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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,

v.

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

Respondents.

CITY OF HOQUIAM AND WASHINGTON STATE
DEPARTMENT OF ECOLOGY'S ANSWER TO BRIEF OF
AMICUS CURIAE COALITION OF COASTAL FISHERIES

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ORIGINAL

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I. INTRODUCTION

Amicus Coalition of Coastal Fisheries (Coalition) contends that the Ocean Resources Management Act (ORMA) applies to any “use or activity” in the four coastal counties that adversely impacts ocean or coastal resources, regardless of whether the use or activity is located in or on the ocean. This interpretation is wrong and should be rejected for several reasons. First, it is inconsistent with RCW 43.143.030(1), which limits ORMA’s application to uses located “in Washington’s coastal waters.” Second, it is inconsistent with Ecology’s long standing ocean use guidelines, which limit ORMA to “ocean uses” located “on Washington’s coastal waters.” Third, the interpretation is overbroad as it would sweep within ORMA’s coverage many projects located far inland having nothing to do with the ocean. The better interpretation of ORMA is that it applies only to “ocean uses” as defined in Ecology’s regulation. That is, ORMA applies to uses and activities located on or in the coastal waters, such as off shore oil drilling, dredge disposal, ocean mining, and the like.

The Coalition contends that Ecology’s ocean use guidelines are invalid and should be ignored. This is a new argument that has not previously been raised in this litigation. As such, it should not be considered by the Court. The argument, in any event, is without merit. Ecology’s guidelines cannot be ignored because the Legislature directed

Ecology to promulgate them in RCW 90.58.195(1). Moreover, Ecology's regulations are fully consistent with the Legislature's direction. The Legislature directed Ecology to promulgate "ocean use guidelines" and that is exactly what Ecology did—it defined "ocean uses." In doing so, Ecology quite reasonably concluded that "ocean uses" must be located "on Washington's coastal waters," not located inland. The current project is not an ocean use so defined and, therefore, ORMA does not apply. The contrary arguments of the Coalition are unpersuasive and should be rejected.

II. AUTHORITY AND ARGUMENT

A. **RCW 43.143.030(2), Upon Which the Coalition Relies, Must be Read in Context and Consistent with RCW 43.143.030(1) and RCW 90.58.195(1)**

The Coalition's primary argument is that, under RCW 43.143.030(2), ORMA is applicable to any "use or activity" that adversely impacts coastal or ocean resources, regardless of whether the activity is located on or in the water. Brief of Amicus Curiae Coalition of Coastal Fisheries (Coalition Amicus Brief) at 7. The problem with the Coalition's argument is that it ignores other applicable provisions of ORMA—including RCW 43.143.030(1)—and results in an overly broad interpretation that is inconsistent with the statute's legislative history and with Ecology's long-standing and unchallenged regulation. Their

interpretation also leads to the unlikely result that ORMA would be applicable to almost every significant project in the coastal counties, even projects located far inland.

ORMA is not as broad as the Coalition contends. As discussed in Ecology's Supplemental Brief at pages 7–10, RCW 43.143.030(1) limits ORMA's application to uses and developments located "in Washington's coastal waters." Similarly, RCW 90.58.195(1) directs Ecology to promulgate "ocean use" guidelines to guide ORMA's application. Both of these statutes mandate a narrower interpretation of ORMA than advocated by the Coalition. They both indicate that ORMA is limited to "ocean uses," i.e., uses located on or in Washington's coastal waters, as more fully defined in Ecology's regulation.

Subsection (2) of RCW 43.143.030 contains the "uses or activities" phrase upon which the Coalition relies. The Coalition argues that the phrase, taken in isolation, is not limited to projects located in or on the coastal waters. Coalition Amicus Brief at 8–9. However, the phrase cannot be read in isolation. Subsection (2) must be read in conjunction with subsection (1) because they are both part of the same statute and were passed at the same time. *See Key Bank of Puget Sound v. City of Everett*, 67 Wn. App. 914, 917, 841 P.2d 800 (1992); *In re Arbitration of*

Mooberry v. Magnum Mfg., Inc., 108 Wn. App. 654, 658, 32 P.3d 302 (2001).

As explained in Ecology's Supplemental Brief at pages 10–11, subsection (1) of RCW 43.143.030 refers to planning under ORMA and subsection (2) identifies project review criteria. These two activities logically go together and should apply in the same geographic area, not in widely disparate areas as the Coalition contends. The uses and developments planned for under subsection (1), which are those located "in Washington's coastal waters," must be the same uses and activities to which the review criteria in subsection (2) apply. Otherwise, local governments in the coastal counties would be left planning for projects "in Washington's coastal waters" but applying restrictive review criteria to different projects located on land, for which they have not specifically planned under ORMA. Such a bifurcated interpretation makes no sense.

