No. 92552-6

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

Consolidated Nos. 45887-0-II, 45947-7-II, 45957-4-II

QUINAULT INDIAN NATION, FRIENDS OF GRAYS HARBOR, SIERRA CLUB, GRAYS HARBOR AUDUBON, and CITIZENS FOR A CLEAN HARBOR,
Petitioners,

v.

CITY OF HOQUIAM; STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY; and WESTWAY TERMINAL COMPANY, LLC,
Respondents,

and

IMPERIUM TERMINAL SERVICES, LLC,
Respondent/Cross-Petitioner,

SHORELINES HEARINGS BOARD,
Respondent.

JOINT OPPOSITION BRIEF OF QUINAULT INDIAN NATION AND FRIENDS OF GRAYS HARBOR *et al.*

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INTRODUCTION

During the truncated environmental review for the Westway and Imperium proposals, the Washington Department of Ecology and the City of Hoquiam regularly referred to three crude-by-rail proposals in Grays Harbor, acknowledging the near-identical nature of the Westway, Imperium, and US Development projects. Ecology and Hoquiam had long known that US Development planned the same kind of facility (a crude oil transfer terminal) in the same area as Westway and Imperium. Each of the three proposals would receive crude oil by the same rail-tracks, store the oil in large tanks on the same shoreline, and ship the oil through the same shipping lanes out of Grays Harbor and through Washington's ocean waters. Ecology and Hoquiam also knew the likely impacts: like Westway and Imperium, US Development's proposal would increase the risk of routine and catastrophic oil spills and explosions, risks to species, and risk of harm to the people whose lives, livelihoods, and culture depend on the waters of Grays Harbor.

The Shorelines Hearings Board held that Ecology and Hoquiam should have considered the cumulative impacts of US Development's proposal because its impacts were anticipated, known, and quantifiable. The record shows that Ecology and Hoquiam were well aware of the relevant specifics of the US Development project—the volumes of oil the

project would receive and ship, its storage capacity, and its anticipated number of vessel movements. And, surprising no one, on March 27 and April 7, 2014, US Development submitted its permit applications for a third proposed crude oil terminal in Grays Harbor.

Imperium's appeal raises only one issue: whether the Shorelines Hearings Board erred by finding, based on the record before the agencies, that US Development's proposal was "reasonably foreseeable" for purposes of cumulative impacts review. The answer is plainly no; there was no error. Adopting Imperium's argument would allow willful blindness to obvious cumulative impacts and would reward project proponents who play games with the timing of their permit applications to avoid cumulative review. Petitioners Quinault Indian Nation and Friends of Grays Harbor *et al.* respectfully ask the Court to uphold the Board's decision finding that the US Development proposal was "reasonably foreseeable" for the cumulative impacts analyses.

BACKGROUND

During the State Environmental Policy Act ("SEPA") and Shoreline Management Act permitting phases for the Westway and Imperium crude oil shipping terminal projects, US Development[1] publicly

[1] US Development is sometimes referred to by its subsidiary name "Grays Harbor Rail Terminal, LLC" in the record.

stated that its proposal for a third, nearly-identical project would also be located in Grays Harbor and would include cargo handling of "up to 50,000 barrels per day with one, 120-car unit train delivery about every two days," and "[s]hip calls will range from 45-60 per year," with predicted operation within two years. Administrative Record ("AR") 1224 (US Development Group, Grays Harbor Rail Terminal Frequently Asked Questions (Apr. 17, 2013)). US Development took steps to secure a location in Grays Harbor and conduct a feasibility analysis for its proposed crude oil terminal. As discussed in Petitioners' joint opening brief, that project, along with Westway's and Imperium's proposals, would result in a combined storage capacity of over 1.5 million barrels of oil and together would be responsible for over 500 vessel transits through Grays Harbor each year. *See* Petitioners' Opening Br. at 7-8.

