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IN THE SUPREME COURT OF THE STATE OF
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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.

SUPPLEMENTAL BRIEF OF
RESPONDENT IMPERIUM TERMINAL SERVICES, LLC

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ORIGINAL

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I. INTRODUCTION

In this appeal, the Petitioners' challenge the holdings below by the Court of Appeals and the Shorelines Hearings Board ("SHB") that the Ocean Resources Management Act ("ORMA") does not apply to the two terminal expansion projects at issue. The project proposed by Respondent Imperium Terminal Services, LLC ("Imperium") involved an expansion of Imperium's bulk liquid storage capacity at its existing biofuels facility to allow for the receipt, storage, and outbound shipment of crude oil and other materials, including feedstocks for its biodiesel refinery operations.²

Imperium asks this Court to affirm the Court of Appeals' decision, which affirmed the SHB's holding that ORMA's project review process does not apply to the two land-based terminal projects at issue. The decisions by the Court of Appeals and the SHB were consistent with the plain language of ORMA, with the legislative history surrounding ORMA, and with the regulations and interpretations adopted by the Washington State Department of Ecology ("Ecology"), the agency charged with enforcing ORMA and adopting regulations to implement ORMA. ORMA's plain language and legislative history make clear that ORMA was intended to fill a regulatory gap for projects "off" Washington's coast, and was never intended to apply to land-based projects like the terminal expansions at issue here. Moreover, in the twenty-five years since the

¹ Petitioners are Quinault Indian Nation, Friends of Grays Harbor, Sierra Club, Grays Harbor Audubon, and Citizens for a Clean Harbor.

² As explained in Section II.B.4 below, Imperium recently revised its proposal to exclude crude oil.

Legislature adopted ORMA, the Legislature has had many opportunities to amend the statute to reject Ecology's implementation of ORMA, but it has chosen not to do so. This long period of silence regarding Ecology's interpretation and enforcement of ORMA is strong evidence that the Legislature has acquiesced to Ecology's interpretation.

The Petitioners' novel interpretation of ORMA, by contrast, renders meaningless key language in ORMA and its regulations. Petitioners' interpretation also flies in the face of ORMA's legislative history, which confirms that the Legislature never intended to apply ORMA's project review process to land-based transportation projects. Petitioners' interpretation should be rejected.

II. STATEMENT OF THE CASE

The Court of Appeals' decision includes a thorough description of the underlying projects at issue, the procedural history of this case, and the SHB's decision that is the subject of this appeal.³ In addition, Imperium provides the following overview of the legislative history surrounding ORMA's project review process.

The primary impetus for ORMA was the impending "lease sale" of ocean areas off the coast of Washington by the federal Mineral Management Service ("MMS").⁴ In the late 1980s, MMS was planning to

³ *Quinault Indian Nation v. Imperium Terminal Serv., LLC*, 190 Wn. App. 696,700-703, 360 P.3d 949 (2015).

⁴ Final Legislative Report, 51st Leg., at 166-68 (Wash. 1989) (Final Report), Appendix to Petitioners' Court of Appeals Opening Brief ("App'x") at 65-68.

provide for such a “lease sale” in April of 1992.⁵ At the time, there was “dispute as to the extent to which” any oil and gas exploration, development, and production activities under such a lease sale were required to be consistent with Washington law pursuant to the consistency requirements of the federal Coastal Zone Management Act (“CZMA”).⁶ “In 1987, due to concern over the upcoming lease sale, the Washington Legislature and the Governor took several actions,”⁷ which included adopting ORMA.

As the Petitioners acknowledge, the ORMA project review criteria at issue in this appeal were adopted as part of a larger “legislative package”⁸ aimed at addressing hazards associated with oil and gas *exploration activities* as well as hazards associated with oil *spills* (the “ORMA Bill”).⁹ The ORMA Bill included two central components: (1) a policy, planning and project review framework, which was aimed at oil and gas *exploration activities* (Sections 8-11 and Section 13 of the ORMA Bill);¹⁰ and (2) financial responsibility provisions aimed at “oil *spills* and other forms of incremental pollution,” whose express purpose was “to define and prescribe financial responsibility requirements for vessels that transport petroleum products across the waters of the state of Washington” (Sections 1-7 of the ORMA Bill).¹¹

⁵ *Id.*, App’x at 67.

