Consolidated Nos. 45887-0-II, 45947-7-II, 45957-4-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON - DIVISION II

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

Petitioners,

v.

CITY OF HOQUIAM, STATE DEPARTMENT OF ECOLOGY and WESTWAY TERMINAL COMPANY, LLC,

Respondents

and

IMPERIUM TERMINAL SERVICES, LLC,

Intervenor-Petitioner

SHORELINES HEARINGS BOARD,

Respondent

RESPONSE BRIEF OF INTERVENOR-PETITIONER IMPERIUM TERMINAL SERVICES, LLC

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Table of Contents

Table of Authorities

Cases

Statutes

Regulations

Other

I. INTRODUCTION

Respondent/Cross-Petitioner Imperium Terminal Services, LLC ("Imperium") files this brief in response and opposition to the Joint Opening Brief filed by Petitioners Quinault Indian Nation, Friends of Grays Harbor, Sierra Club, Grays Harbor Audubon, and Citizens for a Clean Harbor ("Petitioners").[1]

In this appeal of the Amended Order on Summary Judgment issued by the Washington State Shorelines Hearings Board (SHB) on December 9, 2013[2] (the "Order"), the Petitioners challenge two specific conclusions in the SHB's Order: that the project review process in the Ocean Resources Management Act, Chapter 43.143 RCW ("ORMA") does not apply to the two projects at issue in this case, and that RCW 88.40.025 and other authorities do not require a demonstration of financial responsibility at the application stage, rather than prior to the commencement of operations.

The Court should affirm the SHB's conclusions and reject the Petitioners' admittedly novel interpretation of the relevant authorities. In

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[1] In its cross-appeal, Imperium has previously filed an opening brief on the issue of cumulative impacts under the State Environmental Policy Act (SEPA).

[2] AR 2379-2421 (*Quinault Indian Nation et al. v. City of Hoquiam et al.*, SHB No. 13-012c, Amended Order on Summary Judgment (December 9, 2013) (the "Order"). Citations to "AR" are to the Bates-stamped pages of the certified administrative record before the SHB. For the Court's convenience, the SHB's index to the certified administrative record is attached as **Appendix A**.

their Joint Opening Brief, Petitioners fail to offer any compelling reason to disturb the longstanding agency interpretations supporting the SHB's decision. Petitioners rely on strained interpretations of the relevant statutes and regulations that ignore the plain language of the applicable regulations, would lead to absurd results, and fly in the face of well-established interpretations by the agencies charged with administering those statutes and regulations. For these reasons, which are further explained below, the Court should reject the Petitioners' appeal and affirm the SHB's conclusions.

II. STATEMENT OF THE CASE

A. Project Descriptions.

This case pertains to the environmental review for the expansion of two separate bulk liquid storage and marine transloading terminals, detailed descriptions of which are included in Imperium's opening brief in its cross-appeal. [3] The applicants for the projects at issue in this appeal, Imperium and Westway Terminal Company, LLC ("Westway"), both currently operate bulk liquid storage terminals in the City of Hoquiam on the shoreline of Grays Harbor.[4] Both applicants have proposed to expand these existing facilities.

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[3] *See* Intervenor-Petitioner Imperium's Opening Brief, pp. 5-16
[4] Order, pp. 7-9; AR 279, 676, 1632.

In 2012, Westway submitted an application to the City for a Shoreline Substantial Development Permit (SSDP) to authorize the expansion of its existing facility to allow for the receipt, storage, and outbound shipment of crude oil (the "Westway Project").[5] In 2013, Imperium separately applied to the City for a SSDP to authorize an expansion of its existing facility to allow for the receipt, storage, and outbound shipment of crude oil and other materials, including feedstocks for its biodiesel refinery operations.[6] All of the crude oil handled by these facilities will be transported by rail from locations outside Washington State, most likely from sources in North Dakota.[7] Both projects consist of onshore bulk storage and transloading facilities, and both projects will have the indirect effect of generating marine and rail traffic by other entities transporting the products handled by Imperium and Westway.[8]

The City and the Department of Ecology ("Ecology"), acting as co-lead agencies under the State Environmental Policy Act (SEPA), issued a Mitigated Determination of Nonsignificance (MDNS) for the Westway Project on March 14, 2013.[9] The City and Ecology issued a MDNS for

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[5] Order, p. 7, AR 673-722.
[6] Order, p. 8, AR 277-88.
[7] AR 628, 1209 *See also* Petitioners' Joint Opening Brief, p. 31.
[8] AR 87-101, AR 123-133; AR 227-239; AR 309-354
[9] Order, p. 11; AR 123-133.

the Imperium Project on May 2, 2013.[10] The MDNSs for both projects include a detailed discussion of their potential environmental impacts.[11] In particular, the MDNSs discussed potential spills of oil and other liquid materials, including a description of applicable state and federal regulations governing oil spill prevention, preparedness, and response.[12] They also imposed detailed mitigation measures regarding facility design, oil spill prevention, and oil spill contingency planning.[13]

After the City approved the Westway SSDP and the Imperium SSDP, the Petitioners appealed the two SSDP approvals, along with each accompanying MDNS, to the Shorelines Hearings Board ("SHB").[14] The appeals were consolidated and the parties filed cross-motions for summary judgment on numerous issues.[15] The SHB issued its final Amended Order on Summary Judgment on December 9, 2013 (the "Order"), a 43-page decision addressing a wide range of issues.[16] In a split decision, the SHB concluded that certain aspects of the MDNS decisions were inadequate and remanded the case back to the City for further SEPA analysis.[17] The SHB also unanimously rejected the Petitioners' argument that ORMA

[10] Order, p. 11; AR 227-239.
[11] Order, pp 11-14, AR 123-133; AR 227-239.
[12] AR 128-130; AR 233-236.
[13] *Id.*
[14] Order, pp 1-2
[15] Order, p. 2
[16] *Id.*, p. 43
[17] *Id.*, pp. 16-37.

regulates the Imperium Project and the Westway Project, as well as the Petitioners' argument that RCW 88.40.025 and other authorities require a demonstration of financial responsibility at the application stage, rather than prior to the commencement of operations.[18]

Petitioners appealed the SHB's conclusions regarding ORMA and financial responsibility to this Court. Imperium also filed a cross-appeal challenging certain conclusions in the SHB's decision related to "cumulative impacts" under SEPA, and is the only party appealing those cumulative impact issues. This Court accepted direct review of the two appeals on June 11, 2014, and consolidated Imperium's appeal with the Petitioners' appeal. As Petitioners recognize, since the SHB issued its Order, Westway and Imperium have agreed to the issuance of a Determination of Significance (DS) for the two projects at issue, and the City and Ecology are currently in the process of preparing an Environmental Impact Statement (EIS) for the projects.[19]

B. Regulatory Framework.

The legislature adopted the legal authority relevant to both of Petitioners' issues as part of the same bill, titled "Ocean Resources

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[18] *Id.*, pp. 16-37

[19] Petitioners' Joint Opening Brief, p. 15.

Management Act" (the "ORMA Bill").[20] The financial responsibility provisions were adopted in Sections 1-7 of the ORMA Bill,[21] and ORMA's project review provisions were adopted in Sections 8-11 and Section 13 of the bill.[22]

During the late 1980s, public concern over proposed oil and gas drilling off the Washington coast resulted in the adoption of the ORMA Bill.[23] In adopting the ORMA Bill in 1989, the Legislature began with a legislative finding that "Washington's coastal waters, seabed, and shorelines are among the most valuable and fragile of its natural resources."[24] The Legislature also found that "[o]cean and marine-based industries and activities, such as fishing, tourism, and marine transportation have played a major role in the history of the state and will continue to be important in the future." *Id.* (emphasis added).[25]

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[20] H.B. 2242, Laws of 1989, 1st Ex. Sess., ch. 2 ("ORMA Session Law"), §§ 1-7 (codified at RCW 43.143.005(1)), attached to Petitioners' Appendix at pages 57-63. Imperium, like the Petitioners and the SHB, use the acronym "ORMA" to reference the project review provisions of the ORMA Bill (currently codified at Chapter 43.143 RCW). The ORMA Bill also included the financial responsibility provisions at issue in this appeal (currently codified in Chapter 88.40 RCW).

[21] ORMA Session Law, §§ 1-7 (codified at Chapter 88.40 RCW).

[22] ORMA Session Law, §§ 8-11 (codified at Chapter 43.143 RCW), § 13 (codified at RCW 90.58.195).

[23] *See* Section III.A, below (discussing materials attached to Petitioners' Joint Opening Brief).

[24] ORMA Session Law, § 8(1) (codified at RCW 43.143.005(1)), attached to Petitioners' Appendix at pages 57-63.

[25] *Id.*, § 8(2) (codified at RCW 43.143.005(2)).

The ORMA Bill includes several different substantive provisions. First, the Legislature adopted a temporary ban on the leasing of Washington's tidal or submerged lands for the purpose of oil or gas exploration, development, or production, which was later made permanent.[26] The Legislature also established review criteria for certain "[u]ses or activities that require federal, state, or local government permits or other approvals and that will adversely impact renewable resources, marine life, fishing, aquaculture, recreation, navigation, air or water quality, or other existing ocean or coastal uses."[27] In recognition of the broad scope of this section, however, the Legislature stated that "[i]t is not currently the intent of the legislature to include recreational uses or currently existing commercial uses involving fishing or other renewable marine or ocean resources within the uses and activities which must meet the planning and review criteria set forth in RCW 43.143.030."[28]

Next, the Legislature also required Ecology to adopt "ocean use guidelines" and required coastal local governments to amend their Shoreline Master Programs (SMPs) to implement the sections of the

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[26] *Id.*, § 9(2). (codified at RCW 43.143.010(2)).

[27] *Id.*, § 11(2) (codified at RCW 43.143.030(2))

[28] *Id.*, § 11(2) (codified at RCW 43.143.010(5)). The Legislature further stated as follows: "It is not the intent of the legislature, however, to permanently exclude these uses from the requirements of RCW 43.143.030. If information becomes available which indicates that such uses should reasonably be covered by the requirements of RCW 43.143.030, the permitting government or agency may require compliance with those requirements." *Id.*

ORMA Bill discussed above by imposing review criteria for certain uses while excluding other uses from regulation.[29] Ecology adopted its Ocean Use Guidelines in 1991.[30] Also in 1991, Hoquiam amended its SMP to include ocean use regulations consistent with ORMA and Ecology's Ocean Use Guidelines.[31] The Ocean Use Guidelines include the following definition of "ocean uses":

> Ocean uses are activities 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, recreational, and tribal fishing, aquaculture, recreation, shellfish harvesting, and pleasure craft activity.[32]

Like ORMA, the Ocean Use Guidelines "are not intended to regulate recreational uses or currently existing commercial uses involving fishing or other renewable marine or ocean resources."[33] Hoquiam's SMP includes provisions mirroring these statutory and regulatory

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[29] *Id.*, § 13 (codified at RCW 90.58.195).

[30] WSR 91-10-033 (Order 91-08), § 173-16-064, filed 4/24/91, effective 5/25/91 (now codified at WAC 173-26-360).

[31] Hoquiam Municipal Code (HMC), 11.04.065 (Ocean use regulations). *See also* HMC 11.04.030(13)-(20) (related definitions).

[32] WAC 173-26-360(3).

[33] WAC 173-26-360(4)

requirements.[34] In the twenty-plus years since the adoption of the Ocean Use Guidelines, Ecology has consistently interpreted ORMA and the Ocean Use Guidelines as not applicable to non-extractive marine transportation activities like those associated with the Imperium Project and the Westway Project. As the SHB noted in its Order, the Petitioners offered "no evidence that ORMA, which has been in place in Washington for 24 years, has ever been interpreted" in the broad manner asserted by Petitioners.[35]

Finally, the Legislature adopted financial responsibility requirements for certain vessels transporting petroleum products.[36] Unlike ORMA's project review provisions, the financial responsibility provisions of the ORMA Bill did not exclude any currently-existing activities from their requirements.[37] As originally adopted, the financial responsibility provisions of the ORMA Bill only covered vessels and did not impose financial responsibility requirements for related onshore and offshore

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[34] HMC 11.04.030(20) (definition of "ocean use"); HMC 11.04.065 (stating that regulations "are not intended to regulate recreational uses or existing commercial uses involving fishing or other renewable marine or ocean resources not currently regulated under the Shoreline Management Act").

[35] Order, p. 41.

[36] ORMA Session Law, §§ 1-7 (codified at Chapter 88.40 RCW).

[37] *Compare* ORMA Session Law, § 11(2) (codified at RCW 43.143.010(5) (excluding "currently existing commercial uses involving fishing or other renewable marine or ocean resources") *with* ORMA Session Law, §§ 1-7 (codified at Chapter 88.40 RCW).

facilities.[38] The statute also did not include any timing requirements specifying at what point during the permitting process vessels are required to make such a showing of financial responsibility.[39]

The Legislature later amended the statute to specify when vessels must provide evidence of financial responsibility, requiring that "[d]ocumentation of such financial responsibility shall be kept on any covered vessel and filed with the department at least twenty-four hours before entry of the vessel into the navigable waters of the state."[40] The Legislature also added a financial responsibility requirement for related onshore and offshore facilities, requiring such facilities to "demonstrate financial responsibility in an amount determined by the department [of Ecology] 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."[41] The Legislature did not include any timing requirements specifying at what point during the permitting process such onshore facilities are required to make such a showing of financial responsibility.[42]

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[38] *Id.*
[39] *Id.*
[40] *See* RCW 88.40.030.
[41] RCW 88.40.025.
[42] *Id.*

III. ARGUMENT

A. Objection to Petitioners' Citation to Evidence Outside the Agency Record.

The Petitioners' Joint Opening Brief includes citations to extensive materials that were not included in the agency record before the SHB.[43] Imperium objects to these citations. With the exception of the materials from the official legislative history of ORMA, of which the Court may appropriately take judicial notice, the new materials cited by Petitioners should not be considered by this Court.

