



1 Karen Allston  
2 Senior Assistant Attorney General  
3 Quinault Indian Nation  
4 Office of Attorney General  
5 P.O. Box 613  
6 Taholah, WA 98587  
7 (206) 713-8223 | Phone  
8 (360) 276-8127 | Fax  
9 kallston@quinault.org

7 2. Identification of Other Parties

8 The respondents in this appeal are the City of Hoquiam, Washington Department of  
9 Ecology, and Westway Terminal Company, LLC.

10 3. Decisions Under Review

11 This is a Petition for Review of Shoreline Substantial Development Permit No. SMA 12-  
12 07, issued by the City of Hoquiam Shoreline Administrator to Westway Terminal Company,  
13 LLC on April 26, 2013. A copy of the Permit, with its incorporated exhibits, is attached as  
14 Exhibit A to this Petition for Review. The Mitigated Determination of Nonsignificance for this  
15 project (Permit Exhibit 4) is also challenged.

16 4. Short and Plain Statement Showing Grounds for Petition

17 The City of Hoquiam issued the Shoreline Substantial Development Permit in violation  
18 of the State Environmental Policy Act (“SEPA”), SEPA’s governing regulations, and SEPA’s  
19 implementing ordinances, because the responsible official relied on a Mitigated Determination of  
20 Nonsignificance (“MDNS”) prepared by the City of Hoquiam and Washington State Department  
21 of Ecology that erroneously concluded that the Permit would not have a significant adverse  
22 environmental impact. Issuance of the Permit to Westway will, as discussed further below, have  
23 a variety of significant adverse environmental impacts. Consequently, the City should not have  
24 issued the Permit before the City of Hoquiam and the Washington Department of Ecology  
25 completed an environmental impact statement (“EIS”) disclosing and evaluating all of the  
26 impacts of, alternatives to, and potential mitigation for the project.

1 The City of Hoquiam issued the Permit in violation of the Shorelines Management Act,  
2 RCW 90.58, as implemented through the City of Hoquiam Shoreline Management Master  
3 Program Regulations, Chapter 11.04, because the Permit fails to show that this “ocean use” will  
4 “meet or exceed” the criteria set forth in RCW 43.143.030(2) and WAC 173-16-064(6). *See*  
5 Hoquiam Shoreline Management Master Program Regulations, § 11.04.180(6). The Permit fails  
6 to address the Ocean Use Regulations, § 11.04.065, including but not limited to § 11.04.065(2),  
7 which requires “adequate protection from geological hazards such as liquefaction, hazardous  
8 slopes, earthquakes, physical oceanographic processes, and natural disasters.” The Permit also  
9 fails to comply with § 11.04.065(5), which requires ocean use facilities to “prevent, avoid, and  
10 minimize adverse impacts” on threatened or endangered species habitat, environmentally critical  
11 and sensitive habitats, and “areas of high productivity for marine biota such as ... estuaries.”  
12 Finally, the Permit fails to give adequate consideration to § 11.04.020 (Purposes) of the Hoquiam  
13 Shoreline Management Master Program Regulations, as well as protect Shorelines of Statewide  
14 Significance, RCW 90.58.030(2)(f)(i).

15 5. Statement of Facts

16 On December 3, 2012, Westway filed a Joint Aquatic Resources Permit Application with  
17 the City of Hoquiam for a permit to expand its existing bulk liquid storage terminal at the Port of  
18 Grays Harbor to accept, store, and then ship crude oil. The Westway proposal would accept  
19 crude oil brought to the facility by rail, store it in large tanks, and then load the crude onto ships  
20 and barges that would take it to U.S. refineries, presumably in Washington or California. The oil  
21 will likely come by train from North Dakota, *see* Westway SEPA Checklist Appendix B, but it  
22 could also come from “a variety of locations throughout the U.S. and Canada,” with the most  
23 likely sources being from North Dakota, Montana, and Alberta, Canada. Port of Grays Harbor,  
24 CBR Fact Sheet (Jan. 30, 2013), *available at* [http://www.portofgraysharbor.com/about/CBR-](http://www.portofgraysharbor.com/about/CBR-Project.php)  
25 [Project.php](http://www.portofgraysharbor.com/about/CBR-Project.php). The Westway crude-by-rail facility is one of at least three similar proposals  
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1 currently under consideration in this area of Grays Harbor to build infrastructure on real property  
2 leased from the Port of Grays Harbor to receive crude oil by train and ship it to refineries by  
3 marine vessels.

