NO. 45887-0

COURT OF APPEALS, DIVISION II
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, STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY; WESTWAY TERMINAL COMPANY, LLC., and SHORELINES HEARINGS BOARD,

Respondents,

and

IMPERIUM TERMINAL SERVICES, LLC.,

Respondent/Cross-Petitioner.

JOINT RESPONSE BRIEF OF RESPONDENTS STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, AND CITY OF HOQUIAM

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I. INTRODUCTION

This case concerns two separate proposals to construct oil terminal facilities in Grays Harbor. The Petitioners Friends of Grays Harbor (FOGH) and the Quinault Indian Nation (Quinault) argue that (1) the Department of Ecology (Ecology) and the City of Hoquiam (City) should have required financial assurances from the applicants prior to issuing State Environmental Policy Act (SEPA) determinations or Shoreline Substantial Development Permits (Permits) for the projects, and (2) that the City of Hoquiam should have reviewed the projects under the Ocean Resources Management Act (ORMA).

The Shorelines Hearings Board (Board) properly rejected these arguments on summary judgment and its decision should be affirmed. First, the Board correctly determined that compliance with financial assurance requirements is not required at the SEPA stage or prior to the shoreline permitting. The Board found that financial assurance is unrelated to the purpose of SEPA, which is to determine if there will be significant environmental impacts. The Board also declined to require financial assurances at the shoreline permitting stage because such assurances may be provided later, when the facilities submit spill plans to Ecology.

Second, the Board correctly determined that the projects are not subject to ORMA. The Board found that the Westway and Imperium facilities, which are entirely land-based and merely provide docking and loading facilities for marine transport, are not ocean uses within the scope of ORMA. The Board's decision is supported by the language, purpose, and legislative history of the statute.

The Board reversed the SEPA determinations and the Permits for the facilities on grounds other than these two issues. As a result, both facilities have now agreed to the issuance of a Determination of Significance for their proposals. Ecology and the City withdrew the original SEPA determinations and a full environmental impact review of the projects is ongoing. This process will result in the drafting and issuance of an Environmental Impact Statement (EIS) for both projects prior to any further permitting. Nevertheless, the Petitioners filed this appeal on the two issues above.

II. RESTATEMENT OF THE ISSUES ON REVIEW

Ecology and the City are responding to the following two issues:

1. Does RCW 88.40.025 require the facilities in this case to provide financial assurances as part of the SEPA review or the shoreline permit process when Ecology regulations require applicable financial assurances to be submitted later, with the facilities' oil spill plans?

2. Is a land based facility that includes docking and loading facilities for marine vessels an "ocean use" within the scope of RCW 43.143 when the law's implementing regulations define "ocean use" as an activity or development "on the coastal waters"?

III. RESTATEMENT OF THE CASE

Westway currently operates a bulk methanol storage terminal in Hoquiam, on the shoreline of Grays Harbor. Administrative Record (AR) at 676. This facility is located on leased property owned by the Port of Grays Harbor (Port). AR at 658. Westway constructed the facility in 2009, and began operations at the end of that calendar year. AR at 676.

In December 2012, Westway submitted a Washington State Joint Aquatics Resources Permit Application (JARPA) to the City. AR at 657. In the application, Westway requested a permit for shoreline substantial development for authorization to expand the facility in the shoreline. *Id.* 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 transfer of the oil to vessels and/or barges from the Port's Terminal No. 1. AR at 657–58.

Imperium currently operates a facility for the production of biodiesel fuel and the storage of bulk liquids. AR at 565. The facility is at

the Port's Terminal No. 1, immediately to the west of the Westway facility. *Id.*

In February 2013, Imperium submitted a JARPA application to expand its exiting 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 by vessel. *Id.*

The City and Ecology, acting as Co-leads under SEPA, issued a Mitigated Determination of Non-Significance (MDNS) for Westway's expansion proposal.[1] AR at 671. The MDNS was issued because the Co-leads determined that the project would not cause significant adverse environmental impacts if specified mitigation measures were implemented. *Id.*; WAC 197-11-350. The Co-leads also issued a MDNS for the Imperium expansion proposal. AR at 566. The City then issued shoreline permits for each proposal. *Id.*

Quinault and FOGH appealed both facilities' permits to the Board. AR at 44, 169, 208, 240. They raised numerous arguments against the SEPA determination in their appeals, including: (1) that the Co-leads should have considered the cumulative effects of a third, as yet, unpermitted terminal facility proposal (US Development proposal);

[1] Ecology's SEPA rules designate which governmental entity will have primary responsibilities under SEPA as the "lead agency." WAC 197-11-924 through -948. Two or more agencies can agree to serve as "co-leads" by sharing the responsibilities of the lead agency, as occurred in this case. WAC 197-11-944.

(2) that the Co-leads did not adequately review and analyze rail and vessel impacts associated with the proposed facilities; (3) that the Co-leads, at the SEPA stage, should have required the facilities to provide financial assurance in case of an oil spill; and (4) that the project needed to be reviewed under ORMA. AR at 2383–84 (Order on Summary Judgment (As Amended on Reconsideration)) (Order).

All parties filed partial motions for summary judgment on issues raised on appeal. AR at 2381. The Board granted summary judgment to Quinault and FOGH on the first two issues and granted summary judgment to Ecology and the City on the second two issues. AR at 2420. Specifically, the Board concluded that the Co-leads should have considered the cumulative impacts of the US Development proposal and that the Co-leads did not adequately review and analyze rail and vessel traffic impacts presented by the Westway proposal, prior to issuing the permits (the Board clarified in the Order that its ruling applied to both Westway *and* Imperium).[2] AR at 2395–411. The Board agreed with Ecology and the City that the facilities were not required to provide financial assurance at the SEPA or shoreline permitting stage because

[2] At the time of summary judgment briefing before the Board, the Imperium proposal was not final. The Board and parties agreed it would be efficient to move forward with the appeal, recognizing that the legal issues presented in an appeal of the Imperium permitting would be similar. The Board's Order specified that all rulings relating to the Westway proposal were also applicable to similar legal questions stemming from the Imperium proposal. AR at 2380 (Order at 2 n.2).

financial assurances are provided later on in the process, when the facilities submit oil spill plans. AR at 2416–17. The Board also agreed with Ecology and the City that the facilities were not subject to ORMA because they were not engaged in an "ocean use" as defined by ORMA. AR at 2417–2420.

