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SUPREME COURT
OF THE STATE OF WASHINGTON

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

Petitioners,

vs.

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

Respondents.

BRIEF OF AMICUS CURIAE
COALITION OF COASTAL FISHERIES

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ORIGINAL

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I. INTRODUCTION

The Legislature adopted the Ocean Resources Management Act (“ORMA”) to provide broad protections to Washington’s coastal waters, seabed, and shorelines. The statute requires careful coastal resource planning, and it separately establishes mandatory project review criteria. These project review criteria protect the coastal environment, as well as the people and communities that depend on it, from the adverse impacts of new uses or activities. ORMA’s project review criteria were not followed in this case.

The City of Hoquiam (“City”) failed to apply ORMA’s self-executing project review criteria to two coastal crude oil shipment terminals proposed at the Port of Grays Harbor. The Shorelines Hearings Board (“SHB”) compounded this error by limiting its review to guidelines promulgated by the Department of Ecology (“Ecology”) under the Shoreline Management Act (“SMA”). Both the City and the SHB ignored the text of ORMA entirely. Both flouted the statute by restricting the range of projects subject to ORMA’s project review criteria. Both failed to protect coastal communities from the adverse impacts of the proposed oil terminals.

The Coalition of Coastal Fisheries (“CCF”) submits this amicus curiae brief to urge that ORMA’s unambiguous language be given effect as written and intended by the Legislature. CCF asks the Court to hold that ORMA’s project review criteria must be considered and applied in the oil terminals’ substantial shoreline development permitting process.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

CCF is a nonprofit organization formed in 1990. CCF advocates for the interests of its members, which include Washington commercial fishing organizations, oyster growers, and charter boat operators. The proposed coastal crude oil shipment terminals at the Port of Grays Harbor pose an existential threat to these industries and the people who work in them.

Washington's seafood businesses employ 67,000 people and contribute \$8 billion a year to the state's economy. In Westport, a city at the mouth of Grays Harbor, fishing supports 2,200 jobs and generates \$220 million annually.¹ In 2006, Washington's coastal region caught 85 percent of the state's fish harvest.² Grays Harbor County alone accounted for almost one-third of the "total value of [fish] landings" in the state.³

Despite its economic importance, fishing is an increasingly imperiled profession. Ilwaco was once home to some 300 commercial fishing boats. That fleet is now fewer than 50 vessels. Historically, fishers could rely on a single fishery to support themselves. Now, they must rely on multiple fisheries to get by.⁴ Younger fishers have had to

¹ CCF, DEIS Cmts. for Imperium & Westway, at 1 (Nov. 14, 2015) [hereinafter "CCF DEIS Cmts."], <http://www.fogh.org/pdf/CoalitionLetterhead2014XtestIV-rd.pdf>.

² Wash. Dep't of Fish & Wildlife, Economic Analysis of the Non-Treaty Commercial & Recreational Fisheries in Wash. State, at ES-2 (Dec. 2008), <http://wdfw.wa.gov/publications/00464/wdfw00464.pdf>.

³ *Id.* at ES-2 to ES-3.

⁴ Wash. Coastal Marine Advisory Council, Marine Sector Analysis Report: Non-Tribal Fishing, at 52 (Oct. 31, 2014), <http://msp.wa.gov/wp-content/uploads/2014/03/FishingSectorAnalysis.pdf>.

take on large debts to fund their commercial fishing operations, putting them at significant financial risk if their ability to fish is hampered.⁵

CCF and its members know too well the devastation of ocean oil spills. In 1988, the fuel oil barge *Nestucca* collided with a tug boat and spilled 231,000 gallons of heavy fuel oil after crossing the Grays Harbor bar. A relatively modest spill, the *Nestucca* incident killed 56,000 seabirds and created an 800-square-mile oil slick that fouled beaches from Oregon to the Strait of Juan de Fuca.⁶

In 1989, the tanker *Exxon Valdez* spilled 11 million gallons of oil in Alaska's Prince William Sound. Cleanup costs and natural resource damages exceeded \$3.8 billion. About \$1 billion in damages were awarded for private losses after a hard-fought legal battle, but only after an initial jury award of \$5 billion was reduced on appeal. Affected marine life, including orca whale and herring populations, have not recovered.⁷