4 Westway proposes four large new storage tanks with the capacity to store a total of  
5 800,000 barrels or 33,600,000 gallons of crude oil. Westway estimates that the terminal would  
6 receive 9,600,000 barrels of oil per year by rail, equaling two, 120 car trains (one loaded with oil  
7 on the way in, one empty on the way out) every three days, although the proposal will lead to a  
8 total of 76 loading/unloading spots, which gives the facility the capacity for larger daily  
9 deliveries. The company estimates 120 ship/barge transits through Grays Harbor per year.

10 A. State Environmental Policy Act

11 On April 4, 2013, as part of the City's effort to comply with the requirements of SEPA,  
12 the City Administrator and the Southwest Regional Director of the Washington Department of  
13 Ecology issued the MDNS.<sup>1</sup> The MDNS concluded that the Project "will not have probable  
14 significant impact on the environment," and did not trigger the requirement to prepare an EIS.  
15 The MDNS included several conditions identified as mitigation for the Project, most of which  
16 simply affirm Westway's existing duties under other environmental and land use requirements.

17 In concluding that the crude-by-rail facility would not have a significant environmental  
18 impact, the MDNS neglected a number of environmental factors in its consideration of the  
19 environmental impact of building a large oil shipping facility, including at least the following:

20 a. the cumulative impacts of three proposed crude-by-rail terminals in Grays Harbor  
21 (Westway, Imperium, and U.S. Development);

22 b. the direct, indirect, and cumulative impacts of transporting crude oil long  
23 distances to the facility by rail, including impacts to tribal treaty protected rights to fishing and  
24 gathering, risks of oil spills along the rail line and/or into fresh water, traffic, safety, recreation,

25 \_\_\_\_\_  
26 <sup>1</sup> The responsible officials originally issued the MDNS on March 14, 2013, but re-issued it to  
27 give the public a longer written comment period.

1 aesthetics, and increases in greenhouse gas emissions;

2 c. the direct, indirect, and cumulative impacts of transporting crude oil long  
3 distances from the facility to refineries by marine vessels, including impacts to tribal treaty  
4 protected rights to fishing and gathering, risks of oil spills into the Grays Harbor estuary and/or  
5 Pacific marine waters, traffic, safety, recreation, aesthetics, and increases in greenhouse gas  
6 emissions;

7 d. the precedential nature of this decision relative to other expected proposals in  
8 Washington State to build and operate marine shipping crude-by-rail facilities.

9 Had the responsible officials considered these reasonably foreseeable direct, indirect, and  
10 cumulative effects of building the Westway crude-by-rail facility, they would have concluded  
11 that the Project is likely to have a significant adverse environmental impact. This would, in turn,  
12 trigger the duty to prepare a full EIS prior to a decision to grant the permit, as required by SEPA.  
13 However, the responsible officials erroneously believed that SEPA only required consideration  
14 of the immediate, local impacts in Hoquiam of building and operating this project, and they  
15 failed to include or consider the above effects in their SEPA documentation.

16 The responsible officials' conclusion that the immediate and local effects of the Permit  
17 were not significant was also erroneous. The ongoing operation of this facility raises serious  
18 concerns for streams, wetlands, fishing areas, shellfish beds, water quality, aquatic life, and  
19 migratory bird habitats. Grays Harbor and the Chehalis River are home to several species  
20 protected under the Endangered Species Act that were not addressed in the MDNS. The MDNS  
21 did not adequately address negative impacts to salmon, eulachon, smelt, and other fish, nor did  
22 the MDNS adequately address the significant harm that crude oil spills from rail cars, marine  
23 vessels, and loading activities could cause in the unique Grays Harbor environment.

24 Generally, the MDNS relies on the existence of federal and state emergency spill  
25 response plans to mitigate for a possible oil spill but fails to address oil spill tug delayed  
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1 response time, oil spill response program funding, the risk of potential tsunami risks, and the risk  
2 of liquefaction during an earthquake. Further, while the MDNS presumes that the crude oil will  
3 be coming from the Bakken play in North Dakota, there are indications that crude might come  
4 from Alberta, Canada. Alberta tar sands oil is very different from other crude oil; it is more  
5 precisely called diluted bitumen, and is also heavier, making it much harder to clean up after a  
6 spill. Because the MDNS does not define the type and/or composition of the crude oil that will  
7 be received, stored, and shipped through Westway's facility, the actual environmental impacts of  
8 this project are essentially unknown, unexamined, and certainly not mitigated.