The Court's review is "confined to the agency record" under RCW 34.05.558 and may be supplemented only as provided in RCW 34.05.562.[44] Similarly, under RAP 9.11(a), "[t]he appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review" only if certain criteria are met. "The appellate court will ordinarily direct the trial court to take additional

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[43] *See* Petitioners' Joint Opening Brief, pp. 5-8, 15, 16, 35, 46-48. *See also* Petitioners' Appendix, pp. 76-81. For the Court's convenience, included as **Appendix B** to this brief is an annotated copy of Petitioners' brief indicating the citations to materials outside the record.

[44] RCW 34.05.562 gives the court two options for receiving new evidence. First, RCW 34.05.562(1) allows the court to directly receive new evidence from the parties if certain criteria are met. Second, RCW 34.05.562(2) allows the court to remand for further agency fact-finding and other proceedings if certain other criteria are met.

evidence and find the facts based on that evidence."[45] Petitioners have not asked this Court to take judicial notice of any of the evidence cited in their brief, and they have not even attempted to show that any of the criteria in RCW 34.05.562(1)-(2) and RAP 9.11(a) have been met.[46] Moreover, the evidence cited by Petitioners clearly does not meet the criteria in RCW 34.05.562(1)-(2) and RAP 9.11(a).

The Court should refuse to consider the new evidence cited by Petitioners. Alternatively, if the Court is inclined to consider this new evidence, Imperium has *included a substantive response to Petitioners'* extra-record evidence in section III.C.5 below.

B. Standard of Review.

Where an administrative agency like the SHB issues a decision on summary judgment, the reviewing court must overlay the APA standard of review with the summary judgment standard.[47] The court views the facts in the record in the light most favorable to the nonmoving party.[48] Summary judgment is appropriate where the undisputed facts entitle the

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[45] RAP 9.11(b). Here, because the SHB was the finder of fact and this Court is directly reviewing the SHB's decision, the SHB is the "trial court" for purposes of RAP 9.11(b).

[46] Petitioners have also failed to explain why the Court should directly accept new evidence despite the statement in RAP 9.11(b) that "[t]*he appellate court will ordinarily* direct the trial court to take additional evidence."

[47] *Verizon NW, Inc. v. Washington Employment Sec. Dep't*, 164 Wn.2d 909, 915-16, 194 P.3d 255, 260 (2008).

[48] *Id.*

moving party to judgment as a matter of law.[49] The parties agree that the court evaluates the facts in the administrative record *de novo* and the law in light of the APA's "error of law" standard, RCW 34.05.570(3)(d).[50]

Under the APA's error of law standard, the court accords substantial weight to an agency's interpretation of a statute within its expertise, and also gives substantial weight to an agency's interpretation of rules that the agency promulgated.[51] This APA standard is consistent with the doctrine of contemporaneous construction, which accords "great weight . . . to the contemporaneous construction placed upon it by officials charged with its enforcement, particularly where that construction has been accompanied by silent acquiescence of the legislative body over a long period of time."[52] The Washington Supreme Court has specifically held that "Ecology's interpretation of relevant statutes and regulations . . .

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[49] *Id.*

[50] *Id*; Petitioners' Joint Opening Brief, pp. 16-17.

[51] *Verizon Nw.*, 164 Wn.2d at 915 (citing *Macey v. Department of Employment Security*, 110 Wn.2d 308, 313, 752 P.2d 372 (1988); *Washington State Liquor Control Board v. Washington State Personnel Board*, 88 Wn.2d 368, 379, 561 P.2d 195 (1977)). See also Petition of *Washington State Emp. Ass'n v. Cleary*, 86 Wn.2d 124, 129, 542 P.2d 1249, 1251 (1975) (citing *Immigration & Naturalization Serv. v. Stanisic*, 395 U.S. 62, 89 S.Ct. 1519, 23 L.Ed.2d 101 (1969).

[52] *Stroh Brewery Co. v. State, Dept. of Revenue*, 104 Wn. App. 235, 15 P.3d 692 (2001) (citing *Newschwander v. Board of Trustees of the Wash. State Teachers' Retirement System*, 94 Wn.2d 701, 711, 620 P.2d 88 (1980)). See also *Ball v. Smith*, 87 Wn.2d 717, 723, 556 P.2d 936 (1976) (citing *Morin v. Johnson*, 49 Wash.2d 275, 300 P.2d 569 (1956)); *Mall, Inc. v. City of Seattle*, 108 Wn.2d 369, 377-78, 739 P.2d 668 (1987) ("It is a well established rule of statutory construction that considerable judicial deference should be given to the construction of an ordinance by those officials charged with its enforcement."); *Jefferson Cnty. v. Seattle Yacht Club*, 73 Wn. App. 576, 588, 870 P.2d 987, 995 (1994).

is entitled to great weight."[53] An agency's interpretation is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[54] If a statute is silent or ambiguous, the question for the court is "whether the agency's [interpretation] is based on a permissible construction of the statute."[55] To sustain the agency's interpretation, the court need only find that the agency's interpretation was "sufficiently rational" to preclude the court from substituting its judgment for that of the agency.[56]

As the Petitioners acknowledge, the court's analysis begins with the "plain language" of the relevant statutes and regulations.[57] In applying the plain language, the court may not add words or clauses that the Legislature or an agency chose not to include in a statute or regulation.[58] By the same token, the court must give effect to all of the language,

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

[54] *Immigration & Naturalization Serv.*, 395 U.S. at 72 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945))

[55] *Skamania Cnty. v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 43, 26 P.3d 241, 247 (2001) (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)).

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

[57] Petitioners' Joint Opening Brief, p. 17.

[58] *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792, 795 (2003).

rendering no portion meaningless or superfluous.[59] Finally, the court must avoid constructions "that yield unlikely, strange or absurd consequences."[60]

C. The SHB Correctly Concluded that ORMA Does Not Regulate the Imperium Project or the Westway Project.

1. ORMA Does Not Regulate the Bulk Liquid Storage and Transloading Facilities or their Associated Marine Transportation Activities.

As noted above, the Imperium Project and the Westway Project include two direct activities (bulk liquid storage and transloading) and are associated with one indirect activity (marine transportation). The SHB correctly concluded that the portions of ORMA regulating project review of ocean uses do not regulate any of these activities.

While the Imperium Project and the Westway Project are associated with a marine transportation use, the bulk storage and transloading activities that comprise the projects are not themselves "ocean uses." The Ocean Use Guidelines define "ocean uses" as certain activities or developments "that occur on Washington's coastal waters."[61] The bulk storage and transloading components of these projects undeniably occur on land, not on water.

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[59] *City of Seattle v. State*, 136 Wn.2d 693, 698, 965 P.2d 619 (1998).
[60] *State v. Keller*, 143 Wn.2d 267, 277, 19 P.3d 1030, 1036 (2001).
[61] WAC 173-26-360(3).

Petitioners suggest that these land-based projects are "ocean uses" because the Ocean Use Guidelines also regulate "off shore, near shore, inland marine, shoreland, and upland facilities" associated with regulated uses occurring on coastal waters,[62] but Petitioners' argument reads the regulation in reverse. Project review under ORMA is triggered when permits are required for certain uses occurring on coastal waters, and review of those uses under ORMA must include any associated onshore facilities, but ORMA is not triggered when the reverse is true – when permits are required for onshore facilities associated with uses on coastal waters, as in the case of the Imperium Project and the Westway Project.[63] The SHB correctly rejected Petitioners' backwards reading of ORMA's Ocean Use Guidelines.

The SHB's conclusion is also supported by the following provisions of the Ocean Use Guidelines, which were the focus of the parties' briefing before the SHB:

- "Ocean uses involving nonrenewable resources include such activities as extraction of oil, gas and minerals, energy production, disposal of waste products, and salvage."[64]

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[62] WAC 173-26-360(3).

[63] *See id.* ("Ocean uses are activities 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 . . .") (emphasis added).

[64] *See id.*

- Regulated "oil and gas uses and activities" are those that "involve the extraction of oil and gas from beneath the ocean."[65]

- Regulated "transportation" uses are limited to those "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."[66]

The SHB correctly concluded that the Imperium Project and the Westway Project are not regulated "ocean uses" under ORMA because the bulk liquid storage and transloading projects and their associated marine transportation do not fall into any of these categories. These activities do not involve "extraction of oil, gas and minerals, energy production, disposal of waste products, and salvage," or the "extraction of oil and gas from beneath the ocean."[67] Nor do they involve "transportation activities that originate or conclude in Washington's coastal waters," or transportation activities that "are transporting a nonrenewable resource extracted from the outer continental shelf off Washington."[68] Petitioners admit that, while the marine transportation activities associated with these projects will begin in Grays Harbor, the transportation of crude oil by rail for these projects will originate outside Washington State, most likely in

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[65] WAC 173-26-360(8).
[66] WAC 173-26-360(12).
[67] WAC 173-26-360(3), (8).
[68] WAC 173-26-360(12).

North Dakota.[69] They also admit that these projects are not transporting any resource extracted from Washington's outer continental shelf.[70]

Petitioners repeatedly assert that the SHB erred by concluding that ORMA, in its entirety, is limited to "activities involving the extraction of oil and gas from Washington's waters."[71] Petitioners' assertion is a straw man. A careful reading of the SHB's decision reveals that the SHB did not necessarily intend to rule that ORMA as a whole is limited to those types of facilities, but rather that the relevant provisions of ORMA cited in its decision are limited to such facilities and do not include marine transportation uses like those associated with the Imperium Project and the Westway Project.[72] Those provisions were the focus of the parties' briefing below, and the SHB's statements regarding the scope of ORMA should be read in that context.[73] Even if the Court concludes that the Board intended to suggest that ORMA is limited in its entirety to extraction of oil and gas from Washington's coastal waters, however, the SHB's decision should not be reversed if it can be sustained on any theory,

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[69] Petitioners' Joint Opening Brief, p. 31 (citing AR 1195, 1209). As discussed in Section III.C.3, below, the Petitioners' interpretation of WAC 173-26-360(12) adds a word to the regulation and renders meaningless another word in the regulation.

[70] Petitioners' Joint Opening Brief, p. 30.

[71] *Id.*, pp. 3, 14, 23-33.

[72] Order, pp. 39-42. The SHB's holding regarding ORMA may have been inartfully-worded due to the need to address the wide range of other issues raised by Petitioners.

[73] *See* AR 537-2202.

even a theory that differs from that relied on by the SHB.[74] Thus, even assuming the Petitioners' hyperbolic characterization of the SHB's Order, the Court should affirm the SHB's Order because the SHB reached the correct result by concluding that ORMA does not apply to the projects at issue.

An independent basis for affirming the SHB's conclusion is that the Legislature excluded non-extractive marine transportation projects from ORMA's review process set forth in set forth in RCW 43.143.030. As noted above, in adopting ORMA, the Legislature emphasized the importance of "marine transportation"[75] and stated its intent to exclude from the review process in RCW 43.143.030 "currently existing commercial uses involving fishing or other renewable marine or ocean resources."[76] This broad exclusion covers all commercial uses involving renewable marine or ocean resources that existed in 1989, when ORMA was adopted. At that time, marine transportation was a currently existing commercial use involving a renewable ocean resource: coastal waters. As the Petitioners recognize, ORMA defines "ocean resources" to include

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[74] See *Whidbey Environmental Action Network (WEAN) v. Island County*, 122 Wn App. 156, 168, 93 P.3d 885 (2004).

[75] RCW 43.143.005(1).

[76] RCW 43.143.005(5)

"coastal waters."[77] The Legislature's recognition of the importance of marine transportation, coupled with its broad exclusion for existing commercial uses, indicates its intent to exclude non-extractive marine transportation projects from the review process in RCW 43.143.030. As further explained below, to the extent that there is any ambiguity regarding whether the statutory exclusion for commercial uses covers such marine transportation projects, the Court should defer to the interpretations of Ecology and local governments in resolving that ambiguity.

2. Petitioners' Interpretation of ORMA is Inconsistent with the APA and the Doctrine of Contemporaneous Construction.

As noted above, the APA and the doctrine of contemporaneous construction require the Court to give "great weight" to agency interpretations of ORMA and the Ocean Use Regulations, "particularly where that construction has been accompanied by silent acquiescence of the legislative body over a long period of time."[78] Here, ORMA's subject matter is clearly within the expertise of Ecology, and the Legislature expressly delegated to Ecology and local governments the authority to adopt implementing regulations under the SMA that define which types of

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[77] Petitioners' Joint Opening Brief, p. 24 (citing RCW 43.143.005(1)).
[78] *Verizon Nw.*, 164 Wn.2d at 915; *Stroh Brewery Co.*, 104 Wn. App. 235

projects should be subject to scrutiny under ORMA.[79] The Court should give deference to the agencies' interpretations of their own regulations (Ecology's Ocean Use Guidelines and the City of Hoquiam's ORMA regulations in its SMP).[80] Moreover, because ORMA is implemented under the SMA, the statute is also within the expertise of the SHB.[81] The Court must give substantial weight to the interpretations of these three agencies, all of which concluded that ORMA does not apply to the projects at issue in this appeal. The agencies' interpretations are rational and permissible and should not be disturbed by the Court.

The agencies' interpretations are also consistent with their longstanding practice during the two decades ORMA has been in effect.[82] Petitioners admit that Ecology has never interpreted ORMA in the way Petitioners suggest.[83] These agency interpretations are controlling because they are not "plainly erroneous or inconsistent with the regulation,"[84] and they are sufficiently rational to preclude the Court from substituting its

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[79] See ORMA Session Law, § 13 (codified at RCW 90.58.195).

[80] *Verizon NW*, 164 Wn.2d at 915.

[81] *Preserve Our Islands v. Shorelines Hearings Bd.*, 133 Wn. App. 503, 516, 137 P.3d 31 (2006), *rev. denied*, 62 Wn.2d 1008, 175 P.3d 1092 (2008) (deferring to SHB's expertise in SMA matters).

[82] Order, p. 41.