These disasters foreshadow the peril of increased crude oil shipping on Washington's coast. A major spill in Grays Harbor could be even worse. The harbor is an ecologically sensitive estuary vital to wildlife and fishing. It "is a major nursery area for Dungeness crab and is

⁵ See *id.*

⁶ See generally Wash. Dep't of Ecology, Incident History of the Nestucca Barge (May 20, 2010), <http://www.ecy.wa.gov/programs/spills/incidents/Nestucca/NestuccaHistory.pdf>; U.S. Fish & Wildlife Serv., Final *Nestucca* Oil Spill Revised Restoration Plan (Oct. 2004), https://www.doi.gov/sites/doi.gov/files/migrated/restoration/library/casedocs/upload/WA_barge_Nestucca_RP_10-04.pdf.

⁷ See generally Doug Struck, *Twenty Years Later, Impacts of the Exxon Valdez Linger*, Environment360 (Mar. 24, 2009), http://e360.yale.edu/feature/twenty_years_later_impacts_of_the_exxon_valdez_linger/2133/.

considered an essential habitat for many other species”⁸ including salmon, sturgeon, trout, and marine mammals.⁹ Major spills would “lead to a catastrophic loss of habitat,” and “the potentially affected area could be much larger than just Grays Harbor.”¹⁰

The proposed coastal crude oil shipment terminals would substantially increase the risk of an oil spill in Grays Harbor. The projects would involve nearly 2 billion gallons of annual crude oil shipments through the harbor. The projects’ shared dock would be occupied 363 days a year by individual vessels, each holding between one million and 14.7 million gallons of crude oil.¹¹ Vessel traffic in the shallow and narrow harbor channel would nearly triple, dramatically increasing maritime collision risks.

A major spill could not be mitigated. The terminals intend to ship both crude oil from the Bakken shale and a heavier version of crude from Canada’s tar sands.¹² Following a spill, tar sands crude would sink and

⁸ CCF DEIS Cmts. at 1.

⁹ Wash. Dep’t of Ecology, Westway Expansion Project Draft Env’tl. Impact Statement, at 3.5-8 to 3.5-16 (Aug. 31, 2015) [hereinafter “Westway DEIS”], <http://www.ecy.wa.gov/geographic/graysharbor/westwayterminal.html>.

¹⁰ Wash. Dep’t of Fish & Wildlife, Imperium & Westway Env’tl. Impact Scoping Cmts., at 2 (May 27, 2014), <http://www.fogh.org/pdf/WDFWcommentsWestway-ImperiumProposals.pdf>.

¹¹ Westway DEIS at S-30, 2-10.

¹² CCF DEIS Cmts. at 5; Westway DEIS at 3.14-9.

coat marine sediments.¹³ Bakken crude would disperse widely with strong currents and weather.¹⁴

Even a single crude oil spill in Grays Harbor would destroy critical marine habitat and cripple Washington's fishing industry up and down the coast. It would destroy the jobs, way of life, and fragile coastal resources that CCF's members depend on and that ORMA was intended to protect.

III. STATEMENT OF THE CASE

CCF adopts the Petitioners' statements of the case,¹⁵ but with one important modification.¹⁶ Recourse to Ecology's "ocean use" guidelines is unnecessary to determine the range of projects to which ORMA's self-executing review criteria apply. The plain language of the statute requires the City to consider ORMA's project review criteria in its permitting process for the proposed coastal crude oil shipment terminals. The Court need look no further.

IV. ARGUMENT

A. The City And SHB Should Have Considered ORMA.

The proposed coastal crude oil shipment terminals are subject to ORMA's project review criteria because they are "uses or activities" that

¹³ CCF DEIS Cmts. at 5-6.

¹⁴ See Westway DEIS at Appx. N, N-4 to N-12.

¹⁵ Pet. for Review at 1-8; Pet'rs' Suppl. Br. at 2-6.

¹⁶ *City of Seattle v. McCready*, 123 Wn.2d 260, 269, 868 P.2d 134 (1994) (A court "is not constrained by the issues as framed by the parties if the parties ignore a constitutional mandate, a statutory commandment, or an established precedent."); see also *State v. Quismundo*, 164 Wn.2d 499, 505-06, 192 P.3d 342 (2008) (A court's "obligation to follow the law remains the same regardless of the arguments raised by the parties . . .").