⁶ *Id.*

⁷ *Id.*

⁸ Petition for Review at 9.

⁹ H.B. 2242, Laws of 1989, 1st Ex. Sess., ch. 2, App’x at 57-63.

¹⁰ *Id.*, §§ 8-11, 13.

¹¹ *Id.*, §§ 1-7 (emphasis added).

This appeal involves ORMA's policy and project review framework. The Final Bill Report for ORMA states that this framework applies to "coastal waters *off Washington*."¹² The legislative digest similarly describes the framework as applying to "state coastal waters, seabed and coastline."¹³ The digest also recognized that ORMA's focus was on "oil and gas-related activities."¹⁴

ORMA's policy and project review framework included several substantive provisions. First, the Legislature adopted a temporary ban on the leasing of Washington's tidal or submerged lands for the purpose of oil or gas exploration, development, or production.¹⁵ This temporary ban applied to a specific geographic area: the three-mile band of state-owned waters off Washington's coast.¹⁶ The ban did not apply in the federally-managed "exclusive economic zone" – the band of waters stretching from three miles to 200 miles off the coast. As the Legislature stated in ORMA, Washington "has an inherent interest" in the management of natural resources in the "exclusive economic zone" even though the federal government has primary jurisdiction in the area.¹⁷

Accordingly, in addition to adopting the temporary ban on leasing in state-owned waters, the Legislature established review criteria for certain uses and activities "in Washington's coastal waters" that were to

¹² Final Legislative Report, 51st Leg. (Wash. 1989) ("Final Report") at 166, App'x at 65.

¹³ Legislative Digest and History of Bills – House, 51st Leg. at 580 (1990) ("Digest"), App'x at 71.

¹⁴ Digest, App'x at 71.

¹⁵ H.B. 2242, Laws of 1989, 1st Ex. Sess., ch. 2, § 9(2), App'x at 60.

¹⁶ *Id.*

¹⁷ *Id.*, § 8(5), App'x at 59

be immediately applied to regulated uses and activities in the exclusive economic zone, and would also apply to regulated uses and activities in the three-mile band of state-owned waters in the event the temporary ban on extraction activities was not extended.¹⁸ The review criteria applied to “[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.”¹⁹ In recognition of the broad scope of this language, the Legislature emphasized that “[i]t is not currently the intent of the legislature to include recreational uses or *currently existing commercial uses involving fishing or other renewable marine or ocean resources* within the uses and activities which must meet the planning and review criteria” currently codified in RCW 43.143.030.²⁰ Because ORMA defines “ocean resources” to include “coastal waters,”²¹ this exclusion covers all commercial uses involving coastal waters that existed in 1989, when ORMA was adopted. In adopting ORMA’s policy and project review framework, the Legislature recognized that “[o]cean and marine-based industries and activities, such as fishing, tourism, and *marine transportation* have played a major role in the history of the state and will continue to be important in the future.”²²

¹⁸ *Id.*, § 11(1)-(2), App’x at 61.

¹⁹ *Id.*, § 11(2), App’x at 61.

²⁰ *Id.* (emphasis added).

²¹ *Id.*, § 8(1), App’x at 59.

²² *Id.*, § 8(2), App’x at 59.

The Legislature also required Ecology to adopt “ocean use guidelines” to implement ORMA by imposing review criteria for certain uses while excluding other uses from regulation.²³ Ecology adopted its Ocean Use Guidelines in 1991.²⁴ Like ORMA, the Ocean Use Guidelines stated that they “are not intended to regulate recreational uses or *currently existing commercial uses involving fishing or other renewable marine or ocean resources.*”²⁵ It is undisputed that Ecology has never interpreted ORMA or the Ocean Use Guidelines as applying to land-based activities like the projects at issue here or to marine transportation activities associated with such land-based projects.²⁶ As the SHB noted in its Order, the Petitioners offered “no evidence that ORMA, which has been in place in Washington for 24 years, has ever been interpreted” in the broad manner asserted by Petitioners.²⁷

ORMA has been amended three times since it was passed by the Legislature in 1989: in 1995, 1997, and 2013. In 1995, the Legislature amended ORMA to defer until the year 2000 its decision regarding whether to further extend or make permanent ORMA's leasing ban.²⁸ In 1997, the Legislature amended ORMA to make the ban permanent.²⁹ In

²³ *Id.*, § 13 (codified at RCW 90.58.195), App'x at 62.

