No. 92552-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

Petitioners,

v.

CITY OF HOQUIAM, WASHINGTON STATE DEPARTMENT OF ECOLOGY, IMPERIUM TERMINAL SERVICES LLC, WESTWAY TERMINAL COMPANY LLC, and WASHINGTON SHORELINES HEARINGS BOARD,

Respondents.

RESPONDENT IMPERIUM TERMINAL SERVICES, LLC'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Respondent Imperium Terminal Services, LLC ("Imperium") files this Answer in opposition to the Petition for Review ("Petition") filed by Petitioners Quinault Indian Nation, Friends of Grays Harbor, Sierra Club, Grays Harbor Audubon, and Citizens for a Clean Harbor (collectively "Petitioners"). Petitioners ask this Court to adopt a novel and overly-broad interpretation of the Ocean Resources Management Act ("ORMA")[1] that would extend ORMA's reach to facilities and projects that the Legislature never intended the regulate under ORMA. Importantly, in the twenty-five years since the Legislature's adoption of ORMA, no agency or court has ever interpreted the statute in the manner advanced by Petitioners. Indeed, the Department of Ecology, the agency charged with enforcing ORMA and adopting regulations to implement ORMA, has rejected the Petitioners' interpretation, as did the Shorelines Hearings Board ("SHB"). Moreover, the Legislature has had many opportunities to amend the statute to reject Ecology's regulatory implementation of ORMA, but it has chosen not to do so. This long period of silence is strong evidence that the Legislature has acquiesced to Ecology's interpretation and enforcement of ORMA. Finally, the Court of Appeals also rejected Petitioners' interpretation in its well-reasoned decision. The Court of Appeals decision correctly deferred to Ecology's interpretation of ORMA and rejected Petitioners' attempt to transform ORMA into

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[1] Chapter 43.143 RCW.

something the Legislature clearly did not intend it to be. Thus, the Petition does not warrant review by this Court.

II. STATEMENT OF THE CASE

Imperium adopts the Statement of the Case set forth in the Answer filed by Ecology. In addition, Imperium provides the following overview of the legislative history surrounding ORMA.

During the late 1980s, public concern over proposed oil and gas drilling off the Washington coast resulted in the adoption of a bill titled the "Ocean Resources Management Act" (the "ORMA Bill").[2] The ORMA Bill included two different types of provisions: financial responsibility provisions, which were adopted in Sections 1-7 of the bill;[3] and project review provisions, which were adopted in Sections 8-11 and Section 13 of the bill.[4] Only the project review provisions are at issue in the Petition.

Contrary to the Petitioners' speculation that the legislation was a response to oil spills that had occurred in the Pacific Ocean, the primary impetus for ORMA was the impending "lease sale" of ocean areas off the coast of Washington by the federal Mineral Management Service (MMS).[5] In the late 1980s, MMS was planning to provide for such a lease sale in

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[2] H.B. 2242, Laws of 1989, 1st Ex. Sess., ch. 2 ("ORMA Bill"), §§ 1-7 (codified at RCW 43.143.005(1)), included in the Appendix to Petitioners' opening brief before the Court of Appeals ("Petitioners' Appendix) at 57-63. Imperium, like the Petitioners and the SHB, use the acronym "ORMA" to reference the project review provisions of the ORMA Bill (currently codified at Chapter 43.143 RCW) as distinguished from the ORMA Bill's financial responsibility provisions, which are no longer at issue in this appeal.

[3] ORMA Bill, §§ 1-7 (codified at Chapter 88.40 RCW).

[4] *Id.*, §§ 8-11 (codified at Chapter 43.143 RCW), § 13 (codified at RCW 90.58. 195).

[5] *See* Petitioners' Appendix at 65-68.

April of 1992.[6] During this time, there was a "dispute as to the extent to which" any exploration, development, and production activities under such a lease sale were required to be consistent with Washington law pursuant to the consistency requirements of the federal Coastal Zone Management Act ("CZMA").[7] "In 1987, due to concern over the upcoming lease sale, the Washington Legislature and the Governor took several actions,"[8] including steps that led to the adoption of ORMA's project review criteria.