[83] Petitioners' Joint Opening Brief, p. 33 (citing Order, p. 41). Similarly, Petitioners do not contest the SHB's finding that they presented no evidence showing ORMA "has ever been interpreted in this manner" by any agency or court. *Id.*

[84] *Immigration & Naturalization Serv.*, 395 U.S. at 72 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945)).

judgment for that of the agencies and overturning two decades of consistent agency interpretation and practice.[85] Moreover, if the Legislature disagreed with the interpretations of Ecology and local governments in implementing ORMA, it had ample opportunity to adopt legislation clarifying its intent and directing Ecology and local governments to act accordingly. Because the Legislature has not done so, the court should presume it has acquiesced to the longstanding interpretations of Ecology and local governments.[86]

In their Joint Opening Brief, Petitioners ignore these well-established agency interpretations, asserting that "[t]here has never before been occasion to consider ORMA's application."[87] On the contrary, Ecology and local governments have had numerous opportunities over the past two decades to consider ORMA's application, and they have consistently concluded that it does not apply to marine transportation activities other than those regulated as extractive "transportation" uses in the Ocean Use Regulations. This conclusion is evidenced by the fact that Petitioners are unable to point to a single example of a non-extractive

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[85] *Skamania Cnty* , 144 Wn.2d at 43.

[86] *Stroh Brewery Co*, 104 Wn. App. 235.

[87] Petitioners' Joint Opening Brief, p. 32-33 (citing *W. Virginia Div. Of Izaak Walton League of Am. v. Butz*, 522 F 2d 945, 949-52 (4th Cir. 1975)). Petitioners' reliance on the *Butz* case is misplaced. That case did not involve a statute that had been consistently interpreted by an agency to exclude the type of project at issue. *Butz* is inapposite.

marine transportation project that has been regulated under ORMA since its adoption. The Court should therefore give substantial weight and deference to the interpretations of Ecology, the City of Hoquiam, and the SHB, all of which concluded that ORMA does not apply to the projects at issue in this appeal.

3. Petitioners' Interpretation of ORMA Fails to Apply the Plain Language of the ORMA Regulations Addressing Transportation Uses.

Petitioners incorrectly argue that the Imperium Project and the Westway Project fall within the subcategory of "transportation" uses in the Ocean Use Regulations.[88] Petitioners admit that this subcategory is limited to 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," but they suggest that the projects at issue "originate" in Washington's coastal waters because "they would involve marine transportation" originating in Washington's coastal waters.[89]

Petitioners' interpretation attempts to add a word that does not appear in the relevant language of the regulation. The limitation in question does not apply to "marine transportation" originating in

[88] Petitioners' Joint Opening Brief, pp. 29-32.

[89] Petitioners' Joint Opening Brief, p. 30 (citing WAC 173-26-360(12)) (emphasis added).

Washington's coastal waters; instead, it applies to "transportation activities that originate or conclude in Washington's coastal waters."[90] As noted above, Petitioners acknowledge that the transportation of crude oil by rail for these projects will, in fact, originate outside Washington State. The Court should reject Petitioners' strained interpretation, which attempts to add the word "marine" to that sentence in the Ocean Use Guidelines and would render meaningless the word "originate" in the regulation.[91]

4. The Petitioners' Interpretation of ORMA Would Lead to Absurd Results.

As noted in the SHB's Order, Petitioners' interpretation of ORMA would expand the reach of the statute to "require ORMA analysis for every transportation project in ports along the Washington coast."[92] Indeed, Petitioners' broad reading of the transportation section of the ORMA Guidelines would regulate every single vessel trip that includes a stop on Washington's coast because, under their interpretation, any transportation use involving any vessel leaving or arriving in Washington's coastal waters would be deemed to "originate or conclude" in Washington's coastal waters. ORMA cannot reasonably be interpreted to be so broad.

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[90] WAC 173-26-360(12) (emphasis added).
[91] *See Delgado*, 148 Wn.2d at 727, *City of Seattle*, 136 Wn.2d at 698.
[92] Order, p. 41.

According to the Petitioners, the only relevant consideration is "[w]hether the use will adversely impact Washington's resources."[93] Indeed, Petitioners would interpret ORMA to regulate any and all uses or activities that have any adverse impact on the many different types of resources listed in the statute: "renewable resources, marine life, fishing, aquaculture, recreation, navigation, air or water quality, or other existing ocean or coastal uses."[94] This would be an absurd result, particularly in light of the related statutory and regulatory provisions discussed in this brief, which confirm that the Legislature intended a much narrower application of ORMA.

Petitioners suggest that the Board's concern regarding the overly-broad reach of their interpretation is unfounded because of the limitation to activities that adversely impact coastal resources.[95] In another section of their brief, however, they argue that the mere presence of vessels in coastal waters represents an "adverse impact" to navigation, fishing, and other ocean uses.[96] Thus, it is clear that the "adverse impact" standard does not provide a reasonable limitation on the reach of ORMA, as

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[93] Petitioners' Joint Opening Brief, pp. 25, 32-33.
[94] *Id.*, pp. 29-32; RCW 43.143.030(2).
[95] Petitioners' Joint Opening Brief, pp. 32-33.
[96] *Id.*, p. 36. *See also* AR 1856 (Quinault Indian Nation's Opposition to Respondents' Motions for Summary Judgment, p. 23) (arguing that the projects at issue "easily" trigger the "adverse impact" criterion of ORMA, as distinguished from the "significant adverse effect" criterion of SEPA).

suggested by the Petitioners. The Court should reject Petitioners' interpretation, which would lead to the needless regulation of all marine transportation uses in Washington's coastal waters.[97]

5. Petitioners' Interpretation of ORMA is Inconsistent with the New Materials Attached to their Brief.

If the Court considers the new materials attached to the Petitioners' brief, which were not included in the record before the SHB, a careful reading of those materials will reveal that they do not support Petitioners' interpretation of ORMA. On the contrary, the new materials offered by the Petitioners demonstrate that the project review criteria in ORMA were intended to address concerns regarding the leasing of state coastal waters for oil and gas development, and were not intended to regulate non-extractive marine transportation activities.

For example, the summary of ORMA included in Petitioners' Appendix confirms that the statute was primarily intended to address the potential "lease sale" of ocean areas off the coast of Washington by the federal Mineral Management Service (MMS).[98] In the late 1980s, MMS was planning to provide for such a lease sale in April of 1992.[99] During this time, there was "dispute as to the extent to which" any exploration,

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[97] *Keller*, 143 Wn 2d at 277

[98] *See* Petitioners' Appendix, pp 65-68.

[99] *See id.*, p. 67.

development, and production activities under such a lease sale were required to be consistent with Washington law pursuant to the consistency requirements of the federal Coastal Zone Management Act (CZMA).[100] "In 1987, due to concern over the upcoming lease sale, the Washington Legislature and the Governor took several actions,"[101] including the adoption of ORMA's project review criteria. The media reports included in Petitioners' Appendix similarly confirm that the Legislature's focus in adopting the ORMA project review criteria was addressing "the potential hazards of oil drilling" by "[creating] a state policy on offshore oil exploration" and "[blocking] the federal government from leasing offshore areas for drilling."[102] These materials confirm that ORMA's project review criteria were intended to address these types of hazards, and were not designed to address potential oil spills from marine transportation uses.

By contrast, the only mention of oil spills in the legislative history and in ORMA itself is found in the "financial responsibility" sections of the bill, which are clearly separate and distinct from the sections of the bill

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[100] *See id.*
[101] *See id.*
[102] *See* Petitioners' Appendix, pp. 76-80.

setting forth ORMA's project review criteria.[103] If the Legislature had intended to apply ORMA's project review criteria to marine transportation uses, it could have used the same type of specific language found in the "financial responsibility" sections of the bill. The Legislature's use of specific language regarding oil spills only in that section of the bill confirms that the underlying legislative intent behind the two sections was different.

Petitioners rely on media reports as support for their suggestion that ORMA was "revived in part due to 'public outrage over the Exxon Valdez oil spill in Alaska."[104] This reliance is misplaced. First, this statement from a newspaper article is not reflected in the ORMA legislation or anywhere in the official legislative materials cited by the Petitioners. Second, even if the Legislature had been motivated to act by the Exxon Valdez oil spill, the Legislature's only action explicitly addressing oil spills was its adoption of the "financial responsibility" sections of the ORMA. Petitioners have offered no evidence suggesting that the Legislature adopted ORMA's project review criteria, as

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[103] *Compare* ORMA Session Law, §§ 1-7 (codified at Chapter 88.40 RCW) *with* ORMA Session Law, §§ 8-11 (codified at Chapter 43.143 RCW), § 13 (codified at RCW 90.58.195). *See also* Petitioners' Appendix, pp. 65-68.

[104] Petitioners' Joint Opening Brief, p. 35 (citing Petitioners' Appendix, p. 78)

distinguished from its financial responsibility provisions, in an effort to regulate non-extractive marine transportation activities.

D. The SHB Correctly Interpreted RCW 88.40.025 and Related Authorities Addressing Financial Assurances.

The SHB correctly concluded that compliance with the financial responsibility requirements of RCW 88.40.025 is not required prior to the issuance of a SEPA threshold determination or prior to the issuance of a shoreline permit under the SMA.[105] Petitioners cite no authority supporting their assertion that compliance with RCW 88.40.025 is required at these early stages in the project review process, rather than being required prior to the commencement of operations. Indeed, the plain language of RCW 88.40.025 confirms its focus on demonstrating financial responsibility prior to operation, not prior to permitting. Moreover, it is undisputed that the oil spill plans, which require a demonstration of financial responsibility, will be required "before the facilities can begin operations."[106]

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[105] Order, pp 38-39

[106] Order, p. 39. *See also* Petitioners' Joint Opening Brief, p. 42 (admitting that financial assurances will be required "before operations"). Petitioners attempt to mischaracterize Imperium's position before the SHB, asserting that Imperium "does not intend to provide evidence of financial responsibility unless and until Ecology goes through a rule-making process. *Id.* The statement from Imperium's brief cited by the Petitioners was merely a restatement of Ecology's position as set forth in the motion to dismiss filed jointly by Ecology and the City of Hoquiam. AR 652. In any event, as discussed below, the question of whether RCW 88.40.025 is contingent on Ecology's

As further discussed below, Petitioners' position is inconsistent with the plain language of Chapter 88.40 RCW, and their position is not supported by SEPA, the Hoquiam Municipal Code (HMC), or the alleged "importance of financial responsibility requirements."[107] The Court should reject the Petitioners' argument and rule that none of the authorities cited by Petitioners require a demonstration of financial responsibility at the application stage, rather than prior to commencement of operations. Even though Imperium and Westway agreed to the issuance of a DS for the two projects at issue after the SHB issued its Order, the question of when financial assurances are required under RCW 88.40.025 and related authorities is still relevant to the ongoing EIS process for the projects.

1. The Plain Language of Chapter 88.40 RCW Does Not Require Compliance at the Application Stage.

As Petitioners admit, Chapter 88.40 RCW does not include any express timing requirement stating when "onshore facilities" like the Imperium Project and the Westway Project must provide evidence of financial responsibility.[108] With respect to vessels, however, the statute expressly states that such evidence need not be provided until "twenty-four hours before entry of the vessel into the navigable waters of the state"

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promulgation of regulations is irrelevant to the question of whether financial assurances are required at the application stage.

[107] Petitioners' Joint Opening Brief, p. 35 (citing Petitioners' Appendix, p. 78)

[108] *See* Petitioners' Joint Opening Brief, p. 41.

– in other words, immediately prior to operation in the state.[109] This timing provision confirms that the Legislature did not intend to require financial assurances, generally, at the application stage, as suggested by Petitioners. If that had been the Legislature's intent, the Legislature would have required vessels to provide financial assurances at an earlier date, and it would have included an express timing requirement applicable to onshore facilities when it amended the statute to cover such facilities. Instead, the Legislature chose to defer to Ecology's judgment in addressing such details.[110]

2. SEPA Does Not Require Compliance with RCW 88.40.025 at the Application Stage.

Petitioners incorrectly argue that SEPA requires a demonstration of compliance with RCW 88.40.025 at the application stage.[111] Petitioners' argument rests on two false premises.

First, Petitioners incorrectly argue that "the statutory financial responsibility requirements are one of Ecology's key justifications for avoiding a full analysis of the environmental impacts of oil spills."[112] The record does not support this statement, even when the facts are viewed in

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[109] RCW 88.40.030.

[110] *See, e.g.*, RCW 88.40.025 (requiring onshore facilities to "demonstrate financial responsibility in an amount determined by the department [of Ecology]"); RCW 88.40.030 (stating that financial responsibility "may be established by any one of, or a combination of, the following methods acceptable to the department of ecology").

[111] Petitioners' Joint Opening Brief, pp. 38-40.

[112] *Id.*, pp. 38-39

Petitioners' favor. On the contrary, the MDNS documents for the projects at issue do not include a single mention of financial responsibility requirements. Instead, they discuss numerous non-financial measures that Ecology determined would mitigate the risks associated with an oil spill, such as the application of state and federal regulations governing facility design and operations, inspections, and contingency plans for responding to spills, "including a worst-case discharge."[113] They also impose mitigation measures requiring the applicants to prepare and maintain several other oil spill prevention and response plans, and requiring the applicants to comply with detailed design, engineering, construction, and operational specifications.[114] Petitioners do not even attempt to argue that these measures are inadequate to mitigate the potential environmental impacts from a spill, focusing instead on speculative economic impacts that are outside the scope of SEPA review.[115] The Court should reject Petitioners' attempts to raise such economic impact issues under SEPA.

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[113] AR 123-133; AR 227-239.

[114] *Id.*

[115] Petitioners attempt to mischaracterize Imperium's position below regarding the availability of funds from the federal Oil Spill Liability Trust Funds and the state oil spill response account. Petitioners' Joint Opening Brief, p. 43. Imperium did not argue that "it did not need to comply with the [financial responsibility] requirements because government funds are available to bail out the companies in the event that oil spill costs exceed the companies ability to properly clean up the spills." *See id.* (emphasis added). Instead, Imperium argued that the availability of such funds provides further evidence that any environmental impacts will be mitigated, regardless of when financial

Petitioners' assertion that Ecology relied on financial requirements in the MDNSs is not supported by the mere fact that one of the mitigation measures in the MDNSs (the requirement to prepare and maintain oil spill prevention plans) includes a financial responsibility requirement, particularly since Ecology did not discuss the issue of financial responsibility in the MDNSs themselves.[116] As Ecology and the City explained in their briefing before the SHB, "[i]t is the state and federally required oil spill prevention and preparedness plans that mitigate spill potential and harms," not financial responsibility guarantees.[117] Ecology's analysis was appropriately focused on environmental impacts and mitigation measures. Petitioners' argument, by contrast, is about an alleged economic impact ("leaving the State and local governments on the hook for an oil spill") rather than an environmental impact.[118] Indeed, in their Joint Opening Brief, the Petitioners do not identify a single environmental impact that will allegedly result from the lead agencies' decision to require compliance with financial responsibility requirements prior to operation, rather than prior to SEPA review. As a result, they

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responsibility requirements are applied. AR 1583-1584 (Imperium's Response to Motions for Partial Summary Judgment, pp. 26-27).