9 Other significant environmental and social impacts of the project include: a substantial  
10 increase in the number of trains moving through the Hoquiam area, delaying traffic and other rail  
11 system users (Westway estimates 243 train transits per year), and a substantial increase in the  
12 number of ocean-going ships and barges (Westway estimates 120 vessel transits per year)  
13 arriving and leaving the site each year, creating pollution, invasive species risks, navigation  
14 hazards, harming aquatic species, and limiting access to treaty fishing areas. The MDNS also  
15 fails to consider archeological and cultural impacts to the Quinault Indian Nation.

16 Although the MDNS attempts to address some of these impacts, the responsible officials  
17 erroneously concluded that the environmental impacts were not significant. The Quinault Indian  
18 Nation filed extensive and timely comments on the MDNS. The responsible officials have not  
19 responded to those comments.

20 SEPA also prohibits agencies and project proponents from segmenting a single project  
21 into multiple separate decisions in order to avoid a comprehensive analysis. WAC 197-11-  
22 060(3)(b) ("Proposals or parts of proposals that are related to each other closely enough to be, in  
23 effect, a single course of action shall be evaluated in the same environmental document.").  
24 Westway may be segmenting its action here, as Westway acknowledges that future expansion of  
25 the project is possible, MDNS at 3. Westway has also proposed no in-water work on its dock at  
26

27 *Earthjustice*  
28 *705 Second Ave., Suite 203*  
*Seattle, WA 98104*  
*(206) 343-7340*

1 this time. Given the significant expansion of Westway’s operation and the different  
2 requirements for loading crude oil onto barges and ships, it seems likely that Westway will need  
3 to upgrade its dock in the future. If likely dock repair or upgrade associated with this project is  
4 foreseeable, it should be included here; under SEPA, phased review (WAC 197-11-060(5)(b)) is  
5 not appropriate when it divides a project to avoid consideration of cumulative or significant  
6 impacts. Additionally, completion of this project involves a number of other agencies and  
7 approval decisions, as listed in the MDNS at 3. The impacts of these various permits should not  
8 be viewed in isolation but rather aggregated in a single, comprehensive environmental impact  
9 statement that explores all of the direct, indirect, and cumulative impacts of the Westway  
10 proposal to build and operate a crude oil shipping facility.

11 Finally, Washington State law recognizes that “oil and hazardous substance spills and  
12 other forms of incremental pollution present serious danger to the fragile marine environment of  
13 Washington state.” RCW 88.40.005. Because of this significant environmental danger, RCW  
14 88.40.025 requires that Westway “shall demonstrate financial responsibility in an amount  
15 determined by [the Department of Ecology] as necessary to compensate the state and affected  
16 counties and cities for damages that might occur during a reasonable worst case spill of oil from  
17 that facility....” The financial responsibility calculations must include the amount of oil that  
18 could be spilled, cost of cleaning up the spill, frequency of operations at the facility, and  
19 damages that could result from a spill. *Id.* The MDNS contains no such discussion, analysis, or  
20 evidence.

21 B. Shorelines Management Act

22 On April 26, 2013, the City of Hoquiam’s City Administrator issued the Permit.

23 The Permit violates the Shorelines Management Act, RCW 90.58, because it fails to  
24 show that this “ocean use” will “meet or exceed” the criteria set forth in RCW 43.143.030(2) and  
25 WAC 173-16-064(6). *See* Hoquiam Shoreline Management Master Program Regulations,  
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1 § 11.04.180(6). The Permit fails to even address the criteria, which include:

- 2 (a) There is demonstrated significant local, state, or national need for the proposed use or  
3 activity;
- 4 (b) There is no reasonable alternative to meet the public need for the proposed use or  
5 activity;
- 6 (c) There will be no likely long-term significant adverse impacts to coastal or marine  
7 resources or uses;
- 8 (d) All reasonable steps are taken to avoid and minimize adverse environmental impacts,  
9 with special protection provided for the marine life and resources of the Columbia River,  
10 Willapa Bay and Grays Harbor estuaries and Olympic National Park;
- 11 (e) All reasonable steps are taken to avoid and minimize adverse social and economic  
12 impacts, including impacts on aquaculture, recreation, tourism, navigation, air quality,  
13 and recreational, commercial, and tribal fishing;
- 14 (f) Compensation is provided to mitigate adverse impacts to coastal resources or uses;
- 15 (g) Plans and sufficient performance bonding are provided to ensure that the site will be  
16 rehabilitated after the use or activity is completed; and
- 17 (h) The use or activity complies with all applicable local state and federal laws and  
18 regulations.

