IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 92552-6

Court of Appeals No. 45887-0-II
Consolidated with Nos. 45947-7-II
and 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; WASHINGTON STATE DEPARTMENT OF ECOLOGY; IMPERIUM TERMINAL SERVICES, LLC; WESTWAY TERMINAL COMPANY, LLC; and WASHINGTON SHORELINES HEARINGS BOARD,

Respondents.

PETITION FOR REVIEW

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IDENTITY OF PETITIONERS

Petitioners are Quinault Indian Nation, Friends of Grays Harbor, Sierra Club, Grays Harbor Audubon, and Citizens for a Clean Harbor. Each was a party to the initial challenge before the Shorelines Hearings Board and the appeal in the Court of Appeals, Division II.

COURT OF APPEALS DECISION

Petitioners seek review of the published opinion terminating review by the Court of Appeals, Division II, of October 20, 2015, in *Quinault Indian Nation v. Imperium Terminal Services*. A copy of the Court of Appeals opinion is attached as Appendix A.

ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred when it ignored the text of the Ocean Resources Management Act, RCW 43.143, in holding that proposed oil-shipping terminals and their associated vessels fall outside ORMA's purview.

2. Whether the Court of Appeals erred when it interpreted ORMA's regulations, WAC 173-26-360, such that the proposed oil ships and terminals were neither "ocean uses" nor "ocean transportation."

STATEMENT OF THE CASE

In part 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 Ocean Resources Management Act to do two separate things: (1) ban oil extraction in Washington's coastal waters and (2) provide substantive review criteria for all other activities that could harm Washington's coast, its thriving marine life, and the people who depend on ocean resources. Three crude oil shipping terminals proposed in Grays Harbor would move over one billion gallons of oil through Washington's coastal waters every year, yet the Court of Appeals held that this unprecedented parade of oil tankers did not trigger evaluation under the Ocean Resources Management Act ("ORMA"), RCW 43.143. There is a substantial public interest in review of this decision that undercuts ORMA's protections that have been in place for many years. RAP 13.4(b)(4). Petitioners ask this Court to accept review and reverse to give full effect to ORMA's safeguards.

These proposed industrial projects exist only to receive oil by train, store it in large tanks, and ship it via ocean-going vessels. They serve no other purpose, and they could not function without the integral ocean shipping component that will result in numerous impacts to Washington's ocean coast, including navigation risks and the threat of an oil spill catastrophe. ORMA regulates proposals like these by ensuring that risky projects, defined by the statute as those that would "adversely impact" Washington's ocean coast, only move forward if they are justified, and, if

so, only in the least environmentally harmful manner. The Court of Appeals never applied that test, instead focusing solely on the regulatory definition of "ocean use." In its consideration of the regulation, however, the appellate court added restrictive language requiring that activities have a "primary" ocean use, excluding oil shipping because it also occurs on land. The Court of Appeals also ruled that these projects to ship billions of gallons of oil by vessel were not "ocean transportation," even though ocean shipping of oil is clearly called out in the regulation.

I. STATUTORY AND REGULATORY FRAMEWORK

When the Washington Legislature passed ORMA, it 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), (3). To address these unacceptable risks, the Legislature took a two track approach. First, it banned leases for oil exploration and oil production in Washington's ocean waters. RCW 43.143.010(2).[1] Second, for other risky activities, the Legislature established review criteria to evaluate and mitigate impacts. RCW 43.143.030; RCW 43.143.010(3). In this way,

[1] Washington's "coastal waters" are "the waters of the Pacific Ocean seaward from Cape Flattery south to Cape Disappointment." RCW 43.143.020. They exclude Puget Sound and the Straight of Juan de Fuca.

ORMA addressed (and banned) oil extraction, and it addressed and regulated other potentially harmful ocean activities. ORMA's substantive review criteria apply to projects that will "adversely impact" Washington's coastal waters; ORMA allows 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. RCW 43.143.030(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). While broad, ORMA also contains important limitations. It only applies to (1) Washington's four coastal counties, (2) projects already requiring permits, and (3) projects that were not in existence at the time of ORMA's passage. RCW 43.143.030(2); RCW 43.143.020; RCW 43.143.010(5).

ORMA's regulations define "ocean uses" as "activities or developments involving renewable and/or nonrenewable resources that occur on Washington's coastal waters and includes their associated [. . .] upland facilities." WAC 173-26-360(3). They also separately regulate "transportation," defined as "[s]hipping, transferring between vessels, and offshore storage of oil and gas; transport of other goods and commodities; and offshore ports and airports." WAC 173-26-360(12).

ORMA gives life to these protections by establishing "guidelines for the exercise of state and local management authority over Washington's coastal waters, seabed, and shorelines." RCW 43.143.010(1) WAC 173-26-360(4) (ORMA's requirements augment Shorelines Management Act). Every coastal government has updated its Shoreline Master Program by adding the substantive ORMA protections to its Shoreline Management Act permit criteria, *see, e.g.*, Hoquiam Municipal Code 11.04.030(19)-(20), fulfilling ORMA's purpose to "address evolving interest in ocean development and prepare state and local agencies for new ocean developments and activities." WAC 173-26-360(1).

II. THE CRUDE OIL SHIPMENT PROJECTS

The Westway and Imperium proposals would ship over one billion gallons of crude oil each year. Westway and Imperium propose to receive oil by trains, then briefly store it in large oil tanks on the shore of Grays Harbor. Both proposals would transfer the oil from tanks to oil tankers and barges, resulting in up to 520 tanker and barge transits through Grays Harbor and Washington's open ocean per year. AR at 124 (Westway MDNS at 2 (120 transits)); AR at 228 (Imperium MDNS at 2 (400 transits)). A third company, US Development Group, has also proposed an oil shipping terminal in Grays Harbor with 120 additional yearly vessel

trips. US Development SEPA Checklist, *available at* http://cityofhoquiam.com/pdf/GHRT-SEPA-Checklist.pdf.

III. PROCEDURAL HISTORY

In 2013, the City of Hoquiam and the Washington Department of Ecology ("Ecology") issued mitigated determinations of non-significance ("MDNS") for Westway's and Imperium's oil terminal proposals, exempting them from full environmental and public health review under SEPA. *See* AR at 123-33 (Westway MDNS); AR at 227-39 (Imperium MDNS). Hoquiam subsequently issued both companies Substantial Shoreline Development Permits. AR at 59-68 (Westway SSDP); AR at 216-26 (Imperium SSDP). Neither the companies nor the regulatory authorities evaluated the proposals under ORMA.

Petitioners appealed the Westway and Imperium MDNSs and shorelines permits to the Washington Shorelines Hearings Board. SHB No. 13-012c. On November 12, 2013, the Board granted, in part, Petitioners' summary judgment motions, ruling that Ecology and Hoquiam failed to fully review and analyze the harmful cumulative effects of the oil terminal proposals in Grays Harbor. AR at 2394-2411 (SHB Order at 16-33). 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" and rejected 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" under ORMA's regulations because the proposals would not extract crude from Washington waters or transport oil drilled from beneath the ocean despite the fact that such oil drilling off Washington's coast is separately prohibited by RCW 43.143.010(2). *Id.* at 2418-19 (SHB Order at 40-41).

On December 9, 2013, Petitioners appealed the Board's summary judgment ruling on the application of ORMA to these oil shipment projects. Of the respondents, Imperium alone appealed the Board's summary judgment decision that the US Development proposal was reasonably foreseeable for cumulative impacts analysis. On October 20, 2015, the Court of Appeals ruled, without considering the statutory language of ORMA, that the "ocean use" regulatory definition required a "primary" ocean-related activity, and that under this newly minted interpretation, shipping oil over Washington coastal waters did not qualify. The appellate court further found that the regulation pertaining to transportation did not apply to these projects, despite the fact that the

regulation explicitly discusses oil shipping. Because the Court of Appeals decision vitiates ORMA's protective framework, this petition followed.

ARGUMENT

This Court should accept review of the Court of Appeals decision because there is substantial public interest in maintaining protections for Washington's coastal waters, ensuring ORMA continues to apply to evolving threats, and giving force to the legislative intentions behind ORMA. RAP 13.4(b)(4). By ignoring the statutory language and narrowing the regulatory definitions, the Court of Appeals stripped ORMA of meaning. The Court of Appeals did not decide whether the movement of hundreds of oil tankers and billions of gallons of oil would adversely impact Washington's ocean coast, ORMA's crucial first step. Instead, the Court of Appeals skipped the language of the statute entirely. Looking solely at the regulations, the court created a new standard that only applied ORMA to activities with a "primary" ocean-based component. Courts may not interpret regulations to undermine the purpose of the statute. Without reversal, the decision threatens to render ORMA irrelevant and superfluous, as it would only apply to activities already banned.[2]

[2] This appeal is not moot since the application of ORMA is certain to arise in the next round of Westway and Imperium permitting, which is currently

I. ORMA'S PLAIN TEXT COVERS OIL SHIPMENT ALONG WASHINGTON'S OCEAN COAST.

A. ORMA Broadly Includes Activities that "Adversely Impact" Washington's Coastal Resources.

ORMA was part of a comprehensive legislative package to reduce oil spill and other risks, titled "An Act Relating 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 (Quinault Opening Br. App'x at 58). ORMA originally died in the Legislature, but it ultimately was revived, in part, because of "public outrage over the *Exxon Valdez* spill in Alaska." Quinault Opening Br. App'x at 78 (Jim Simon, *Offshore-Oil Bill Takes on New Life–Senate Committee Reverses Action*, The Seattle Times, Apr. 14, 1989, at B3). One focus of ORMA was on preventing oil extraction, but the threat of spills unrelated to extraction, like the *Exxon Valdez* and *Nestucca* oil spills, was in the public consciousness at the time.

