No. 45887-0-II

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

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

vs.

CITY OF HOQUIAM; STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY; and WESTWAY TERMINAL COMPANY LLC.
Respondents.

and

IMPERIUM TERMINAL SERVICES, LLC,
Respondent/Cross-Petitioner,

SHORELINES HEARINGS BOARD,
Respondent.

RESPONSE BRIEF OF WESTWAY TERMINAL COMPANY LLC

Svend A. Brandt-Erichsen
Jeff B. Kray
Meline G. MacCurdy
Marten Law PLLC
1191 Second Avenue, Suite 2200
Seattle, WA 98101

Attorneys for Westway
Terminal Services, LLC

ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

INTRODUCTION

Westway Terminal Company LLC ("Westway") submits this response to the Joint Opening Brief of Quinault Indian Nation and Friends of Grays Harbor *et al* (collectively, the "petitioners").[1]

The central issue in this appeal is the petitioners' request that this Court interpret two long-standing statutes in ways that they have never been interpreted in the past. First, the petitioners argue that a twenty-five year old statute written to address resource extraction in Washington's coastal waters should nonetheless be applied, for the first time, to an onshore facility that has no connection to resource extraction in Washington's coastal waters. This argument overlooks the transparent legislative intent, as shown in the legislative history and contemporaneous secondary sources that the petitioners themselves have placed before this Court, to address resource extraction in Washington's coastal waters, including the federal waters that are outside of Washington's direct jurisdiction. The review criteria at the heart of the petitioners' appeal were written to influence offshore leases in the federally-controlled exclusive economic zone. The petitioners point to no evidence that the legislature also intended the Ocean Resources Management Act ("ORMA") to apply to the types of projects at issue in this appeal.

[1] Westway takes no position with respect to the cross-appeal brought by Imperium Terminal Services, LLC ("Imperium").

Second, the petitioners contend that SEPA requires review of an applicant's ability to comply with financial responsibility requirements under the state oil spill regulations far in advance of the time these requirements are designed to apply. Not only is this argument without legal foundation, it undermines the fundamental goal of SEPA that environmental review take place early in the project development process to influence decision-making and consider proposals before they gain irreversible momentum.

ASSIGNMENTS OF ERROR

Westway adopts the restatement of the issues on review presented in the Joint Response Brief of Respondents State of Washington, Department of Ecology, and City of Hoquiam ("Joint Response").

STATEMENT OF THE CASE

Westway adopts the statement of the case presented in the Joint Response.

STANDARD OF REVIEW

Westway adopts the standard of review presented in the Joint Response.

ARGUMENT

I. The Ocean Resources Management Act Does Not Apply to Onshore Facilities That Do Not Involve Resource Extraction in Washington's Coastal Waters

The petitioners have not pointed to any circumstance in the twenty-five years since the legislature enacted ORMA where the statute has been

applied to an onshore facility that has no connection to resource extraction in Washington's coastal waters. The lack of precedent for the petitioners' novel interpretation of ORMA is predictable given that the legislature did not intend the statute to apply to such facilities and the agencies and local governments responsible for implementing the statute have never interpreted ORMA in the manner the petitioners have suggested.

When ORMA was enacted in 1989, the federal government was in the planning stages for a 1992 lease-sale that would have authorized oil and gas exploration in waters off Washington's coast.[2] ORMA embodies a two-part legislative response that sought to limit and impose restrictions on resource extraction within Washington's "coastal waters." ORMA defines "coastal waters" as including the three-mile area under Washington jurisdiction and the adjacent 197-miles of the exclusive economic zone under federal jurisdiction.[3]

Within the three-mile zone of Washington's coastal waters that are under the state's jurisdiction, the legislature imposed an outright moratorium on leases for oil and gas exploration, development, or production.[4]

---

[2] Quinault Indian Nation and Friends of Grays Harbor *et al* Appendix ("App'x") 67.

[3] RCW 43.143.020(2) (defining "coastal waters" as "the waters of the Pacific Ocean seaward from Cape Flattery south to Cape Disappointment, from mean high tide seaward two hundred miles"); *see also* RCW 43.143.005(4) (explaining federal jurisdiction over exclusive economic zone from three miles seaward).