In accordance with the Board's Order, and with the guidance provided in that Order, the Co-leads withdrew the MDNSs and prepared to issue new SEPA threshold determinations. *See* Quinault Opening Brief at 15. Both facilities voluntarily agreed to a Determination of Significance for their proposals. *Id.* As a result, a full environmental impact review of their projects has been initiated, and is ongoing. *Id.* This process will result in the drafting and issuance of an EIS for both projects.

IV. STANDARD OF REVIEW

The burden of demonstrating the invalidity of the agency's action is on the party asserting invalidity, in this case Quinault, FOGH, and Imperium. RCW 34.05.570(1)(a). The issues being appealed were decided by the Board on summary judgment. "[W]here the original administrative decision was on summary judgment, the reviewing court must overlay the APA standard of review with the summary judgment standard." *Verizon Nw., Inc. v. Wash. Emp't Sec. Dep't*, 164 Wn.2d 909, 916, 194 P.3d 255 (2008) (citing *Alpine Lakes Prot. Soc'y v. Dep't of*

Natural Res., 102 Wn. App. 1, 14, 979 P.2d 929 (1999). "Summary judgment is appropriate only where the undisputed facts entitle the moving party to a judgment as a matter of law." *Id.* The decision is reviewed directly, based on the record before the Board. *Alpine Lakes*, 102 Wn. App. at 14. The record before the Board on summary judgment in this case is the briefing of the parties, with attached declarations and exhibits.[3]

The propriety of summary judgment is a question of law, and therefore the substantial evidence standard used for other factual findings is not appropriate. *Verizon*, 164 Wn.2d at 916 n.4. The facts in the administrative record are reviewed in the light most favorable to the nonmoving party, and the law evaluated de novo under the error of law standard. *Id.* at 916. Under this standard, substantial weight is accorded to an agency's interpretation of a statute within its expertise, and to rules that the agency promulgated, although the court may substitute its view of the law for that of the agency. *Id.* at 915.

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[3] The Petitioners have cited to numerous media and reports and include an appendix containing newspaper articles in support of their position that are outside the record. A majority of the evidence post-dates the Board's decision. However, judicial review of agency action is generally confined to the agency record and the court can accept new evidence only in limited circumstances, none of which are met here. RCW 34.05.562(1). A reviewing court will not consider evidence that was not before the agency when it made its decision and, thus, could not have been a basis for the decision. *Okamoto v. Employment Sec. Dep't*, 107 Wn. App. 490, 495, 27 P.3d 1203 (2001), *review denied*, 145 Wn.2d 1022 (2002). The APA requirements for taking new evidence not contained in the agency record have not been met and this Court should reject the Petitioners' attempt to supplement and expand the record. RCW 34.05.562(1).

V. ARGUMENT

A. The Co-Leads Were Not Required To Collect Financial Assurances When Issuing The Threshold Determinations Or Permits

The Petitioners contend that, under RCW 88.40.025, the Co-leads should have obtained financial assurances from the facilities prior to issuing the SEPA threshold determinations or shoreline permits.[4] Joint Opening Brief of Quinault Indian Nation and Friends of Grays Harbor, et al. (Quinault Opening Brief) at 36–37. As a threshold matter, this issue is not properly before the Court because the MDNSs were withdrawn and the Co-leads are now in the process of completing an EIS, so whether the Co-leads should have provided financial assurances as mitigation prior to issuing the MDNSs or permits is moot. Additionally, because the SEPA process and permits have not been finalized, the issue is not ripe.

However, should the Court reach the merits of this issue, the Petitioners' contention is erroneous because (1) RCW 88.40.025 contains no legal requirement to provide financial assurances at any particular stage of the permitting process; therefore it is permissible to require such assurances later in the process when spill plans are submitted; and

[4] As a basic premise, because the threshold determination is made prior to any shoreline permitting, the Petitioners are in essence making two separate arguments: (1) financial assurances must be required prior to a threshold determination, and (2) if financial assurances are not required at the SEPA stage, they are then required prior to the shoreline permitting.

(2) financial assurances need not be actually obtained and submitted until the facility begins operations because, until then, there is no risk of an oil spill.

1. Because the MDNSs and permits at issue in this case were withdrawn, when and how financial assurances must be provided is not properly before this Court.

The Petitioners argue that, because the Co-leads relied upon the oil spill plans, which include financial assurances, as mitigation in issuing the MDNSs, the co-leads were required to actually obtain the financial assurances at that time. Quinault Opening Brief at 39. However, the MDNSs were remanded by the Board, the Co-leads have withdrawn them and issued a determination of significance for both facilities, and the Co-leads are currently in the process of preparing EISs for the facilities. Thus, the Co-leads have already issued a new threshold determination that does not rely upon any mitigation and the Petitioners' argument is moot.

Washington courts follow the general rule that appeals which involve only moot issues or abstract propositions should be dismissed. *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972); *Westerman v. Cary*, 125 Wn.2d 277, 286, 892 P.2d 1067 (1994). A case is considered moot when the court cannot provide the basic relief originally sought, or can no longer provide effective relief. *Dioxin/Organochlorine*

Ctr. v. Pollution Control Hearings Bd., 131 Wn.2d 345, 350, 932 P.2d 158 (1997). The courts will thus normally dismiss moot cases or issues.

Where an issue is moot, there is an exception to the general rule requiring dismissal if it involves a matter of "substantial public interest." *Westerman*, 125 Wn.2d at 286 (quoting *Sorenson*, 80 Wn.2d at 558). This analysis comprises three factors: "(1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur." *Hart v. Dep't of Social & Health Servs.*, 111 Wn.2d 445, 448, 759 P.2d 1206 (1988) (citing the three *Sorenson* factors).

Our Supreme Court has warned against the overuse of the public interest exception, and has affirmatively indicated that moot issues should be dismissed unless a rigorous review of these elements indicates that the exception should be applied. The court has stated:

> The use of the public interest exception has increased greatly in recent years without rigorous examination and application of the *Sorenson* criteria to the facts of each case to justify the exception. The increased use of the exception threatens to swallow the basic rule of not issuing decisions in moot cases. Actual application of the *Sorenson* criteria to each case where the exception is urged is necessary to ensure that an actual benefit to the public interest in reviewing a moot case outweighs the harm from an essentially advisory opinion.