“will adversely impact” existing “ocean or coastal uses.”¹⁷ Yet the City did not even consider whether those oil shipment terminals would have an adverse impact on protected coastal uses, let alone whether the projects would meet or exceed ORMA’s project review criteria.

The SHB likewise failed to consider ORMA’s text. Relying instead on guidelines promulgated by Ecology under the SMA, the SHB incorrectly concluded that ORMA’s project review criteria apply only to a narrow range of “ocean uses.”¹⁸

Ecology’s guidelines are not a substitute for unambiguous statutory text. The SHB, like the City, was required to consider the plain language of ORMA’s self-executing project review criteria.

B. “Uses Or Activities” Include Coastal Crude Oil Terminals.

The coastal crude oil shipment terminals are “uses or activities” under ORMA. They would store crude oil on Washington’s shoreline and pipe that oil across the shore and into the holds of tankers and barges in Washington’s coastal waters. Loading would take place, all but two days a year, at a dock on Washington’s near-shore seabed.

1. “Uses Or Activities” Has A Broad Ordinary Meaning.

ORMA must be construed to carry out the Legislature’s intent to protect vital coastal resources from the adverse effects of new uses.¹⁹ The

¹⁷ See RCW 43.143.030(2).

¹⁸ SHB Order on Summ. J., SHB No. 13-012c, at 41 (Dec. 9, 2013) (as amended on reconsideration) [hereinafter “SHB Order”].

¹⁹ See *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

Legislature did not define “uses or activities” in ORMA, but the plain meaning of that phrase encompasses a wide range of projects – including coastal crude oil shipment terminals.

“Use” is a noun meaning “[a] purpose for which something is used.”²⁰ “Activity” is a noun meaning “a specified pursuit in which a person partakes.”²¹ In the absence of a statutory definition, plain meaning may be ascertained from a dictionary.²² “Uses” and “activities” are common terms and each is defined broadly. Simply put, the phrase “uses or activities” encompasses any use and any activity.

The Legislature did not qualify or otherwise restrict the plain and obvious meaning of “uses or activities.” If a “statute’s meaning is plain on its face, then [courts] must give effect to that plain meaning as an expression of legislative intent.”²³ A statute’s “plain language” is the “surest indication of legislative intent.”²⁴ Courts do not “resort to interpretive tools such as legislative history” to construe unambiguous statutory language.²⁵

²⁰ American Heritage Dictionary of the English Language (5th ed. 2016), online, <https://ahdictionary.com/word/search.html?q=use>.

²¹ American Heritage Dictionary of the English Language (5th ed. 2016), online, <https://ahdictionary.com/word/search.html?q=activity>.

²² *Am. Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 8, 802 P.2d 784 (1991).

²³ *Campbell & Gwinn*, 146 Wn.2d at 9-10.

²⁴ *State v. Larson*, 184 Wn.2d 843, 848, 365 P.3d 740 (2015) (quoting *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010)).

²⁵ *Larson*, 184 Wn.2d at 854.

Contrary to the SHB's assessment, a broad interpretation of "uses or activities" is grounded in the plain meaning rather than in "the policy goals of ORMA."²⁶ Nevertheless, a broad interpretation of "uses or activities" is more consistent with ORMA's policy goals than the narrow interpretation espoused by terminal proponents.²⁷ It is terminal proponents who most heavily rely on speculative policy arguments untethered from statutory text.²⁸

Nor does a broad interpretation of "uses or activities" mean the jurisdictional reach of ORMA's project review criteria is without limit. The statute's project review criteria apply only to uses or activities that require government approval and that will have an adverse impact on existing ocean and coastal uses.

2. "Uses Or Activities" Are Not Limited To "Ocean Uses."

Surrounding statutory language and ORMA's statutory scheme as a whole confirm that "uses or activities" include more than just "ocean uses."²⁹ ORMA's project review criteria apply to "u]ses or activities . . . that will adversely impact renewable resources, marine life, fishing, aquaculture, recreation, navigation . . . or other existing ocean or coastal uses."³⁰ When the Legislature uses different words or phrases in the same

²⁶ *Contra* SHB Order at 41.