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

²⁵ WAC 173-26-360(4) (emphasis added).

²⁶ *Quinault Indian Nation v. City of Hoquiam*, SHB No. 13 012c, Order on Summary Judgment (as Amended on Reconsideration) (Nov. 12, 2013), CP 60. Future references to the SHB's Order will refer to the Clerk's Papers ("CP") at pages 20-62.

²⁷ *Id.* See also Petition for Review at 16 (admitting Petitioner's Interpretation is novel).

²⁸ S.B. 5544, Chapter 339, Laws of 1995, § 1.

²⁹ H.B. 1189, Chapter 152, Laws of 1997, §§ 1-2.

2013, the Legislature amended ORMA to establish the Washington coastal marine advisory council in the Governor's executive office.³⁰ None of these ORMA amendments questioned or amended Ecology's consistent interpretation and enforcement of ORMA's project review provisions.

Nor did the Legislature amend ORMA to incorporate or implement the interpretation advanced by Petitioners in other legislative acts addressing the risk of oil spills. In 1990, the year after ORMA was passed, the Legislature passed a bill titled "Oil and Hazardous Substance Spills" that was intended to address the issue of "water borne transportation as a source of supply for oil and hazardous substances" in general, and the risk of spills from "vessels transporting oil into Washington" in particular.³¹ The "Oil and Hazardous Substance Spills" bill required, among other things, the preparation of contingency plans for certain facilities and vessels and the review of such plans by Ecology. That bill was amended in 1991, 2004, 2005, 2010, and 2015, to include numerous other provisions intended to address spill risks.³² In 2015, the Legislature amended the findings in the bill to specifically address "[t]he movement of crude oil through rail corridors and over Washington waters."³³ The Legislature did not amend ORMA's project review provisions on any of these occasions.

³⁰ E.S.B. 5603, Chapter 318, Laws of 2013, §§ 1-2.

³¹ H.B. 2494, Chapter 116, Laws of 1990.

³² H.B. 1027, Chapter 200, Laws of 1991; S.B. 6641, Chapter 226, Laws of 2004; S.B. 5432, Chapter 304, Laws of 2005; S.B. 2617, Laws of 2010, § 71 *et seq.*; H.B. 1149, Chapter 274, Laws of 2015.

³³ H.B. 1149, Chapter 274, Laws of 2015, §1.

III. ARGUMENT

A. Standard of Review

In reviewing the SHB's decision, this Court sits in the same position as the Court of Appeals, applying the standards of the Administrative Procedures Act ("APA") directly to the record before the SHB.³⁴ This Court evaluates the facts in the administrative record *de novo*, and reviews the law in light of the APA's "error of law" standard, RCW 34.05.570(3)(d).³⁵ Under the APA's "error of law" standard, the Court accords substantial weight to an agency's interpretation of a statute within its expertise, and also to an agency's interpretation of rules that the agency has promulgated.³⁶ This APA standard is consistent with the doctrine of contemporaneous construction, which accords "great weight.... to the contemporaneous construction placed upon it by officials charged with its enforcement, particularly where that construction has been accompanied by silent acquiescence of the legislative body over a long period of time."³⁷

³⁴ *King Cnty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn. 2d 543, 553, 14 P.3d 133, 138-39 (2000) (citing *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 45, 959 P.2d 1091 (1998)).

³⁵ *Verizon Nw., Inc. v. Washington Employment Sec. Dep't*, 164 Wn.2d 909, 915-16, 194 P.3d 255, 260 (2008) (citing *Macey v. Department of Employment Security*, 110 Wn.2d 308, 313, 752 P.2d 372 (1988)). See also *Petition of Washington State Emp. Ass'n v. Cleary*, 86 Wn.2d 124, 129, 542 P.2d 1249, 1251 (1975) (citing *Immigration & Naturalization Serv. v. Stanisic*, 395 U.S. 62, 89 S.Ct. 1519, 23 L.Ed.2d 101 (1969)).

³⁶ *Verizon Nw.*, 164 Wn.2d at 915-16. Where an administrative agency like the SHB issues a decision on summary judgment, the reviewing court must overlay the APA standard of review with the summary judgment standard. *Id.*

³⁷ *Stroh Brewery Co. v. State, Dept. of Revenue*, 104 Wn. App. 235, 15 P.3d 692 (2001) (citing *Newschwander v. Board of Trustees of the Wash. State Teachers' Retirement System*, 94 Wn.2d 701, 711, 620 P.2d 88 (1980)).

