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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,

vs.

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

Respondents.

**SUPPLEMENTAL BRIEF OF RESPONDENT
WESTWAY TERMINAL COMPANY, LLC**

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Table of Contents

INTRODUCTION 1

RESTATEMENT OF ISSUE ON REVIEW 2

STATEMENT OF THE CASE..... 2

ARGUMENT 3

 I. ORMA’s scope is limited by its plain text
 to uses of Washington’s coastal waters 3

 II. The expansion of Westway’s terminal does
 not fall within ORMA’s plain language 7

 III. Even if ORMA is ambiguous, its
 legislative history affirms that the statute
 does not apply to Westway’s project 8

 IV. The expansion of Westway’s terminal is
 not an “ocean use” within the meaning of
 ORMA regulations..... 10

 V. Terminals on land are not “ocean
 transportation” uses..... 13

CONCLUSION..... 18

Table of Authorities

Cases

<i>Dep't of Ecology v. Campbell & Gwinn, LLC</i> , 146 Wn.2d 1, 9, 40 P.3d 4 (2002).....	3, 4, 9, 16
<i>Five Corners Family Farmers v. State</i> , 173 Wn.2d 296, 305, 268 P.3d 892 (2011).....	8
<i>Quinault Indian Nation v. Imperium Terminal Services, LLC</i> , 190 Wn.App. 696, 700, 360 P.3d 949 (2015).....	1, 7, 12, 14, 15, 16, 17
<i>Restaurant Dev., Inc. v. Cananwill, Inc.</i> , 150 Wn.2d 674, 682, 80 P.3d 598 (2003).....	9

Revised Code of Washington

43.143.005(4).....	9
43.143.010 – .030.....	1
43.143.010(2).....	9
43.143.010(5).....	6, 7, 8, 11, 16
43.143.020(2).....	5
43.143.030.....	3, 6, 8, 11, 12, 16
43.143.030(1).....	5, 6
43.143.030(2).....	4, 5, 6, 7, 8, 14
43.21C.031.....	8

Washington Administrative Code

173-26-241.....	5
173-26-360.....	5, 11
173-26-360(1).....	11
173-26-360(2).....	11
173-26-360(3).....	11, 12, 15, 16, 17
173-26-360(4)-(14).....	11
173-26-360(6).....	13, 14

173-26-360(7)	11, 13, 16
173-26-360(7)(j)	11
173-26-360(8)	16
173-26-360(12)	14, 15, 17
187-11-060(4)(d).....	8, 14
187-11-060(4)(e).....	14

Other Authorities

Final Legislative Report, 51 st Leg. (Wn. 1989)	9
Legislative Digest and History of Bills – House, 51 st Leg. (Wn. 1990)...	10

INTRODUCTION

This appeal advances a novel – and incorrect – reading of the Ocean Resource Management Act¹ (ORMA), attempting to apply that statute’s criteria for uses and development in Washington’s coastal waters to the expansion of existing port facilities located entirely on land. Contrary to the theories advanced by Petitioners Quinault Indian Nation, Friends of Grays Harbor, Sierra Club, Grays Harbor Audubon and Citizens for a Clean Harbor (collectively, “Quinault”), there must be a development or use of nonrenewable resources in Washington’s coastal waters that itself requires a permit for ORMA to apply to associated onshore development, and even then ORMA only applies to onshore activities that are intended to support the use or activity occurring on coastal waters.

Quinault’s argument that any use or activity that impacts coastal resources is subject to ORMA, regardless of where that use or activity occurs, is contradicted by the plain language of the statute and, to the extent there is any ambiguity in the statute’s language, by ORMA’s legislative history. ORMA is triggered by conduct – the proposed use or development of nonrenewable resources in Washington’s coastal waters – not by potential impacts.

Quinault’s further argument that a port project becomes subject to ORMA if it will deliver crude oil to oceangoing vessels reads ORMA’s

¹ RCW 43.143.010 – .030.

implementing regulation backwards. The ORMA regulation extends the review of the authorization for a use occurring on coastal waters to include permitting for any supporting onshore facilities. Quinault seeks the reverse: direct ORMA review of an onshore facility because it is associated with vessel traffic that is beyond the scope of any permit being sought. Moreover, the vessel traffic in question is not an “ocean use” within the meaning of the regulation because: (a) commercial cargo shipments are not, by themselves, an ORMA “ocean use”; and (b) the vessel traffic at issue here is a continuation of multi-modal commercial shipments that neither originate nor conclude in Washington’s coastal waters. Quinault’s attempt to redirect ORMA to regulate port expansion projects that are unconnected to the use and development of nonrenewable resources in Washington’s coastal waters is not supported by the statute or its implementing regulations, and so must fail.