²⁷ *See, e.g.*, RCW 43.143.005; RCW 43.143.010.

²⁸ *E.g.*, Ecology & City Suppl. Br. at 9-10; Wash. Pub. Ports Ass'n Amicus Br. at 2-20.

²⁹ *See Larson*, 184 Wn.2d at 848-49; *Campbell & Gwinn*, 146 Wn.2d at 10-12.

³⁰ RCW 43.143.030(2) (emphasis added).

statute, those words and phrases are presumed to have different meanings.³¹

Here, the unqualified phrase “uses or activities” and the qualified phrase “other existing ocean or coastal uses” are used in the same sentence. This means that only new “uses or activities” are subject to ORMA’s project review criteria and also that those new “uses or activities” include more than just ocean or coastal uses. This is consistent with the statute’s effects-driven purpose. ORMA is intended to protect existing uses from the adverse effects of new uses and to resolve conflicts between competing uses in favor of renewable uses.³²

Even if the phrase “other existing ocean or coastal uses” was interpreted as qualifying the phrase “uses or activities,” the “uses or activities” subject to ORMA’s project review criteria would still include both “ocean uses” and “coastal uses.”³³ The term “coastal” encompasses the “[l]and next to the sea” as well as “[t]he water near this land.”³⁴

Broader statutory context also confirms that ORMA’s project review criteria apply to more than just “ocean uses.” ORMA is designed to protect not just Washington’s coastal waters, but also the state’s

³¹ See *Ass’n of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 353, 340 P.3d 849 (2015).

³² RCW 43.143.010(3); RCW 43.143.030(2).

³³ See *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (explaining that all language used by the Legislature must be given effect).

³⁴ See, e.g., American Heritage Dictionary of the English Language (5th ed. 2016), online, <https://ahdictionary.com/word/search.html?q=coastal>.

“seabed” and “shorelines.”³⁵ Likewise, ORMA is intended to protect both ocean resources and coastal resources.³⁶ CCF agrees with Ecology that ORMA’s provisions “must be read together” to achieve a harmonious statutory scheme.³⁷ But that means looking to all of ORMA’s provisions rather than just the ones that support Ecology’s narrow view.

The purpose of ORMA’s project review criteria is to protect existing coastal and ocean uses – including Washington’s coastal waters, seabed, and shorelines – from the adverse effects of any new uses or activities. Ecology misreads the statute when it claims the Legislature was concerned more about regulating certain projects in particular locations than it was concerned about protecting existing coastal resources from new uses.³⁸

3. The Crude Oil Terminals Are In Coastal Waters.

This Court need not determine the maximum jurisdictional boundary of ORMA’s project review criteria to conclude that they do apply to coastal crude oil shipment terminals physically connected to vessels in coastal waters by pipes and an in-water loading dock anchored to the seabed.

Despite stating in its briefing that the coastal crude oil terminals are “located entirely on land,”³⁹ Ecology elsewhere agrees that the projects

³⁵ RCW 43.143.005(1), (3); RCW 43.143.010(1).

³⁶ RCW 43.143.005(4); RCW 43.143.030(2).

³⁷ Ecology & City Suppl. Br. at 8.

³⁸ *See id.*

³⁹ *Id.* at 14.

are partially located in Washington's coastal waters.⁴⁰ Terminal proponents cannot escape ORMA's project review criteria by "piecemealing" the on-land operations of the crude oil terminals from the terminals' in-water and seabed operations.⁴¹ Artificial project segmentation stretches fact, strains logic, and frustrates the purpose and intent of ORMA.

C. Ecology's Guidelines Do Not Apply To The Permit Decision.

1. The Guidelines Cannot Limit ORMA's Application.

Neither Ecology nor the City has authority to restrict application of ORMA's project review criteria to "ocean uses."⁴² To the extent Ecology's ocean use guidelines purport to circumscribe the statute's applicability, those guidelines lack "a specific statutory basis."⁴³ And, whether the City's shoreline master program is consistent with Ecology's guidelines is irrelevant to whether it properly vetted the terminals with ORMA's self-executing project review criteria.