Hart, 111 Wn.2d at 450 (citations omitted). Thus, courts will not issue advisory opinions unless there are legitimate public purposes served by a judicial pronouncement regarding the issues.

In the present case, the Board remanded the MDNSs and the Permits to the Co-leads and they were withdrawn. The agencies were instructed to consider additional factors and make a new threshold determination. Since that time, the Co-leads have issued Determinations of Significance. The MDNSs at issue in the present appeal have been withdrawn by the Co-leads and there will not be another MDNS issued for either facility in this case. Once the MDNSs were withdrawn, whether the mitigation relied upon in the MDNSs should have been demonstrated prior to their issuance is a moot question.

Under *Sorenson,* a moot issue should not be addressed by the Court unless it involves a matter of "substantial public interest." Because the issue here is a private proposal with a unique set of facts, this exception does not apply in this case. This case involves two corporations that have entirely unique financial situations; it is improbable that another SEPA threshold determination involving (1) oil spill financial assurances specific to an individual entity and (2) mitigation, will arise. Therefore, the public interest exception to the mootness rule does not apply in this case.

In addition to being moot, this issue is not ripe for review. Subject matter jurisdiction, which encompasses the doctrine of ripeness, is a prerequisite to a court's ability to hear and decide a case. As a necessary component of jurisdiction, if ripeness is lacking, a court has no choice but to dismiss the action. *See Postema v. Snohomish Cnty.,* 83 Wn. App. 574, 580, 922 P.2d 176 (1996) (a mere disagreement that is speculative or that cannot be conclusively resolved does not present a justiciable issue and therefore is subject to dismissal); *see also Ernst & Young v. Depositors Economic Prot. Corp.*, 45 F.3d 530, 538 (1st Cir. 1995). The ripeness doctrine asks whether there is a current need for a court to act. *See Western Oil & Gas Ass'n v. Sonoma Cnty.*, 905 F.2d 1287, 1290 (9th Cir. 1990). Washington basically follows the federal approach regarding ripeness, with the narrow exception that Washington courts may hear a case when matters of continuing and substantial interest are involved. *See State v. Walker*, 93 Wn. App. 382, 386, 967 P.2d 1289 (1998).[5]

In considering the ripeness of an issue, fitness and hardship are the primary criteria that a court will take into account. *See First United Methodist Church of Seattle v. Hearing Examiner for Seattle Landmarks Preservation Bd.,* 129 Wn.2d 238, 245, 916 P.2d 374 (1996); *Abbott Lab*

[5] In this appeal, the Petitioners must meet the requirements of RCW 34.05.530, including the requirement that the agency decision is "likely to prejudice" the petitioner. This requirement encompasses the same concerns of fitness for review and hardship as ripeness.

v. Gardner, 387 U.S. 136, 148, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967). In order for a claim to be ripe, both criteria must ordinarily be satisfied. *See Ernst,* 45 F.3d at 535.

The critical question concerning fitness for review is whether the claim involves uncertain and contingent events that may or may not occur. *See Massachusetts Ass'n of Afro-Am. Police, Inc. v. Boston Police Dep't*, 973 F.2d 18, 20 (1st Cir. 1992). If a plaintiff's claim, though predominantly legal in character, depends on a future event that may never come to pass, then the claim is unripe. *See id.*; *see also Armstrong World Indus., Inc. v. Adams*, 961 F.2d 405, 411 (3rd Cir. 1992) (the existence of a contingency is sufficient to conclude that the issue is not yet ripe for review). In this case, whether these facilities will be permitted or not before financial assurances are required involves multiple contingencies. First, the Co-leads may use their substantive SEPA authority to require financial assurances for the projects.[6] Second, the facilities may voluntarily offer financial assurances. Third, the facilities may for a variety of reasons decide to abandon the proposals. The Petitioners' claim is thus unripe under this prong of the test.

[6] The Co-leads have substantive authority to require mitigation as part of the SEPA process pursuant to RCW 43.21C.060 and WAC 197-11-660. As the EIS is in the drafting stages and incomplete, no decision has been made on what, if any, mitigation will be required.

The second criterion is hardship. Courts will examine the hardship that the parties would endure if consideration of the issue is withheld on grounds that the controversy is not ripe. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 732–37, 118 S. Ct. 1665, 140 L. Ed. 2d 921 (1998). The hallmark of cognizable hardship is direct and immediate harm. *See Ernst,* 45 F.3d at 536. The fact that an action, if taken, could possibly produce harm does not constitute a cognizable hardship if there is no indication that the action is, in fact, about to be taken. The Petitioners fail this criterion as well. The facilities, should they continue to pursue the proposals, will need to complete a final EIS and will need another shoreline permit. Just as the MDNSs were appealed, the EIS and the subsequent permit will be appealable. The Petitioners will suffer no immediate and direct harm if this Court withholds consideration of their claim; moreover, they may never suffer any harm because of the contingencies discussed above. The Petitioners' claim is thus the type of abstract dispute that the doctrine of ripeness seeks to keep out of the courts. Further, as discussed above, the public interest exception to the ripeness doctrine does not apply here because the question of whether financial assurances are required for these projects at the SEPA stage is unique to these facilities. This Court should therefore dismiss the issue due to lack of jurisdiction.

2. In any event, Petitioners' argument on this issue is without merit because the statute upon which they rely does not create a legal requirement that financial assurances be provided either at the SEPA stage or the shoreline permitting stage of a project.

Petitioners base their argument regarding financial assurances on RCW 88.40.025. This statute, however, does not require that financial assurances be submitted at any particular time. Under Ecology's regulations, applicable financial assurances are required at the time the facility submits its oil spill response plan prior to operation. WAC 173-180-630(7).[7] This timing makes sense because, until the facility begins operation, there is no threat of an oil spill and no need for any financial assurances. Also, until the facility is fully permitted, its final configuration and design is unknown. The Petitioners, however, argue that financial assurances must be obtained earlier, either at the SEPA stage or at the shoreline permitting stage. Many of their arguments, however, relate not to the timing question, but rather relate to the question of whether financial assurances are needed at all. *See., e.g.*, Quinault Opening Brief at 47–48 (discussing the damages that may occur as a result of a spill). At any rate, neither the statute nor Ecology's regulation require

[7] The regulation specifies that for existing facilities operating with an approved spill plan, "[w]ithin thirty calendar days after evidence of financial responsibility is required by rules adopted by [E]cology pursuant to chapter 88.46 RCW, the plan must be updated to include any applicable evidence of compliance." WAC 173-180-630(7). *See also* WAC 173-180-670 (requiring existing facilities to have Ecology approval of updated spill plans showing compliance with state financial responsibility requirements or be subject to enforcement).

financial assurances to be submitted at the SEPA stage of a project. The Board therefore properly granted summary judgment to Ecology and the City on this issue.