19 The Permit fails to address the Ocean Use Regulations, § 11.04.065, specifically  
20 § 11.04.065(2) for “adequate protection from geological hazards such as liquefaction, hazardous  
21 slopes, earthquakes, physical oceanographic processes, and natural disasters.” The Permit fails  
22 to address the requirements of RCW 88.40.025 (Evidence of Financial Responsibility) and other  
23 local, state, and federal laws. The Permit also fails to comply with § 11.04.065(5), which  
24 requires ocean use facilities to “prevent, avoid, and minimize adverse impacts” on threatened or  
25 endangered species habitat, environmentally critical and sensitive habitats, and “areas of high  
26 productivity for marine biota such as ... estuaries.” The Permit fails to give adequate  
27 consideration to § 11.04.020 (Purposes) of the Hoquiam Shoreline Management Master Program  
28 Regulations, the Grays Harbor Estuary Management Plan, and Shorelines of Statewide  
Significance, RCW 90.58.030(2)(f)(i).



1 C. Interests of the Quinault Indian Nation

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

11 Treaties create a special fiduciary duty and trust responsibility upon all agencies of the  
12 United States and states to protect treaty rights, including fishing rights. *Seminole Nation v.*  
13 *United States*, 316 U.S. 286, 297 (1942). These rights cannot be abrogated except by explicit  
14 Congressional authorization. Federal courts have consistently required the federal agencies and  
15 states to keep the treaty promises upon which the Tribes relied when they ceded huge tracts of  
16 land by way of the Treaties. *See, e.g., United States v. Oregon*, 718 F.2d 299, 304 (9th Cir.  
17 1983); *United States v. Washington*, 2007 WL 2437166 (W.D. Wash. 2007); *Northwest Sea Farms*  
18 *v. U.S. Army Corps of Eng’rs*, 931 F. Supp. 1515 (W.D. Wash. 1996); *Muckleshoot v. Hall*, 698 F.  
19 Supp. 1504 (W.D. Wash. 1988); *Confederated Tribes of Umatilla Indian Reservation v.*  
20 *Alexander*, 440 F. Supp. 553 (D. Or. 1977).

21 In a landmark case known as the “Boldt decision,” a federal court confirmed that Indian  
22 tribes have a right to half of the harvestable fish in state waters and established the tribes as co-  
23 managers of the fisheries resource with the State of Washington. *United States v. Washington*,  
24 384 F. Supp. 312 (W.D. Wash. 1974). Specific to the Quinault Indian Nation, the Boldt decision  
25 affirmed the Quinault usual and accustomed fishing areas include “Grays Harbor and those  
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1 streams which empty into Grays Harbor.” *Id.* at 374.

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

8         The Chehalis and the Humptulips Rivers, and the Grays Harbor estuary into which they  
9 flow, provide the freshwater and marine habitat that support natural production of chinook,  
10 chum, and coho salmon and steelhead of critical importance to the Quinault Nation’s treaty-  
11 protected terminal river fisheries within Grays Harbor, managed jointly by the Quinault Nation  
12 and Washington State Department of Fish and Wildlife and governed by seasonal plans and  
13 agreements. Grays Harbor nourishes other species of fish important to the Quinault Nation’s  
14 treaty-protected fisheries such as white sturgeon and dungeness crab. Grays Harbor produces  
15 numerous species of invertebrates and finfish that provide important prey to species and stocks  
16 utilizing Grays Harbor and adjacent marine areas.

17         Quinault weavers have gathered materials from the Grays Harbor area for many  
18 generations. Sweetgrass, cattail, and other grasses and willow gathered from the Bowerman  
19 Basin are used by the Quinault as a material in the traditional weaving of baskets and mats, and  
20 for ceremonial purposes. Weaving is as integral to contemporary Indian culture as it was in the  
21 past. For more detail, *see* K. James and V. Martino, *Grays Harbor and Native Americans*  
22 (1986), prepared for the U.S. Army Corps of Engineers (Contract #DACQ67-85-M-0093).

23         Bowerman Basin, located in Grays Harbor to the north of the proposed Westway project,  
24 is one of the two major areas remaining in Washington with large sweetgrass populations.  
25 Sweetgrass is a key component, and participant, in the highly complex estuarine ecosystem  
26

1 processes. Its loss due to a potential oil spill would significantly impact juvenile salmonid and  
2 bird habitats, and estuary function, having huge negative implications for the Quinault.