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underway, and it is equally applicable to the nearly-identical US Development project also proposed in Grays Harbor. Even if this issue were moot (which it is not), Washington courts may decide a moot issue if it "involves matters of continuing and substantial public interest." *Thomas v. Lehman*, 138 Wn. App. 618, 622 (2007).

In addition to creating an extraction ban, ORMA broadly regulates

> [u]ses or activities that [. . .] will adversely impact renewable resources, marine life, fishing, aquaculture, recreation, navigation, air or water quality, or other existing ocean or coastal uses . . . .

RCW 43.143.030(2). The key to determining whether ORMA applies to a project is whether the project "will adversely impact" Washington's coastal resources. *Id.*

ORMA itself also has several explicit limitations.[3] First, ORMA only applies to the four counties on Washington's ocean coast; Grays Harbor appears to be the only major port covered by ORMA. RCW 43.143.030(1), (2); RCW 43.143.020.

Second, ORMA only applies to projects that already require permitting. RCW43.143.030(2). ORMA does not regulate every boat that hits Washington water; it adds a layer of substantive review for projects already being scrutinized under another process. Third, ORMA only applies to projects that would have an adverse impact on Washington's

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[3] While the Shorelines Hearings Board limited ORMA by finding it only applied to oil extraction, AR at 2417-20 (SHB Order at 39-42), the Court of Appeals declined to decide the "extraction only" argument. Opinion at 13. The "extraction only" reading is inconsistent with ORMA's plain text since the statute broadly regulates activities that "will adversely impact" resources like marine life and navigation. RCW 43.143.030(2). Moreover, in another section, the statute prohibited oil extraction in Washington waters, *id.*, and temporarily exempted non-oil-extraction activity like recreational and commercial fishing, *id.* at (5).

ocean coast. *Id.* That analysis is related to the "adversely affect" standard under the State Environmental Policy Act that Ecology and local jurisdictions are familiar with and apply routinely. *See* WAC 173-26-360(7)(e) (incorporating SEPA rules). And lastly, ORMA exempts some activities that existed on Washington's coast at the time ORMA was passed. RCW 43.143.010(5).

B. These Projects Fit Within ORMA's Plain Language.

When a court interprets a statute, its fundamental 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.* 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.

If, ultimately, a statute is subject to more than one reasonable interpretation, a court may look to the legislative history to ascertain legislative intent, *id.* at 12, which includes the circumstances leading up to and surrounding the statute's enactment, *Restaurant Dev., Inc. v. Cannanwill*, 150 Wn.2d 674, 682 (2003). Courts also examine the historical context at the time of the statute's passage. *Washington State Nurses Ass'n v. Board of Medical Exam'rs*, 93 Wn.2d 117, 121 (1980).

ORMA covers activities that would "adversely impact" Washington's ocean resources; that is the test the Legislature created. RCW 43.143.030(2). These projects would have uncontested adverse impacts on Washington's ocean coast due to routine oil leaks, increased vessel traffic, and other ongoing harms, in addition to the ever-present risk of a catastrophic oil spill. Indeed, the substantial increase in vessel traffic alone is an adverse impact to navigation and fishing, both activities ORMA explicitly protects. RCW 43.143.030(2). In a worst-case scenario, a large oil spill in Washington's ocean would devastate the 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.

II. OIL SHIPMENT IN GRAYS HARBOR FITS WITHIN THE REGULATIONS' PLAIN TEXT.

A. The Regulations' Scope Is as Broad as the Statute.

Far from narrowing ORMA, the regulations explain and give full effect to ORMA's broad sweep. ORMA's regulations cover "ocean uses," which are defined as:

> activities or developments involving renewable and/or nonrenewable resources that occur on Washington's coastal waters.

WAC 173-26-360(3). Ocean uses also include the "associated [. . .] shoreland, and upland facilities." WAC 173-26-360(3). The key to

determining whether an activity falls within the regulations is whether it involves renewable and/or nonrenewable resources and occurs on Washington's coastal waters.

B. The Projects Fall Within the Regulations' Broad Reach.

The regulations restate the application of ORMA's substantive checks on projects involving Washington's ocean resources. WAC 173-26-360(3). "Ocean uses" can involve either renewable or nonrenewable resources. WAC 173-26-360(3). Far more than pleasure craft activity or recreational fishing—activities the regulations list as examples of ocean uses, WAC 173-26-360(3)—these proposals, with hundreds of ships and billions of gallons of oil, involve and put the ocean coast at risk.

III. THE COURT OF APPEALS DID NOT APPLY THE PLAIN LANGUAGE OF ORMA OR THE REGULATIONS BUT INSTEAD CREATED A NEW, NARROWING TEST.

Rather than apply the broad text of ORMA or ORMA's regulations, the Court of Appeals created a novel "primary" ocean use test, asking whether these projects are primarily based on land or primarily water-based. Opinion at 16 ("The definition requires that there be a primary activity that occurs on Washington's coastal waters . . . ."). That reading creates a formalistic taxonomy that is unworkable in the context of an integrated project with many pieces without which the project cannot

proceed—ocean shipping is an integral component that will occur daily as a result of these proposals.

In creating that new "primary" ocean activity test, the Court of Appeals never asked whether these projects "adversely impact" Washington's ocean coast (under ORMA) or whether they involve Washington's ocean resources (under the regulations). Indeed, the Court of Appeals did not review ORMA's text to apply it to these projects.[4] Instead, the Court of Appeals skipped straight to the regulations, Opinion at 15, and adopted a view that narrows ORMA's review provisions to meaninglessness. Even if the regulations included that test, of course, they cannot trump the statute,[5] and the Court of Appeals should have examined these proposals under the statute first, particularly since the Court of Appeals appears to believe the regulations themselves may be invalid. Opinion at 16 n.8. The regulations cannot narrow the activities the Legislature meant to include in ORMA. *See Dep't of Labor & Indus. v. Gongyin*, 154 Wn.2d 38, 50 (2005) ("Rules must be written within the framework and policy of the applicable statutes.") (citations omitted).

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[4] Petitioners briefed ORMA's text and the adverse impacts of these projects in the Court of Appeals. *See* Quinault Opening Br. at 35-36.

[5] *Kim v. Pollution Control Hearing Bd.*, 115 Wash. App. 157, 163 (2003) (rejecting notion that agency can alter plain meaning of a statute).

While these projects' loading and storage activities occur on land, such an exclusive emphasis on the land-based activities ignores the hundreds of associated yearly vessel trips. No test requiring the reviewing court to close its eyes to the vessel trips or to find a separate "primary" ocean use can be found in ORMA or its regulations. By accepting Ecology's post hoc litigating position, the Court of Appeals' new "primary" ocean use test excuses projects that will harm Washington's ocean coast from ORMA review, a statute passed in the wake of two major oil spills and meant to mitigate harms just like these to Washington's coastal ocean.

Of course, oil tankers will not call on Grays Harbor but for the construction of these facilities. Oil shipments by ocean have been integral and expected all along, and they have been analyzed and considered with the rest of these projects' impacts. *See, e.g.*, AR at 130 (Westway MDNS at 8) (describing mitigation to prevent vessel spills). The Court of Appeals' acceptance of the characterization of these projects as "land-based projects that have some marine transportation," Opinion at 16 (citing Ecology Br. at 25), downplays the intrinsic nature of oil shipping to this system. This is akin to characterizing an airport as a land-based project having only "some" use of the surrounding airspace. In both cases, the terminals or airport would not exist but for the ships or airplanes.

Ecology and Imperium will likely argue, as they did in the Court of Appeals, that because ORMA has never been applied to oil shipping terminals, it should not be applied here. Imperium Resp. at 24-25; Ecology Resp. at 27-28. The Court of Appeals did not address that position, but as a federal appellate court noted when faced with a similar argument, "a line must be drawn between according administrative interpretations deference and the proposition that administrative agencies are entitled to violate the law if they do it often enough." *Wilderness Soc'y v. Morton*, 479 F.2d 842, 865 (1973). This Court should not defer to past inaction; ORMA and its regulations should be applied as written, even if this is the first occasion to do so in the statute's history.

IV. SHIPPING OIL BY OCEAN TANKER AND BARGE IS OCEAN TRANSPORTATION.

A. ORMA's Regulations Apply to Transportation Uses.

The Court of Appeals deferred to Ecology's litigating position that moving oil through Washington waters was not "ocean transportation." The regulations add checks for "ocean transportation" activities, defined as:

> [s]hipping, transferring between vessels, and offshore storage of oil and gas; transport of other goods and commodities; and offshore ports and airports.