RCW 88.40.025 states that: "An onshore or offshore facility shall demonstrate financial responsibility in an amount determined by the Department as necessary to compensate the state and affected counties and cities for damages that might occur during a reasonable worst case spill of oil from that facility into the navigable waters of the state." The statute directs Ecology to consider various factors in setting the amount of the financial assurances, such as the amount of oil that might be spilled, the costs of response, damages, operations at the facility, and the affordability of financial responsibility. RCW 88.40.025. Significantly, the statute does not require that a facility provide financial assurances at any particular time.

Additionally, the Legislature has directed Ecology to implement the state's vessel and facility oil spill prevention and response requirements and operation standards. RCW 88.46.040, .060; RCW 90.56.200–.210. By rule, Ecology has adopted regulations establishing vessel and facility oil spill handling requirements, contingency plan requirements, drill and equipment verification

requirements, primary response contractor standards, and recordkeeping and compliance information. WAC 173-180-010; WAC 173-182-010.

As part of the facility oil handling requirements, class 1 facilities such as Imperium and Westway must submit for approval a facility spill plan. WAC 173-180-600. The regulations require facilities to include applicable financial assurances in the spill plans. RCW 88.40.025; WAC 173-180-630(7). A facility must submit its spill plan for Ecology approval under RCW 88.46.040(1). A facility cannot operate until its spill plan has been approved. WAC 173-180-650(6)(c). Under these regulations, applicable financial assurances need not be submitted until a facility submits its spill plan for review and approval by Ecology.

The Petitioners do not challenge Ecology's rules and they admit that: "RCW 88.40.025 is not explicit regarding when facilities must provide the required financial assurances, and there is no legal precedent addressing this issue." Quinault Opening Brief at 41. The Petitioners nevertheless argue that "this Court" should create a different rule requiring financial assurances "at the application phase." *Id.* at 43. Apparently, the Petitioners would have applicants submit letters of credit or bonds—potentially in very large amounts—with their application materials, despite the fact that typically, at such an early stage of the process, no final plans for the facility exist and the conditions under which it may be

permitted are unknown. Such an approach is not required by the statute, is contrary to Ecology's rule, and does not make sense because, among other things, the amount of the bond could not reasonably be determined until the project plans are finalized. Moreover, until the facility begins operations, there is no threat of a spill and no need for any financial assurances.

The Petitioners' primary argument that the financial responsibility provisions of RCW 88.40.025 should be required at the application stage is that: "[O]btaining shoreline permits and completing the SEPA process could provide substantial momentum for the crude oil terminal projects, risking a snowball effect that would hinder the State's ability to stop the projects in the event Westway and Imperium are unable to provide adequate financial assurances." Quinault Opening Brief at 42. However, this policy concern cannot alter the plain language of the statute or Ecology's rules. Nor is this concern even valid—if the facilities do not provide applicable financial assurances at the appropriate time, Ecology will not approve their spill plans and they will not be allowed to operate their facilities. WAC 173-180-650(6)(c). There is no factual or legal basis for Petitioners' "momentum" argument.

The Petitioners further contend that a section of the Hoquiam Municipal Code (HMC), 11.04.065(4), requires financial assurances as

part of mitigation at the shoreline application stage. However, that argument fails, because the provision cited only applies to "ocean uses." The definition of "ocean uses" provided in HMC 11.04.030(20) is virtually identical to the definition of "ocean uses" provided in WAC 173-26-360(3). As discussed below, the facilities do not involve any "ocean uses," within the scope of ORMA and therefore the provisions of HMC 11.04.065(4) do not apply.

The Petitioners argue that, to the extent the Co-leads relied on the spill plans and future posting of financial assurances as a mitigation condition in issuing the MDNSs, they should have obtained the financial assurances before the MDNSs were issued. As discussed above, this argument is moot because the MDNSs have been withdrawn and will not be reissued. Additionally, the argument is incorrect. A SEPA lead agency is entitled to rely on future submittals in issuing MDNS. *See West 514, Inc. v. Spokane Cnty.*, 53 Wn. App. 838, 848–49, 770 P.2d 1065 (1989). Here, not only was a spill plan required as part of SEPA mitigation but Ecology's regulations are clear that a spill plan must be submitted and approved before a facility can begin operations. WAC 173-180-650(6)(c). Nothing in SEPA, RCW 88.44.025, or Ecology's regulations require applicants to actually complete the plan and provide the assurances ahead of time.

The Petitioners go on to argue that if financial assurances are not obtained at this early stage, then they will not be obtained at all, leading to substantial environmental impacts. Quinault Opening Brief at 42–43. Again, there is no factual basis for this argument. If financial assurances are required, they will be obtained prior to operation when the facility submits its spill plan for Ecology approval. This Court should not assume that Ecology will not follow its regulations. As the Board held:

> [T]he 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 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 . . . Spill plans, along with the required showing of financial responsibility, will be required before the facilities can begin operations. . . . Importantly, as pointed out by Ecology, regardless of any financial assurances, a responsibility party is strictly liable for unlimited oil spill costs and damages.

AR at 2417.

The Petitioners argue that strict liability and penalties are inadequate in these circumstances because the company may go bankrupt after a spill. Although theoretically possible, this policy argument does not address the fact that neither statute nor Ecology's regulations require

financial assurances at the SEPA stage. Furthermore, the Petitioners' argument focuses exclusively on *economic* impacts whereas SEPA is instead concerned with *environmental* impacts. In fact, a particular facility's financial viability has no impact on the adequacy of an oil spill response because it is the state and other emergency responders that determine the level of clean-up following an oil spill. RCW 90.56.020. Both the federal and state governments maintain robust oil spill cleanup funds to cover the costs of cleaning up an oil spill. 26 U.S.C. § 9509; RCW 70.105D.070; RCW 82.23B.020.[8] Thus, although there could be an *economic* impact to one of these funds if a company goes bankrupt, there will no adverse environment impact, which is the focus of SEPA. *See, e.g.*, RCW 43.21C.031; WAC 197-11-330(1)(b).

