NO. 92552-6

SUPREME COURT OF THE STATE OF WASHINGTON

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

Petitioners,

v.

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

Respondents.

RESPONDENTS CITY OF HOQUIAM AND WASHINGTON STATE DEPARTMENT OF ECOLOGY'S ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Rules

Other Authorities

I. INTRODUCTION

Petitioners Quinault Indian Nation, Friends of Grays Harbor, Sierra Club, Grays Harbor Audubon, and Citizens for a Clean Harbor (collectively "Quinault") seek review of the Court of Appeals decision below holding that the Ocean Resources Management Act (ORMA) does not apply to proposed oil and bulk liquid terminal expansion projects located in the City of Hoquiam. The Court of Appeals held ORMA does not apply because the projects—primarily storage tanks—are neither "ocean uses" nor "transportation" uses as those terms are defined in Ecology's implementing regulation. This means that the projects, while receiving full environmental review under the State Environmental Policy Act (SEPA), will not receive an additional layer of review under ORMA.

Quinault claims this Court should accept review because the Court of Appeals allegedly deprived ORMA of meaning. In fact, the Court of Appeals decision gives full effect to ORMA. Under the Court of Appeals decision, ORMA continues to apply to uses and activities on or in Washington's coastal waters. The Court of Appeals simply ruled that ORMA does not apply to the land-based projects at issue here.

Below, and in their Petition for Review (Petition), Quinault advocates for an overly broad interpretation of ORMA that would make the statute applicable to virtually any port activity in one of Washington's

coastal counties or any ship that transports products through Washington's coastal waters to a coastal port. Quinault's interpretation is based on reading a single section of ORMA out of context, while ignoring the statute's legislative history and purpose, its structure and context, and the plain language of Ecology's implementing regulation.

Because the Court of Appeals committed no error in concluding that ORMA does not apply to these proposed land-based projects, Quinault does not raise any issues of substantial public interest and review should be denied.

II. STATEMENT OF ISSUE

Does the Ocean Resource Management Act, RCW 43.143, apply to proposed oil and bulk liquid terminal facilities that are located on land?

III. STATEMENT OF THE CASE

Respondents Westway Terminal Company, LLC (Westway), and Imperium Terminal Services, LLC (Imperium)[1] seek to expand their existing facilities in the City of Hoquiam to allow for the receipt, storage, and transshipment of crude oil, as well as other bulk liquids. The projects consist of the construction of storage tanks to hold the liquids, as well as rail facilities, pumps, pipelines, and associated structures. *See Quinault Indian Nation v. Imperium Terminal Serv.*, 2015 WL 6437694, at *1,

[1] Imperium recently was acquired by Renewable Energy Group.

___ Wn. App.___, 360 P.3d 949, 951 (2015) (Opinion, attached as Appendix A to Petition for Review). The projects will utilize an existing pier and dock that they share and consequently no in-water work is required. Loading arms and a marine vapor combustion system will be added to the existing pier. The projects will receive crude oil by rail, primarily from the Bakken formation in North Dakota, store the oil in on-site storage tanks, and then load it onto vessels for shipment to refineries elsewhere. *Id.*

Imperium has an existing biodiesel production and storage facility on its site. *See Quinault Indian Nation v. City of Hoquiam*, SHB No. 13-012c, at 7–9, Order on Summary Judgment (as Amended on Reconsideration) (Nov. 12, 2013) (Board Decision) CP 26–28.[2] Imperium proposes to construct up to nine additional storage tanks holding approximately 30 million gallons that could receive crude oil, ethanol, naphtha, gasoline, kerosene, jet fuel, and other liquids. Westway's facility, adjacent to Imperium, currently stores and ships methanol. Westway proposes to construct up to five additional tanks holding approximately 42 million gallons for storage and shipment of crude oil. All of the proposed developments, except the loading arms and portions of

[2] Future references to the Board Decision will refer to the Clerk's Papers (CP) at pages 20–62.

the marine vapor combustion system, will be located on land leased to the Port of Grays Harbor. *Id.*

Ecology and the City of Hoquiam are co-lead agencies under SEPA for the proposals. CP at 29–30. Initially, the co-leads concluded that the projects, with a number of mitigation measures, would not have any significant adverse environmental impacts. Consequently, they issued Mitigated Determinations of Non-significance (MDNSs) for the proposals. The City also issued shoreline substantial development permits. Quinault appealed the shoreline permits and the MDNSs to the Shorelines Hearings Board. Among other things, Quinault argued that the projects required review under ORMA, RCW 43.143.

