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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

Council Order No. 16-001

ORDER DISMISSING PETITION FOR
DECLARATORY ORDER

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Nature of the Proceeding:

6 Northwest Innovation Works, LLC, Kalama (NWIW) is proposing to develop and
7 operate a natural gas-to-methanol production plant and storage facilities at the Port of Kalama
8 (Port), which is located on the Columbia River in Cowlitz County (County). On April 9, 2014,
9 the Port executed a lease and related agreements with NWIW for this facility. *Wilson Decl., at*
10 *1-2.*

11 Natural gas will be delivered to the methanol plant through a proposed new three-mile
12 transmission pipeline lateral that will extend through the County and the City of Kalama. The
13 facility will manufacture and export methanol to global markets, which will be used in the
14 manufacture of olefins. Olefins are used in the production of plastics and other materials. The
15 yearly production of methanol at full capacity is anticipated to be approximately 3.6 million
16 metric tons. The methanol will be stored in non-pressurized storage tanks with a total capacity
17 of 200,000 metric tons. Methanol will be transferred by pipeline from the storage tanks to ships
18 docked at a deep draft marine terminal. The applicant anticipates loading between three and six
19 ships per month depending on vessel size. *Wilson Decl., Ex. B at 1.*

1 On September 3, 2014, EFSEC staff sent NWIW a letter indicating that its proposed
2 facility fell outside EFSEC's jurisdiction. *Petition, Ex. 6*. A copy of this letter was also sent to
3 the Department of Ecology and to the Governor's Office for Regulatory Innovation and
4 Assistance. EFSEC's determination was based upon a letter from NWIW on August 26th
5 describing the proposed facility. *Petition, Ex. 5*.

6 On October 14, 2014, the Department of Ecology (Ecology) transferred lead agency
7 status to the Port and County. With this transfer, the Port and the County are acting as co-lead
8 agencies over this proposal and have the main responsibility for completing environmental
9 review under the State Environmental Policy Act (SEPA). *WAC 197-11-758; Wilson Decl., Ex.*
10 *A*.

11 On June 23, 2016, Columbia Riverkeeper (Riverkeeper) filed a Petition for a Declaratory
12 Order (Petition) with the Washington Energy Facility Site Evaluation Council (EFSEC or
13 Council). Riverkeeper seeks a declaratory order from EFSEC that asserts EFSEC's jurisdiction
14 over the proposed Kalama Methanol Manufacturing and Export Facility rather than the Port and
15 County.

16 **Participants:**

17 Miles Johnson represents Petitioner Columbia Riverkeeper. Timothy L. McMahan of
18 Stoel Rives LLP represents Northwest Innovation Works, Kalama, LLC. Jay P. Derr and Brent
19 Carson of Van Ness Feldman LLP represent the Port of Kalama.

20 **Procedural Setting:**

21 In response to the Petition, the Council created a briefing schedule in a letter dated July
22 15, 2016, which included an early deadline for the filing of any objections to the Petition. In
23 ruling on the Petition, the Council considered the following documents submitted by the parties:

- 1 1. Petition for Declaratory Order by Columbia Riverkeeper (Petition), with attached
- 2 Exhibits 1-6;
- 3 2. Port of Kalama's Objection to Columbia Riverkeeper's Petition for Declaratory Order
- 4 (Port's Objection);
- 5 3. Declaration of Mark Wilson in Support of Port of Kalama's Objection to Columbia
- 6 Riverkeeper's Petition for Declaratory Order (Wilson Decl.), with Attached Exhibits
- 7 A-F;
- 8 4. Northwest Innovation Works, Kalama, LLC's Objection to Columbia Riverkeeper's
- 9 Petition for Declaratory Order (NWIWs' Objection), with attached Exhibit 1;
- 10 5. Declaration of Murray V. Godley III in Support of Northwest Innovation Works'
- 11 Objection to Columbia Riverkeeper's Petition for Declaratory Order (Godley Decl.),
- 12 with attached Exhibit A;
- 13 6. Northwest Innovation Works, Kalama, LLC's Notice of Correction and Errata
- 14 Regarding Objection to Columbia Riverkeeper's Petition for Declaratory Order;
- 15 7. Cowlitz County Board of Commissioners Response to Columbia Riverkeeper's
- 16 Petition for Declaratory Order (County's Objection);
- 17 8. Columbia Riverkeeper's Response to Objections (Riverkeeper's Response); and
- 18 9. Northwest Innovation Works, Kalama, LLC's and Port of Kalama's Joint Reply to
- 19 Columbia Riverkeeper's Response to Objections (NWIW/Port Joint Reply).