RESTATEMENT OF ISSUE ON REVIEW

Is an onshore port terminal project subject to ORMA’s review criteria where the project will be used to receive crude oil by rail and deliver that crude oil to oceangoing vessels engaged in the commercial oil trade, but the project does not itself involve any use or development of nonrenewable resources on or in Washington’s coastal waters?

STATEMENT OF THE CASE

Westway Terminal Company, LLC (Westway) adopts the statement of the case presented in the Joint Response Brief filed in the

Court of Appeals by the State of Washington, Department of Ecology (Ecology) and the City of Hoquiam.

ARGUMENT

I. ORMA's scope is limited by its plain text to uses of Washington's coastal waters

Quinault's central premise is that any project that requires a permit may become subject to ORMA's review criteria based solely upon its effects on coastal resources, regardless of where the project is located. Pet. For Review at 10-11. If the project "will adversely impact" existing ocean or coastal uses, Quinault believes that ORMA must apply, without regard to the actual location or nature of the project.² *Id.* But to the contrary, by the statute's plain language, the location and nature of the project is just as important as its impacts in determining whether ORMA applies. RCW 43.143.030.

In discerning a statute's plain meaning, a court looks to the language of the specific section or sentence in question, to the purpose of the act, and to all related statutes or other provisions of the same act in which the provision is found. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 40 P.3d 4 (2002); Pet. For Review at 11.

² Quinault also asserts, without citation or any basis in fact, that the proposed terminal expansion projects "would have uncontested adverse impacts on Washington's ocean coast..." Pet. For Review at 12. No court has ever made that finding, nor has Westway ever conceded that allegation.

The statutory subsection that establishes ORMA's review criteria begins with the words "uses and activities." RCW 43.143.030(2). Quinault reads this term in isolation and assumes, since this particular subsection does not state a geographic limit on the covered "uses and activities," the statute's review criteria must apply to any use that requires some permit and "will adversely impact" existing ocean or coastal uses. Pet. For Review at 10-11. That is how Quinault justifies its incorrect assertion that the location and nature of the covered use is irrelevant and wrongly claims that the only factor that determines ORMA's application is whether the use "will adversely impact" coastal resources. *Id.* at 11.

Quinault's reading of ORMA fails because it ignores the plain language found elsewhere in the same section of the statute, as well as in other sections of ORMA, which also must be considered in determining the plain meaning of the provision central to their appeal. *See Campbell & Gwinn, LLC*, 146 Wn.2d at 9. When read in concert with the rest of this section and with other sections of the statute, it is readily apparent that ORMA's review criteria are triggered by the location and nature of the activity; they apply to nonrenewable resource uses and activities in and on Washington's coastal waters, and not to activities occurring on land.

Quinault would wrongly have ORMA's criteria for specific projects apply more broadly than the plans those criteria are intended to implement. The first subsection of RCW 43.143.030 describes the uses the legislature intended to make subject to ORMA's planning and review criteria. It directs that planning for the "use or development of *natural*

resources in Washington's coastal waters" be guided by ORMA's policies. RCW 43.143.030(1) (emphasis added). This geographic constraint limits ORMA's planning requirement to addressing activities occurring in Washington's coastal waters. ORMA defines "coastal waters" to mean the Pacific Ocean waters extending two hundred miles seaward from mean high tide. RCW 43.143.020(2). ORMA further directs that these planning criteria be incorporated into coastal management plans, RCW 43.143.030(1), thereby shaping the shoreline management master programs of the coastal local governments. *See* WAC 173-26-360. These shoreline master programs set the review criteria for individual projects. *See* WAC 173-26-241 (shoreline uses).

The second subsection of RCW 43.143.030 – the provision at issue in this appeal – then describes the review criteria applicable to specific uses that fall within the plans established under the first subsection, with the phrase "uses and activities" referring back to those described in the preceding subsection. *See* RCW 43.143.030(2). The statute thereby specifies the project-specific review criteria that local jurisdictions must incorporate into the ocean resource planning that is made part of their shoreline master plans by the statute's preceding subsection.