Ecology and Hoquiam, however, omitted the anticipated US Development project from the cumulative impacts analyses associated with the Westway and Imperium proposals, despite the very public nature of US Development's plans for Grays Harbor and the specificity provided in the pre-permitting phase of the US Development project. Quinault Indian Nation and Friends of Grays Harbor *et al.* appealed that omission, and the Board found that the US Development proposal was "reasonably foreseeable" such that Ecology and Hoquiam should have considered it

during the other two Grays Harbor crude shipping proposals' environmental reviews. AR 2394-2404 (Shorelines Hearings Board Order on Summary Judgment (As Amended on Reconsideration) at 16-26) ("SHB Order"). In strong language, the Board enumerated some of the many facts known and acknowledged by Ecology and Hoquiam, which together justified a cumulative impacts analysis that included US Development. The Board found, "based on uncontroverted facts in the record," that

> [t]he Co-leads know enough about the USD project to make a general discussion of its potential impacts, in combination with the other two pending proposals, meaningful. They know its location on Grays Harbor, which is the same harbor as the other two facilities. They know its purpose, which is the same as the Westway and Imperium expansions, is to receive multiple grades of crude-by-rail, store it in terminals, and transfer it to vessels. They know its maximum capacity of proposed liquid storage, along with the daily maximum capacity of liquids it can handle. They know the number of anticipated rail unit trains and vessels visiting the planned new facility. This information is sufficient to merit its inclusion in the consideration of cumulative impacts from all three projects.

AR 2404 (SHB Order at 26). In short, not only was the project reasonably foreseeable, US Development had provided enough information to allow SEPA analysis. Two members of the six-member Board filed a partial concurrence and dissent stating while they agreed with the legal analysis on cumulative impacts, they would have required a factual hearing on the

question of whether US Development was reasonably foreseeable. AR 2372-74.

On March 27, 2014, US Development sent an application to Hoquiam for a Shoreline Substantial Development Permit, and on April 7, 2014, US Development submitted a SEPA Checklist.[2] US Development's application indicates, as US Development had indicated previously in other submissions, that it would store between 800,000 and 1,000,000 barrels of crude oil and would require 6-10 vessel transits through Grays Harbor each month, adding 72-120 vessel transits per year. US Development SEPA Checklist at 3. US Development would receive an average of 45,000 barrels of oil per day, *id.*, and one unit train of oil every two days, *id.* at 24. On September 10, 2014, Hoquiam and Ecology issued a Determination of Significance, requiring US Development to complete a full Environmental Impact Statement. US Development Determination of Significance, *available at* http://cityofhoquiam.com/pdf/ghrtdsscoping-2014.09.18.pdf (last visited Sept. 25, 2014).

STANDARD OF REVIEW

This Court reviews Shorelines Hearings Board orders under the Washington Administrative Procedure Act. *Port of Seattle v. Pollution*

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[2] US Development Shorelines Permit Application and SEPA checklist, *available at* http://cityofhoquiam.com/newsroom/public-notices/grays-harbor-rail-terminal-project-reports/ (last visited Sept. 25, 2014).

Control Hearings Bd., 151 Wn.2d 568, 587, 90 P.3d 659 (2004). Where the decision under review stems from summary judgment, courts overlay Administrative Procedure Act review with the summary judgment standard. *Verizon Nw. v. Wash. Employment Sec. Dep't.,* 164 Wn.2d 909, 916, 194 P.3d 255 (2008). As summary judgment is appropriate only where the undisputed material facts entitle the moving party to judgment as a matter of law, *Verizon,* 164 Wn.2d at 916, courts evaluate the facts in the record and conclusions of law de novo. RCW 34.05.570(3)(d); *Verizon,* 164 Wn.2d at 916, 194 P.3d 255.

Here, where the underlying evidence comes entirely from documents in the administrative record prepared by Ecology and Hoquiam and that evidence was (and remains) undisputed, AR 24 (SHB Order at 24), there are no questions of fact for this Court to review. Nor has Imperium appealed the conclusion of law that all reasonable foreseeable projects must be included in a cumulative impacts review under SEPA. *See infra* n.4. This Court reviews Imperium's sole challenge—whether the undisputed facts in the record show that US Development's proposal was reasonably foreseeable—de novo.