The Board rejected Quinault's argument based on ORMA. CP at 58–61. However, the Board reversed the shoreline permits and the MDNSs on other grounds. Recently, the co-leads issued draft environmental impact statements for the projects. *See generally* Ecology's website at www.ecy.wa.gov/geographic/graysharbor/terminals.html. The draft environmental impact statements include a number of proposed mitigation measures to address the risk of oil spills from the facility, the rail line, and from vessels. These measures include contingency planning, training, staging of equipment, financial assurances, use of updated rail cars, tug escorts, development of a vessel management system, and other

measures. *See id.* (Draft Environmental Impact Statement (DEIS) §§ 4.4.3 (facility), 4.5.3 (rail), and 4.6.3 (vessels)).

Quinault appealed the Board's ORMA decision directly to the Court of Appeals. The Court of Appeals, however, in its Opinion, affirmed the Board. In doing so, the court focused on Ecology's implementing regulation, WAC 173-26-360, and especially the definitions of "ocean uses" and "transportation" uses. As the court noted, all parties including Quinault agreed these definitions controlled the outcome of the case. Opinion at 17 n.9. The court held that the projects fit neither of these definitions because they are located on land and only incidentally involve ocean transportation.

Quinault then filed this Petition for Review.

IV. AUTHORITY AND ARGUMENT

A. The Court of Appeals Decision Gives Full Effect to ORMA

Quinault's sole argument in favor of review under RAP 13.4 is that the Court of Appeals decision fails to give proper effect to ORMA. *See* Petition at 8. This argument fails, however, because the Court of Appeals decision gives full effect to ORMA. Under the Court of Appeals decision, ORMA continues to apply to uses or activities located on or in Washington's coastal waters. Quinault faults the Court of Appeals for focusing on the regulation instead of the statute, but the Court of Appeals

did so because all parties agreed the regulation was controlling. In any case, the court's decision is fully consistent with the statute, its purpose, and legislative history.

1. The Court of Appeals applied the correct statutory construction principles to give effect to ORMA's purpose

In interpreting statutory provisions, the primary objective is to ascertain and give effect to the intent of the Legislature. *State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724 (2013). 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, 526, 243 P.3d 1283 (2010) (citation omitted). If a statute is ambiguous, the court may look to its legislative history and context to ascertain its meaning. *Biggs v. Vail*, 119 Wn.2d 129, 134, 830 P.2d 350 (1992).

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). Interpretations that result

in unlikely, strained, or absurd consequences should be avoided. *See 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).

An agency's interpretation of a statute it is charged with administering is entitled to "great weight" if the statute is ambiguous. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004). Similarly, the court should give deference to an agency's interpretation of its own regulations. *Id.*

2. ORMA's purpose is to address uses or activities in or on Washington's coastal waters

ORMA, RCW 43.143, was enacted in 1989 in response to the perceived threat of oil and gas leasing by the federal government on the outer continental shelf. *See* Final Legislative Report, 51st Leg. at 166 (Wash. 1989); Quinault Court of Appeals Opening Brief at App'x 65–67. At the time ORMA was enacted, the Department of the Interior had scheduled part of the outer continental shelf off Oregon and Washington for lease to allow oil and natural gas exploration and development. *Id.*

ORMA banned oil and gas extraction in Washington's waters. RCW 43.143.010(2). However, this ban only applies to waters subject to state jurisdiction—from the coast to three miles offshore. *Id.* From three

miles out to 200 miles off the coast—the outer continental shelf—the federal government has primary jurisdiction. RCW 43.143.005(4). In that area, the state could not ban oil and gas development, but it could potentially condition or deny such development under the federal Coastal Zone Management Act, 16 U.S.C. §§ 1451–1466.