B. The Court of Appeals and the SHB Correctly Concluded that ORMA Does Not Apply to the Imperium or the Westway Terminal Development Projects

1. ORMA does not regulate the bulk liquid storage and transloading activities proposed for permitting or their associated marine transportation activities.

The terminal projects at issue include two “direct” activities – the activities that would be directly authorized by the shoreline permits under appeal (bulk liquid storage and transloading) – and they are associated with one “indirect” activity (marine transportation), which would not be authorized by the shoreline permits, but was nevertheless considered in evaluating the potential application of ORMA. The SHB and Court of Appeals correctly concluded that ORMA’s project review requirements for “ocean uses” do not apply to any of these three types of activities.

ORMA’s project review criteria for “ocean uses” apply only to uses or activities that are being directly authorized by a particular permit or other approval.³⁸ While the projects at issue are associated with a marine transportation use, the shoreline permits for the projects will authorize only the proposed bulk storage and transloading activities, which are not themselves “ocean uses.” The Ocean Use Guidelines define “ocean uses” as certain activities or developments “that occur on Washington’s coastal waters.”³⁹ The bulk storage and transloading

³⁸ RCW 43.143.030(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”).

³⁹ WAC 173-26-360(3).

components of the two projects at issue would undeniably occur on land, not on water.⁴⁰ Those land-based activities are not regulated by ORMA.

Petitioners suggest that these land-based activities are “ocean uses” because the Ocean Use Guidelines also regulate “off shore, near shore, inland marine, shoreland, and upland facilities” associated with regulated uses occurring on coastal waters,⁴¹ but Petitioners’ argument reads the regulation in reverse. Project review under ORMA is triggered when permits are required for certain uses occurring on coastal waters, and review of those uses under ORMA must include any associated onshore facilities,⁴² but ORMA is not triggered when the reverse is true.⁴³

Even if ORMA review could be triggered by an activity on coastal waters that is associated with a land-based project, ORMA review still would not be triggered by the marine transportation activity associated with the two projects at issue here. Regulated “transportation” uses are limited to those “transportation activities that originate or conclude in Washington’s coastal waters or are transporting a nonrenewable resource extracted from the outer continental shelf off Washington.”⁴⁴ Petitioners admit that the transportation of crude oil for these projects would originate and conclude outside of Washington State, and that there would be no

⁴⁰ See CP 27-30.

⁴¹ Petition for Review at 12-13 (citing WAC 173-26-360(3)).

⁴² WAC 173-26-360(3).

⁴³ See *id.* (“Ocean uses are *activities or developments* involving renewable and/or nonrenewable resources *that occur on Washington’s coastal waters* and *includes their associated* off shore, near shore, inland marine, shoreland, and upland *facilities . . .*”) (emphasis added).

⁴⁴ WAC 173-26-360(12).

transportation of any resource extracted from Washington's outer continental shelf."⁴⁵ Thus, ORMA review would not in any event be triggered by the marine transportation activity associated with the two projects at issue. Petitioners' contrary interpretation of the transportation regulations would add the words "marine" or "coastal" to the relevant sentence in the regulations. The limitation in question does not apply to "marine transportation activities" or to "ocean transportation activities" originating in Washington's coastal waters; instead, it applies to "*transportation activities* that originate or conclude in Washington's coastal waters."⁴⁶ The Court should reject Petitioners' strained interpretation, which attempts to add the words "marine" or "ocean" to that sentence in the regulations.⁴⁷

Petitioners also argue that, by interpreting the "transportation" regulations as requiring that "the commodity must come from Washington's waters," the SHB and the Court of Appeals have rendered "the second half of the description of regulated transportation [activities] superfluous" because that interpretation "narrows the regulations, once again, to extraction activities, which are independently banned."⁴⁸ Petitioners' argument ignores the fact that the ban on extraction activities did not apply in the exclusive economic zone, and it also ignores the fact

⁴⁵ Petitioners' Court of Appeals Opening Brief at 41.

⁴⁶ WAC 173-26-360(12) (emphasis added).

⁴⁷ See *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792, 795 (2003) (courts may not add words or clauses that the Legislature or an agency chose not to include in a statute or regulation).

