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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 ECOLOGY, and WESTWAY TERMINAL COMPANY, LLC,

Respondents.

and

IMPERIUM TERMINAL SERVICES, LLC,

Intervenor-Petitioner

SHORELINES HEARINGS BOARD,

Respondent

INTERVENOR-PETITIONER IMPERIUM'S REPLY BRIEF

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ORIGINAL

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I. INTRODUCTION

At the time of the environmental review for the Westway and Imperium projects that are the subject of this appeal, the potential for a third marine transloading terminal in Grays Harbor proposed by U.S Development ("USD") was not "reasonably foreseeable" because it was still speculative. USD was still in the process of exploring the feasibility of a third crude-by-rail terminal in Grays Harbor, but the nascent plans for a USD terminal were not sufficiently certain to occur, nor were its potential parameters sufficiently determined such that it should have been considered in a cumulative impacts analysis for the Westway and Imperium proposals.

In their joint opposition brief, Quinault Indian Nation and Friends of Grays Harbor, et al. (collectively "Petitioners"), suggest that the Court should narrowly construe what constitutes a "speculative" action that is excluded from a cumulative impacts analysis. To support their claims, Petitioners misconstrue and ignore relevant case law. When analogized to relevant state and federal case law, the evidence in the record, including evidence to which Petitioners cite, demonstrates that a USD proposal was speculative and uncertain at the time. Specifically, documents in the record confirm that there was uncertainty regarding the scope and scale of the potential USD proposal and that USD's early plans for a project were

evolving and its parameters were shifting. The state of USD's planning and its commitment to pursue a project of any kind were comparable to other projects in their infancy that courts have concluded are "speculative." Accordingly, the evidence in the record demonstrates that that the City of Hoquiam ("Hoquiam"), the Department of Ecology ("Ecology")[1] did not have the necessary evidence of a commitment to a project of a particular scope and scale to render it "reasonably foreseeable" and allow "meaningful consideration" in a cumulative impacts analysis at that time. Because the USD project was still speculative at the time of the permitting for Imperium and Westway, the Co-leads were correct in their approach and the Board erred in holding that the Co-leads should have considered the potential for a USD terminal in a cumulative impacts analysis.

II. ARGUMENT

A. Case Law on Cumulative Impacts Does Not Require Analysis of Uncertain Potential Projects that Are Still in Planning Stages.

As indicated in Imperium's opening brief, Courts have concluded that actions that are contemplated but are still being planned are "speculative," and not "reasonably foreseeable," such that the agencies are

[1] Ecology and Hoquiam are referred to collectively as "Co-Leads."

not required to consider them in a cumulative impacts analysis.[2] According to relevant case law cited in Imperium's Opening Brief, projects for which there has been no commitment to pursue a specific proposal and that are still subject to regulatory, financial or other contingencies that make the proposal uncertain are considered "speculative" such that they need not be considered in a cumulative impacts analysis. *Id.*

This line of cases recognizes that "projects in their infancy have uncertain futures," and those projects whose scope and scale are still being formulated or evolving, and for which there has not been a commitment to proceed, should not be included in cumulative impacts analyses until the project scope and parameters are more defined and those uncertainties are resolved. *Theodore Roosevelt Conservation Partnership*, 616 F.3d at

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[2] Intervenor-Petitioner Imperium's Opening Brief, dated July 28, 2014, ("Opening Brief") at 21-22; *Jones v. Nat'l Marine Fisheries Serv.*, 741 F 3d 989 (9th Cir. 2013); *Gulf Restoration Network v. U.S. Dep't of Transp.*, 452 F.3d 362, 370-71 (5th Cir. 2006); *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 513 (D.C. Cir. 2010); *Gebbers v. Okanogan Cnty. Public Utility Dist. No. 1*, 144 Wn.App 371, 386-87, 183 P.3d 324, 331-332 (2008) (in its environmental review of new transmission line, PUD was not required to consider rebuilding of existing line, though identified in agency's record and in EIS, because the possibility of the rebuild is speculative)

See also, Environmental Protection Information Center v. U.S. Forest Serv. ("EPIC"), 451 F 3d 1005, 1014-15 (9th Cir. 2006) (timber sale was not reasonably foreseeable even though it was proposed at the time the EA was issued for the project under review and even though it was earlier proposed as part of a larger project with the project under review); *Olenac v. NMFS*, 765 F Supp.2d 1277, 1287 (D.Or. 2011) (upholding decision to exclude proposed mining sites from cumulative impacts analysis where the proposal is still under development and where all of the proposed mining sites are "financially independent of the proposed project."); *Airport Impact Relief v. Wykle*, 192 F.3d 197, 206 (1st Cir. 1999).

