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

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

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

Petitioners,

v.

CITY OF HOQUIAM, STATE DEPARTMENT OF ECOLOY, and WESTWAY TERMINAL COMPANY, LLC,

Respondents.

and

IMPERIUM TERINAL SERVICES, LLC,

Intervenor-Petitioner

SHORELINES HEARINGS BOARD,

Respondent

INTERVENOR-PETITIONER IMPERIUM'S OPENING BRIEF

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I. INTRODUCTION

This appeal of the Order on Summary Judgment ("Order")[1] of the Shorelines Hearings Board ("Board") addresses the required scope of a cumulative impacts analysis conducted by the Washington State Department of Ecology ("Ecology") and the City of Hoquiam ("City") as part of their environmental review of two independent bulk liquid marine terminal development projects on property at the Port of Grays Harbor pursuant to the State Environmental Policy Act ("SEPA"). Applicants for the two independent projects are Intervener-Petitioner Imperium Terminal Services, LLC ("Imperium") and Respondent Westway Terminal Company, LLC ("Westway"). Imperium asks this Court to reverse the Board's decision on Issue A.1[2] and rule that SEPA does not require Ecology and the City, which were acting as co-lead agencies, to consider in their cumulative impacts analyses the potential for a third project by U.S. Development Group, LLC ("USD"), which had taken early steps in its efforts to explore the feasibility of a marine terminal at a different location at the Port of Grays Harbor.

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[1] The term "Order" refers to the Board's Order issued on November 12, 2013, as amended on reconsideration on December 9, 2013. AR 2379-2421.

[2] The Board identified issue A1 in its Order as follows: "Is the Mitigated Determination of Non-Significance ('MDNS') issued by the City of Hoquiam and Washington Department of Ecology Invalid because the responsible officials failed to adequately consider the direct, indirect and cumulative impacts of three proposed crude-by-rail terminals in Grays Harbor (Westway, Imperium and U.S. Development)." AR 2383.

Relying significantly on NEPA case law, the Board concluded that SEPA requires lead agencies to include potential projects that are "reasonably foreseeable" in cumulative impacts analysis.[3] A majority of the Board in a split decision erroneously concluded that a potential project by USD was reasonably foreseeable. In ruling against Imperium, Westway, and the co-lead agencies on summary judgment, the majority of the Board concluded that reasonable minds could not differ that a potential project by USD was reasonably foreseeable, despite the fact that the undisputed evidence in the record demonstrated only that USD had expressed interest in a potential project and had entered into agreements with the Port to assess and evaluate the feasibility of a potential project. USD had also participated in a public forum regarding the benefits of crude-by-rail projects, but USD had not submitted any application or similar documents signaling actual commitment to build a terminal facility. Based on the facts at the time of the environmental review, USD's potential project did not rise to the level of certainty or sufficiency

[3] Before the Board, Imperium argued that the state standard for cumulative impacts under SEPA is different from and narrower than the "reasonably foreseeable" standard used in NEPA. AR 567-71; AR 1568-70; AR 2072-76. The Board rejected this argument. AR 2397-401 ("While there is support for Imperium's argument in these cases, the Board concludes that this approach to the cumulative impacts analysis conflates two separate and distinct SEPA concepts: 'cumulative impacts' and 'connected actions.'"). Imperium has not appealed that conclusion. In this appeal, Imperium argues, as it did below, that even the "reasonably foreseeable" standard adopted by the Board does not require the co-lead agencies to consider the a potential for a USD project in their cumulative impacts analysis because any such project was speculative and not "reasonably foreseeable."

of project information to constitute a "reasonably foreseeable action." To hold otherwise, as did the Board, would require Ecology and the City to consider the speculative and unformulated plans and unknown impacts of a possible future development.

It bears emphasizing that this case is not about whether a cumulative impacts analysis is required. The co-lead agencies completed an analysis for each of the two proposals for which they had sufficient information on which to base their environmental review. Instead, this case is about how far an agency needs to cast its net when completing a cumulative impacts analysis and whether the agency must consider preliminary, unformulated and speculative plans for potential proposals. If the Court lets stand the Board's conclusion that the Co-leads should have included the potential for the USD proposal based on these facts, it creates an unworkable standard for other agencies to apply. The speculative project at issue in this case was in its nascent planning stages; the plans were unformulated and the little project information that was known could change over time because the project proponent had not demonstrated sufficient commitment to proceed with an identified proposal, nor presented any details regarding the outcome of its feasibility analysis that could inform the SEPA co-leads as to what type and scale of project, if any, was feasible at the third location. Indeed, it was possible

that the entity could abandon the proposed "project" entirely as was the case with other similar recent projects proposed in the vicinity where USD is considering development that had gone through similar steps to explore project feasibility. Applicants would incur expenses in completing the studies and potentially suffer the consequences of having to mitigate for their contribution to those cumulative impacts for projects which have not sufficiently demonstrated that they will even occur.

Accordingly, Imperium asks the Court to reverse the Board's order on issue A1 and determine that the co-lead agencies were not required to consider the potential for a project by USD because it was speculative and not reasonably foreseeable.

II. ASSIGNMENTS OF ERROR

1. The Board erred when it concluded, based on the uncontested facts presented on summary judgment, that a potential project by USD was "reasonably foreseeable," and was not "speculative" such that the SEPA lead agencies should have considered its potential impacts in their cumulative impacts analysis for the Imperium MDNS. AR 2387-2388; 2401-2404; 2420.

The following issue pertains to the assignment of error:

Issue 1. Whether an unrelated third potential marine terminal project was

speculative and not "reasonably foreseeable" such that the lead agencies were not required to consider its impacts as part of the cumulative impacts analyses for the Imperium and Westway proposals.