Thus, when read in context, the project review criteria set out in RCW 43.143.030(2) apply to the use or development of natural resources which are located in Washington's coastal waters and subject to ORMA's planning guidelines, not to uses located elsewhere that may affect coastal natural resources. Quinault's attempt to apply ORMA's review criteria

outside of Washington's coastal waters is refuted by ORMA's unambiguous language, which applies the statute's planning requirements and its review criteria to the same geographic area: the use and development of natural resources that are located in coastal waters, meaning the waters extending up to 200 miles seaward from the high tide line. *See* RCW 43.143.020, .030(1) & (2).

The legislature's intent that the two subsections of RCW 43.143.030 – ORMA's planning and review criteria – be read in conjunction and apply to the same uses and activities is confirmed by RCW 43.143.010(5). This provision excludes fishing and other renewable resources from "the uses and activities which must meet the planning and review criteria set forth in RCW 43.143.030." RCW 43.143.010(5). In so doing, it confirms that the planning and review criteria have the same scope, using the term from RCW 43.143.030(2) – "uses and activities" – to identify the uses that are, and are not, subject to the planning criteria established by RCW 43.143.030(1) and the review criteria established by RCW 43.143.030(2). Moreover, RCW 43.143.010(5) excludes specific uses of "marine or ocean resources" from ORMA's planning and review criteria, affirming the legislature's intent that the planning and review criteria apply to activities occurring in Washington's coastal waters. There is no suggestion in the language of the statute that the legislature intended ORMA's planning and review criteria to apply to uses and activities occurring shoreward of the high tide line.

II. The expansion of Westway's terminal does not fall within ORMA's plain language

As discussed in the preceding section, ORMA's review criteria are triggered by a permit application: (a) for the use or development of nonrenewable resources in or on Washington's coastal waters; that (b) will adversely impact renewable resources of those coastal waters or existing ocean or coastal uses. RCW 43.143.010(5), .020 & .030(2). Westway has not applied for any such permit and so its project does not fall within ORMA's plain language.

Westway applied for a Shoreline Substantial Development Permit to construct storage tanks, rail spurs and piping at its existing terminal at the Port of Grays Harbor so that the facility can receive crude oil by train, store it in tanks and load it into vessels. *See Quinault Indian Nation v. Imperium Terminal Services, LLC*, 190 Wn.App. 696, 700, 360 P.3d 949 (2015). All of the proposed construction would occur on land. *Id.* at 712-13. Westway would not own the oil transferred through its facility and would not own or operate any of the vessels that would transport the oil. *Id.*

Apparently recognizing that there is nothing about Westway's proposed terminal expansion project itself that could trigger ORMA, Quinault focuses instead on the vessels that will call at the terminal, arguing that the vessel traffic is "integral" to the terminal project, and that increases in that vessel traffic should trigger ORMA. Pet. For Review at 12. But Westway will not be operating those vessels and the permit it seeks is for onshore facilities, not for vessel traffic. The potential increase

in vessel traffic is an indirect impact of Westway's project, which is being evaluated under the State Environmental Policy Act (SEPA), *see* RCW 43.21C.031; WAC 187-11-060(4)(d), but that does not bootstrap Westway's onshore terminal project past ORMA's threshold requirement that covered activities require a permit or authorization for the use or development of nonrenewable resources on or in Washington's coastal waters. *See* RCW 43.143.010(5), .020 & .030. Regardless of the claimed impact on existing ocean or coastal uses, commercial vessel traffic does not involve the use or development of nonrenewable resources in or on Washington's coastal waters, seabed or shoreline. *See id.*

III. Even if ORMA is ambiguous, its legislative history affirms that the statute does not apply to Westway's project

The legislature's intent to limit ORMA's planning and review criteria to the use or development of nonrenewable resources on or in Washington's coastal waters is plain on the face of the statute. Quinault's attempt to advance a broader reading of "uses and activities" under RCW 43.143.030(2) does not inject ambiguity into the statute. "The fact that two or more interpretations are conceivable does not render a statute ambiguous." *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305, 268 P.3d 892 (2011).

But should the Court nevertheless conclude, after considering the language of RCW 43.143.030(2) in light of what the legislature said elsewhere in ORMA, that the location or nature of the covered "uses and activities" remains susceptible to more than one reasonable meaning, then

the Court may resort to extrinsic aids to construction, including legislative history. *Campbell & Gwinn, LLC*, 146 Wn.2d at 11-12. If a statute is subject to more than one reasonable interpretation, the court “may look to the legislative history of the statute and the circumstances surrounding its enactment to determine legislative intent.” *Restaurant Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003).

