ENVIRONMENTAL HEARINGS
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Shorelines Hearings Board

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November 12, 2013

Via e-mail and regular mail

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Re: **SHB NO. 13-012c**
QUINAULT INDIAN NATION and FRIENDS OF GRAYS HARBOR, SIERRA CLUB, SURFRIDER FOUNDATION, GRAYS HARBOR AUDUBON, and CITIZENS FOR A CLEAN HARBOR v. CITY OF HOQUIAM, ECOLOGY and WESTWAY TERMINAL CO. LLC and IMPERIUM TERMINAL SERVICES LLC

Dear Parties:

Enclosed please find the Order on Summary Judgment and the Partial Concurrence and Dissent of the Shorelines Hearings Board.

This is a FINAL ORDER for purposes of appeal to Superior Court within 30 days. *See* WAC 461-08-570 and 575, and RCW 34.05.542(2) and (4).

You are being given the following notice as required by RCW 34.05.461(3): Any party may file a petition for reconsideration with the Board. A petition for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final decision. WAC 461-08-565.

Sincerely,

Kay M. Brown, Presiding
Administrative Appeals Judge

KMB/jb/S13-012, -013
Encl.
cc: Don Bales

CERTIFICATION

On this day, I forwarded a true and accurate copy of the documents to which this certificate is affixed via United States Postal Service postage prepaid or via delivery through State Consolidated Mail Services to the parties of record herein.

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

DATED 11/12/13, at Tumwater, WA

SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

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 OF WASHINGTON, DEPARTMENT OF ECOLOGY and WESTWAY TERMINAL COMPANY, LLC, Respondents, And IMPERIUM TERMINAL SERVICES, LLC Respondent Intervenor.	SHB No. 13-012c ORDER ON SUMMARY JUDGMENT

On May 16, 2013, Petitioner Quinault Indian Nation (QIN) filed a petition for review with the Shorelines Hearings Board (Board) for review of a shoreline substantial development permit (SSDP) issued to Westway Terminal Company, LLC (Westway) by the City of Hoquiam (City) for expansion of Westway's existing bulk liquid storage terminal at the Port of Grays Harbor. On May 17, 2013, the Friends of Grays Harbor, Sierra Club, Surfrider Foundation, Grays Harbor Audubon, and Citizens for a Clean Harbor (collectively the Environmental Petitioners) appealed the same SSDP. On July 3, 2013, the Environmental Petitioners and QIN

filed two new appeals at the Board, challenging an SSDP issued by the City to Imperium Terminal Services, LLC (Imperium) for a similar facility located adjacent to the Westway facility. All four appeals were consolidated, and now all parties to the appeal have moved for summary judgment on several of the issues listed in the pre-hearing order. [1]

The Board was comprised of Tom McDonald, Chair, Kathleen D. Mix, Joan M. Marchioro, Pamela Krueger, Grant Beck, and John Bolender. Administrative Appeals Judge Kay M. Brown presided for the Board.

Attorneys Kristen L. Boyles and Matthew R. Baca represented the QIN. Attorneys Knoll Lowney and Elizabeth H. Zultoski represented the Environmental Petitioners. Attorneys Svend A. Brandt-Erichsen, Jeff B. Kray, and Meline G. MacCurdy represented Westway. Attorney Steven R. Johnson represented the City. Assistant Attorneys General Thomas J. Young and Allyson C. Bazan represented the Washington State Department of Ecology (Ecology). Attorneys Jay P. Derr and Tadas Kisielius represented Respondent Intervenor Imperium Terminal Services, LLC (Imperium).

In rendering its decision, the Board considered the following submittals:

1. Quinault Indian Nation's Petition for Review for SHB No. 13-012 with attached Exhibit A (Hearings Examiner Decision, with attached Exhibits 1-5).

[1] The parties and the presiding officer established the issues in the pre-hearing order pertaining to the appeals of the Westway SSDP prior to consolidation with the appeals pertaining to the Imperium SSDP. All parties agreed to consolidation of all four appeals, given their extensive overlap in legal issues. However, because the parties had already filed motions for summary judgment in the Westway appeals at the time of the consolidation, and the case schedule was very compressed due to the 180-day statutory deadline on the Westway appeals, no amendments to the existing legal issues or additional motions for summary judgment pertaining specifically to the Imperium project were allowed. The parties agreed, however, that the questions of law raised in the dispositive motions that were filed pertaining to Westway apply similarly to Imperium. This decision will include references to the Imperium project to the extent that information is available in the summary judgment record and relevant to the decision.

2. Quinault Indian Nation's Petitioner for Review for SHB No. 13-021 with attached Exhibit A (Hearings Examiner Decision with attachments).

3. Imperium Terminal Services, LLC's Motion to Intervene, Declaration of Tadas Kisielius with attached Exhibits A-D;

4. Quinault Indian Nation Motion for Partial Summary Judgment (SEPA Issue No. 1).
    a. Declaration of Kristen L. Boyles Re: Exhibits to Quinault Indian Nation Motion for Partial Summary Judgment (SEPA Issue No. 1) with Exhibits A-T.

5. Friends of Grays Harbor, et al.'s Motion for Partial Summary Judgment.
    a. First Declaration of Elizabeth H. Zultoski in Support of Friends of Grays Harbor, et al.'s Motion for Partial Summary Judgment with Exhibits 1-41.

6. Respondent City of Hoquiam's Motion for Partial Summary Judgment with Exhibit A.
    a. Declaration of Brian Shay

7. Respondents Department of Ecology and City of Hoquiam's Joint Motion for Partial Summary Judgment.
    a. Declaration of Diane Butorac in Support of Respondents Department of Ecology and City of Hoquiam's Joint Motion for Partial Summary Judgment with Exhibits A-G.

8. Westway Terminal Company LLC's Motion for Partial Summary Judgment.
    a. Declaration of Svend A. Brandt-Erichsen with Exhibits 1-2.
    b. Declaration of Ken Shoemake.

9. Respondent Intervenor Imperium's Motion for Partial Summary Judgment.

10. Joint Response of Westway Terminal Company, LLC and City of Hoquiam to Friends of Grays Harbor et al.'s Motion to Partial Summary Judgment.

11. Response of Westway Terminal Company, LLC to Quinault Indian Nation Motion for Partial Summary Judgment.
    a. Declaration of Dennis Kyle with Exhibits 1-2.

12. Quinault Indian Nation's Opposition to Respondents' Motions for Summary Judgment (SEPA Issues Nos. 1, 3, 6, 7, 8, 9; SMA Issues Nos. 3, 4, 10).
    a. Second Declaration of Kristen L. Boyles, Re: Exhibits to Quinault Indian Nation's Opposition to Respondents' Motions for Summary Judgment with

Exhibits U-HH.

13. Friends of Grays Harbor et al.'s Response to Respondents' Motions for Partial Summary Judgment.
    a. Declaration of Arthur Grunbaum.
    b. First Declaration of Knoll Lowney in Support of Friends of Grays Harbor et al.'s Response to Motions for Partial Summary Judgment of Respondents with Exhibits A-H.

14. Respondent Intervenor Imperium's Response to Petitioners' Motions for Partial Summary Judgment.
    a. Declaration of Steve Drennan in Support of Respondent Intervenor Imperium's Response to Motions for Partial Summary Judgment with Exhibits A-F.

15. Respondents Department of Ecology and City of Hoquiam's Response in Opposition to Quinault Indian Nation's Motion for Partial Summary Judgment (SEPA Issue No. 1) with Exhibit A.
    a. Second Declaration of Diane Butorac in Support of Respondents Department of Ecology and City of Hoquiam's Response to the Quinault Indian Nation's Motion for Partial Summary Judgment (SEPA Issue No. 1) with Exhibits A-E.
    b. Declaration of Linda Pilkey-Jarvis in Support of Respondents Department of Ecology and City of Hoquiam's Response to the Quinault Indian Nation's Motion for Partial Summary Judgment (SEPA Issue No. 1) with Exhibits A-B.
    c. Declaration of David Byers in Support of Respondents Department of Ecology and City of Hoquiam's Response to the Quinault Indian Nation's Motion for Partial Summary Judgment (SEPA Issue No. 1).

16. Reply in Support of Westway Terminal Company LLC's Motion for Partial Summary Judgment.

17. Respondent Intervenor Imperium's Reply in Support of Motion for Partial Summary Judgment.

18. Reply in Support of Quinault Indian Nation's Motion for Partial Summary Judgment.
    a. Third Declaration of Kristen L. Boyles Re: Exhibits to Reply in Support of Quinault Indian Nation's Motion for Partial Summary Judgment with Exhibits II-PP.