III. STATEMENT OF CASE

The following sections set forth the factual and procedural background regarding the projects and environmental review under SEPA.

A. The Westway and Imperium Proposals

Imperium and Westway currently operate bulk liquid storage terminals on adjacent land leased by the Port of Grays Harbor at the Port's Terminal #1 adjacent to the Chehalis River.[4] Imperium currently operates a facility for the production of biodiesel fuel from feedstock and storage of bulk liquids with similar features, including 8 storage tanks, rail spurs and related equipment.[5] Since 2007 when it first began operations at this location, Imperium has been loading and unloading vessels and shipping and receiving railcars continuously, all without incident through careful adherence to company policies and applicable government regulations.[6] Westway currently operates a bulk methanol storage terminal that was built and began operating in 2009.[7] The facility includes four storage

[4] AR 279; AR 1632, AR 676

[5] AR 1690, AR 1632-33.

[6] AR 1690-91.

[7] AR 676.

tanks, tank rail spurs with loading/unloading facilities and a concrete lined containment structure, pipelines, pumps, vapor control equipment, two office buildings, one electrical room, and a warehouse building.[8]

In late 2012, both companies independently began pursuing plans to expand their terminals. Imperium proposed to expand its existing bulk liquid storage terminal to allow for the receipt, storage, and shipment of biofuels, feedstocks for biofuel production, gasoline, diesel, crude oil, and other renewable fuels.[9] Imperium plans to renovate the existing rail facility to accommodate the increased capacity of the business to participate in the liquid fuel storage and transportation market.[10] Westway similarly proposed to expand its terminal to allow for expanded tank storage and receipt of crude oil from rail, and outbound shipment by vessel and/or barge.[11]

Westway and Imperium submitted Joint Aquatic Resources Permit Applications ("JARPA") with the City on Dec. 3, 2012 and February 13, 2013, respectively in which they requested that the City issue Shoreline Substantial Development Permits ("SSDP") for their expansion

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[8] *Id*

[9] AR 1690.

[10] AR 1697.

[11] AR 628

proposals.[12]

B. Permitting and Environmental Review of the Westway and Imperium Proposals

SEPA requires a lead agency to complete environmental review of the development proposals. In this case, Ecology and the City agreed to work as SEPA "Co-leads," jointly responsible for the environmental review.[13] At the outset of their review on each of the projects, the Co-leads were responsible for issuing a threshold determination[14] in which the Co-leads indicate whether the projects will have "probable," "significant" adverse impacts.[15] Their threshold determination for each of the projects was based on information contained in the application, accompanying SEPA checklists, and additional information requested from Westway.[16] The Co-leads conducted ample consultations during their consideration of

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[12] AR 673-722; AR 277-88.

[13] AR 759-62; AR 558; AR 667.

[14] The agency must base its threshold determination on whether a project will have probable, significant adverse environmental impacts. RCW 43.21C.031, 033. If an agency determines the project will result in "probable, significant adverse impacts" the agency issues a "determination of significance" ("DS"), which triggers further environmental review in the form of an environmental impact statement ("EIS"). WAC 197-11-310, -360. Conversely, if an agency determines that there will be no probable significant adverse impacts, the agency issues a determination of non-significance ("DNS") completing the environmental review process. WAC 197-11-340. As a third option, the agency can issue a mitigated determination of non-significance ("MDNS") pursuant to which the agency imposes mitigating conditions that ensure the project will not create any probable significant adverse impacts.

[15] "'Significant' as used in SEPA means a reasonable likelihood of more than a moderate adverse impact on environmental quality." WAC 197-11-794(1). "Impacts" are defined as " ..the effects or consequences of actions." WAC 197-11-752.

[16] AR 665-66; AR 558.

the permits, including interfacing with various other agencies, stakeholders, and the public.[17] The Ecology SEPA team also consulted with other programs within Ecology to obtain internal feedback and assistance on the SEPA review.[18]

As a result of their environmental review, the Co-leads issued each of the individual projects a "mitigated determination of non-significance," ("MDNS") which concluded that the Imperium and Westway proposals were not likely to have probable adverse environmental impacts if mitigated consistent with the conditions listed in the MDNS.[19] On May 2, 2013, the Co-leads issued the final MDNS for Imperium's proposal pursuant to WAC 197-11-350(1).[20]

In issuing the MDNS, the City and Ecology expressly evaluated the potential aggregate impacts of the existing and proposed operation and the cumulative impacts of both Westway's and Imperium's proposed expansions.[21] The co-lead agencies concluded that the proposals were not a single course of action because they were not interdependent and each

[17] AR 668-69; AR 671; AR 558-61.
[18] AR 558-59.
[19] AR 559.
[20] AR 561, AR 227. Although this involves two separate MDNSs, the SHB consolidated the separate of appeals
[21] AR 561

proposal could be implemented on its own.[22] But the City and Ecology nevertheless considered potential vessel and rail traffic impacts arising from both proposals "because of the potential for indirect or cumulative impacts resulting from the two proposals using the same transportation pathways and constructed in a similar timeframe."[23] On April 26, 2013, the City issued the SSDP for Westway's proposed expansion.[24] On June 14, 2013, the City issued the SSDP for Imperium's project.[25]

C. Evidence of the Potential for a Third Project

At the time Imperium applied for the permit, USD had begun to explore the potential development of an independent third bulk liquids rail terminal using a different terminal than Westway and Imperium at a nearby site on property also owned by the Port of Grays Harbor. Unlike Westway and Imperium, USD has no existing facilities at the site and was contemplating the potential construction of an entirely new facility.[26] In fact, the 105 acre property is vacant, except for approximately 25 acres, which is used by a facility that stores and sorts logs and operates a wood chipper.[27]

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[22] *Id.*
[23] *Id.*
[24] AR 559.
[25] *Id.*
[26] AR 561.
[27] AR 1302.

