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Via Federal Express and Email

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Re: Westway Terminal Tank Farm Expansion: Mitigated Determination of
Non-Significance

Dear Mr. Shay and Ms. Toteff:

The following comments are submitted on behalf of the Quinault Indian Nation on the proposed State Environmental Policy Act ("SEPA") Mitigated Determination of Non-Significance for the proposed Westway Terminal Tank Farm Expansion—a proposed crude-by-rail oil shipping facility. The Quinault Indian Nation is a sovereign tribal government that has federally-guaranteed treaty rights and other interests in Grays Harbor and the Chehalis River. We appreciate the opportunity to comment, and thank you for extending the deadline for submitting comments.¹

We are deeply concerned about this decision, which will effectively authorize the construction of a new oil shipping terminal in Grays Harbor and give Westway the capacity to store 800,000 barrels of crude oil at any given time. Westway predicts that it will bring through Grays Harbor, via rail and marine vessels, **at least ten million barrels of crude oil annually.**

¹ While the original threshold SEPA decision, dated March 14, 2013, stated that "comments or a written statement appealing the threshold determination" were due by a date certain, the language referring to the filing of an appeal was deleted from the April 4, 2013 threshold determination which extended the comment period. The Quinault Indian Nation views this amendment to require comments only by April 19, 2013; however, if an appeal of the threshold determination is still required, these comments should be treated as an appeal as well.

The decision to authorize this type of facility, particularly given the acknowledgement that two additional facilities for crude-by-rail—amounting to **tens of millions of barrels of crude oil annually through Grays Harbor**—are also being proposed in the same area, poses **major environmental risks to the Grays Harbor community and the Quinault Indian Nation.**

The Quinault Indian Nation has usual and accustomed fishing areas in Grays Harbor and the Chehalis River, and tribal members' right to access currently-used fishing, hunting, and gathering sites will be impacted by increased vessel and rail traffic. Grays Harbor and the tributaries that feed it are critical nursery areas for many Quinault harvested species including Dungeness crab, an economically vital fishery on the coast of Washington. Additionally, an oil spill would devastate the fish, shellfish, eel grass, and cultural plant populations they rely on for commercial and subsistence harvest and cultural activities. Tribal members have always and continue to live and work in the Grays Harbor area. The Quinault Indian Nation is also concerned about the global warming impacts of this terminal. While Westway acknowledges that approximately 15,000 metric tons/year of CO₂ equivalent will be generated annually (measured within Washington State borders) from rail, marine vessel, automobile, and Marine Vapor Combustion of this project alone, Westway under-estimates rail transportation emissions by at least 68%, fails to account for all marine transportation emissions, and wholly fails to account for emissions from drilling, pumping, refining, and burning.

It is inconceivable that a decision to build an oil pipeline and associated oil shipping terminal would be reviewed without an environmental impact statement; the transport of crude oil by railcar does not lessen the significant environmental risks associated with this proposal. In many ways, this pipeline-on-wheels system is more risky than a conventional pipeline, as it involves continually mobile vehicles and a greater number of transfer points. At the same time, proposals to build coal export terminals in Washington are receiving full SEPA review, and many of the coal terminal impacts—increased rail and marine vessel impacts, impacts to marine and aquatic life, impacts to tribal treaty rights and cultural historic sites, life-cycle greenhouse gas emissions—are just as significant for this proposed crude-by-rail project.

Even with the proposed mitigation, there are probable and significant adverse environmental impacts from this project. For the reasons discussed below, the Mitigated Determination of Non-Significance (“MDNS”) and the proposed permits are inconsistent with SEPA and its implementing regulations, RCW 43.21C & WAC 173-11; the Shoreline Management Act and its implementing regulations, RCW 90.58 & WAC 173-27-180; and the City of Hoquiam code.² We strongly urge you to withdraw the inadequate MDNS for Westway's proposal and suspend all permitting until this project is given closer scrutiny by the public and state and local decisionmakers through a complete environmental impact statement.

² We also incorporate by reference the comments of Friends of Grays Harbor *et al.*

Moreover, proceeding with Westway's proposal through a Mitigated Determination of Non-Significance on a Shorelines Management Act permit violates Washington law on financial responsibility for transport of petroleum products (RCW 88.40) and protection of ocean resources (RCW 43.143). Finally, Westway's proposed crude-by-rail facility falls under the jurisdiction of Washington's Energy Facility Site Evaluation Council, not the City of Hoquiam and Ecology, and this project should be proceeding under the requirements and provisions of RCW 80.50.

I. BACKGROUND

A. Westway Proposal

Westway Terminal Company has proposed to expand its existing bulk liquid storage terminal at the Port of Grays Harbor to accept, store, and then ship crude oil. The Westway proposal would accept crude oil brought to the facility by rail, store it in large tanks, and then load the crude onto ships and barges that would take it to U.S. refineries, presumably in Washington or California. The oil will come by train from "a variety of locations throughout the U.S. and Canada," with the most likely sources being from North Dakota, Montana, and Alberta, Canada. Westway proposes four large new storage tanks with the capacity to store a total of 800,000 barrels or 33,600,000 gallons.³ Westway estimates that the terminal would receive 9,600,000 barrels of oil per year by rail, equaling two, 120 car trains (one loaded with oil on the way in, one empty on the way out) every three days, although the proposal will lead to a total of 76 loading/unloading spots, which gives the capacity for larger daily deliveries. The company estimates 120 ship/barge transits through Grays Harbor per year. Westway must obtain at least a Shorelines Management Act Substantial Development Permit and a Conditional Use Permit for its proposal.

