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

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

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

v.

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

and

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

SHORELINES HEARINGS BOARD,
Respondent.

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

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INTRODUCTION

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

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

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

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

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

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

Petitioners Quinault Indian Nation and Friends of Grays Harbor,

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

ASSIGNMENTS OF ERROR

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

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

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

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

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

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Crude Oil Transportation in the Pacific Northwest

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

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

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

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

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

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

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

[6] *See* Conrad Wilson, *20K gallons of crude spill in MN train wreck*, Minnesota Public Radio, Mar. 27, 2013, *available at* http://goo.gl/UZ0Iw.

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

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

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

B. The Westway and Imperium Crude Oil Shipment Terminal Proposals

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

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

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

C. The Quinault Indian Nation and Grays Harbor

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

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

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

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

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

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

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

D. Friends of Grays Harbor *et al.*

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

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

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

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

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

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

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

II. PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

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

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

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

STANDARD OF REVIEW

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at (2) (emphasis added).

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

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

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

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

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

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

> activities or developments involving renewable and/or nonrenewable resources that occur on Washington's coastal waters and includes their associated off shore, near shore, inland marine, shoreland, and upland facilities and the supply, service, and distribution activities, such as crew ships, circulating to and between the activities and developments. Ocean uses involving nonrenewable resources include such activities as extraction of oil, gas and minerals, energy production, disposal of waste products, and salvage. Ocean uses which generally involve

> sustainable use of renewable resources include commercial, recreational, and tribal fishing, aquaculture, recreation, shellfish harvesting, and pleasure craft activity.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Board was also concerned that Ecology or the Court has never interpreted ORMA in the way Quinault Indian Nation and FOGH suggested. AR at 2419 (SHB Order at 41 ("The Petitioners offer no evidence that ORMA, which has been in place in Washington for 24 years has ever been interpreted in this manner nor that this interpretation is consistent with its stated purposes . . . .")). Equally true, however, is that ORMA has never been interpreted in the way the Board decided. Simply put, no court or agency has interpreted ORMA; this lack of interpretation does not support either reading of the text but instead highlights the need for a close reading of ORMA's text, structure, and legislative history. *See W. Virginia Div. of Izaak Walton League of Am. v. Butz*, 522 F.2d 945, 949-52 (4th Cir. 1975) (analyzing and applying long-dormant statutory provision of the Organic Act of 1897), *superseded by statute on other*

grounds.

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

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

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

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

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

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

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

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

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

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

[15] RCW 43.143.030(2).

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

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

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

> [a]n onshore or offshore facility shall demonstrate financial responsibility in an amount determined by the department as necessary to compensate the state and affected counties and cities for damages that might occur during a reasonable worst case spill of oil from that facility into the navigable waters of the state. The department shall consider such matters as the amount of oil that could be spilled into the navigable waters from the facility, the cost of cleaning up the spilled oil, the frequency of operations at the facility, the damages that could result from the spill and the commercial availability and affordability of financial responsibility.

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

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

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

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

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

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

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

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

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

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

RCW 88.40.025 is not explicit regarding when facilities must provide the required financial assurances, and there is no legal precedent addressing this issue. Accordingly, this Court should interpret RCW 88.40.025 in a manner that carries out the intent of the Legislature. *See Campbell & Gwinn,* 146 Wn.2d at 9. The Legislature's intent in mandating financial responsibility requirements was to protect the State and local governments from bearing the costs of a worst-case-scenario oil spill from an oil handling facility. *See* RCW 88.40.025. Here, the State and local governments' interests will only be protected if Westway and Imperium give evidence of financial responsibility prior to receiving the initial land use authorizations and analyzing the environmental impacts for the proposed crude oil terminals.

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

unstoppable administrative inertia." *King Cnty. v. Boundary Review Bd.*, 122 Wn.2d 648, 664 (1993) (holding that a simple boundary change for annexation of land necessitated an environmental impact statement because, although it did not authorize development, "the inertia generated by the initial government decisions . . . may carry the project forward regardless"). Here, obtaining shoreline permits and completing the SEPA process could provide substantial momentum for the crude oil terminal projects, risking a snowball effect that would hinder the State's ability to stop the projects in the event Westway and Imperium are unable to provide adequate financial assurances.

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

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

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

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

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

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

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

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

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

228 (Imperium MDNS at 2).

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted this 28th day of July, 2014.

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

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CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. My business address is 705 Second Avenue, Suite 203, Seattle, Washington 98104.

On July 28, 2014, I served a true and correct copy of the following document(s) on the parties listed below:

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

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I, Catherine Hamborg, declare under penalty of perjury that the foregoing is true and correct. Executed on this 28th day of July, 2014, at Seattle, Washington.

CATHERINE HAMBORG

APPENDIX

SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

QUINAULT INDIAN NATION, FRIENDS OF GRAYS HARBOR, SIERRA CLUB, SURFRIDER FOUNDATION, GRAYS HARBOR AUDUBON, AND CITIZENS FOR A CLEAN HARBOR Petitioners, v. CITY OF HOQUIAM, STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY and WESTWAY TERMINAL COMPANY, LLC, Respondents, And IMPERIUM TERMINAL SERVICES, LLC Respondent Intervenor.	SHB No. 13-012c ORDER ON SUMMARY JUDGMENT[1] *(AS AMENDED ON RECONSIDERATION)*

On May 16, 2013, Petitioner Quinault Indian Nation (QIN) filed a petition for review with the Shorelines Hearings Board (Board) for review of a shoreline substantial development permit (SSDP) issued to Westway Terminal Company, LLC (Westway) by the City of Hoquiam (City) for expansion of Westway's existing bulk liquid storage terminal at the Port of Grays Harbor. On May 17, 2013, the Friends of Grays Harbor, Sierra Club, Surfrider Foundation, Grays Harbor Audubon, and Citizens for a Clean Harbor (collectively the Environmental

[1] As amended by the Board's Order on Petitions for Reconsideration or Clarification issued on December 9, 2013.

Petitioners) appealed the same SSDP. On July 3, 2013, the Environmental Petitioners and QIN filed two new appeals at the Board, challenging an SSDP issued by the City to Imperium Terminal Services, LLC (Imperium) for a similar facility located adjacent to the Westway facility. All four appeals were consolidated, and now all parties to the appeal have moved for summary judgment on several of the issues listed in the pre-hearing order. [2]

The Board was comprised of Tom McDonald, Chair, Kathleen D. Mix, Joan M. Marchioro, Pamela Krueger, Grant Beck, and John Bolender. Administrative Appeals Judge Kay M. Brown presided for the Board.