WAC 173-26-360(12). Notably, these regulations explicitly reference shipping oil, *id.*, and require that where feasible "hazardous materials such

as oil [. . .] should not be transported through highly productive commercial, tribal, or recreational fishing areas," *id.* at (12)(b). Those provisions read like a description of these proposals, which would ship oil through highly productive tribal and commercial fishing areas. The Court of Appeals, however, found that these projects were not "ocean transportation" because they were not related to a primary "ocean use," an incorrect conclusion as discussed above. Likewise, nothing in the regulations requires an independent ocean use for the regulation of ocean transportation, which will necessarily "involve" Washington's coastal ocean waters and will always themselves be "ocean uses." The structure of the regulations reinforces the text. The regulations cover a number of ocean activities such as mining (WAC 173-26-360(9)), disposal (11), ocean research (13), and salvage (14) with no indication that there must be some other associated ocean use for these activities to be regulated; transportation (12) is no different.

B. Ocean Transportation Here Originates in Washington's Coastal Waters.

The court also believed that application of the regulation depended on the origin of the oil itself, rather than the starting place of the ocean shipments. Opinion at 17-21. The regulations cover "transportation activities that originate or conclude in Washington's coastal waters."

WAC 173-26-360(12). While the crude would be moved by rail before vessel, it is undisputed that the ocean transportation originates in Washington at the Port of Grays Harbor. *See* WAC 173-26-360(12) ("Ocean transportation includes such uses as . . . ."). The phrase "originates or concludes in Washington's coastal waters" exempts vessels passing through Washington's coast without a stop, a far different scenario from the intensive oil loading and shipping activities proposed here.[6]

Additionally, holding that "originate in Washington" means the commodity must come from Washington's waters narrows the regulations, once again, to extraction activities, which are independently banned. It also renders the second half of the description of regulated transportation superfluous. The regulations apply to "transportation activities that [1] originate or conclude in Washington's coastal waters or [2] are transporting a nonrenewable resource extracted from the outer continental shelf off Washington." WAC 173-26-360(12) (emphasis and numbering added). The second form of ocean transportation, transporting extracted resources, would be redundant if "originate" in Washington means only "extracted" in Washington. Such a reading violates the canon against

[6] Logically, if it is the shipped goods (rather than the ocean transportation) that must "originate" in Washington, shipped goods under the "conclude" regulatory language must conclude on Washington's coast without further transit, but such a reading is patently absurd—all ocean-shipped goods are transported somehow by land at the end of their journey.

reading superfluity into statutes and regulations. *See Cockle v. Dep't of Labor and Indus.*, 142 Wn.2d 801, 811 (2001).

On these points, the Court of Appeals gave "'great weight' to [Ecology's] interpretation." Opinion at 19. Yet, Ecology has never offered a rule, past application, or even interpretive guidance on the "ocean transportation" section. Until this litigation, Ecology has been silent, offering less even than the interpretive article this Court declined to defer to in *W. Telepage, Inc. v. City of Tacoma Dep't of Fin.*, 140 Wn.2d 599, 611-12 (2000). Ecology's current argument is simply a post hoc litigation position and rationalization, which courts do not accord "great weight." *See, e.g., Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 156-57 (1991) ("[A]gency 'litigating positions' are not entitled to deference when they are merely appellate counsel's 'post hoc rationalizations' for agency action, advanced for the first time in the reviewing court.").

Finally, while the Court of Appeals expressed concern about creating "unintended results" and a "large, new administrative burden," Opinion at 20-21, it cited, once again, only legislative statements focused on oil extraction. ORMA is about more. The court was bound to give life to all of ORMA's provisions, especially the overarching policy concerns about protecting Washington's ocean coast against all threats. RCW

43.143.005(1) (finding "Washington's coastal waters, seabed, and shorelines are among the most valuable and fragile of its natural resources."). Both the statutory text and the Legislature's policy concerns point to protecting Washington's coast through effective application of ORMA.

CONCLUSION

For the reasons stated above, the Petitioners ask the Court to accept review and reverse the Court of Appeals' opinion as to the applicability of ORMA and its regulations to the Westway and Imperium proposals.

Respectfully submitted this 18th day of November, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2015, I electronically filed Petitioners' **Petition for Review** with the Court of Appeals, Division II Clerk of the Court using the JIS-Link electronic filing system. Service on the parties listed below will be affected via email:

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A copy of the Petition for Review will be submitted to the Washington State Supreme Court via the Court of Appeals, Division II Clerk's office.

I, Eudora Powell, declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Executed this 18th day of November, 2015, at Seattle, Washington.

Eudora Powell

EUDORA POWELL

APPENDIX A

Published Opinion
October 20, 2015
Court of Appeals, Div. II
Case No. 45887-0-II

Filed
Washington State
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Division Two

October 20, 2015

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

QUINAULT INDIAN NATION, FRIENDS OF GRAYS HARBOR, SIERRA CLUB, GRAYS HARBOR AUDUBON, and CITIZENS FOR A CLEAN HARBOR, Petitioners/Cross-Respondents, v. IMPERIUM TERMINAL SERVICES, LLC, Respondent/Cross-Petitioner, CITY OF HOQUIAM, WASHINGTON STATE DEPARTMENT OF ECOLOGY, WESTWAY TERMINAL COMPANY, LLC, and WASHINGTON SHORELINES HEARINGS BOARD, Respondents.	No. 45887-0-II Consolidated with Nos. 45947-7-II and 45957-4-II PUBLISHED OPINION

JOHANSON, C.J. — The Quinault Indian Nation, Friends of Grays Harbor, Grays Harbor Audubon Society, Sierra Club, and Citizens for a Clean Harbor (collectively Quinault) appealed the Shoreline Hearings Board's (Board) grant of summary judgment on certain issues to Westway Terminal Company LLC, Imperium Terminal Services LLC, the Department of Ecology (DOE), and the City of Hoquiam (City). Quinault argues that (1) RCW 88.40.025 requires that Westway

and Imperium demonstrate financial responsibility at the State Environmental Policy Act (SEPA)[1] threshold determination phase and before permitting, and (2) the Ocean Resources Management Act (ORMA)[2] applies to Westway's and Imperium's terminal development projects. We reject Quinault's arguments and hold that (1) RCW 88.40.025 does not require permit applicants to demonstrate financial responsibility prior to permitting, and (2) ORMA does not apply to the Westway or the Imperium terminal development projects.

Imperium cross petitions and argues that the Board erred when it invalidated the DOE's and the City's SEPA threshold determinations because they did not consider the cumulative impact of U.S. Development Group LLC's (USD) similar terminal development project. We conclude this issue is moot because the DOE's and the City's mitigated determinations of nonsignificance (MDNS) were withdrawn, the parties have agreed to a determination of significance (DS), an environmental impact statement (EIS) will be prepared, and the continuing and substantial public interest exception to the mootness doctrine does not apply. We affirm the Board's grant of summary judgment.

[1] Ch. 43.21C RCW.

[2] Ch. 43.143 RCW.

FACTS

I. SUBSTANTIVE FACTS

A. THE WESTWAY AND IMPERIUM TERMINAL PROJECTS

Westway owns a terminal for storing methanol in the Port of Grays Harbor (Port) in Hoquiam. The Westway facility currently includes four 3.34 million gallon storage tanks, two rail spurs with 18 loading and unloading points, pipelines, and office and warehouse buildings.

On November 30, 2012, Westway applied for a substantial shoreline development permit (SSDP) based on plans to expand its operations. The purpose of the expansion was "to allow for the receipt of crude oil unit trains, storage of crude oil from these trains and shipment of crude oil by vessel and/or barge from the Port." Administrative Record (AR) at 73. The project involved adding four new storage tanks each with a capacity to hold 200,000 barrels of crude oil. Westway would have expanded the adjoining rail facility by lengthening the existing rail spurs and adding two additional spurs. Westway estimated that the expanded rail facility will receive 9.6 million barrels of crude oil per year—approximately equivalent to one 120-railcar train every three days.

Imperium operates a similar facility adjacent to the Westway terminal that is currently permitted for storage of biodiesel, methanol, and other products. In February 2013, Imperium applied for an SSDP for an expansion similar to Westway's expansion.[3] Imperium proposed nine new storage tanks with a total capacity of 720,000 barrels. Imperium also proposed to construct a "berm" large enough to contain the contents of the largest tank plus rainwater, to add 6,100 feet of

[3] We refer to the Imperium and Westway SSDPs collectively as "the permits."

railroad track and new rail spurs, and to expand the rail yard. Imperium would also have constructed pipelines to connect the Port terminal to the new storage tanks.

B. SEPA REVIEW

Under the Shoreline Management Act of 1971 (SMA),[4] Westway's and Imperium's proposals must comply with SEPA and both Westway and Imperium submitted SEPA environmental checklists with their permit applications. Working together as "Co-leads," DOE and the City were charged with making a SEPA threshold determination of either nonsignificance (DNS), DS, or MDNS on both the Westway and the Imperium proposals.

In April and May, 2013, the Co-leads issued an MDNS for both the Westway and Imperium proposals.[5] As one of the mitigation measures, the MDNS required Westway and Imperium to submit oil spill prevention plans "required by . . . WAC 173-180." AR at 779, 234.