B. Additional Crude-By-Rail Proposals

The Westway project is one of three crude-by-rail projects being proposed for this area of Grays Harbor, the other two proposals being put forth by Imperium and U.S. Development Group.

The Imperium Terminal Services has proposed a crude-by-rail facility at Terminal 1. Imperium submitted its permit applications to Ecology and the City of Hoquiam in February 2013. The Westway MDNS admits that the Imperium proposal has the potential for cumulative impacts, WAC 197-11-792, although the MDNS only discusses combined vessel and rail traffic impacts resulting from the two proposals. According to the MDNS, Imperium's proposal adds

³ One barrel of oil = 42 U.S. gallons. For "light" crude oil, such as that from the Bakken, the ideal rail tank car capacity is 30,000 to 32,000 gallons (or 714-761 barrels). Ass'n of American Railroads, *Moving Crude Petroleum by Rail* (Dec. 2012) at 8.

730 train trips and 400 vessel transits annually to the Grays Harbor/Hoquiam area. With a capacity to receive 78,000 barrels per day, Imperium may ship almost 28.5 million barrels of crude oil per year.

U.S. Development Group is also proposing a crude-by-rail facility at Terminal 3. The MDNS does not mention or consider any impacts from this proposal. While the permit applications have not yet been submitted, the U.S. Development Group proposal is reasonably foreseeable. The Port of Grays Harbor website describes the U.S. Development proposal as a facility that would handle “multiple grades of crude oil” up to “50,000 barrels per day” (18.25 million barrels a year) with two 120-car unit trains every two days and 90-120 vessels transits per year, depending on vessel size. See <http://www.portofgraysharbor.com/about/CBR-Project.php> (last visited April 5, 2013).

It should be noted that crude-by-rail is a recent phenomenon. “As recently as 2008, U.S. Class I railroads originated just 9,500 carloads of crude oil. By 2011, this had jumped to 66,000 carloads, and in 2012 will exceed 200,000.” Ass’n of American Railroads, *Moving Crude Petroleum by Rail* (Dec. 2012) at 1.

C. Interests of the Quinault Indian Nation

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, 380-381 (1905). Treaty rights are akin to easements running with the lands or places they burden and include a right of access to those places. *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).

Treaties are the highest law of the land 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., *U.S. v. Winans*, 198 U.S. 371 (1905); *Confederated Tribes of Umatilla Indian Reservation v. Alexander*, 440 F. Supp. 553 (D. Or. 1977); *U.S. v. Oregon*, 718 F.2d 299, 304 (9th Cir.1983); *Muckleshoot v. Hall*, 698 F. Supp. 1504 (W.D. Wash. 1988); *Northwest Sea Farms v. U.S. Army Corps of Eng’rs*, 931 F. Supp. 1515 (W.D. Wash. 1996); *U.S. v. Washington*, 2007 WL 2437166 (W.D. Wash. 2007).

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. *U.S. 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.

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.⁴ 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.

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. Grays Harbor produces numerous species of invertebrates and finfish that provide important prey to species and stocks utilizing Grays Harbor and adjacent marine areas.

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. For more detail, 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).

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.

The Quinault Indian Nation has an obvious and keen 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

⁴ See, generally Jacqueline M. Strom, *Land of the Quinault* (1990).

fishing areas and any impact to that right is an unconstitutional taking of a property right. These collective federally-protected treaty rights must be considered and addressed—the State of Washington cannot take actions that impinge the Quinault Indian Nation’s treaty rights.

II. THE PROJECT’S SEPA ANALYSIS IS FATALLY FLAWED.

On March 14, 2013, the City of Hoquiam and Washington Department of Ecology (co-lead agencies for SEPA) announced that they had made a mitigated finding of non-significance for Westway’s proposal to build four new, large storage tanks at the Port of Grays Harbor, a decision that exempts the proposal from full review under SEPA. The MDNS was re-issued on April 4, 2013, extending the comment period to April 19, 2013. The MDNS is deeply flawed in multiple respects and will not withstand review in an appeal. A decision to authorize the storage, shipping, and handling of millions of barrels of crude oil each year will have a number of critically important environmental impacts that must be fully evaluated in an environmental impact statement, along with a complete analysis of different alternatives and potential mitigation possibilities, if any.

A. Legal Requirements

SEPA requires an environmental impact statement (“EIS”) for any action that has a “probable significant, adverse environmental impact.” RCW 43.21C.031(1). Significance means a reasonable likelihood of more than a moderate adverse impact on environmental quality.” WAC 197-11-794. To assist in determining whether an EIS is required, agencies conduct a “threshold determination.” RCW 43.21C.033. If, in reviewing the project, the agency concludes that the project will not have a significant adverse environmental impact, it may issue a “determination of non-significance” and proceed without further review. Similarly, if significant adverse environmental impacts can be mitigated to reduce them to insignificance, a “mitigated determination of non-significance” is permissible. In contrast, if the threshold determination concludes that significant environmental impacts will result, the agency needs to conduct a full EIS that evaluates all of the environmental impacts, alternatives to the proposed action, and potential mitigation. SEPA authorizes, but does not require, the mitigation of adverse environmental impacts.