[4] RCW 43.143.010(2).

As ORMA explains, however, the legislature was equally concerned with activities in the adjacent federal waters (such as the planned oil and gas lease-sale) due to the potential for activities in those waters to impact Washington's waters and shorelines. "Since protection, conservation, and 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."[5] The legislature also stated that insufficient information was "available to adequately assess the potential adverse effects of oil and gas exploration and production off Washington's coast."[6]

ORMA's review criteria, central to the petitioners' appeal, stem from the legislature's inability to directly regulate or prohibit activities in the vast majority of Washington's coastal waters that are outside the state's jurisdiction. These provisions do not, contrary to the petitioners' assertion, reflect a legislative intent to reach beyond resource extraction in Washington's coastal waters,[7] nor is there any "inconsistency" with including these criteria in tandem with the moratorium on extraction in the portions of Washington's coastal waters over which the state has

---

[5] RCW 43.143.005(4).

[6] App'x-59.

[7] In theory, the criteria also could be applied to renewable resource uses at some future date, but the legislature makes clear that uses involving renewable resources were neither the focus of the statute nor intended to be regulated under the statute at that time. RCW 43.143.010(5). Thus, while notionally applicable to all on-water resource uses, in fact ORMA only applies to nonrenewable resource extraction.

jurisdiction.[8] Rather, the review criteria furthered the legislature's goal of influencing resource exploration in all of Washington's coastal waters, including the waters under federal jurisdiction.[9] This motivation is clear in the legislative history, where the legislature stated that ORMA was intended to guide the federal decision-making process regarding the management, conservation, use, and development of resources in coastal waters that are under federal jurisdiction.[10]

The legislature's calculated effort to impose restrictions on resource extraction in the portion of Washington's coastal waters under federal control is described clearly in the legislature's explanation of the mechanism through which the legislature intended ORMA to assert this influence. The goal was to create a set of review criteria adopted by local governments that, by virtue of the Coastal Zone Management Act ("CZMA"), would bind the federal government's exploration activities in the exclusive economic zone.[11] The legislative history explains that the CZMA "directs that federal agencies conduct and support activities directly affecting the coastal zone in a manner which is, to the maximum extent practicable, consistent with approved state management programs."[12] Applicants for federal licenses "to conduct an activity

---

[8] *See* Petitioner's Op. Brief at 29.
[9] *See* App'x-65 (explaining that few regulations, guidelines, or policies governed the use or development of Washington State's coastal resources).
[10] App'x-65-68.
[11] App'x-67-68.
[12] App'x-67; *see also* 16 U.S.C. § 1456(c)(1)(A).

affecting land or water uses in the coastal zone of a state must provide a state approved certification of consistency with that state's management program," even where such plans are for exploration, development, or production from areas in the exclusive economic zone.[13] As a result, the legislature concluded, "any exploration, development, or production activities conducted or permitted by [the Mineral Management Service ("MMS")] must be consistent with" ORMA.[14]

To incorporate the purpose of ORMA into the state's management plans, the legislature directed Ecology to develop "ocean use guidelines and policies to be used" in reviewing and amending local governments' shoreline master programs consistent with the intent of ORMA and required local governments to adopt these guidelines.[15] The net result was a comprehensive scheme of local shoreline master programs that were

---

[13] App'x-67; *see also* 16 U.S.C. § 1456(c)(3)(A) (providing that "any applicant for a required Federal license or permit to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program").

[14] App'x-67.

[15] App'x-62 (codified in RCW 90.58.195, implementing shoreline master plan review); *see also* App'x-68 (stating that local governments were directed to review and amend their shoreline master programs to ensure consistency with ORMA and that Ecology was to "consult with affected state agencies, local governments, Indian Tribes, and the public prior to responding to federal coastal zone management consistency certifications," whereby Ecology would ensure that ORMA's policies would be met).

imbued with the dictates of ORMA and that would collectively impose restrictions on exploration within the exclusive economic zone adjacent to these local governments.