513.

Indeed, courts have concluded that at the early stages of a project, before the applicant has made a commitment to proceed with a project of a particular scope and scale, the mere fact that an applicant can withdraw a project at its early stages suggests a level of uncertainty that renders the project speculative. For example, in *Gulf Restoration Network*, the Court addressed a challenge to the sufficiency of the environmental review of a marine port terminal. The Court specifically upheld an agency's decision to exclude three marine port projects from a cumulative impacts analysis because of the potential uncertainty in the nascent stages of those projects:

> [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. For example, one or more of the applicants may decide for a number of reasons to withdraw its application before the Secretary's approval, such as ExxonMobil did with its application for the Pearl Crossing GBS platform. The Secretary, after receiving input from other agencies, may deny an application or make changes to the application's construction specifications....

Gulf Restoration Network v. U.S. Dep't of Transp., 452 F.3d 362, 370-71 (5th Cir. 2006). *See also Theodore Roosevelt Conservation P'ship*, 616 F.3d at 513 (noting that the fact that "projects in their infancy have uncertain futures" rendering them speculative because of the potential for applicants to withdraw their permit applications and evolving project

parameters); *Jones*, 741 F.3d at 1001 ("The three sites excluded from the application, Section 33, Shepard, and Westbrook, all face significant logistical hurdles to development" including access, permitting, and leasing issues such that the Corps was not required to consider them in the cumulative impacts analysis).

Thus, the law requires some a commitment to proceed with a project for it to be considered in a cumulative impacts analysis. While Petitioners contest that premise, Petitioners' Response Brief at 9, the requirement for some measure of certainty in a project's future stems directly from relevant case law interpreting the "reasonably foreseeable" standard in the context of cumulative impacts analyses.[3]

B. The Potential for a USD Terminal Was Speculative at the Time of Permitting and Environmental Review for the Westway and Imperium Projects.

Evidence in the record, including the evidence to which Petitioners cite in their Response Brief, confirms that there was uncertainty regarding the scope and scale of the USD project and that USD had not made sufficient commitment to pursue a project to warrant inclusion in the cumulative impacts analysis for Westway and Imperium. The clearest statement of the uncertainty regarding project scope and scale at the time

[3] As discussed in section II.D, below, Petitioners' efforts to distinguish these cases on their facts fails

of the permitting and environmental review of the Imperium and Westway Projects is a letter from the Energy Facilities Siting and Evaluation Council ("EFSEC") to USD dated April 23, 2013, which was sent after the Co-Leads had issued an MDNS for Westway and just before they issued an MDNS for Imperium. AR 1542-43. In the letter, EFSEC, a state agency which has regulatory authority over oil terminal projects over a certain capacity, raises questions about the project scope and scale of the potential USD project, based on the varying and wide-ranging project descriptions that had been circulating in the public. Because of this uncertainty, EFSEC sought clarification from USD regarding the potential project.[4] Indeed, as EFSEC's letter acknowledges the range in proposals was between 45,000 barrels per day on the low end and 174,000 barrels per day on the high end. Thus the USD "proposal" was evolving over the course of the permitting and environmental review for Imperium and Westway and was therefore not yet sufficiently defined to be reasonably foreseeable.

Even the evidence to which Petitioners cite demonstrates the shifting project parameters and uncertainty regarding the scope and scale

[4] *Id.* Other documents in the record similarly convey widely different potential project proposals. AR 1878-79 ("plan is for 2 unit trains per day") *with* AR 1302-1314 (Feasibility study assumes 1 unit train every other day).

of the project. For example, minutes of the Port meeting from November 2012 to which the Petitioners cite, acknowledge that more planning to formulate a proposal is required. *See, e.g.*, AR 1319-20 ("If the [feasibility] study shows that the site is a suitable location for a liquid bulk cargo facility, planning efforts will begin in earnest, including preparation of detailed proposal..."). Similarly, Ecology's email several months later on January 31, 2013, to which Petitioners cite, recognizes the uncertainty regarding scale and scope if a potential USD project, noting that the proposal has "unknown quantities at this time."[5] AR 1881.