Attorneys Kristen L. Boyles and Matthew R. Baca represented the QIN. Attorneys Knoll Lowney and Elizabeth H. Zultoski represented the Environmental Petitioners. Attorneys Svend A. Brandt-Erichsen, Jeff B. Kray, and Meline G. MacCurdy represented Westway. Attorney Steven R. Johnson represented the City. Assistant Attorneys General Thomas J. Young and Allyson C. Bazan represented the Washington State Department of Ecology (Ecology). Attorneys Jay P. Derr and Tadas Kisielius represented Respondent Intervenor Imperium Terminal Services, LLC (Imperium).

In rendering its decision, the Board considered the following submittals:

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[2] The parties and the presiding officer established the issues in the pre-hearing order pertaining to the appeals of the Westway SSDP prior to consolidation with the appeals pertaining to the Imperium SSDP. All parties agreed to consolidation of all four appeals, given their extensive overlap in legal issues. However, because the parties had already filed motions for summary judgment in the Westway appeals at the time of the consolidation, and the case schedule was very compressed due to the 180-day statutory deadline on the Westway appeals, no amendments to the existing legal issues or additional motions for summary judgment pertaining specifically to the Imperium project were allowed. The parties agreed, however, that the questions of law raised in the dispositive motions that were filed pertaining to Westway apply similarly to Imperium. This decision will include references to the Imperium project to the extent that information is available in the summary judgment record and relevant to the decision.

1. Quinault Indian Nation's Petition for Review for SHB No. 13-012 with attached Exhibit A (Hearings Examiner Decision, with attached Exhibits 1-5).

2. Quinault Indian Nation's Petitioner for Review for SHB No. 13-021 with attached Exhibit A (Hearings Examiner Decision with attachments).

3. Imperium Terminal Services, LLC's Motion to Intervene, Declaration of Tadas Kisielius with attached Exhibits A-D;

4. Quinault Indian Nation Motion for Partial Summary Judgment (SEPA Issue No. 1).
    a. Declaration of Kristen L. Boyles Re: Exhibits to Quinault Indian Nation Motion for Partial Summary Judgment (SEPA Issue No. 1) with Exhibits A-T.

5. Friends of Grays Harbor, et al.'s Motion for Partial Summary Judgment.
    a. First Declaration of Elizabeth H. Zultoski in Support of Friends of Grays Harbor, et al.'s Motion for Partial Summary Judgment with Exhibits 1-41.

6. Respondent City of Hoquiam's Motion for Partial Summary Judgment with Exhibit A.
    a. Declaration of Brian Shay

7. Respondents Department of Ecology and City of Hoquiam's Joint Motion for Partial Summary Judgment.
    a. Declaration of Diane Butorac in Support of Respondents Department of Ecology and City of Hoquiam's Joint Motion for Partial Summary Judgment with Exhibits A-G.

8. Westway Terminal Company LLC's Motion for Partial Summary Judgment.
    a. Declaration of Svend A. Brandt-Erichsen with Exhibits 1-2.
    b. Declaration of Ken Shoemake.

9. Respondent Intervenor Imperium's Motion for Partial Summary Judgment.

10. Joint Response of Westway Terminal Company, LLC and City of Hoquiam to Friends of Grays Harbor et al.'s Motion to Partial Summary Judgment.

11. Response of Westway Terminal Company, LLC to Quinault Indian Nation Motion for Partial Summary Judgment.
    a. Declaration of Dennis Kyle with Exhibits 1-2.

12. Quinault Indian Nation's Opposition to Respondents' Motions for Summary Judgment (SEPA Issues Nos. 1, 3, 6, 7, 8, 9; SMA Issues Nos. 3, 4, 10).
    a. Second Declaration of Kristen L. Boyles, Re: Exhibits to Quinault Indian Nation's Opposition to Respondents' Motions for Summary Judgment with Exhibits U-HH.

13. Friends of Grays Harbor et al.'s Response to Respondents' Motions for Partial Summary Judgment.
    a. Declaration of Arthur Grunbaum.
    b. First Declaration of Knoll Lowney in Support of Friends of Grays Harbor et al.'s Response to Motions for Partial Summary Judgment of Respondents with Exhibits A-H.

14. Respondent Intervenor Imperium's Response to Petitioners' Motions for Partial Summary Judgment.
    a. Declaration of Steve Drennan in Support of Respondent Intervenor Imperium's Response to Motions for Partial Summary Judgment with Exhibits A-F.

15. Respondents Department of Ecology and City of Hoquiam's Response in Opposition to Quinault Indian Nation's Motion for Partial Summary Judgment (SEPA Issue No. 1) with Exhibit A.
    a. Second Declaration of Diane Butorac in Support of Respondents Department of Ecology and City of Hoquiam's Response to the Quinault Indian Nation's Motion for Partial Summary Judgment (SEPA Issue No. 1) with Exhibits A-E.
    b. Declaration of Linda Pilkey-Jarvis in Support of Respondents Department of Ecology and City of Hoquiam's Response to the Quinault Indian Nation's Motion for Partial Summary Judgment (SEPA Issue No. 1) with Exhibits A-B.
    c. Declaration of David Byers in Support of Respondents Department of Ecology and City of Hoquiam's Response to the Quinault Indian Nation's Motion for Partial Summary Judgment (SEPA Issue No. 1).

16. Reply in Support of Westway Terminal Company LLC's Motion for Partial Summary Judgment.

17. Respondent Intervenor Imperium's Reply in Support of Motion for Partial Summary Judgment.

18. Reply in Support of Quinault Indian Nation's Motion for Partial Summary Judgment.

a. Third Declaration of Kristen L. Boyles Re: Exhibits to Reply in Support of Quinault Indian Nation's Motion for Partial Summary Judgment with Exhibits II-PP.

19. Friends of Grays Harbor et al.'s Reply in Support of Motion for Partial Summary Judgment.

20. Respondents Department of Ecology and City of Hoquiam's Reply in Support of Joint Motion for Partial Summary Judgment.
    a. Declaration of Sally Toteff in Support of Respondents Department of Ecology and City of Hoquiam's Reply in Support of Joint Motion for Partial Summary Judgment with Exhibits A, B.