The newspaper articles that the petitioners cite, published contemporaneously with the passage of ORMA, highlight the purpose of the statute and the mechanism through which it was intended to accomplish that purpose. When the bill briefly stalled in the legislature, the official who was at the time advising Washington's then-governor regarding offshore drilling stated that Washington State "urgently need[ed] some kind of oil policy if it [was] to succeed in preventing the federal Interior Department from leasing sites off the Washington coastline for oil exploration."[16] When the bill was revived ten days later, the Seattle Times described ORMA as "a bill designed to protect state waters from the hazards of oil drilling and other development" and stated that then-Governor Booth Gardner and other supporters "claim[ed] the coastal development policy that would be established under the bill [was] essential if the state hope[d] to block the Bush administration from leasing offshore areas for drilling."[17] The newspaper article also stated that ORMA would revise the Shoreline Management Act ("SMA") "so that it would regulate activities within state waters" and require that lessees "comply with stringent state requirements" if the federal government were

[16] App'x-76.
[17] App'x-78.

to lease offshore areas.[18]

It is within this context that Ecology developed its regulations implementing the scope of activities that are subject to ORMA and, as a result, integrated into local governments' shoreline management plans.[19] Ecology's awareness of the legislature's purpose in passing ORMA led to the clear definition of "ocean uses" as directly connected to resource extraction in Washington's coastal waters. Ecology defined "ocean uses" 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.[20]

The petitioners have not explained how the projects at issue in this appeal fall within this definition, where they will not involve the extraction of crude oil or resources from Washington's coastal waters. While the projects mark a transition point between modes of transporting crude oil, the oil itself is extracted in the heart of the continent, far from Washington's coastal waters. Since the projects have no connection to any extractive "activity or development" on Washington's coastal waters,

---

[18] *Id.*
[19] *See* App'x-62; RCW 90.58.195; WAC 173-26-360(1).
[20] WAC 173-26-360(3).

the petitioners would have to demonstrate that ORMA applies to the mere transport of a commodity (crude oil), regardless of its point of origin. This they simply cannot do.

Finally, the petitioners fail to explain how their expansive interpretation of ORMA fits within the web of environmental review provisions under the SMA and SEPA that already provide the type of review and analysis of onshore facilities that the petitioners would impose under ORMA. The SMA is designed to evaluate development of shorelines by ensuring that such development controls pollution and prevents damage to the natural environment and has consistently been applied to evaluating land use decisions involving onshore facilities.[21] Likewise, SEPA already ensures that probable significant, adverse impacts will be evaluated and mitigated before a project moves forward.[22] The petitioners have provided no explanation for why the legislature would have deemed the SMA and SEPA insufficient to evaluate the potential impacts from on-shore facilities, particularly since the legislative history makes it clear the legislature intended ORMA to bolster the State's influence over offshore facilities.[23]

---

[21] *See* RCW 90.58.020.
[22] *See* RCW 43.21C.031.
[23] *See* App'x-65-68.

II. SEPA Does Not Require Premature Evaluation of Prospective Compliance with Washington's Financial Responsibility Requirements for Onshore Facilities

The petitioners' assertion that SEPA requires an evaluation of an applicant's ability to comply with financial responsibility requirements under the state oil spill regulations is without legal foundation and conflicts with SEPA's dictate that environmental review take place at the earliest possible stage in the regulatory review process so that it can guide later decision-making.[24] The petitioners' view that individual elements of the subsequent regulatory review should be accelerated and completed during SEPA review is entirely antithetical to SEPA's intent. Moreover, as the Board properly held, SEPA decision-makers are entitled to condition their SEPA review on compliance with a variety of complex environmental laws when such compliance becomes ripe.[25] Petitioners have presented no compelling argument for why this Court should single out financial responsibility from among the many forthcoming permits and regulatory reviews that will be necessary before the proposed projects go forward and require that this one regulatory requirement be satisfied during the initial environmental review.