ARGUMENT

During the environmental review processes for Westway and Imperium, the Ecology Spills Program put it clearly, stating that due to

"the similarity of the three proposals, Westway, Imperium, and US Development Corporation; [the Spills Program] believes that the effect of all facility operations together should be assessed." AR 1906 (Ecology memo to Diane Butorac and Sally Toteff from Dale Jensen, Re: Westway Terminal Tank Farm Expansion Project—SEPA Checklist Comments (Feb. 8, 2013)) (emphasis added). That candid statement captured what the written record evidence proved through repeated emails and other statements: Ecology and Hoquiam had detailed and plentiful evidence demonstrating the reasonable likelihood of the US Development project, along with sufficient detail to add that project to the analysis. US Development's clear commitment to the project and its well-known plans for a specified number of rail and marine transits, crude storage amounts, and throughput made the US Development Project "likely, not merely speculative." WAC 197-11-060(4)(a).

I. PROJECTS THAT ARE "REASONABLY FORESEEABLE" REQUIRE CUMULATIVE IMPACTS REVIEW.

SEPA requires consideration of the cumulative impacts of the proposed action under review along with anticipated impacts of similar existing and reasonably foreseeable projects. The cumulative impacts analysis supports SEPA's purpose of decision-making based on "complete disclosure of environmental consequences." *King Cnty. v. Wash. State*

Boundary Review Bd. for King Cnty., 122 Wn.2d 648, 663 (1993). SEPA does not define "cumulative impacts," but under National Environmental Policy Act ("NEPA") regulations,[3] cumulative impacts are those that result "from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency … or person undertakes such other actions." 40 C.F.R. § 1508.7. As the Board found, the standard for determining whether a given cumulative impact must be considered is whether it is "reasonably foreseeable." AR 2401 (SHB Order at 23 (distinguishing connected actions and cumulative impacts)).[4]

To warrant consideration as a cumulative impact during the SEPA threshold determination, future projected actions need not be certain. *Wash. State Boundary Review Bd. for King Cnty.*, 122 Wn.2d at 663. An impact is reasonably foreseeable when it is sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision. *See Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992).

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[3] Washington courts use federal NEPA provisions and case law to discern the meaning of SEPA and its implementing regulations. *See, e.g.*, *ASARCO v. Air Quality Coal.*, 92 Wn.2d 685, 709 (1979).

[4] Imperium argued below that reasonable foreseeability was not the appropriate standard, but it has not appealed the Board's determination on that issue. Imperium Opening Br. at 2 n.3.

Imperium takes the position that only projects with a "definite commitment," that have submitted permit applications, should be considered as part of a cumulative impacts analysis. Imperium Opening Br. at 29. There is no such requirement in SEPA. Instead, rather than delay analysis until some unspecified point of future project certainty, "[t]he lead agency shall prepare its threshold determination and environmental impact statement (EIS), if required, at the earliest possible point in the planning and decision-making process, when the principal features of a proposal and its environmental impacts can be reasonably identified." WAC 197-11-055(2) (emphasis added).

Reasonably foreseeable projects will invariably include some amount of speculation. *See N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1078-79 (9th Cir. 2011). The *Northern Plains* court found that "NEPA requires that an EIS engage in reasonable forecasting. Because speculation is … implicit in NEPA, [ ] we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as crystal ball inquiry." *Id.* (internal quotation marks and citation omitted). In that case, additional well-drilling estimates extended twenty years into the future and had a large range of possible impacts. The court found those impacts reasonably foreseeable and required cumulative impacts consideration. *Id.*

Other cases demonstrate that some amount of uncertainty is to be expected and that uncertainty alone does not eliminate the need for a cumulative impacts review. *See Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 812 (9th Cir. 1999) (second land exchange was reasonably foreseeable even though still in negotiation); *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 869 (9th Cir. 2004) (unrelated project was reasonably foreseeable and should have been included in cumulative impacts analysis due to increases in vessel traffic); *Fritiofson v. Alexander*, 772 F.2d 1225, 1245 (5th Cir. 1985) ("cumulative impacts analysis [at the EA stage] . . . should consider . . . future actions that are 'reasonably foreseeable,' <u>even if they are not yet proposals and may never trigger NEPA-review requirements</u>.") (emphasis added); *Fla. Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 401 F. Supp. 2d 1298, 1330 n.31 (S.D. Fla. 2005) (quoting *Fritiofson*); *Stewart v. Potts*, 126 F. Supp. 2d 428, 436 (S.D. Tex. 2000) (quoting *Fritiofson*).

The case law is clear that all reasonably foreseeable impacts should be included in the cumulative impacts analysis, even where some uncertainty remains.