Moreover, reading subsection (2) in isolation from the rest of the statute, as the Coalition does, leads to the unlikely result that ORMA would apply to any project in the four coastal counties having any adverse impact on coastal or ocean resources. Under the statute, such resources include "marine life, fishing, aquaculture, recreation, navigation, air or water quality, or other existing ocean or coastal uses."

RCW 43.143.030(2). Many projects on the coast, even those far inland,

may have an adverse impact on one or more of these resources. The Coalition's interpretation would make all such projects subject to ORMA.¹ But the Legislature is unlikely to have intended ORMA to have such broad applicability when (1) the statute was adopted in response to the perceived threat of oil and gas leasing off the coast; and (2) projects located on land already are subject to planning and review criteria under the Shoreline Management Act (SMA). *See Ecology's Supplemental Brief at 12–14.*

The better interpretation of ORMA is that it is limited to the “ocean uses” defined in Ecology's regulation, WAC 173-26-360. That interpretation is consistent with the language of subsection (1) of RCW 43.143.030, and with RCW 90.58.195(1). It is also consistent with ORMA's intent to address uses and activities, like oil and gas drilling off the coast, that occur in the coastal waters. ORMA fills the gap left in the SMA with respect to uses or activities occurring in the ocean—it ensures that those activities are subject to rigorous planning and review criteria. The statute, however, does not apply to uses located on land, such as the

¹ The Coalition attempts to minimize the breadth of their interpretation by contending that only adverse impacts to existing ocean or coastal uses trigger ORMA. Coalition Amicus Brief at 8. In fact, if their interpretation is correct, ORMA would apply to any permitted project that had any adverse impact to any of the listed resources. For example, an inland project that had an adverse impact on air quality would be covered by ORMA under their view, even if it had no impact on any other ocean use or resource.

project here, because they are already covered by the SMA and other land use and environmental laws.²

The Coalition argues that the phrase “other existing ocean or coastal uses” in RCW 43.143.030(2) means that the “uses and activities” that statute applies to is broader than just ocean uses. Coalition Amicus Brief at 9. They note that the Legislature used two different phrases in the statute—one referring to “ocean and coastal uses” and the other merely “uses and activities.” According to them, this means the Legislature intended the phrase “uses and activities” to be broader than ocean uses. In fact, the Legislature’s use of the phrase “other existing ocean or coastal uses” suggests that the “uses and activities” to which that statute applies are ocean uses. The word “other” in the second phrase serves to distinguish the ocean or coastal uses that may be impacted from the ocean uses that are the subject of review. It is perfectly logical for the Legislature to require analysis of the impacts of an “ocean use” on “other existing ocean and coastal uses.” In any case, the phrase “other existing ocean or coastal uses” is simply part of the list of things that must be assessed to determine if they are adversely affected by a covered “use or activity.” The phrase does not define what uses or activities are actually

² Under Ecology’s regulation, uses on land that are associated with an offshore “ocean use” are also covered by ORMA. WAC 173-26-360(3). Here, no such offshore use exists.

covered. As discussed above, to determine what is covered, the Court must look to subsection (1) and the language there that limits ORMA to uses and activities “in Washington’s coastal waters.”

The Coalition also argues that the word “coastal” in RCW 43.143.030 means that the Legislature intended ORMA to apply to projects located on land, because the dictionary definition of “coast” includes land along the shore. Coalition Amicus Brief at 9. However, the word “coastal” only appears in the second phrase in the statute—in the list of items that must be assessed when presented with a covered “use or activity.” As discussed above, that phrase does not define the scope of ORMA’s applicability. With respect to applicability, ORMA for the most part, does not use the term “coast” by itself, but instead uses the phrase “coastal waters.” *E.g.*, RCW 43.143.005, .010(1), .020(2), .030(1). The term “coastal waters” is defined in RCW 43.143.020(2) to mean the waters of the Pacific Ocean from Cape Flattery south to Cape Disappointment, from mean high tide seaward 200 miles. Rather than supporting the Coalition’s argument, the use of the phrase “coastal waters” suggests that ORMA is limited to ocean uses located on or in Washington’s waters.

The Coalition also argues that the Westway project at issue here is located “in Washington’s waters” because it involves making some

modifications to an existing dock. Coalition Amicus Brief at 10–11. According to the draft Environmental Impact Statement (EIS) for the project, loading arms and a marine vapor combustion system will be installed on the existing dock, but otherwise the project is located entirely on land.³ The project does not involve any in water work. The fact that a small portion of the project involves modifying an existing dock does not make the project subject to ORMA, because the project still is not an “ocean use.” As discussed in Ecology’s Supplemental Brief at pages 16–17, the fact that ships will call at the dock and be loaded with oil does not make the project an “ocean use”—shipping alone is not an ocean use under Ecology’s regulation.