Additionally, and importantly, at the time of permitting and review of the Westway and Imperium projects, the USD project was still in its infancy and USD had not made adequate commitments to proceed and pursue a project of a specific scope. Notably, USD had not yet submitted for any of the many permit applications identified in its feasibility study[6] (nor would USD submit its shoreline permit application until almost full year after the Co-Leads had issued MDNSs for Imperium and Westway).

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[5] Petitioners grossly misquote the content of this correspondence, suggesting that the email attachment includes specific number of vessel calls and train trips to and from the facility, when, in fact, no such information is included in the document. *Compare* Petitioners' Brief at 13 (misquoting document as stating that the USD proposal involves "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") *with* AR 1882 (the description of the potential USD project does not include any reference to train trips or vessel calls and only indicates, as follows: "unknown quantities at this time, but likely largest of the 3 POGH CBR projects").

[6] AR 1308-09.

Also, in addition to costs of the project, USD identified significant improvements that would need to be addressed such as dredging at the berth to accommodate vessels, AR 1305, and rail infrastructure improvements identified in the feasibility study including $2,000,000 in improvements to a railroad bridge, AR 1311-12, and a need to establish a tail track along a previously abandoned railroad right-of-way that currently supports an electric utility transmission line, AR 1307.[7]

Most importantly, the project was still speculative because it was not sufficiently far along in a complicated, multi-agency permitting process; until it demonstrated a more firm commitment to proceed, USD could simply give up the project plans. In fact the record includes evidence of another project at that very site that had secured an access agreement, like USD, to explore feasibility of constructing a transloading terminal, but ultimately abandoned its plans. AR 1734-1736. This evidence shows that the limited steps that USD had taken to pursue its potential project during the time of the environmental review and permitting for Imperium and Westway – the very steps on which Petitioners rely to demonstrate project certainty – are insufficient to show a necessary commitment to the project to justify its inclusion in

[7] These improvements are unique to USD's proposal. For example, the rail infrastructure improvements are further west of the Imperium and Westway sites such that it is not necessary for those projects.

cumulative impacts analysis. Based on this evidence, even with the access agreement, the USD project was still highly uncertain like the projects in *Gulf Restoration Network*, *Theodore Roosevelt Conservation Partnership*, and *Jones*.

While Petitioners in their brief reject the evidence of the earlier abandoned project without any reasoned discussion, Petitioners' Brief at 21 n.7, it is exactly the kind of evidence that other courts have indicated is relevant to the analysis of whether a project is "reasonably foreseeable." *Gulf Restoration Network*, 452 F.3d at 370-71 (projects were not reasonably foreseeable because "one or more of the applicants may decide for a number of reasons to withdraw its application before the Secretary's approval, such as ExxonMobil did with its application for the Pearl Crossing GBS platform"). *See also Theodore Roosevelt Conservation P'ship*, 616 F.3d at 513. The evidence demonstrates that even with an access agreement and preliminary steps to assess project feasibility, the project can easily be abandoned, and is not "reasonably foreseeable."

C. Evidence Upon Which Petitioners' Rely Does Not Demonstrate that the Potential for USD Project Was Reasonably Foreseeable.

Citations to the record in Petitioners' brief do not support their claim that a potential USD Project was "reasonably foreseeable." First, the vast majority of their citations to the record are to documents or

correspondence in which the Port of Grays Harbor ("Port"), Hoquiam, or Ecology simply mention the potential for a third project, without any reference to project specifics or details.[8] At most, this evidence stands for the simple proposition that the agencies and general public were aware, throughout the permitting and environmental review for the Imperium and Westway projects, that USD was exploring the feasibility of a potential third terminal. The Co-Leads' awareness of a potential for a project does not render the potential third project "reasonably foreseeable." Indeed, if the mere knowledge of a potential for a project is sufficient to render it reasonably foreseeable, then all of the specifically named projects that courts have determined to be "speculative" – like the three port terminal