Quinault submitted ORMA’s legislative history and some contemporaneous newspaper articles as an appendix to their brief in the Court of Appeals. If the Court considers that legislative history, it will find confirmation that the statute was never intended to reach projects like Westway’s.

Washington adopted ORMA in 1989, in the wake of the *Exxon Valdez* spill and in response to federal planning for a 1992 lease sale that would have authorized oil and gas exploration in the federal waters off Washington’s coast. *See* Final Legislative Report, 51st Leg. at 167 (Wn. 1989), Quinault Court of Appeals Opening Brief Appendix (App’x) at 67. The statute prohibited oil and gas leasing in the three-mile band of state-owned waters off Washington’s coast. RCW 43.143.010(2). But the legislature was equally concerned about the potential for oil and gas development in the federal waters out to 200 miles off the coast. *See* RCW 43.143.005(4); App’x at 65-68. It therefore adopted ORMA’s review criteria so that, through application of the federal Coastal Zone Management Act, Washington’s state and local governments could condition or deny oil and gas development that might be proposed in the

federal waters extending from three to two hundred miles off Washington's coast. App'x at 67-68.

This legislative history for House Bill 2242, the bill that became ORMA (*see* App'x at 58), demonstrates the legislature's understanding that the bill was designed to guide – and restrict – resource development in the coastal waters off Washington. The legislative digest, describing the bill as enacted, recognized the geographic scope of what became RCW 43.143.030: “Sets forth certain guidelines for the exercise of state and local management authority over state coastal waters, seabed and coastline.” Legislative Digest and History of Bills – House, 51st Leg. at 580 (Wn. 1990), App'x at 71. And even more explicitly, the digest recognized that ORMA's review criteria were aimed at oil and gas exploration: “Requires that certain oil and gas-related activities meet or exceed certain standards.” *Id.*

This legislative history demonstrates that ORMA was adopted in a conscious effort to restrict natural resource development – particularly oil and gas exploration – in the coastal waters off Washington that are under federal jurisdiction. *See* App'x at 65-68, 71. It was never intended to apply to the onshore development of port facilities, like Westway's, that are unrelated to offshore resource development.

IV. The expansion of Westway's terminal is not an “ocean use” within the meaning of ORMA regulations

In 1991, Ecology adopted a regulation – titled “Ocean Management” – implementing the planning and review criteria called for

by ORMA. WAC 173-26-360. In that regulation, Ecology defined the term “ocean uses” consistent with ORMA’s geographic description of coastal waters and the statute’s repeated references to the resources and uses of those waters: “Ocean uses are activities or developments involving renewable and/or nonrenewable resources that occur on Washington’s coastal waters...” *Compare* WAC 173-26-360(3) with RCW 43.143.010(5), .020 & .030.

Ecology’s ocean management regulation also extended ORMA review to support facilities and activities, adding that the term “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.” WAC 173-26-360(3). But despite inclusion of associated facilities, the term “ocean uses” remains focused on “activities or developments involving renewable and/or nonrenewable resources *that occur on Washington’s coastal waters.*” WAC 173-26-360(3) (emphasis added).

All of the substantive requirements of the ocean management regulation are keyed to the use or development of the ocean and its resources. *See* WAC 173-26-360(1), (2), (4)-(14). The only mention of onshore facilities is as support facilities for ocean activities. *See, e.g.,* WAC 173-26-360(7) (“general ocean uses guidelines” apply “to all ocean uses, their service, distribution, and supply activities and their associated facilities that require shoreline permits.”); 360(7)(j) (“Ocean uses and their associated coastal or upland facilities”).

Quinault admits that “the key to determining whether an activity falls within the regulations is whether it involves renewable and/or nonrenewable resources and occurs on Washington’s coastal waters.” Pet. For Review at 12-13. But Quinault nevertheless faults the Court of Appeals for applying what Quinault describes as a new “primary” ocean activity test. Pet. For Review at 13-14. To the contrary, the Court of Appeals simply gave effect to the word “associated,” which features prominently in the ocean management regulation’s extension of ORMA to facilities that support ocean uses. *See* WAC 173-26-360(3); *Quinault Indian Nation*, 190 Wn.App. at 713. Onshore facilities are not subject to ORMA’s review criteria unless they are “associated” with “activities or developments involving renewable and/or nonrenewable resources that occur on Washington’s coastal waters.” *See* WAC 173-26-360(3). If there is no activity occurring on Washington’s coastal waters that is itself subject to ORMA review, then there can be no associated facilities. *Id.* The Court of Appeals appropriately characterized this threshold requirement for ORMA jurisdiction as a “primary activity” occurring on Washington’s coastal waters, *see* 190 Wn.App. at 713, and in the absence of any such “primary activity” it correctly concluded that ORMA does not apply. *See* WAC 173-26-360(3); RCW 43.143.020 & .030.