⁴⁸ Petition for Review at 18.

that the ban on extraction activities was initially a temporary ban.⁴⁹ In light of these facts, it is clear that the regulations are not rendered superfluous by the Court of Appeals' decision; rather, they were adopted to fill the regulatory gap for extractive activities in the exclusive economic zone, and as a fallback in case the temporary ban on the leasing of Washington's tidal or submerged lands was not extended. Petitioners' arguments simply ignore these critical facts.

More fundamentally, Petitioners' interpretation relies on a cramped reading of the "adversely impact" language in RCW 43.143.030(2), in isolation,⁵⁰ without considering the accompanying language in RCW 43.143.030(1) that limits ORMA's scope to activities involving "the management, conservation, use, or development of natural resources *in Washington's coastal waters*." The Petitioners' interpretation, which renders that language meaningless, should be rejected.⁵¹

2. Petitioners' interpretation of ORMA is inconsistent with ORMA's legislative history.

As explained above, ORMA's legislative history confirms that ORMA's project review criteria were intended primarily to address concerns regarding the leasing of state coastal waters for oil and gas development, and were not intended to regulate non-extractive marine

⁴⁹ See Section II, *supra*.

⁵⁰ See Petition for Review at 10 (Petitioners' single mention of RCW 43.143.030(1), which offers no explanation for the language referring to "natural resources in Washington's coastal waters").

⁵¹ *City of Seattle v. State*, 136 Wn.2d 693, 698, 965 P.2d 619 (1998) (courts must give effect to all of the language, rendering no portion meaningless or superfluous).

transportation activities. Petitioners' argument to the contrary mischaracterizes the legislative history.

There is no merit to Petitioners' suggestion that ORMA's project review criteria were intended to address oil spills that had occurred in the Pacific Ocean shortly before ORMA was passed.⁵² While the ORMA Bill as a whole may have been "resuscitated" in part by the public response to oil spills, the larger legislative package was focused on petroleum extraction, not oil spills, and only ORMA's "financial responsibility" provisions were aimed specifically at addressing oil spills. Indeed, the only mention of oil spills in the ORMA Bill and its legislative history is found in the "financial responsibility" provisions of the bill, which are clearly separate and distinct from the sections of the bill setting forth ORMA's project review criteria.⁵³ If the Legislature had intended to apply ORMA's project review criteria to prevent oil spills and other impacts caused by marine transportation uses, it could have used the same type of specific language found in the "financial responsibility" sections of the bill. The Legislature's use of specific language regarding oil spills only in that section of the bill confirms that the underlying legislative intent behind the two sections was different. The maxim of *expressio unius est exclusio alterius* "demands that this court give weight and significance to this obvious legislative vacancy."⁵⁴

⁵² See Petition for Review at 1-2, 9.

⁵³ Compare H.B. 2242, Laws of 1989, 1st Ex. Sess., ch. 2, §§ 1-7 (codified at Chapter 88.40 RCW) with §§ 8-11 (codified at Chapter 43.143 RCW), § 13 (codified at RCW 90.58.195). See also App'x at 65-68.

⁵⁴ *State v. Swanson*, 116 Wn. App. 67, 76, 65 P.3d 343, 348 (2003).

3. Petitioners' interpretation of ORMA is inconsistent with the APA and the doctrine of contemporaneous construction.

a. *Petitioners' interpretation is inconsistent with the interpretations of the two primary agencies charged with enforcing ORMA.*

Ecology's interpretations of ORMA and its regulations must be given "great weight" under the error of law standard,⁵⁵ and Ecology's interpretations are "of *controlling weight* unless they are plainly erroneous or inconsistent with the statute or regulation."⁵⁶ If a statute or regulation is silent or ambiguous, the question for the Court is whether Ecology's interpretation "is based on a permissible construction" of the statute or regulation.⁵⁷ To sustain Ecology's interpretation, the Court need only find that the interpretation was "sufficiently rational" to preclude the Court from substituting its judgment for Ecology's judgment.⁵⁸

Here, ORMA's subject matter is clearly within the expertise of Ecology.⁵⁹ The Court should give deference to Ecology's interpretations of ORMA and its own regulations.⁶⁰ Because ORMA is implemented

⁵⁵ See Section II.A, *supra* (citing *Verizon Nw.*, 164 Wn.2d at 915).