[8] AR 1249-1264 (USD's Slides from briefing to Port say nothing about USD's potential project parameters); AR 1266-88 (Slides from Community Workshop with Port say nothing about USD's potential project parameters); AR 1228 (email from Diane Butorac, Ecology, acknowledges that "there are three crude oil proposals expected for Grays Harbor," but no details regarding potential project parameters for USD); AR 1209-10 (Port fact sheet describing the potential three proposals does not include potential USD project parameters and states only that with further planning efforts "the Port will know more about USD's findings and what their site plans may look like"); AR 1881 (email from Alan Bogner indicates "unknown quantities at this time" for the potential USD project); AR 1903 (email from Curt Hart regarding the potential 3 proposals does not identify any project parameters about the potential USD proposal except to say, "I guess the US Development proposal will be near the airport close to the Grays Harbor National Wildlife Refuge"); AR 1230 (email from Diane Butorac, Ecology, refers to the Imperium proposal as the "second of three" proposals, but does not have any indication of potential USD project parameters); AR 1899 (notes from Ecology's Southwest Regional Office spill team indicates simply that "the three Crude-by-Rail proposed projects in Hoquiam were briefly discussed"), AR 1299 (Port Frequently Asked Questions document refers to the three proposals, but does not discuss or describe USD proposal in any detail); AR 1901 (email from GayLee Kilpatrick talks about general language that Ecology could use to require three projects to consider seismic impacts but no discussion of project parameters), AR 2188 (Port newsletter talks generally about three crude by rail projects").

projects in *Gulf Restoration Network*, the three specifically named mining sites in *Jones*, or the project in *Theodore Roosevelt Conservation Partnership* – would need to have been considered in cumulative impacts analyses. As noted above, to be considered "reasonably foreseeable," certainty regarding project parameters and more of a commitment to proceed are required, beyond the mere knowledge of a potential project in the abstract.

As noted in section II.B, above, several of the documents to which Petitioners cite acknowledge the uncertainty and speculative nature of the project.[9] To the extent that documents upon which Petitioners rely actually describe potential project details, they convey widely different potential project proposals. AR 1878-79 ("plan is for 2 unit trains per day") *with* AR 1302-1314 (Feasibility study assumes 1 unit train every other day).

Despite Petitioners' characterization, at p. 14 of their brief, none of the documents to which petitioners cite are evidence of USD's "firm commitment" to proceed with the development of a terminal. The access agreement USD signed in November, 2012, does not explain project parameters, and by its very terms authorizes USD to engage in preliminary

[9] *See, e.g.*, AR 1319-20 ("If the [feasibility] study shows that the site is a suitable location for a liquid bulk cargo facility, planning efforts will begin in earnest, including preparation of detailed proposal .."); AR 1881 ("unknown quantities at this time")

due diligence to determine whether a project is even feasible and, if so, what project parameters it may pursue. AR 1232-44. Indeed, while the Port agreed to give USD the exclusive right to pursue a potential crude by rail project at the site during the term of the access agreement, it expressly reserved the right to continue to market the property and negotiate with other entities for other development opportunities at the site during the term of the agreement, thereby underscoring the uncertain future of the potential USD project at that time. AR 1235. Similarly, USD's presentations to the Port and at workshops, while acknowledging the potential of a USD project, do not provide any specific project details or any "firm commitment" to proceed. *See* AR 1249-64; AR 1246-47; AR 1319-21; AR 1266-88; AR 1289-95. Finally, the option to lease, described in a port newsletter is simply that; an option to make a firm commitment in the future. AR 1316-17. None of the documents to which Petitioners cite provides sufficient indication that the USD project would proceed for purposes of inclusion in a cumulative impacts analysis.

Relying on the illusion of certainty that comes from hindsight, Petitioners seize on the fact that USD's permit application[10] (which USD

[10] Petitioners include a link to the permit applications in their brief, but the applications were not part of the administrative record. Nor could they be. USD filed an application materials on March 27, 2014, and the SEPA checklist on April 7, 2014, almost a full year after the Co-Leads issued MDNSs for Westway and Imperium's projects. The Co-Leads did not issue a threshold determination for the USD project until September 10, 2014,

submitted almost a full year after the Co-Leads issued the challenged MDNSs for the Imperium and Westway Projects) commits to pursuing a project the parameters of which are within the range discussed during permitting and environmental review for Westway and Imperium. Petitioners Brief at 5, 23. But this hindsight does not change the uncertainty that existed at the time of the environmental review and permitting for Imperium and Westway regarding whether USD would proceed and the wide range of potential project parameters. Even if USD ultimately pursued a defined project almost a year later, the evidence is clear that USD's concept of a potential project was shifting and evolving and uncertain at the time of the permitting and environmental review for Westway and Imperium. It is for exactly this reason that agencies require a stronger commitment to proceed with a project, often in the form of an application, before the agency considers the project in a cumulative impacts analysis. It is precisely this kind of commitment to pursue a project of specific parameters that allows for "meaningful consideration" of the potential cumulative impacts.