The following issues, which were submitted by the parties and set out in the Pre-Hearing Order, are the subject of the motions filed by the parties.[3]

A. Violations of the State Environmental Policy Act ("SEPA"):

1. Is the Mitigated Determination of Non-Significance ("MDNS") issued by the City of Hoquiam and Washington Department of Ecology invalid because the responsible officials failed to adequately consider the direct, indirect, and cumulative impacts of three proposed crude-by-rail terminals in Grays Harbor (Westway, Imperium, and U.S. Development)?
3. Is the MDNS invalid because the responsible officials failed to consider alternatives, incorrectly relied on existing federal and state requirements as mitigation, and failed to adequately condition and/or mitigate the Project?
6. Is the MDNS invalid because the responsible officials failed to require a pre-approval analysis of critical environmental issues, including but not limited to seismic and tsunami hazards, archeological and cultural resources, shipping and train impacts, and oil spill hazards?
7. Is the MDNS invalid because the responsible officials and the Project failed to comply with the requirements of RCW 88.40.025 relating to guarantees of financial responsibility?
8. Is the MDNS invalid because the responsible officials failed to consider or comply with the requirements of RCW 43.143 applicable to ocean resources management?

[3] This list does not include all issues identified in the pre-hearing order. Instead, it includes only those issues that are the subject of the summary judgment motions. Because the Board's decision on issue A.1 results in invalidation of the SEPA Mitigated Determinations of Non-Significances (MDNS) upon which both the Westway and Imperium SSDPs rely, this decision is dispositive of the entire consolidated case.

9. Did the responsible officials' approvals of the MDNS suffer from procedural errors, including failure to give proper notice, failure to consider public comments, and failure to obtain required and/or sufficient information on which to base its decisions?

B. Violations of the Shorelines Management Act:

3. In issuing the Permit, did the responsible official fail to consider and comply with applicable laws and regulations relating to ocean management and ocean uses, including the requirements of Hoquiam Municipal Code 11.04.065, 11.04.180(6), RCW Chapter 43.143, and WAC 173-26-360?
4. In issuing the Permit, did the responsible official fail to consider and comply with the requirements of RCW 88.40.025 relating to guarantees of financial responsibility?
8. Are the Project, Permit, and MDNS invalid because they are inconsistent with all applicable local, state, and federal laws and regulations, including but not limited to Growth Management Act Critical Areas Ordinances (including but not limited to provisions relating to wetlands, seismic hazards, and mandatory buffers), and the Coastal Zone Management Act, 16 U.S.C. § 1451, et seq.?
9. Did the application and the Permit contain insufficient detail to determine its consistency with the Shorelines Management Act, its implementing regulations, the Shorelines Management Plan, SEPA, and the Critical Area Ordinances?
10. Did the responsible official's approval of the Permit suffer from procedural errors, including failure to give proper notice, failure to consider public comments, and failure to obtain required and/or sufficient information on which to base its decisions?

Based upon the records and files in the case, the evidence submitted, and the written legal arguments of counsel,[4] the Board enters the following decision.

[4] QIN requested oral argument on the motion. The Board's presiding officer denies the request based on the compressed schedule for this appeal and the Board's calendar. WAC 461-08-475(3).

BACKGROUND

1. The Projects

a. Westway

Westway currently operates a bulk methanol storage terminal in Hoquiam on the shoreline of Grays Harbor. The facility is located on property owned by the Port of Grays Harbor (Port) and leased by Westway. Westway built the facility in 2009, and began operations at the end of that calendar year. The facility currently includes four 3,340,000 gallon storage tanks, two rail spurs with loading/unloading facilities and a concrete lined containment structure, pipelines, pumps, vapor control equipment, two office buildings, one electrical room, and an old wood frame warehouse building. Butorac Decl., Ex. A.

On December 3, 2012, Westway submitted an application to the City for an SSDP to authorize the expansion of the facility in the shoreline. The purpose of the proposed expansion is to allow for the receipt of crude oil by train, the storage of crude oil from these trains, and the shipment of the crude oil by vessel and/or barge from Port Terminal #1. The proposed expansion includes the addition of four 8,400,000 gallon storage tanks providing a project total storage capacity of 33,600,000 gallons. Each tank will be 150 feet in diameter and 64 feet in height. The tanks will sit on a concrete slab, supported by a series of piles driven approximately 150 feet into the ground. The new tanks will be surrounded by a concrete containment wall, which will have the capacity to contain the total volume of a single tank plus an allowance for rainfall. Butorac Decl., Ex. A.

The existing rail facility will be expanded from two short spurs with a total of 18 loading/ unloading spots to four longer spurs with a total of 76 loading/unloading spots. Westway anticipates that the expanded terminal could result in two additional unit trains[5] every three days (one loaded with oil and one empty). The current volume of train traffic to the Westway Terminal is an average of two to three rail cars per day. A new pipeline will be added to connect the tanks via an existing pipe bridge to the Port Terminal #1. Westway anticipates the expanded terminal will result in 64 barge movements per year. Currently, the facility has three to four vessels per year. Boyles Decl., Exs. A, C; Butorac Decl., Exs. A, C.

b. Imperium

Imperium currently operates a facility for the production of biodiesel fuel and storage of bulk liquids on property owned by the Port. The Imperium facility is at the Port Terminal #1, and is immediately to the west of the Westway Terminal. 1st Zultoski Decl., Ex. 39; Kisielius Decl., Ex. A.

On February 12, 2013, Imperium submitted a permit application to expand its existing facility to allow for the receipt of biofuels, biofuel feedstocks, petroleum products, crude oil and renewable fuels; storage of these bulk liquids; and outbound shipment of the liquids. The proposal includes the addition of nine storage tanks, each with a capacity of 3,360,000 gallons for a project total storage capacity of up to 30,240,000 gallons. Each tank will be 95 feet in

[5] The record on summary judgment does not provide a fixed definition of "unit train." Apparently the number of railroad cars in a unit train can vary because the Westway material describes a unit train as having up to four locomotives and 120 cars, Boyles Decl., Ex. C, p. 2, Butorac Decl., Ex. C, §B.2; the Imperium material describes a unit train as approximately 105 railroad cars, Boyles Decl., Ex. Q, p. 4; and the U.S. Development Group (USD) material describes a unit train as approximately 60 to 120 rail cars, each with a capacity of 680 to 720 barrels. Boyles Decl., Ex. N, p. 9.

diameter and 64 feet in height. A berm designed to contain 100 percent of the total volume of one tank plus an additional six inches of precipitation will surround the tanks. The tank pads will be supported by pilings driven into the ground. 1st Zultoski Decl., Ex. 39; Petition for Review, SHB No. 13-021, Ex. A.