[116] *See* Petitioners' Joint Opening Brief, pp. 38-39.

[117] AR 652 (Ecology's and City's Joint Motion for Partial Summary Judgment, p. 22).

[118] Petitioners' Joint Opening Brief, pp. 38-39.

have failed to meet their burden of showing that the MDNS was not "based upon information reasonably sufficient to evaluate the environmental impact of a proposal."[119]

Second, Petitioners' argument is based on the false premise that the mitigation measure at issue is "capable of being accomplished" under SEPA only if Westway and Imperium demonstrate compliance with Chapter 88 40 RCW before the MDNS is issued.[120] As noted above, the mitigation measures at issue require the applicants to prepare and maintain certain oil spill prevention and response plans, which must include a demonstration of compliance with state and federal financial responsibility requirements.[121] Contrary to the Petitioners' argument, this mitigation measure is clearly "capable of being accomplished." The dictionary defines "capable" to means "characterized as susceptible or open to being affected," as in "a passage capable of misinterpretation."[122] Thus,

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[119] WAC 197-11-335 (emphasis added) *See also Anderson v. Pierce Cnty.*, 86 Wn. App. 290, 302, 936 P.2d 432, 439 (1997).

[120] Petitioners' Joint Opening Brief, pp 38-41 (citing RCW 43.21C.060; WAC 197-11-660(1)(c)).

[121] *See* AR 128-130, AR 233-236. As discussed above, Petitioners challenge to these mitigation measures is based on alleged economic impacts, not environmental impacts.

[122] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 330 (2002). In the absence of a statutory definition, courts will give a term its plain and ordinary meaning ascertained from a standard dictionary. *State v. Sullivan*, 143 Wn.2d 162, 175, 19 P 3d 1012, 1019 (2001) (citing *Am. Legion Post 32 v. City of Walla Walla*, 116 Wn.2d 1, 8, 802 P.2d 784 (1991), *City of Spokane v. Fischer*, 110 Wn.2d 541, 543, 754 P.2d 1241 (1988))

"capable of being accomplished" does not mean "certain to be accomplished," as suggested by the Petitioners, but rather means "susceptible to being accomplished." The mere hypothetical possibility that some applicants may ultimately be unable to demonstrate compliance with Chapter 88.40 RCW prior to operations does not render the mitigation measure incapable of being accomplished.

In fact, the SEPA rules promulgated by Ecology make it clear that lead agencies conducting SEPA review must assume that all applicable local, state, and federal requirements, such as oil spill planning and financial responsibility requirements, will be applied and enforced.[123] Even when preparing an EIS, which requires a higher level of detail than a MDNS, agencies are not required to analyze the economic practicability of mitigation measures. The SEPA rules provide that an EIS "shall . . . [i]ndicate what the intended environmental benefits of mitigation measures are for significant impacts, and may discuss their technical

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[123] *See* WAC 197-11-330(1)(c) (providing that lead agencies "shall . . . [c]onsider mitigation measures 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."); 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.") (emphasis added) *See also Chuckanut Conservancy v. Wash. State Dept. of Natural Res.*, 156 Wn. App. 274, 285-86, 232 P.3d 1154 (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").

feasibility and economic practicability, if there is concern about whether a mitigation measure is capable of being accomplished."[124] The courts have similarly concluded that it is not necessary for an EIS to address "the cost and effectiveness of the mitigation measures."[125] If that level of detail is not required in an EIS, it is certainly not required in a MDNS.

Petitioners' speculation about an alleged "snowball effect that would hinder the State's ability to stop the projects" is unsupported by any citation to evidence, and it is also unsupported by the law. [126] As support for their argument, Petitioners rely on a single case involving an annexation, a type of land use decision that is "not associated with any direct and immediate change in land," but is associated with likely indirect and eventual land use changes.[127] That case stands for the proposition that SEPA review of such indirect but probable land use changes may not be postponed merely because the present government decision does not directly and immediately cause those changes. It has no bearing on the

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[124] WAC 197-11-440(6)(iv) (emphasis added). WAC 197-11-440(6)(iv) further provides that "[t]he EIS need not analyze mitigation measures in detail unless they involve substantial changes to the proposal causing significant adverse impacts, or new information regarding significant impacts, and those measures will not be subsequently analyzed under SEPA."

[125] *Solid Waste Alternative Proponents v. Okanogan Cnty.*, 66 Wn App. 439, 447, 832 P.2d 503, 508 (1992).

[126] Petitioners' Joint Opening Brief, pp. 41-42 (citing *King Cnty. v. Washington State Boundary Review Bd. for King Cnty.*, 122 Wn.2d 648, 664, 860 P.2d 1024, 1033 (1993)).

[127] *King Cnty.*, 122 Wn.2d at 662-63.

question of whether SEPA requires a demonstration of financial responsibility under RCW 88.40.025 for the projects at issue in this case.

Petitioners have failed to show that the agencies' conclusions in the MDNS documents for these projects were clearly erroneous, particularly in light of the deference given to agency interpretations under SEPA.[128] In addition to the deference afforded to agency decisions under the APA, SEPA requires that reviewing bodies accord "substantial weight" to an agency's decision to issue a MDNS and not to require an EIS.[129] Here, Ecology's interpretations should be given particular weight in light of its expertise in SEPA and oil spill prevention planning. The Court should reject Petitioners' strained argument, defer to the agencies' interpretations under SEPA, and affirm the agencies' conclusions that SEPA does not require a demonstration of compliance with RCW 88.40.025 prior to the issuance of a MDNS.

3. HMC 11.04.065(4) Does Not Require Financial Assurances at the Application Stage.

Petitioners suggest that HMC 11.04.065(4), which requires "an applicant proposing oil and/or gas . . . facilities to produce evidence indicating adequate prevention, response, and mitigation can be provided

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[128] This Court reviews the two SEPA determinations at issue in this appeal under the "clearly erroneous" standard. *Anderson*, 86 Wn. App. at 302.

[129] *Anderson*, 86 Wn. App. at 302 (citing RCW 43.21C.090).

before the use is initiated and throughout the life of the proposed project," should be interpreted to require financial assurances at the application stage.[130] Petitioners rely heavily on the use of the word "applicant" in the regulation, ignoring the fact that an "applicant" for a permit is often referred to as an "applicant" even after the permit is issued.[131] Petitioners also ignore the fact that the regulation explicitly states when evidence of adequate prevention, response, and mitigation is required: "before the use is initiated and throughout the life of the proposed project."[132] This explicit timing provision contradicts Petitioners' argument that such evidence is required at an earlier stage in the permitting process.

Petitioners further ignore the fact that HMC 11.04.065(4) applies only to "ocean uses" regulated under ORMA.[133] As discussed above, the projects at issue in this appeal are not regulated under ORMA.[134] Thus, HMC 11.04.065(4) does not apply in this case, and even if it did, it only

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[130] Petitioners' Joint Opening Brief, p. 43 (quoting HMC 11.04.065(4)) (emphasis in original).

[131] For example, HMC 9.01.040(17) describes certain post-approval responsibilities of an "applicant" as follows

"Reserved street area" means a defined area of land within the short plat or subdivision which is required by the city engineer to be reserved for a future street, and said area shall be dedicated to the city at the time of approval, but the street need not be constructed by the applicant or developer until such time as stated in the ordinance.

(emphasis added).

[132] HMC 11.04.065(4) (emphasis added).

[133] HMC 11.04.065

[134] As noted above, Hoquiam's SMP includes language that mirrors ORMA's provisions excluding "existing commercial uses involving fishing or other renewable marine or ocean resources." HMC 11.04.065.

requires evidence of prevention, response, and mitigation before the initiation of a use, not prior to the issuance of a MDNS under SEPA.

4. The Alleged "Importance of Financial Responsibility Requirements" Does Not Require Compliance with RCW 88.40.025 at the Application Stage.

Relying on newspaper articles and other materials from outside the record, Petitioners ask this Court to impose the requirements of RCW 88.40.025 at the application stage for purely policy reasons: because, according to the Petitioners, "recent catastrophic environmental disasters caused by underfunded and financially insecure companies highlight the importance of financial responsibility requirements." [135] Petitioners' argument is unsupported by citation to any legal authority addressing the question of when financial responsibility requirements are required. Even Petitioners' factual allegations regarding recent events described in newspaper reports have nothing to do with the issue of timing for financial responsibility requirements. Instead, Petitioners' factual allegations relate to the question of whether financial responsibility requirements should be applied at all (which Imperium does not dispute), and to the amount of financial responsibility that should be required (which the statute

[135] Petitioners' Joint Opening Brief, p. 43 (quoting HMC 11.04.065(4)) (emphasis in original).

expressly delegates to Ecology, and is not at issue in this appeal).[136] The newspaper reports cited by Petitioners are simply irrelevant to the question before this Court: whether RCW 88.40.025 and related authorities require evidence of financial responsibility at the application stage, or prior to commencement of operations.

The Court should refuse to consider Petitioners' citations to new materials outside the SHB's record and reject their irrelevant factual assertions and policy arguments. None of the legal authorities cited by Petitioners requires a showing of financial responsibility at the application stage.

IV. CONCLUSION

For the foregoing reasons, Imperium respectfully requests that the Court deny the Petitioners' appeal and affirm the SHB's conclusions regarding ORMA and the financial responsibility requirements of RCW 88.40.025 and related authorities.

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[136] RCW 88.40.025 (requiring onshore facilities to demonstrate financial responsibility "in an amount determined by the department [of Ecology]")

RESPECTFULLY SUBMITTED this 26th day of September, 2014.

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APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

QUINAULT INDIAN NATION,

Petitioner,

v.

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

Respondents.

THURSTON COUNTY CASE NO: 13-2-02507-5

(SHB Case No. 13-012c)

INDEX TO THE CERTIED RECORD

DATE	TITLE	FILED BY	Bates No:
	Correspondences		000001-000043
6/13	SHB 13-012 Petition for Review; COS	Kristen Boyles	000044-000168
5/17/13	SHB 13-013 Petition for Review; COS	Knoll Lowney	000169-000207
7/3/13	SHB 13-020 Petition for Review; COS	Knoll Lowney	000208-000239
7/03/13	SHB 13-021 Petition for Review; COS	Kristen Boyles	000240-000536
7/11/13	Respondent City of Hoquiam's Motion for Partial Summary Judgment; Declaration of Brian Shay	Steven Johnson	000537-000563
7/12/13	Respondent Intervenor Imperium's Motion for Partial Summary Judgment; COS	Tadas Kisielius	000564-000576
7/12/13	Westway Terminal Company LLC's Motion for Partial Summary Judgment; Declaration of Svend A. Brandt-Erichsen; Declaration of Ken Shoemake; COS	Svend Brandt-Erichsen	000577-000630
7/12/13	Respondent Department of Ecology and city of Hoquiam's Joint Motion for Partial Summary Judgment; Declaration of Diane Butorac; COS	Allyson Bazan; Steve Johnson	000631-000785
7/12/13	Friends of Grays Harbor Et al.'s Motion for Partial Summary Judgment; First Declaration of Elizabeth Zultoski; COS	Knoll Lowney	000786-001121
12/13	Quinault Indian Nation Motion for Partial Summary Judgment (SEPA Issue NO. 1) Oral Argument	Kristen Boyles	001122-001391

DATE	TITLE	FILED BY	Bates No:
	Kristen L. Boyles; COS		
9/9/13	Direct Testimony of Joseph Watman, PH.D.; COS	Knoll Lowney	002203-002249
9/9/13	Direct Testimony of James E. Jorgensen; Direct Testimony of Brent Finley; Testimony of Ervin Joseph Schumacher; Direct Testimony of Paul Rosenfeld, Ph.D.; Direct Testimony Paul S. O'Brien; Direct Testimony of Fred Felleman; COS	Kristen Boyles	002250-002328
11/12/13	Order on Summary Judgment; Partial Concurrence and Dissent	Tom McDonald; Kathleen Mix; Joan Marchioro; Pamela Krueger; Kay Brown; Grant Beck; John Bolender	002329-002374
12/9/13	Order on Petitions for Reconsideration or Clarification	Tom McDonald; Kathleen Mix; Joan Marchioro; Pamela Krueger; Kay Brown	002375-002378
12/9/13	Order on Summary Judgment (As Amended on Reconsideration)	Tom McDonald; Kathleen Mix; Joan Marchioro; Pamela Krueger; Kay Brown	002379-002421

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

Consolidated Nos. 45887-0-II, 45947-7-II, 45957-4-II

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; and WESTWAY TERMINAL COMPANY, LLC,
Respondents,

and

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

SHORELINES HEARINGS BOARD,
Respondent.

JOINT OPENING BRIEF OF QUINAULT INDIAN NATION AND FRIENDS OF GRAYS HARBOR *et al*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

For the last several decades, Washington has led the nation in enacting substantive statutes to protect its vibrant but fragile shorelines and ocean resources. In 1969, Governor Evans placed a moratorium on all tideland fill projects until the passage of the Shorelines Management Act ("SMA"). In 1971, Washington enacted the State Environmental Policy Act ("SEPA"), requiring comprehensive and public environmental review of government decisions. And in response to the 1989 Exxon Valdez oil spill in Alaska and the 1988 Nestucca oil spill outside Grays Harbor, the Washington Legislature enacted the 1989 Ocean Resources Management Act to provide review criteria for all activities in Washington's coastal ocean waters that could harm Washington's coast, thriving marine life, and the people that depend on them. RCW 43.143.030. As part of that same package, the Legislature also required a showing of financial responsibility for tankers transporting oil in Washington waters to ensure the ability to pay clean-up costs for a worst case scenario oil spill; two years later, the Legislature extended that requirement to onshore and offshore oil facilities. RCW 88.40.025. These statutes help form the backbone of a review and protection scheme that has kept Washington from having a devastating oil spill in its marine waters since the Nestucca disaster in the late 1980s.