In adopting ORMA's project review provisions, the Legislature took several steps aimed at addressing the potential impacts of oil and gas drilling and related activities off the Washington coast. First, the Legislature adopted a temporary moratorium on the leasing of Washington's tidal or submerged lands for the purpose of oil or gas exploration, development, or production, which was later made permanent.[9] Next, the Legislature established review criteria, later codified in RCW 43.143.030, for certain "[u]ses or activities that require federal, state, or local government permits or other approvals and that will adversely impact renewable resources, marine life, fishing, aquaculture, recreation, navigation, air or water quality, or other existing ocean or coastal uses."[10] The Legislature also required Ecology to adopt "ocean use guidelines" and required coastal local governments to amend their

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[6] *See Id.* at 67.
[7] *See Id.*
[8] *See Id.*
[9] ORMA Bill, § 9(2) (codified at RCW 43.143.010(2)).
[10] *Id.*, § 11(2) (codified at RCW 43.143.030(2)).

Shoreline Master Programs ("SMPs") to implement ORMAs project review provisions by imposing review criteria for certain uses while excluding other uses from regulation (the "Ocean Use Guidelines").[11]

Ecology adopted the Ocean Use Guidelines in 1991.[12] The Ocean Use Guidelines were recodified as WAC 173-26-360 in 2000 and amended in 2011.[13] In the twenty-plus years since the adoption of the Ocean Use Guidelines, Ecology has never applied ORMA or the Ocean Use Guidelines to land-based projects like the Imperium Project and the Westway Project, or to any other non-extractive marine transportation activities like those associated with the Imperium Project and the Westway Project. As the SHB noted in its Order,[14] the Petitioners offered "no evidence that ORMA, which has been in place in Washington for 24 years, has ever been interpreted" in the broad manner asserted by Petitioners.[15]

ORMA has been amended three times since it was passed by the the Legislature in 1989: in 1995, 1997, and 2013. In 1995, the Legislature amended ORMA to defer until the year 2000 its decision whether to

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[11] *Id.*, § 13 (codified at RCW 90.58.195).
[12] WSR 91-10-033 (Order 91-08), § 173-16-064, filed 4/24/91, effective 5/25/91 (now codified at WAC 173-26-360). Also in 1991, Hoquiam amended its SMP to include ocean use regulations consistent with ORMA and Ecology's Ocean Use Guidelines. Hoquiam Municipal Code (HMC), 11.04.065 (Ocean use regulations). See also HMC 11.04.030(13)-(20) (related definitions).
[13] WSR 00-24-031 (Order 95-17a), filed 11/29/2000; WSR 11-05-064 (Order 10-07), filed 2/11/11.
[14] AR 2379-2421 (*Quinault Indian Nation et al. v. City of Hoquiam et al.*, SHB No 13-012c, Amended Order on Summary Judgment (December 9, 2013) (the "Order"). Citations to "AR" are to the Bates-stamped pages of the certified administrative record before the SHB.
[15] Order, p. 41.

further extend or make permanent ORMA's leasing moratorium.[16] In 1997, the Legislature amended ORMA to make the moratorium permanent.[17] In 2013, the Legislature amended ORMA to establish the Washington coastal marine advisory council in the Governor's executive office.[18] None of these ORMA amendments questioned or amended Ecology's consistent enforcement of ORMA's project review provisions.

Nor has the Legislature amended ORMA to incorporate or implement the interpretation advanced by Petitioners in other legislative acts addressing spill risks. For example, in 1990, the year after ORMA was passed, the Legislature passed a bill titled "Oil and Hazardous Substance Spills" that was intended to address the issue of "water borne transportation as a source of supply for oil and hazardous substances" in general, and the risk of spills from "vessels transporting oil into Washington" in particular.[19] The bill required, among other things, the preparation of contingency plans for certain facilities and vessels and the review of such plans by Ecology. That bill was amended in 1991, 2004, 2005, 2010, and 2015, to include numerous other provisions intended to address spill risks.[20] In 2015, the Legislature amended the findings in the bill to specifically address "[t]he movement of crude oil through rail

[16] S.B. 5544, Chapter 339, Laws of 1995, § 1.
[17] H.B. 1189, Chapter 152, Laws of 1997, §§ 1-2.
[18] E.S.B. 5603, Chapter 318, Laws of 2013, §§ 1-2.
[19] H.B. 2494, Chapter 116, Laws of 1990.
[20] H.B. 1027, Chapter 200, Laws of 1991; S.B. 6641, Chapter 226, Laws of 2004; S.B. 5432, Chapter 304, Laws of 2005; S.B. 2617, Laws of 2010, § 71 et seq; H.B. 1149, Chapter 274, Laws of 2015.

corridors and over Washington waters."[21] Thus, despite the fact that the SHB issued its Order rejecting Petitioners' interpretation of ORMA in 2013 and this case was pending before the Court of Appeals during the 2015 legislative session, the Legislature chose during that session to address the risk of oil spills from "[t]he movement of crude oil through rail corridors and over Washington waters" through other, non-ORMA legislation. Thus, the Legislature chose not to amend ORMA or adopt any other legislation that would have disturbed Ecology's longstanding application of ORMA or the SHB's recent decision with respect to projects involving such movement of crude oil.

III. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

Imperium joins Ecology in its Answer to the Petition. In addition, Imperium offers the following further reasons why this Court should not accept review of the Petition.

Petitioners' request for review relies exclusively on RAP 13.4(b)(4), which provides that review will be accepted "[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court." Petitioners assert that this criterion is met because the Court of Appeals decision "undercuts ORMA's protections that have been in place for many years" and "because there is substantial public interest in maintaining protections for Washington's coastal waters, ensuring ORMA continues to apply to evolving threats, and giving force

[21] H.B. 1149, Chapter 274, Laws of 2015, §1.

to the legislative intentions behind ORMA."[22] As further explained below, however, ORMA was never intended to provide the types of "protections" that Petitioners incorrectly assert "have been in place." Thus, Petitioners cannot demonstrate that the case involves an issue of substantial public interest.

Because the Court of Appeals decision is entirely consistent with ORMA, the Petition does not raise any issue of public interest that warrants review by this Court. The Court should defer to Ecology's and the SHB's reasonable interpretations of ORMA, affirm the SHB and the Court of Appeals, and reject the Petitioners' boundless interpretation, which would have the absurd result of requiring ORMA analysis for every transportation project in ports along the Washington coast.

A. The Court of Appeals Decision Is Consistent with the Interpretation of the Agency Charged with ORMA's Implementation.

For the reasons explained in Ecology's Answer, Ecology's interpretation of ORMA is entirely reasonable and appropriate when viewed in light of the statutory and regulatory framework as a whole.

Importantly, the Administrative Procedure Act ("APA")[23] and the doctrine of contemporaneous construction require the Court to give "great weight" to agency interpretations of ORMA and the Ocean Use Regulations.[24] Under the APA's error of law standard, the court accords

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[22] Petition at 2, 8.
[23] Chapter 34.05 RCW.
[24] *Verizon Nw., Inc. v. Washington Employment Sec. Dep't*, 164 Wn.2d 909, 915-16, 194 P.3d 255, 260 (2008); *Stroh Brewery Co. v. State, Dept. of Revenue*, 104 Wn. App. 235,

substantial weight to an agency's interpretation of a statute within its expertise, and the court also gives substantial weight to an agency's interpretation of rules promulgated by the agency.[25] This APA standard follows the doctrine of contemporaneous construction, which accords "great weight . . . to the contemporaneous construction placed upon it by officials charged with its enforcement."[26] The Washington Supreme Court has specifically held that "Ecology's interpretation of relevant statutes and regulations . . . is entitled to great weight."[27] To sustain the agency's interpretation, the Court need only find that the agency's interpretation was "sufficiently rational" to preclude the court from substituting its judgment for that of the agency.[28]

242, 15 P.3d 692 (2001).

[25] *Verizon Nw.*, 164 Wn.2d at 915 (citing *Macey v. Department of Employment Security*, 110 Wn.2d 308, 313, 752 P.2d 372 (1988); *Washington State Liquor Control Board v. Washington State Personnel Board*, 88 Wn.2d 368, 379, 561 P.2d 195 (1977)).

[26] *Stroh Brewery*, 104 Wn. App. at 242 (citing *Newschwander v. Board of Trustees of the Wash. State Teachers' Retirement System*, 94 Wn.2d 701, 711, 620 P.2d 88 (1980)). *See also Mall, Inc. v. City of Seattle*, 108 Wn.2d 369, 377-78, 739 P.2d 668 (1987) ("It is a well established rule of statutory construction that considerable judicial deference should be given to the construction of an ordinance by those officials charged with its enforcement.").

[27] *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659, 672 (2004). *See also Jenkins v. Washington State Dep't of Soc. & Health Servs.*, 160 Wn.2d 287, 307, 157 P.3d 388, 397 (2007) (quoting *Skandalis v. Rowe*, 14 F.3d 173, 178 (2d Cir.1994)) ("When an agency construes its own regulations, [judicial] deference is particularly appropriate.")