II. THE UNDISPUTED EVIDENCE IN THE RECORD DEMONSTRATED THAT THE US DEVELOPMENT PROJECT WAS REASONABLY FORESEEABLE.

As the Board found, the record demonstrated US Development's proposal contained all necessary details for cumulative impacts analyses, including the project location in Grays Harbor, the purpose to transport crude oil from rail to vessel, the storage capacity, the daily maximum receipt capacity, and the anticipated number of unit trains and marine vessels. AR 2404 (SHB Order at 26). In addition to project specifications, evidence in the record demonstrated US Development's clearly- and repeatedly-articulated commitment to the project, along with Ecology's, Hoquiam's, and the Port of Grays Harbor's anticipation of the now-filed application from US Development.

Officials at Ecology and Hoquiam consistently communicated about <u>three</u> crude oil terminals in Grays Harbor, demonstrating that they foresaw the US Development project well before US Development filed its permit applications. *See* AR 1228 (Email from Diane Butorac, Regional Planner, Southwest Region, Washington Department of Ecology (Jan. 11, 2013)) ("there are three crude oil proposals expected for Grays Harbor"); AR 1230 (Email from Diane Butorac, Regional Planner, Southwest Region, Washington Department of Ecology (Feb. 7, 2013)) (attaching "the environmental checklist for the second of three crude oil

tank farm proposals for Grays Harbor"). Likewise, the Port of Grays Harbor's website provided similar clarity on the number—three—of anticipated crude oil shipping terminals in Grays Harbor. AR 1297 (CBR Project ("Opportunity snapshot—3 projects combined")); AR 1209 (CBR Fact Sheet (Jan. 30, 2013)) ("There are currently three proposed CBR projects at the Port of Grays Harbor."); AR 1299 (CBR Frequently Asked Questions (Feb. 20, 2013)) ("It is our understanding the City of Hoquiam and the Department of Ecology are co-leads for reviewing Westway's State Environmental Policy Act (SEPA) checklist and have expressed interest in continuing to be co-leads for the other two proposed projects.").

Further, at an Ecology Spill Team meeting, "[t]he three Crude-by-Rail proposed projects in Hoquiam were briefly discussed. They include Westway Terminals, Imperium and US Development Group." AR 1899 (Ecology SW Regional Office Spill Team Meeting (Feb. 19, 2013)); *see also* AR 1901 (Email from GayLee Kilpatrick, Ecology, Re: City of Hoquiam Critical Areas Ordinance (Feb. 20, 2013)) ("Here's the language that Hoquiam could use to require consideration of seismic design for Westway, Imperium and US Development's tanks and secondary containment."); AR 1903 (Email from Curt Hart, Ecology, Re: Governor's Alerts—Department of Ecology—for week of February 4, 2013) ("In all

likelihood, Spill is going to have a lot to do with how we shape the messaging behind these three interrelated proposals….").

Ecology also engaged in discussion of the specifics of the US Development facility during the Westway and Imperium environmental review processes. *See* AR 1878-79 (Email from Ryan Paulsen, Ecology, Re: Proposed Facility at Grays Harbor (Nov. 15, 2012)) (summarizing US Development Group's project); AR 1881 (Email from Alan Bogner, Governor's Office of Regulatory Assistance, Re: CBR Projects (Jan. 31, 2013)) (attachment shows US Development proposal as "1 unit train every 2 days, 45-60 ships or barges a year, unknown quantities [of crude] at this time, but likely largest of the 3 [Port of Grays Harbor] CBR projects"). Additionally, Ecology briefed Governor Inslee on the cumulative statistics of the "three different proposed projects (Westway, Imperium Renewables, and US Development)" that would "store up to 20 million gallons of crude oil to be transferred over water to marine fuel barges for distribution to Washington and California refineries." AR 1884-85 (Alert to Governor, Week of February 4-8, 2013: Interest growing about proposals to store and transfer crude oil at Port of Grays Harbor).