B. The MDNS Failed to Consider Cumulative Impacts From Three Crude-By-Rail Proposals.

The MDNS review was limited to the immediate environmental impacts of the construction work and operating the facility. It did, however, recognize one of the other two crude-by-rail terminal proposals (Imperium) as having similar transportation pathways and timeframes; this led to a chart of aggregate transportation impacts from two projects only. The MDNS, however, limited most of its analysis to only the Westway proposal. Where Imperium was considered, it was only for its transportation (rail and marine vessel) impacts, but not others,

including greenhouse gas emissions, impacts of marine life, impacts to Quinault treaty rights, or risks of oil spills.

There is no explanation why the third proposal (Grays Harbor Rail Terminal, a subsidiary of U.S. Development Group) was not considered. Like Westway and Imperium, U.S. Development Group is proposing a crude-by-rail facility, with similar types of impacts from rail and vessel transportation, greenhouse gas emissions, impacts of marine life, impacts to Quinault treaty rights, and risks of oil spills. Although this proposal has not yet submitted its permit application, it is clearly foreseeable and being proposed in the same time frame. Information about the proposal is available on the Port of Grays Harbor website, and the Port recently granted a subsidiary of Grays Harbor Terminals a lease option.⁵

“Proposals are similar if, when viewed with other reasonably foreseeable actions, they have common aspects that provide a basis for evaluating their environmental consequences together, such as common timing, types of impacts, alternatives, or geography.” WAC 197-11-060(3)(c)(i). Because the MDNS did not fully consider the indirect and cumulative impacts of the three crude-by-rail proposals for Grays Harbor, WAC 197-11-792, there are probable significant adverse cumulative environmental impacts associated with this project that require review in an environmental impact statement.

C. The MDNS Fails to Consider Direct, Indirect, and Cumulative Impacts of This Project on Water Quality and Aquatic Life.

The MDNS failed to adequately consider and mitigate the impacts of this project on streams, wetlands, fishing areas, shellfish beds, water quality, aquatic life, and migratory bird habitats, and the probable adverse impacts from this proposal on these marine and aquatic resources are simply too significant for an MDNS. The Chehalis River is home to several fish species protected under the federal Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, including bull trout, green sturgeon, and Pacific eulachon. Westway’s SEPA checklist omits the fact that Grays Harbor is critical habitat for endangered sturgeon and threatened eulachon. Chinook, coho, and chum salmon and steelhead are found in Grays Harbor,⁶ and the harbor is an important nursery and adult refuge for Dungeness Crab. Snowy plover (threatened) have critical habitat at Damon Point, due west of the Westway site. Steller sea lions and bald eagles also live in the area.

⁵ See <http://www.thenewstribune.com/2013/04/10/2551234/port-of-grays-harbor-open-to-oil.html>.

⁶ Coho and chinook salmon originating from Grays Harbor and its tributaries are heavily harvested by the ocean salmon fisheries from Oregon up to Southeast Alaska. The status of Grays Harbor coho and chinook salmon are important components of United States-Canada Treaty considerations. See <http://www.psc.org/pubs/Treaty/Treaty.pdf>.

Juvenile salmon, which use near shore environments for migration and rearing, may also be disrupted by increased vessel traffic. With the increase of vessel traffic, turbidity and suspended sediments could increase, interfering with fish feeding capabilities. The use of the area by Pacific eulachon or smelt for near shore movement, schooling, and spawning will be harmed. During terminal operations, noise and artificial light will harm all the fish that use the near shore environment. Protection of near-shore estuary areas is vital for the survival and recovery of juvenile chinook and coho salmon. “En route to the ocean the juveniles may spend from a few days to several weeks in the estuary, depending on the species. The highly productive estuarine environment is an important feeding and acclimation area for juveniles preparing to enter marine waters.” Endangered and Threatened Species: Final Listing Determinations for 16 ESUs of West Coast Salmon, 70 Fed. Reg. 37,160, 37,161 (June 28, 2005).

Gray whales are also often seen in Grays Harbor. The National Marine Fisheries Service notes that current threats to gray whales includes collisions with vessels, impacts for commercial development, and local catastrophic events.⁷ The MDNS assessed none of these impacts on gray whales.

The Grays Harbor National Wildlife Refuge is also at risk from this proposal. From late April through early May, hundreds of thousands of shorebirds concentrate on the muddy tideflats of Grays Harbor estuary—one of four major staging areas for shorebirds in North America and one of the largest concentrations of shorebirds on the west coast, south of Alaska. Shorebirds gather here in the spring to feed, store up fat reserves, and rest for the non-stop flight to their northern breeding grounds. From June through October, shorebirds return to the estuary in lesser concentrations on their way south during the longer fall migration period. Thousands of shorebirds stay for the winter.

The potential for the introduction of invasive species, including through ballast water, was not assessed, even though tens of thousands of cubic meters of ballast water per visit will be discharged by the shipping vessels. Hull fouling presents a similar danger of invasive species introduction.

Probable, significant impacts to the marine and fresh-water aquatic environment from operation of the facility include oil spills (discussed further below), polluted runoff, and the impacts of the new pollutant loads on aquatic life. Stormwater runoff from the tanks area is also not appropriately mitigated, requiring testing only of rainfall releases to marine waters without specifying a measure limit to determine when releases would be prohibited.

⁷ See <http://www.nmfs.noaa.gov/pr/species/mammals/cetaceans/graywhale.htm>.