20 EFSEC held an executive session on September 20, 2016 for the purpose of considering
21 the Petition. The Council also discussed the Petition at the public hearing following the
22 conclusion of the executive session on the same date. Following the discussion, the Council

1 voted to issue an order dismissing the Petition. The Council hereby issues the following Order
2 and ruling on Riverkeeper's Petition:

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DISCUSSION

5 Riverkeeper asserts that NWIW's proposed methanol facility at the Port of Kalama
6 should be subject to EFSEC's process for approving energy facility siting because the proposed
7 facility constitutes an "energy plant" within the meaning of RCW 80.50.020(12)(f). This
8 subsection provides EFSEC jurisdiction over "[f]acilities capable of processing more than
9 twenty-five thousand barrels per day of petroleum or biofuel into refined products"

10 *Petition at 2.*

11 Riverkeeper is using the declaratory order process set forth in RCW 34.05.240(1) as a
12 mechanism to bring the proposed facility under EFSEC jurisdiction. This statute authorizes any
13 person to petition an agency for a declaratory order with respect to the applicability to specified
14 circumstances of a rule, order, or statute enforceable by the agency. Within 15 days after
15 receiving a petition requesting a declaratory order, the agency must give notice of the petition to
16 all persons to whom notice is required by law, and may give notice to any other person it
17 considers to be appropriate. RCW 34.05.240(3).

18 The declaratory order process has limitations.

19 An agency may not enter a declaratory order that would substantially prejudice the rights
20 of a person who would be a necessary party and who does not consent in writing to the
21 determination of the matter by a declaratory order proceeding.

22
23 *RCW 34.05.240(7).*

24 If NWIW or the Port meet the requirements in RCW 34.05.240(7), then the Council may
25
26 not issue a declaratory order on the Petition.

1 On June 23, 2016, Riverkeeper filed the Petition. On July 8, 2016, EFSEC provided
2 notice of the Petition to NWIW, the Port, and the County. On July 15, 2016, EFSEC sent a
3 notice of schedule for response documents to the Petition. NWIW, the Port, and the Cowlitz
4 County Board of Commissioners filed separate objections to the Petition in which they stated
5 their opposition to the Council issuing a declaratory order regarding jurisdiction over the
6 proposed facility. On August 9, 2016, Riverkeeper filed a response to the objections. On August
7 12, 2016, NWIW and the Port filed a joint reply to Riverkeeper's response.

8 “Necessary party” is not expressly defined in the Administrative Procedure Act, chapter
9 34.05 RCW. The Council agrees with NWIW and the Port that Washington Superior Court Civil
10 Rule (CR) 19(a), which is used when determining whether a party must be joined in a civil action
11 if feasible, provides helpful guidance as to what a “necessary party” means in RCW
12 34.05.240(7). In discussing what is required under CR 19(a), the Washington Supreme Court
13 stated “[a] necessary party is one which has sufficient interest in the litigation that the judgment
14 cannot be determined without affecting that interest or leaving it unresolved. *Harvey v. Board of*
15 *County Commissioners of San Juan County*, 90 Wn.2d 473, 474, 584 P.2d 391 (1978). The Port
16 is a necessary party for purposes of RCW 34.05.240(7) because it is the owner of the land on
17 which the facility is proposed. The Port is also responsible for obtaining numerous permits
18 required for the proposed facility related to the dock and related infrastructure, and is the
19 applicant on the Joint Aquatic Resources Permit Application (JARPA). Likewise, NWIW is a
20 necessary party for purposes of RCW 34.05.240(7) because it is the applicant for all permits
21 related to the methanol production of the proposed facility. *Port's Objection at 7-8; NWIW's*
22 *Objection at 4-5*. Riverkeeper does not dispute that NWIW and the Port are necessary parties.
23 Riverkeeper, however, contends that neither the rights of NWIW nor the Port would be