USD had not applied for any permits to develop such a facility.[28] Nor had USD submitted any documents to the City defining the scope of its project.[29] Instead, evidence in the record indicates only that USD had taken preliminary steps to further evaluate the feasibility of a project at the site. Through its subsidiary Grays Harbor Rail Terminal,[30] USD entered into an Access Agreement with the Port on September 11, 2012, allowing it to complete a feasibility study by December 31, 2012.[31] The Access Agreement explicitly stated that neither the Agreement nor the resulting Feasibility Studies should be construed as an obligation or commitment on either party to pursue a lease of the property.[32] Additionally, the Agreement plainly stated that the Port "is currently in discussions with several third parties regarding inbound/outbound shipping facilities and other terminalling[sic] and development projects for the Property" and that nothing in the agreement should prevent the Port from continuing to market or engage in the exchange of information to third parties that are interested in the third terminal property for a non-rail/marine crude oil

[28] AR 1522.

[29] AR 562.

[30] In this pleading, we use the term USD to refer to U.S. Development or its subsidiary, Grays Harbor Rail Terminal.

[31] AR 1232.

[32] AR 1237.

terminal facility.[33] Later, on March 12, 2013, after Westway and Imperium had submitted applications and the co-lead agencies had begun their review, USD stated in a briefing to the Port Commission that it had "[p]erformed due diligence to determine if [the] site is appropriate for [a] rail logistics facility."[34] Although USD did participate in a community workshop in January 2013, the information in the record regarding USD's ideas for the site are preliminary and there is no indication of any commitment to actually construct a third terminal facility.[35]

In April 2013, the Port approved a Grant of Option to Lease to USD.[36] The lease option provides USD two years for more site and project evaluation and permitting.[37] As the Port stated on its website in July 2013 (after the Co-leads had already issued the MDNSs and permits for the Imperium and Westway projects), the lease will allow USD to perform "further analysis and obtaining of permits..."[38]

USD was not the first to take similar exploratory steps in the potential development of a marine terminal facility at that location. In fact, an entirely different company, RailAmerica, had recently considered

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[33] AR 1235.
[34] AR 1291.
[35] AR 1266-87.
[36] AR 1317.
[37] *Id.*
[38] AR 1297.

the exact site as a possible location for development of a coal storage and export facility.[39] Like USD, the RailAmerica coal project had an access agreement with the Port and disclosed potential volumes of coal that the facility could export; nonetheless, the RailAmerica project never came to fruition and it abandoned the project.[40]

A letter to the Vice President of USD's subsidiary from the Energy Facilities Sighting and Evaluation Council ("EFSEC") dated April 23, 2103, illustrates how indefinite USD's plan was during the course of the environmental review of Imperium's and Westway's projects.[41] In the letter, EFSEC staff points out discrepancies between a USD draft letter, sent in December 2012, and subsequent draft letters sent in February and March of 2013.[42] The December letter described a project designed to receive between 164,000 and 174,000 barrels of crude oil per day.[43] As indicated by the March letter, within the span of 4 months, USD's potential project capacity had drastically changed; in March, USD claimed a potential project would have capacity to receive approximately 45,000 barrels a day.[44]

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[39] AR 1734-36.
[40] *Id.*
[41] AR 1542-43.
[42] *Id.*
[43] *Id.* at 1542.
[44] *Id.*

Before issuing the MDNSs, the City and Ecology consulted with the Port regarding how likely the USD project was to materialize.[45] When Ecology asked Port officials whether they believed USD was committed to the potential third terminal project, Port officials replied that the project was not certain.[46] As a result of this consultation and the lack of any permit application or other material signifying further commitment, the Co-leads ultimately decided to exclude USD's speculative and unshaped proposal from their environmental review of Westway's proposal,[47] concluding the "project was still in a conceptual stage".[48]

D. The Board's Review of the Westway and Imperium MDNSs

The Quinault Indian Nation ("QIN") and a collection of other petitioners before the Board[49] (collectively "Petitioners") filed an appeal challenging the City's decision to approve the SSDPs and issue the MDNSs on a variety of claims under SEPA and the Shoreline Management Act.[50] The parties filed cross-motions for summary judgment on July 12, 2013. In their motion, Petitioners asked the Board to

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[45] AR 1522.

[46] *Id*

[47] *Id.*

[48] AR 1522.

[49] Besides the Quinault Indian Nation, petitioning parties included: Friends of Grays Harbor, Grays Harbor Audubon Society, Sierra Club, Surfrider Foundation, and Citizens for a Clean Harbor.

[50] AR 44-536.

rule that SEPA Co-leads erred by failing to consider impacts from the potential USD project along with their consideration of impacts from the Westway and Imperium projects.[51]

On December 9, 2013, the Board issued the order that is the subject of this appeal.[52] While the Board found in favor of the applicants and Co-leads on several issues, with specific respect to the single issue that is the subject of this appeal, the Board concluded that the standard applicable to the issue of cumulative impacts is whether a future project is reasonably foreseeable, and that the USD project was reasonably foreseeable.[53] Because of this finding, the Board concluded that issuance of an MDNS under these circumstances was clearly erroneous and awarded summary judgment on Issue A.1.[54]

With respect to the determination that the USD project was reasonably foreseeable, the Board relied on evidence that USD had entered into an access agreement to conduct a feasibility study, completed the study and sent it to the Port, and participated in community workshops where they identified their potential project as one of three crude-by-rail

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[51] AR 1122-391.