Officials at Ecology, Port of Grays Harbor, and Hoquiam internally referred to the "astounding" cumulative estimates for Grays Harbor, with US Development's project included. *See* AR 2184 (Email

from Sean Orr, Ecology Re: Westway SEPA Review (Feb. 6, 2013)) ("The first page and initial focus is to look a[t] the impacts from all three facilities. You will see that the estimates for transfer volumes and vessel traffic that are based on information from the checklists is astounding. Therefore felt it was important to look at it this way. We are taking the step to advise them a risk study should be prepared. This will ensure we are on record."); *see also* AR 2188 (Port of Grays Harbor, Around the Docks (July 2013)) ("These are all strong arguments for why Grays Harbor should welcome the three proposed crude by rail (CBR) storage and shipping facilities. All three companies are responsible corporate partners…. For more information and updates on the three projects, please visit porto[f]graysharbor.com.") (emphasis added); AR 2192 (Email from Brian Shay, Hoquiam City Administrator, Re: Imperium meeting (Jan. 23, 2013)) ("Your project, along with Westway and US Development all qualify as a 'Permitted Shorelines Use.'").

The expectation of a forthcoming application was rooted in US Development's many and varied public indications of firm commitment to plans for a crude oil shipping terminal in Grays Harbor. In September 2012, US Development entered into an "access agreement" with the Port of Grays Harbor to conduct feasibility studies at Terminal 3. *See* AR 1232-44 (Access Agreement). At the November 13, 2012 Port of Grays

Harbor Commission Meeting, US Development conducted a briefing on its "Proposed Terminal 3 Facility." AR 1249-64 (US Development Group, Proposed Terminal 3 Facility Commission Briefing (Nov. 13, 2012)); AR 1246-47 (Port of Grays Harbor Commission Meeting Agenda (Nov. 13, 2012) (with notes from Hoquiam staff)); AR 1319-21 (Port of Grays Harbor Commission Meeting Minutes (Nov. 13, 2012)). In January 2013, US Development participated in a community workshop discussing its views of the benefits of the three combined Grays Harbor oil terminal proposals, including its project. AR 1279, 1283-84, 1287 (Port of Grays Harbor, Grays Harbor Economic Opportunity: Crude by Rail Community Workshop (Jan. 30, 2013)) (slide 14, Terminal 3 opportunity; slides 18-19, "combined" economic benefits; slide 22, Hoquiam, Westway, Imperium, and US Development participants). Two months after that, US Development provided an updated briefing to the Port of Grays Harbor Commission on its "Proposed Terminal 3 Facility." AR 1289-95. Finally, in April 2013, the Port of Grays Harbor approved a Grant of Lease to Grays Harbor Rail Terminal for 24 months. AR 1316-17 (Port of Grays Harbor, Around the Docks (Apr. 2013)).

While US Development had not yet submitted its application, it had repeatedly and publicly released the specifics of its proposed project. The Port of Grays Harbor's website contained a US Development Group

Frequently Asked Questions document discussing "Terminal 3, where the facility will be built," cargo handling of "up to 50,000 barrels per day with one, 120-car unit train delivery about every two days," "[s]hip calls will range from 45-60 per year, depending on vessel size," predicted operation within two years, job creation, emergency spill response plans, and facility design. AR 1224. US Development's feasibility study, which it submitted to the Port of Grays Harbor on February 28, 2013, contains the same projections. *See* AR 1302-14 (US Development Group, Terminal 3 Bulk Liquids Rail Logistics Facility: Feasibility Study Supporting Information (Feb. 28, 2013)). The feasibility study included estimates of the maximum receiving capacity of the proposed operation of 50,000 barrels per day. *Id.* at 1310 (Feasibility Study at 9). The total crude storage capacity of the tanks would be 800,000 to 1,000,000 barrels. *Id.* at 1311 (Feasibility Study at 10). The anticipated increase in ship traffic due to the operation would be five vessel calls per month. *Id.*

As early as January 2013, Hoquiam had already begun providing information to US Development to inform its forthcoming application. *See* AR 2186 (Email from Brian Shay, Hoquiam City Administrator Re: US Development Project (Jan. 14, 2013)) (forwarding Ecology's initial Westway SEPA checklist comments to US Development with note that

"[h]ere is some helpful information and insight from Ecology regarding your SEPA.").