1 substantially prejudiced if the proposed facility is subject to EFSEC jurisdiction. Riverkeeper
2 advances two separate arguments: (1) it asserts that there would be no significant timing impact
3 if EFSEC obtained jurisdiction over the siting process for the proposed facility; and (2) NWIW
4 and the Port have no legal rights to use an improper review procedure.

5 Addressing the second argument advanced by Riverkeeper, if an entity or person
6 demonstrates necessary party status, then that entity or person has rights that are subject to being
7 substantially prejudiced by the declaratory order. Having necessary party status and possessing
8 rights under the statute go hand-in-hand. It is illogical to hold that an entity or person who is a
9 necessary party under RCW 34.05.240(7) does not have rights subject to protection under that
10 section. Riverkeeper essentially is making the same argument the Council found to be circular in
11 nature in a recent declaratory order. *In Re Petition of Quinault Indian Nation*, No. 14-001
12 (EFSEC Order Dismissing Petition for Declaratory Order, Feb.12, 2015)(hereinafter *Quinault*).
13 This argument requires the Council to make a jurisdictional decision over the proposed facility in
14 order to determine whether NWIW and the Port can object to the Council making a jurisdictional
15 decision regarding the proposed facility. Clearly, the framers of the statute could not have
16 intended such a result. As in *Quinault*, the Council rejects this argument.

17 The Council next determines whether NWIW or the Port would be substantially
18 prejudiced if the permitting process was removed from the Port and the County and placed in
19 EFSEC.

20 With respect to whether there would be a significant timing impact, Riverkeeper
21 acknowledges that the County and the Port have issued a draft environmental impact statement
22 (DEIS), but do not anticipate a final EIS for several months. Furthermore, Riverkeeper states
23 that agency decisions have not been made regarding permits for the proposed facility, and no

1 draft permits have been published for public review. *Petition at 3.* Riverkeeper maintains the
2 public would substantially benefit from EFSEC review, including: state-wide review for a
3 project with state-wide impacts, greater transparency and opportunity for public input, the
4 appointment of an associate attorney general to serve as a counsel for the environment, and the
5 Governor acting as the final decision-maker. *Petition at 5-6.*

6 NWIW and the Port also argue that they are far along in the approval process, and have
7 spent several million dollars preparing technical materials, conducting environmental analysis,
8 preparing permit applications, and supporting the preparation of the EIS. *NWIW's Objection at*
9 *2.* They note that Riverkeeper has participated in two public processes with respect to SEPA and
10 this proposed facility. On December 4, 2014, Riverkeeper submitted extensive comments during
11 the SEPA scoping process. *Wilson Decl. at 2, Ex. C.* After more than one year of working on
12 the DEIS, the Port and the County issued it on March 3, 2016. The comment period was
13 extended from 30 to 45 days. *Wilson Decl. at 3, Ex. D.* On April 18, 2016, Riverkeeper
14 submitted 52 pages of comments on the DEIS. *Wilson Decl. at 3, Ex. E.* Riverkeeper did not file
15 a petition for a declaratory order with EFSEC at either time. The Port and the County have been
16 reviewing the estimated 325 submissions commenting on the DEIS, not counting the 2,816
17 petitions that were also received. The Port and the County anticipated issuing the Final
18 Environmental Impact Statement (FEIS) soon. *Wilson Decl. at 3.*