The proposed project and its cumulative effects to connected upstream freshwater habitat have also been omitted. In the unfortunate event that a crude oil spill or leak did happen via storage tanks or rail, the impacts could cumulatively affect fresh water habitat. The Chehalis, Humptulips, Wishkah, Johns, Elk, and Hoquiam rivers are tidally influenced by Grays Harbor. Water moves from Grays Harbor into these drainages and periodically creates a back water effect into its tributaries. Pollutants would make their way into freshwater systems and disperse in the same manner as saltwater.⁸ These rivers provide vital habitat for all life stages of salmonids and other fish; the effects to fish habitat from a crude spill could be irreversible. Local, state, federal, and tribal entities contribute millions of dollars a year to protect and restore declining estuarine and freshwater habitat, yet the cumulative effects over time by this project could directly compromise these efforts.

D. The MDNS Does Not Adequately Address, Let Alone Mitigate for, the Risk of an Oil Spill From Rail Cars or Marine Vessels.

Crude oil spills into marine and fresh waters can destroy salmon, eulachon, sturgeon, Dungeness crab, and bivalve shellfish habitat. Importantly, oil spill response plans were not provided before issuance of the MDNS and are not required until prior to operation—after construction of the facility. Without those plans, the true impact of an oil spill is impossible to assess. For example, there is no information provided in the MDNS or SEPA checklist about wind, tide, or current modeling with respect to clean up of an oil spill.

The MDNS also fails to evaluate or mitigate for spill threats and responses along the rail line; its mitigation measures simply call for an already required spill response plan and ensuring that equipment caches are positioned near as-yet-to-be-determined sensitive areas. MDNS at 7. As the rail line crosses fish-bearing streams numerous times, an oil spill into non-marine waters poses a significant environmental risk.

Generally, the MDNS relies on the existence of federal and state emergency spill response plans to mitigate for a possible oil spill. But mitigation that is merely “compliance with applicable law” can only be adequate for a MDNS where there is an actual analysis of whether those laws are actually sufficient to mitigate the identified risk. There is no actual analysis of applicable law in this MDNS. Moreover, at least three admitted major factors exist that cannot be addressed by this “paper” mitigation, leaving probable significant adverse environmental impacts unaddressed. First, oil spill response tugs in Neah Bay and the Columbia River will take time to arrive in Grays Harbor if response is necessary. As the MDNS admits, “response tugs at Neah Bay and Columbia River could provide assistance, however, response times will depend on tug availability and weather conditions.” MDNS at 8. Second, the necessary oil spill response programs may not be sufficiently funded. Third, this project is proposed within a tsunami hazard

⁸ Beverage, J. & Swecker, M., Estuarine Studies in Grays Harbor Washington (1969).

zone,⁹ yet there is no discussion of potential tsunami risks. MDNS at 7. State, Federal, and Tribal government programs have established tsunami zones, evaluated risks in these zones, and designated emergency response programs. The MDNS cannot consider the risk of tsunami remote or speculative without a discussion of tsunami and oil spill risk.

While the MDNS presumes that the crude oil will be coming from the Bakken play in North Dakota, Westway also avers that crude might come from Alberta, Canada. Alberta tar sands oil is very different from other crude oil; it is more precisely called diluted bitumen, “a highly corrosive, acidic, and potentially unstable blend of thick raw bitumen and volatile natural gas liquid condensate.”¹⁰ Alberta tar sands oil is also heavier, making it much harder to clean up after a spill. Because the MDNS does define the type and/or composition of the crude oil that will be received, stored, and shipped through Westway’s facility, the actual environmental impacts of this project are essentially unknown and certainly not mitigated.

Assessments of crude oil properties indicate the serious pernicious toxic properties of crude oil when released into air, water, and soil and its potential effects on fish, the aquatic environment, and wildlife.¹¹ Crude oil spills are more difficult to clean-up than refined oil products. Crude oil is heavier and thicker; it lasts longer in the environment, coating vegetation, debris, and wildlife. Crude oil can also get trapped in sediments, rocks, and other debris, which allows the oil to be remobilized into the environment days, weeks, and even months after a spill incident.¹² Alberta tar sands crude—diluted bitumen—is even more difficult to clean up, especially in an aquatic environment, as it is heavier and can sink to the bottom. A spill of crude oil or diluted bitumen would wreak devastating harm on Grays Harbor’s estuaries, fish populations, and aquatic ecosystem.¹³

⁹ See, e.g., http://www.emd.wa.gov/hazards/documents/haz_TFS_Hoquiam.pdf;
<http://www.co.grays-harbor.wa.us/info/dem/index.asp>.

¹⁰ See <http://www.nrdc.org/energy/tarsandsafetyrisks.asp>;
<http://cahr.uvic.ca/nearbc/documents/2009/Alberta-Tar-Sands-Industry-Pollute.pdf>;
<http://www.pnas.org/content/106/52/22346.full.pdf>.

¹¹ See, generally <http://www.epa.gov/hpv/pubs/summaries/crdoilct/c14858ca.pdf>.

¹² See <http://okaloosa.ifas.ufl.edu/MS/OilSpillFactSheetAlaska.pdf>;
http://dujs.dartmouth.edu/winter-2012/oil-spills-severity-and-consequences-to-our-ecosystem#.UWgvDy7n_ug.