Under the Coastal Zone Management Act, states can influence federal permitting decisions on the outer continental shelf through their federally approved and adopted Coastal Zone Management Plans. *See* 16 U.S.C. § 1456(c)(3)(B) (state must concur that the proposal is consistent with the state's management plan). Immediately after ORMA was enacted, the state incorporated it into the state's Coastal Zone Management Plan for that purpose. *See* Washington State Department of Ecology, *Managing Washington's Coast, Washington State's Coastal Zone Management Program*, 101 (Ecology Pub. No. 00-06-029) (2001).[3]

This purpose—to address uses and activities in or on Washington's coastal waters—is why ORMA declares that the state has an "inherent interest" in the management of natural resources in the area from 3 to 200 miles out. RCW 43.143.005(4). It is also why ORMA requires the State to participate in "federal ocean and marine resource decisions to the fullest extent possible . . . ." RCW 43.143.010(6). The purpose is also reflected

[3]Available on Ecology's website at www.ecy.wa.gov/programs/sea/czm/prgm.html.

in Ecology's contemporaneous implementing regulation, which states that ORMA applies to "ocean uses," i.e. uses or activities occurring on Washington's coastal waters.

Consistent with incorporation into the state's Coastal Zone Management Plan, ORMA requires state and local governments to use its policies when developing plans for the management, conservation, use or development of natural resources "in Washington's coastal waters." RCW 43.143.030(1). It defines the "coastal waters" to mean the Pacific Ocean along Washington's coast from the line of high tide out 200 miles. RCW 43.143.020(2).

ORMA then goes on to articulate a set of review criteria for uses or activities that may adversely impact Washington's "ocean or coastal uses." RCW 43.143.030(2). These review criteria require, among other things, that there is a demonstrated local, state, or national need for the project; that there is no reasonable alternative to meet that need; that there will be no likely long-term significant adverse impacts to coastal or marine resources; that all reasonable steps to avoid and minimize adverse impacts have been taken, "with special protection provided for the marine life and resources of the Columbia River, Willapa Bay and Grays Harbor estuaries, and Olympic national park;" that performance bonding is provided, and that the project complies with all local, state, and federal laws. *Id.*

Under the plain language of the statute, and consistent with its legislative history and purpose, the review criteria in RCW 43.143.030(2) apply only to uses and activities occurring offshore, either in or on Washington's waters. Using those criteria, and through incorporation of them into the State's Coastal Zone Management Plan, state and local governments may condition or deny federally permitted activities and uses occurring in Washington's waters. State and local governments may also use the review criteria to condition or deny uses or activities proposed in state waters that do not require federal permits.

3. The Court of Appeals correctly concluded that ORMA does not apply to the land-based activities at issue here

In the present case, the uses and activities proposed by Westway and Imperium do not occur in Washington's coastal waters. No in water work is proposed and none was authorized by the substantial development permits under review by the Board. Virtually all of the proposed developments—the storage tanks, rail improvements, pumps and pipelines—occur on land, most of them more than 200 feet from the shoreline. *See* Administrative Record (AR) at 60–61 (Findings of Fact and Conclusions of Law of the Shoreline Administrator). The vessel traffic associated with the proposed facilities—which does occur on the ocean—is not owned or operated by them. Opinion at 16. That traffic is

also not part of the uses or developments authorized by the subject permits. Consequently, as the Court of Appeals correctly held, ORMA does not apply here. Opinion at 18.

Quinault argues ORMA applies to the Westway and Imperium proposals because they may have "an adverse impact" on coastal resources. Petition at 10–11. According to Quinault, the statute's review criteria apply to any project having an "adverse impact" whether located on land or in the water. The Court of Appeals, however, properly rejected this overly broad interpretation because it is inconsistent with ORMA's language and purpose, as well as Ecology's implementing regulation. As discussed above, ORMA's purpose is limited to activities and uses occurring "in the coastal waters" that may adversely effect "ocean or coastal uses." Similarly, Ecology's implementing regulation is limited to "ocean uses." WAC 173-26-360(3).