Now, however, as the production of domestic and Canadian oil grows, Washington faces several proposals that would vastly increase the amount of crude oil stored along Washington's coast and transported through Washington's marine waters. The two crude oil shipping terminals at issue in this appeal, proposed by Westway Terminal Company and Imperium Terminal Services,[1] would be responsible for a combined average of five crude oil ship/barge transits through Grays Harbor and Washington's coastal ocean waters each week. This parade of vessels—each ship or barge carrying thousands of barrels of crude oil—would be loaded at the mouth of the fast-moving Chehalis River, navigate near the Grays Harbor National Wildlife Refuge, pass over Grays Harbor's difficult-to-navigate bar, and emerge in Washington's coastal ocean en route to destinations in the United States and abroad. The line of 260 oil-laden vessels per year out of the harbor, of course, would be mirrored by 260 inbound trips each year. This is precisely the type of ocean use that the Legislature intended the Ocean Resources Management Act ("ORMA") and the financial responsibility requirements to address.

These statutory requirements would ensure that the proposed crude-by-rail facilities are permitted in a way that minimizes impacts to

[1] A third proposed oil shipping terminal, US Development, would add to the harm faced by the Grays Harbor community, waters, and environment.

Washington's coastal waters and ocean uses, such as navigation and fishing, and ensures the project proponents have adequate financial resources to respond to a catastrophic oil spill. Contrary to the plain language of ORMA, its legislative history, and its implementing regulations, the Shorelines Hearings Board held that this unprecedented stream of vessel traffic and increased risk to Washington's ocean waters did not constitute a use of the ocean under ORMA. Instead, the Board limited ORMA to activities involving the extraction of oil and gas from Washington waters, an activity long-banned in the state, effectively rendering ORMA's strong protections meaningless even as oil vessel traffic and the accompanying risk of spills increase beyond any precedent.

With respect to oil spill clean-up, the Shorelines Hearings Board held that neither SEPA nor the SMA required project proponents to demonstrate financial responsibility to pay costs of a worst-case-scenario spill at the permitting phase Instead, the Board held that compliance with the financial responsibility requirements was necessary when the companies submit a spill prevention plan. This ruling could allow permitting and construction of the proposed projects with no evidence of the basic financial wherewithal to pay for a crude oil spill in Washington's ocean waters.

Petitioners Quinault Indian Nation and Friends of Grays Harbor,

Grays Harbor Audubon Society, Sierra Club, and Citizens for a Clean Harbor (collectively "FOGH") respectfully ask the Court to give full effect to ORMA's protective plain language and purpose by correcting the Board's overly narrow statutory construction and ensuring that the crude shipping terminals receive the scrutiny intended by the Legislature. Similarly, Quinault and FOGH ask the Court to require evidence of financial responsibility for a reasonable worst-case oil spill at the permitting stage, before construction and operation of these terminals.

ASSIGNMENTS OF ERROR

1. Whether the Ocean Resources Management Act, RCW 43.143, applies to Westway and Imperium's use of Washington's ocean resources.

   1a. Whether the Board erred in finding that the Ocean Resources Management Act does not apply to the Westway and Imperium crude oil shipping facility proposals. AR at 2417-20 (SHB Order at 39-42).

2. Whether Westway and Imperium must demonstrate compliance with the financial responsibility statute, RCW 88.40.025, during the SEPA and SMA permitting process.

   2a. Whether the Board erred in finding that Westway and Imperium did not need to demonstrate compliance with

RCW 88.40.025 during the SEPA and SMA permitting process. AR at 2416-17 (SHB Order at 38-39).

STATEMENT OF THE CASE

I FACTUAL BACKGROUND

A. Crude Oil Transportation in the Pacific Northwest

The Westway and Imperium shipping terminal proposals are part of a recent phenomenon of transporting crude oil by rail from North Dakota and Alberta, Canada to the East and West Coasts, where it is then transferred to boats and barges for delivery abroad or to refineries in the United States. Including the three proposals in Grays Harbor, there are currently eleven crude-by-rail proposals or operating terminals in the Pacific Northwest.[2] In 2008, 9,500 tank car loads of crude were transported by rail. That number swelled to over 400,000 car loads in 2013, for a total movement of approximately 280 million barrels of crude oil that year, an increase of over 4,000%. All indications are that rail shipments of crude oil, Bakken crude in particular, will continue to grow.[3]

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[2] *See* Sightline Institute, *The Northwest's Pipeline on Rails* at 1 (May 2014) ("Sightline Report"), *available at* http://goo.gl/llJvto.

[3] Congressional Research Service, *U.S. Rail Transportation of Crude Oil: Background & Issues for Congress* at 1 (Feb. 6, 2014); AAR, *Moving Crude Oil by Rail* at 1 (Dec. 2013); Testimony of Edward R. Hamberger, AAR President, Hearing on Enhancing Our Rail Safety: Current Challenges for Passenger and Freight Rail Before U.S. Senate Comm. on Commerce, Science and Transportation at 5 (Mar. 2014).

The steep increase in crude oil shipping by rail and vessel has been accompanied by an equally sharp rise in oil spills and explosions, demonstrating the inherent environmental and health risks in the patchwork rail-to-terminal-to-vessel system. On July 6, 2013, an oil train derailed and exploded in Lac-Megantic, Quebec, killing 47 people.[4] After that disaster, in May 2013, five train cars derailed near Jansen, Saskatchewan, spilling over 18,000 gallons of crude oil.[5] On March 27, 2013, another train derailment spilled close to 20,000 gallons of tar sands crude oil in Parkers Prairie, Minnesota.[6] In November 2013, a 90-car oil train derailed in Alabama, causing flames to leap 300 feet into the air as the tanks exploded and smoldered for days.[7]

Recent oil spills have not been confined to land. In February 2014, approximately 31,500 gallons of crude spilled into the Mississippi River after a tank barge collided with a towboat.[8] Similarly, in April of this

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[4] *See* Scott Haggett, et al., *Quebec rail disaster shines critical light on oil-by-rail boom*, Reuters, July 7, 2013, *available at* http://goo.gl/18TUH.

[5] *See CP Railway reopens line, cleans up after oil spill*, Reuters, May 22, 2013, *available at* http://goo.gl/SJq6B.

[6] *See* Conrad Wilson, *20K gallons of crude spill in MN train wreck*, Minnesota Public Radio, Mar. 27, 2013, *available at* http://goo.gl/UZ0lw.

[7] *See* Edward McAllister, *Train carrying crude oil derails, cars ablaze in Alabama*, Reuters, Nov. 8, 2013, *available at* http://goo.gl/K69rBf.

[8] *See* Janet McConnaughey, *Lower Mississippi River Back Open After Oil Spill*, Associated Press, Feb. 24, 2014, *available at* http://goo.gl/8YDNua.

year, a train derailed and spilled into the James River near Lynchburg, Virginia, causing Lynchburg and Richmond to switch to backup water supplies. The leaking crude oil briefly ignited.[9]

B. The Westway and Imperium Crude Oil Shipment Terminal Proposals

The Westway and Imperium proposals would result in oil moving over Washington's ocean waters in unprecedented volumes. Westway proposes four oil storage tanks with the capacity to store a total of 800,000 barrels or 33,600,000 gallons of crude oil. AR at 124 (Westway MDNS at 2). Westway would receive 9,600,000 barrels of oil per year by rail: every three days a 120-car train would arrive, unload crude oil, and depart the terminal. *Id.* After unloading the crude into storage tanks, Westway would transfer the oil to ships and barges, resulting in 120 ship/barge transits through Grays Harbor and Washington's open ocean per year, half of which would carry oil. *Id.* Imperium's proposal would add up to nine storage tanks, each with a capacity of 80,000 barrels for a project total storage capacity of up to 720,000 barrels (30,240,000 gallons). AR at 228 (Imperium MDNS at 2). Crude oil and other liquids would arrive at Imperium's facility by rail and then would be pumped into the storage

[9] *See* Clifford Krauss and Trip Gabriel, *As New Shipping Rules Are Studied, Another Oil Train Derails*, N.Y. Times, Apr. 30, 2014, *available at* http://goo.gl/aPpSZZ.

tanks and shipped out by barge or ship, for a total increase of 400 vessel entry and departure transits each year. *Id.*

C. The Quinault Indian Nation and Grays Harbor

The Quinault have lived near and depended on Grays Harbor for generations. They have been called the Canoe people because of the importance of the ocean, bays, estuaries, and rivers to every aspect of tribal life. *See generally* Jacqueline M Strom, Land of the Quinault (1990). Quinault fishermen catch salmon, sturgeon, steelhead, halibut, cod, crab, oysters, razor clams, and many other species in Grays Harbor.

The Quinault Indian Nation is a signatory to the Treaty of Olympia (1856) in which it reserved a right to take fish at its "usual and accustomed fishing grounds and stations" and the privilege of gathering, among other rights, in exchange for ceding lands it historically roamed freely. Treaty rights are not granted to tribes, but rather are "grants of rights from them—a reservation of those not granted." *U.S. v. Winans*, 198 U.S. 371, 380-81 (1905). In a landmark court case known as the "Boldt decision," a federal court confirmed that Indian tribes have a right to half the harvestable fish in state waters and established the tribes as co-managers of the fisheries resource with the State of Washington. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974). The Boldt decision affirmed that the Quinault usual and accustomed fishing areas include

"Grays Harbor and those streams which empty into Grays Harbor." *Id.* at 374. Tribal members have always lived and worked, and continue to live and work, in the Grays Harbor area.

The Chehalis and the Humptulips Rivers and the Grays Harbor estuary provide the freshwater and marine habitat that supports chinook, chum, and coho salmon and steelhead of critical importance to the Quinault Nation's Treaty-protected terminal river fisheries within Grays Harbor. Grays Harbor nourishes other species of fish important to the Nation's Treaty-protected fisheries such as White Sturgeon and Dungeness Crab, an economically vital fishery on the Washington coast.

Quinault weavers have gathered materials from the Grays Harbor area for many generations. Sweetgrass, cattail, and other grasses and willow gathered from the Bowerman Basin are used by the Quinault as a material in the traditional weaving of baskets and mats and for ceremonial purposes. Weaving is as integral to contemporary Quinault culture as it was in the past. Bowerman Basin, located in Grays Harbor to the north of the proposed Westway and Imperium projects, is one of the two major areas remaining in Washington with large sweetgrass populations. Sweetgrass is a key component, and participant, in the highly complex estuarine ecosystem processes. Its loss due to a potential oil spill would significantly harm juvenile salmonid and bird habitats, and estuary

function, which would have huge negative implications for the Quinault.

Endangered Species Act ("ESA") protected species such as bull trout, green sturgeon, and Pacific eulachon live in Grays Harbor estuary. AR at 2390 (Shorelines Hearings Board Order on Summary Judgment (As Amended on Reconsideration) at 12) ("SHB Order"). Federal and state-protected birds such as marbled murrelets, brown pelicans, western snowy plovers, and streaked horn lark are also found in Grays Harbor. *Id.* Grays Harbor National Wildlife Refuge, used by dozens of species of shorebirds, is three miles from the proposed project sites. *Id.* Additionally, protected marine mammals, such as the southern resident killer whale, gray whale, humpback whale, sperm whale, and stellar sea lion, are found in Grays Harbor. *Id*

D. Friends of Grays Harbor *et al.*

Friends of Grays Harbor, Grays Harbor Audubon Society, the Sierra Club, and Citizens for a Clean Harbor are non-profit organizations concerned about the environmental impacts of the proposed crude-by-rail terminals.

Friends of Grays Harbor is a broad-based, volunteer, tax-exempt citizens' group comprised of crabbers, fishers, oyster growers and concerned citizens. Its mission is to foster and promote the economic, biological, and social uniqueness of a healthy Grays Harbor estuary,

protecting the natural environment and human health in Grays Harbor and vicinity through science, advocacy, law, activism, and empowerment

Grays Harbor Audubon Society is a chapter of the National Audubon Society. Grays Harbor Audubon Society is non-profit organization that provides environmental education, wildlife habitat protection, and bird- and nature-related activities in Grays Harbor. Along with the City of Hoquiam and the Grays Harbor Wildlife Refuge, it organizes the annual Grays Harbor Shorebird Festival. The Festival is timed to coincide with the annual migration of hundreds of thousands of shorebirds pausing to rest and feed in the Grays Harbor estuary on their way to nesting grounds in the Arctic. The Grays Harbor Audubon Habitat Protection Program has acquired or made conservation easement agreements for over 3,050 acres of habitat in Grays Harbor, Pacific, and Jefferson counties.

Sierra Club is a national non-profit organization of over one million members and supporters dedicated to exploring, enjoying, and protecting the wild places of the earth; practicing and promoting responsible use of the earth's ecosystems and resources; educating and enlisting humanity to protect and restore the quality of the natural and human environment; and using all lawful means to carry out these objectives. Sierra Club has more than 20,000 members in the State of

Washington who want to ensure that Washington's treasured coastline and the regions in which oil could be transported by rail are protected into the future.

Citizens for a Clean Harbor is a grassroots organization of citizens concerned about the actions of the Port of Grays Harbor and how those actions affect water quality, water quantity, and health of the estuary, rivers, and streams upon which they depend.

II. PROCEDURAL HISTORY

On March 14, 2013, the City of Hoquiam and the Washington Department of Ecology ("Ecology") issued a mitigated determination of non-significance ("MDNS") for Westway's oil terminal proposal, exempting the proposal from full environmental and public health review under SEPA. On April 26, 2013, Hoquiam issued Westway a Substantial Shoreline Development Permit. *See* AR at 123-33 (Westway MDNS); AR at 59-68 (Westway SSDP). Hoquiam and Ecology issued a similar threshold determination for Imperium on May 2, 2013; on June 14, 2013, Hoquiam issued a Substantial Shoreline Development Permit to Imperium. *See* AR at 227-39 (Imperium MDNS); AR at 216-26 (Imperium SSDP). Neither the companies nor the regulatory authorities evaluated the proposals under ORMA, nor did either company demonstrate financial responsibility under RCW 88.40.025.