Imperium proposes to expand its existing rail facility by adding approximately 6,100 feet of track in multiple new rail spurs and expanding the existing rail yard. Imperium estimates that the terminal operations could result in an increase of two additional unit trains per day (one loaded and one unloaded) and up to 200 ships or barges per year (400 entry and departure transits). Pipelines will be installed connecting the Port Terminal #1 with the Imperium tank farm. 1st Zultoski Decl., Ex. 39; Petition for Review, SHB No. 13-021, Ex. A.

c. USD

USD is proposing a third project of a similar type bordering Grays Harbor. The project would be a $50 million bulk liquids rail logistics facility at the Port Terminal #3. Boyles Decl., Ex. P. Port Terminal #3 is in the City of Hoquiam between Highway 109 and Grays Harbor. Boyles Decl., Exs. K, N. USD, through its subsidiary Grays Harbor Rail Terminal (GHRT), entered into an Access Agreement with the Port on September 11, 2012, allowing it to complete a feasibility study by December 31, 2012. Boyles Decl., Ex. G. On March 12, 2013, in a briefing to the Port Commission, USD stated that it had performed "due diligence" to determine if the site is appropriate for a rail logistics facility. Boyles Decl., Ex. K. The record on summary judgment also includes supporting documentation for a feasibility study. This documentation includes a preliminary operations plan, which explains that the proposed facility "will include

delivery of various liquid bulk materials, specifically various types of crude oil and condensates." Boyles Decl., Ex. N., p. 9. The facility will be designed to "receive and off-load a maximum of one full unit train every two days on average, providing a maximum receiving capacity of less than 50,000 barrels per day. *Id.* The facility will have approximately six to eight above-ground storage tanks with a total capacity of 800,000 to 1,000,000 barrels. The facility will be developed to support the operation of approximately five vessel calls per month. *Id.* at pp. 9, 10. In April 2013, the Port approved a Grant of Option to Lease to GHRT. The lease provides GHRT 24 months for planning and permitting. Boyles, Ex. O. As the Port stated on its web-site in July of 2013, the lease will allow GHRT to perform "further analysis and obtaining of permits to bring the project to shovel-ready." Boyles Decl., Ex. L. To date, USD has not submitted an application for a shoreline permit for their project. 2nd Butorac Decl., ¶ 13.

2. The State Environmental Policy Act (SEPA) process

As part of their permit application process, Westway and Imperium were required to comply with SEPA. The first step in the SEPA process is the submission of an Environmental Checklist completed by the applicant. After two revisions, Westway submitted its completed checklist with attachments on February 20, 2013. Butorac Decl., ¶ 5, and Exs. A, C. Imperium submitted its completed checklist, with attachments, on February 22, 2013. QIN's Petition for Review (SHB No. 13-021) with attached Ex. A.

Ecology and the City worked together as SEPA Co-leads on both the Westway and Imperium proposals. The summary judgment record contains detailed information regarding the process the Co-leads went through to arrive at a final threshold determination for the Westway

project. The process occurred between December, 2012 and March, 2013, and included meetings between the Co-leads, contacts the Co-leads made with Westway, additional information requested and reviewed from Westway, consultation with other entities, open house meetings in Grays Harbor where the Co-leads provided information to the public, discussions regarding mitigation measures, and the consideration of other applicable laws. During their review of the checklist, the Co-leads also considered the aggregate impacts of the existing and proposed operations and the cumulative impacts of the Westway proposal and the Imperium crude oil proposal. The Co-leads did not consider potential impacts from USD because USD had not submitted an application or environmental checklist. Butorac Decl., ¶¶ 4-6, 10-20, 2nd Butorac Decl., ¶ 13.

After considering the information they had gained during the process described above, the Co-leads determined that the Westway proposal, as mitigated, was not likely to have probable adverse environmental impacts. The Co-leads issued a mitigated determination of non-significance (MDNS) on March 14, 2013, with a 15-day comment period, which they subsequently extended. The Co-leads issued a subsequent and final MDNS on the Westway project on April 4, 2013. Butorac Decl., ¶¶ 20-22, Ex. G.

The record does not contain a similar amount of detail pertaining to the SEPA process conducted on the Imperium project. However, the Co-leads published an MDNS for the Imperium project on May 2, 2013. The Co-leads did not consider potential impacts from USD. 2nd Butorac Decl., ¶ 13; Zultoski Decl., Ex. 39.

The City Shoreline Administrator (Administrator) issued the City's decision approving the Westway SSDP, with conditions, on April 26, 2013. The Administrator issued the City's decision approving the Imperium SSDP, with conditions, on June 14, 2013. QIN's PFR (SHB No. 13-012) with attached Ex. A; QIN's PFR (SHB No. 13-021) with attached Ex. A.

3. Environmental impacts

The SEPA checklists, submitted by Westway and Imperium, and reviewed by the Co-leads, contain many indications of potential environmental impacts, including oil spill risks, increase in rail and vessel traffic, and location of expanded facilities in areas of known natural resource and cultural sensitivity.

The Grays Harbor Estuary is an area rich in environmental resources. The Chehalis River, which borders the Westway and Imperium sites, drains into the Grays Harbor estuary, and is home to several fish species protected under the federal Endangered Species Act (ESA), including bull trout, green sturgeon, and Pacific eulachon. The Grays Harbor Estuary provides marine habitat that supports natural production for chinook, chum and coho salmon, and steelhead. Grays Harbor also supports white sturgeon and Dungeness crab, an economically vital fishery on the coast of Washington. Several ESA-listed and/or state listed bird species are found in the Grays Harbor area including marbled murrelets, brown pelicans, western snowy plovers, and the streaked horned lark. Grays Harbor National Wildlife Refuge is approximately three miles from the Westway and Imperium project sites, and the Pacific Flyway flight corridor for migrating waterfowl crosses both project sites. As many as 24 species of shorebirds use Grays Harbor Refuge. Several species of ESA-listed and state-listed marine mammals use

marine habitat in Grays Harbor, such as the southern resident killer whale, gray whale, humpback whale, sperm whale, and steller sea lion. An oil spill could potentially impact all of these resources. Boyles Decl., Ex. Q; Butorac Decl., Ex. C; 3rd Boyles Decl., Ex. KK, Brennan Decl., Ex. A.

The Westway project site is in an area with high potential for archaeological resources. It is located across from a large fish weir archaeological site and is adjacent to a historic archaeological sawmill site. Neither the Westway nor Imperium sites have any documented known archaeological or cultural resources. 2nd Boyles Decl., Exs DD, EE and FF; Boyles Decl., Ex. Q; Butorac Decl., Ex. C.