B. The Coalition’s Challenge to Ecology’s Regulation Should Not Be Considered and in Any Event the Coalition Misconstrues the Legislature’s Grant of Rulemaking Authority to Ecology

The Coalition devotes much of its amicus brief to the mistaken argument that Ecology improperly exercised its rulemaking authority in adopting WAC 173-26-360, the ocean use guidelines. According to the Coalition, the Court should ignore those guidelines because they allegedly exceed Ecology’s authority and/or are inconsistent with the statute. These

³ The draft EIS is available on Ecology’s website at www.ecy.wa.gov/geographic/graysharbor/terminals.html. The proposed facilities are described in § 2.1.3.1.

arguments should not be considered by the Court because they have not been raised previously by any party. In any event, they have no merit.

The law is well-established that new arguments raised for the first time on appeal will not be considered by the court. RAP 2.5(a); *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). Similarly, new arguments raised solely by Amicus will not be considered. *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 631, 71 P.3d 644 (2003). Here, no party below challenged the validity of Ecology's regulation. *See Quinault Indian Nation v. Imperium Terminal Serv. LLC*, 190 Wn. App. 696, 713 n.8, 360 P.3d 949 (2015). On appeal in this Court, all parties continue to rely on the regulation to support their arguments. *See, e.g.*, Petitioners' Supplemental Brief at 13. Amicus Coalition is the only party to challenge the validity of Ecology's regulation; as such, their argument should not be considered.

Even if their argument is considered, it should be rejected. First, the Coalition mistakenly assumes that RCW 90.58.195 is not part of ORMA. In fact, that statute was enacted as section 13 of the same bill that enacted the rest of ORMA. *See* Laws of 1989, 1st Exec. Sess., ch. 2, § 13; Petitioners Court of Appeals Joint Opening Brief at App'x 62. Although that particular section of the bill amended the Shoreline Management Act, and was codified there, it is nevertheless part of ORMA.

The session laws label the entire chapter, of which section 13 is a part, as the “Ocean Resources Management Act.” *Id.* at App’x 58. The Legislature’s decision to codify a portion of ORMA in the Shoreline Management Act suggests that the Legislature intended implementation of ORMA to be coordinated with the SMA. It does not suggest, as the Coalition argues, that the review criteria in RCW 43.143.030(2) were intended to be “self-executing.” Coalition Amicus Brief at 12–13. There is no merit to the Coalition’s contention that “ORMA itself” did not grant Ecology any rulemaking authority, *Id.* at 12.

Second, the Legislature clearly intended the grant of rulemaking authority in RCW 90.58.195(1) to define the “ocean uses” covered by ORMA. This follows from the language of the statute itself, which directs Ecology to adopt “ocean use guidelines,” and from the fact that it was included as a part of ORMA. The use of the term “ocean use guidelines” dovetails with the subject matter of the rest of the statute. The Legislature obviously intended Ecology to adopt guidelines that address all uses and activities covered by ORMA. Further, pursuant to RCW 90.58.195(2), the Legislature must have intended the guidelines to define how local governments would comply with RCW 43.143.030 because consistency with that statute is specifically required. The Coalition’s attempt to bifurcate the grant of authority in the SMA from the rest of ORMA, and

treat it as essentially unrelated, is without merit. *See* Coalition Amicus Brief at 13–14.

Finally, the Coalition argues that Ecology’s regulation is not entitled to deference because it conflicts with the statute. Coalition Amicus Brief at 16–18. As discussed above, and in Ecology’s Supplemental Brief at pages 15–16, Ecology’s ocean use guidelines are fully consistent with, and properly implement, ORMA. The guidelines are consistent with both RCW 43.143.030(1) and RCW 90.58.195(1), as well as with ORMA’s intent. The guidelines do exactly what the Legislature envisioned in enacting ORMA—they specify the uses and activities *in the state’s coastal waters* that the state intends to regulate and they specify the standards which those activities must meet. There is no reason to disregard them or find them invalid in this case.

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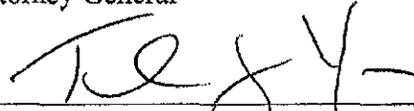
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III. CONCLUSION

For the reasons stated above, the arguments made by the Amicus Coalition of Coastal Fisheries should be rejected.

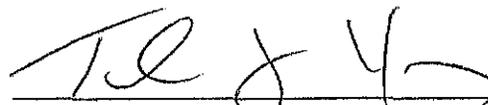
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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 21st day of September, 2016, I caused to be served Ecology's Answer to Brief of Amicus Curiae Coalition of Coastal Fisheries in the above-captioned matter upon the parties herein as indicated below:

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Attached for filing in Supreme Court Case No. 92552-6, *Quinault Indian Nation, et al. v. City of Hoquiam, et al.*, is the City of Hoquiam and Department of Ecology's Answer to Brief of Amicus Curiae Coalition of Coastal Fisheries, with attached Certificate of Service. Thank you for your attention to this matter.

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