Before making their determinations, the Co-leads considered Westway's and Imperium's SEPA checklists, held telephone and in-person meetings with Westway and Imperium personnel, and reviewed additional information. The Co-leads, however, did not consider the cumulative impact of USD's similar terminal development proposal because USD "had not submitted an environmental checklist or permit application" and their proposal was still in its "conceptual stage." AR at 1522. USD's plans involved construction of new storage tanks with a 1.1 million-barrel storage capacity and receiving about five vessels per month.

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[4] Ch. 90.58 RCW.

[5] The Co-leads issued the original Westway MDNS on March 14, 2013, but due to multiple requests to extend the comment period, issued the final MDNS on April 4.

II. PROCEDURAL FACTS

After the Co-leads issued the MDNS for both projects, the City issued permits to Westway and Imperium. Quinault appealed the permits and the MDNS to the Board.[6] Quinault argued, in relevant part, that (1) the MDNS were invalid because the Co-leads "failed to adequately consider the direct, indirect, and cumulative impacts of three proposed crude-by-rail terminals in Grays Harbor," (2) the MDNS and permits were invalid because they failed to require demonstrations of financial responsibility under RCW 88.40.025, and (3) the MDNS and permits were invalid because "responsible official[s]" failed to consider ORMA. AR at 211.

Quinault, Friends of Grays Harbor, the Co-leads, the City, Westway, and Imperium each moved for summary judgment. The Board invalidated the MDNS and remanded the permits to the City and to the Co-leads for further SEPA analysis. The Board agreed with the Co-leads, Westway, and Imperium that (1) ORMA does not apply to the Westway and Imperium projects and (2) Westway and Imperium need not demonstrate financial responsibility until they file their oil spill prevention plans. But the Board agreed with Quinault on the cumulative impact issue and concluded that the MDNS were clearly erroneous because the Co-leads failed to consider the cumulative impact of USD's proposal.

Following the Board's decision, the Co-leads withdrew the MDNS and the permits, Westway and Imperium agreed to a DS, and the Co-leads began to prepare an EIS. Quinault and

[6] Quinault, Friends of Grays Harbor, and several other environmental groups—separately appealed the MDNS and permits to the Board. The Board consolidated their appeals and they submitted one brief to this court.

Imperium appeal the Board's order, petitioning for discretionary review by this court pursuant to RCW 34.05.518. We consolidated the appeals and granted review.

ANALYSIS

I. MOOTNESS

As a threshold matter, we determine (1) whether the Co-leads' failure to consider the cumulative impact of USD's proposal is moot, and (2) whether the Co-leads' failure to require a demonstration of financial responsibility at the permitting stage is moot. While we conclude both issues are moot, we address the financial responsibility issue under the continuing and substantial public interest exception.

A. STANDARD OF REVIEW AND RULES OF LAW

An issue is moot when we cannot provide the relief that the appealing party seeks. *Dioxin/Organochlorine Ctr. v. Pollution Control Hearings Bd.*, 131 Wn.2d 345, 350, 932 P.2d 158 (1997). There is an exception to the mootness doctrine when the issues "involve[ ] matters of continuing and substantial public interest." *Thomas v. Lehman*, 138 Wn. App. 618, 622, 158 P.3d 86 (2007). We apply a three-part test to determine whether an issue involves continuing and substantial public interest: "(1) the public or private nature of the question presented, (2) the desirability of an authoritative determination to provide future guidance to public officers, and (3) the likelihood that the question will recur." *Thomas*, 138 Wn. App. at 622.

B. THE CUMULATIVE IMPACTS ANALYSIS IS MOOT

Imperium argues that the Board erred when it invalidated the MDNS because the Co-leads failed to consider the cumulative environmental impact of the USD terminal proposal alongside the Westway and Imperium projects. The relief Imperium requests is that we reinstate the MDNS.

But the Co-leads have withdrawn the MDNS and made a new threshold DS with Westway's and Imperium's agreement. Because the Co-leads have voluntarily withdrawn the challenged MDNS and made a new DS with the permit applicants' agreement and the DS has not been appealed, we cannot grant the relief Imperium requests and the issue is moot.

Nonetheless, we must determine whether the continuing and substantial public interest exception to the mootness doctrine applies. First, this issue is of a public nature as it involves public natural resources and there is great public interest in the potential impact of these projects on those resources. Second, because consideration of cumulative impacts and specifically USD's proposal is fact specific, our holding here will not be helpful under a different set of facts. Thus, an authoritative determination based on the facts presented here would not provide future guidance because of necessarily different future factual scenarios. Finally, although the issue of cumulative impacts is likely to recur, an analysis of cumulative impacts is fact specific, as just discussed, such that a decision here is unlikely to be helpful even if it recurs. Thus, we conclude that the continuing and substantial public interest exception to the mootness doctrine does not apply. We hold that this issue is moot.

C. THE FINANCIAL RESPONSIBILITY ISSUE IS OF CONTINUING AND SUBSTANTIAL PUBLIC INTEREST

Likewise, because the Co-leads withdrew the MDNS, Quinault's argument that a demonstration of financial responsibility is required before permitting and during the threshold determination phase is moot. We hold that although we cannot provide the relief that Quinault seeks, the continuing and substantial public interest exception to the mootness doctrine applies.

Quinault seeks to invalidate the MDNS and the permits. But as discussed above, the MDNS and the permits were voluntarily withdrawn and we cannot provide the relief that Quinault seeks.

But again, we must next consider whether the continuing and substantial public interest exception applies. The question of when an applicant must demonstrate financial responsibility under RCW 88.40.025 is of public interest because this case concerns the use of public natural resources, is relevant to a substantial portion of the Port's economic development plan, and the environmental and economic impacts of the projects have already been the subject of several public meetings. As this issue will be relevant to future threshold determinations, it is also desirable to have a decision resolving if, when, and in what circumstances a permit applicant must demonstrate financial responsibility. This will provide meaningful guidance to public officials in the future. Finally, it is likely that this question will recur both in the future and between these parties because even after the EIS is completed, a question will exist regarding whether Westway and Imperium must demonstrate financial responsibility prior to permit approval.

Accordingly, we conclude that the continuing and substantial public interest exception applies. Thus, we reach the merits of the question of when an applicant must demonstrate financial responsibility under RCW 88.40.025.

II. DEMONSTRATING FINANCIAL RESPONSIBILITY

Quinault argues that the MDNS are clearly erroneous and the permits are invalid because they do not require Westway and Imperium to demonstrate financial responsibility for a possible oil spill during the SEPA threshold determination phase and before the City may issue permits. We affirm the Board and hold that RCW 88.40.025 requires Westway and Imperium to

demonstrate financial responsibility in their oil spill prevention plans prior to beginning operation but not during the threshold determination phase or before permits may be issued.

A. FINANCIAL RESPONSIBILITY UNDER CH. 88.40 RCW AND CH. 90.56 RCW

Chapter 88.40 RCW imposes certain requirements on "facilities" that "transfer[ ] 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." RCW 88.40.011(7)(a). Facilities that meet this definition must

> demonstrate financial responsibility in an amount determined by [DOE] 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.

RCW 88.40.025. Evidence of financial responsibility "may be established by any one of, or a combination of . . . (1) [e]vidence of insurance; (2) surety bonds; (3) qualification as a self-insurer; or (4) other evidence of financial responsibility." RCW 88.40.030.

These facilities must also submit an oil spill prevention plan to DOE. Former RCW 90.56.200(1) (2000). The oil spill prevention plan requires the facilities to demonstrate compliance with other "financial responsibility requirements under federal and state law," such as the financial responsibility requirements in RCW 88.40.025. RCW 90.56.200(2)(a). If DOE does not approve a facility's oil spill prevention plan, that facility "must not continue oil storage, transfer, production, or other operations until a plan for that facility has been approved." WAC 173-180-650(6)(c).

B. FINANCIAL ASSURANCES ARE NOT REQUIRED PRIOR TO PERMITTING

Here, both the Westway and Imperium proposals included the construction of "facilities" for transferring oil to vessels. The Westway project's objective was the construction of four new storage tanks that would each hold 200,000 barrels of crude oil. That crude oil would then be transferred from the storage tanks to vessels that would carry it to refineries. The Imperium project included the construction of storage tanks to hold up to 720,000 barrels of bulk liquids, including fuel oil and crude oil. The Imperium proposal also included the construction of a pipeline that would be used to store and to transfer oil and other bulk liquids from the new storage tanks to the Port terminal so that they could be loaded onto vessels. Therefore, both Westway and Imperium must demonstrate financial responsibility in a "worst case spill." RCW 88.40.025.

The facilities must also submit oil spill prevention plans under former RCW 90.56.200(1) and as mitigation measures pursuant to the Co-leads' MDNS. The oil spill prevention plans require Westway and Imperium to demonstrate compliance with "financial responsibility requirements under federal and state law." RCW 90.56.200(2)(a). However, neither proposal's MDNS provides a specific date by which Westway and Imperium must demonstrate financial responsibility. Instead, the MDNS both state that Westway and Imperium must submit their oil spill prevention plans "required by . . . WAC 173-180." AR at 779, 234. WAC 173-180-650(6)(c) provides that Westway and Imperium will not be permitted to operate if DOE has not approved their oil spill prevention plans. Therefore, the latest that Westway and Imperium may demonstrate financial responsibility under RCW 88.40.025 is when they submit their oil spill prevention plans and prior to operating. There is no requirement that Westway and Imperium demonstrate financial responsibility under RCW 88.40.025 during the threshold determination phase.