[52] The Board's Order is included in the administrative record at AR 2379-421.

[53] AR 2394-404. AR 2420-21. The Board also found that the SSDPs were invalid because the MDNSs concluded there would not be probable significant impacts to the environment from increases in rail and vessel traffic prior to receipt of the Rail Transportation Impact Analyses and Vessel Transportation Impact Analyses, AR 2411, but this appeal is limited to the Board's finding with respect to Issue A.1.

[54] AR 2404

proposals.[55] Moreover, in awarding summary judgment, the Board did not permit a hearing, the opportunity to proffer testimony or evidence on the actual "feasibility" of terminal construction on the site contemplated by USD.

Two members of the Shorelines Hearings Board declined to agree with the majority's ruling on this issue and stated summary judgment was not appropriate.[56] The Partial Concurrence and Dissent highlighted the Co-leads' conclusion on the uncertain nature of the USD project and found that "[r]easonable minds have clearly reached differing opinions as to whether the U.S. Development project was reasonably foreseeable, and therefore should have been considered in evaluating the cumulative impacts from the Westway and Imperium projects. This is especially true given the deference owed to the SEPA-responsible officials' decision making, and the Board's clearly erroneous standard of review."[57]

As a result of the majority ruling on SEPA and cumulative impacts, the Board reversed the City's approval of the SSDPs and remanded the matter back to the City for further SEPA analysis consistent with the Board's opinion.[58]

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[55] AR 2351-52

[56] AR 2372-74.

[57] AR 2373-74.

[58] AR 2421.

E. Judicial Appeal

Imperium, QIN, and Friends of Grays Harbor each filed a Petition for Judicial Review of the Order in Thurston County Superior Court.[59] In their appeals, Petitioners seek review of the Board's decision on different issues pertaining to the applicability of the Ocean Resources Management Act and the need for project applicants to provide financial assurances prior to permit issuance.[60]

On February 20, 2014, the Board granted a Certificate of Appealability in response to Imperium's request for certification finding that "direct review by the Court of Appeals avoids delay and facilitates the goal to efficiently and expeditiously resolve these types of issues" and certifying these appeals for direct review.[61] This court accepted review on June 11, 2014 and consolidated Imperium's appeal with those of the Petitioners.

IV. ARGUMENT

A. Standard of Review and Deference

Imperium seeks review of the Board's Order under the

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[59] *Quinault Indian Nation v. Hoquiam*, No. 13-2-02507-5 (Thurston Co. Superior Ct.), *Imperium Terminal Services, LLC v. Shorelines Hearings Board*, No. 14-2-00030-5.

[60] See QIN's Motion for Discretionary Review, February 13, 2014; Friends of Grays Harbor's Motion for Discretionary Review, March 18, 2014. Imperium is a respondent with respect to those issues and intends to file a response brief.

[61] *See* Imperium's Notice of Discretionary Review to Court of Appeals Division II, February 26, 2014.

Administrative Procedure Act ("APA"), RCW Chapter 34.05. Pursuant to the APA, this Court reviews the decision solely on the record before the Board at the time of the motion for summary judgment.[62]

Imperium challenges the Board's failure to consider all of the facts presented on this issue, its application of the relevant facts to the law and its legal conclusions. The APA establishes the standard of review for appeals of orders in adjudicative proceedings that correspond with these various grounds for review.[63] However, because this case involves an appeal of an agency order on summary judgment, the Court must "overlay the APA standard of review with the summary judgment standard."[64] Thus, while a court typically reviews challenges to an agency's factual conclusions pursuant to the "substantial evidence" standard in RCW 34.05.570(e), in the context of a review of an agency's Order on summary judgment, the Court must "view the facts in the record in the light most favorable to the nonmoving party" and must "evaluate the facts in the record de novo."[65] Any factual findings in an agency order on summary

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[62] RCW 34.05.558; RAP 9.12; *Batchelder v. City of Seattle*, 77 Wn.App. 154, 158, 890 P.2d 25, 28 (1995); *Wash. Fed'n of State Emps., Council 28 v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 163, 849 P.2d 1201, 1206 (1993).

[63] *See* RCW 34.05.570(3).

[64] *Skagit Cnty. v. Skagit Hill Recycling, Inc.*, 162 Wn. App. 308, 318, 253 P.3d 1135, 1140 (2011) (*citing Verizon Northwest, Inc. v. Wash. Emp't Sec. Dept.*, 164 Wn.2d 909, 916, 194 P.3d 255, 260 (2008)).

[65] *Id.*

judgment are "superfluous and have no consequence on appeal."[66] Under the APA, in reviews of the agency's interpretation of the law in an order of summary judgment, the court reviews "the law in light of the error of law standard," pursuant to which the Court reviews the SHB's legal conclusions de novo.[67] Pursuant to this standard, a decision is clearly erroneous when the court is "left with the definite and firm conviction that a mistake has been committed."[68]

Additionally, because this appeal involves review of the Department of Ecology's threshold determination, the Court must give deference to Ecology's determination, even when that decision has been overturned by an intervening administrative adjudicative body. While the APA often gives deference to the agency Order on review (in this case, that of the SHB), in the instance in which the agency order is an order on appeal of an Ecology SEPA determination, the Courts give deference to

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[66] *Skimming v. Boxer*, 119 Wn.App. 748, 755, 82 P.3d 707, 711, *review denied*, 152 Wn.2d 1016, 101 P.3d 108 (2004); *See also Lewis v. Krussel*, 101 Wn.App. 178, 2 P.3d 486 (2001) (on appeal of a summary judgment, a trial court's findings are superfluous and the appellate court need not consider them. This includes the finding that there is no material issue of fact).

