPA) provides explicit authority for government agencies to condition or deny proposed actions—even when they meet all other requirements of the law—based on environmental impacts that cannot be mitigated. RCW 43.21C.060. This authority is echoed in the Hoquiam City Code (11.10.220(3) and (4)). The Draft EISs for Westway and REG acknowledge the proposed crude-by-rail projects will cause adverse environmental impacts that cannot be mitigated.

Second, as explained in our letter to you dated November 30, 2015, the Public Trust Doctrine (PTD) obligates you as public trustees to reject the Westway and REG oil terminals proposals. Your agencies are responsible for making decisions about shoreline uses that in turn impact navigable waters, fisheries, migrating and resident birds, and other aquatic resources, as well as the commerce and recreation dependent on those resources. Construction and operation of the Westway and REG oil terminals would cause major, negative impacts on the public trust resources of Grays Harbor. Rail and vessel transport will limit public and tribal access to fisheries and tidelands for recreational use.

The PTD, embodied in the Washington State Constitution (Article XVII, Section 1) and the Shoreline Management Act, asserts public ownership over all navigable waters and tidelands of the state, which includes Grays Harbor and serves as a basis to deny permits that threaten to harm those trust resources and the public's ability to access and use them. Courts have expressly used the PTD to reject development permits when threats to public resources are clear: to eliminate threats to Lake Chelan, Padilla Bay, Elliott Bay, the waters surrounding the San Juan Islands, and Eagle Harbor. The Westway and REG permits should be denied based on their threat to public resources.

Importantly, the PTD would operate as a defense against oil company lawsuits claiming regulatory takings when agencies deny permits for shoreline development. Should the City of Hoquiam deny permits to Westway and REG on the basis of harm to trust resources, the PTD is available as a defense to subsequent Fifth Amendment takings or other constitutional claims. The need to protect public trust resources of Grays Harbor provides Ecology and Hoquiam with a valid and powerful defense to any claim of an entitlement to transport oil.

Finally, Grays Harbor falls within the QIN's federally-reserved treaty fishing and gathering area, where Quinault tribal members have fished and gathered since time immemorial. The DEISs for Westway and REG both conclude that "increased vessel traffic related to the proposed action in Grays Harbor could increase the potential for conflict with fishing areas and access to fishing areas for the Quinault Indian Nation," and that these impacts are unavoidable and significant. Though the DEISs attempt to minimize the nature and magnitude of treaty impacts (as explained in detail in our November 24, 2015 DEIS comment letter submitted to you by Earthjustice), they do acknowledge that "[n]o mitigation measures would completely eliminate the possibility of impacts to fishing resources because of vessel operations related to the proposed action."

Treaties take precedence over conflicting state laws by reason of the Supremacy Clause of the U.S. Constitution, Art. VI, Sect. 2. Accordingly, treaties are the supreme law of the land.

Worcester v. Georgia, 31 U.S. 515, 531 (1832). In addition, federal courts have confirmed that treaty rights are property rights protected by the Fifth Amendment to the U.S. Constitution that 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)).

Based on these legal principles, federal courts have interpreted treaty rights strictly—meaning that no portion of a treaty fishing right may be taken without specific authorization by Congress. Included in this prohibition are takings of access to fishing grounds: “Apart from allowing States to limit fishing rights for purposes of conservation . . . no court has permitted the actual taking of access or taking of fishing grounds without an act of Congress.” *Muckleshoot*, 698 F. Supp. at 1512. Accordingly, tribes have succeeded in stopping harmful development projects that impacted small portions of their usual and accustomed fishing areas. *Id.* at 1515 (granting preliminary injunction halting construction of a new marina which would have occupied one-eighth of one square mile of Puget Sound, including two tribes’ treaty fishing area); *see also NW Sea Farms v. U.S. Army Corps of Eng’rs*, 931 F. Supp. 1515, 1525 (W.D. Wash. 1996) (upholding decision of the Corps to deny permit to developer proposing to build a fish farm covering one acre of surface area and eleven acres underwater within tribe’s treaty fishing area).

The strength of tribal treaty rights is also evident in the recent denial by the U.S. Army Corps of Engineers of the Clean Water Act § 404 permit to the Gateway Pacific Project proposing a marine-rail coal terminal based on impacts to treaty fishing rights held by the Lummi Tribe and other tribal nations in Puget Sound (see attached denial memo).

The Westway and REG projects would do far more than just harm a small portion of the QIN’s usual and accustomed fishing area, and the QIN will take all measures necessary to protect its treaty rights.

Communities and residents throughout the Grays Harbor County share QIN’s opposition to the Westway and REG projects. Resolutions passed by local governments expressing grave concern or opposition to proposed crude oil terminals include Aberdeen, Ocean Shores, Montesano, Elma and Westport (find links to resolutions at <http://www.standuptofoil.org/resolutions-and-statements/>).

More than 500 people, QIN Tribal members and our Grays Harbor neighbors, expressed opposition to the terminals at the “Shared Waters, Shared Values” rally in front of Hoquiam City Hall on July 8th. This public expression echoes the findings from a December 2015 poll of Grays Harbor County that found 57% of voters surveyed oppose crude oil terminals (attached).

In light of this strong public opposition to these projects and the legal exposure associated with issuing the shoreline permits, we urge you to choose the No-Action Alternative and deny the Westway and REG shoreline permits.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to be 'F. Sharp', written in a cursive style.

Fawn Sharp, President
Quinault Indian Nation

cc: Sally Toteff, Regional Director, SWRO
Diane Butorac, Regional Planner, Southwest Region
Gordon White, Program Manager, Shorelands and Environmental Assistance
Tom Laurie, Tribal Liaison
Tom Young, AAG
Steve Johnson, City Attorney