19. Friends of Grays Harbor et al.'s Reply in Support of Motion for Partial Summary Judgment.

20. Respondents Department of Ecology and City of Hoquiam's Reply in Support of Joint Motion for Partial Summary Judgment.
    a. Declaration of Sally Toteff in Support of Respondents Department of Ecology and City of Hoquiam's Reply in Support of Joint Motion for Partial Summary Judgment with Exhibits A, B.

The following issues, which were submitted by the parties and set out in the Pre-Hearing Order, are the subject of the motions filed by the parties.[2]

A. Violations of the State Environmental Policy Act ("SEPA"):

1. 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)?
3. Is the MDNS invalid because the responsible officials failed to consider alternatives, incorrectly relied on existing federal and state requirements as mitigation, and failed to adequately condition and/or mitigate the Project?
6. Is the MDNS invalid because the responsible officials failed to require a pre-approval analysis of critical environmental issues, including but not limited to seismic and tsunami hazards, archeological and cultural resources, shipping and train impacts, and oil spill hazards?
7. Is the MDNS invalid because the responsible officials and the Project failed to comply with the requirements of RCW 88.40.025 relating to guarantees of financial responsibility?
8. Is the MDNS invalid because the responsible officials failed to consider or comply with the requirements of RCW 43.143 applicable to ocean resources management?
9. Did the responsible officials' approvals of the MDNS suffer from procedural errors, including failure to give proper notice, failure to consider public comments, and failure to obtain required and/or sufficient information on which to base its decisions?

[2] This list does not include all issues identified in the pre-hearing order. Instead, it includes only those issues that are the subject of the summary judgment motions. Because the Board's decision on issue A.1 results in invalidation of the SEPA Mitigated Determinations of Non-Significances (MDNS) upon which both the Westway and Imperium SSDPs rely, this decision is dispositive of the entire consolidated case.

B. Violations of the Shorelines Management Act:

3. In issuing the Permit, did the responsible official fail to consider and comply with applicable laws and regulations relating to ocean management and ocean uses, including the requirements of Hoquiam Municipal Code 11.04.065, 11.04.180(6), RCW Chapter 43.143, and WAC 173-26-360?
4. In issuing the Permit, did the responsible official fail to consider and comply with the requirements of RCW 88.40.025 relating to guarantees of financial responsibility?
8. Are the Project, Permit, and MDNS invalid because they are inconsistent with all applicable local, state, and federal laws and regulations, including but not limited to Growth Management Act Critical Areas Ordinances (including but not limited to provisions relating to wetlands, seismic hazards, and mandatory buffers), and the Coastal Zone Management Act, 16 U.S.C. § 1451, et seq.?
9. Did the application and the Permit contain insufficient detail to determine its consistency with the Shorelines Management Act, its implementing regulations, the Shorelines Management Plan, SEPA, and the Critical Area Ordinances?
10. Did the responsible official's approval of the Permit suffer from procedural errors, including failure to give proper notice, failure to consider public comments, and failure to obtain required and/or sufficient information on which to base its decisions?

Based upon the records and files in the case, the evidence submitted, and the written legal arguments of counsel,[3] the Board enters the following decision.

BACKGROUND

1. The Projects

a. Westway

Westway currently operates a bulk methanol storage terminal in Hoquiam on the shoreline of Grays Harbor. The facility is located on property owned by the Port of Grays Harbor (Port) and leased by Westway. Westway built the facility in 2009, and began operations

[3] QIN requested oral argument on the motion. The Board's presiding officer denies the request based on the compressed schedule for this appeal and the Board's calendar. WAC 461-08-475(3).

at the end of that calendar year. The facility currently includes four 3,340,000 gallon storage tanks, two rail spurs with loading/unloading facilities and a concrete lined containment structure, pipelines, pumps, vapor control equipment, two office buildings, one electrical room, and an old wood frame warehouse building. Butorac Decl., Ex. A.

On December 3, 2012, Westway submitted an application to the City for an SSDP to authorize the expansion of the facility in the shoreline. The purpose of the proposed expansion is to allow for the receipt of crude oil by train, the storage of crude oil from these trains, and the shipment of the crude oil by vessel and/or barge from Port Terminal #1. The proposed expansion includes the addition of four 8,400,000 gallon storage tanks providing a project total storage capacity of 33,600,000 gallons. Each tank will be 150 feet in diameter and 64 feet in height. The tanks will sit on a concrete slab, supported by a series of piles driven approximately 150 feet into the ground. The new tanks will be surrounded by a concrete containment wall, which will have the capacity to contain the total volume of a single tank plus an allowance for rainfall. Butorac Decl., Ex. A.

The existing rail facility will be expanded from two short spurs with a total of 18 loading/ unloading spots to four longer spurs with a total of 76 loading/unloading spots. Westway anticipates that the expanded terminal could result in two additional unit trains[4] every three days (one loaded with oil and one empty). The current volume of train traffic to the Westway

[4] The record on summary judgment does not provide a fixed definition of "unit train." Apparently the number of railroad cars in a unit train can vary because the Westway material describes a unit train as having up to four locomotives and 120 cars, Boyles Decl., Ex. C, p. 2, Butorac Decl., Ex. C, §B.2; the Imperium material describes a unit train as approximately 105 railroad cars, Boyles Decl., Ex. Q, p. 4; and the U.S. Development Group (USD) material describes a unit train as approximately 60 to 120 rail cars, each with a capacity of 680 to 720 barrels. Boyles Decl., Ex. N, p. 9.

Terminal is an average of two to three rail cars per day. A new pipeline will be added to connect the tanks via an existing pipe bridge to the Port Terminal #1. Westway anticipates the expanded terminal will result in 64 barge movements per year. Currently, the facility has three to four vessels per year. Boyles Decl., Exs. A, C; Butorac Decl., Exs. A, C.

b. Imperium

Imperium currently operates a facility for the production of biodiesel fuel and storage of bulk liquids on property owned by the Port. The Imperium facility is at the Port Terminal #1, and is immediately to the west of the Westway Terminal. 1st Zultoski Decl., Ex. 39; Kisielius Decl., Ex. A.

On February 12, 2013, Imperium submitted a permit application to expand its existing facility to allow for the receipt of biofuels, biofuel feedstocks, petroleum products, crude oil and renewable fuels; storage of these bulk liquids; and outbound shipment of the liquids. The proposal includes the addition of nine storage tanks, each with a capacity of 3,360,000 gallons for a project total storage capacity of up to 30,240,000 gallons. Each tank will be 95 feet in diameter and 64 feet in height. A berm designed to contain 100 percent of the total volume of one tank plus an additional six inches of precipitation will surround the tanks. The tank pads will be supported by pilings driven into the ground. 1st Zultoski Decl., Ex. 39; Petition for Review, SHB No. 13-021, Ex. A.

Imperium proposes to expand its existing rail facility by adding approximately 6,100 feet of track in multiple new rail spurs and expanding the existing rail yard. Imperium estimates that the terminal operations could result in an increase of two additional unit trains per day (one

loaded and one unloaded) and up to 200 ships or barges per year (400 entry and departure transits). Pipelines will be installed connecting the Port Terminal #1 with the Imperium tank farm. 1st Zultoski Decl., Ex. 39; Petition for Review, SHB No. 13-021, Ex. A.

c. USD

USD is proposing a third project of a similar type bordering Grays Harbor. The project would be a $50 million bulk liquids rail logistics facility at the Port Terminal #3. Boyles Decl., Ex. P. Port Terminal #3 is in the City of Hoquiam between Highway 109 and Grays Harbor. Boyles Decl., Exs. K, N. USD, through its subsidiary Grays Harbor Rail Terminal (GHRT), entered into an Access Agreement with the Port on September 11, 2012, allowing it to complete a feasibility study by December 31, 2012. Boyles Decl., Ex. G. On March 12, 2013, in a briefing to the Port Commission, USD stated that it had performed "due diligence" to determine if the site is appropriate for a rail logistics facility. Boyles Decl., Ex. K. The record on summary judgment also includes supporting documentation for a feasibility study. This documentation includes a preliminary operations plan, which explains that the proposed facility "will include delivery of various liquid bulk materials, specifically various types of crude oil and condensates." Boyles Decl., Ex. N., p. 9. The facility will be designed to "receive and off-load a maximum of one full unit train every two days on average, providing a maximum receiving capacity of less than 50,000 barrels per day. *Id.* The facility will have approximately six to eight above-ground storage tanks with a total capacity of 800,000 to 1,000,000 barrels. The facility will be developed to support the operation of approximately five vessel calls per month. *Id.* at pp. 9, 10. In April 2013, the Port approved a Grant of Option to Lease to GHRT. The lease

provides GHRT 24 months for planning and permitting. Boyles, Ex. O. As the Port stated on its web-site in July of 2013, the lease will allow GHRT to perform "further analysis and obtaining of permits to bring the project to shovel-ready." Boyles Decl., Ex. L. To date, USD has not submitted an application for a shoreline permit for their project. 2nd Butorac Decl., ¶ 13.