For these reasons, the Co-leads decision to not require financial assurances at the SEPA threshold determination is not clearly erroneous. *See, e.g., Ass'n of Rural Residents v. Kitsap Cnty.*, 141 Wn.2d 185, 195–96, 4 P.3d 115 (2000) (threshold determination reviewed under "clearly

[8] Contrary to the Petitioners' arguments, these funds are not funded by the general taxpayers. Quinault Opening Brief at 44. The federal fund is funded through various dedicated sources, including an environmental tax on petroleum and water pollution penalties. 26 U.S.C. § 9509(b). The state fund is funded through a tax on hazardous substances, including petroleum. RCW 82.21.030.

erroneous" legal standard).[9] The Board properly granted summary judgment to Ecology and the City on this issue.

B. The Facilities Are Not Subject To ORMA Because They Are Not Ocean Uses Within The Meaning Of The Act's Implementing Regulations

The Board correctly held as a matter of law that the facilities are not subject to ORMA, or to provisions of the Hoquiam Municipal Code, which mirror the provisions and definitions of ORMA, HMC 11.04.030(20), and HMC 11.04.180(6). AR at 2419–20 (Board Order at 41–42). The facilities are not subject to ORMA because they are not "ocean uses" as that term is defined in the implementing regulations. WAC 173-26-360.

In interpreting statutory provisions, the primary objective is to ascertain and give effect to the intent and purpose of the Legislature. In attempting to ascertain legislative intent, courts will first look to the plain meaning of the words used in the statute. *State v. McDougal*, 120 Wn.2d 334, 350, 841 P.2d 1232 (1992). Plain meaning is derived from "the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Lake v. Woodcreek Homeowner's Ass'n*, 169 Wn.2d 516,

[9] A decision is "clearly erroneous" when the reviewing tribunal is left with the definite and firm conviction that a mistake was made. *See, e.g., Murden Cove Pres. Ass'n v. Kitsap Cnty.*, 41 Wn. App. 515, 523, 704 P.2d 1242 (1985).

526, 243 P.3d 1283 (2010) (citation omitted). When a statute is subject to more than one reasonable interpretation, "the interpretation which better advances the overall legislative purpose should be adopted." *Weyerhaeuser Co. v. Dep't of Ecology*, 86 Wn.2d 310, 321, 545 P.2d 5 (1976). An equally important principle of statutory construction provides that statutes should be construed to affect their purpose, and unlikely, absurd, or strained consequences resulting from a literal reading should be avoided. *See State v. McDougal*, 120 Wn.2d at 350; *See also Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002) (stating "The spirit or purpose of an enactment should prevail . . . over express but inept wording.").

ORMA itself does not define the uses or activities to which it applies. The Act contains no definitions (except for geographic ones) or statement of applicability. We thus turn to regulatory definitions to determine the uses to which ORMA applies. *See Washington Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 646, 62 P.3d 462 (2003) (agency can pass rules to fill in the gaps in a statutory scheme).

Ecology is charged with adopting guidelines to implement ORMA as part of the shoreline master program process.[10] RCW 90.58.195. Pursuant to this authority, Ecology interpreted ORMA as applying to "ocean uses," which Ecology defined as:

> [A]ctivities 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, recreation, and tribal fishing, aquaculture, recreation, shellfish harvesting, and pleasure craft activity.

WAC 173-26-360(3).

The Petitioners have not challenged this rule and all parties rely on this definition in making their arguments. *See* Quinault Opening Brief at 26–27. The Board, in its decision rejecting the Petitioners' arguments, held that, under this definition, ORMA is limited to resource extraction activities such as oil and gas development on the continental shelf. AR at 2417–18. As discussed below, this reading is consistent with the legislative history and apparent purpose of ORMA. However, the language of the regulation arguably is broader than resource extraction

[10] Under the Shoreline Management Act, local governments develop shoreline master programs that govern development on shorelines within their jurisdiction. WAC 173-26-030.

because it includes other activities such as "disposal of waste products, and salvage." WAC 173-26-360(3). The Court, however, need not decide in this case the full scope of ORMA's coverage. Regardless of whether the Act covers these other activities, it does not include the land based facilities at issue here, and the Board committed no error in rejecting the Petitioners' arguments.

Under the regulation, an "ocean use" is one that occurs "on Washington's coastal waters." *Id.* Fundamentally, the facilities here do not fall within this definition because they are land-based facilities that are not located on the coastal waters. They are located on land. The Petitioners, however, argue that the facilities here are included in this definition because they involve marine transportation. According to the Petitioners, marine transportation is an "ocean use" and the land-based facilities here are "associated shoreland" or upland facilities that are included in the definition.

This argument is mistaken because it reads the regulation backwards. These projects are not marine or ocean-based projects with a land component. Instead, they are land-based projects that have associated with them some marine transportation. Such land-based facilities are not within the scope of the regulation. Only activities or developments *on the coastal waters* that make some use of ocean resources and that may or

may not have an associated shoreland or upland facility are within the definition. This is apparent from the definition as well as from common sense. One would not normally refer to a terminal on land that merely transfers products from trains to ships as an "ocean use" because, fundamentally, such activity makes no use of ocean resources.

The use of the ocean here is not by the terminal itself, but instead is by vessels traveling to and from the facility. This use by vessels is a renewable use that has existed for decades. Both ORMA itself and the regulations state that such currently existing renewable uses are not intended to be included. RCW 43.143.010(5); WAC 173-26-360(4). The mere fact that the facility will have vessels traveling to and from it over the ocean does not convert the facility into an "ocean use." Yet, this is precisely what the Petitioners contend. To support their argument, they point to the reference in the regulations to "transportation." WAC 173-26-360(12). According to the Petitioners, "transportation" is a subset of "ocean use" thereby bringing these land based facilities under the umbrella of ORMA. *See* Quinault Opening Brief at 29–31.