Quinault Indian Nation and FOGH appealed the Westway and Imperium MDNSs and shorelines permits to the Washington Shorelines Hearings Board, advancing three major claims in their motions for summary judgment: (1) that ORMA applies to these proposals because transporting crude oil over open water to vessels and shipping crude oil by vessel is an "ocean use" and "transportation use" under ORMA and its implementing regulations; (2) that Westway and Imperium were required to demonstrate financial responsibility for oil spill clean-up during the environmental review and before issuance of a shorelines permit; and (3) that under the State Environmental Policy Act and the Shorelines Management Act, Ecology and Hoquiam failed to consider the cumulative effects of a third crude oil shipping terminal proposed in Grays Harbor and failed to fully consider the cumulative effects of the two terminals at issue, particularly given the impact of greatly increased rail and vessel traffic in and out of Grays Harbor.

On November 12, 2013, the Board granted in part Quinault and FOGH's summary judgment motions on the SEPA claims, finding that Ecology and Hoquiam failed to fully review and analyze the harmful effects of crude-by-rail proposals in Grays Harbor because they failed to review the impacts of a third nearby terminal proposed by US Development. AR at 2394-2404 (SHB Order at 16-26). The Board went

on to find that even the limited cumulative impacts analysis done for the Westway and Imperium projects was inadequate because it did not review rail and vessel traffic impacts before issuing the permits. AR at 2395-2411 (SHB Order at 26-33). The Board also found "troubling questions of the adequacy of the analysis done regarding the potential for individual and cumulative impacts from oil spills, seismic events, greenhouse gas emissions, and impacts to cultural resources." AR at 2412 (SHB Order at 34). The Board reversed and remanded the Westway and Imperium MDNSs and shoreline permits. *Id.* at 2420-21 (SHB Order at 42-43).

In its ruling, however, the Board concluded that ORMA was limited to "facilities directly engaged in resource exploration and extraction," rejecting the argument that ORMA applies to these projects. *Id.* at 2417-20 (SHB Order at 39-42). The Board decided that ocean shipment of crude oil was not an "ocean use" or "transportation use" under ORMA because the proposals would not extract crude from Washington waters or transport oil drilled from beneath the ocean. *Id.* at 2418-19 (SHB Order at 40-41).

The Board also concluded that Westway and Imperium did not need to comply with RCW 88.40.025's financial responsibility requirements as part of the SEPA or shoreline permit process. *Id.* at 2416 (SHB Order at 38-39). The Board found that Westway and Imperium may

delay providing financial assurances until an oil spill prevention plan is required, even though the MDNS explicitly relies on compliance with the spill prevention plan and RCW 80.40.025. AR at 2416-17 (SHB Order at 38-39).

Since that time, Westway and Imperium have agreed to the completion of full environmental and public health review for their projects. Hoquiam and Ecology issued Determinations of Significance for those proposals on April 4, 2014. Westway Determination of Significance, *available at* http://www.ecy.wa.gov/geographic/graysharbor/westwayterminal.html; Imperium Determination of Significance, *available at* http://www.ecy.wa.gov/geographic/graysharbor/imperiumterminal.html. Hoquiam and Ecology accepted scoping comments on the Westway and Imperium proposals through May 27, 2014, receiving approximately 22,253 comments. *See* Amelia Dickson, *22,253 comments made on Imperium and Westway EIS scoping*, The Daily World, June 17, 2014, *available at* http://goo.gl/w5jUmR.

On March 27, 2014, US Development Group—the proponent of a third crude-by-rail proposal in Grays Harbor—submitted its long-expected application to Hoquiam for a Shoreline Substantial Development permit ("SSDP"); US Development submitted a State Environmental Policy Act Checklist on April 7, 2014. US Development SSDP Application;

US Development SEPA Checklist.[10] That project would be capable of storing between 800,000 and 1,000,000 barrels of crude oil and would require 6-10 vessel transits of Grays Harbor and Washington's ocean coast each month, adding 72-120 transits per year. US Development SEPA Checklist at 3.

On December 9, 2013, Quinault Indian Nation petitioned for judicial review in Thurston County Superior Court of the Board's summary judgment ruling in favor of the respondents on the application of ORMA to these projects. FOGH similarly appealed the Board's decision on ORMA and financial responsibility on January 7, 2014. Of the respondents, Imperium alone appealed the Board's summary judgment decision on the Board's conclusion that the US Development proposal was reasonably foreseeable for cumulative impacts analysis. This Court consolidated the appeals and accepted discretionary review of all three appeals on June 11, 2014.

STANDARD OF REVIEW

Judicial review of the Board's decisions is governed by RCW 34.05.570. Because this challenge presents a question of law, this Court applies an error-of-law standard. *See Lund v. State Dep't of Ecology*,

[10] All US Development application materials are available at http://cityofhoquiam.com/newsroom/public-notices/grays-harbor-rail-terminal-project-reports/.

93 Wn. App. 329, 333 (1998). SHB orders require reversal where the Board erroneously applied the law. RCW 34.05.570(3)(d).

When a court is called upon to interpret a statute, a court's primary objective is to carry out the intent of the legislature. *Dep't of Ecology v Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9 (2002). If the statute's meaning is plain on its face, the court's inquiry ends there. *Id.* Under Washington law, 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. "[M]eaning is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Id.* at 11-12. *See also Christensen v. Ellsworth*, 162 Wn.2d 365, 373 (2007) ("Plain meaning is discerned 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." (citations omitted)).

The plain meaning rule also provides that "background facts of which judicial notice can be taken are properly considered as part of the statute's context because presumably the legislature also was familiar with them when it passed the statute." *Campbell & Gwinn*, 146 Wn.2d at 11 (quoting 2A Norman J. Singer, *Statutes and Statutory Construction*

§ 48A:16 at 809-10 (6th ed. 2000)). In cases of statutory interpretation, a court does not read and interpret any provision in isolation.

Likewise, "each word of a statute must be accorded meaning, for the legislature is presumed not to have used superfluous words." *State v. Fenter*, 89 Wn.2d 57, 60 (1977) (citing *State v. Lundquist*, 60 Wn.2d 397 (1962)). That principle is equally true for interpretation of administrative regulations. *See Hayes v. Yount*, 87 Wn 2d 280, 290 (1976); *Pac. Wire Works, Inc. v. Dep't of Labor & Indus.*, 49 Wn. App. 229, 235 (1987).

Washington's approach comports with that of the U.S. Supreme Court. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (the Court must consider "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole"); *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 94-95 (1993) (each statutory provision should be read by reference to the whole act and to its object and policy); *Smith v. U.S.*, 508 U.S. 223, 233 (1993) (statutory interpretation is a "holistic" endeavor (citation and quotation omitted)). *See also United States v. Treadwell*, 593 F.3d 990, 1006-07 (9th Cir. 2010) ("[W]hen we look to the plain language of a statute to interpret its meaning, we do more than view words or sub-sections in isolation. We derive meaning from context, and this requires reading the relevant statutory provisions as a whole." (citation and

quotation omitted)). In determining legislative intent, the "whole act rule" directs courts to consider how the legislature used a given term elsewhere in the statute by not looking "merely to a particular clause in which general words may be used," but rather a court should "take in connection with [the relevant clause] the whole statute (or statutes of the same subject) and the objects and policy of the law." *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974).

If, ultimately, a statute is subject to more than one reasonable interpretation, a court may look to the legislative history to glean legislative intent. *Campbell & Gwinn*, 146 Wn.2d at 12, including the circumstances leading up to and surrounding the statute's enactment. *Restaurant Dev., Inc. v. Cannanwill*, 150 Wn.2d 674, 682 (2003) (citing Philip A. Talmadge, *A New Approach to Statutory Interpretation in Washington*, 25 Seattle U. L. Rev. 179, 203 (2001)); *State v. Costich*, 152 Wn.2d 463, 477 (2004).

ARGUMENT

The Washington Legislature passed the Ocean Resources Management Act to protect Washington's ocean coast from the threat of oil and other hazards soon after the Exxon Valdez and Nestucca oil spills. An interpretation that limits the scope of ORMA solely to activities involving the extraction of oil from Washington waters prevents ORMA's

important protections from applying to exactly the sort of dangerous activities contemplated by the Washington State Legislature. The plain language of ORMA and its implementing regulations require that proposals such as these, which would ship millions of barrels of crude oil annually through Washington's ocean waters, be classified as "ocean uses" and "transportation" as defined by statute and regulations. These proposals will have an adverse impact on Washington's coastal resources, whether through a catastrophic spill—like those that precipitated the passage of ORMA—or via the repeated, routine leaks and additional traffic resulting from these proposals. The Court should confirm that the two proposals are covered by ORMA and reverse the conclusion of the Shorelines Hearings Board.

Similarly, the Legislature passed RCW 88.40.025 to protect the State and local governments from shouldering the enormous costs resulting from oil spills at onshore oil facilities. Westway and Imperium should comply with this statute prior to the SEPA threshold determination process to ensure that Ecology's mitigation measures for oil spills, which includes a yet-to-be prepared oil spill prevention plan and accompanying financial responsibility requirements, are not illusory. Westway and Imperium must be required to comply with RCW 88.40.025 prior to receiving shorelines permits to ensure compliance with the statute's

protective requirements. Interpreting RCW 88.40.025 to require compliance prior to receiving initial authorizations will ensure—in accordance with the intent of the statute—that facilities like the proposed crude oil terminals are not built and operated by financially-insecure companies that could be unable to pay for the costs of a *reasonable* worst-case scenario oil spill.

I. THE PROPOSED WESTWAY AND IMPERIUM CRUDE OIL TERMINALS AND ASSOCIATED VESSEL SHIPMENTS ARE OCEAN USES UNDER ORMA.

In passing ORMA in 1989, the Washington State Legislature found that "Washington's coastal waters, seabed, and shorelines are among the most valuable and fragile of its natural resources" but are "faced with conflicting use demands," some of which "may pose unacceptable environmental or social risks at certain times." RCW 43.143.005(1) and (3). To specifically address one of these unacceptable risks, the Legislature banned leases for oil exploration and production in Washington's ocean waters. RCW 43.143.010(2). For other risky activities, those not receiving the outright ban, ORMA established a set of review criteria to evaluate and mitigate their impacts, requiring priority for uses of Washington's ocean that would not impair Washington's natural resources. RCW 43.143.030; RCW 43.143.010(3). ORMA's review criteria, for projects that will adversely affect Washington's coastal

waters, allow permitting only if "[t]here will be no likely long-term significant adverse impacts to coastal or marine resources or uses" and if "there is no reasonable alternative," among other requirements. *Id.* at (2)(b), (d). The statute explicitly calls out Grays Harbor for protection, and mandates that "[a]ll reasonable steps [be] taken to avoid and minimize adverse environmental impacts" to Grays Harbor's marine life and resources. *Id.* at (2)(d).

Application of ORMA's permitting criteria to the proposed crude-oil terminals will provide an important layer of analysis, protection, and mitigation for ocean uses and resources. Notably, the criteria would require Westway and Imperium to minimize economic and social impacts on crucial uses of Grays Harbor and the surrounding waters—aquaculture, recreation, tourism, navigation, air quality, and recreational, commercial, and tribal fishing. RCW 43.143.030(2)(e). Given the major impacts expected to these uses, including the curtailment of all other vessel traffic while oil vessels travel from the proposed terminals offshore—essentially grinding to a halt all fishing, navigation, and recreational uses of Grays Harbor for multiple hours a day on a regular basis—the minimization requirement would provide important relief to the people who depend upon existing uses. ORMA and its permitting criteria are designed to address these types of conflicts and balance competing needs.

Contrary to the plain text, structure, and legislative history of ORMA, the Board confined ORMA to activities involving the extraction of oil from Washington's ocean waters. The Board stated that "Ecology understands that the Legislature designed ORMA to address facilities directly engaged in resource exploration and extraction activities in Washington waters." AR at 2418 (SHB Order at 40). ORMA sweeps far more broadly than the Board recognized, covering these two projects because the two shipping terminal proposals each involve "ocean uses" and "transportation" under the Act and implementing regulations. These risky uses of the ocean—over 500 vessel movements per year—require comprehensive evaluation through the statute's permitting criteria as contemplated by the Legislature when it passed ORMA.

A. Shipping Oil by Vessel Through Washington's Ocean Waters Is a Covered "Use" under ORMA and an "Ocean Use" under ORMA's Regulations.

The Westway and Imperium proposals are within the plain language of ORMA and its implementing regulations. The first purpose articulated by the Legislature in passing ORMA highlights its broad reach: "to articulate policies and establish guidelines for the exercise of state and local management authority over Washington's coastal waters, seabed, and shorelines." RCW 43.143.010(1). Under ORMA's text and structure, consistent with this purpose, transportation of crude oil through

Washington's ocean waters is a use covered by the statute. The proposals are also well-within the definitions of "ocean uses" and "transportation" found in ORMA's implementing regulations.

1. ORMA's text and structure show that ORMA applies to the Westway and Imperium proposals.

ORMA states that "Washington's coastal waters, seabed, and shorelines are among the most valuable and fragile of its natural resources." RCW 43.143.005(1) (emphasis added). The use of the word "resources" here and in other ORMA sections, referring to Washington's coastal waters generally, demonstrates that ORMA is not solely about the development of gas and oil: it is more broadly about the natural environment and ecosystems of Washington's ocean coast. Later in the statute, the drafters again used the word "resources," stating that for developing "plans for the management, conservation, use, or development of natural resources in Washington's coastal waters, the policies in RCW 43.143.010 shall" govern the process. RCW 43.143.030(1) (emphasis added). The statute continues:

> [u]ses or activities that require federal, state, or local government permits or other approvals and that will adversely impact renewable resources, marine life, fishing, aquaculture, recreation, navigation, air or water quality, or other existing ocean or coastal uses, may be permitted only if the criteria below are met or exceeded.

Id. at (2) (emphasis added).