Nevertheless, Quinault claims that because the mitigation measures that the Co-leads required pursuant to the MDNS must be "'capable of being accomplished,'" they must actually be accomplished in the threshold determination phase. Br. of Pet'rs at 39-40 (quoting RCW 43.21C.060; WAC 197-11-660(1)(c)). Therefore, according to Quinault, because the mitigation measures here include oil spill prevention plans and oil spill prevention plans require a demonstration of financial responsibility, SEPA requires Westway and Imperium to actually make the demonstrations of financial responsibility during the threshold determination phase. However, Quinault's argument fails because (1) SEPA's plain text does not require that mitigating measures actually be accomplished during the threshold determination phase, and (2) SEPA's policy permits compliance with mitigation measures after permits are issued but before beginning operations.

First, SEPA requires that the mitigation measures only be "reasonable and capable of being accomplished." RCW 43.21C.060. Nowhere in SEPA's text nor its implementing regulations does it require that mitigation measures actually be accomplished before permits may be issued. The statutes and regulations that govern oil spill prevention plans likewise do not provide a date certain by which the plans must be completed and submitted. The plain text of the regulations does, however, require a completed, approved oil spill prevention plan before a facility may begin "oil storage, transfer, production, or other operations." WAC 173-180-650(6)(c). In the absence of statutory language to the contrary, we do not read into the law a requirement that mitigation measures must actually be completed during the threshold determination phase and prior to permitting.

Second, the policy behind SEPA environmental review seeks to balance competing interests. As we have held,

> The timing of environmental review has long vexed the application of SEPA to the iterative progression of land use approvals. On one hand, review too near the inception of the process can become a discarded hypothetical exercise as features of the proposal change and become more specific. On the other hand, our Supreme Court observed that "the risk of postponing environmental review is a dangerous incrementalism where the obligation to decide is postponed successively while project momentum builds."

Lands Council v. Wash. State Parks Recreation Comm'n, 176 Wn. App. 787, 803, 309 P.3d 734 (2013) (internal quotation marks omitted) (quoting *King County v. Boundary Review Bd.*, 122 Wn.2d 648, 664, 860 P.2d 1024 (1993)). SEPA rules require that "[t]he lead agency shall prepare its threshold determination and [EIS], if required, at the earliest possible point in the planning and decision-making process, when the principal features of a proposal and its environmental impacts can be reasonably identified." WAC 197-11-055(2).

Taking these rules together, it is consistent with SEPA's policy that Westway and Imperium demonstrate financial responsibility for a possible oil spill before they begin operations but not at the threshold determination or permitting phases. This sequence of events permits an efficient but complete threshold determination and permitting process while allowing the Co-leads to continue to ensure compliance with the mitigation measures.

The statute and its implementing regulations are silent as to when a showing of financial responsibility must be made. Thus, we hold that it was not error for the Board to allow only a later demonstration of responsibility here. We do not hold that it would necessarily be error for the Co-leads to require an earlier showing of financial responsibility in a different case. Accordingly, we affirm the Board and hold that Westway and Imperium are not required to demonstrate financial responsibility either at the threshold determination phase or prior to permitting. Therefore, the MDNS were not clearly erroneous nor were the permits invalid on this basis.

III. THE OCEAN RESOURCES MANAGEMENT ACT

Quinault next argues that the MDNS and permits are invalid because the Co-leads did not review the potential impacts of the Westway and Imperium projects using ORMA criteria. Specifically, Quinault argues that transporting oil by ship is either an "ocean use" or a "transportation" use under the text of ORMA's implementing regulations and the purpose of the statute. We disagree.

The Co-leads and Imperium contend that the Westway and Imperium projects are not "ocean uses" under ORMA, its implementing regulations, or the City's municipal code because the projects at issue here are "land based" and ORMA applies to "marine or ocean-based projects." The Co-leads and Imperium also argue that the Westway and Imperium projects are not "transportation" uses because the transportation in these projects originates on land and not on the ocean.

Westway argues that the text and legislative history of ORMA demonstrate that it does not apply to onshore projects that do not involve oil extraction or exploration in Washington's coastal waters. Specifically, Westway argues that the legislature enacted ORMA to "impose restrictions on resource extraction" in Washington's oceans and both its implementing regulations and local shoreline management plans reflect that history. Br. of Resp't Westway at 5. We agree with the Co-leads and Imperium and hold that the Westway and Imperium projects are neither "ocean uses" nor "transportation" uses under ORMA. Accordingly, we affirm the Board. Because we conclude that ORMA does not apply to the Westway and Imperium projects, we do not address whether ORMA is limited to projects that involve oil extraction as Westway suggests.

A. STANDARD OF REVIEW AND RULES OF LAW

Whether ORMA applies presents a question of statutory interpretation. Statutory interpretation is a question of law that we review de novo. *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 555, 14 P.3d 133 (2000). However, we give DOE's interpretation of the law considerable weight because ORMA is within its area of expertise and DOE is charged with administering ORMA. *Cornelius v. Dep't of Ecology*, 182 Wn.2d 574, 585, 344 P.3d 199 (2015).

Our primary purpose in statutory interpretation is to ascertain and carry out legislative intent. *Manary v. Anderson*, 176 Wn.2d 342, 350-51, 292 P.3d 96 (2013) (citing *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002)). We begin statutory interpretation by analyzing the statute's plain meaning. *Manary*, 176 Wn.2d at 352. Where the statute's meaning is "plain on its face," we give effect to that plain meaning and presume it is the legislature's intent. *Campbell & Gwinn, LLC*, 146 Wn.2d at 9-10. *Barton v. Dep't of Transp.*, 178 Wn.2d 193, 222, 308 P.3d 597 (2013). Plain meaning can be determined "from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Campbell & Gwinn, LLC*, 146 Wn.2d at 11. Where a statute is ambiguous, we consider legislative history and principles of statutory construction to discern legislative intent. *Stephenson v. Pleger*, 150 Wn. App. 658, 662, 208 P.3d 583 (2009) (citing *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 242-43, 88 P.3d 375 (2004)). Statutory language is ambiguous when it is "susceptible to more than one reasonable interpretation." *Stephenson*, 150 Wn. App. at 662.

The legislature enacted ORMA in 1989 in order to protect the natural resources in Washington's coastal waters. RCW 43.143.005. ORMA requires additional environmental review

criteria for "[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." RCW 43.143.030(2).

An "ocean use" is defined 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) (emphasis added); Hoquiam Municipal Code (HMC) 11.04.030(20).

B. THE WESTWAY AND IMPERIUM PROPOSALS ARE NOT OCEAN USES

The plain language of ORMA's implementing regulations confirms that the Westway and Imperium proposals are not "ocean uses" under WAC 173-26-360(3) or the City municipal code.[7] "Ocean uses are activities or developments involving renewable and/or nonrenewable resources that occur on Washington's coastal waters." WAC 173-26-360(3). Westway's and Imperium's proposals both include the construction of new storage tanks and pipelines for crude oil and other bulk liquids and the expansion of the adjoining railroad facilities to receive the crude oil. This construction will all occur on land and will not occur "on Washington's coastal waters." WAC 173-26-360(3). Westway and Imperium both propose to load the crude oil and other bulk liquids

[7] Hoquiam Municipal Code defines "ocean uses" and "ocean transportation uses" identically to ORMA's implementing regulations. HMC 11.04.030(19)-(20); WAC 173-26-360(3), (12).

from the storage tanks onto vessels or barges that will be traveling in Washington's coastal waters. However, Westway and Imperium will not own or operate any of those vessels. The purpose of the Westway and Imperium projects is to receive crude oil from trains, put them into storage tanks, and to load the crude oil onto vessels. This is not an ocean use because it does not occur on Washington's coastal waters.[8]

The Westway and Imperium proposals are also not "associated off shore, near shore, [or] inland marine . . . facilities." WAC 173-26-360(3). This definition requires that there be a primary activity that occurs on Washington's coastal waters to which these projects could be "associated." As discussed above, there is no primary activity that occurs on Washington's coastal waters. As the Co-leads argue, "These projects are not marine or ocean-based projects with a land component. Instead, they are land-based projects that have associated with them some marine transportation" component. Br. of Resp'ts DOE and City at 25. Because there is no primary activity occurring on Washington's coastal waters, the Westway and Imperium projects are not an "ocean use" subject to ORMA.

C. THE WESTWAY AND IMPERIUM PROPOSALS ARE NOT TRANSPORTATION USES

Quinault argues that the Westway and Imperium projects are "transportation" uses because the "marine" transportation of the crude oil will begin in Washington's coastal waters at the new terminal sites. Imperium argues that Quinault's interpretation of the regulation defining

[8] All parties rely on WAC 173-26-360(3) for the definition of "ocean use." We note that this regulation limits "ocean use" to activities that occur *on ocean waters* and their associated facilities. But RCW 43.143.030(2) does not contain such limiting language; instead it refers broadly to activities that have *an adverse impact* on renewable resources, marine life, and other ocean uses. Because the parties have not challenged this regulation, we do not further address this discrepancy.