The only two aspects of Westway's and Imperium's proposals Ecology and Hoquiam analyzed for cumulative impacts were rail and marine vessel transits, *see* AR 126, 127 (Westway MDNS at 4, 9), AR 230, 237 (Imperium MDNS at 4, 11), meaning that the information US Development provided was sufficient to trigger and accommodate a cumulative impacts review of all three projects.[5] Further, US Development's application, submitted earlier this year, subsequently reaffirmed the earlier estimates.

Despite these clear indications of US Development's plans, Imperium argues that US Development's projections were unreliable. Imperium cites one letter from the Washington Energy Facility Site Evaluation Council that pointed out that US Development had at one point indicated higher levels of anticipated oil shipments out of Grays Harbor. Imperium Opening Br. at 12 (citing AR 1542-43). Yet, absolute certainty is not required for a cumulative impacts analysis—only reasonable foreseeability—and that US Development may have earlier anticipated

[5] The Board agreed, finding that the knowledge of the location, purpose, capacity, and anticipated traffic of the US Development project rendered it "reasonably foreseeable." *See* AR 2404 (SHB Order at 26).

greater amount of oil throughput is hardly justification for ignoring its later, lower estimates.

Ecology itself said it most clearly in comments from the Spills Program on the Westway proposal:

> Based on our understanding of the similarity of the three proposals, Westway, Imperium, and US Development Corporation; we believe that the effect of all facility operations together should be assessed, thus warranting a programmatic review of these projects' impacts. From a spills point of view, it is important to assess spill risk from increased traffic, oil handling, and transfer operations as [a] whole.

AR 1906-10 (Ecology Memo to Diane Butorac and Sally Toteff from Dale Jensen, Re: Westway Terminal Tank Farm Expansion Project—SEPA Checklist Comments (Feb. 8, 2013)). The undisputed evidence proves that US Development's project has long been far from a "nascent" plan. *See* Imperium Opening Br. at 30.

III. THE BOARD CORRECTLY DETERMINED THAT THE TOTALITY OF THIS UNCONTROVERTED EVIDENCE REQUIRED A CUMULATIVE IMPACTS ANALYSIS.

Like the Board, courts applying the "reasonably foreseeable" standard routinely require consideration of impacts of future actions that are still in the planning stages where enough is known for meaningful consideration of the future projects' effects. Yet Imperium argues that US Developments projections—communicated to the public and regulators—were not enough. Imperium Opening Br. at 27-31. Addressing what it

characterizes as the Board's "strained" reasoning, Imperium argues that the ruling would mean that projects with what it characterizes as "preliminary" estimates would be subject to review. *Id.* at 28. There is, however, nothing strained about reasoning that would subject to review a project with all relevant details disclosed, repeated and discussed by regulators, expounded publicly in community forums, and planned for and anticipated by Ecology and Hoquiam for months. The Board's decision was based on material undisputed facts. Imperium does not contest the evidence; it simply believes it is not enough.

In fact, Imperium's real objection appears to be with the standard itself, lamenting that under the Board's holding it would be "forced to evaluate the impacts from another competing project that may never come to fruition." *Id.* at 30. But certainty of fruition is not required, and even a reasonably foreseeable project may ultimately disappear—some uncertainty is inherent in and accepted by that standard.[6] US Development's public back and forth with Ecology, the Port of Grays Harbor, and Hoquiam, which ultimately led to US Development's

[6] Imperium's public policy objection—that if the US Development project were considered but ultimately did not come to fruition, Imperium would bear unnecessary costs for mitigation—falls flat. The larger concern, as reflected in the "reasonably foreseeable" standard, is the opposite: failing to consider *all* impacts would allow applicants to avoid cumulative consideration through the timing of their applications.

submission of its application, was not only foreseeable but foreseen by every relevant actor during the Westway and Imperium environmental review processes.

The cases Imperium cites are readily distinguishable. Imperium relies heavily on *Jones v. Nat'l Marine Fisheries Serv.*, but in that case there had been only "general statements" and "no information as to the scope or location of any future projects or even how many such projects [the proponent] contemplates pursuing." 741 F.3d at 1001. General statements about future intent, failing even to include information on location, scope, and number of sites, is far different from the specific, known plans of US Development. Here, Ecology and Hoquiam were aware of not only the leased location in Grays Harbor but the projected crude oil throughput from early on. *Jones* is simply not comparable.