¹³ See generally <http://pipeupagainstenbridge.ca/images/uploads/resources/pipelines-and-salmon-in-northern-bc-report.pdf>.

E. Increased Marine Vessel Impacts Pose a Probable Risk of Significant Environmental Impact and Will Disrupt Tribal Fisheries.

The Quinault actively fish in Grays Harbor and the Chehalis River, including in the waters adjacent to the Westway site. Quinault fishermen will be directly impacted by increased vessel traffic associated from this project. The Quinault Nation is particularly concerned about the potential for catastrophic impacts to fish and shellfish habitat if an oil spill were to occur in or near the waters of their usual and accustomed fishing areas. Increased large vessel traffic will impact Pacific eulachon by harming larval fish that have recently been confirmed in the waters of the lower Chehalis River.¹⁴ Larval eulachon will inevitably suffer mortalities from large propellers associated with tankers and tugs that are part of this proposed project.

The increased use of the pier with boats and tugs will have shading impacts, which in turn affects marine vegetation like eel grass and macro algae. Marine vegetation is vital to the marine species found in Grays Harbor for spawning, forage, and refuge habitat.¹⁵

The increased shipping traffic brings with it an increased risk of collisions, groundings, spills, discharges, and accidents during vessel fueling. Increased vessel traffic in Grays Harbor and the surrounding waters will disturb native populations and salmon and eulachon. One mitigation measure calls for a Vessel Traffic Impact Analysis to determine “the potential for impacts that may result from changes or increases in vessel traffic in Grays Harbor.” MDNS at 10-11. However, this analysis is only required prior to the applicant receiving a certificate of occupancy. The City and Ecology should have required this analysis up-front, in order to review and evaluate the probable, significant risks to the environment caused by increased vessel traffic.

Although the MDNS avers that fishing access will not be affected, the additional rail and vessel traffic make this assumption unlikely. The MDNS’s mitigation measure of required tug escort for outbound make it more likely that fisheries will be disturbed and negatively impacted. If a U.S. Coast Guard security zone is eventually required, such a zone would have an even greater negative impact on fishing access and the tribal fishery.

F. The MDNS Fails to Consider Archeological and Cultural Impacts.

There are also two known, archeologically significant sites in the near vicinity of the Westway facility which were not considered. One is a large fish weir archaeological site that lies across from the Westway site; the other is an adjacent historic archaeological sawmill site. This

¹⁴ U.S. Army Corps of Eng’rs/Quinault Indian Nation joint study of eulachon habitat and distribution in Grays Harbor, 2012-continuing.

¹⁵ Parametrix, Port of Grays Harbor Industrial Development District Property #1—Eelgrass/Macro Algae Survey (2006).

area is within the State Historic Preservation Office's "high probability zone" for archeological resources because ancient Indian fish weirs are abundant around the bay and have been found underneath industrial sites in the general area. The Quinault have a deep interest in protecting and preserving historic archeological sites.

The Nation was not consulted before the MDNS issued; nor was the State Historic Preservation Officer consulted. "If the proposed project is not exempt, the applicant will usually be asked to fill out an 'environmental checklist.' This checklist asks questions about the proposal and its potential impacts on a variety of subjects including impacts to historic and cultural resources. 'Question 13' on the SEPA checklist relates to archaeological, historical and cultural resources. The Department of Archaeology & Historic Preservation is considered the agency with expertise in this area."¹⁶ The checklist submitted by Westway on October 31, 2012 incorrectly states there are no historically significant sites near the project location.

The Quinault also exercise their treaty gathering rights in the Grays Harbor area, including Bowerman Basin and the Grass Creek area to the north, to collect grasses, reeds, and willows for traditional cultural uses. An oil spill in Grays Harbor would devastate this culturally significant area. *See* discussion above at section I.C. The MDNS fails to disclose or discuss any impacts to these treaty gathering rights.

G. The MDNS Fails to Adequately Address Impacts to Public Safety and Local Economics From Increased Rail Traffic.

The impacts to public safety run the gamut from increased train traffic and vehicle accidents, increased derailments and concomitant emergency response, travel time delays at specific intersections (including the economic impacts of those delays, and impacts to/delay of emergency services (fire, police, EMT).

Threats from frequent long trains at rail crossings all along the route from North Dakota/Alberta and near the project area will mean delayed emergency medical service response times; and increased accidents, traumatic injury and death. A 120-unit train is over a mile long, and this proposal would significantly increase the daily number of trains along the rail route. These trains will bisect multiple communities along the route, leading to significant traffic delays and potential safety issues at grade-crossings. The delay of only a few minutes for an emergency response vehicle can mean the difference between life and death for citizens in these rural communities.

The MDNS (at 9) contains a chart that sets out the number of vessel and train transits per year expected from the Westway and Imperium proposals. This chart is incomplete, as it is missing the Grays Harbor Terminal proposal increases. Yet the MDNS fails to use this

¹⁶ *SHPO and SEPA*, <http://www.dahp.wa.gov/sepa>.

incomplete chart when assessing rail traffic. On the next page, the “Rail Traffic” discussion focuses on two additional unit trains every three days (the Westway estimates), with no discussion or even acknowledgment of the additional rail traffic from any of the other projects. Even without the Grays Harbor Terminal numbers, there will be an estimated 18 additional trains a week (nine loaded and unloaded)—much more than the Freight Rail Plan 2013 that “identifies infrastructure enhancements for an increase of three to seven loaded trains per week.” MDNS at 10.