"transportation" uses is incorrect and would lead to absurd results. The Co-leads argue that a "transportation" use is not any use that involves transportation in Washington waters generally, but those uses that are only "incidental to an offshore ocean use."[9] Br. of Resp'ts DOE and City at 27. We hold that the Westway and Imperium projects are not transportation uses because the regulation limits "transportation" uses to uses that are incidental to an "ocean use" and, as discussed above, there is no "ocean use." Further, the transportation of the crude oil and bulk liquids will originate on land at the extraction point and not in Washington's coastal waters.

"Transportation" uses include "[s]hipping, transferring between vessels, and offshore storage of oil and gas; transport of other goods and commodities; and offshore ports and airports" and are defined as "activities that originate or conclude in Washington's coastal waters or are transporting a nonrenewable resource extracted from the outer continental shelf off Washington." WAC 173-26-360(12). Certain environmental impact review criteria must also be applied 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." WAC 173-26-360(12). The only issue here is whether the Westway and Imperium projects involve "transportation activities that 'originate . . . in Washington's coastal waters.'" Br. of Resp't Imperium at 23.

1. THE CO-LEADS' ARGUMENT

The Co-leads argue that the regulation defining a "transportation" use applies only to uses that are "incidental" to a separate ocean use. We agree and hold that the Westway and Imperium

[9] The parties agree that the proper interpretation of the definition of "ocean uses" and "transportation" uses under WAC 173.26.360(3) and (12) controls the outcome in this case.

terminal projects are not "transportation" uses under WAC 173-26-360(12) because ORMA review criteria apply to only transportation uses where there is an associated "ocean use."

DOE promulgated WAC 173-26-360 to implement ORMA, which required DOE to "develop guidelines and policies for the management of ocean uses." WAC 173-26-360(1). In furtherance of this purpose, the regulation defines "ocean uses," explains the review criteria that permitting agencies must apply to ocean uses, and further defines other activities to which ORMA review criteria may apply. WAC 173-26-360(3), (6), (8)-(12) (oil and gas uses, ocean mining, ocean disposal, and transportation). We give "great weight" to an agency's interpretation of its own regulations. *Puget Soundkeeper All. v. Pollution Control Hearings Bd.*, 2015 WL 4540664, at *3 (Wash. Ct. App. July 28, 2015); *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004). In this case, DOE's position is that a "transportation" use is only subject to ORMA review criteria when it is "incidental to an offshore ocean use." Br. of Resp'ts DOE and City at 27.

Here, based on the stated purpose of WAC 173-26-360(1)—the development of "guidelines and policies for the management of *ocean uses*"—transportation uses are not separate activities to which permitting agencies must apply ORMA review criteria. (Emphasis added.) Instead, as DOE and the City argue, where an "ocean use" exists, ORMA review criteria must also be applied to its "incidental" transportation uses and activities. Applying ORMA review criteria to a prospective "transportation" use will only further WAC 173-26-360's purpose when an incidental ocean use exists. In this case the Co-leads need not apply ORMA review criteria to the Westway and Imperium projects because, as we concluded above, no "ocean use" exists.

Despite this regulation's stated purpose, Quinault points to the ocean shipment of crude oil and other bulk liquids from the Westway and Imperium terminals to refineries as the transportation use at issue here, arguing that "[b]y 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." Br. of Pet'rs at 31-32. This argument is unpersuasive for two reasons. First, it ignores WAC 173-26-360's purpose—developing guidelines and policies for the management of *ocean uses*. Instead of addressing the regulation's purpose, Quinault asks this court to apply the definition of a "transportation" use to the Westway and Imperium projects. Quinault's argument assumes that "transportation" uses are freestanding uses to which ORMA review criteria must be applied even in the absence of an "ocean use." However, the regulation's definition of "transportation" uses does not implicate the Westway and Imperium projects because, in our view, ORMA applies when only an ocean use exists.

Second, Quinault's interpretation of ORMA and WAC 173-26-360 gives no deference to DOE's interpretations of those relevant laws. We, however, give "great weight" to DOE's interpretation—that transportation uses are subject to only ORMA review criteria when incidental to an existing ocean use—because both the regulations and ORMA are within DOE's area of expertise. *Cornelius*, 182 Wn.2d at 585; *Port of Seattle*, 151 Wn.2d at 593. Accordingly, we conclude that DOE's interpretation is reasonable and hold that the Westway and Imperium terminal projects are not "transportation" uses under WAC 173-26-360(12) because ORMA review criteria applies to transportation uses that are incidental to only an ocean use.

2. IMPERIUM'S ARGUMENT

Imperium contends that its and Westway's projects do not involve transportation that originates in Washington's coastal waters because the transportation of crude oil will begin at its extraction point, out of state. We agree that based on a plain reading of WAC 173-26-360(12), the Westway and Imperium projects are not transportation uses because the transportation of the crude oil and other bulk liquids will begin out of state and not in Washington's coastal waters.

"Transportation" uses, are, in relevant part, "activities that originate or conclude in Washington's coastal waters." WAC 173-26-360(12). The Westway and Imperium projects are not "transportation" uses because the transportation of crude oil and bulk liquids will originate out of state where the liquids will be loaded onto trains and transported by rail. At the proposed terminals, the bulk liquids will be received, stored in tanks, and transferred to ships.

Quinault's argument that ORMA applies because the "marine transportation" of the crude oil and bulk liquids *does* originate in Washington's coastal waters is misguided because WAC 173-26-360's text makes no distinction between transportation generally and "marine" transportation. The transportation of the crude oil and bulk liquids at issue here will not originate at the Westway and Imperium terminals but out of state at their extraction point.

Additionally, Quinault's interpretation of the term "transportation" uses would yield unintended results, namely that most transportation from ports on Washington's coast could be subject to ORMA review criteria. Although there are limits to when ORMA should apply—where only permits are required and the proposal would "adversely impact renewable resources, marine life"—such an interpretation of "transportation" uses would create a large, new administrative burden where ORMA's statements of legislative policy and intent are focused, though not

exclusively, on resource exploration. RCW 43.143.030(2). *See, e.g.*, RCW 43.143.010(2) ("There shall be no leasing of Washington's tidal or submerged lands."); RCW 43.143.010(4) ("It is the policy of the state of Washington to actively encourage the conservation of liquid fossil fuels, and to explore available methods of encouraging such conservation."). Therefore, we hold that the Westway and Imperium projects are not "transportation" uses because the transportation of the crude oil and bulk liquids will not originate in Washington's coastal waters.

IV. CONCLUSION

In conclusion, we hold that RCW 88.40.025 does not require permit applicants to demonstrate financial responsibility before permitting, and ORMA does not apply to the Westway or the Imperium terminal development projects because neither project involves an ocean or transportation use as they are defined under ORMA. Further, we decline to address Imperium's cross appeal because the issue is moot, and we reject Quinault's argument that ORMA applies to the Westway and Imperium terminal expansion proposals.

We affirm.

Johanson, C.J.
JOHANSON, C.J.

We concur:

Maxa, J.
MAXA, J.

Sutton, J.
SUTTON, J.

APPENDIX B

Cited Statutory and Regulatory Provisions

TABLE OF CONTENTS

Statutes:

Regulations:

RCW 43.143.005
Legislative findings.

(1) Washington's coastal waters, seabed, and shorelines are among the most valuable and fragile of its natural resources.

(2) Ocean and marine-based industries and activities, such as fishing, aquaculture, tourism, and marine transportation have played a major role in the history of the state and will continue to be important in the future.

(3) Washington's coastal waters, seabed, and shorelines are faced with conflicting use demands. Some uses may pose unacceptable environmental or social risks at certain times.

(4) The state of Washington has primary jurisdiction over the management of coastal and ocean natural resources within three miles of its coastline. From three miles seaward to the boundary of the two hundred mile exclusive economic zone, the United States federal government has primary jurisdiction. Since protection, conservation, and development of the natural resources in the exclusive economic zone directly affect Washington's economy and environment, the state has an inherent interest in how these resources are managed.

[1997 c 152 § 1; 1989 1st ex.s. c 2 § 8.]

RCW 43.143.010
Legislative policy and intent — Moratorium on leases for oil and gas exploration, development, or production — Appeals from regulation of recreational uses — Participation in federal ocean and marine resource decisions.

(1) The purpose of this chapter is to articulate policies and establish guidelines for the exercise of state and local management authority over Washington's coastal waters, seabed, and shorelines.

(2) There shall be no leasing of Washington's tidal or submerged lands extending from mean high tide seaward three miles along the Washington coast from Cape Flattery south to Cape Disappointment, nor in Grays Harbor, Willapa Bay, and the Columbia river downstream from the Longview bridge, for purposes of oil or gas exploration, development, or production.

(3) When conflicts arise among uses and activities, priority shall be given to resource uses and activities that will not adversely impact renewable resources over uses which are likely to have an adverse impact on renewable resources.