D. Petitioners' Efforts to Distinguish Case Law Fail.

The Court should reject Petitioners' efforts to distinguish relevant

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well over a year after the Co-Leads issued the permits for Westway and Imperium. Despite the fact that they are not properly part of the record, the Petitioners have not asked the Court to supplement the record or take official notice.

cases that provide analogous fact patterns. Petitioners overlook relevant portions of those cases or point to factual distinctions that are not relevant to the legal analysis. For example, Petitioners seek to distinguish *Gulf Restoration Network*, arguing that the geographic proximity of various projects was controlling in the courts cumulative impacts analysis. Petitioners Brief at 20. In that case, the Court rejected a challenge to the environmental review for a natural gas marine terminal in the *Gulf Restoration Network*, 452 F.3d at 370-71. Opponents of the project had argued that the environmental review for the project should have considered other similar terminals in the Gulf in a cumulative impacts analysis. While the geographic proximity of the projects was relevant to the administrative agency's decision to exclude two of the three projects from the cumulative impacts analysis, both the agency below and the Court on appeal ultimately concluded that all three need not be considered in the cumulative impacts analysis on entirely independent grounds. Specifically, the court concluded that all three projects were too speculative because "the occurrence of any one of a number of contingencies could cause the plans to build the ports to be cancelled or drastically altered." *Gulf Restoration Network*, 452 F.3d at 370. Among the contingencies that made the project speculative, the Court observed that "one or more of the applicants may decide for a number of reasons to

withdraw its application before the [agency's] approval..." *Id.* at 371. Thus, as described above, the case is directly analogous to the potential for a USD terminal at the time of the permitting and environmental review for the Imperium and Westway projects.

Petitioners similarly fail to adequately distinguish *Jones* and claim that *Jones* stands only for the limited principle that cumulative impacts analyses need not consider proposals described in general statements and for which there was no information as to the scope or location of any future projects. *See* Petitioners' Brief, at 20. However, Petitioners present only a part of the court's holding and ignore key facts relevant to this case. In *Jones*, opponents of a mining project challenged the project's environmental review for failure to consider cumulative impacts of the mining project. The Court rejected their claims that the environmental review should have considered applicant's plans to widen the scope of its mining operations in the future. *Jones*, 741 F.3d at 1000-01. As part of that decision, the Court indicated that the planned mining expansion did not have sufficient information regarding the scope or location. However the Court's analysis is not limited to that comparison; the Court also rejected the argument that three specifically identified sites should have been considered in a cumulative impacts assessment, noting that mining at those sites is speculative because they "all face significant logistical

hurdles to development," including permitting, construction of access, and lease issues. *Id.* Based on that information, the Court concluded that "it is unclear whether [the applicant] will pursue mining these sites at all, much less whether [the applicant] had developed an actual plan or proposal that was sufficiently well-defined to 'permit meaningful consideration.'" *Id.* at 1001. In seeking to distinguish the case, Petitioners ignore this relevant portion of the court's analysis to analogous facts.

The Petitioners seek to distinguish other cases on irrelevant factual differences. For example, Petitioners suggest that the potential for a USD project is unlike the two projects that the Court considered "speculative" in *Theodore Roosevelt Conservation Partnership*. 616 F.3d at 512-13. Petitioners base this argument on the fact that the environmental review of the two additional projects in that case began "approximately five years into EIS process" of the Atlantic Rim Project under appeal. Petitioners' Brief at 22. While environmental review for the project began before the review of the other projects, Petitioners completely ignore the fact that their review processes overlapped; the applicants for one of the two projects submitted applications (in the form of a notice of intent filed published in the federal register) 8 months *before* the draft EIS for the Atlantic Rim project was published while the other submitted its notice of intent shortly after the DEIS but before the final EIS. 616 F.3d at 512-13.