[28] *Skamania Cnty. v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 43, 26 P.3d 241, 247 (2001) (citing *Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc.*, 470 U.S. 116, 125, 105 S.Ct. 1102, 84 L.Ed.2d 90 (1985)). *See also Puget Soundkeeper Alliance v. State, Dep't of Ecology*, 102 Wn. App. 783, 787, 9 P.3d 892, 894 (2000) (citing *Seatoma Convalescent Ctr. v. DSHS*, 82 Wn. App. 495, 518, 919 P.2d 602 (1996), rev. denied, 130 Wn.2d 1023, 930 P.2d 1230 (1997)) (even though an agency's interpretation of a statute is not binding on the court, the court "will uphold it if it is a plausible construction").

Here, ORMA's subject matter is clearly within the expertise of Ecology, and the Legislature expressly delegated to Ecology and local governments the authority to adopt implementing regulations under the SMA that define which types of projects should be subject to scrutiny under ORMA.[29] The Court should give deference to the agencies' interpretations of their own regulations (Ecology's Ocean Use Guidelines and the City of Hoquiam's ORMA regulations in its SMP).[30] Moreover, because ORMA is implemented under the SMA, the statute is also within the expertise of the SHB.[31] The Court should give substantial weight to the interpretations of these three agencies, all of which concluded that ORMA does not apply to the projects at issue in this appeal. These agency interpretations are controlling because they are not "plainly erroneous or inconsistent with" ORMA or the Ocean Use Guidelines,[32] and because they are sufficiently rational to preclude the Court from substituting its judgment for that of the agencies.[33]

The agencies' interpretations are consistent with their longstanding practice during the two decades ORMA has been in effect.[34] Petitioners admit that ORMA has never been interpreted or applied in the way

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[29] *See* ORMA Bill, § 13 (codified at RCW 90.58. 195).
[30] *Verizon Nw.*, 164 Wn.2d at 915.
[31] *See Preserve Our Islands v. Shorelines Hearings Bd.*, 133 Wn. App. 503, 516, 137 P.3d 31 (2006), *rev. denied*, 62 Wn.2d 1008, 175 P.3d 1092 (2008) (deferring to SHB's expertise in SMA matters).
[32] *Immigration & Naturalization Serv. v. Stanisic*, 395 U.S. 62, 72, 89 S.Ct. 1519, 23 L.Ed.2d 101 (1969) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945)).
[33] *Skamania Cnty.*, 144 Wn.2d at 43.
[34] Order at 41.

Petitioners suggest by Ecology, a local government, or the SHB.[35] Petitioners offer no evidence for their repeated assertion that Ecology's interpretations should be disregarded by this Court as a "post hoc litigating position."[36] On the contrary, Ecology and local governments have had countless opportunities over the past two decades to consider ORMA's application, and they have consistently concluded that the law does not apply to land-based transportation projects or to marine transportation activities other than those regulated as extractive "transportation" uses in the Ocean Use Regulations. Indeed, Petitioners are unable to point to a single example of a land-based transportation project or a non-extractive marine transportation project that has been regulated under ORMA since its adoption. That is because the agencies have consistently excluded such projects from the scope of ORMA's review.

B. The Legislature Has Declined to Amend ORMA to Adopt Petitioners' Interpretation.

If the Legislature disagreed with the manner in which Ecology and local governments implemented ORMA, it had ample opportunity to adopt legislation clarifying its intent and directing Ecology and local governments to act accordingly. Because the Legislature has not done so, the Court should presume it has acquiesced to the longstanding interpretations of Ecology and local governments.[37]

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[35] Petition at 16. Similarly, Petitioners do not contest the SHB's finding that they presented no evidence showing ORMA "has ever been interpreted in this manner" by any agency or court. *See* Order at 41.
[36] *See* Petition at 15, 19.
[37] *Stroh Brewery Co*, 104 Wn. App. 235.

Deference to an agency interpretation is particularly appropriate "where that construction has been accompanied by silent acquiescence of the legislative body over a long period of time."[38] As this Court has explained,

> [t]he Legislature's failure to amend a statute interpreted by administrative regulation constitutes legislative acquiescence in the agency's interpretation of the statute. This is especially true when the Legislature has amended the statute in other respects without repudiating the administrative construction.[39]