⁵⁶ *Immigration & Naturalization Serv.*, 395 U.S. at 72 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945)) (emphasis added).

⁵⁷ *Skamania Cnty. v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 43, 26 P.3d 241, 247 (2001) (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)).

⁵⁸ *Skamania Cnty.*, 144 Wn.2d at 43 (citing *Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc.*, 470 U.S. 116, 125, 105 S.Ct. 1102, 84 L.Ed.2d 90 (1985)). See also *Puget Soundkeeper Alliance v. State, Dep't of Ecology*, 102 Wn. App. 783, 787, 9 P.3d 892, 894 (2000) (citing *Seatoma Convalescent Ctr. v. DSHS*, 82 Wn. App. 495, 518, 919 P.2d 602 (1996), rev. denied, 130 Wn.2d 1023, 930 P.2d 1230 (1997)) (even though an agency's interpretation of a statute is not binding on the court, the court "will uphold it if it is a plausible construction").

⁵⁹ See H.B. 2242, Laws of 1989, 1st Ex. Sess., ch. 2, § 13 (codified at RCW 90.58.195).

⁶⁰ *Verizon Nw.*, 164 Wn.2d at 915.

under the Shoreline Management Act, the statute is also within the expertise of the SHB, whose interpretation is also owed deference.⁶¹

Petitioners offer no evidence for their repeated assertion that Ecology's interpretations should be disregarded by this Court as a "post hoc litigating position."⁶² Indeed, Petitioners are unable to point to a single example of a land-based transportation project or a non-extractive marine transportation project that has been regulated under ORMA since its adoption.⁶³ That is because the agencies have consistently excluded such projects from the scope of ORMA's review.

b. Petitioners' interpretation is inconsistent with the Legislature's acquiescence to those agency interpretations.

Under the doctrine of contemporaneous construction, deference to an agency interpretation is appropriate "where that construction has been accompanied by silent acquiescence of the legislative body over a long period of time,"⁶⁴ particularly when "the Legislature has amended the statute in other respects without repudiating the administrative construction."⁶⁵ Here, the Legislature has amended ORMA three times since it was adopted, and in each case, the Legislature chose not to disturb

⁶¹ *Preserve Our Islands v. Shorelines Hearings Bd.*, 133 Wn. App. 503, 516, 137 P.3d 31 (2006), *rev. denied*, 62 Wn.2d 1008, 175 P.3d 1092 (2008) (deferring to SHB's expertise in SMA matters).

⁶² See Petition for Review at 15, 19.

⁶³ CP 61.

⁶⁴ *Verizon Nw.*, 164 Wn.2d at 915; *Stroh Brewery Co.*, 104 Wn. App. 235.

⁶⁵ *Manor v. Nestle Food Co.*, 131 Wn. 2d 439, 446, 932 P.2d 628, 631 (1997).

Ecology's historical enforcement of ORMA.⁶⁶ As a result, the Legislature has acquiesced to Ecology's interpretation.

The Legislature's acquiescence to Ecology's interpretation is also evident in its recent decision to address the risk of oil spills from "[t]he movement of crude oil through rail corridors and over Washington waters" through non-ORMA legislation.⁶⁷ Courts presume that the Legislature is aware of the prior construction and administration of a statute by agencies.⁶⁸ This Court should therefore presume that, when the Legislature adopted non-ORMA legislation in 2015 addressing oil spill risks associated with transporting crude oil by rail, the Legislature was aware of Ecology's longstanding administration of ORMA as well as the SHB's 2013 decision rejecting Petitioners' interpretation of ORMA. Because the Legislature chose not to disturb Ecology's and the SHB's interpretations of ORMA, this Court should do the same.

Contrary to Petitioners' assertion, Imperium is not arguing that "because ORMA has never been applied to oil shipping terminals, it should not be applied here."⁶⁹ This "straw man" argument ignores the judicial recognition that deference to agency interpretations is particularly appropriate in light of legislative acquiescence – precisely because such

⁶⁶ See Section II, *supra*.

⁶⁷ See H.B. 1149, Chapter 274, Laws of 2015, §1.

⁶⁸ See, e.g., *State Dep't of Transp. v. State Employees' Ins. Bd.*, 97 Wn. 2d 454, 462, 645 P.2d 1076, 1080 (1982) (giving "great weight" to "the statutory construction employed by the Department, the ferry employees and followed by the SEIB" because, "in the five times the SEIB Act was amended, prior to 1981, the legislature did not repudiate" that construction").