[67] RCW 34.05.570(3)(d); *Skagit Cnty. v. Skagit Hill Recycling, Inc.*, 162 Wn. App. 308, 318, 253 P 3d 1135, 1140 (2011) (citing *Verizon Northwest, Inc. v. Wash. Emp't Sec. Dept.*, 164 Wn.2d 909, 916, 194 P.3d 255, 260 (2008))

[68] *Cougar Mt. Assocs. v. King County*, 111 Wn.2d 742, 747, 765 P.2d 264, 267 (quoting *Polygon Corp. v. City of Seattle*, 90 Wn.2d 59, 69, 578 P.2d 1309, 1315 (1978)); *Ecology v. Public Utility Dist. No. 1 of Jefferson County*, 121 Wn.2d 179, 849 P.3d 646 (1993) *aff'd sub nom. Public Utility Dist. No. 1 of Jefferson Cnty. v. Washington Dep't of Ecology*, 511 U.S. 700, 114 S. Ct. 1900 (1994)

Ecology's determination, not that of the Board.[69] This is in line with the more general principal that Court's give deference to an agency's interpretation of a statute where the statute falls within the agency's area of expertise.[70] Because Ecology has been "charged with the rule-making powers to implement and interpret SEPA," and is responsible for adopting chapter 197-11 WAC, the Court should give deference to Ecology's underlying determination that was the subject of the appeal before the Board.[71]

B. SEPA Did Not Require the Co-lead Agencies to Consider the Potential for a USD Project in the Cumulative Impacts Analysis

SEPA requires that agencies review actions for "probable significant adverse impacts." RCW 43.21C.031(1). Included among the impacts that the agency must review are "direct, indirect, and cumulative"

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[69] *Public Utility Dist. No. 1 of Clark Cnty. v. Pollution Control Hearings Bd.*, 137 Wn. App. 150, 157, 151 P.3d 1067, 1070 (2007) (In an APA appeal of a decision of the Pollution Control Hearings Board, Court gives Ecology's underlying SEPA determination deference because Ecology is "charged with the rule-making powers to implement and interpret SEPA ...").

[70] *Id. See also Quadrant v. State Growth Mgt. Hearings Bd.*, 154 Wn.2d 224, 110 P3d 1132 (2005); *Port of Seattle v. PCHB*, 151 Wn.2d 568, 90 P.3d 659 (2004); *ARCO Products Co. v. Washington Util. & Transp. Comm'n*, 125 Wn.2d 805, 888 P.2d 728 (1995).

[71] *Pub. Util. Dist. No. 1 of Clark Cnty.*, 137 Wn. App. at 157. *See also* RCW 43.21C.090; *PT Air Watchers v. State, Dep't of Ecology*, 179 Wn.2d 919, 926, 319 P.3d 23, 27 (2014); *Norway Hill Pres. & Prot. Ass'n v. King County Council*, 87 Wn.2d 267, 275, 552 P.2d 674 (1976) (recognizing that the 'clearly erroneous' standard of review will allow a reviewing court to give substantial weight to the agency determination as required by RCW 43.21C.090).

impacts.[72] In interpreting the obligation to assess cumulative impacts, the Board concluded that "agencies are required to consider the effects of a proposal's probable impacts combined with the cumulative impacts from other proposals."[73]

In this case, Ecology and the City specifically analyzed the cumulative impacts of the Imperium and Westway proposals, but the Board concluded that the analysis was deficient because it also did not include the impacts from the potential for a USD terminal project. As indicated in further detail below, the Board erred in concluding that a potential USD project was reasonably foreseeable such that it should be included in a cumulative impacts analysis. While USD was clearly in the process of exploring the feasibility of pursuing development of an additional oil terminal at Grays Harbor, the prospects for that project remained purely speculative and subject to change during Imperium's and Westway's environmental review. Accordingly, under SEPA or NEPA, review of "cumulative impacts," including consideration of "reasonably foreseeable future actions," did not require consideration of a potential third terminal by USD.

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[72] WAC 197-11-060(4)(e). The SEPA regulations do not define the term "cumulative impacts."

[73] AR 2396.

1. The Potential for a USD Project Was a Speculative Future Action and Not Reasonably Foreseeable

Because SEPA does not define "cumulative impacts" or provide a clear standard for the manner in which agencies are required to review them, the Board relied on the definition of cumulative impacts in the National Environmental Policy Act ("NEPA") and in associated case law to conclude that cumulative impacts analyses must analyze "reasonably foreseeable" project proposals. As a corollary to the reasonably foreseeable standard, courts have made clear that agencies need only consider cumulative impacts where those impacts are known, not speculative.[74] This stems from the fundamental premise that SEPA only requires analysis of impacts that are "probable."[75] An impact is only "probable" if it is "reasonably likely to occur," as opposed to "merely

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[74] *See, e.g., Cheney v. City of Mountlake Terrace*, 87 Wn.2d 338, 346, 552 P.2d 184, 189 (1976) (evaluation of cumulative impacts from speculative future development not required where proposed road was necessary to meet current traffic needs); *SEAPC v. Cammack II Orchards*, 49 Wn.App. 609, 614, 744 P.2d 1101 (1987); *Gebbers v. Okanogan Cnty. Public Utility Dist. No. 1*, 144 Wn. App. 371, 386-87, 183 P.3d 324, 331-332 (2008) (in evaluating new proposed electrical transmission line, PUD was not required to consider rebuilding of existing transmission line when such possibility is only hypothetical and speculative). *See also Tugwell v. Kittitas County*, 90 Wn. App. 1, 12, 951 P.2d 272, 278 (1997) (evaluation of anticipated development following rezone speculative because "there are no specific plans to review and the impacts therefore are unknown").