The "whole act rule" of statutory interpretation requires an interpretation giving the same meaning to "resources" across the statute. *Kokoszka*, 417 U.S. at 650. Applying that rule of consistency, these subsections demonstrate that the relevant consideration is how a use—whatever that use might be—will affect Washington's broadly-construed ocean resources. Whether the use will adversely impact Washington's resources determines whether it is subject to ORMA RCW 43.143.030(2). Contrary to the Board's exclusive focus on the type of the use—extraction-related activities or other—ORMA's relevant consideration is the impact the use will have on Washington's resources. RCW 43.143.005(1).[11]

Reading the statute otherwise, such that it only extends to extraction-related activities, is inconsistent with other parts of ORMA. In interpreting a statute, a court not only looks to the plain meaning of the statutory text but also to the structure and context of the statute. *See*

[11] As discussed further below, part of the Board's basis for granting summary judgment in favor of respondents was that, in its view, Quinault's reading of ORMA would subject all transportation through Washington's ocean waters to ORMA review. AR at 2419 (SHB Order at 41). That concern is wholly unwarranted. ORMA's limiting principle is articulated explicitly in the statute: ORMA only applies to uses that will "adversely impact renewable resources." RCW 43.143.030(2). That threshold determination is similar to the State Environmental Policy Act's likelihood of significant impact and is one agencies and local governments are well-equipped to make.

Christensen, 162 Wn.2d at 373. In passing ORMA, the Legislature went out of its way to temporarily exempt certain commercial and recreational uses of Washington's ocean waters. *See* RCW 43.143.010(5). But the Legislature went on to point out that these activities would not be permanently excluded from ORMA. *Id.* This temporary exclusion demonstrates that ORMA must cover activities other than those involving extraction. There is no reason to explicitly exempt an activity from ORMA that would not be otherwise covered: the only way to read ORMA as an integrated whole—without superfluity and internal contradiction—is to recognize that it must cover more than extraction-related activities. *See Treadwell*, 593 F.3d at 1006-07 (requiring reading of statute as integrated whole).

2. Shipping millions of barrels of crude oil through Washington waters is an ocean use.

ORMA's implementing regulations define "ocean uses" very broadly as

> activities 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, recreational, and tribal fishing, aquaculture, recreation, shellfish harvesting, and pleasure craft activity.

WAC 173-26-360(3). The Board found that this definition limits ORMA to "facilities directly engaged in resource exploration and extraction activities in Washington waters." AR at 2418 (*SHB Order* at 40). The relevant definition, however, is far broader than extraction activities, encompassing a range of activities that necessarily include the proposals at issue.

First and most clearly, ORMA states that "ocean uses" can involve either renewable or nonrenewable resources, i.e., if any of Washington's resources—renewable or otherwise—is involved, the use is covered by ORMA. WAC 173-26-360(3) ("activities or developments involving renewable and/or nonrenewable resources"). The regulations go on to provide four non-exclusive examples of ocean uses involving nonrenewable resources, and extraction is only one of the four categories listed, demonstrating that ORMA covers much more than that one narrow category. WAC 173-26-360(3) ("[1] extraction of oil, gas and minerals, [2] energy production,[12] [3] disposal of waste products, and [4] salvage"). It was error for the Board to constrain ORMA and its regulations to

[12] "Energy production" is defined later in the regulations and includes electricity-generating activities directly from the ocean such as wave-action. WAC 173-26-360(10).

extraction activities as it is clear that extraction was just one of many anticipated uses of Washington's ocean resources.

Moreover, the four examples of covered uses are just that: examples. The relevant sentence says that "[o]cean uses involving nonrenewable resources include such activities as . . . ." WAC 173-26-360(3) (emphasis added). The regulations use the inclusive word "include" rather than an exclusive phrasing such as "limited to." As the Washington Supreme Court has found, "includes" is a term of enlargement and does not narrow a definition. *See Quects Band of Indians v. State*, 102 Wn.2d 1, 4 (Wash. 1984) ("'includes' is construed as a term of enlargement"). There is no reason to read "include" in this sentence in any way other than as introducing illustrative examples.

There are two final incoherencies introduced to the regulations if ORMA is interpreted only to cover oil extraction activities, both of which violate the canon against reading superfluity into statutes or regulations. The first is that the regulations provide a specific category for extraction activities, what the regulations refer to as "oil and gas uses," WAC 173-26-360(8). The specifically enumerated "oil and gas uses" are defined to "involve the extraction of oil and gas resources from beneath the ocean." *Id.* This category would be redundant if ORMA as a whole were meant only to cover extraction and exploration, and such a reading impermissibly

renders an entire subsection superfluous. *See Fenter*, 89 Wn.2d at 60; *Pac. Wire Works, Inc.*, 49 Wn. App. at 235.

Further, if ORMA and its implementing regulations only covered extraction-related activities, there would be the puzzle of why ORMA immediately imposed a ban on the leases required for drilling and extraction and simultaneously imposed review criteria for the banned activities. RCW 43.143.010(2).[13] If ORMA were meant to cover extraction and drilling activities only, the Washington State Legislature need not have created review criteria since the statute banned all activities possibly covered. These inconsistencies demonstrate the broader-reaching intent of the Legislature in passing ORMA and the logically necessary inclusion of activities such as oil shipment terminals.

3. The proposals fit into the "transportation" category within "ocean uses"

In addition to being an "ocean use" broadly, shipping crude oil through Washington waters is also a "transportation" use as defined by the regulations. "Transportation" is a sub-category of "ocean uses" and includes "[s]hipping, transferring between vessels, and offshore storage of oil and gas; transport of other goods and commodities; and offshore ports

[13] The ban was originally temporary but was eventually made permanent. *Compare* Laws of 1989, 1st Ex. Sess., ch 2 at 2422 (imposing temporary leasing ban at § 9(2)), *with* RCW 43.143.010(2) (containing permanent leasing ban).

and airports." WAC 173-26-360(12). Included specifically in this definition is exactly what Westway and Imperium propose for Washington's ocean waters: shipments of oil. *Id.* This definition is then limited to "activities that originate or conclude in Washington's coastal waters or are transporting a nonrenewable resource extracted from the outer continental shelf off Washington." *Id.* (emphasis added). The disjunctive "or" shows that "transportation" covers either of two situations: 1) activities originating/concluding in Washington's coastal waters and 2) those activities that involve moving resources extracted from the outer continental shelf off Washington: ORMA applies equally to both categories. *See State v. Bolar*, 129 Wn.2d 361, 365-66 (1996) ("'Or' is presumed to be used disjunctively in a statute unless there is clear legislative intent to the contrary.").

While Westway's and Imperium's proposals would not transport oil extracted from Washington's coastal waters, category two, they would involve marine transportation originating in Washington's coastal waters, category one. The Board entirely failed to consider that category of uses—activities involving transportation originating in Washington's coastal waters—and instead summarily concluded that these projects would not be "transportation" simply because they would not transport oil extracted from Washington's ocean waters. AR at 2418-19 (SHB Order at

40-41 ("Westway does not intend to extract or otherwise service the extraction of crude oil or any other resources from Washington waters. It is not transporting oil from beneath the ocean. Rather, the Project will facilitate the movement of crude oil from and to areas outside the Washington border."). Quinault and FOGH have never claimed that Westway or Imperium will transport oil extracted from Washington's coastal waters—nor do they need to—and the Board erred by failing to examine the other, equally important category of ocean transportation originating in Washington waters.

The marine transportation of crude oil to be shipped by Westway and Imperium would begin in Grays Harbor after the crude arrives from North Dakota or Alberta, Canada by rail. *See* AR at 1195 (Westway SEPA Checklist, Appendix B at 2); *id.* at 1209 (Port of Grays Harbor CBR Fact Sheet at 1 (Jan. 30, 2013)). While the oil will have traveled by rail before traveling by vessel, its ocean transportation undisputedly originates in Washington. *See* WAC 173-26-360(12). That the oil would move first by rail has no bearing on the reality that all the relevant, ORMA-covered activity would take place in Washington. The oil would be loaded over open water into vessels in Washington waters and shipped out of a Washington port, through a Washington channel, and along hundreds of miles of Washington's ocean coast. By covering activities that originate

or conclude in Washington, ORMA captures transportation of oil and other goods that would be loaded or unloaded in Washington ports: Westway and Imperium's proposed use of facilities for shipping crude oil fits that definition and is a regulated form of "transportation."

The Board was concerned with what it perceived as an overly broad reach of "transportation" and "ocean uses" under Quinault and FOGH's reading of ORMA's regulations. AR at 2418-19 (SHB Order at 40-41 ("[Petitioners'] 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.")). That concern is misguided for two reasons. First, the Court should implement the text of ORMA and its regulations as written, even if this is the first appropriate occasion in the statute's history. There has never before been occasion to consider ORMA's application, particularly in a situation involving the tremendous volumes of oil proposed for Grays Harbor. The new threat facing Washington's coastal waters fits into the broad categories shaped by the Washington Legislature. Second, ORMA's reach is narrowed by the statutory limitation to activities that "will adversely impact renewable resources, marine life, fishing, aquaculture, recreation, navigation, air or water quality." RCW

43.143.030(2). While "transportation" and "ocean uses" are broadly defined by the regulations, it is not the case that every activity falling under those definitions would be subject to the permit criteria of 43.143.030(2). Only those ocean uses that also will adversely impact Washington's fragile ocean resources are subject to that criteria. *See id*; RCW 43.143.005(1). The adverse-impact limitation is the only one the Legislature saw fit to impose, and it sufficiently limits the application of RCW 43.143.030(2).

The Board was also concerned that Ecology or the Court has never interpreted ORMA in the way Quinault Indian Nation and FOGH suggested. AR at 2419 (SHB Order at 41 ("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 . . . .")). Equally true, however, is that ORMA has never been interpreted in the way the Board decided. Simply put, no court or agency has interpreted ORMA; this lack of interpretation does not support either reading of the text but instead highlights the need for a close reading of ORMA's text, structure, and legislative history. *See W. Virginia Div. of Izaak Walton League of Am. v. Butz*, 522 F.2d 945, 949-52 (4th Cir. 1975) (analyzing and applying long-dormant statutory provision of the Organic Act of 1897), *superseded by statute on other*

grounds.

B. ORMA's Legislative Findings and Legislative History Show that It Is Intended to Reach More than Oil Extraction and Exploration.

While it is clear that ORMA addresses offshore drilling, the legislative history and context of ORMA demonstrate that it was meant to reach any activities that threaten harm to Washington's ocean resources. ORMA's legislative history highlights ORMA's reach. At the time of ORMA's passage, the Legislature characterized it as "[r]elating to oil spills and the transfer and safety of petroleum products across the marine waters of the state of Washington." Laws of 1989, 1st Ex. Sess., ch 2 at 2420.[14] ORMA passed as part of a comprehensive bill addressing oil spills and other risks to Washington's coast, which included legislation requiring financial assurances for vessel transport of petroleum products. *Id.* The legislative history shows that the planning and project review criteria were meant to "set the minimum standards which must be met before the state may support any activities that are likely to have an adverse impact on marine life, fishing, aquaculture, recreation, navigation, air or water quality, or other existing ocean or coastal uses." Wash. Legislative Reports, HB 2242, p. 168 (emphasis added). As the legislative

[14] ORMA's legislative history is included in the attached appendix at App'x 57-75.

history confirms, "any activities" likely to harm Washington's ocean resources—broadly construed—would be subject to ORMA. *See id.*

ORMA originally died in the legislature, but it revived in part due to "public outrage over the Exxon Valdez spill in Alaska." App'x at 78 (Jim Simon, *Offshore-Oil Bill Takes on New Life–Senate Committee Reverses Action*, The Seattle Times at B3 (Apr. 14, 1989)). The risk of oil spills was already in the public eye: on December 22, 1988, a barge collided with the Nestucca oil barge in Grays Harbor, causing a spill that covered more than 300 miles of Washington's coast with oil. App'x at 81 (*Gardner tours oil spill aid center*, Idahonian Daily News at 10A (Jan. 4 1989)). Not long before signing ORMA into law, Governor Booth Gardner toured a cleanup center in Grays Harbor at Ocean Shores, Washington where seabirds covered in oil from the Nestucca spill were being tube fed and washed. *Id.* ORMA passed against this background of recent oil spills, none of which were the result of offshore drilling and extraction.

C. The Westway and Imperium Proposals Will Adversely Impact Washington's Ocean Resources.

It is impossible to ship such tremendous volumes of oil without causing adverse impacts to Washington's ocean coast, both through the possibility of a catastrophic spill and routine leaks, increased vessel traffic,

and other ongoing harms. As the Board found, these two proposals alone would be responsible for over 520 vessel transits of Grays Harbor each year. *See* AR at 2386-87 (SHB Order at 8-9). That nearly fourfold increase in vessel traffic demonstrates adverse impact to navigation, fishing, and other ocean uses. In the worst-case-scenario, a large oil spill in Washington's ocean would do untold harm to the ocean coast, its wildlife and plant life, and the people—such as members of the Quinault Indian Nation—who depend on Grays Harbor and Washington's ocean coast for their livelihoods and culture. The inevitable routine harm these projects would cause, along with the risk of a major oil spill, "will adversely impact renewable resources, marine life, fishing, aquaculture, recreation, navigation, air or water quality"[15] in Washington's ocean coast. These projects are therefore uses of Washington's ocean that are subject to the requirements of ORMA

II. WESTWAY AND IMPERIUM MUST COMPLY WITH RCW 88.40.025 PRIOR TO ISSUANCE OF THE SHORELINE PERMITS.

By holding that Westway and Imperium need not comply with RCW 88.40.025 prior to receiving authorization for the proposed crude oil terminals, AR at 2417 (SHB Order at 39), the Board's decision undermines the protective purpose of Washington's financial

[15] RCW 43.143.030(2).

responsibility requirements for oil handing facilities. The Board reasoned that delaying compliance with RCW 88.40.025 until an unspecified future date was appropriate because Westway and Imperium would be subject to enforcement and penalties if they failed to comply and because they would be strictly liable for costs in the event of an oil spill. *Id* These after-the-fact sanctions cannot serve as adequate substitutes for compliance with the statute—penalties and enforcement, unlike prospective financial assurances, are ineffective for ensuring protection if a company's financial capital or assets will not cover the costs of a worst case scenario oil spill. It goes without saying that strict liability, while perhaps capable of providing legal vindication, is in practice ineffective at securing damages from a company in bankruptcy. Accordingly, RCW 88.40.025 requires compliance prior to issuance of shorelines permits and the accompanying threshold determinations under SEPA to prevent Westway and Imperium from evading this crucial statutory mandate and leaving the State and local governments on the hook for an oil spill from the proposed crude oil terminals.