2. The State Environmental Policy Act (SEPA) process

As part of their permit application process, Westway and Imperium were required to comply with SEPA. The first step in the SEPA process is the submission of an Environmental Checklist completed by the applicant. After two revisions, Westway submitted its completed checklist with attachments on February 20, 2013. Butorac Decl., ¶ 5, and Exs. A, C. Imperium submitted its completed checklist, with attachments, on February 22, 2013. QIN's Petition for Review (SHB No. 13-021) with attached Ex. A.

Ecology and the City worked together as SEPA Co-leads on both the Westway and Imperium proposals. The summary judgment record contains detailed information regarding the process the Co-leads went through to arrive at a final threshold determination for the Westway project. The process occurred between December, 2012 and March, 2013, and included meetings between the Co-leads, contacts the Co-leads made with Westway, additional information requested and reviewed from Westway, consultation with other entities, open house meetings in Grays Harbor where the Co-leads provided information to the public, discussions regarding mitigation measures, and the consideration of other applicable laws. During their review of the checklist, the Co-leads also considered the aggregate impacts of the existing and proposed operations and the cumulative impacts of the Westway proposal and the Imperium

crude oil proposal. The Co-leads did not consider potential impacts from USD because USD had not submitted an application or environmental checklist. Butorac Decl., ¶¶ 4-6, 10-20, 2nd Butorac Decl., ¶ 13.

After considering the information they had gained during the process described above, the Co-leads determined that the Westway proposal, as mitigated, was not likely to have probable adverse environmental impacts. The Co-leads issued a mitigated determination of non-significance (MDNS) on March 14, 2013, with a 15-day comment period, which they subsequently extended. The Co-leads issued a subsequent and final MDNS on the Westway project on April 4, 2013. Butorac Decl., ¶¶ 20-22, Ex. G.

The record does not contain a similar amount of detail pertaining to the SEPA process conducted on the Imperium project. However, the Co-leads published an MDNS for the Imperium project on May 2, 2013. The Co-leads did not consider potential impacts from USD. 2nd Butorac Decl., ¶ 13; Zultoski Decl., Ex. 39.

The City Shoreline Administrator (Administrator) issued the City's decision approving the Westway SSDP, with conditions, on April 26, 2013. The Administrator issued the City's decision approving the Imperium SSDP, with conditions, on June 14, 2013. QIN's PFR (SHB No. 13-012) with attached Ex. A; QIN's PFR (SHB No. 13-021) with attached Ex. A.

3. Environmental impacts

The SEPA checklists, submitted by Westway and Imperium, and reviewed by the Co-leads, contain many indications of potential environmental impacts, including oil spill risks,

increase in rail and vessel traffic, and location of expanded facilities in areas of known natural resource and cultural sensitivity.

The Grays Harbor Estuary is an area rich in environmental resources. The Chehalis River, which borders the Westway and Imperium sites, drains into the Grays Harbor estuary, and is home to several fish species protected under the federal Endangered Species Act (ESA), including bull trout, green sturgeon, and Pacific eulachon. The Grays Harbor Estuary provides marine habitat that supports natural production for chinook, chum and coho salmon, and steelhead. Grays Harbor also supports white sturgeon and Dungeness crab, an economically vital fishery on the coast of Washington. Several ESA-listed and/or state listed bird species are found in the Grays Harbor area including marbled murrelets, brown pelicans, western snowy plovers, and the streaked horned lark. Grays Harbor National Wildlife Refuge is approximately three miles from the Westway and Imperium project sites, and the Pacific Flyway flight corridor for migrating waterfowl crosses both project sites. As many as 24 species of shorebirds use Grays Harbor Refuge. Several species of ESA-listed and state-listed marine mammals use marine habitat in Grays Harbor, such as the southern resident killer whale, gray whale, humpback whale, sperm whale, and steller sea lion. An oil spill could potentially impact all of these resources. Boyles Decl., Ex. Q; Butorac Decl., Ex. C; 3rd Boyles Decl., Ex. KK, Brennan Decl., Ex. A.

The Westway project site is in an area with high potential for archaeological resources. It is located across from a large fish weir archaeological site and is adjacent to a historic archaeological sawmill site. Neither the Westway nor Imperium sites have any documented

known archaeological or cultural resources. 2nd Boyles Decl., Exs DD, EE and FF; Boyles Decl., Ex. Q; Butorac Decl., Ex. C.

Both of these projects are proposed within a recognized tsunami and liquefaction hazard zone.[5] The critical areas report relied on by Westway states that the project is located on dredge soils, has a high liquefaction susceptibility factor, and is rated as a seismic site class D-E. The Imperium critical areas report confirms that the project site is in an area of high liquefaction susceptibility and estimates that during a moderate to severe earthquake, settlement at the ground surface would be around 12 inches. This report also indicates that the site is located within the tsunami inundation area. Butorac Decl., Ex. D; Brennan Decl., Ex. A, Geotechnical Report, pp. 10, 11.

The SEPA checklist for both Westway and Imperium identifies potential impacts from the projected increase in rail and vessel traffic from the projects. The Westway checklist identifies the increase in train and vessel traffic (from two to three rail cars every day currently, to two unit trains every three days; and from three to four vessels per year currently to 64 barge movements per year). The checklist goes on to recognize that the increase in rail traffic will increase the amount of greenhouse gasses in the state of Washington by approximately 11,329 tons per year, and the increase in vessel traffic will result in 1,595 metric tons of greenhouse gas emissions.[6] Butorac Decl., Ex. C. The Imperium checklist estimates that the project could result

[5] "Liquefaction is a phenomenon where vibration or shaking of the ground, usually from earthquake forces, results in development of excess pore pressures in loose, saturated soils and subsequent loss of strength in the deposit of soil so affected." Drennan Decl., Ex. A, Geotechnical Report, p. 10.

[6] The vessel greenhouse gas figure is based on barge movements from the three nautical mile limit to the facility and back. Butorac Decl., Ex. C.

in an increase of up to two additional unit trains per day (one loaded and one empty) and up to 200 ships or barges per year (400 entry and departure transits). The checklist estimates that greenhouse gas emissions in Washington State from the additional rail and vessel volumes will be 19,098 metric tons per year. Boyle Decl., Ex. Q; Zultoski Decl., Ex. 39.

In the MDNS issued for each project, the Co-leads address the potential impacts from the increases in rail and vessel traffic, both from each project separately and the two projects combined, primarily through the requirement of the future submission of a Rail Transportation Impact Analysis (RTIA) and a Vessel Transportation Impact Analysis (VTIA). Both MDNSs state that the RTIA and VTIA will "determine the potential for impacts" caused by additional rail and vessel traffic, and shall identify any improvements or mitigation needed. The Co-leads indicate that they considered the cumulative impacts from the Westway and Imperium projects together, but that they did not consider the additional impacts from USD. Butorac Decl., ¶ 11, Boyles Decl., Ex. C; Zultoski Decl., Ex. 39.

ANALYSIS

1. Summary judgment standard and review of SEPA threshold determination

Summary judgment is a procedure available to avoid unnecessary trials where formal issues cannot be factually supported and cannot lead to, or result in, a favorable outcome to the opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977). The party moving for summary judgment must show there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a summary judgment proceeding is one

that will affect the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992).

If the moving party is a respondent and meets this initial showing, the inquiry shifts to the party with the burden of proof at trial. If, at this point, the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, then the trial court should grant the motion. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182, 187 (1989). In making its responsive showing, the nonmoving party cannot rely on mere allegations, unsubstantiated opinions, or conclusory statements, but must set forth specific facts showing that there is a genuine issue for trial. At that point, we consider the evidence and all reasonable inferences therefrom in the light most favorable to the non-moving party. *Id.* at 226.

The Board reviews the City and Ecology's SEPA threshold determination under a "clearly erroneous" legal standard. *Ass'n of Rural Residents v. Kitsap County*, 141 Wn.2d 185, 195-96, 4 P.3d 115 (2000); *Norway Hill Preservation and Protection Ass'n. v. King County Council*, 87 Wn.2d 267, 272-274, 552 P.2d 674 (1976). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Murden Cove Preservation Ass'n v. Kitsap County*, 41 Wn. App. 515, 523, 704 P.2d 1242(1985). For the MDNS to survive judicial scrutiny, the record must demonstrate that "environmental facts were adequately considered in a manner sufficient to establish prima facie compliance with SEPA," and that the agency based its decision to issue an MDNS on information sufficient to evaluate the proposal's

environmental impact. *Pease Hill Community Group v. County of Spokane*, 62 Wn. App. 800, 810, 816 P.2d 37 (citations deleted); WAC 197-11-100.