As the Court of Appeals and the Board recognized, Quinault's interpretation would make ORMA applicable to virtually every major project that is located on the coast, both on land and on the water, or that ships products on the ocean. Grain elevators, bulk cargo terminals, factories, lumber mills, automobile transfer facilities, bridges, and many other similar projects, all may have some "adverse impact" on coastal resources. ORMA, however, was not intended to address such a broad

spectrum of projects, but instead was intended to address only uses or activities "in Washington's coastal waters." *See* Opinion at 20–21; CP at 59.

Recognizing the overbreadth of their interpretation, Quinault emphasizes the alleged "limits" that ORMA includes. *See* Petition at 10–11. These limits are ORMA's application to the four coastal counties and its application to projects that require permits. *Id.* These limits, however, do very little to narrow their interpretation. Virtually all major construction projects require permits of some kind. Even a house requires a building permit. Also, the four coastal counties cover a wide geographic area. The counties include many coastal cities and towns, such as Aberdeen, Hoquiam, Raymond, Long Beach, Ocean Shores, Westport, and South Bend. Quinault's interpretation would require application of ORMA throughout these counties to virtually every major project there.

Quinault argues that the Court of Appels erred by allegedly "ignoring" the statutory language. Petition at 8. In fact, the Court of Appeals did not ignore the statute. The Court recited the applicable language, but then turned to Ecology's implementing regulation to ascertain its meaning. Opinion at 14–15. This was appropriate because no party challenged the regulation and the regulation is, in any event, consistent with the statute in focusing on offshore uses and activities.

Far from "strip[ping] ORMA of meaning," as Quinault claims (Petition at 8), the Court of Appeals decision is reasonable and consistent with ORMA's language, purpose, and legislative history. Consequently, there is no basis for review.

B. The Court of Appeals Properly Applied Ecology's Regulation Defining "Ocean Uses" and "Transportation" Uses

As noted above, the Court of Appeals relied on Ecology's implementing regulation, WAC 173-26-360, to conclude that the statute does not apply to facilities located on land. Opinion at 15. Quinault contends that the Court of Appeals misinterpreted the regulation, but their contention has no merit. The Court of Appeals properly read and applied the plain language of the regulation.

Ecology's regulation defines the key term "ocean use" as being "activities or developments . . . that occur **on** Washington's coastal waters . . . ." (emphasis added). WAC 173-26-360(3). The Court of Appeals correctly read this regulation to mean that ORMA only applies to offshore uses and activities; it does not apply to facilities like Westway and Imperium that are land-based. Opinion at 15–16.

The Court of Appeals decision is correct because it simply applies the regulatory language. According to Quinault, however, the Court of Appeals erred because it failed to give sufficient weight to the fact that the

projects involve ocean transportation. According to them, marine transportation is an integral component of the projects and as such, they qualify as "ocean uses." Petition at 15. This interpretation is incorrect, however, for two reasons. First, as discussed below, marine transportation by itself is not an "ocean use" under the regulation. Only transportation associated with another ocean use (such as an offshore drill rig) is covered. If transportation by itself was an ocean use, then every ship passing through Washington's coastal waters and stopping at a Washington coastal port would have to satisfy ORMA's review criteria. This clearly would be an overbroad and unreasonable reading of the regulation.

Second, the permitted facilities here—the storage tanks, pumps, pipelines, etc.—are virtually all located on land, most of them more than 200 feet from the shoreline. These facilities do not qualify as "ocean uses" under the regulation because they are not located "on Washington's coastal waters." They are located on land. As a result, the Westway and Imperium proposals are neither ocean uses themselves nor are they associated with any ocean use. Thus, the Court of Appeals correctly held that the regulation does not apply here.