Similarly, Imperium's reliance on *Gulf Restoration Network v. U.S. Dep't of Transp.*, a case involving a natural gas marine terminal, is misplaced. In *Gulf Restoration Network*, two of the three proposed projects for which plaintiffs sought consideration appear to have been <u>over two hundred miles</u> from the evaluated project. 452 F.3d 362, 370-71 (5th Cir. 2006). The court in *Gulf Restoration Network* also pointed to rapidly-changing technology in that area that called into question the future effects of the planned ports. *Id.* All in all, those distant projects were uncertain

because they were subject to "the occurrence of any one of a number of contingencies." *Id.* They were, fundamentally, different from the nearly-identical, next-door US Development project in this case for which no similar contingencies have been documented.[7]

Imperium criticizes the Board's reliance on *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005 (9th Cir. 2006). Imperium Opening Br. at 27-28. While that case ultimately did not require a cumulative impacts analysis, *id.* at 1015, it states the law accurately and clearly. Where "meaningful consideration" of a project is possible, consideration of cumulative effects is required. *Id.* at 1014. Even where all project information has not been formalized and a broader analysis is not possible, a discussion of what is known is useful. *Id.* ("enough was then known to permit a general discussion of effects"); *see also N. Plains Res. Council*, 668 F.3d at 1078. These are the points for which the Board cited that case. *See* AR 2397, 2404 (SHB Order at 19, 26). Here, however, US Development's project was further along than the project in *Environmental Protection Information Center* and had produced sufficient data for meaningful consideration of its proposal.

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[7] Nor does it matter that a coal facility previously discussed for the same site never materialized. Prior proposals say nothing about the certainty or reasonably foreseeability of US Development's proposal, especially when compared with the undisputed evidence in the record.

Imperium cites a number of other cases, all of which involved highly speculative projects that did not warrant consideration as part of a cumulative impacts analysis. For that reason, each of these cases is irrelevant. *See N. Carolina Alliance for Transp. Reform v. U.S. Dep't of Transp.*, 713 F. Supp. 2d 491, 523 (M.D.N.C. 2010) (neither project had a source of funding and one would be funded, if ever, up to twenty years in future); *City of Shoreacres v. Waterworth*, 332 F. Supp. 2d 992, 1007-08 (S.D. Tex. 2004) *aff'd*, 420 F.3d 440 (5th Cir. 2005) (no actual plan or proposal to deepen the channel, and projections indicated only that the need may arise sometime before 2030); *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 512-13 (D.C. Cir. 2010) (other project review begun approximately five years into EIS process); *Airport Impact Relief v. Wykle*, 192 F.3d 197, 206 (1st Cir. 1999) ("Any possible airport expansion is contingent on several events that may or may not occur over an eight-year span.").[8]

In contrast to these cases, US Development's plans were firm and specific. Its engagement with Ecology and Hoquiam was already long-

[8] Imperium also cites a U.S. Supreme Court discussion of an analysis of the need for a region-wide, programmatic EIS. Imperium Opening Br. at 30 (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976)). The Supreme Court's discussion in *Kleppe* of the standard for requiring a programmatic EIS, however, addresses an entirely different issue from the cumulative impacts review relevant in this case.

running at the time of Westway's and Imperium's environmental analyses, and the details of the project have not changed from the feasibility study projections to the applications it submitted this year. Based on the evidence in the record, it is clear that the US Development project was a "reasonably foreseeable" similar action for purposes of cumulative impact review under SEPA.

CONCLUSION

For the reasons stated above, the Court should deny Imperium's appeal and affirm the Board's ruling on summary judgment as to the reasonable foreseeability of the US Development project, requiring cumulative impact review under SEPA.

Respectfully submitted this 26th day of September, 2014.

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CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. My business address is 705 Second Avenue, Suite 203, Seattle, Washington 98104.

On September 26, 2014, I served a true and correct copy of the following document(s) on the parties listed below:

1. Joint Opposition Brief of Quinault Indian Nation and Friends of Grays Harbor, *et al.*

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I, Catherine Hamborg, declare under penalty of perjury that the foregoing is true and correct. Executed on this 26th day of September, 2014, at Seattle, Washington.

CATHERINE HAMBORG

EARTHJUSTICE

September 26, 2014 - 11:25 AM

Transmittal Letter

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