In this case, the material facts necessary to rule on Issue A.1 are not in dispute, and this issue is ripe for summary judgment. In addition, parts of Issues A.3 and A.6, all of Issues A.7, A.8, B.3, and B. 4 are also ripe for summary judgment.

2. SEPA analysis and cumulative impacts from the USD project (Issue A.1).

QIN contends that the MDNS issued by the City and Ecology for the Westway[7] project is clearly erroneous because it failed to include consideration of cumulative impacts from the USD project, along with its consideration of the impacts from Westway and Imperium. Based on the analysis below, the Board concludes the MDNS is clearly erroneous for failing to consider the cumulative impacts of all three projects.

a. Cumulative Impacts Standard

SEPA requires that "[a]n environmental impact statement (the detailed statement required by RCW 43.21C.030(2)(c)) shall be prepared on proposals for . . . major actions having a probable significant, adverse environmental impact." RCW 43.21C.031(1). The Washington State Supreme Court, in interpreting this requirement, has stated:

> RCW 43.21C.031 mandates that an EIS should be prepared when significant adverse impacts on the environment are "probable," not when they are "inevitable."

[7] While the QIN motion refers only to the Westway MDNS, QIN's arguments on this issue, and the responses filed by the Respondents, apply equally to the Imperium MDNS. While there are factual differences between the two proposals, these facts are not material to the analysis on this issue.

King Cnty. v. Washington State Boundary Review Bd. for King Cnty., 122 Wn. 2d 648, 663, 860 P.2d 1024, 1032 (1993). A state or local agency must make a "threshold determination" as to whether an EIS is required, based on whether a project will have a significant adverse environmental impact. RCW 43.21C.031, 033.

As explained in Ecology's SEPA rules, "'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. "Probable" means:

> . . .likely or reasonably likely to occur, as in 'a reasonable probability of more than a moderate effect on the quality of the environment' (see WAC 197-11-794). Probable is used to distinguish likely impacts from those that merely have a possibility of occurring, but are remote or speculative. This is not meant as a strict statistical probability test.

WAC 197-11-782.

Ecology's SEPA rules provide further guidance on the environmental review process. See WAC 197-11-060. WAC 197-11-060(1) states that, "Environmental review consists of the range of proposed activities, alternatives, and impacts to be analyzed in an environmental document, in accordance with SEPA's goals and policies." The SEPA rules direct that consideration of environmental impacts include impacts that are likely, and not merely speculative. WAC 197-11-060(4)(a). The rules direct agencies to "carefully consider the range of probable impacts, including short-term and long-term effects. Impacts shall include those that are likely to arise or exist over the lifetime of a proposal or, depending on the particular proposal, longer." WAC 197-11-060(4)(c). A proposal's effects include "direct and indirect impacts

caused by a proposal." WAC 197-11-060(4)(d). The rules further clarify that the range of impacts to be analyzed in an EIS include direct, indirect, and cumulative impacts. WAC 197-11-060(4)(e).

When making the threshold determination, WAC 197-11-330(3) requires that agencies take into account that "[s]everal marginal impacts when considered together may result in a significant adverse impact" and that "[a] proposal may to a significant degree . . .[e]stablish a precedent for future actions with significant effects."

Based on the SEPA statute and Ecology's SEPA rules, agencies are required to consider the effects of a proposal's probable impacts combined with the cumulative impacts from other proposals. This interpretation is consistent with the interpretation of the requirement for cumulative impacts under the federal National Environmental Policy Act (NEPA). Washington uses NEPA provisions and case law interpreting NEPA to discern the meaning of SEPA and its implementing regulations. *Pub. Util. Dist. No. 1 of Clark Cnty. v. Pollution Control Hearings Bd.*, 137 Wn. App. 150, 158, 151 P.3d 1067, 1070 (2007). The regulations interpreting NEPA define cumulative impact as:

> [T]he impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7.

This definition, referred to as the "reasonably foreseeable" standard, has been construed and applied in several federal court cases. These cases have concluded that projects need not be

final before they are reasonably foreseeable, but that there must be enough information available to permit meaningful consideration. *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1078 (9th Cir. 2011); *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1014 (9th Cir. 2006).

All of the parties, with the exception of Imperium, agree that the standard applicable to the issue of cumulative impacts is whether the future project is reasonably foreseeable.[8] This standard comes from the SEPA statute, RCW 43.21C.031 (mandating preparation of an EIS for major actions having a *probable* significant environmental impact), the SEPA rules, WAC 197-11-782 (defining "probable" to mean "reasonably likely to occur" as opposed to being "remote or speculative") and the definition of *cumulative impact* under NEPA regulations, 40 C.F.R. ¶ 1508.7 (incremental impact of the action when added to "reasonably foreseeable future actions"). Imperium argues, however, that the standard for consideration of cumulative impacts under SEPA is narrower than the reasonably foreseeable standard. It contends that there is:

> . . . a whole body of Washington law that suggests that [under SEPA] cumulative impact analyses need only occur when there is some evidence that the project under review will facilitate future action that will result in additional impact, or when the project is dependent on subsequent proposed development.

Imperium's Response to Motions for Partial Summary Judgment, p. 11, 12, citing several Washington cases, the most recent of which is *Gebbers v. Okanogan Cnty. Pub. Util. Dist. No. 1*, 144 Wn. App. 371, 380, 183 P.3d 324, 328 (2008), *rev. denied* 165 Wn.2d 1004, 183 P.3d 324 (2008). While there is support for Imperium's argument in these cases, the Board concludes that

[8] Westway states the standard as "reasonably likely to occur." Westway's response to QIN, p. 2.

this approach to cumulative impacts analysis conflates two separate and distinct SEPA concepts: "cumulative impacts" and "connected actions."

The SEPA rules define "connected actions" as "proposals or parts of proposals which are closely related." WAC 197-11-792(2)(a)(ii). Connected actions are narrowly prescribed to be proposals that:

> (i) Cannot or will not proceed unless the other proposals (or parts of proposals) are implemented simultaneously with them; or
> (ii) Are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation.

WAC 197-11-060(3)(b). The SEPA rules direct agencies to discuss connected actions in the same environmental document. WAC 197-11-060(3)(b).

The SEPA rules, on the other hand, do not offer a definition of "cumulative impacts."[9] While the directive to evaluate "impacts" is clear, and the concept that "impacts" includes "cumulative" as distinct from "direct and indirect impacts" is clear, a precise definition of "cumulative impacts" is missing. WAC 197-11-060(4), WAC 197-11-792(2)(c). The SEPA rules, however, plainly set out connected actions and cumulative impacts as two distinct concepts. See WAC 197-11-060(3)(b) and WAC 197-060(3), (4).

The Ninth Circuit offers a succinct explanation of "cumulative impacts" and "connected actions" in *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 896 (9th Cir. 2002), a decision involving the review of a timber sale under NEPA. In *Native Ecosystems,* the Court stated:

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[9] Because the SEPA statute and/or rules do not define "cumulative impacts," it is appropriate to look to the federal definition of cumulative impacts for guidance. *See PUD No. 1,* at 158.

> The obligation to wrap several cumulative action proposals into one EIS for decision making purposes is separate and distinct from the requirement to consider in the environmental review of one particular proposal, the cumulative impact of that one proposal when taken together with other proposed or reasonably foreseeable actions.

Id. at 896, n. 2.

Other decisions, however, have muddied the distinction between these two concepts. In *Gebbers*, a case heavily relied on by Imperium, the Court was asked to review a final EIS, which was prepared to evaluate the impacts from a proposal to build a transmission line and substation between Pateros and Twisp. *Gebbers,* at 376, 377. A citizens group argued that the EIS was deficient because it failed to include an analysis of rebuilding the new line. *Id.,* at 380. In a holding which intertwines the concepts of connected actions and cumulative impacts analysis, the Court states that "When, like here, any future project [the rebuilding of the existing line] is not dependent on the proposed action [building of a new connection line], no cumulative impacts analysis is required." *Id.* at 386. In rejecting what it referred to as a "cumulative impacts analysis," the court was referring only to the lack of interconnection between the proposal for the new transmission line and future rebuilds of that line (i.e., that there had been no piecemealing or improper segmentation of the proposal analyzed in the EIS), such that its impacts should have been analyzed as a single proposal in a single environmental document. The *Gebbers* court, after noting that SEPA does not define "*cumulative impacts*," turns to the NEPA "reasonably foreseeable" definition to fill the definitional gap. *Gebbers,* at 380.