3 The Quinault Indian Nation has an obvious and keen interest in protecting the fish and  
4 fish habitat that it relies on in Grays Harbor to exercise its federally-guaranteed treaty fishing  
5 rights, as well as the traditional areas used for gathering plants for traditional cultural use.  
6 Additionally, the Quinault Nation's treaty fishing right includes a right of access to its traditional  
7 fishing areas and any impact to that right is an unconstitutional taking of property. These  
8 collective federally-protected treaty rights must be considered and addressed—the State of  
9 Washington cannot take actions that impinge the Quinault Indian Nation's treaty rights.

10 The issuance of this Permit, which authorizes Westway to construct four large storage  
11 tanks for its crude-by-rail facility, injures the Quinault Indian Nation in several ways. First,  
12 construction and operation of the facility will have adverse impacts on the aquatic environment  
13 by harming aquatic species and habitat relied upon by the Quinault Indian Nation to exercise  
14 their federally-guaranteed treaty fishing rights. Second, construction and operation of the facility  
15 will result in significant increases in local train and ship traffic with attendant increases in  
16 pollution, traffic delays, safety hazards, and greenhouse gas emissions, and it will limit access to  
17 usual and accustomed fishing areas. Third, operation of this project will result in significant  
18 increases in Washington State's contribution to global emissions of greenhouse gases and other  
19 pollutants. These increases will occur because operation of the project will result in increased  
20 transportation of oil, and increased refining and burning of oil, which in turn contributes to  
21 human-induced climate instability that harms the Quinault's commercial, recreational, aesthetic,  
22 spiritual, and other interests.

23 6. Relief Sought

24 Petitioners respectfully request that this Board find unlawful and set aside both the Permit  
25 and the MDNS, and prohibit the City from reissuing the permit until it and the Washington  
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27 *Earthjustice*  
28 *705 Second Ave., Suite 203*  
*Seattle, WA 98104*  
*(206) 343-7340*

1 Department of Ecology have adequately complied with SEPA and the Shorelines Management  
2 Act.

3 7. Service

4 Copies of this Petition for Review were sent to the Washington Department of Ecology,  
5 the Washington State Office of the Attorney General, the City of Hoquiam, and Westway  
6 Terminal Company, LLC via Federal Express on May 15, 2013.

7 Respectfully submitted this 15th day of May, 2013.

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10   
11 KRISTEN L. BOYLES  
12 MATTHEW R. BACA  
13 Earthjustice  
14 705 Second Avenue, Suite 203  
15 Seattle, WA 98104-1711  
16 (206) 343-7340 | Phone  
17 (206) 343-1526 | Fax  
18 kboyles@earthjustice.org  
19 mbaca@earthjustice.org

20 *Attorneys for Petitioner Quinault Indian Nation*

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.

On May 15, 2013, I served a true and correct copy of the following documents on the parties listed below:

1. Petition for Review

Westway Terminal Company, LLC
Robert K. Shoemake, Regional Manager
3128 Port Industrial Road
Hoquiam, WA 98550
kens@westway.com

- via facsimile
via overnight mail
via first-class U.S. mail
via hand delivery
via electronic service by Clerk
via email

City of Hoquiam
Brian Shay, City Administrator
609 - 8th Street
Hoquiam, WA 98550
bshay@cityofhoquiam.com

- via facsimile
via overnight mail
via first-class U.S. mail
via hand delivery
via electronic service by Clerk
via email

State Attorney General
Washington Attorney General's Office
Ecology Division
P.O. Box 40117
Olympia, WA 98504-0117
Street Address:
2425 Bristol Court S.W., 2nd Floor
Olympia, WA 98502
(360) 586-4614 | Phone


- via facsimile
via overnight mail
via first-class U.S. mail
via hand delivery
via electronic service by Clerk
via email

1 Washington State Department of Ecology  
2 300 Desmond Drive  
3 Olympia, WA 98504-7600

- via facsimile
- via overnight mail
- via first-class U.S. mail
- via hand delivery
- via electronic service by Clerk
- via email

6 I, Cheryl McEvoy, declare under penalty of perjury that the foregoing is true and correct.

7 Executed on this 15th day of May, 2013, at Seattle, Washington.

9  
10   
11 Cheryl McEvoy