One mitigation measure calls for a Rail Transportation Impact Analysis to determine “the potential for impacts directly caused by changes and increases in rail traffic on local vehicular traffic and other rail commodities.” MDNS at 10. However, this analysis is only required prior to the applicant receiving a certificate of occupancy. The City and Ecology should have required this analysis up-front, in order to review and evaluate the probable, significant risks to the environment caused by increased rail traffic. As with the Vessel Traffic Impact Analysis, the requirement that a rail impact analysis be prepared after permits are approved cannot serve SEPA’s goal of analyzing and understanding project impacts before projects are fully built.

In addition, the MDNS fails to examine or even require post-approval examination of the rail impacts from all three crude-by-rail proposals combined with anticipated rail impacts from proposed coal export terminals.

Unless mitigated with significant capacity additions, the addition of the massive increases of crude oil and coal train traffic is likely to present significant adverse impacts on other users of the rail line, including grain and fruit shippers, intermodal users, ports, industries, aircraft manufacturers and passenger rail—all of who are critically dependent on timely and affordable access to the rail system.¹⁷ Existing state studies indicate that coal rail traffic alone is already having a significant negative impact on the ability of Washington shippers to access markets where coal traffic from the Powder River Basin is dominating the rail lines. These reports also confirm that the railroad prioritizes unit trains, such as crude oil trains, over other shippers. The MDNS fails to analyze any impacts on northwest shippers if inbound and outbound freight traffic is diverted or eliminated due to the competition with crude-by-rail trains.

The economic impacts of the increased rail traffic associated with this project must also be reviewed. Issues here include the impact of dramatic increases in train traffic on real estate values and damage to property from oil leaks, diesel emissions, vibration, and noise. There are also serious concerns relating to the impact of such a massive increase in rail traffic on other non-oil shippers of freight by rail, including ports and shippers of agricultural products. These same issues may dramatically affect passenger rail interests. These significant rail traffic increases are likely to create major impacts on communities affected by vehicle traffic problems

¹⁷ *Heavy Traffic Ahead*, <http://www.heavytrafficahead.org/>.

related to delays at non-grade separated railway crossings, which will affect non-rail freight mobility, access to ports, retailers, tourist centers, and employers.¹⁸

H. The MDNS Fails to Fully Disclose and Consider All Climate Impacts From Greenhouse Gas Emissions.

SEPA and its implementing regulations explicitly require consideration of direct and indirect climate impacts. *See* RCW 43.21C.030(f) (directing agencies to “recognize the world-wide and long-range character of environmental problem); WAC 197-11-444 (listing “climate” among elements of the environment that must be considered in SEPA review). SEPA regulations also explicitly direct that environmental impacts outside the jurisdiction of the deciding agency should be considered. WAC 197-11-060(c). Crucially, agencies are required to assess both the direct and indirect impacts of the proposal.

In recent years, state and federal agencies have made efforts to better define how climate analysis should be performed, and to provide tools to enable agencies to meaningfully assess and mitigate the greenhouse gas contribution of proposed projects. For example, in late 2008, Ecology and the State’s Department of Community, Trade and Economic Development (CTED) issued a “comprehensive plan to address the challenges and opportunities of climate change.” (2008 Climate Plan).¹⁹ That plan recognized the increasing pressure on local governments to better identify climate impacts in their SEPA analyses, and noted that SEPA analysis provided an opportunity to evaluate climate impacts of government decisions and to identify changes to proposals to reduce or mitigate those impacts. *Id.* at 50.

Also in 2008, a governor-appointed working group provided a list of recommendations on how to ensure that climate change is considered in meeting SEPA’s directives.²⁰ Notably, those recommendations identified the following categories of greenhouse gas emissions to be considered pursuant to SEPA: a) off-site mining of materials purchased for the project; b) transportation of raw materials to the project, and transport of the final product offsite; c) use of products sold by proponent to consumers or industry, including “emissions generated from combustion of fuels manufactured or distributed by the facility.” *Id.* at App. D.

¹⁸ Freight rail congestion has become an important issue with respect to coal trains; an increase in crude-by-rail traffic would cause the same choke-points, but the MDNS did not address this issue. *See* <http://earthfix.opb.org/communities/article/northwest-railroads-already-congested/>.

¹⁹ Available at <http://www.ecy.wa.gov/pubs/0801025.pdf>.

²⁰ Available at http://www.ecy.wa.gov/climatechange/2008CATdocs/IWG/sepa/103008_sepaiwg_report.pdf.

Ecology recently issued SEPA guidance for its own consideration of greenhouse gas emissions.²¹ Accordingly, that Guidance makes clear that SEPA requires climate to be considered in its environmental analysis. Ecology's Guidance proposes that SEPA documents consider whether the proposal will significantly contribute to greenhouse gas concentrations, and states that "[i]f the emissions are proximately caused by the project, they should be disclosed regardless of their location." *Id.* at 4. The Guidance proposes that projects qualitatively disclose greenhouse gas emissions of at least 10,000 metric tons/year and quantitatively disclose greenhouse gas emissions for projects expected to produce an average of 25,000 tons/year of CO₂ equivalent.