[75] RCW 43.21C.031(2) ("An environmental impact statement is required to analyze only those probable adverse environmental impacts which are significant."); RCW 43.21C.110(1)(d) (providing that "statements are required to analyze only reasonable alternatives and probable adverse environmental impacts which are significant"); WAC 197-11-060(4)(a) (stating that environmental impacts are limited to those "that are likely, not merely speculative").

hav[ing] a possibility of occurring, but [being] remote or speculative."[76] Thus, when considering the impacts of one proposal cumulatively with those of other proposals, it is unnecessary to conduct a cumulative impact analysis of speculative future actions.[77]

Accordingly, Courts have concluded that actions that are still being planned or are only contemplated are speculative such that agencies need not consider them in a cumulative impacts analysis.[78] Where a proposal's future is uncertain, its premature evaluation in a cumulative impact

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[76] WAC 197-11-782. *See also City of Des Moines v. Puget Sound Reg'l Council*, 98 Wn.App. 23, 41, 108 Wn.App. 836, 854, 988 P.2d 27, 37 (1999) (EIS regarding proposal to build third runway at Sea Tac did not need to go beyond year 2010 because a detailed analysis of the years beyond 2010 would be extremely speculative), *review denied* 140 Wn.2d 1027, 10 P.3d 403 (2000); *San Juan County v. Dep't of Natural Res.*, 28 Wn.App. 796, 802, 626 P.2d 995 (DNS regarding proposed boat destination site was not clearly erroneous even though possibility of future expansion), *review denied*, 95 Wn.2d 1029 (1981), *Mentor v. Kitsap County*, 22 Wn.App. 285, 290, 588 P.2d 1226, 1230 (1978) (EIS for a proposed beach-front hotel did not need to address the prospects of hotel users trespassing upon resident properties because this effect was remote and speculative).

[77] *See, e.g.*, WAC 197-11-060(4), 40 C.F.R § 1508.7. *See also Jones v. Nat'l Marine Fisheries Serv.*, 741 F.3d 989, 1001 (9th Cir. 2013), *Cheney v. City of Mountlake Terrace*, 87 Wn.2d 338, 346, 552 P.2d 184, 190 (1976), *Gebbers v. Okanogan Cnty. Public Utility Dist. No. 1*, 144 Wn. App. 371, 386, 183 P.3d 324, 331 (2008); *Boehm v. City of Vancouver*, 111 Wn. App. 711, 720, 47 P.3d 134, 142 (2002); *SEAPC v. Cammack II Orchards*, 49 Wn. App. 609, 614, 744 P.2d 1011, 1105 (1987).

[78] *See Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1014 (9th Cir. 2005), *Jones*, 741 F.3d at 1001; *N. Carolina Alliance for Transp. Reform, Inc. v. U.S. Dep't of Transp.*, 713 F. Supp. 2d 491, 526 (M.D.N.C. 2010) (finding project that hadn't materialized "beyond the preliminary incubation stage" not "sufficiently likely to occur."); *City of Shoreacres v. Waterworth*, 332 F. Supp. 2d 992, 1007 (S.D. Tex. 2004) (finding future canal-deepening project to be speculative despite the fact that current project was designed to accommodate and contemplated the future project. Mere suggestion that long-range projections make canal deepening likely did not overshadow the fact that there was no plan or proposal for the future project.), *aff'd*, 420 F.3d 440 (5th Cir. 2005).

analysis would be speculative.[79] Courts have also concluded that potential future actions are speculative because they have not been adequately studied in a manner that facilitates review of potential future projects.[80]

For example, In *Jones v. Nat'l Marine Fisheries Serv.*, 741 F.3d 989 (9th Cir. 2013), the court ultimately found that a reviewing agency was not required to consider the cumulative impacts from expanded mining development because the proposed development was still speculative.[81] Although a company explicitly planned to widen the scope of its mining operations, the court found the majority of the plans had not been reduced to specific proposals and, as such, were speculative.[82] Pointing to the fact that the company had only made "general statements" regarding the proposal as well as the significant logistical hurdles the company would face in further development of the mines, the court stated

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[79] *Jones*, 741 F.3d at 1000-1001; *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 513 (D.C. Cir. 2010) (impacts from newly proposed private drilling projects not reasonably foreseeable in light of wide fluctuations in scale and scope throughout the environmental review process for the subject private drilling project); *N. Carolina Alliance for Transp. Reform, Inc.*, 713 F. Supp. 2d at 526 (finding no duty to consider potential project when project still "contingent" on funding)

[80] *Jones v. Nat'l Marine Fisheries Serv.*, 741 F.3d 989 (9th Cir. 2013); *Waterworth*, 332 F. Supp. at 1007 (agreeing with Corp's statement that "[b]ecause the [potential project] has not been proposed, much less studied, it is entirely speculative.... [therefore] NEPA does not require the Corps to address this issue."), *aff'd*, 420 F.3d 440 (5th Cir. 2005); *Envtl. Prot. Info. Ctr.*, 451 F.3d at 1014 (finding agency's decision to omit effects of potential project from cumulative impacts analysis not arbitrary and capricious when 'specifics of the units (size and treatment prescription) had not yet been identified' and parameters of the project unknown at the time of environmental assessment).

[81] *Jones*, 741 F.3d at 1001

[82] *Id.* at 1000.