Under SMA amendments enacted at the same time as ORMA, Ecology must prepare "ocean use guidelines and policies" for "reviewing

⁴⁰ See Wash. Dep't of Ecology, Comparison of Westway and Imperium Expansion Projects Fact Sheet, <http://www.ecy.wa.gov/geographic/graysharbor/factsheet-comparison.html>. The SHB implicitly acknowledged this fact, too. See SHB Order at 8 (noting that terminal tanks will be connected to ships by pipelines and that terminal operations will involve increases in vessel traffic).

⁴¹ Cf. *Swift v. Island Cty.*, 87 Wn.2d 348, 362, 552 P.2d 175 (1976).

⁴² But see WAC 173-26-360; City of Hoquiam Mun. Code 11.04.030(20).

⁴³ See *State ex rel. Living Servs., Inc. v. Thompson*, 95 Wn.2d 753, 759, 630 P.2d 925 (1981).

and, where appropriate, amending” certain shoreline master programs.⁴⁴ This requirement makes sense in light of ORMA’s mandate to integrate “the policies in RCW 43.143.010” into resource planning for “coastal waters.”⁴⁵ But the narrow purpose of this requirement is to align shoreline management programs with the planning policies in ORMA.⁴⁶ Contrary to the arguments of terminal proponents, the SMA amendments do not give Ecology authority to define the range of uses or activities to which ORMA’s separate project review criteria apply.⁴⁷

The Legislature knows how to delegate broad rule-making authority to administrative agencies. But the authority granted to Ecology by the SMA amendments is limited, at most, to administering the SMA.⁴⁸ Unlike broad delegations of authority, as in the Model Toxics Control Act, the SMA amendments do not open-endedly authorize Ecology to “take any other actions necessary”⁴⁹ The Legislature’s narrow grant of rule-making authority in the SMA, and the conspicuous absence of any delegation of rule-making authority in ORMA itself, reinforces the fact that the Legislature intended ORMA to provide independent and self-

⁴⁴ RCW 90.58.195(1).

⁴⁵ RCW 43.143.030(1).

⁴⁶ Terminal proponents argue that ORMA should not apply because environmental impacts from the projects are already addressed by the Washington State Environmental Policy Act (SEPA) and the SMA. *E.g.*, Westway Resp. to Pet. for Rev. at 5-6. But if the Legislature wanted ORMA to regulate only what SEPA and the SMA do not, it would have said so.

⁴⁷ *Contra, e.g.*, Ecology & City Suppl. Br. at 10-11.

⁴⁸ RCW 90.58.195(1).

⁴⁹ *Compare* RCW 90.58.195(1) *with* RCW 70.105D.030(1).

executing standards for evaluating projects that adversely impact existing coastal resources.

Notably, RCW 90.58.195(1) does not even reference the statutory provisions that constitute ORMA. By restricting Ecology's powers to preparation of "ocean use guidelines," the SMA amendments only confirm that Ecology has no authority to circumscribe ORMA's broader project review criteria. If the Legislature had intended Ecology's SMA rule-making authority to be co-extensive with the reach of ORMA's project review provisions, it would have used identical terms to describe both.⁵⁰

The only cross-reference to ORMA in the SMA amendments is in RCW 90.58.195(2), which requires local shoreline master programs to "conform with RCW 43.143.010 and 43.143.030 and with the . . . ocean use guidelines."⁵¹ With this language, the Legislature explicitly indicated that Ecology's SMA ocean use guidelines are a separate standard from ORMA's project review criteria. In doing so, the Legislature restricted Ecology's ability to impinge on ORMA's statutory requirements.

In addition, by requiring that shoreline master programs passively "conform" to ORMA, the Legislature indicated that Ecology and local governments should apply ORMA's project review criteria directly. "Conform" means to "be or act in accord with a set of standards, expectations, or specifications."⁵² In this regard, the SMA amendments

⁵⁰ See *Ass'n of Wash. Spirits & Wine Distribs.*, 182 Wn.2d at 353.

⁵¹ RCW 90.58.195(2) (emphasis added).