⁶⁹ See Petition for Review at 16.

acquiescence provides evidence that the agency's interpretation is consistent with legislative intent. *Wilderness Soc. v. Morton*, 479 F.2d 842 (D.C. Cir. 1973), which did not involve decades of legislative acquiescence to an agency's interpretation, does not support the Petitioners' straw man argument.⁷⁰ Indeed, the *Morton* court recognized that deference to an agency's interpretation is appropriate unless there are "compelling indications that it is wrong."⁷¹ Petitioners have failed to offer any such compelling indication that the agencies have wrongly interpreted or applied ORMA, and the Legislature's silent acquiescence confirms that the agencies' interpretations are entirely consistent with legislative intent.

4. Petitioners' interpretation of ORMA would lead to absurd results.

As noted in the SHB's Order, Petitioners' interpretation of ORMA would expand the reach of the statute to "require ORMA analysis for every transportation project in ports along the Washington coast."⁷² Similarly, the Court of Appeals found that Petitioners' interpretation "would create a large, new administrative burden where ORMA's statements of legislative policy and intent are focused, though not exclusively, on resource exploration."⁷³ Indeed, Petitioners' broad reading of ORMA regulate every permitted project involving even a single vessel trip that includes even a single stop on Washington's coast – including

⁷⁰ See *id.* (citing *Morton*).

⁷¹ *Morton*, 479 F.2d at 865.

⁷² CP 61.

⁷³ *Quinault Indian Nation*, 190 Wn. App. at 717 (citing RCW 43.143.030(2), RCW 43.143.010(2), and RCW 43.143.010(4)).

Imperium's revised proposal, which no longer involves crude oil.⁷⁴

ORMA cannot reasonably be interpreted to be so broad.

According to the Petitioners, the only relevant consideration is “[w]hether the use will adversely impact Washington’s resources.”⁷⁵ Petitioners have argued that the mere presence of vessels in coastal waters represents an “adverse impact” to navigation, fishing, and other ocean uses.⁷⁶ In light of this argument, it is clear that the “adverse impact” standard does not provide a reasonable limitation on the reach of ORMA. Indeed, Petitioners would interpret ORMA to regulate any and all uses or activities that have *any* adverse impact – no matter how minor, without making any allowance for *de minimis* impacts – on the many different types of resources listed in the statute: “renewable resources, marine life, fishing, aquaculture, recreation, navigation, air or water quality, or other existing ocean or coastal uses.”⁷⁷ The Court should reject this absurd result.⁷⁸

⁷⁴ See, e.g., Kyle Mittan, *REG abandons crude-oil storage* (January 6, 2016), <http://www.thedailyworld.com/news/local/reg-abandons-crude-oil-storage> (last visited June 27, 2016).

⁷⁵ Petitioners’ Court of Appeals Opening Brief at 25, 32-33.

⁷⁶ *Id.* at 36. See also AR 1856 (Quinault Indian Nation’s Opposition to Respondents’ Motions for Summary Judgment before SHB at 23) (arguing that the projects at issue “easily” trigger the “adverse impact” criterion of ORMA, as distinguished from the “significant adverse effect” criterion of SEPA).

⁷⁷ *Id.* at 29-32; RCW 43.143.030(2).

⁷⁸ *State v. Keller*, 143 Wn.2d 267, 277, 19 P.3d 1030, 1036 (2001) (courts avoid constructions “that yield unlikely, strange or absurd consequences”).

IV. CONCLUSION

For the foregoing reasons, Imperium respectfully requests that the Court reject the Petitioners' appeal and affirm the Court of Appeals' decision.

Respectfully submitted this 27th day of June, 2016.

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CERTIFICATE OF SERVICE

I certify that I caused a copy of Respondent Imperium Terminal Services, LLC.'s Supplemental Brief to be served on all parties or their counsel of record on the date below as indicated.

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Washington that the foregoing is true and correct.

DATED this 27th day of June, 2016, at Seattle, WA.



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Clerk of the Court & Counsel:

Please see attached Imperium Terminal Services, LLC.'s Supplemental Brief, together with certificate of service for filing in case no. 92552-6.

Thank you,

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