Here, as noted in Section II.A above, the Legislature has amended ORMA in various ways in the twenty-plus years since it was adopted, and in each case, the Legislature chose not to disturb Ecology's historical enforcement of ORMA, which has always been consistent with Ecology's position in this litigation. This is particularly true in light of the Legislature's recent decision to address the risk of oil spills from "[t]he movement of crude oil through rail corridors and over Washington waters" through non-ORMA legislation, leaving intact Ecology's longstanding implementation of ORMA and the Ocean Use Guidelines and its specific approach with respect to the two projects at issue in this case.[40] Courts presume that the Legislature is aware of the prior construction and administration of a statute by agencies.[41] This Court should therefore

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[38] *Verizon Nw.*, 164 Wn.2d at 915; *Stroh Brewery Co*, 104 Wn. App. 235.
[39] *Manor v. Nestle Food Co.*, 131 Wn. 2d 439, 446, 932 P.2d 628, 631 (1997) (citing *Green River Community College v. Higher Educ. Personnel Bd.*, 95 Wn.2d 108, 118, 622 P.2d 826 (1980), modified, 95 Wash.2d 962, 633 P.2d 1324 (1981); *State ex rel. Pirak v. Schoettler*, 45 Wn.2d 367, 371–72, 274 P.2d 852 (1954)).
[40] *See* Section II, *supra*.
[41] *See, e.g., State Dep't of Transp. v. State Employees' Ins. Bd.*, 97 Wn. 2d 454, 462, 645 P.2d 1076, 1080 (1982) (giving "great weight" to "the statutory construction employed

presume that, when the Legislature adopted the non-ORMA legislation in 2015 addressing such oil spill risks, it was aware of Ecology's longstanding administration of ORMA as well as the SHB's 2013 decision rejecting Petitioners' interpretation of ORMA. If the Legislature disagreed with Ecology and the SHB and wanted to address such oil spill risks through ORMA, it would have said so expressly.

The Court should reject Petitioners' attempt to mischaracterize Imperium's position as merely asserting that "because ORMA has never been applied to oil shipping terminals, it should not be applied here."[42] This "straw man" argument ignores this Court's recognition that deference to agency interpretations is particularly appropriate in light of legislative acquiescence – precisely because such acquiescence is evidence that the agency's interpretation is consistent with legislative intent. Petitioners' reliance on *Wilderness Soc. v. Morton*, 479 F.2d 842, 865 (D.C. Cir. 1973) to support their straw man argument is misplaced. That decision did not involve two-plus decades of legislative acquiescence to an agency's interpretation, and even the *Morton* court recognized that deference to an agency's interpretation is appropriate unless there are "compelling indications that it is wrong."[43] Here, Petitioners have failed to offer any such compelling indication that the agencies have wrongly interpreted or applied ORMA since it was adopted in 1989, and the Legislature's silent

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by the Department, the ferry employees and followed by the SEIB" because, "in the five times the SEIB Act was amended, prior to 1981, the legislature did not repudiate" that construction").

[42] *See* Petition at 16.

[43] *Morton*, 479 F.2d at 865.

acquiescence during that time period confirms that the agencies' interpretations are entirely consistent with the Legislature's intent in adopting ORMA.

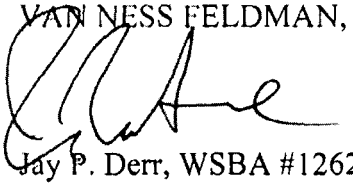
IV. CONCLUSION

The Petition offers no compelling reason for this Court to disturb the agencies' longstanding interpretations of ORMA, to which the Legislature has acquiesced. The Court should give substantial weight and deference to the interpretations of Ecology, the City of Hoquiam, and the SHB, all of which concluded that ORMA does not apply to the projects at issue in this appeal. The Court should also defer to the Legislature's repeated decisions not to disturb these agency interpretations of ORMA, and to the Legislature's recent decision to address the types of oil spill risks raised in the Petition through non-ORMA legislation.

In light of such deference to the agencies' reasonable interpretations and the Legislature's choice to address oil spill risks outside of ORMA's framework, it is clear that this is not a case involving an issue of substantial public interest that should be determined by the Supreme Court. The Court of Appeals decision was correctly decided and the Petition should be denied.

Respectfully submitted this 18th day of December, 2015.

VAN NESS FELDMAN, LLP



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Certificate of Service

I certify that I caused a copy of Respondent Imperium Terminal Services, LLC.'s Answer to Petition for Review to be served on all parties or their counsel of record on the date below as indicated.

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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.

DATED this 18th day of December, 2015, at Seattle, WA.

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Clerk of the Court & Counsel:

Please see attached Imperium Terminal Services, LLC.'s Answer to Petition for Review, together with certificate of service for filing in case no. 92552-6.

Thank you,

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