Gebbers, however, does not support the notion that a cumulative impact analysis of past, present, and reasonably foreseeable future actions is not required. *Id.* at 381. Simply put, in

Gebbers, future updates to the proposed transmission line were neither part of the transmission line proposal nor reasonable foreseeable future actions. Hence, they did not violate SEPA's piecemealing rule nor require a cumulative impact analysis. *Cheney v. City of Mountlake Terrace*, 87 Wn.2d at 338, 343-45, 552 P.2d 184 (1976) (evaluation of impacts from a possible future development of a parcel of property was not required in the EIS prepared for the permit to construct the road, when the road was independent of the development, because this did not involve improper segmentation); *SEAPC v. Cammack II Orchards*, 49 Wn. App. 609, 614, 615, 744 P.2d 1101 (1987) (EIS need not consider impacts of subsequent phases when initial phase is substantially independent and would be constructed without regard to future developments, consistent with the SEPA rule allowing for phased environmental review). Neither these nor the *Gebbers* court rejected the use of the reasonably foreseeable standard for evaluation of cumulative impacts from multiple unrelated projects.

The Board is not convinced, based on this line of cases, that Washington courts have adopted the narrow standard for evaluation of cumulative impacts argued for by Imperium. A close reading of *Gebbers* does not support this conclusion. NEPA's use of the reasonably foreseeable standard for cumulative impacts makes it unlikely, in the Board's view, that the Legislature intended the cumulative impacts analysis under SEPA to be triggered only by connected actions. The connected actions standard proposed by Imperium is less protective of the environment than the reasonably foreseeable NEPA standard, a result that is contrary to the "considerably stronger" policy statement in SEPA than in NEPA. *ASARCO, Inc. v. Air Quality Coal*, 92 Wn.2d 685, 709, 601 P.2d 501 (1979). While projects may not be sufficiently related to

require analysis as connected actions and part of the same proposal, their individual cumulative impacts must be analyzed together in order to make a significance determination. The Board concludes that the standard for evaluation of cumulative impacts under SEPA is whether the other project(s) is reasonably foreseeable.

b. USD project is reasonably foreseeable.

The evidence in the record establishes that the USD project is reasonably foreseeable. USD entered into an 'access agreement' with the Port in September 2012 that allowed USD to conduct feasibility studies more easily at Terminal #3. Boyles Decl., Ex. G. USD sent its completed feasibility study to the Port on February 28, 2013. Boyles Decl., Ex. N. On March 12, 2013, USD provided an updated briefing to the Port on its "Proposed Terminal 3 Facility." Boyles Decl., Ex. K. Subsequent to completing the feasibility study, USD entered an Option to Lease the site from the Port subject to obtaining necessary permits and other approvals. Boyles Decl., Ex. L. USD has participated in community workshops put on by the Port of Grays Harbor on crude-by-rail. In those community workshops, the USD project has been identified as one of three crude-by-rail proposals. Boyles Decl., Ex. J, U. The Port's website and publications also provide descriptions of, and fact sheets for, the three crude-by-rail proposals. Boyles Decl., Ex. B, D, L, M, O. The totality of this undisputed evidence supports the conclusion that the USD project is reasonably foreseeable.

There is also undisputed evidence in the record to conclude that the project is sufficiently defined to allow for meaningful review. USD's feasibility study, which it sent to the Port in February, 2013, included estimates of the maximum receiving capacity of the proposed operation

(less than 50,000 barrels per day); the total crude capacity of the tanks (six to eight above-ground tanks with combined storage of 800,000-1,000,000 barrels); the anticipated increase in ship traffic due to the operation (facility will support five vessel calls per month); and the anticipated increase in train traffic (facility designed to receive and off-load a maximum of one full unit train every two days on average). Boyles Decl., Ex. N. This information was sufficient to allow the Co-leads to evaluate the potential increase in vessel and train traffic from the three proposals, as well as to consider the greater risk of oil spills.

While the Respondents[10] do not contest the facts established in the record on summary judgment, they do argue that the facts are insufficient to meet the legal standard of reasonably foreseeable or reasonably likely to occur, and that the information on USD's proposal is insufficient to provide the Co-leads with a basis to evaluate the potential for cumulative impacts from the proposal. They argue that the evidence presented by QIN shows only that USD is exercising due diligence in exploring the feasibility and economics of proposing an additional oil terminal at Grays Harbor. They point to statements in the record from the Ecology SEPA lead that the Port officials characterized the USD project as "not certain" and that the USD project was still in a conceptual stage because it was undergoing changes as evidenced by communication from EFSEC regarding changes in the USD project. 2nd Butorac Decl., ¶ 13 and

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[10] Ecology does not separately brief this issue, although it does join in the other parties' briefing. During the SEPA process, the Ecology Spills Program reached the conclusion that the cumulative impacts of the three projects should be evaluated together. In a memo from the Ecology Spills Project Manager to Ecology's Southwest Regional Office SEPA leads, the manager stated: "Based on our understanding of the similarity of the three proposals, Westway, Imperium, and U.S. 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 vessel traffic, oil handling, and transfer operations as [a] whole." Boyles Decl., Ex. CC.

Ex. E. Therefore, they argue, the project is far from being inevitable, and in fact remains speculative.

"Inevitable," however, is not the standard. The Ninth Circuit Court of Appeals has recognized that even reasonably foreseeable projects have some level of speculation. *N. Plains Res. Council*, at 1078-79. In that case, the Court said that well-drilling estimates extending 20 years into the future and involving a wide range of number of wells (between 10,000 and 26,000 coal bed methane wells and between 250 and 975 conventional oil and gas wells) had reasonably foreseeable impacts. Similarly, the court in *Environmental Protection Information Center* concluded that a timber sale, while not initially reasonably foreseeable, became reasonably foreseeably when "although the proposal was still not firm, enough was then known to permit a general discussion of effects." *Environmental Protection Center* at 1015. Here, although the USD project is not completely firm, or inevitable, it is reasonably foreseeable.

The 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.

Here, based on uncontroverted facts in the record, the Board concludes that the USD project is reasonably foreseeable, and that the project is sufficiently defined to allow for meaningful review. Therefore, the Co-leads should have considered the cumulative impacts from the USD project along with the cumulative impacts from Westway and Imperium in making their threshold determination. Their failure to do so makes the MDNS clearly erroneous. The Board grants summary judgment to QIN and FOGH on this portion of Issue 1.

3. SEPA analysis of impacts from increases to rail and vessel traffic from Westway alone, and Westway and Imperium cumulatively (Parts of Issue A.1 and A.6)

QIN raises a second challenge to the validity of the Westway MDNS, contending that the consideration of rail and vessel impacts both from the Westway project alone, and the Westway and Imperium projects combined, was inadequate. One key aspect of this challenge is that the applicant was not required to submit information necessary for consideration of these impacts (both individually and collectively) until after the issuance of the MDNS and approval of the SSDP. The Board agrees with QIN that this process does not comply with the requirements of SEPA.

Unlike their approach in handling potential impacts from USD, Ecology and the City correctly recognized that they needed to consider potential impacts from the Imperium proposal when evaluating the environmental impacts for the Westway project. The MDNS for the Westway project contains the following explanation of the Co-leads decision to address the Imperium project:

> As allowed in SEPA regulations (WAC 197-11-060) the Co-lead Agencies recognize this is one of two similar crude oil terminal proposals in the Grays

> Harbor area that have been submitted for review. The agencies have considered the aggregate impacts of the existing Westway operations and proposed operations and the cumulative impacts of the Westway proposal and the Imperium crude oil proposal during this evaluation. The proposals are not being considered a single course of action under WAC 197-11-060. They are not interdependent and each proposal can be implemented on its own. The potential vessel and rail traffic impacts from the Imperium proposal are being considered 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 (WAC 197-11-792).

Boyles Decl., Ex. C, p. 4.

Both the Westway amended checklist and the Imperium checklist provide information on numbers of additional trains and vessels, in categories of the checklist identifying impacts to air and transportation. Butorac Decl., Ex. C; Boyles Decl., Ex. Q. The MDNS for the Westway project uses the numbers from both the Westway and Imperium checklist and combines them into a chart.[11] Boyles Decl., Ex. C, p. 9. Based on the chart, the number of vessels per year into and out of Grays Harbor will increase from a 2012 level of 168 vessels to a projected level of 688 vessels. The number of trains per year into and out of the Port of Grays Harbor will increase from a 2012 level of 730 unit trains to a projected level of 1,703 unit trains. After charting these numbers, the Co-leads reach the conclusion, without further analysis or explanation, that they do not expect the trains from just the Westway project to significantly impact existing traffic patterns at two places where the trains cross roads (the Olympic Gateway shopping center and the Port Industrial Road).