(4) It is the policy of the state of Washington to actively encourage the conservation of liquid fossil fuels, and to explore available methods of encouraging such conservation.

(5) It 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. 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, and appeals of that decision shall be handled through the established appeals procedure for that permit or approval.

(6) The state shall participate in federal ocean and marine resource decisions to the fullest extent possible to ensure that the decisions are consistent with the state's policy concerning the use of those resources.

[1997 c 152 § 2; 1995 c 339 § 1; 1989 1st ex.s. c 2 § 9.]

RCW 43.143.020
Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter:

(1) "Coastal counties" means Clallam, Jefferson, Grays Harbor, and Pacific counties.

(2) "Coastal waters" means the waters of the Pacific Ocean seaward from Cape Flattery south to Cape Disappointment, from mean high tide seaward two hundred miles.

[1989 1st ex.s. c 2 § 10.]

RCW 43.143.030
Planning and project review criteria.

(1) When the state of Washington and local governments develop plans for the management, conservation, use, or development of natural resources in Washington's coastal waters, the policies in RCW 43.143.010 shall guide the decision-making process.

(2) Uses 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:

(a) There is a demonstrated significant local, state, or national need for the proposed use or activity;

(b) There is no reasonable alternative to meet the public need for the proposed use or activity;

(c) There will be no likely long-term significant adverse impacts to coastal or marine resources or uses;

(d) All reasonable steps are taken to avoid and minimize adverse environmental impacts, with special protection provided for the marine life and resources of the Columbia river, Willapa Bay and Grays Harbor estuaries, and Olympic national park;

(e) All reasonable steps are taken to avoid and minimize adverse social and economic impacts, including impacts on aquaculture, recreation, tourism, navigation, air quality, and recreational, commercial, and tribal fishing;

(f) Compensation is provided to mitigate adverse impacts to coastal resources or uses;

(g) Plans and sufficient performance bonding are provided to ensure that the site will be rehabilitated after the use or activity is completed; and

(h) The use or activity complies with all applicable local, state, and federal laws and regulations.

[1989 1st ex.s. c 2 § 11.]

WAC 173-26-360

Ocean management.

(1) Purpose and intent. This section implements the Ocean Resources Management Act, (RCW 43.143.005 through 43.143.030) enacted in 1989 by the Washington state legislature. The law requires the department of ecology to develop guidelines and policies for the management of ocean uses and to serve as the basis for evaluation and modification of local shoreline management master programs of coastal local governments in Jefferson, Clallam, Grays Harbor, and Pacific counties. The guidelines are intended to clarify state shoreline management policy regarding use of coastal resources, address evolving interest in ocean development and prepare state and local agencies for new ocean developments and activities.
(2) Geographical application. The guidelines apply to Washington's coastal waters from Cape Disappointment at the mouth of the Columbia River north one hundred sixty miles to Cape Flattery at the entrance to the Strait of Juan De Fuca including the offshore ocean area, the near shore area under state ownership, shorelines of the state, and their adjacent uplands. Their broadest application would include an area seaward two hundred miles (RCW 43.143.020) and landward to include those uplands immediately adjacent to land under permit jurisdiction for which consistent planning is required under RCW 90.58.340. The guidelines address uses occurring in Washington's coastal waters, but not impacts generated from activities offshore of Oregon, Alaska, California, or British Columbia or impacts from Washington's offshore on the Strait of Juan de Fuca or other inland marine waters.
(3) Ocean uses defined. 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.
(4) Relationship to existing management programs. These guidelines augment existing requirements of the Shoreline Management Act, chapter 90.58 RCW, and those chapters in Title 173 of the Washington Administrative Code that implement the act. They are not intended to modify current resource allocation procedures or regulations administered by other agencies, such as the Washington department of fisheries management of commercial, recreational, and tribal fisheries. They are not intended to regulate recreational uses or currently existing commercial uses involving fishing or other renewable marine or ocean resources. Every effort will be made to take into account tribal interests and programs in the guidelines and master program amendment processes. After inclusion in the state coastal zone management program, these guidelines and resultant master programs will be used for federal consistency purposes in evaluating federal permits and activities in Washington's coastal waters. Participation in the development of these guidelines and subsequent amendments to master programs will not preclude state and local government from opposing the introduction of new uses, such as oil and gas development.

These and other statutes, documents, and regulations referred to or cited in these rules may be reviewed at the department of ecology, headquarters in Lacey, Washington, for which the mailing address is P.O. Box 47600, Olympia, WA 98504. The physical address is 300 Desmond Drive S.E., Lacey, WA 98503.

(5) Regional approach. The guidelines are intended to foster a regional perspective and consistent approach for the management of ocean uses. While local governments may have need to vary their programs to accommodate local circumstances, local government should attempt and the department will review local programs for compliance with these guidelines and chapter 173-26 WAC: Shoreline Management Act guidelines for development of master programs. It is recognized that further amendments to the master programs may be required to address new information on critical and sensitive habitats and environmental impacts of ocean uses or to address future activities, such as oil development. In addition to the criteria in RCW 43.143.030, these guidelines apply to ocean uses until local master program amendments are adopted. The amended master program shall be the basis for review of an action that is either located exclusively in, or its environmental impacts confined to, one county. Where a proposal clearly involves more than one local jurisdiction, the guidelines shall be applied and remain in effect in addition to the provisions of the local master programs.

(6) Permit criteria: Local government and the department may permit ocean or coastal uses and activities as a substantial development, variance or conditional use only if the criteria of RCW 43.143.030(2) listed below are met or exceeded:

(a) There is a demonstrated significant local, state, or national need for the proposed use or activity;

(b) There is no reasonable alternative to meet the public need for the proposed use or activity;

(c) There will be no likely long-term significant adverse impacts to coastal or marine resources or uses;

(d) All reasonable steps are taken to avoid and minimize adverse environmental impacts, with special protection provided for the marine life and resources of the Columbia River, Willapa Bay and Grays Harbor estuaries, and Olympic National Park;

(e) All reasonable steps are taken to avoid and minimize adverse social and economic impacts, including impacts on aquaculture, recreation, tourism, navigation, air quality, and recreational, commercial, and tribal fishing;

(f) Compensation is provided to mitigate adverse impacts to coastal resources or uses;

(g) Plans and sufficient performance bonding are provided to ensure that the site will be rehabilitated after the use or activity is completed; and

(h) The use or activity complies with all applicable local, state, and federal laws and regulations.

(7) General ocean uses guidelines. The following guidelines apply to all ocean uses, their service, distribution, and supply activities and their associated facilities that require shoreline permits.

(a) Ocean uses and activities that will not adversely impact renewable resources shall be given priority over those that will. Correspondingly, ocean uses that will have less adverse impacts on renewable resources shall be given priority over uses that will have greater adverse impacts.

(b) Ocean uses that will have less adverse social and economic impacts on coastal uses and communities should be given priority over uses and activities that will have more such impacts.

(c) When the adverse impacts are generally equal, the ocean use that has less probable occurrence of a disaster should be given priority.

(d) The alternatives considered to meet a public need for a proposed use should be commensurate with the need for the proposed use. For example, if there is a demonstrated national need for a proposed use, then national alternatives should be considered.
(e) Chapter 197-11 WAC (SEPA rules) provides guidance in the application of the permit criteria and guidelines of this section. The range of impacts to be considered should be consistent with WAC 197-11-060 (4)(e) and 197-11-792 (2)(c). The determination of significant adverse impacts should be consistent with WAC 197-11-330(3) and 197-11-794. The sequence of actions described in WAC 197-11-768 should be used as an order of preference in evaluating steps to avoid and minimize adverse impacts.
(f) Impacts on commercial resources, such as the crab fishery, on noncommercial resources, such as environmentally critical and sensitive habitats, and on coastal uses, such as loss of equipment or loss of a fishing season, should be considered in determining compensation to mitigate adverse environmental, social and economic impacts to coastal resources and uses.
(g) Allocation of compensation to mitigate adverse impacts to coastal resources or uses should be based on the magnitude and/or degree of impact on the resource, jurisdiction and use.
(h) Rehabilitation plans and bonds prepared for ocean uses should address the effects of planned and unanticipated closures, completion of the activity, reasonably anticipated disasters, inflation, new technology, and new information about the environmental impacts to ensure that state of the art technology and methods are used.
(i) Local governments should evaluate their master programs and select the environment(s) for coastal waters that best meets the intent of chapter 173-26 WAC, these guidelines and chapter 90.58 RCW.
(j) Ocean uses and their associated coastal or upland facilities should be located, designed and operated to prevent, avoid, and minimize adverse impacts on migration routes and habitat areas of species listed as endangered or threatened, environmentally critical and sensitive habitats such as breeding, spawning, nursery, foraging areas and wetlands, and areas of high productivity for marine biota such as upwelling and estuaries.
(k) Ocean uses should be located to avoid adverse impacts on proposed or existing environmental and scientific preserves and sanctuaries, parks, and designated recreation areas.
(l) Ocean uses and their associated facilities should be located and designed to avoid and minimize adverse impacts on historic or culturally significant sites in compliance with chapter 27.34 RCW. Permits in general should contain special provisions that require permittees to comply with chapter 27.53 RCW if any archaeological sites or archaeological objects such as artifacts and shipwrecks are discovered.
(m) Ocean uses and their distribution, service, and supply vessels and aircraft should be located, designed, and operated in a manner that minimizes adverse impacts on fishing grounds, aquatic lands, or other renewable resource ocean use areas during the established, traditional, and recognized times they are used or when the resource could be adversely impacted.
(n) Ocean use service, supply, and distribution vessels and aircraft should be routed to avoid environmentally critical and sensitive habitats such as sea stacks and wetlands, preserves, sanctuaries, bird colonies, and migration routes, during critical times those areas or species could be affected.
(o) In locating and designing associated onshore facilities, special attention should be given to the environment, the characteristics of the use, and the impact of a probable disaster, in order to assure adjacent uses, habitats, and communities adequate protection from explosions, spills, and other disasters.