When passing financial responsibility requirements related to risks of oil spills, the Legislature recognized that "oil and hazardous substance spills and other forms of incremental pollution present serious danger to the fragile marine environment of Washington state." RCW 88.40.005.

When amending the financial responsibility requirements to include facilities involved in oil shipment, the Legislature required that:

> [a]n 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 department shall consider such matters as the amount of oil that could be spilled into the navigable waters from the facility, the cost of cleaning up the spilled oil, the frequency of operations at the facility, the damages that could result from the spill and the commercial availability and affordability of financial responsibility.

RCW 88.40.025. The Legislature also provided examples of how facilities must establish evidence of financial responsibility—through evidence of insurance, surety bonds, or qualification as a self-insurer. RCW 88.40.030. The requirements provide vital protection for the state from a catastrophic oil spill in Washington's waters, the risks of which have grown quickly and proportionately with the boom in crude-by-rail transportation and bulk oil storage along Washington's fragile shorelines

A. SEPA Requires Compliance with RCW 88.40.025 at the Threshold Determination Phase.

Similarly, the Board erroneously held that Westway and Imperium are not required to comply with RCW 88.40.025 under SEPA. AR at 2417 (SHB Order at 39). RCW 88.40.025 requires Westway and Imperium to provide evidence of financial responsibility as part of the SEPA threshold

determination because the statutory financial responsibility requirements are one of Ecology's key justifications for avoiding a full analysis of the environmental impacts of oil spills. Specifically, Ecology relied on Ecology's Spill Prevention Plan as a mitigation measure, which requires compliance with RCW 88.40.025's financial responsibility requirements. AR at 127 (Westway MDNS at 5). Accordingly, RCW 88.40.025 is a required component of the mitigation measures that justifies the MDNS under SEPA, and Ecology and Hoquiam are not permitted to take on faith that Westway and Imperium will comply.

Under SEPA, this "[m]itigation measure shall be reasonable and capable of being accomplished." RCW 43.21C.060; WAC 197-11-660(1)(c). To rely on RCW 88.40.025 as mitigation for oil spills, Ecology needed to determine whether Westway and Imperium are capable of complying with the financial responsibility requirements. Without any data regarding Westway's and Imperium's finances, Ecology could not judge whether this mitigation measure was "capable of being accomplished" as required. *See* RCW 43.21C.060; WAC 197-11-660(1)(c).

The Board failed to require compliance with RCW 88.40.025 at the SEPA threshold determination stage because Westway and Imperium may be subject to penalties if they do not comply at a later date. AR at 2417

(SHB Order at 39). The Board erred because the possibility of future enforcement against a company with inadequate or no financial assurance evidence does not make compliance with RCW 88.40.025 "capable of being accomplished." *Id.*; RCW 43.21C.060; WAC 197-11-660(1)(c). Without any data provided, the Board simply could not have determined whether Westway and Imperium would have adequate resources to fulfill their obligations in the case of an oil spill.

Moreover, strict liability is only relevant after an oil spill occurs and does nothing to prevent a company that may not be able to pay out those damages from building a risky oil terminal in the first place. Likewise, a financially unstable company that has not complied with RCW 88.40.025 has given no evidence that it will be able to quickly generate new capital to cover costs of cleaning up a spill, rendering penalties insufficient to ensure compliance. Waiting until after the SEPA review is completed and the shoreline permits are issued to obtain information about the significance of potential impacts, including those from oil spills due to inadequately funded mitigation, does not comply with SEPA's mandate to "provide consideration of environmental factors at the earliest possible stage to allow decisions to be based on complete disclosure of environmental consequences." *See* AR at 2407 (SHB Order at 29 (reaching similar conclusion regarding impacts from vessel and train

increases, the analysis of which Hoquiam and Ecology deferred until after the MDNS's issuance) (citing *King Cnty. v. Washington State Boundary Review Bd. For King Cnty.*, 122 Wn.2d 648, 663 (1993))).

B. Westway and Imperium Must Comply with RCW 88.40.025 at the Application Phase.

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. Accordingly, this Court should interpret RCW 88.40.025 in a manner that carries out the intent of the Legislature. *See Campbell & Gwinn*, 146 Wn.2d at 9. The Legislature's intent in mandating financial responsibility requirements was to protect the State and local governments from bearing the costs of a worst-case-scenario oil spill from an oil handling facility. *See* RCW 88.40.025. Here, the State and local governments' interests will only be protected if Westway and Imperium give evidence of financial responsibility prior to receiving the initial land use authorizations and analyzing the environmental impacts for the proposed crude oil terminals.

Clearing these major regulatory approvals without providing financial assurances will provide substantial momentum in the regulatory process that may be difficult to undue. As the Washington Supreme Court has recognized, government action "can 'snowball' and acquire virtually

unstoppable administrative inertia." *King Cnty. v. Boundary Review Bd.*, 122 Wn.2d 648, 664 (1993) (holding that a simple boundary change for annexation of land necessitated an environmental impact statement because, although it did not authorize development, "the inertia generated by the initial government decisions . . . may carry the project forward regardless"). Here, obtaining 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.

Neither Westway, Imperium, Ecology, nor Hoquiam pointed to a specific timeframe in which Westway and Imperium will comply with RCW 88.40.025, raising serious questions about when, or even whether compliance will be required. *See, e.g.*, AR at 2094-95 (Ecology Reply at 13-14 (financial assurances will be required at some unknown time before operations)). Instead of providing the Board with some certainty about when it would comply with RCW 88.40.025, Imperium argued that application of RCW 88.40.025 "is contingent upon the Department of Ecology developing the applicable regulations," suggesting that it does not intend to provide evidence of financial responsibility unless and until Ecology goes through a rule-making process. AR at 1583 (Imperium

Response at 26). Remarkably, Imperium further suggested that it did not need to comply with the requirements because government funds are available to bail out the companies in the event that oil spill costs exceed the companies' ability to properly clean up spills. *Id* at 1583-84 (Imperium Response at 26-27). Imperium's attitude highlights the serious risk that the companies may evade compliance with these stringent financial responsibility requirements if the Court does not require compliance at the application stage. Requiring compliance with RCW 88.40.025 up front during the application phase is the only way to ensure the statute's mandate is fulfilled.

C. HMC 11.04.065(4) Requires Financial Assurances as Part of Mitigation at the Application Stage.

Westway and Imperium are also required to comply with financial responsibility requirements as part of the City of Hoquiam's local ocean use regulations, which require "an applicant proposing oil and/or gas . . facilities to produce evidence indicating adequate prevention, response, and mitigation can be provided before the use is initiated and throughout the life of the proposed project." HMC 11.04.065(4) (emphasis added). This provision must require evidence of the ability to respond and mitigate a worst-case-scenario oil spill. Because oil spills are a major risk posed by the crude oil shipment terminal proposals in Grays Harbor, adequate

response and mitigation needs to include paying for damages and cleanup of a spill. Hoquiam's local regulations require evidence of this at the application stage, not after the permitting process, meaning that financial evidence of Westway and Imperium's ability to mitigate and respond to an oil spill must be provided at the application stage. HMC 11.04.065.

D. RCW 88.40.025 Protects the State and Local Governments from Bearing the Costs of a Worst-Case-Scenario Oil Spill.

Westway and Imperium's proposed crude oil terminals must comply with the statutory financial responsibility requirements because their proposed terminals qualify as onshore facilities.[16] A worst-case-scenario oil spill from these proposed terminals could have a devastating and significant impact on the environment and the $10.8 billion in annual state economic activity tied to the coastal economy. *Id.* at 839-40 (FOGH

[16] RCW 88.40.011(14) defines "onshore facility" as "any facility any part of which is located in, on, or under any land of the state, other than submerged land, that because of its location, could reasonably be expected to cause substantial harm to the environment by discharging oil into or on the navigable waters of the state or the adjoining shorelines." RCW 88.40.011(7)(a) defines "facility" as "any structure, group of structures, equipment, pipeline, or device, other than a vessel, located on or near the navigable waters of the state that transfers oil in bulk to or from any vessel with an oil carrying capacity over two hundred fifty barrels or pipeline, that is used for producing, storing, handling, transferring, processing, or transporting oil in bulk." The proposed crude oil terminals, which would locate several structures and types of equipment along the shoreline of Grays Harbor to store and transfer several hundred thousand barrels of crude oil to and from railcars and vessels, plainly meet this definition and are therefore subject to the statutory financial responsibility requirements.

Mot. Summ. J., Ex. 6 (Department of Ecology, Final Cost-Benefit and Least Burdensome Alternative Analysis, Chapter 173-182 WAC, December 2012) at 6-7). To calculate the financial assurance required to compensate the government for a worst-case-scenario oil spill, Ecology must consider the amount of oil that could be spilled from the facilities and the cost of cleaning up the oil. RCW 88.40.025. Based on the capacity of the proposed crude oil terminals' storage tanks and Ecology's calculations regarding the average and high-end cost of cleaning up oil spills, Westway and Imperium could likely be required to provide assurance of the ability to pay more than a billion dollars each. Ecology has found that "the average crude oil spill in the past decade is reported to be $2 thousand per barrel or more" for cleanup costs, with high-end estimates to be approximately $34 thousand per barrel. AR at 842 (FOGH Mot. Summ. J., Ex. 6 (Department of Ecology, Final Cost-Benefit and Least Burdensome Alternative Analysis, Chapter 173-182 WAC, December 2012) at 9). A spill of all 800,000 barrels of crude oil that could be stored at Westway's proposed facility would cost $1.6 billion based upon Ecology's average spill costs, or $27.2 billion based upon Ecology's high-end estimate of spill costs. *See* AR at 124 (Westway MDNS at 2). The costs of cleaning up the 720,000 barrels that could be stored at Imperium's proposed facility would be nearly as high. *See* AR at

228 (Imperium MDNS at 2).

Whether Westway and Imperium can provide evidence of their ability to cover these enormous potential costs of a worst-case-scenario oil spill is far from certain given that neither company has provided any of the required data to make such a determination. Westway only had $13.5 million in cash on hand in 2011, far short of the amount necessary to provide financial assurances in the form of surety bonds, qualification of a self-insurer, or other company-financed evidence of financial assurances.[17] Ensuring that these companies provide adequate financial assurances is imperative, especially in light of the staggering additional costs for which they could be financially responsible—Clean Water Act penalties, personal injury claims, and compensation for economic losses could further constrain the companies' ability to cover the damage costs borne by state and local governments. For instance, the 2010 BP Horizon off-shore drilling disaster, that caused an estimated 2.45 to 4.2 million barrels of crude oil to be spilled into the Gulf of Mexico, resulted in BP's establishment of a $20 billion trust fund to fulfill the several billion dollars

[17] Westway Group, Annual Report 2011 at 51, *available at* http://www.westway.com/documents/Westway%202011%20Annual%20Report.pdf; *see also* RCW 88.40.030 (methods of establishing financial responsibility).

in economic, property, and medical claims.[18] A spill of the 800,000 barrels that could be stored at Westway's, or the 720,000 barrels at Imperium's, proposed crude oil terminal could constitute approximately one-quarter of the size of the BP oil spill, making the risk that Westway or Imperium would incur billions of dollars in financial liabilities on top of damages owed to the State and local governments a near certainty. These additional liabilities would further tax the companies' financial resources to fund cleanup efforts and demonstrate the inherent riskiness of a wait-and-see approach to financial assurances.

Recent catastrophic environmental disasters caused by underfunded and financially insecure companies highlight the importance of financial responsibility requirements. The railway responsible for the deadly crude-by-rail explosion in Quebec during July 2013, and the company responsible for the massive chemical spill in West Virginia during January 2014, both promptly filed for bankruptcy protection after the disasters.[19] To prevent similar pollute-and-run situations at shoreline

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[18] Paul M. Barrett, *BP's Big Payouts Amid Other Oil Spill Liability*, Bloomberg Businessweek, June 27, 2013, *available at* http://www.businessweek.com/articles/2013-06-27/bps-big-payouts-amid-other-oil-spill-liability

[19] David McLaughlin et al., *Montreal Maine Railway Files for Bankruptcy After Crash*, Bloomberg, Aug. 8, 2013, *available at* http://www.bloomberg.com/news/2013-08-07/montreal-maine-railway-files-for-bankruptcy-after-crash.html; Peg Brickley, *Company Linked to West*

oil storage facilities, the Legislature required a demonstration that the state would not be stuck with the tab after companies reap the profits from risky crude-oil terminals such as these. A demonstration of financial assurance is required by the statute, warranting reversal by this Court.

CONCLUSION

For the reasons stated above, the Court should reverse the Board's decision as to the applicability of ORMA and RCW 88.40.025 to the Westway and Imperium proposals.

Respectfully submitted this 28th day of July, 2014.

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Virginia Chemical Spill to Shut Down Operations, The Wall Street Journal, Feb. 21, 2014, *available at* http://online.wsj.com/news/articles/SB10001424052702303775504579397244168927478.

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Consolidated Nos. 45887-0-II, 45947-7-II, 45957-4-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON - DIVISION II

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

Petitioners,

v.

CITY OF HOQUIAM, STATE DEPARTMENT OF ECOLOGY, and WESTWAY TERMINAL COMPANY, LLC,

Respondents.

and

IMPERIUM TERINAL SERVICES, LLC,

Intervenor-Petitioner

SHORELINES HEARINGS BOARD,

Respondent

CERTIFICATE OF SERVICE

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CERTIFICATE OF SERVICE

I, Amanda Kleiss-Acres, declare as follows:

That I am over the age of 18 years, not a party to this action, and competent to be a witness herein;

That I, as a legal assistant in the office of Van Ness Feldman LLP, caused true and correct copies of the following documents to be delivered as set forth below:

> Joint Opening Brief of Quinault Indian Nation and Friends of Grays Harbor, *et al*

and that on September 26, 2014, I addressed said documents and deposited them for delivery as follows:

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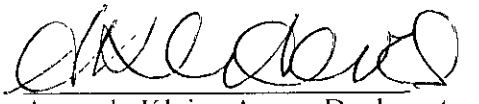
I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Seattle, WA on this 26th day of September, 2014.



Amanda Kleiss-Acres, Declarant