[11] The MDNS for the Imperium project uses the same approach. *See* Zultoski Decl., Ex. 39, p. 11.

The conclusions of the MDNS are problematic for two reasons. First, while the chart includes numbers from both the Westway and Imperium proposals, the Co-leads apparently based the threshold determination on the Westway traffic additions alone. *Compare* Boyles Decl., Ex. C, p. 10 ("Two additional unit trains shall transit through the Aberdeen/Hoquiam area . . .every three days but are not expected to significantly impact existing traffic patterns. . . ." *with id.* at p. 10 (Westway/Imperium totals of approximately 18 additional trains per week)). There is no analysis provided of the increase in rail traffic from the combined proposals.

Second, the Co-leads rely on the yet-to-be-completed RTIA and VTIA to generate information to determine the potential for impacts from the two proposals and any improvements or mitigation needed. The MDNS states "[t]he RTIA *will determine the potential for impacts* directly caused by changes and increases in rail traffic on local vehicular traffic and other rail commodities." Boyles Decl., Ex. C., p. 10 (emphasis added). A similar requirement is imposed for vessel traffic, with a similar purpose ("The VTIA *will determine the potential for impacts* that may result from changes or increases in vessel traffic in Grays Harbor.") *Id.* (emphasis added). The information the applicants will develop in the RTIA and VTIA is the information that the Co-leads should have before they make their threshold determination, not afterward. To wait until after the SEPA threshold determination is made, and the SSDP is issued, to obtain information that identifies whether potential impacts from vessel and train increases will be significant and whether mitigation is necessary, does not comply with the mandate of SEPA to "provide consideration of environmental factors at the earliest possible stage to allow decisions

to be based on complete disclosure of environmental consequences." *King Cnty. v. Washington State Boundary Review Bd. for King Cnty.*, 122 Wn.2d 648, 663, 860 P.2d 1024, 1033 (1993).

The Respondents respond to this argument through both legal and factual arguments. In their legal argument, they contend that it is acceptable to rely on future environmental studies and cite two appellate cases and one Shorelines Hearings Board case in support of their argument.[12] In *West 514, Inc. v. Spokane Co.*, 53 Wn. App 838, 848-49, 770 P.2d 1065 (1989), *rev. denied* 113 Wn. 2d 1005(1989), the Court upheld an MDNS issued in connection with the approval of a site development plan for a shopping mall which required compliance with a future study. The West court stated "when a governmental agency makes a negative threshold determination, it must show it considered environmental factors 'in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA.'" *West 514* at 848-49 *(citations deleted).* The Court in *West 514* concluded this standard was satisfied by the MDNS issued in that case, even though it contained a condition requiring compliance with a future study, because the SEPA responsible officials issued the MDNS only after they had adopted the pertinent parts of a prior EIS detailing the impacts expected from a similar abandoned project at the same site. *Id.* at 849. Hence, this case is not relevant to the present case.

In *Anderson v. Pierce Cnty.*, 86 Wn. App. 290, 304-05, 936 P.2d 432, 440 (1997), the second case relied upon by the Respondents, the Court affirmed an MDNS which, while

[12] The Co-leads also cite *Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 601-02, 90 P.3d 659 (2004)(approving conditions on a CWA §401 certification that required submission of revised studies, plans, and reports in the future.) This is not a case involving a SEPA threshold determination, and therefore is not applicable here.

including a condition to submit a final mitigation plan, was issued only after the impacts of the project had been determined. The Court in that case described the threshold determination process as follows:

> Our review of the record indicates that PALS [the Pierce County Planning Department] thoroughly considered appropriate environmental factors in analyzing RPW's CUP application and environmental checklist, reviewing comments from other state agencies, and formulating 54 mitigation measures included in the MDNS. After accepting comments and analyzing the proposal, PALS initially determined that the RPW Project was reasonably likely to have a "significant adverse environmental impact." WAC 197–11–330(1)(b). PALS and RPW then worked cooperatively to reduce the project's significant adverse environmental impacts. WAC 197–11–350(2). RPW altered its plans, and PALS imposed substantial mitigating measures. These mitigation measures reduced all significant adverse environmental impacts below the threshold level of significance, such that an EIS was no longer required. WAC 197–11–350(5).

Anderson, at 304-05 (footnote omitted). Thus, the impacts had been clearly identified, as well as the needed mitigation; the submission of the final mitigation plan would merely reflect them. This case is not relevant to the present case.

In the Shoreline Hearings Board case cited by Respondents, *Overaa v. Bauer*, SHB No. 10-015 (2011), the Board addressed a situation in which future studies, included as conditions in an MDNS, were not expected to reveal any new significant adverse impacts. The Board concluded that the county had the information necessary to determine whether the project would have significant environmental impact at the time it issued the DNS, and that the study would not provide pertinent information. *Id.* at CL 18. The Board, in fact, remanded the MDNS and ordered the county to either modify or eliminate the future study condition because the results were not necessary for the threshold determination. *Id.* at Order.

Here, unlike *West 514*, there has been no prior EIS completed to provide information regarding the impacts from this level of increase in rail and vessel traffic. Unlike *Anderson*, there have been no major changes made to the proposal prior to the issuance of the MDNS to reduce the identified impacts. Unlike *Overaa*, the RTIA and VTIA studies are fundamental and vital to the determination of whether the rail and vessel increases that will result from these two projects, individually and cumulatively, will create significant adverse impacts.

The Co-leads argue as a factual matter that they determined that there were not going to be probable significant adverse impacts from the increase in rail and vessel traffic from these two proposals. They state they were ". . . told by the subject matter experts, the Port, and the rail company, that there would be no probable significant impacts." They explain that they required the RTIA and VTIA studies, merely to ". . . verify that there would be no probable significant impacts and also, for safety and clarity, to document the information on how things would be done in Grays Harbor." Toteff Decl., ¶¶ 5, 6. While the Co-leads may have reached the conclusion that there was not likely to be more than a moderate environmental impact from 520 additional vessel transits per year in Grays Harbor, and 973 unit trains per year to the Port of Grays Harbor, they did not share the basis for that conclusion in any of the SEPA documents. Further, the Co-leads' after-the-fact explanation as to why they required the preparation of the RTIA and VTIA, after they had already concluded there would not be impacts, is not supported by the required scope of the RTIA and VTIA analysis. The scoping documents for the RTIA and VTIA clearly focus on evaluating potential adverse impacts. Toteff Decl., Ex. B, Contract and Scope of Services document for Westway, p. 1, 2 ("Two of the mitigation measures required in

the MDNS as currently published includes the need to further evaluate potential adverse impacts of the proposal by conducting a Rail Transportation Impact Analysis (RTIA) and a Vessel Transportation Impact Analysis (VTIA) that would identify potential transportation impacts for both modes of travel in and around Grays Harbor.") The objective of Task 1 is stated as "Evaluate the potential adverse impacts to existing railroad and roadway traffic along the rail route resulting from projected rail traffic as defined by the traffic table provide above. The analysis and potential mitigation measures included in the analysis will be for trains during both peak and non-peak traffic hours along the rail route from Centralia to the facility." *See also*, Toteff Decl., Ex. A, Contract and Scope of Services document for Imperium.

Based on the information in the MDNS issued for the Westway project, the Co-leads' factual statements in the declarations filed in support of these motions, and the responsibilities imposed on SEPA responsible officials when making a threshold determination, the Board is left with a firm and deep conviction that the Co-leads clearly erred in concluding that there would not be probable significant impacts to the environment from the increases in rail and vessel traffic prior to receipt of the RTIA and VTIAs. The Board grants summary judgment to QIN on those parts of issue A.1 and A.6 pertaining to the lack of pre-approval analysis of rail and shipping impacts.

4. SEPA analysis of other individual and cumulative impacts and failure to require pre-approval analysis (Remainder of Issues A.1and A.6)

The Petitioners raise other factual challenges to the MDNS. They contend that the Westway MDNS failed to adequately consider the cumulative risks posed by the Westway and

Imperium proposals, and to require sufficient pre-approval analysis of, potential impacts from oil spills, seismic and tsunami events, greenhouse gas emissions, impacts on marine life, impacts on recreational uses, and impacts to archeological and cultural resources. If the Board were not invalidating the MDNS on other grounds, these challenges would need to proceed to an evidentiary hearing. They are highly factual, and there has been a sufficient showing made of disputed issues of fact to require a hearing. However, because the Board is invalidating the MDNS and remanding it back to Ecology and the City, it is unnecessary to conduct a hearing on the remaining issues pertaining to the MDNS.