⁵² American Heritage Dictionary of the English Language (5th ed. 2016), online, <https://ahdictionary.com/word/search.html?q=conform>.

fall significantly short of the broad and express delegation of authority typically granted to agencies “charged with the administration and enforcement of a statute.”⁵³

Nor do the SMA amendments imply agency authority to alter the scope of ORMA. “The rule of ‘necessary implication’ includes only those powers that are essential to the declared purpose of the legislation, ‘not simply convenient, but indispensable’ to carrying out the legislative purpose.”⁵⁴ Agency authority is not implied merely because it “would be beneficial, useful or reasonable.”⁵⁵

Ecology argued at the Court of Appeals that ORMA’s lack of a statutory definition for “uses or activities” allows the agency to offer its own definition.⁵⁶ But the case relied upon by Ecology says only that agencies may “fill in the gaps” to the extent “necessary to the effectuation of a general statutory scheme.”⁵⁷ Ecology’s guidelines do not fill in a gap. They create one.

⁵³ *E.g., Ass’n of Wash. Bus. v. State Dep’t of Revenue*, 155 Wn.2d 430, 439-440, 120 P.3d 46 (2005) (quotations omitted).

⁵⁴ *In re Impoundment of Chevrolet Truck*, 148 Wn.2d 145, 156 n.10, 60 P.3d 53 (quoting *City of Los Angeles v. L.A. City Water Co.*, 177 U.S. 558, 570-71, 20 S. Ct. 736, 44 L. Ed. 886 (1900)).

⁵⁵ *Skagit Surveyors & Eng’rs, LLC v. Friends of Skagit Cty.*, 135 Wn.2d 542, 567, 958 P.2d 962 (1998).

⁵⁶ See Ecology & City Jnt. Resp. Br. at 23.

⁵⁷ See *Wash. Pub. Ports Ass’n v. State Dep’t of Revenue*, 148 Wn.2d 637, 646, 62 P.3d 462 (2003) (quoting *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wn.2d 441, 448, 536 P.2d 157 (1975)).

ORMA mandates that all state and local permitting authorities consider and apply the statute's project review criteria.⁵⁸ It does not single out Ecology or Ecology-administered programs, and it does not otherwise say or imply that Ecology is authorized to administer the statutory project review process in any special manner.

Under the SMA, Ecology must prepare ocean use guidelines consistent with ORMA's planning policies.⁵⁹ Ecology must also verify that some shoreline master programs conform to ORMA's project review criteria.⁶⁰ But even without those obligations, the City must apply the project review criteria when it issues permits for "uses or activities" that "adversely impact" existing coastal resources. ORMA governs permits issued by any agency under any regulatory program, whether or not the criteria are also incorporated in separate regulations like Ecology's ocean use guidelines or the City's shoreline master program.

ORMA's project review provision does not require state or local rules to take effect. This is in contrast to statutes like the Washington Clean Air Act, which instructs Ecology to adopt a range of rules that establish "air quality objectives and . . . standards" and "emissions standards."⁶¹ ORMA directs permitting authorities to comply with and

⁵⁸ See RCW 43.143.030(2).

⁵⁹ RCW 90.58.195(1); RCW 43.143.030(1).

⁶⁰ RCW 90.58.195(2).

⁶¹ RCW 70.94.331(2)(a)-(b).

adhere to the statute's detailed project review provision, not to narrow it with "implementing" regulations.⁶²

2. The Guidelines, As Applied, Are Invalid.

Even if Ecology had authority to administer ORMA, it could not limit application of the project review criteria to "ocean uses" alone.

Courts review agency regulations on a de novo basis.⁶³ A rule is invalid if it conflicts with a statute and is therefore beyond an agency's authority.⁶⁴ Rules must be "reasonably consistent with the statute being implemented."⁶⁵ Restricting ORMA to "ocean uses" is squarely at odds with the statute.⁶⁶ "An agency may not promulgate a rule that amends . . . a legislative enactment."⁶⁷

To the extent Ecology's guidelines purport to limit application of ORMA's project review criteria to "ocean uses," they ignore the Legislature's express concern about impacts to Washington's coastal natural resources, including the state's seabed and shorelines. Nothing in

⁶² *Contra* WAC 173-26-360(1).