In other words, both projects had already initiated their environmental review before the environmental review of the Atlantic Rim project was complete. 616 F.3d at 513. Despite the fact that the environmental review of the Atlantic Rim Project overlapped with those two projects, the Court found that the two projects were still speculative and need not be considered in a cumulative impacts analysis. In this case, by contrast, USD had not submitted an application until almost a year after the Co-Leads had issued MDNSs for the Imperium and Westway projects, and the Co-leads had not initiated environmental review of USD until well over a year after the permits for both projects had been issued. The projects at issue in *Theodore Roosevelt Conservation Partnership* which Petitioners characterize as "highly speculative," were further along in their development and environmental review than was USD in its project development at the time of the environmental review for the Imperium and Westway projects.

E. Cases on Which Petitioners Rely Do Not Support their Arguments that USD Was Reasonably Foreseeable.

Petitioners have not cited to any Washington case law in which a court reviewed an analogous fact pattern and concluded a potential project, like that of USD, was "reasonably foreseeable" and should have been included in a cumulative impacts analysis under SEPA. In fact, in

the limited instances in which Washington courts have concluded a cumulative impacts analysis is required, they have required agencies to consider cumulative impacts of existing development and other previously approved projects. *See, e.g., Douglass v. City of Spokane Valley*, 154 Wn.App. 408, 423-24, 225 P.3d 448, 456-57 (2010) (concluding that the City failed to consider cumulative traffic impact of project in conjunction with other projects that had been approved in the area). Petitioners have not cited to any Washington state court cases to support their claims that a project like that of USD should have been considered in a cumulative impacts analysis.

Additionally, the federal case law on which Petitioners rely does not support the conclusion that USD was reasonably foreseeable. For example, Petitioners rely on *N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1078-79 (9th Cir. 2011). While the court in that case concluded that a development of coal bed methane wells in the vicinity of a rail line was reasonably foreseeable and warranted inclusion in a cumulative impacts analysis of the construction of the rail route, the Court's conclusion was premised on the fact that an EIS had already described in detail the likely scope of CBM well development in the future. In other words, another EIS provided sufficient project detailed analysis to facilitate a "meaningful consideration" of well development in

a cumulative impacts analysis for the project. No similar environmental review of the USD proposal exists now or at the time of the permitting and environmental review of the Westway and Imperium projects.

Similarly, Petitioners' reliance on *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 812 (9th Cir. 1999) is also misplaced. Petitioners argue that the court in that case required inclusion of a second land exchange in the cumulative impacts analysis "even though it was still in negotiation." Petitioners' brief at 10. However, that case is not analogous. As described in that case, the Secretary of Agriculture had already formally announced the second land exchange in a press release and other planning documents had already described and mapped the proposed exchange such that the proposal was significantly more defined and certain than the USD proposal. 177 F.3d at 812.

Petitioners reliance on *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846 (9th Cir. 2005), is misplaced and their characterization of the case is inaccurate. In that case, the Court concluded that the Corps did not complete any cumulative impacts of a proposed dock expansion. The question before the court was not whether "an unrelated project was reasonably foreseeable," as Petitioners assert at page 10 of their brief. Instead, the entire inquiry is whether the Corps violated NEPA when it did not complete a cumulative impacts analysis of

potential increase in vessel traffic.

Similarly, the Court should reject Petitioners' reliance on *Fritiofson v. Alexander*, 772 F.2d 1225 (5th Cir. 1985). Like *Ocean Advocates*, *Fritiofson* is a case in which the agency failed entirely to conduct a cumulative impacts analysis. 772 F.3d at 1244-47. The case does not explore whether a specific project is "reasonably foreseeable." Indeed, the Court expressly abstained from identifying whether any potential actions in the project vicinity "are actually proposals" for purposes of inclusion in the cumulative impacts analysis and held that the agency should have completed further study to address the issue.[11] Additionally, *Fritiofson* was later abrogated by another 5th Circuit decision which concluded that the Court in *Fritiofson* had not applied a sufficiently deferential standard of review to the underlying agency action. *Sabine River Authority v. U.S. Dept. of Interior*, 951 F.2d 669, 677-78 (5th Cir. 1992). Accordingly, because it did not apply a sufficiently deferential standard of review, its substantive conclusions are questionable.