Although these matters will not proceed to hearing at this time, the Board notes that there are areas of the existing SEPA review, in addition to the failure to consider cumulative impacts from USD, and the failure to require the RTIA and VTIA prior to the issuance of the MDNS, that it finds troubling. In particular, the current record before the Board presents troubling questions of the adequacy of the analysis done regarding the potential for individual and cumulative impacts from oil spills, seismic events, greenhouse gas emissions, and impacts to cultural resources prior to making the threshold determination. The pre-threshold determination analysis of cultural resources, for example, appears incomplete. Despite information from the Department of Archeology and Historic Preservation (DAHP) that the project area has a high potential for containing archeology resources, and their recommendation that a professional archaeological survey of the project area should occur before ground breaking activities, the MDNS reaches the conclusion that a condition requiring construction to be halted in the vicinity of any potentially historical objects or other resources found during construction, adequately

mitigates any potential for impact. Boyles Decl., Ex. C, p. 9. While the Co-leads argue that the information from DAHP was conclusory, and that prior construction on the site revealed no historic or cultural resources, they cite no evidence for this statement. Ecology and City's Reply, pp. 7-8. The Co-leads might have been able to prove at hearing that there would not be a potential for impact to archeological resources, however, the Board is not convinced by the record on summary judgment alone that this is the case.

The Board also encourages the inclusion of more analysis in the SEPA documents, so that the public and future reviewing bodies can be confident that the Co-leads analyzed all potential impacts. As an example, the Co-leads acknowledge that different types of crude oil could have different characteristics when spilled, and that the MDNS does not analyze or address the difference. Ecology and City Response, p. 10. They then go on to explain in briefing that they relied on current regulatory requirements regarding oil spills to address any potential impacts from any types of spills. *Id.* at 10-14. While the Co-leads might have been able to prove at a hearing that other regulatory requirements are sufficient to mitigate for impacts from spills of any type of oil, the Co-leads do not provide this information in the SEPA documents themselves.[13] Although SEPA may not require "explicit" mention of every minor potential impact in a decision document, as argued by the Co-leads, certainly an impact with the potential to "wipe out generation(s) of a livelihood of work they [the shellfish folks or agricultural

[13] As is apparent from record on summary judgment, the Ecology Spills Program had concerns. See 3rd Boyles Decl. Exs. II, Washington 's oil movement evolution: Talking points 02-12-2103 (draft) at 4-5, Ex. JJ, Email from Dale Jensen, Ecology Spills Program, Re: Aberdeen media on Crude By Rail Public Meeting -250 attend meeting (Feb. 1, 2013): "Crude or refined products have not been moved out of the Grays Harbor in the large quantities as is being proposed . . .ever. . . Crude oil . . . no matter the makeup, behaves differently than the refined product . . . ."

families, or tribes and local communities] have enjoyed and are skilled to do" should be explicitly addressed. 3rd Boyles Decl., Ex. JJ.

5. Consideration of alternatives, reliance on existing laws, and adequate conditions (Issue A.3).

The Petitioners attack the validity of the Westway MDNS on two other legal grounds.[14] First, they contend that the MDNS is invalid because it does not consider alternatives to the proposal. Secondly, they contend that it incorrectly relies on state and federal laws as mitigation. The Respondents move for summary judgment on both of these contentions.

The Respondents argue that there is no requirement in SEPA that SEPA officials consider alternatives to a proposal prior to preparation of an EIS. See RCW 43.21C.030(2)(c)(iii) (requiring in every EIS, consideration of alternatives to the proposed action.) Neither the Environmental Petitioners nor QIN cites to any such requirement, nor does the Board know of any. In fact, QIN concedes this portion of Issue A.3. *See* QIN's Response Brief, p. 10, n. 9. The Board grants summary judgment to the Respondents on this issue, noting that this does not mean it is inappropriate to consider alternatives at the threshold determination stage – just that it is not explicitly required by SEPA.

The second contention, that the Co-leads incorrectly relied on state and federal law as mitigation, is not as straightforward. The Respondents correctly state, and QIN concedes, "Reliance on state and federal legal requirements in an MDNS plainly is appropriate." City and Ecology's Motion, p. 13, citing WAC 197-11-330(1)(c)(in making threshold determination, lead

[14] The third part of issue A.3 is whether the MDNS is adequately conditioned and/or mitigated. Because the Board has invalidated the MDNS on other grounds, and therefore the SEPA process will need to redone, the Board concludes that the question of the validity of these conditions on the MDNS is now moot.

agency should consider mitigation required by other environmental laws); QIN response brief, p. 11. The issue, however, as recognized by all parties, is whether the Co-leads supported their reliance on existing laws and regulations with sufficient analysis. The Board concludes that the evaluating agency cannot "simply list generally-applicable laws that a project must by law comply with and, without more, conclude that compliance will be sufficient to render impacts insignificant." QIN Response Brief, p. 12.

Here, the MDNS does more than just list the applicable laws. A good example of this can be seen in section 7 of the MDNS where spill prevention is addressed. Boyles Decl., Ex. C., pp. 6-8. The MDNS states that Washington State has strong oil spill prevention, preparedness and response regulations, and then goes on to generally discuss those requirements. It does not, however, address the potential impacts from oil spills from these proposals (including quantities and types of oil, locations of potential spills, and impacts to resources). In their summary judgment material, Ecology and the City provide more information regarding the information the Co-leads considered in determining that existing laws were adequate mitigation for the potential for impacts from oil spills. 2nd Butorac Decl., ¶¶ 8-10. This analysis, however, is absent from the SEPA documentation.

Here again, the Board concludes that a factual hearing would be necessary to rule on whether the MDNS's extensive reliance on existing laws was appropriate. When, in response to this opinion, the Co-leads take a second look at the SEPA MDNS, the Board encourages the Co-leads to identify potential impacts and then analyze how existing laws will mitigate for those impacts. The SEPA documents themselves should reflect this analysis.

The Board grants summary judgment to Respondents on the legal questions of whether alternatives must be analyzed in a threshold determination and whether an MDNS can rely on existing laws for mitigation. However, on the factual question of whether the Westway MDNS inappropriately relied on existing laws without sufficient analysis, the Board declines to rule, given the invalidity of the MDNS on other grounds.

6. Compliance with RCW 88.40.025 (Issue A.7 and B.4)

RCW 88.40.025 requires a facility to demonstrate financial responsibility in an amount determined by Ecology to compensate the affected state and local counties and cities for damages from a worst case spill of oil into the waters of the state. The statute directs Ecology to consider various factors such as the amount of oil that could be spilled, the costs of response, damages, operations at the facility, and affordability of financial responsibility. RCW 88.40.025. RCW 88.46.040(2)(a) requires that a spill prevention plan include any applicable state or federal financial responsibility requirements.

Issues A.7 and B.4 pose the question of whether the MDNS and the SSDP for the Westway facility are invalid because neither requires that Westway demonstrate financial responsibility. The Respondents move for summary judgment on these issues, contending that financial responsibility guarantees are unrelated to potential environmental impacts, and that the SMA and local shoreline master program (SMP) do not require evaluation of this statute when reviewing an SSDP.

In response, Petitioners point out that the MDNS relies, in part, on the requirement that Westway comply with an Ecology-approved spill prevention plan as mitigation for the potential

impacts from oil spills. The statute requires that a spill prevention plan show compliance with financial responsibility requirements. *See* RCW 88.46.040(2)(a). They contend that this means that Westway must show financial responsibility as part of the SEPA process and that its failure to do so to date invalidates the MDNS.

After consideration of Petitioners arguments, the Board concludes that an appropriate evaluation of SEPA impacts by the Co-leads did not require Westway to make a showing of compliance with RCW 88.40.025. As pointed out by the Respondents, the spill prevention plan is not yet required, and therefore it is premature to contend that Westway is out of compliance with one of the plan's requirements by not having made a showing of financial responsibility. If Westway fails to establish a showing of financial responsibility at the time it submits a spill plan, it will be subject to enforcement and penalty sanctions. WAC 173-180-670, 173-180-065. Spill plans, along with the required showing of financial responsibility, will be required before the facilities can begin operations. Butorac Decl., Ex. G, p. 3. Importantly, as pointed out by Ecology, regardless of any financial assurances, a responsible party is strictly liable for unlimited oil spill costs and damages. RCW 90.56.360, 370.