Quinault argues that, even if this is a correct reading of the regulation, “it cannot trump the statute.” Pet. For Review at 14. There are several flaws in this line of argument. First, Quinault never challenged the regulation below, and so cannot do so for the first time on appeal. *See*

RAP 2.5(a). Second, the statute makes no mention of “associated facilities.” It sets criteria for resources uses and activities occurring in or on coastal waters. RCW 43.143.030. It is Ecology’s regulation alone that extended ORMA’s requirements to the facilities, located onshore or off shore, that support the use and development of nonrenewable resources occurring in coastal waters. Whether or not it was reasonable for Ecology to expand ORMA to include associated facilities, Quinault cannot point to a silent statute as proof that the regulations do not go far enough in that regard.

Quinault also accuses the Court of Appeals of “closing its eyes” to “hundreds of *associated* yearly vessel trips.” Pet. For Review at 15 (emphasis added). But as the highlighted term demonstrates, Quinault refuted their own objection even as they stated it. Westway seeks a shoreline substantial development permit to build storage tanks, expand a rail spur, and install piping and vapor emission controls, not a permit for vessels. The fact that vessels will call at an onshore project does not convert it to an ocean use. ORMA’s review criteria only apply to the permitting of ocean uses. RCW 43.143.030; WAC 173-26-360(6) & (7).

V. Terminals on land are not “ocean transportation” uses

Ecology’s ocean management regulation contains a subsection, titled “transportation,” which describes uses that are considered “ocean transportation” and are subject to guidelines for “transportation activities that originate or conclude in Washington’s coastal waters or are transporting a nonrenewable resource extracted from the outer continental

shelf off Washington.” WAC 173-26-360(12). The Court of Appeals properly concluded that vessel calls alone do not trigger ORMA because: (a) the vessel calls are not incidental to a separate ocean use, and so are not “ocean transportation” within the meaning of this regulation; and (b) the shipments of oil and bulk liquids that will be transferred by the projects from rail to vessels originate at their point of extraction (inland) and not in Washington’s waters. 190 Wn.App. at 713-16.

Quinault closes their appeal to this Court with an argument that shipping oil through Washington waters nevertheless is “ocean transportation” within the meaning of the ocean management regulation. Pet. For Review at 16-20. This argument underscores Quinault’s failure to focus on the actual proposals at issue in this case, which are land-based terminals, not ships. Moreover, Quinault’s argument overlooks the fact that ORMA’s review criteria are triggered by the permitting of an ocean use. RCW 43.143.030(2), WAC 173-26-360(6). Westway is not seeking a permit for vessel traffic,³ so even if the vessels were considered an “ocean use,” that would not trigger ORMA here.

³ The potential impacts of vessel traffic, including the potential for oil spills from those vessels, is being evaluated in the ongoing SEPA review of the shoreline permits for the projects, as Quinault acknowledges. See Pet. For Review at 15. But SEPA review extends well beyond the effects directly attributable to a proposed project; it includes indirect effects, and the evaluation of impacts under SEPA may be wider than the impacts attributable to the proposal under consideration. See WAC 187-11-060(4)(d) & (e). The fact that SEPA’s broad authority may be used to evaluate the indirect impacts of vessels that are owned and operated by third parties does not (a) expand the scope of the projects to include the vessel traffic, or (b) expand the scope of ORMA, which remains

Quinault's first objection to the Court of Appeals' holding is that ocean-going cargo ships should themselves be considered an "ocean use" triggering ORMA, independent of any other activity. Pet. For Review at 16-17. In rejecting this argument, the Court of Appeals deferred to Ecology's interpretation of its own rule as regulating transportation that is incidental to an offshore ocean use, and not regulating transportation independently. 190 Wn.App. at 715. Quinault attempts to characterize Ecology's reading of the regulation as a litigation position. Pet. For Review at 19. But Quinault cannot point to one instance in the 26 years since ORMA was enacted that Ecology has applied the regulation to commercial shipping, despite the near-constant commercial vessel traffic in Washington's coastal waters, so this is hardly a newly-formed agency interpretation of the regulation. Moreover, if Ecology had intended commercial cargo traffic, by itself, to be an "ocean use," then it would be expected to mention such a major type of use in its list of covered uses in the definition of that term. It did not do so. *See* WAC 173-26-360(3).