Ecology has also provided a "table of tools" that can be used to calculate emissions from projects.²² That Table, in turn, lists various sources of emissions from projects, methods to calculate those emissions, and options to mitigate them. Direct "Scope 1" emissions include trains and boats. *Id.* at 1. Scope 3 emissions include "emissions from the future combustion of fossil fuels," which are defined to include "emissions that will result from the combustion of fossil fuels transported, distributed or imported as a result of the project (*e.g.*, natural gas pipeline)." *Id.* at 2.

Here, Westway reviewed its greenhouse gas emissions in its SEPA Checklist Appendix B to arrive at a total greenhouse gas emission estimate of 14,979 metric tons CO_{2e} annually. However, Westway began and ended its greenhouse gas emission analysis at Washington's state borders. For inbound rail, while Appendix B states that the distance to Hoquiam from Departure Point is 1,154 miles, in the calculations, Westway uses a distance of 366 miles (732 round trip), a decision that arbitrarily under-calculates emission amounts by 68%. "In assessing the significance of an impact, a lead agency shall not limit its consideration of a proposal's impacts only to those aspects within its jurisdiction, including local or state boundaries." WAC 197-11-060(4)(b).

Westway's failure to calculate and consider the full rail greenhouse gas emissions violates SEPA. "For projects with ongoing operations that include transporting products from outside the state, such as a port, a more thorough and perhaps more defensible analysis would include the transportation emissions from the source location outside of Washington to the final destination if either is known and the extent to which either is known." Guidance for Ecology at 4. Because the rail emissions will have a significant environmental impact, the MDNS is invalid.

On the outbound marine vessel side of the equation, Appendix B again uses the state border (here the nautical three mile boundary). Clearly, the transportation of the crude oil to a

²¹ Available at <http://www.ecy.wa.gov/climatechange/sepa.htm>.

²² Available at <http://www.ecy.wa.gov/climatechange/sepa.htm>.

refinery in Washington or California will be a much longer journey and will emit many more tons of CO_{2e} per year.

The MDNS also fails to calculate the greenhouse gas emissions of drilling, pumping refining the crude oil, and ultimately burning the refined product. A life-cycle analysis (well to wheel) was not done.

Because the MDNS fails to account for the actual greenhouse gas emissions from the Westway proposal, and because those emissions will have a significant and detrimental environmental impact, the MDNS is invalid.

I. The MDNS Failed to Address Climate Change Impacts, Including Ocean Acidification.

In February 2012, Washington Governor Christine Gregoire convened the Washington State Blue Ribbon Panel on Ocean Acidification to chart a course for addressing the causes and consequences of acidification. The Governor charged the Panel to:

- Review and summarize the current state of scientific knowledge of ocean acidification,
- Identify the research and monitoring needed to increase scientific understanding and improve resource management,
- Develop recommendations to respond to ocean acidification and reduce its harmful causes and effects, and
- Identify opportunities to improve coordination and partnerships and to enhance public awareness and understanding of ocean acidification and how to address it.

The Panel released its report and recommendations in the document Washington State Blue Ribbon Panel on Ocean Acidification (2012): Ocean Acidification: From Knowledge to Action, Washington State's Strategic Response, H. Adelsman and L. Whitely Binder (eds). Washington Department of Ecology, Olympia, Washington.²³

In November 2012, Governor Christine Gregoire issued an Executive Order²⁴ acknowledging the particular harm that ocean acidification, caused by increased emissions of greenhouse gases into the atmosphere, inflicts on Washington. “[I]t is critical to our economic

²³ Available at <https://fortress.wa.gov/ecy/publications/SummaryPages/1201015.html>. The technical summary (Feely, R.A., T. Klinger, J.A. Newton, and M. Chadsey (2012): Scientific Summary of Ocean Acidification in Washington State Marine Waters. NOAA OAR Special Report) is available at <https://fortress.wa.gov/ecy/publications/SummaryPages/1201016.html>.

²⁴ Available at http://www.governor.wa.gov/execorders/eo_12-07.pdf.

and environmental future that effective and immediate actions be implemented in a well-coordinated way and that we work collaboratively with federal, tribal, state, and local governments, universities, the shellfish industry, businesses, the agricultural sector, and the conservation/environmental community to address this emerging threat. The Executive Order specifically directs “[t]he Office of the Governor and the cabinet agencies that report to the Governor to advocate for reductions in emissions of carbon dioxide at a global, national, and regional level.” Despite this directive, the MDNS fails to address any impacts of this proposal for crude oil shipping on ocean acidification.

J. The MDNS Should Not Segment Connected Actions Into Separate Analyses.

SEPA prohibits agencies and project proponents from segmenting a single project into multiple separate decisions in order to avoid a comprehensive analysis. WAC 197-11-060(3)(b) (“Proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document.”). Westway may be segmenting its action here.

First, Westway acknowledges that future expansion of the project is possible. MDNS at 3. If Westway has affirmative plans for a larger project, its review cannot be validly segmented in order to present seemingly less significant environmental harms and risks.

Second, Westway has proposed no in-water work on its dock at this time. Given the significant expansion of Westway’s operation and the different requirements for loading crude oil onto barges and ships, it seems likely that Westway will need to upgrade its dock in the future. In-water dock work would require separate, federal permits. If likely dock repair or upgrade associated with this project is foreseeable, it should be included here, and not segmented into a separate, later analysis.

Third, completion of this project involves a number of other agencies and approval decisions, as listed in the MDNS at page 3. The impacts of these various permits should not be viewed in isolation but rather aggregated in a single, comprehensive environmental impact statement that explores all of the direct, indirect, and cumulative impacts of the Westway proposal to build and operate a crude oil shipping facility.