19 Numerous federal, state, and local permits or required actions are also being pursued by
20 the Port and the County. These include, but are not limited to: a Section 401 water quality
21 certification from Ecology, an air discharge permit from Ecology, an NPDES industrial
22 wastewater discharge permit from Ecology, a hydraulic project approval (HPA) from the
23 Department of Fish and Wildlife, a Section 10 permit under the Rivers and Harbors Act from the

1 U.S. Army Corps of Engineers (Corps), a Section 404 permit from the Corps, an Endangered
2 Species Act (ESA) Section 7 consultation by the Corps, a shoreline conditional use permit and a
3 shoreline substantial development permit from the County, review under the County critical
4 areas ordinance, and a floodplain development permit from the County. *Wilson Decl. at 3-4.*

5 The Port and County maintain that substantial progress is being made in agency review
6 and processing of these permit applications. *Godley Decl., Ex. A.* On October 15, 2015, the
7 Corps initiated the ESA Section 7 consultation. On December 21, 2015, the NPDES industrial
8 wastewater discharge permit was submitted to Ecology. On December 4, 2015, the shoreline
9 permits, review under the critical areas ordinance, and the floodplain development permit were
10 submitted to the County, and were revised on February 25, 2016. On February 24, 2016, the
11 application for the air discharge permit was filed with the Southwest Clean Air Agency
12 (SWCAA). The Port and the County note that Riverkeeper also provided a 33-page response to
13 the Corps' joint public notice with respect to the federal Section 404 and Section 10 permits.
14 *Wilson Decl. at 3-4, Ex. F.*

15 NWIW and the Port argue that the additional time and expense associated with stopping
16 the current process and initiating a new process before a different state agency constitutes
17 substantial prejudice. They assert that the delay and costs are only increased by Riverkeeper's
18 delay before filing this petition. If EFSEC asserted jurisdiction over this proposed facility, it
19 would require the Port and NWIW to revisit steps that are already completed and would be
20 disruptive to orderly agency proceedings. *NWIW's Objection at 7-9; Port's Objection at 9-12.*
21 They both observe that decisions by other state agencies have found substantial prejudice with
22 little or no consideration of the nature or expense of those impacts. See, for example, *Noreen v.*
23 *City of Burien*, SHB No. 03-006 (March 18, 2003); *Boeing Company v. Ecology*, PCHB No. 11-

1 050 (Order of Dismissal, August 5, 2011). Cowlitz County also observes “that to move
2 jurisdiction at this late date invalidates the valuable and productive public process that has
3 occurred.” *County’s Objection at 1.*

4 The Council agrees with that there would be delays if EFSEC assumed jurisdiction over
5 the proposed facilities. EFSEC would need to hire additional staff, which in turn, would need to
6 familiarize themselves with the proposals. Even though EFSEC would be able to save some
7 steps in its process if it assumed jurisdiction, there are parts of the EFSEC process, such as the
8 adjudication, that are not part of the local government siting process. The Council agrees that the
9 time delays and additional costs associated with the transfer of jurisdiction – particularly so late
10 in the process, would constitute substantial prejudice to NWIW and the Port. The Council
11 reaffirms its finding in *Quinault* that it is unnecessary to quantify these costs before making such
12 a finding. *Quinault at 7.*

13 Having found that NWIW and the Port are necessary parties to this proceeding, and that
14 delays associated with the transfer of jurisdiction of the siting process to EFSEC would
15 substantially prejudice the rights of NWIW and the Port, the Council concludes that the criteria
16 in RCW 34.05.240(7) are met and that dismissal of the Petition is necessary. Having found that
17 dismissal of the Petition is necessary, the Council declines to address the merits of the arguments
18 raised by the parties.

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20 DATED and effective at Olympia, Washington, the 21st day of September, 2016.



William H. Lynch, EFSEC Chairman

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