Quinault points out that the provision describing "ocean transportation" lists "shipping ... oil and gas" among its examples. Pet. For Review at 16-17 (citing WAC 173-26-360(12)). But the next sentence states that the regulation's guidelines apply to "transporting a nonrenewable resource extracted from the outer continental shelf off Washington." WAC 173-26-360(12). Thus, reading the two sentences

applicable only to the permitting of ocean uses.

together – as the Court must, *see Campbell & Gwinn, LLC*, 146 Wn.2d at 9 – the references in the preceding sentence to shipping oil, transferring it between vessels, or storing it offshore, relied upon by Quinault, all relate to offshore oil and gas development. *See id.*

This reading of the regulation’s “ocean transportation” provision is reinforced by the separate provision that is directed to offshore oil and gas, which does not discuss transporting oil by vessel. WAC 173-26-360(8). The oil and gas provision relies upon the separate “ocean transportation” provision to address potential impacts from transporting oil extracted from Washington’s coastal waters. As the Court of Appeals recognized, 190 Wn.App. at 716, Quinault’s attempt to expand the regulation to oil shipping that is unrelated to offshore development also is inconsistent with the purpose of the regulation (and ORMA), which is to develop policies and guidelines for managing activities in Washington’s coastal waters that are directed at developing or using nonrenewable resources. *See* RCW 43.143.010(5) & .030; WAC 173-26-360(3), (7). The Court of Appeals further observed that ORMA’s “statements of legislative policy and intent are focused, though not exclusively, on resource exploration.” 190 Wn.App. at 717. Expanding ORMA to cover oil shipments that did not come from Washington’s coastal waters would be inconsistent with those expressions of legislative intent.

Finally, Quinault argues that, even though the oil being shipped is not “extracted from the outer continental shelf off Washington,” oil shipments from the terminal projects should nevertheless fall under

ORMA because the vessels are loaded with oil in Washington's waters. Pet. For Review at 17-20. Quinault's argument rests on the phrase "transportation activities that originate or conclude in Washington's coastal waters." *Id.*; see WAC 173-26-360(12). The Court of Appeals correctly rejected that argument, noting that the oil shipments will originate out of state and arrive at the proposed projects by rail, and so do not originate at the Westway terminal, or in Washington's coastal waters. *See* 190 Wn.App. at 716-17.

Quinault's argues to this Court that, regardless of where the oil originated, the "ocean transportation" starts in Washington waters. Pet. For Review at 18. But the phrase that Quinault relies upon does not use the words "ocean transportation." It describes "transportation activities" that originate in Washington's coastal waters. WAC 173-26-360(12). Here, the activity – the movement of oil in interstate commerce – does not originate in Washington's coastal waters.

Quinault further argues that if "originate" in Washington means only "extracted" in Washington, then regulating transportation "originating" in Washington waters would be repetitive and superfluous. Pet. For Review at 18-19. But Quinault's argument misses the fact that the regulation applies to activities that support ocean uses – "the supply, service, and distribution activities, such as crew ships, circulating to and between the activities and developments." WAC 173-26-360(3). It is these supply vessel trips that are picked up by including vessel traffic originating or concluding in Washington's coastal waters within the scope

of “ocean transportation,” adding them to any vessel traffic involving oil extracted from Washington’s waters. Quinault’s argument fails because it ignores the ocean management regulation’s application to the vessel traffic that would support offshore oil development, or other uses of the resources of Washington’s coastal waters.

CONCLUSION

For the reasons set forth above, Westway respectfully urges the Court to determine that ORMA does not apply to the expansion of existing port facilities that are located entirely on land and are not associated with the development or use of nonrenewable resources in Washington’s coastal waters, and to affirm the holding below that ORMA does not apply to Westway’s terminal expansion project.

Respectfully submitted this 27th day of June, 2016.

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I certify under penalty of perjury under the laws of the State of Washington that on June 27, 2016, I caused the Supplemental Brief of Respondent Westway Terminal Company, LLC in the above-captioned matter to be served upon the parties herein as indicated below:

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Subject: RE: 92552-6 - Quinault Indian Nation, et al. v. City of Hoquiam, et al.

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Attached for filing in the above-referenced matter is Respondent Westway Terminal Company, LLC's Supplemental Brief. All parties are being served via email only, as indicated in the proof of service attached to the brief.

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