Both of these projects are proposed within a recognized tsunami and liquefaction hazard zone.[6] The critical areas report relied on by Westway states that the project is located on dredge soils, has a high liquefaction susceptibility factor, and is rated as a seismic site class D-E. The Imperium critical areas report confirms that the project site is in an area of high liquefaction susceptibility and estimates that during a moderate to severe earthquake, settlement at the ground surface would be around 12 inches. This report also indicates that the site is located within the tsunami inundation area. Butorac Decl., Ex. D; Brennan Decl., Ex. A, Geotechnical Report, pp. 10, 11.

The SEPA checklist for both Westway and Imperium identifies potential impacts from the projected increase in rail and vessel traffic from the projects. The Westway checklist

[6] "Liquefaction is a phenomenon where vibration or shaking of the ground, usually from earthquake forces, results in development of excess pore pressures in loose, saturated soils and subsequent loss of strength in the deposit of soil so affected." Drennan Decl., Ex. A, Geotechnical Report, p. 10.

identifies the increase in train and vessel traffic (from two to three rail cars every day currently, to two unit trains every three days; and from three to four vessels per year currently to 64 barge movements per year). The checklist goes on to recognize that the increase in rail traffic will increase the amount of greenhouse gasses in the state of Washington by approximately 11,329 tons per year, and the increase in vessel traffic will result in 1,595 metric tons of greenhouse gas emissions.[7] Butorac Decl., Ex. C. The Imperium checklist estimates that the project could result in an increase of up to two additional unit trains per day (one loaded and one empty) and up to 200 ships or barges per year (400 entry and departure transits). The checklist estimates that greenhouse gas emissions in Washington State from the additional rail and vessel volumes will be 19,098 metric tons per year. Boyle Decl., Ex. Q; Zultoski Decl., Ex. 39.

In the MDNS issued for each project, the Co-leads address the potential impacts from the increases in rail and vessel traffic, both from each project separately and the two projects combined, primarily through the requirement of the future submission of a Rail Transportation Impact Analysis (RTIA) and a Vessel Transportation Impact Analysis (VTIA). Both MDNSs state that the RTIA and VTIA will "determine the potential for impacts" caused by additional rail and vessel traffic, and shall identify any improvements or mitigation needed. The Co-leads indicate that they considered the cumulative impacts from the Westway and Imperium projects together, but that they did not consider the additional impacts from USD. Butorac Decl., ¶ 11, Boyles Decl., Ex. C; Zultoski Decl., Ex. 39.

[7] The vessel greenhouse gas figure is based on barge movements from the three nautical mile limit to the facility and back. Butorac Decl., Ex. C.

ANALYSIS

1. Summary judgment standard and review of SEPA threshold determination

Summary judgment is a procedure available to avoid unnecessary trials where formal issues cannot be factually supported and cannot lead to, or result in, a favorable outcome to the opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977). The party moving for summary judgment must show there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a summary judgment proceeding is one that will affect the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992).

If the moving party is a respondent and meets this initial showing, the inquiry shifts to the party with the burden of proof at trial. If, at this point, the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, then the trial court should grant the motion. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182, 187 (1989). In making its responsive showing, the nonmoving party cannot rely on mere allegations, unsubstantiated opinions, or conclusory statements, but must set forth specific facts showing that there is a genuine issue for trial. At that point, we consider the evidence and all reasonable inferences therefrom in the light most favorable to the non-moving party. *Id.* at 226.

The Board reviews the City and Ecology's SEPA threshold determination under a "clearly erroneous" legal standard. *Ass'n of Rural Residents v. Kitsap County*, 141 Wn.2d 185,

195-96, 4 P.3d 115 (2000); *Norway Hill Preservation and Protection Ass'n. v. King County Council*, 87 Wn.2d 267, 272-274, 552 P.2d 674 (1976). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Murden Cove Preservation Ass'n v. Kitsap County*, 41 Wn. App. 515, 523, 704 P.2d 1242(1985). For the MDNS to survive judicial scrutiny, the record must demonstrate that "environmental facts were adequately considered in a manner sufficient to establish prima facie compliance with SEPA," and that the agency based its decision to issue an MDNS on information sufficient to evaluate the proposal's environmental impact. *Pease Hill Community Group v. County of Spokane*, 62 Wn. App. 800, 810, 816 P.2d 37 (citations deleted); WAC 197-11-100.

In this case, the material facts necessary to rule on Issue A.1 are not in dispute, and this issue is ripe for summary judgment. In addition, parts of Issues A.3 and A.6, all of Issues A.7, A.8, B.3, and B. 4 are also ripe for summary judgment.

2. SEPA analysis and cumulative impacts from the USD project (Issue A.1).

QIN contends that the MDNS issued by the City and Ecology for the Westway[8] project is clearly erroneous because it failed to include consideration of cumulative impacts from the USD project, along with its consideration of the impacts from Westway and Imperium. Based on the analysis below, the Board concludes the MDNS is clearly erroneous for failing to consider the cumulative impacts of all three projects.

[8] While the QIN motion refers only to the Westway MDNS, QIN's arguments on this issue, and the responses filed by the Respondents, apply equally to the Imperium MDNS. While there are factual differences between the two proposals, these facts are not material to the analysis on this issue.

a. Cumulative Impacts Standard

SEPA requires that "[a]n environmental impact statement (the detailed statement required by RCW 43.21C.030(2)(c)) shall be prepared on proposals for . . . major actions having a probable significant, adverse environmental impact." RCW 43.21C.031(1). The Washington State Supreme Court, in interpreting this requirement, has stated:

> RCW 43.21C.031 mandates that an EIS should be prepared when significant adverse impacts on the environment are "probable," not when they are "inevitable."

King Cnty. v. Washington State Boundary Review Bd. for King Cnty., 122 Wn. 2d 648, 663, 860 P.2d 1024, 1032 (1993). A state or local agency must make a "threshold determination" as to whether an EIS is required, based on whether a project will have a significant adverse environmental impact. RCW 43.21C.031, 033.

As explained in Ecology's SEPA rules, "'Significant' as used in SEPA means a reasonable likelihood of more than a moderate adverse impact on environmental quality." WAC 197-11-794(1). "Impacts" are defined as ". . . the effects or consequences of actions." WAC 197-11-752. "Probable" means:

> . . .likely or reasonably likely to occur, as in 'a reasonable probability of more than a moderate effect on the quality of the environment' (see WAC 197-11-794). Probable is used to distinguish likely impacts from those that merely have a possibility of occurring, but are remote or speculative. This is not meant as a strict statistical probability test.

WAC 197-11-782.