Quinault characterizes the court's ruling as improperly engrafting a "primary use" component onto the regulation. Petition at 13–14. In fact,

the Court of Appeals simply required that there be an "ocean use" occurring on Washington's waters for the regulation to apply. The Court of Appeals referred to a "primary use" in response to Quinault's argument below that the Westway and Imperium projects are upland facilities associated with an ocean use, namely, transportation. Opinion at 16. The Court of Appeals concluded that Quinault's characterization was inaccurate because the actual permitted uses and developments, the "primary use," are the upland facilities, not the marine transportation. However, whether the court was correct or not as to which use is primary is immaterial because neither the ocean transportation nor the upland facilities in this case are "ocean uses" under the regulation.[4]

Quinault also argues that the court erred in its interpretation of the regulation defining "transportation." They claim, in essence, that ORMA should apply to any ship transporting oil through Washington's waters. Petition at 16–17. This interpretation is incorrect and overbroad. The Court of Appeals correctly held that only transportation incidental to an "ocean use" is covered. Opinion at 17–18. As the Court of Appeals noted, the regulation begins by stating that its purpose is to provide

[4] From the standpoint of ORMA, the uses and activities proposed by Westway and Imperium are not significantly different from the uses and activities already occurring on the sites. Westway receives methanol by ship, stores it, and ships it by rail and truck. Imperium produces, stores, and ships biodiesel by both rail and vessel. *See* www.ecy.wa.gov/geographic/graysharbor/terminals.html (Draft EIS § 2.1.2). No one contends that ORMA applies to these existing uses and activities.

guidelines for the management of "ocean uses." WAC 173-26-360(1). "Ocean use" is thus the key term to which the regulation applies. The transportation definition later in the regulation does not identify a separate type of "ocean use" but instead defines the types of transportation activities incidental to an ocean use that are covered. To hold otherwise would require every commercial ship calling at a Washington coastal port to pass ORMA's review criteria. *See* Opinion at 20–21. In this case, the marine transportation at issue is not incidental to any ocean use.

None of this means that these projects escape environmental review or lack environmental protections. As noted above, the projects are undergoing full environmental review under SEPA and there are a number of other environmental laws and regulations that apply. *See, e.g.,* WAC 173-180 (facility oil handling standards); 173-182 (oil spill contingency planning); 173-183 (oil spill damage assessment); 173-184 (vessel oil transfer requirements). The draft environmental impact statements include numerous proposed mitigation measures to address the risk of oil spills from the facility, the rail line, and from vessels. Among other things, financial assurances and oil spill contingency planning are required. *See* www.ecy.wa.gov/geographic/graysharbor/terminals.html (Draft EISs §§ 4.4.3 (facility), 4.5.3 (rail), and 4.6.3 (vessels)). It is

unclear what, if any, additional "protection" review under ORMA would add and Quinault identifies none in their Petition.

Quinault characterizes Ecology's interpretation of its regulation, to which the Court of Appeals gave deference, as a mere "litigation position" Petition at 19. In fact, Ecology's interpretation of its regulation—that ORMA applies only to offshore uses and activities "on the coastal waters" and the transportation associated with such offshore uses and activities—is a long-standing one. Ecology has had that interpretation ever since ORMA was enacted and it is reflected in the language of the regulation itself. The Court of Appeals correctly gave Ecology's interpretation deference. *Port of Seattle*, 151 Wn.2d at 593.

V. CONCLUSION

For the reasons stated above, the Court of Appeals committed no error in concluding that ORMA does not apply to these land-based

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projects and the Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 18 day of December, 2015.

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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 18th day of December, 2015, I caused to be served Respondent City of Hoquiam and Department of Ecology's Answer to Petition for Review in the above-captioned matter upon the parties herein as indicated below:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 18th day of December, 2015, in Olympia, Washington.

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Attached for filing in Case No. 92552-6, *Quinault Indian Nation, et al. v. City of Hoquiam, et al.,* is Respondents City of Hoquiam and Washington State Department of Ecology's Answer to Petition for Review, together with an attached Certificate of Service. Thank you for your assistance.

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