"[i]t was thus unclear whether [the company] will pursue mining these sites at all."[83] The court also emphasized that no reliable study or projection had been completed analyzing future projects, thereby distinguishing from other cases in which courts had concluded that projects with sufficient prior environmental analysis should be considered in a cumulative impacts analysis.[84]

Indeed, federal courts of appeal in other circuits, including one case that analyzed an analogous marine terminal development project, have required significantly more progress through the permitting process and environmental analysis before a potential project need be considered in a cumulative impacts analysis. In *Gulf Restoration Network v. U.S. Dep't of Transp.*, 452 F.3d 362 (5th Cir. 2006), an agency reviewing a proposal to operate a deepwater port to receive, store, process, and transfer liquid natural gas did not consider three similar potential future projects in a cumulative impacts analysis because they were too speculative for consideration.[85] Although proponents for each of the three excluded projects had already submitted applications that included the specific proposed location and capacity of each deepwater port, the type and design of all components and storage facilities, a detailed description of

[83] *Id.* at 1001.

[84] *Id.*

[85] *Gulf Restoration Network*, 452 F.3d at 366-67.

each phase of construction (including anticipated dates of completion), the capacity of proposed storage facilities and pipelines, and a host of other information, the court rejected the argument that the details included in the applications gave the agency ample information to evaluate the effects of the projects.[86] In the analysis, the agency included projects that had progressed to the stage of an available draft EIS upon which the cumulative impacts analysis could be based.[87] In excluding the three proposals the court recognized that high demand for natural gas and marine export terminals increased the *possibility* that the ports would be built and recognized that the companies that had filed applications certainly had the resources to build the ports. However, the Court concluded that the agency "was entitled to conclude that the occurrence of any one of a number of contingencies could cause the plans to build the ports to be cancelled or drastically altered."[88] The court found the agency acted within its discretion when it included only projects for which draft

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[86] *Id* at 369; *Id* at 369 n. 10.

[87] *Id* at 368-369 (The agency included in the analysis two proposals for which "an approved public Draft NEPA document [was] available for review at the time of the Draft EIS for Gulf Landing.").

[88] *Id.* at 370; *See also Airport Impact Relief v. Wykle*, 192 F.3d 197, 206 (1st Cir. 1999) (concluding that an airport expansion was not reasonably foreseeable because it was "contingent on several events that may or may not occur over an eight-year span" including "the acquisition of permits, the arrangement of funding, the drafting of expansion plans, and other contingencies that must occur before even the trilateral land exchange can occur. These contingencies render any possibility of airport expansion speculative and,...neither imminent nor inevitable.")

EISs were available and ultimately held that the agency had not abused its discretion or acted arbitrarily or capriciously in concluding that the three ports were not "reasonably foreseeable future actions."[89]

The co-lead agencies in this case had significantly less information about USD's project than the three projects which were properly excluded in the cumulative impacts analysis in *Gulf Restoration Network* such that the USD project was much less certain and more subject to change. The evidence in the record of USD's actions merely demonstrates a company exploring the practicability and feasibility of undertaking a major project with significant hurdles and other issues to address that could, at the very least, result in project revisions. Although USD's access agreement and feasibility study indicate that USD was considering pursuing constructing a third bulk liquid storage terminal, none of the evidence points to any commitment to pursue a project of a particular scope. Similarly, no reliable study or projection indicating the likelihood of future development had been performed relative to USD's potential project. Based on the record before the Board, the Co-leads did not know enough about USD's project to make discussion of its impacts meaningful, as demonstrated by

[89] *Gulf Restoration Network*, 452 F.3d at 371; *Id.* at 370 n. 15. *See also Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497 (D.C. Cir. 2010) (affirming agency decision to exclude two projects from a cumulative impacts analysis that had filed proposals with an agency and had initiated environmental review, but were in the early stages of review)

both the declarations of Brian Shay and Diane Butorac and the speculative nature of the project itself (and thus its impacts).[90] Requiring SEPA Co-leads to consider USD's possible project mandates consideration of a comparably speculative project.

2. The Mere Existence of Basic Parameters for a Potential Project Does Not Render a Project "Reasonably Foreseeable."

The Board appears to reach its decision that a potential USD project was reasonably foreseeable because basic and preliminary information about the potential USD proposal became available during the course of Westway and Imperium's environmental review in the form of basic capacity numbers and project parameters included in USD's initial feasibility study and early communications with the Port. The case law does not support the Board's reasoning that this preliminary and basic information renders a project "reasonably foreseeable." As explained above, a meaningful level of commitment to proceed with a defined project is required before a proposal must be considered in a cumulative impacts analysis.

In reaching the conclusion that availability of basic project information is sufficient to render a project "reasonably foreseeable," the incorrectly Board relied on *Envtl Prot Info Ctr v. U.S Forest Serv*, 451

[90] AR 561-62; AR 1522.

F.3d 1005 (9th Cir. 2006).[91] This case does not support the Board's decision. Contrary to the Board's conclusion, the court in that case did not conclude that a secondary project became reasonably foreseeable when "enough was...known to permit a general discussion of effects."[92] In fact, the court in that case found that even though the secondary project had been proposed before the publication of the environmental assessment, it was not arbitrary and capricious for the agency to omit the project from its cumulative analysis because the parameters of the project were unknown.[93] The lead agency, expressly aware of another similar project contemplated within the same vicinity, properly concluded that the project was not clearly developed enough to consider their cumulative impacts in relation to the subject proposal.[94] Thus, the case upon which the Board relies actually supports the decision of the co-lead agencies in this case, to exclude USD from the analysis because they had only early plans and project information.[95]

More generally, under the Boards strained reasoning, any potential project that has utilized preliminary estimates relating to the size of the project would satisfy the "reasonably foreseeable" criteria, merely because

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[91] AR 2404

[92] *Id*

[93] *Envtl Prot Info Ctr v U.S. Forest Serv.*, 451 F.3d 1005, 1014 (9th Cir 2006).