Ecology's SEPA rules provide further guidance on the environmental review process. See WAC 197-11-060. WAC 197-11-060(1) states that, "Environmental review consists of the

range of proposed activities, alternatives, and impacts to be analyzed in an environmental document, in accordance with SEPA's goals and policies." The SEPA rules direct that consideration of environmental impacts include impacts that are likely, and not merely speculative. WAC 197-11-060(4)(a). The rules direct agencies to "carefully consider the range of probable impacts, including short-term and long-term effects. Impacts shall include those that are likely to arise or exist over the lifetime of a proposal or, depending on the particular proposal, longer." WAC 197-11-060(4)(c). A proposal's effects include "direct and indirect impacts caused by a proposal." WAC 197-11-060(4)(d). The rules further clarify that the range of impacts to be analyzed in an EIS include direct, indirect, and cumulative impacts. WAC 197-11-060(4)(e).

When making the threshold determination, WAC 197-11-330(3) requires that agencies take into account that "[s]everal marginal impacts when considered together may result in a significant adverse impact" and that "[a] proposal may to a significant degree . . .[e]stablish a precedent for future actions with significant effects."

Based on the SEPA statute and Ecology's SEPA rules, agencies are required to consider the effects of a proposal's probable impacts combined with the cumulative impacts from other proposals. This interpretation is consistent with the interpretation of the requirement for cumulative impacts under the federal National Environmental Policy Act (NEPA). Washington uses NEPA provisions and case law interpreting NEPA to discern the meaning of SEPA and its implementing regulations. *Pub. Util. Dist. No. 1 of Clark Cnty. v. Pollution Control Hearings*

Bd., 137 Wn. App. 150, 158, 151 P.3d 1067, 1070 (2007). The regulations interpreting NEPA define cumulative impact as:

> [T]he impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7.

This definition, referred to as the "reasonably foreseeable" standard, has been construed and applied in several federal court cases. These cases have concluded that projects need not be final before they are reasonably foreseeable, but that there must be enough information available to permit meaningful consideration. *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1078 (9th Cir. 2011); *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1014 (9th Cir. 2006).

All of the parties, with the exception of Imperium, agree that the standard applicable to the issue of cumulative impacts is whether the future project is reasonably foreseeable.[9] This standard comes from the SEPA statute, RCW 43.21C.031 (mandating preparation of an EIS for major actions having a *probable* significant environmental impact), the SEPA rules, WAC 197-11-782 (defining "probable" to mean "reasonably likely to occur" as opposed to being "remote or speculative") and the definition of *cumulative impact* under NEPA regulations, 40 C.F.R. ¶ 1508.7 (incremental impact of the action when added to "reasonably foreseeable future actions").

[9] Westway states the standard as "reasonably likely to occur." Westway's response to QIN, p. 2.

Imperium argues, however, that the standard for consideration of cumulative impacts under SEPA is narrower than the reasonably foreseeable standard. It contends that there is:

> . . . a whole body of Washington law that suggests that [under SEPA] cumulative impact analyses need only occur when there is some evidence that the project under review will facilitate future action that will result in additional impact, or when the project is dependent on subsequent proposed development.

Imperium's Response to Motions for Partial Summary Judgment, p. 11, 12, citing several Washington cases, the most recent of which is *Gebbers v. Okanogan Cnty. Pub. Util. Dist. No. 1*, 144 Wn. App. 371, 380, 183 P.3d 324, 328 (2008), *rev. denied* 165 Wn.2d 1004, 183 P.3d 324 (2008). While there is support for Imperium's argument in these cases, the Board concludes that this approach to cumulative impacts analysis conflates two separate and distinct SEPA concepts: "cumulative impacts" and "connected actions."

The SEPA rules define "connected actions" as "proposals or parts of proposals which are closely related." WAC 197-11-792(2)(a)(ii). Connected actions are narrowly prescribed to be proposals that:

> (i) Cannot or will not proceed unless the other proposals (or parts of proposals) are implemented simultaneously with them; or
> (ii) Are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation.

WAC 197-11-060(3)(b). The SEPA rules direct agencies to discuss connected actions in the same environmental document. WAC 197-11-060(3)(b).

The SEPA rules, on the other hand, do not offer a definition of "cumulative impacts."[10] While the directive to evaluate "impacts" is clear, and the concept that "impacts" includes "cumulative" as distinct from "direct and indirect impacts" is clear, a precise definition of "cumulative impacts" is missing. WAC 197-11-060(4), WAC 197-11-792(2)(c). The SEPA rules, however, plainly set out connected actions and cumulative impacts as two distinct concepts. See WAC 197-11-060(3)(b) and WAC 197-060(3), (4).

The Ninth Circuit offers a succinct explanation of "cumulative impacts" and "connected actions" in *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 896 (9th Cir. 2002), a decision involving the review of a timber sale under NEPA. In *Native Ecosystems,* the Court stated:

> The obligation to wrap several cumulative action proposals into one EIS for decision making purposes is separate and distinct from the requirement to consider in the environmental review of one particular proposal, the cumulative impact of that one proposal when taken together with other proposed or reasonably foreseeable actions.

Id. at 896, n. 2.

Other decisions, however, have muddied the distinction between these two concepts. In *Gebbers*, a case heavily relied on by Imperium, the Court was asked to review a final EIS, which was prepared to evaluate the impacts from a proposal to build a transmission line and substation between Pateros and Twisp. *Gebbers,* at 376, 377. A citizens group argued that the EIS was deficient because it failed to include an analysis of rebuilding the new line. *Id.,* at 380. In a holding which intertwines the concepts of connected actions and cumulative impacts analysis, the Court states that "When, like here, any future project [the rebuilding of the existing line] is

[10] Because the SEPA statute and/or rules do not define "cumulative impacts," it is appropriate to look to the federal definition of cumulative impacts for guidance. *See PUD No. 1,* at 158.

not dependent on the proposed action [building of a new connection line], no cumulative impacts analysis is required." *Id.* at 386. In rejecting what it referred to as a "cumulative impacts analysis," the court was referring only to the lack of interconnection between the proposal for the new transmission line and future rebuilds of that line (i.e., that there had been no piecemealing or improper segmentation of the proposal analyzed in the EIS), such that its impacts should have been analyzed as a single proposal in a single environmental document. The *Gebbers* court, after noting that SEPA does not define "*cumulative impacts*," turns to the NEPA "reasonably foreseeable" definition to fill the definitional gap. *Gebbers,* at 380.