This argument is incorrect. The transportation uses that the regulation includes are only those involving an offshore facility "on Washington's coastal waters." As the definition states, ocean uses include "the supply, service, and distribution activities, such as crew ships,

circulating to and between the activities and developments." WAC 173-26-360(3). This definition does not include ocean transportation generally. Rather, the definition includes only such transportation as may be incidental to an offshore ocean use. As the transportation section states, it applies only to transportation that originates or concludes "on Washington's coastal waters"; i.e., offshore. Here, the transportation originates on land, not at an offshore development.

As the Board recognized, if the definition of "ocean use" included transportation generally, a huge variety of coastal developments would suddenly be subject to ORMA:

> 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.

AR at 2419 (Order at 41).

Under the Petitioners' argument, any shoreline project that has associated with it some marine transportation would require evaluation under ORMA. This would include port facilities, grain elevators, bulk loading facilities of all types, and indeed, almost any water-dependent use

on the ocean. Ports on the Columbia River that utilize ocean going vessels would, under the Appellant's argument, be covered by ORMA even though they may be many miles inland. It is no help to suggest, as the Petitioners do, that ORMA is limited only to those facilities having "an adverse impact." Virtually all port facilities have some adverse impact on coastal waters simply by their presence. Again, ORMA cannot reasonably be interpreted, and has never been interpreted, to be so broad.

As discussed under the legislative history section below, ORMA's purpose and intent was to address the threat of oil and gas development in Washington's coastal waters. The facilities or developments "on the coastal waters" referred to in the regulation presumably were off-shore oil drilling platforms. Shortly after its enactment, ORMA was incorporated into Washington's coastal zone management plan under the federal Coastal Zone Management Act, 16 U.S.C. § 1451; *see* Washington State Department of Ecology, *Managing Washington's Coast, Washington State's Coastal Zone Management Program* at 101 (Ecology Pub. No. 00-06-129) (2001).[11] Doing this gave the state a voice in federal leasing or permitting activities in Washington's coastal waters. *See* 16 U.S.C. § 1456(c) (requiring state concurrence prior to federal permitting for

[11] Available on Ecology's website at www.ecy.wa.gov/programs/sea/czm/prgm.html. Relevant excerpts attached hereto as Appendix A.

activities affecting the state's coastal zone). However, no oil or gas drilling has ever occurred off Washington's coast due in part to the establishment of a federal marine sanctuary there.

This history is described in *Managing Washington's Coast*, *supra* at 50–51:

> The entire [outer continental] shelf area came under debate in the mid-1980's to early 1990's. The controversy arose when the Department of Interior scheduled part of the shelf off the Washington and Oregon coast for a lease-sale that would allow exploration and development of oil and natural gas. Washington and Oregon opposed the sale for two primary reasons: not enough was known about the shelf's resources and the potential impacts development would have on them; and some of the targeted area was simply too vulnerable to ever be developed (this area is now the Olympic Coast National Marine Sanctuary). In 1990, President George H.W. Bush declared the area off Washington's and Oregon's coast to be off limits until further studies were conducted. Since then, the Olympic Sanctuary's regulations prohibited oil and gas development, and, in 1998, President William Clinton declared the area off limits to oil and gas leasing consideration until June, 2012.

Against this backdrop, it is clear that the regulation's references to transportation "and the supply, service, and distribution activities, such as crew ships, circulating to and between the activities and developments" were intended to address transportation occurring incidental to off-shore developments, and particularly oil and gas drilling platforms. WAC 173-26-360(3). The definition was not intended to apply to all marine

transportation generally. If it were, ORMA presumably would long ago have been applied to land-based facilities. The Board correctly held that to apply these definitions as the Petitioners urge would ignore ORMA's historical context and purpose, and lead to absurd or unlikely results.

C. The Legislative History And Purpose Surrounding ORMA's Enactment Demonstrates That The Act Was Intended To Regulate Resource Extraction From Within The Ocean And Related Activities

Because ORMA itself contains no definitions, it is arguably ambiguous regarding the scope of its coverage. Consequently, it is appropriate to review the legislative history and purpose surrounding its enactment to aid in determining its scope. The legislative history of ORMA, some of which is contained in the appendix to the Quinault Opening Brief, wholly supports the decision of the Board that ORMA does not apply to the facilities here.

Well-settled principles of statutory interpretation provide that a court may look to the circumstances surrounding a statute's enactment when attempting to discern its meaning. *See Restaurant Dev., Inc. v. Cannanwill*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003). Courts regularly rely on extrinsic aids when interpreting ambiguous laws, such as legislative history, for assistance in discerning legislative intent. *See Biggs v. Vail*, 119 Wn.2d 129, 134, 830 P.3d 350 (1992).

Contrary to the Petitioners' speculation that the legislation was a response to oil spills that had occurred in the Pacific Ocean, the primary motivation for the adoption of ORMA was the imminent leasing of submerged lands along the outer continental shelf by the federal government's Mineral Management Service for natural resource exploration and development. Final Legislative Report, 51st Leg., at 166 (Wash. 1989); Quinault Opening Brief at App. 65. Mindful of the lack of statewide regulations and guidelines for the use and development of Washington's coastal resources, as well as the risks associated with resource-related activities in the waters off Washington's coast, the Legislature sought to establish state policies concerning the use of these resources and a system of financial responsibility for vessel owners and operators engaged in such activities. *See id.*

The Legislative Report references the fact that "[i]n 1987 due to concern over the upcoming lease sale, the Washington Legislature and the Governor took several actions," including writing the Department of Interior to express these concerns and suggesting a delay in the lease sales. *Id.* These concerns are repeatedly referenced, both directly and implicitly, throughout ORMA's provisions.

Beginning with ORMA's legislative findings and policy sections, the Act includes several references to state interests in federal decisions

concerning resource development off Washington's coast. For example, RCW 43.143.005(4) provides in part, "[s]ince...development of the natural resources in the exclusive economic zone directly affect Washington's economy and environment, the state has an inherent interest in how these resources are managed." This is followed by the Act's legislative policy and intent subsection, which provides "[t]he state shall participate in federal ocean and marine resource decisions to the fullest extent possible . . . ." RCW 43.143.010(6).

The legislative intent is also evident in the statute itself, for example, in the statute's legislative policy and intent section that enacts a ban on the leasing of Washington's tidal and submerged lands within a certain range "for purposes of oil or gas exploration, development, or production." RCW 43.143.010(2). Together, these provisions express the legislature's concern over the potential impacts on state waters resulting from federally permitted resource extraction along the outer continental shelf and related activities or developments.