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[11] *Fritiofson* at 1247

> At various times during the administrative process, the Corps' attention was drawn to many other actions on the island that, in the view of experts and ordinary citizens alike, should be included in a cumulative impacts analysis. Admittedly, much of the evidence is conclusory. It is not clear, for example, which, if any, of these actions are actually proposals. That, however, is precisely why, in our view, further study is required.

Finally, Petitioners attempt to distinguish *Airport Impact Relief* is not persuasive. 192 F.3d at 206. In that case the Court concluded a project was speculative and need not be included in a cumulative impacts analysis. Among the reasons expressly listed by the court were the need to get permits and secure funding. Petitioners seize on the fact that the court noted it may take 8 years to complete those tasks, suggesting that the timeframe was determinative of the court's analysis. Instead, the general principle expressed in that case is relevant; namely, that the need to address contingencies including permitting and funding are relevant considerations when determining whether a project is speculative.

F. The Co-Leads' Approach Allows for Meaningful Consideration of Cumulative Impacts.

Petitioners' preferred approach to cumulative impacts requires agencies to consider a wide range of potential speculative projects, many of which may never come to fruition and for which the project parameters are shifting and still evolving. This approach has the likelihood of overstating potential cumulative impacts because it requires consideration of projects whose scope and scale is not known and whose future is uncertain. That is the very reason that courts have required more commitment to pursue a project before that project must be considered in a cumulative impacts analysis.

By contrast, the approach utilized by the Co-Leads in this case is fair and requires reasonable consideration of cumulative impacts. Contrary to Petitioners' concerns, the Co-Leads' approach to cumulative impacts in this case would not allow "willful blindness" to cumulative impacts or "reward project proponents who play games with the timing of their permit applications" as Petitioners assert. Petitioners' brief at 2. A project that is determined to be speculative and not included in cumulative impacts analysis is not exempt from future review if and when the project proceeds. Instead, as noted by the 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." *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 20, 96 S. Ct. 2718 (1976).

By way of example, this is exactly what happened in *EPIC*, *451 F.3d at 1014*. The Court in that case reviewed an agency's environmental review for a project known as "Knob" and upheld the agency's decision to exclude another project known as "Meteor" from a cumulative impacts analysis. Knob and Meteor were both initially part of a larger project that was abandoned before each proceeded as separate projects. The Meteor project had just been proposed when the agency issued the Environmental

Assessment for Knob. The Court observed that even though the agency had excluded Meteor from the cumulative impacts analysis in the EA, the agency eventually prepared a full EIS for the Meteor Project, which included a cumulative impacts analysis that considered the earlier Knob project. *Id.* at 1014 n.5 (quoting *Kleppe v. Sierra Club*, 427 U.S. at 410 n. 20). *See also Olenac*, 765 F.Supp.2d at 1287 (upholding decision to exclude proposed mining sites from cumulative impacts analysis and concluding that "[t]he time for agency analysis and plaintiffs' comment on those future proposals is therefore when the company seeks permits for exploration or development of future sites located in their Weyerhaeuser leasehold"). Similarly, in this case, environmental review for USD's project (which was proposed almost a full year after the MDNS's were issued for Imperium and Westway) is now ongoing.

Petitioners attempt to dismiss the court's language in *Kleppe*, which resolves their concerns of potential for "willful blindness," instead arguing that the Court's discussion is unrelated to the question of cumulative impacts. Petitioners Brief at 22 n 8. However, as noted by the 9th Circuit, the Court's rationale in *Kleppe* is applicable. If a project that is excluded from a cumulative impacts analysis because it is speculative eventually proceeds to permitting (as occurred in this case), the environmental review for that project will take into consideration existing

and proposed actions. *EPIC*, 451 F.3d at 1014 n. 5. No cumulative effects would be ignored.

III. CONCLUSION

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

RESPECTFULLY SUBMITTED this 27th day of October, 2014.

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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 ECOLOGY, and WESTWAY TERMINAL COMPANY, LLC,

Respondents.

and

IMPERIUM TERMINAL SERVICES, LLC,

Intervenor-Petitioner

SHORELINES HEARINGS BOARD,

Respondent

CERTIFICATE OF SERVICE

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ORIGINAL

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:

Intervenor-Petitioner Imperium's Reply Brief

and that on October 27, 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 27th day of October, 2014.

Jessica Roper, Declarant