K. The MDNS Violates RCW 88.40—Transport of Petroleum Products—Financial Responsibility.

Washington State law recognizes that “oil and hazardous substance spills and other forms of incremental pollution present serious danger to the fragile marine environment of Washington state.” RCW 88.40.005. Because of this significant environmental danger, RCW 88.40.025 requires that Westway “shall demonstrate financial responsibility in an amount determined by [the Department of Ecology] as necessary to compensate the state and affected counties and

cities for damages that might occur during a reasonable worst case spill of oil from that facility....” The financial responsibility calculations must include the amount of oil that could be spilled, cost of cleaning up the spill, frequency of operations at the facility, and damages that could result from a spill. *Id.* The MDNS contains no such discussion, analysis, or evidence.

L. The MDNS Violates the Ocean Resources Management Act, RCW 43.143.

The Washington legislature has also found that “Washington’s coastal waters, seabed, and shorelines are among the most valuable and fragile of its natural resources,” and that some uses of Washington’s coastal waters, seabed, and shorelines “may pose unacceptable environmental or social risk at certain times.” RCW 43.143.005. Grays Harbor is among the particular portions of Washington’s coast called out for special protection from oil or gas exploration, development, or production. RCW 43.143.010. RCW 43.143.030 sets forth specific planning and project review criteria for projects along Washington’s coast, and calls for “special protection provided for the marine life and resources of ... Grays Harbor estuaries,” *id.* at 43.143.030(2)(d), as well as all reasonable steps to avoid and minimize impacts on tribal fishing, *id.* at 43.142.030(2)(e). The MDNS fails to mention, discuss, or follow the Ocean Resources Management Act.

M. City of Hoquiam Should Transfer Lead SEPA Authority to the State, and a Complete EIS Should Be Prepared.

For the reasons discussed above, this project needs a “time out” for further evaluation and analysis, public input, appropriate dialogue among all stakeholders, and consultation with the Quinault Indian Nation. SEPA explicitly prohibits the City of Hoquiam from allowing any action which would either have an adverse environmental impact or that would limit the choice of alternatives while a valid EIS is being prepared. WAC 197-11-070(1). We ask that you withdraw the MDNS and hold off from issuing any permits related to this project until SEPA is fully satisfied.

The Westway project requires a complete EIS that fully evaluates the environmental impacts of the crude-by-rail project, reasonable alternatives to that project, and mitigation options. The EIS should encompass all related portions of the project and should include other agency permitting actions related to the project. The EIS should also consider the indirect and cumulative impacts of the other two proposed crude-by-rail projects; alternatively, the Department of Ecology could review these projects as similar actions under WAC 197-11-060(3)(c). The EIS should do an emissions analysis of transporting oil via rail and marine vessel and also include emissions from drilling, pumping, refining, and burning—a true life-cycle analysis of greenhouse gas emissions as well as other air toxics like mercury.

III. WESTWAY'S PROPOSAL MUST BE REVIEWED AND APPROVED BY THE WASHINGTON UTILITY TRANSPORTATION COMMISSION UNDER RCW 80.50.

The State of Washington, through the passage of RCW 80.50, assigned the selection, review, and development of energy facility sites to the Energy Facility Site Evaluation Council ("EFSEC"). The stated policy of this law is "to recognize the pressing need for increased energy facilities, and to ensure through available and reasonable methods, that the location and operation of such facilities will produce minimal adverse effects on the environment, ecology of the land and its wildlife, and the ecology of state waters and their aquatic life." RCW 80.50.010.

EFSEC has jurisdiction over facilities that have "the capacity to receive more than an average of fifty thousand barrels per day of crude or refined petroleum ... which has been or will be transported over marine waters..." RCW 80.50.020(12)(d). Westway's proposal, with an 800,000 barrel capacity, meets this definition of a covered facility.

Westway first proposed to build two, 200,000 barrel crude oil tanks with an estimated receipt of 26,300 barrels per day. A few months later, Westway expanded its proposal to four, 200,000 barrel crude oil tanks. Westway's position is 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." Letter from Ken Shoemake, Westway, to Sally Toteff, DOE, and Jim La Spina, EFSEC (Dec. 4, 2012).

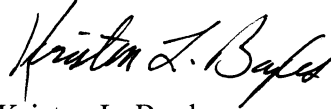
Westway's position misreads Washington law. In order to trigger EFSEC jurisdiction, a facility must have the capacity to receive an average of 50,000 barrels of crude a day, not a lower expectation. Plans can change, yet there will be no further state review if Westway begins to receive more crude oil. Westway proposes to expand to a total of 76 loading/unloading spots, which with a low estimate of 714 barrels per tank car leads to a capacity to receive 54,264 barrels per day.²⁵ Additionally, Westway's proposed storage capacity is 16 times greater than the jurisdictional threshold set in RCW 80.50.020(12)(d); this proposal should be proceeding under the EFSEC's jurisdiction, procedures, and environmental review requirements.

* * * * *

²⁵ Imperium estimates an average of 743 barrels per tank car in its correspondence. See Letter from John Plaza, Imperium, to Stephen Posner, EFSEC (March 19, 2013).

Thank you for the opportunity to comment. We would be pleased to meet with you and discuss these comments further if such a discussion can help avoid appeals and litigation on this project's permits and SEPA review.

Sincerely,



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