



STATE OF WASHINGTON
ENVIRONMENTAL AND LAND USE HEARINGS OFFICE

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Re: **SHB NO. 13-012c**
QUINULT 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:



Counsel for Westway Terminal Co. LLC (Westway) has requested a conference to discuss the likely timing for issuance of the Board's order on the cross motions for summary judgment. Westway explains that the basis for this request is its desire to begin planning for the Board's forthcoming order and its lack of information regarding the basis for the Board's forthcoming decision. In lieu of the requested conference, through this letter I am providing you with more information regarding the basis for the Board's forthcoming decision. **This letter, like the prior letter, does not constitute the Board's final decision on the motions, and is not an appealable order pursuant to RCW 90.58.180(3) and 34.05.542.**

Please be advised that, subject to drafting the Order and the Board's final review, the forthcoming majority order on summary judgment will grant summary judgment to the Quinault Indian Nation (QIN) on Issue A.1. A majority of the Board will conclude that the Mitigated Determination of Non-Significance (MDNS) is clearly erroneous because the City of Hoquiam (City) and the Department of Ecology (Ecology) failed to consider the cumulative impacts from the U.S. Development Group (USD) terminal along with their consideration of impacts from Westway and Imperium. The majority will conclude that the governing legal standard for this issue is whether the USD project is reasonably foreseeable, and will go on to conclude that based on the uncontroverted record on summary judgment, the USD project is reasonably foreseeable.

A majority of the Board will also conclude that the MDNS is clearly erroneous because of its failure to adequately evaluate the potential for impacts from increases to rail traffic and vessel traffic as a result of these three proposals. The record on summary judgment supports the conclusion that the City and Ecology improperly deferred consideration of these impacts to after the issuance of the MDNS and the approval of the permits. The responsible officials did not require the applicants to provide a Rail Transportation Impact Analysis (RITA) and a Vessel Traffic Impact Analysis (VITA) prior to the issuance of the SEPA MDNS.

On Issue A.3, a majority of the Board will conclude that consideration of alternatives is not required at the threshold determination stage of a State Environmental Policy Act (SEPA) review, and therefore will grant summary judgment to Respondents on this limited portion of Issue No. A.3. A majority will conclude that the second part of this issue (incorrect reliance on existing laws as mitigation) involves contested issues of material fact and therefore is not properly the subject of summary judgment. However, since the Board will be invalidating the MDNS on the basis of Issue A.1, the Board will provide additional guidance on this issue to the parties. The Board will inform the parties that while it is permissible to rely on existing laws to provide mitigation for impacts, the SEPA documents must address how an existing law will mitigate for particular potential impacts. The Board will also be concluding that consideration of the third part of Issue A.3, whether the conditions on the application were adequate, is now premature based on the invalidity of the SEPA MDNS.

The Board's decision on Issue A.1 will address parts of Issue A.6, such as the need for pre-approval analysis of shipping and train impacts. A majority of the Board concludes that the remainder of this issue involves contested issues of fact. However, since the Board will be

invalidating the MDNS on the basis of Issue A.1, the Board will go on to provide additional guidance on this issue to the parties. A majority of the Board will inform the parties that the SEPA analysis, as presented in the record on summary judgment, does not appear sufficiently robust pertaining to seismic hazards, archeological and cultural resources, and oil spill hazards.

A majority of the Board will be granting summary judgment to Respondents on Issues A.7 and B.4. The majority will conclude that it is not necessary to make a showing of financial responsibility at the point of either completion of the SEPA threshold review process or issuance of a shoreline permit.

On Issues A.8 and B.3, a majority of the Board will be granting summary judgment to Respondents. A majority will conclude that the proposals at issue do not involve an ocean use for purposes of compliance with RCW 43.143 (Ocean Resources Management Act) based on the definition of "ocean use" contained in WAC 173-26-360(3).

On Issue A.9, a majority of the Board concludes that this issue is now moot because the Board will be invalidating the MDNS on the basis of Issue A.1, and therefore the Board will not address this issue.

A majority of the Board declines to address Issues B.8 and B.9 based on the Board's decision on Issue A.1.

On issue B.10, a majority of the Board concludes that this issue is now moot and the Board will not address it because the Board will be invalidating the MDNS on the basis of Issue A.1.

I trust that this information will help you prepare in advance for the Board's forthcoming order. Please note that it will be several weeks before the Board is able to issue its order, due to the complexity of the issues raised in this case and the press of other cases. If you have questions, please do not hesitate to call the Environmental and Land Use Hearings Office at 360-664-9160.

Sincerely,



Kay M. Brown, Presiding
Administrative Appeals Judge

KMB/jb/S13-012c

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 10/8/13, at Tumwater, WA