(p) Ocean uses and their associated facilities should be located and designed to minimize impacts on existing water dependent businesses and existing land transportation routes to the maximum extent feasible.
(q) Onshore facilities associated with ocean uses should be located in communities where there is adequate sewer, water, power, and streets. Within those communities, if space is available at existing marine terminals, the onshore facilities should be located there.
(r) Attention should be given to the scheduling and method of constructing ocean use facilities and the location of temporary construction facilities to minimize impacts on tourism, recreation, commercial fishing, local communities, and the environment.
(s) Special attention should be given to the effect that ocean use facilities will have on recreational activities and experiences such as public access, aesthetics, and views.
(t) Detrimental effects on air and water quality, tourism, recreation, fishing, aquaculture, navigation, transportation, public infrastructure, public services, and community culture should be considered in avoiding and minimizing adverse social and economic impacts.
(u) Special attention should be given to designs and methods that prevent, avoid, and minimize adverse impacts such as noise, light, temperature changes, turbidity, water pollution and contaminated sediments on the marine, estuarine or upland environment. Such attention should be given particularly during critical migration periods and life stages of marine species and critical oceanographic processes.
(v) Preproject environmental baseline inventories and assessments and monitoring of ocean uses should be required when little is known about the effects on marine and estuarine ecosystems, renewable resource uses and coastal communities or the technology involved is likely to change.
(w) Oil and gas, mining, disposal, and energy producing ocean uses should be designed, constructed, and operated in a manner that minimizes environmental impacts on the coastal waters environment, particularly the seabed communities, and minimizes impacts on recreation and existing renewable resource uses such as fishing.
(x) To the extent feasible, the location of oil and gas, and mining facilities should be chosen to avoid and minimize impacts on shipping lanes or routes traditionally used by commercial and recreational fishermen to reach fishing areas.
(y) Discontinuance or shutdown of oil and gas, mining or energy producing ocean uses should be done in a manner that minimizes impacts to renewable resource ocean uses such as fishing, and restores the seabed to a condition similar to its original state to the maximum extent feasible.
(8) Oil and gas uses and activities. Oil and gas uses and activities involve the extraction of oil and gas resources from beneath the ocean.
(a) Whenever feasible oil and gas facilities should be located and designed to permit joint use in order to minimize adverse impacts to coastal resources and uses and the environment.
(b) Special attention should be given to the availability and adequacy of general disaster response capabilities in reviewing ocean locations for oil and gas facilities.
(c) Because environmental damage is a very probable impact of oil and gas uses, the adequacy of plans, equipment, staffing, procedures, and demonstrated financial and performance capabilities for preventing, responding to, and mitigating the effects of accidents and disasters such as oil spills should be major considerations in the review of permits for their location and operation. If a permit is issued, it should ensure that adequate prevention, response, and mitigation can be provided before the use is initiated and throughout the life of the use.

(d) Special attention should be given to the response times for public safety services such as police, fire, emergency medical, and hazardous materials spill response services in providing and reviewing onshore locations for oil and gas facilities.
(e) Oil and gas facilities including pipelines should be located, designed, constructed, and maintained in conformance with applicable requirements but should at a minimum ensure adequate protection from geological hazards such as liquefaction, hazardous slopes, earthquakes, physical oceanographic processes, and natural disasters.
(f) Upland disposal of oil and gas construction and operation materials and waste products such as cuttings and drilling muds should be allowed only in sites that meet applicable requirements.
(9) Ocean mining. Ocean mining includes such uses as the mining of metal, mineral, sand, and gravel resources from the sea floor.
(a) Seafloor mining should be located and operated to avoid detrimental effects on ground fishing or other renewable resource uses.
(b) Seafloor mining should be located and operated to avoid detrimental effects on beach erosion or accretion processes.
(c) Special attention should be given to habitat recovery rates in the review of permits for seafloor mining.
(10) Energy production. Energy production uses involve the production of energy in a usable form directly in or on the ocean rather than extracting a raw material that is transported elsewhere to produce energy in a readily usable form. Examples of these ocean uses are facilities that use wave action or differences in water temperature to generate electricity.
(a) Energy-producing uses should be located, constructed, and operated in a manner that has no detrimental effects on beach accretion or erosion and wave processes.
(b) An assessment should be made of the effect of energy producing uses on upwelling, and other oceanographic and ecosystem processes.
(c) Associated energy distribution facilities and lines should be located in existing utility rights of way and corridors whenever feasible, rather than creating new corridors that would be detrimental to the aesthetic qualities of the shoreline area.
(11) Ocean disposal. Ocean disposal uses involve the deliberate deposition or release of material at sea, such as solid wastes, industrial waste, radioactive waste, incineration, incinerator residue, dredged materials, vessels, aircraft, ordnance, platforms, or other man-made structures.
(a) Storage, loading, transporting, and disposal of materials shall be done in conformance with local, state, and federal requirements for protection of the environment.
(b) Ocean disposal shall be allowed only in sites that have been approved by the Washington department of ecology, the Washington department of natural resources, the United States Environmental Protection Agency, and the United States Army Corps of Engineers as appropriate.
(c) Ocean disposal sites should be located and designed to prevent, avoid, and minimize adverse impacts on environmentally critical and sensitive habitats, coastal resources and uses, or loss of opportunities for mineral resource development. Ocean disposal sites for which the primary purpose is habitat enhancement may be located in a wider variety of habitats, but the general intent of the guidelines should still be met.
(12) Transportation. Ocean transportation includes such uses as: Shipping, transferring between vessels, and offshore storage of oil and gas; transport of other goods and commodities; and offshore ports and airports. The following guidelines address 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.
(a) An assessment should be made of the impact transportation uses will have on renewable resource activities such as fishing and on environmentally critical and sensitive habitat areas, environmental and scientific preserves and sanctuaries.
(b) When feasible, hazardous materials such as oil, gas, explosives and chemicals, should not be transported through highly productive commercial, tribal, or recreational fishing areas. If no such feasible route exists, the routes used should pose the least environmental risk.
(c) Transportation uses should be located or routed to avoid habitat areas of endangered or threatened species, environmentally critical and sensitive habitats, migration routes of marine species and birds, marine sanctuaries and environmental or scientific preserves to the maximum extent feasible.
(13) Ocean research. Ocean research activities involve scientific investigation for the purpose of furthering knowledge and understanding. Investigation activities involving necessary and functionally related precursor activities to an ocean use or development may be considered exploration or part of the use or development. Since ocean research often involves activities and equipment, such as drilling and vessels, that also occur in exploration and ocean uses or developments, a case by case determination of the applicable regulations may be necessary.
(a) Ocean research should be encouraged to coordinate with other ocean uses occurring in the same area to minimize potential conflicts.
(b) Ocean research meeting the definition of "exploration activity" of WAC 173-15-020 shall comply with the requirements of chapter 173-15 WAC: Permits for oil or natural gas exploration activities conducted from state marine waters.
(c) Ocean research should be located and operated in a manner that minimizes intrusion into or disturbance of the coastal waters environment consistent with the purposes of the research and the intent of the general ocean use guidelines.
(d) Ocean research should be completed or discontinued in a manner that restores the environment to its original condition to the maximum extent feasible, consistent with the purposes of the research.
(e) Public dissemination of ocean research findings should be encouraged.
(14) Ocean salvage. Ocean salvage uses share characteristics of other ocean uses and involve relatively small sites occurring intermittently. Historic shipwreck salvage which combines aspects of recreation, exploration, research, and mining is an example of such a use.
(a) Nonemergency marine salvage and historic shipwreck salvage activities should be conducted in a manner that minimizes adverse impacts to the coastal waters environment and renewable resource uses such as fishing.
(b) Nonemergency marine salvage and historic shipwreck salvage activities should not be conducted in areas of cultural or historic significance unless part of a scientific effort sanctioned by appropriate governmental agencies.
[Statutory Authority: RCW 90.58.120, 90.58.200, 90.58.060 and 43.21A.681. WSR 11-05-064 (Order 10-07), § 173-26-360, filed 2/11/11, effective 3/14/11. Statutory Authority: RCW 90.58.060 and 90.58.200. WSR 00-24-031 (Order 95-17a), recodified as § 173-26-360, filed 11/29/00, effective 12/30/00. Statutory Authority: RCW 90.58.195. WSR 91-10-033 (Order 91-08), § 173-16-064, filed 4/24/91, effective 5/25/91.]