Gebbers, however, does not support the notion that a cumulative impact analysis of past, present, and reasonably foreseeable future actions is not required. *Id.* at 381. Simply put, in *Gebbers*, future updates to the proposed transmission line were neither part of the transmission line proposal nor reasonable foreseeable future actions. Hence, they did not violate SEPA's piecemealing rule nor require a cumulative impact analysis. *Cheney v. City of Mountlake Terrace*, 87 Wn.2d at 338, 343-45, 552 P.2d 184 (1976) (evaluation of impacts from a possible future development of a parcel of property was not required in the EIS prepared for the permit to construct the road, when the road was independent of the development, because this did not involve improper segmentation); *SEAPC v. Cammack II Orchards*, 49 Wn. App. 609, 614, 615, 744 P.2d 1101 (1987) (EIS need not consider impacts of subsequent phases when initial phase is substantially independent and would be constructed without regard to future developments, consistent with the SEPA rule allowing for phased environmental review). Neither these nor the

Gebbers court rejected the use of the reasonably foreseeable standard for evaluation of cumulative impacts from multiple unrelated projects.

The Board is not convinced, based on this line of cases, that Washington courts have adopted the narrow standard for evaluation of cumulative impacts argued for by Imperium. A close reading of *Gebbers* does not support this conclusion. NEPA's use of the reasonably foreseeable standard for cumulative impacts makes it unlikely, in the Board's view, that the Legislature intended the cumulative impacts analysis under SEPA to be triggered only by connected actions. The connected actions standard proposed by Imperium is less protective of the environment than the reasonably foreseeable NEPA standard, a result that is contrary to the "considerably stronger" policy statement in SEPA than in NEPA. *ASARCO, Inc. v. Air Quality Coal*, 92 Wn.2d 685, 709, 601 P.2d 501 (1979). While projects may not be sufficiently related to require analysis as connected actions and part of the same proposal, their individual cumulative impacts must be analyzed together in order to make a significance determination. The Board concludes that the standard for evaluation of cumulative impacts under SEPA is whether the other project(s) is reasonably foreseeable.

b. USD project is reasonably foreseeable.

The evidence in the record establishes that the USD project is reasonably foreseeable. USD entered into an 'access agreement' with the Port in September 2012 that allowed USD to conduct feasibility studies more easily at Terminal #3. Boyles Decl., Ex. G. USD sent its completed feasibility study to the Port on February 28, 2013. Boyles Decl., Ex. N. On March 12, 2013, USD provided an updated briefing to the Port on its "Proposed Terminal 3 Facility."

Boyles Decl., Ex. K. Subsequent to completing the feasibility study, USD entered an Option to Lease the site from the Port subject to obtaining necessary permits and other approvals. Boyles Decl., Ex. L. USD has participated in community workshops put on by the Port of Grays Harbor on crude-by-rail. In those community workshops, the USD project has been identified as one of three crude-by-rail proposals. Boyles Decl., Ex. J, U. The Port's website and publications also provide descriptions of, and fact sheets for, the three crude-by-rail proposals. Boyles Decl., Ex. B, D, L, M, O. The totality of this undisputed evidence supports the conclusion that the USD project is reasonably foreseeable.

There is also undisputed evidence in the record to conclude that the project is sufficiently defined to allow for meaningful review. USD's feasibility study, which it sent to the Port in February, 2013, included estimates of the maximum receiving capacity of the proposed operation (less than 50,000 barrels per day); the total crude capacity of the tanks (six to eight above-ground tanks with combined storage of 800,000-1,000,000 barrels); the anticipated increase in ship traffic due to the operation (facility will support five vessel calls per month); and the anticipated increase in train traffic (facility designed to receive and off-load a maximum of one full unit train every two days on average). Boyles Decl., Ex. N. This information was sufficient to allow the Co-leads to evaluate the potential increase in vessel and train traffic from the three proposals, as well as to consider the greater risk of oil spills.

While the Respondents[11] do not contest the facts established in the record on summary judgment, they do argue that the facts are insufficient to meet the legal standard of reasonably foreseeable or reasonably likely to occur, and that the information on USD's proposal is insufficient to provide the Co-leads with a basis to evaluate the potential for cumulative impacts from the proposal. They argue that the evidence presented by QIN shows only that USD is exercising due diligence in exploring the feasibility and economics of proposing an additional oil terminal at Grays Harbor. They point to statements in the record from the Ecology SEPA lead that the Port officials characterized the USD project as "not certain" and that the USD project was still in a conceptual stage because it was undergoing changes as evidenced by communication from EFSEC regarding changes in the USD project. 2nd Butorac Decl., ¶ 13 and Ex. E. Therefore, they argue, the project is far from being inevitable, and in fact remains speculative.

"Inevitable," however, is not the standard. The Ninth Circuit Court of Appeals has recognized that even reasonably foreseeable projects have some level of speculation. *N. Plains Res. Council*, at 1078-79. In that case, the Court said that well-drilling estimates extending 20 years into the future and involving a wide range of number of wells (between 10,000 and 26,000 coal bed methane wells and between 250 and 975 conventional oil and gas wells) had reasonably

[11] Ecology does not separately brief this issue, although it does join in the other parties' briefing. During the SEPA process, the Ecology Spills Program reached the conclusion that the cumulative impacts of the three projects should be evaluated together. In a memo from the Ecology Spills Project Manager to Ecology's Southwest Regional Office SEPA leads, the manager stated: "Based on our understanding of the similarity of the three proposals, Westway, Imperium, and U.S. Development Corporation; we believe that the effect of all facility operations together should be assessed, thus warranting a programmatic review of these projects' impacts. From a spills point of view, it is important to assess spill risk from increased vessel traffic, oil handling, and transfer operations as [a] whole." Boyles Decl., Ex. CC.

foreseeable impacts. Similarly, the court in *Environmental Protection Information Center* concluded that a timber sale, while not initially reasonably foreseeable, became reasonably foreseeably when "although the proposal was still not firm, enough was then known to permit a general discussion of effects." *Environmental Protection Center* at 1015. Here, although the USD project is not completely firm, or inevitable, it is reasonably foreseeable.

The Co-leads know enough about the USD project to make a general discussion of its potential impacts, in combination with the other two pending proposals, meaningful. They know its location on Grays Harbor, which is the same harbor as the other two facilities. They know its purpose, which is the same as the Westway and Imperium expansions, is to receive multiple grades of crude-by-rail, store it in terminals, and transfer it to vessels. They know its maximum capacity of proposed liquid storage, along with the daily maximum capacity of liquids it can handle. They know the number of anticipated rail unit trains and vessels visiting the planned new facility. This information is sufficient to merit its inclusion in the consideration of cumulative impacts from all three projects.