⁶³ *See, e.g., Wash. State Hosp. Ass'n v. Wash. State Dep't of Health*, 183 Wn.2d 590, 594-95, 353 P.3d 1285 (2015).

⁶⁴ *Id.*; *see also* RCW 34.05.570(2)(c).

⁶⁵ *Wash. State Hosp. Ass'n*, 183 Wn.2d at 595 (quoting *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wn.2d 571, 580-81, 311 P.3d 6 (2013)).

⁶⁶ The Court of Appeals recognized the discrepancy between ORMA's text and Ecology's guidelines, but declined to address the discrepancy because the parties below did not expressly challenge the regulation. *Quinault Indian Nation v. Imperium Terminal Servs., LLC*, 190 Wn. App. 696, 713 n.8, 360 P.3d 949 (2015).

⁶⁷ *Edelman v. State ex rel. Pub. Disclosure Comm'n*, 152 Wn.2d 584, 591, 99 P.3d 386 (2004).

the statute exempts a use or activity conducted on the state's coastal waters, seabed, and shorelines.

3. Deference To The Guidelines Is Unwarranted.

The Court says what the law is.⁶⁸ It need not defer to Ecology or the City. Courts give “no deference to an agency’s rule where no ambiguity exists.”⁶⁹ Courts also do “not defer to an agency determination which conflicts with the statute.”⁷⁰ ORMA’s statutory mandate is clear and unambiguous. Limiting application of the statute’s project review criteria to “ocean uses” directly conflicts with that mandate.

Even if ORMA was ambiguous, neither Ecology nor the City is entitled to deference because neither is charged with administering – much less redefining – the statute’s project review criteria.⁷¹ For the same reason, the doctrine of contemporaneous construction does not help the oil terminal proponents.⁷² Courts only defer to an agency’s contemporaneous statutory construction when the agency is charged with a statute’s

⁶⁸ See *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 627, 869 P.2d 1034 (1994) (“The courts retain the ultimate authority to interpret a statute.”); *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 130, 580 P.2d 246 (1978) (“[I]t is emphatically the province and duty of the judicial department to say what the law is.”) (quotations and alterations omitted).

⁶⁹ *Edelman*, 152 Wn.2d at 590.

⁷⁰ *Waste Mgmt. of Seattle, Inc.*, 123 Wn.2d at 628.

⁷¹ See *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593-94, 90 P.3d 659 (2004) (explaining that agency is entitled to deference only where a statute is ambiguous and the agency is charged with its administration).

⁷² *Contra Imperium Ans. to Pet. for Rev.* at 8.

enforcement.⁷³ Here, like any other state or local permitting authority, Ecology and the City are simply charged with evaluating new uses or activities on the basis of ORMA's project review criteria.

Even if Ecology were charged with administering ORMA, the agency's interpretation is not "absolutely controlling."⁷⁴ If an agency's "interpretation conflicts with the statute or statutory scheme," no deference is accorded.⁷⁵ Moreover, deference "applies mainly to factual matters that are 'complex, technical, and close to the heart of the agency's expertise.'"⁷⁶

Finally, an agency's interpretation is accorded deference only if it has actually construed an ambiguous statutory term.⁷⁷ Neither Ecology nor the City has promulgated a specific definition of "uses or activities" for purposes of ORMA's project review criteria, and nowhere do Ecology's ocean use guidelines actually say that "ocean uses" are the only type of "uses or activities" to which ORMA's project review criteria might

⁷³ See *Skagit Cty. Pub. Hosp. Dist. No. 304 v. Skagit Cty. Pub. Hosp. Dist. No. 1*, 177 Wn.2d 718, 725 n.1, 305 P.3d 1079 (2013); *Ball v. Smith*, 87 Wn.2d 717, 723, 556 P.2d 936 (1976).

⁷⁴ *Hama Hama Co.*, 85 Wn.2d at 448.

⁷⁵ *Swinomish Indian Tribal Cmty.*, 178 Wn.2d at 582 n.5.

⁷⁶ *Utter v. Bldg. Indus. Ass'n of Wash.*, 182 Wn.2d 398, 421, 341 P.3d 953 (2015) (quoting *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 396, 932 P.2d 139 (1997)).