Further no party points to any requirements in the SMA or local SMP requiring a showing of compliance with RCW 88.40.025 prior to approval of an SSPD, and the Board is not aware of any such requirement. The Board grants summary judgment to Respondents on Issues A.7 and B.4.

7. Compliance with Ocean Resources Management Act (Issues A.8 and B.3)

The Ocean Resources Management Act (ORMA), ch. 43.143 RCW, adopted in 1989, requires local governments adjacent to certain defined coastal waters to incorporate policies, guidelines, and project review criteria for "ocean uses" into their shoreline master programs. Ecology has implemented ORMA through the adoption of WAC 173-26-360, which includes a definition of the critical term "Ocean uses". WAC 173-26-360(3) provides:

> Ocean uses defined. Ocean uses are activities or developments involving renewable and/or nonrenewable resources that occur on Washington's coastal waters and includes their associated off shore, near shore, inland marine, shoreland, and upland facilities and the supply, service, and distribution activities, such as crew ships, circulating to and between the activities and developments. Ocean uses involving nonrenewable resources include such activities as extraction of oil, gas and minerals, energy production, disposal of waste products, and salvage. Ocean uses which generally involve sustainable use of renewable resources include commercial, recreational, and tribal fishing, aquaculture, recreation, shellfish harvesting, and pleasure craft activity.

Hoquiam's Shoreline Master Program includes provisions mirroring these statutory and regulatory requirements. HMC 11.04.030(20), 11.04.180(6).

Ocean uses, as defined in WAC 173-26-360(3), are "activities or developments" involving "renewable/and or non-renewable resources that occur on Washington's coastal waters." The definition goes on to clarify that "Ocean uses involving nonrenewable resources include such activities as extraction of oil, gas and minerals, energy production, disposal of waste products, and salvage." From this definition, it is clear that Ecology understands that the Legislature designed ORMA to address facilities directly engaged in resource exploration and extraction activities in Washington waters.

As further clarification of this purpose, the regulation defines specific categories of ocean uses. "Oil and gas uses and activities" are those that "involve the extraction of oil and gas resources from beneath the ocean." WAC 173-26-360(8). Ocean uses that are considered "transportation uses" are those that "originate or conclude in Washington's coastal waters or are transporting a nonrenewable resource extracted from the outer continental shelf off Washington." WAC 173-26-360(12). The proposed Westway terminal does not fall within these definitions. Westway does not intend to extract or otherwise service the extraction of crude oil or any other resources *from Washington waters*. It is not transporting oil from *beneath the ocean*. Rather, the Project will facilitate the movement of crude oil from and to areas outside the Washington border.

Petitioners argue for a very broad interpretation of "ocean uses" based on the policy goals of ORMA. Their proposed interpretation, however, would expand ORMA's reach and require ORMA analysis for every transportation project in ports along the Washington coast, regardless of whether those projects transport extracted materials from the outer continental shelf. The Petitioners offer no evidence that ORMA, which has been in place in Washington for 24 years, has ever been interpreted in this manner nor that this interpretation is consistent with its stated purposes and administration by the agency primarily responsible for its administration, Ecology.

The critical term "ocean uses" has been defined by Ecology, the agency charged with implementation of ORMA through the SMA, in WAC 173-26-360. The City has further implemented this definition through its SMP. The Board must apply that regulatory definition. Based on the plain language of WAC 173-26-360, the Westway facility is not a facility involved

in an "ocean use" as defined by Ecology regulation. WAC 173-26-360. *See also* HMC 11.04.065, 11.04.180(6).

Because Westway is not proposing an ocean use, its facility is not subject to the provisions of ORMA, through the provisions of the SMA and the local SMP. Further, there is no requirement that the SEPA Co-leads consider the provisions of ORMA when reaching a threshold determination for the same reason: Westway proposes no ocean use. The Board grants summary judgment to the respondents on issues A.8 and B.3.

8. Issue A.9, and B.8, 9 and 10 are now moot

Issue A.9 raises challenges to procedural aspects of the SEPA MDNS, such as notice, consideration of comments, and obtaining sufficient information. Because the Board is invalidating the MDNS on other grounds, and the City and Ecology will need to go through another SEPA process in adopting a new threshold determination, a challenge to the process on the existing MDNS is now moot. Similarly, Issue B.10, which raises challenges to the SSDP based on alleged procedural errors, is also moot. Other challenges to the MDNS and SSDP's validity based on compliance with the SMA, the local SMP, the Coastal Zone Management Act, and critical areas ordinances are also moot because of the invalidity of the MDNS on other grounds.[15] The Board declines to address these moot issues.

Based on the foregoing analysis, the Board enters the following:

[15] The Board does note that the Coastal Zone Management Act is applicable only to projects requiring a federal license or permit. 16 U.S.C. § 1456(c)(3)(A). There is no indication in the record that such federal authorization is required for the Westway project.

ORDER

1. Summary judgment is granted to Petitioners on Issues A.1 and parts of A.6 as set forth in this Order.

2. Summary judgment is granted to Respondents on parts of Issue A.3, and all of issues A.7, A.8, B.3, and B.4.

3. The City's approval of the Westway SSDP is reversed based on the invalidity of the underlying MDNS. This matter is remanded to the City for further SEPA analysis consistent with this opinion.

SO ORDERED this 12th day of November, 2013.

SHORELINES HEARINGS BOARD

Tom McDonald
TOM MCDONALD, Chair,

Kathleen D. Mix
KATHLEEN D. MIX, Member

J. Marchioro
JOAN MARCHIORO, Member

Pamela Krueger
PAMELA KRUEGER, Member

-See Dissent and Partial Concurrence-
GRANT BECK, Member

-See Dissent and Partial Concurrence-
JOHN BOLENDER, Member

Kay M. Brown, Presiding
Administrative Appeals Judge

SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

QUINAULT INDIAN NATION, FRIENDS OF GRAYS HARBOR, SIERRA CLUB, SURFRIDER FOUNDATION, GRAYS HARBOR AUDUBON, and CITIZENS FOR A CLEAN HARBOR, Petitioners, v. CITY OF HOQUIM, STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY and WESTWAY TERMINAL CO. LLC, Respondent. and IMPERIUM TERMINAL SERVICES, LLC, Respondent Intervenor.	SHB No. 13-012c PARTIAL CONCURENCE and DISSENT

The majority granted summary judgment to the QIN on issue 1 as identified in the pre-hearing 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)?

We disagree with the majority on this decision for the following reasons.

Summary judgment is proper only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c), *Peterson v. Groves*, 111 Wn. App. 306, 310, 44 P.3d 894 (2002). Summary judgment is appropriate if reasonable minds could reach but one conclusion from all the evidence. *Harberd v. City of Kettle Falls*, 120 Wn. App. 498, 507, 84 P.3d 1241 (2004), *rev. denied* 152 Wn. 2d 1025 (2004). Further, the decision of the Responsible Official is entitled to substantial weight on appeal. RCW 43.21C.075 (3)(d). As stated by the majority, "[t]he Board reviews the City and Ecology's SEPA threshold determination under a 'clearly erroneous' legal standard . . . and [a] 'finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" Majority decision, p. 15 (*citations deleted).*

Here, the City of Hoquiam and Ecology acted as co-lead agencies on the SEPA process and issuance of the MDNS. Ecology is an agency with environmental expertise in the areas of air quality, water quality, and energy production, transmission, and consumption. See WAC 197-11-920. The City and Ecology concluded based on their review of the facts that:

> The U.S. Development project was still in a conceptual stage with significant differences in the various projects, as noted in the April 23, 2013 letter from EFSEC. Ecology also consulted with the Port of Grays Harbor officials, asking whether they believed U.S. Development was committed to a project at the Port; the Port officials replied that the project was not certain.

2nd Butorac Decl., ¶ 13 and Ex. E.

Reasonable 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. Therefore, in our opinion, this issue should proceed to a factual hearing. We do not think that summary judgment on this issue is appropriate.

For the same reasons (contested issues of fact and deference to the SEPA-responsible official), we do not think that summary judgment on the issue of whether the issuance of a Mitigated Determination of Non-significance was clearly erroneous due to the potential cumulative impacts from increases to rail and vessel traffic from the Westway and Imperium projects was appropriate.

We do concur with the majority, however, on their analysis and conclusion that the correct standard for evaluation of cumulative impacts under SEPA is whether the other project is reasonably foreseeable. We also concur with the majority's analysis and conclusions on Issues A. 7 and B.4, pertaining to financial responsibility, and Issues A.8 and B.3, pertaining to ORMA.

DATED this 12th day of November, 2013.

SHORELINES HEARINGS BOARD

GRANT BECK, Member

JOHN BOLENDER, Member