One of SEPA's over-arching goals is that environmental review take place at the earliest stage possible, before significant resources are expended and commitment toward completion of the project becomes

---

[24] *See* WAC 197-11-055(1).
[25] *See* AR at 2413 (SHB Order at 35).

intractable [26] SEPA regulations are replete with this directive, requiring that environmental review take place "at the earliest possible time to ensure that planning and decisions reflect environmental values,"[27] that lead agencies prepare threshold determinations "at the earliest possible point in the planning and decision-making process, when the principal features of a proposal and its environmental impacts can be reasonably identified,"[28] and that lead agencies ensure that review of private proposals take place "at the conceptual stage rather than the final detailed design stage."[29] Case law acknowledges that meeting these directives will necessarily involve conducting a SEPA review in the absence of future agency approvals.[30] The petitioners' assertion that SEPA nonetheless requires premature evaluation of one aspect of what will be a comprehensive oil spill contingency plan would undermine these fundamental goals of SEPA.

Ecology's financial responsibility requirements are embedded in the agency's comprehensive network of oil spill contingency plan requirements addressing what criteria a permit applicant must meet before

---

[26] *See, e.g.*, WAC 197-11-055.
[27] WAC 197-11-055(1).
[28] WAC 197-11-055(2).
[29] WAC 197-11-055(4).
[30] *See, e.g., Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn App. 34, 53 (2002) (analyzing timing of environmental review in the context of Seattle Municipal Code and the application to general development plan for mall expansion, rejecting argument that review was premature before definite proposal or application had been completed).

it is authorized to receive an operating permit.[31] In addition to the financial responsibility requirements, these regulations include criteria associated with oil spill plans, manuals, training, and reports that will be put in place to prevent and respond to oil spills.[32] Ecology evaluates facility submittals under those regulatory requirements, and its approval of a complete oil spill contingency plan is required before a project can begin operations.[33] The petitioners have not explained why conducting this analysis later, at the proper time in the regulatory review process, will result in irrevocable environmental harm.[34]

Completion of appropriate, Ecology-approved oil spill contingency plans is only one of many environmental permitting and review stages that Westway and Imperium will need to meet before facility operations can begin. Ecology and the City included a list of the reviews and approvals that will be necessary before the projects can move forward and clearly stated that their SEPA review presumed that compliance with these

---

[31] *See* WAC 173-180-630(7).
[32] *See* WAC 173-180-630.
[33] *Id.*
[34] The central theme to the petitioners' appeal is to focus on impacts within the context of the oil transportation system in the crude-by-rail and broader resource extraction industries. *See, e.g.*, Petitioners Op. Brief at 46-48 (comparing the Gulf Oil Spill and a rail accident). The SEPA review currently being conducted for these projects takes account of such indirect impacts, as the statute requires. WAC 197-11-060(4). However, these indirect impacts are irrelevant to Westway and Imperium's financial responsibility requirements, which relate only to the potential for spills from their oil terminals. *See* RCW 88.40.025. The petitioners' attempt to graft SEPA's broad scope onto independent underlying regulatory requirements is without precedent or legal basis.

requirements would mitigate potential significant adverse environmental impacts.[35] For Westway, these reviews and approvals included a slew of development permits from the City of Hoquiam, a wastewater permit from the Department of Ecology, approval from the Olympic Region Clean Air Agency, and approvals regarding the facility security and response plans from the U.S. Coast Guard, in addition to many others.[36] SEPA neither requires nor entitles lead agencies to accelerate one component of the multi-layered regulatory scheme that applies to project development. The petitioners have pointed to nothing in SEPA, its implementing regulations, or the case law that would justify separating the financial responsibility component of the oil spill contingency plan from the rest of the forthcoming regulatory steps within the network of land use and environmental laws.

To the contrary, SEPA is designed to allow decision-makers to rely on future compliance with existing legal requirements as conditions that will avoid significant environmental impacts. The Board confirmed this SEPA principle by agreeing with Ecology and the City that "reliance on state and federal legal requirements in an MDNS plainly is appropriate."[37] SEPA not only encourages but compels lead agencies to consider the network of existing environmental laws during a threshold determination, stating that the lead agency "*shall* . . . [c]onsider mitigation measures

---

[35] AR at 61-63, 125.
[36] AR at 125.
[37] AR at 2413 (SHB Order at 35).