⁷⁷ See *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992) (explaining that agency seeking deference to interpretation must show it "has adopted and applied such interpretation as a matter of agency policy.").

apply.⁷⁸ An agency cannot “attempt to ‘bootstrap a legal argument into the place of agency interpretation.’”⁷⁹

D. Applying ORMA To Coastal Oil Terminals Is Reasonable.

Terminal proponents speculate about a parade of horrors that would supposedly flow from applying ORMA’s project review criteria to the coastal crude oil shipment terminals.⁸⁰ Those concerns are unfounded. As Petitioners explained in their supplemental brief, it is unlikely that ORMA’s project review criteria, properly applied, would impose an undue burden on coastal utilization. And, in any event, the unfounded concerns of terminal proponents cannot take precedence over clear statutory text.⁸¹

The Court need not determine, in this case, the full range of uses or activities to which ORMA’s project review criteria apply. CCF believes the proposed terminal projects will adversely impact existing coastal and ocean uses, but the standards for gauging adverse impacts, and the means of applying those standards, can be refined in fact-specific future cases.

⁷⁸ Ecology’s guidelines define the term “ocean uses” simply because that is the phrase used in the SMA amendments requiring Ecology to prepare such guidelines. RCW 90.58.195(1). If Ecology intended its definition of “ocean uses” to delineate the scope of ORMA, it is odd that the guidelines themselves apply permit criteria to “ocean or coastal uses and activities.” WAC 173-26-360(6) (emphasis added). Similarly, the City’s municipal code applies ORMA’s permitting criteria to “ocean uses,” but the code does not expressly limit ORMA’s permitting criteria to such uses. See Hoquiam Mun. Code 11.04.180(6).

⁷⁹ *Cowiche Canyon Conservancy*, 118 Wn.2d at 815.

⁸⁰ See, e.g., Ecology & City Ans. to Pet. at 11-12; Imperium Ans. to Pet. for Rev. at 7; Wash. Pub. Ports Ass’n Amicus Br. at 2-20.

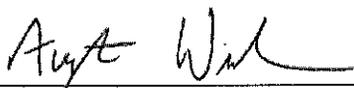
⁸¹ *State v. J.P.*, 149 Wn.2d at 457 (explaining that courts “cannot simply wish away” specific statutory language).

V. CONCLUSION

For the reasons explained above, CCF asks the Court to hold that ORMA's project review criteria must be considered and applied in the substantial shoreline development permitting process for the proposed coastal crude oil shipment terminals.

RESPECTFULLY SUBMITTED this 26th day of August, 2016.

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CERTIFICATE OF SERVICE

I, Matteus Vaga, certify that:

1. I am an employee of Riddell Williams P.S., attorneys for Coalition of Coastal Fisheries in this matter. I am over 18 years of age, not a party hereto, and competent to testify if called upon.

2. On the date below written, I served a true and correct copy of the foregoing document on the parties as follows:

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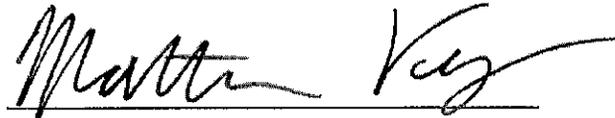
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED at Seattle, Washington, this 26th day of August, 2016.



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Subject: Quinault Indian Nation, et al. v. City of Hoquiam, et al. - Case No. 92552-6
Attachments: Motion to File Brief of Amicus Curiae Coalition of Coastal Fisheries 4845-2613-3815 v.4.pdf;
Brief of Amicus Curiae Coalition of Coastal Fisheries 4812-3299-2050 v.10.pdf

Case: Quinault Indian Nation, et al. v. City of Hoquiam, et al.
Supreme Court Case No. **92552-6**

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Dear Clerk:

Attached for filing regarding the above-referenced matter are the following two documents:

- Motion for Leave to File Brief of Amicus Curiae Coalition of Coastal Fisheries; and
- Brief of Amicus Curiae Coalition of Coastal Fisheries.

All parties are being served via email and U.S. mail, as indicated by the certificates of service attached to the motion and accompanying brief.

Please let me know if you have trouble viewing the documents.

Sincerely,

Matteus

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