[94] *Id* at 1014-15

[95] AR 1522

of availability of basic parameters that could change or evolve as the proposal becomes better defined. However, this is not the standard under NEPA or SEPA case law.[96] The case law requires some more definite commitment to proceed precisely because there is a significant potential for a project at an early planning stage to change in scope and, potentially, to even go away entirely.[97] USD's proposal was dramatically changing in scope as the company explored project feasibility during the course of Imperium's environmental review, as they reduced their projected capacity to less than a third of the original proposal.[98] Similarly, the history of other potential projects at the proposed USD site reiterates the uncertainty of proposals at the exploratory stage. The prior plans of another company that had similarly explored feasibility of a coal export terminal before abandoning the project demonstrates why the commitment to pursue a project is required before a project is deemed reasonably

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[96] *Gulf Restoration Network*, 452 F.3d 362; *See also N. Carolina Alliance for Transp Reform, Inc. v. U.S. Dep't of Transp.*, 713 F. Supp. 2d 491 (M.D.N.C. 2010) (Court holds that although a highway project with discrete parameters had been identified, it was not a reasonably foreseeable action as it had no identified source of funding); *Waterworth*, 332 F. Supp. 2d at 1006-08 (rejecting arguments that deepening of a ship canal is "reasonably foreseeable" despite knowledge of potential future project's scope), *aff'd*, 420 F.3d 440 (5th Cir. 2005).

[97] *Gulf Restoration Network*, 452 F.3d at 370 ("the Secretary was entitled to conclude that the occurrence of any one of a number of contingencies could cause the plans to build the ports to be cancelled or drastically altered."); *Airport Impact Relief v. Wykle*, 192 F.3d 197 (1st Cir.1999) ("These contingencies render any possibility of airport expansion speculative and, ... neither imminent nor inevitable."); *Town of Cave Creek v. FAA*, 325 F.3d 320, 331, 355 U.S. App. D.C. 420, 431 (D.C.Cir. 2003) (projection of noise effects 5 years out too speculative because technology affecting noise could change impacts)

[98] AR 1542-43.

foreseeable.[99] It is precisely because of this uncertainty that NEPA and SEPA case law do not require evaluation of projects that could, eventually, disappear or change in scope. The case law does not require a lead agency to consider these kinds of nascent plans in a cumulative impacts proposal precisely because they may change over time. Indeed, if the Court affirms the Board's standard, applicants like Westway and Imperium are forced to evaluate the impacts from another competing project that may never come to fruition, incur the added expense, and potentially be forced to face their share of added mitigation based on cumulative impacts that do not ever occur.

Finally, it bears emphasizing that speculative projects like the USD proposal do not escape environmental review if or when they ultimately commit to proceeding in a more defined stage. As observed by the United States Supreme Court, "should contemplated actions later reach the stage of actual proposals, impact statements on them will take into account the effect of their approval upon the existing environment; and the condition of that environment presumably will reflect earlier proposed actions and their effects."[100] From a policy standpoint, the Board's position that

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[99] AR 1734-36. The Board did not address these specific facts in its Order.

[100] *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 20, 96 S.Ct. 2718 (1976). *See also Olenec v. Nat'l marine Fisheries Serv.*, 765 F. Supp. 2d 1277, 1287 (D. Or. 2011) (court did not require inclusion of other potential mining sites within leasehold held by same company in cumulative impacts assessment because those other sites had not yet

speculative, preliminary plans must be included in a cumulative impacts analysis leads to unnecessary costs and effort spent evaluating nascent proposals that are still subject to change and may not even come to fruition. Although a potential USD project may eventually materialize that might be consistent with the figures and capacity discussed in early planning materials, that is not the standard for inclusion in a cumulative impacts analysis. Some more concrete level of commitment is required and the Court should therefore find that at threshold determination stage the USD project was still speculative and thus, not reasonably foreseeable.

V. CONCLUSION

For the foregoing reasons, Imperium requests that the Court reverse the Board's decision on issue A1, below, and rule that the lead agencies were not required to consider the potential for a USD project in their cumulative impacts analysis.

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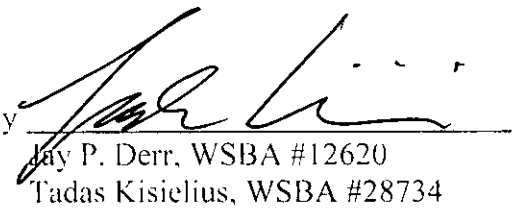
developed a meaningful proposal and were financially independent from the proposed mine).

RESPECTFULLY SUBMITTED this 28th day of July, 2014.

VAN NESS FELDMAN LLP

By 

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

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

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

Petitioners,

v.

CITY OF HOQUIAM, STATE DEPARTMENT OF ECOLOY, and WESTWAY TERMINAL COMPANY, LLC,

Respondents.

and

IMPERIUM TERINAL SERVICES, LLC,

Intervenor-Petitioner

SHORELINES HEARINGS BOARD,

Respondent

CERTIFICATE OF SERVICE

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CERTIFICATE OF SERVICE

I, Jessica Roper, declare as follows:

That I am over the age of 18 years, not a party to this action, and competent to be a witness herein;

That I, as a legal assistant in the office of Van Ness Feldman, LLP, caused true and correct copies of the following documents to be delivered as set forth below:

Imperium Terminal Service's Opening Brief

and that on July 28, 2014, I addressed said documents and deposited them for delivery as follows:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Seattle, WA on this 28th day of July, 2014.

Jessica Roper, Declarant