which an agency or the applicant will implement as part of the proposal, including any mitigation measures required by development regulations, comprehensive plans, or other existing environmental rules or laws."[38] Additional mitigation measures are only appropriate where existing legal requirements are insufficient to address identified significant impacts.[39] Ecology's SEPA Handbook directs the agency to identify potential environmental impacts and take into account potential mitigation—"particularly that already required" under other legal requirements—and only then "decide whether there are any likely significant adverse environmental impacts that have not been adequately addressed."[40] Decision-makers are entitled to presume that a project applicant will comply with existing law in the future.[41]

---

[38] WAC 197-11-330(1)(c) (emphasis added); *see also Chuckanut Conservancy v. Wash. State Dept of Natural Res.*, 156 Wn. App. 274, 285-86 (2010) (stating that threshold determination includes "consider[ing] mitigation measures the applicant will implement and any such measures required by regulations, comprehensive plans, or other existing environmental rules or laws").

[39] WAC 197-11-660(1)(e) ("Before requiring mitigation measures, agencies shall consider whether local, state, or federal requirements and enforcement would mitigate an identified significant impact.").

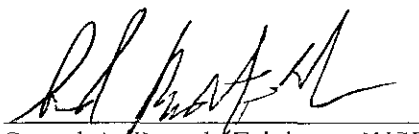
[40] Ecology SEPA Handbook § 2.6; *see id.* § 2.5.3 (stating that "[m]itigation required under existing local, state, and federal rules may be sufficient to eliminate any adverse impacts").

[41] *See* WAC 197-11-350(7) ("Agencies may specify procedures for enforcement of mitigation measures in their agency SEPA procedures."); *see also Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1173 (10th Cir. 2012) (in challenge to issuance of FONSI under NEPA, rejecting argument that project applicant might fail to conduct additional mitigation measures, because applicant "ha[d] a

CONCLUSION

For the reasons stated above, the Court should affirm the Board's ruling that ORMA does not apply to the proposed onshore facilities in this case and that SEPA does not require a premature evaluation of the financial responsibility provisions in RCW 88.40.025.

Respectfully submitted this 26th day of September, 2014.



Svend A. Brandt-Erichsen, WSBA # 23923
Jeff B. Kray, WSBA # 22174
Meline G. MacCurdy, WSBA # 39467
Marten Law PLLC
1191 Second Avenue, Suite 2200
Seattle, WA 98101
206.292.2600 (phone) / 206.292.2601 (fax)
svendbe@martenlaw.com
jkray@martenlaw.com
mmacurdy@martenlaw.com

Attorneys for Westway Terminal Services, LLC

---

legal duty" under existing law to conduct the mitigation and "presum[ing]" that the applicant would perform that obligation).

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing Response Brief of Westway Terminal Company LLC to the parties as indicated below on September 26, 2014:

Karen Allston — Via E-mail
Senior Assistant Attorney General
Quinault Indian Nation
P.O. Box 613
Taholah, WA 98587
kallston@quinault.org

Knoll Lowney — Via E-mail
Elizabeth H. Zultoski
Smith & Lowney, PLLC
2317 East John St.
Seattle, WA 98112
knoll@igc.org
elizabethz@igc.org
jessie.c.sherwood@gmail.com

Jay Derr — Via E-mail
Tadas Kisielius
VanNess Feldman GordonDerr
719 2nd Avenue, Suite 1150
Seattle, WA 98104
jpd@vnf.com
tak@vnf.com

Kristen L. Boyles — Via E-mail
Matthew R. Baca
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104

kboyles@earthjustice.org
mbaca@earthjustice.org
cmcevoy@earthjustice.org

Diane McDaniel — Via E-mail
Washington Shorelines Hearings Board
P.O. Box 40110
Olympia, WA 98504
dianem@atg.wa.gov
lalolyef@atg.wa.gov

Allyson Bazan, WSBA # 44221 — Via E-mail
Assistant Attorney General
Washington Attorney General's Office
Ecology Division
P.O. Box 40117
Olympia, WA 98504-0117
allysonb@atg.wa.gov
tomy@atg.wa.gov
donnaf@atg.wa.gov

Steve Johnson, WSBA # 9528 — Via E-mail
City Attorney
City of Hoquiam
609 8th Street
Hoquiam, WA 98550
sjohnson@cityofhoquiam.com

DATED this 26 day of September, 2014.

Erin Herlihy
Legal Assistant