In addition to ORMA's statutory language, the underlying concern over federally permitted outer continental shelf activities is a reoccurring theme throughout the Act's implementing regulations. For example, WAC 173-26-360(1) states the purpose of the guidelines is to "address *evolving interest* in ocean development and prepare state and local agencies for *new*

ocean developments and activities." (Emphasis added). The inclusion of "evolving interest" and "new ocean developments" is likely a reference to forthcoming resource extraction related activities, to which the review criteria and guidelines relate.

Similarly, the Legislature limited ORMA to apply to coastal waters from Cape Flattery south to Cape Disappointment, from mean high tide seaward 200 miles, and to the four coastal counties bordering the ocean. RCW 43.143.020. The decision to limit the Act's geographic scope to these areas, which are the portions of the state most likely to be impacted by outer continental shelf activities, supports an inference the Legislature was focused on a particular concern, namely outer continental shelf resource extraction. Had the Legislature intended to cover facilities and vessels engaged in potentially harmful resource related activities generally, it is unlikely they would make ORMA inapplicable to the state's inland waters, including the equally sensitive Puget Sound, Strait of Juan de Fuca, Salish Sea, and Columbia River.

Lastly, WAC 173-26-360(4) provides "these guidelines…will be used for federal consistency purposes in evaluating federal permits and activities in Washington's coastal waters." The inclusion of this section, which is a reference to the federal Coastal Zone Management Act, clearly indicates an intent to address activities related to the imminent federal

permitting of outer continental shelf activities with the potential to negatively impact Washington waters. The Legislature did not intend, as the Petitioners claim, to address any project having a risk of an oil spill, nor marine transportation generally.

VI. CONCLUSION

The Respondents Department of Ecology and City of Hoquiam respectfully request the Court to affirm the Order of the Board with respect to the applicability of ORMA and financial assurance requirements of RCW 88.40.025 to the Westway and Imperium expansion proposals.

RESPECTFULLY SUBMITTED this 26th day of September, 2014.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on September 26, 2014, I caused to be served the Joint Response Brief of Respondents Department of Ecology and City of Hoquiam in the above-captioned matter upon the parties herein as indicated below:

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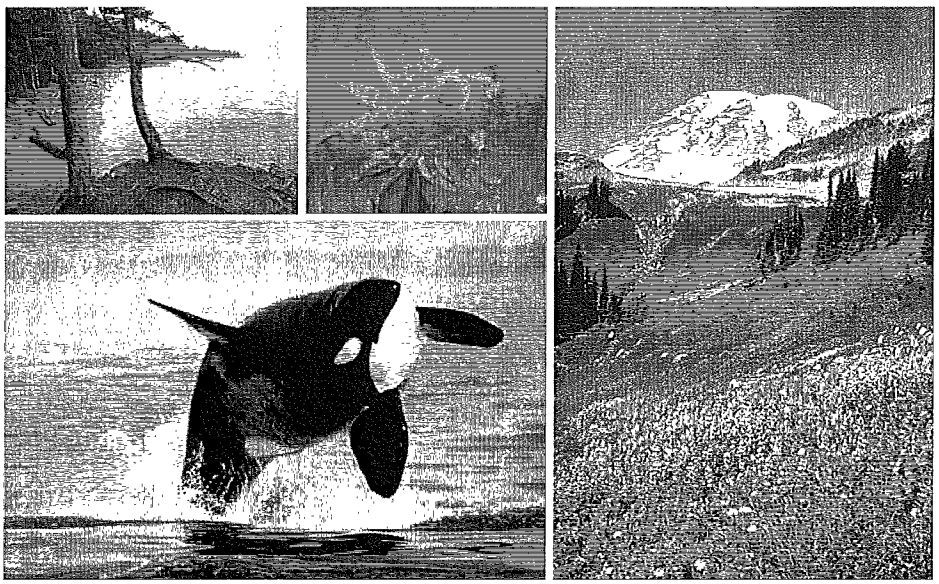
APPENDIX A



Managing Washington's Coast

Washington State's Coastal Zone Management Program

Ecology Publication 00-06-129

APPENDIX A

three shoreline segments interrupted by the mouths of Willapa Bay and Grays Harbor. The beach areas are approximately fifty-four miles long and vary in width from 500 feet to over 7,000 feet. The State Parks and Recreation Commission maintains several developed parks and provides access points to the popular beaches.

Management of the area's beaches has a long history of conflicts over access to and development of the dune area. Most notably, the conflicts arose between state agencies and local governments or private upland owners. Pacific County has a Dune Management Plan for the Long Beach Peninsula, and Grays Harbor County has an Ocean Beach Environment designation with a beach protection setback. However, dune management issues remain contentious.

The long-standing debate over beach driving came to a head in the mid-1980's when the state legislature passed a law requiring local governments to adopt Beach Recreation Management Plans. These plans must be approved by the Washington State Parks and Recreation Commission. A minimum of forty percent of each beach (North Beach, Grayland Plains, and Long Beach) must be designated for pedestrian use from April 15 through the day following Labor Day.

10. Continental Shelf

The outer coast of Washington is oriented in a roughly north-south direction for about 150 miles from Cape Disappointment at the mouth of the Columbia River to Cape Flattery at the mouth of the Strait of Juan de Fuca. The coast is flanked by a relatively shallow, flat, submerged area of land under the Pacific Ocean called the continental shelf. This shelf extends offshore to a depth of roughly 600 feet or 100 fathoms. At this point (the shelf break) the bottom drops off more steeply to form the continental slope, which is indented by several major submarine canyons. Beyond the shelf and slope lie the deep, Pacific ocean waters. State ownership extends seaward for three geographic miles from the coastline. The boundaries of the counties on the ocean coast are the same as the boundaries of the state.

Beyond the state's ownership lies the Outer Continental Shelf (OCS). Federal law defines the OCS as all submerged lands under the ocean that are more than three geographical miles from the coastline where the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control. The seaward limit of jurisdiction for the OCS is generally 200 miles.

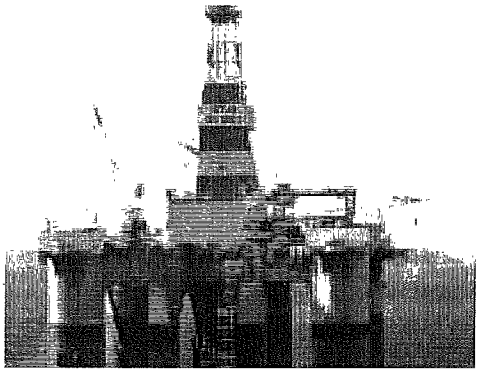


Photo - Brian Walsh

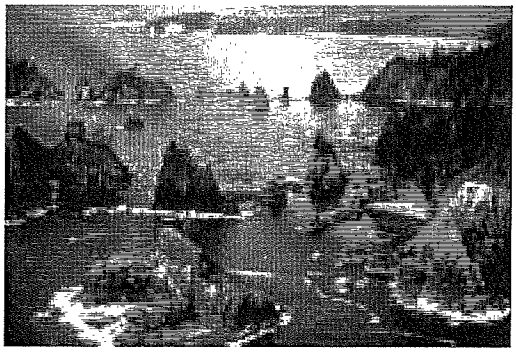
The entire shelf area came under debate in the mid-1980's to early 1990's. The controversy arose when the Department of Interior scheduled part of the shelf off the Washington and Oregon coast for a lease-sale that would allow exploration and development of oil and natural gas. Washington and Oregon opposed the sale for two primary reasons:

not enough was known about the shelf's resources and the potential impacts development would have on them; and some of the targeted area was simply too vulnerable to ever be developed (this area is now the Olympic Coast National Marine Sanctuary).

In 1990, President George H. W. Bush declared the area off Washington and Oregon's coast to be off limits until further studies were conducted. Since then, the Olympic Sanctuary's regulations prohibited oil and gas development, and, in 1998, President William Clinton declared the area off limits to oil and gas leasing consideration until June, 2012.

E. Other Specially Designated Areas

1. Olympic Coast National Marine Sanctuary



Congress conceived Marine Sanctuaries as areas with special conservation, recreational, ecological, historical, scientific, educational, or aesthetic values relative to the national significance of their resource or human use values. In some ways, they represent the water-based equivalent of our National Park system. Marine Sanctuaries are intended to protect marine resources by educating, researching, and encouraging compatible uses.

The Olympic Coast National Marine Sanctuary, consisting of 3,310 square miles of marine waters off the coast of Washington's Olympic Peninsula, contains rocky and sandy shores, kelp forests, sea stacks and islands, and open ocean. Puffins, eagles, otters, whales, salmon and dolphin species, among others, make their home in the Sanctuary. Twenty-nine species of marine mammals use the Sanctuary to breed, or rest while migrating. More kinds of kelp grow in, and more whale, dolphin, and porpoises cruise through the Sanctuary than anywhere else in the world. Birds also use the Sanctuary area, located along the Pacific Flyway migratory route. The largest bald eagle populations in the continental United States make their home here.

Octopus *Photo - Steve Fisher*

Cultural resources include Native American petroglyphs and villages, historic lighthouses and shipwrecks, notably the

SEPA supplements the authority of the SMA. SEPA requires government agencies to analyze the environmental impacts (for example, coastal hazards, water quality and sensitive resources) of activities they are asked to approve. They can condition or deny approval of activities to protect the environment. Again, local governments have the primary role; Ecology plays a supporting role. In addition, SEPA requires consulting federal agencies with environmental expertise regarding activities with a substantial adverse effect on the coastal environment.

The Ocean Resources Management Act

The Ocean Resources Management Act (ORMA) was passed to "articulate policies and establish guidelines for the exercise of state and local management authority over Washington's coastal waters, seabed, and shorelines." Like SEPA, the Ocean Resources Management Act (ORMA) also supplements the Shoreline Management Act. Unlike SEPA, which applies statewide, ORMA applies only to the Pacific Ocean, extending from Cape Flattery south to Cape Disappointment, beginning at the mean high tide line and running seaward for 200 miles. ORMA expresses the state interests in the management of the Exclusive Economic Zone (EEZ) - the area that begins twelve miles seaward of the coastline and extends seaward to a line 200 miles from the coastline.

ORMA includes policies to guide activities in the Pacific Ocean. The policies in RCW 43.143.010 provide that if there are conflicts between uses, those uses that will not adversely impact renewable resources have preference over those that will adversely impact renewable resources. ORMA declares it is state policy to conserve liquid fossil fuels and directs the state to participate in federal ocean and marine resource decisions to the fullest extent possible. These policies are to guide state and local decisions on plans for coastal waters. Shoreline master programs are the primary means for complying with this requirement. In 1991, Ecology adopted regulations to guide updates to shoreline master programs relating to ocean uses. In 1997, the state legislature passed a law prohibiting oil and gas development off Washington's coast.

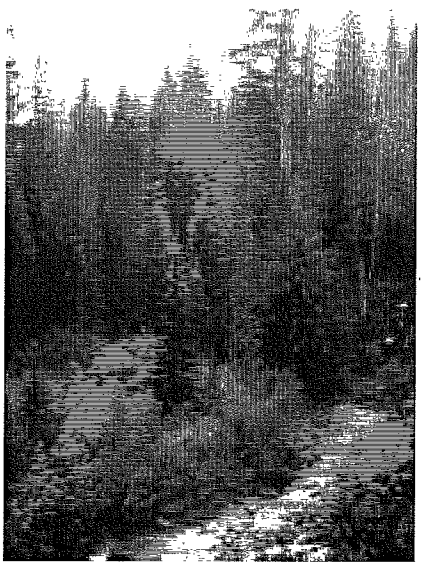


Photo - Tom Mark

The Clean Water Act

"It is declared to be the public policy of the State of Washington to maintain the highest possible standards to insure the purity of all waters of the state..."(RCW 90.48.010)

The Federal Clean Water Act addresses the issue of managing coastal development to improve, safeguard, and restore the quality of the nation's waters, including coastal waters, and to protect the natural resources and existing uses of those waters. The state Water Pollution Control Act authorizes

WASHINGTON STATE ATTORNEY GENERAL

September 26, 2014 - 2:45 PM

Transmittal Letter

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Joint Response Brief of Respondents State of Washington and City of Hoquiam

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