Here, based on uncontroverted facts in the record, the Board concludes that the USD project is reasonably foreseeable, and that the project is sufficiently defined to allow for meaningful review. Therefore, the Co-leads should have considered the cumulative impacts from the USD project along with the cumulative impacts from Westway and Imperium in making their threshold determination. Their failure to do so makes the MDNS clearly erroneous. The Board grants summary judgment to QIN and FOGH on this portion of Issue 1.

3. SEPA analysis of impacts from increases to rail and vessel traffic from Westway alone, and Westway and Imperium cumulatively (Parts of Issue A.1 and A.6)

QIN raises a second challenge to the validity of the Westway MDNS, contending that the consideration of rail and vessel impacts both from the Westway project alone, and the Westway and Imperium projects combined, was inadequate. One key aspect of this challenge is that the applicant was not required to submit information necessary for consideration of these impacts (both individually and collectively) until after the issuance of the MDNS and approval of the SSDP. The Board agrees with QIN that this process does not comply with the requirements of SEPA.

Unlike their approach in handling potential impacts from USD, Ecology and the City correctly recognized that they needed to consider potential impacts from the Imperium proposal when evaluating the environmental impacts for the Westway project. The MDNS for the Westway project contains the following explanation of the Co-leads decision to address the Imperium project:

> As allowed in SEPA regulations (WAC 197-11-060) the Co-lead Agencies recognize this is one of two similar crude oil terminal proposals in the Grays Harbor area that have been submitted for review. The agencies have considered the aggregate impacts of the existing Westway operations and proposed operations and the cumulative impacts of the Westway proposal and the Imperium crude oil proposal during this evaluation. The proposals are not being considered a single course of action under WAC 197-11-060. They are not interdependent and each proposal can be implemented on its own. The potential vessel and rail traffic impacts from the Imperium proposal are being considered because of the potential for indirect or cumulative impacts resulting from the two proposals using the same transportation pathways and constructed in a similar timeframe (WAC 197-11-792).

Boyles Decl., Ex. C, p. 4.

Both the Westway amended checklist and the Imperium checklist provide information on numbers of additional trains and vessels, in categories of the checklist identifying impacts to air and transportation. Butorac Decl., Ex. C; Boyles Decl., Ex. Q. The MDNS for the Westway project uses the numbers from both the Westway and Imperium checklist and combines them into a chart.[12] Boyles Decl., Ex. C, p. 9. Based on the chart, the number of vessels per year into and out of Grays Harbor will increase from a 2012 level of 168 vessels to a projected level of 688 vessels. The number of trains per year into and out of the Port of Grays Harbor will increase from a 2012 level of 730 unit trains to a projected level of 1,703 unit trains. After charting these numbers, the Co-leads reach the conclusion, without further analysis or explanation, that they do not expect the trains from just the Westway project to significantly impact existing traffic patterns at two places where the trains cross roads (the Olympic Gateway shopping center and the Port Industrial Road).

The conclusions of the MDNS are problematic for two reasons. First, while the chart includes numbers from both the Westway and Imperium proposals, the Co-leads apparently based the threshold determination on the Westway traffic additions alone. *Compare* Boyles Decl., Ex. C, p. 10 ("Two additional unit trains shall transit through the Aberdeen/Hoquiam area . . .every three days but are not expected to significantly impact existing traffic patterns. . . ." *with id.* at p. 10 (Westway/Imperium totals of approximately 18 additional trains per week)). There is no analysis provided of the increase in rail traffic from the combined proposals.

[12] The MDNS for the Imperium project uses the same approach. *See* Zultoski Decl., Ex. 39, p. 11.

Second, the Co-leads rely on the yet-to-be-completed RTIA and VTIA to generate information to determine the potential for impacts from the two proposals and any improvements or mitigation needed. The MDNS states "[t]he RTIA *will determine the potential for impacts* directly caused by changes and increases in rail traffic on local vehicular traffic and other rail commodities." Boyles Decl., Ex. C., p. 10 (emphasis added). A similar requirement is imposed for vessel traffic, with a similar purpose ("The VTIA *will determine the potential for impacts* that may result from changes or increases in vessel traffic in Grays Harbor.") *Id.* (emphasis added). The information the applicants will develop in the RTIA and VTIA is the information that the Co-leads should have before they make their threshold determination, not afterward. To wait until after the SEPA threshold determination is made, and the SSDP is issued, to obtain information that identifies whether potential impacts from vessel and train increases will be significant and whether mitigation is necessary, does not comply with the mandate of SEPA to "provide consideration of environmental factors at the earliest possible stage to allow decisions to be based on complete disclosure of environmental consequences." *King Cnty. v. Washington State Boundary Review Bd. for King Cnty.*, 122 Wn.2d 648, 663, 860 P.2d 1024, 1033 (1993).

The Respondents respond to this argument through both legal and factual arguments. In their legal argument, they contend that it is acceptable to rely on future environmental studies and cite two appellate cases and one Shorelines Hearings Board case in support of their argument.[13] In *West 514, Inc. v. Spokane Co.,* 53 Wn. App 838, 848-49, 770 P.2d 1065 (1989),

[13] The Co-leads also cite *Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 601-02, 90 P.3d 659 (2004)(approving conditions on a CWA §401 certification that required submission of revised studies, plans, and

rev. denied 113 Wn. 2d 1005(1989), the Court upheld an MDNS issued in connection with the approval of a site development plan for a shopping mall which required compliance with a future study. The West court stated "when a governmental agency makes a negative threshold determination, it must show it considered environmental factors 'in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA.'" *West 514* at 848-49 *(citations deleted).* The Court in *West 514* concluded this standard was satisfied by the MDNS issued in that case, even though it contained a condition requiring compliance with a future study, because the SEPA responsible officials issued the MDNS only after they had adopted the pertinent parts of a prior EIS detailing the impacts expected from a similar abandoned project at the same site. *Id.* at 849. Hence, this case is not relevant to the present case.

In *Anderson v. Pierce Cnty.*, 86 Wn. App. 290, 304-05, 936 P.2d 432, 440 (1997), the second case relied upon by the Respondents, the Court affirmed an MDNS which, while including a condition to submit a final mitigation plan, was issued only after the impacts of the project had been determined. The Court in that case described the threshold determination process as follows:

> Our review of the record indicates that PALS [the Pierce County Planning Department] thoroughly considered appropriate environmental factors in analyzing RPW's CUP application and environmental checklist, reviewing comments from other state agencies, and formulating 54 mitigation measures included in the MDNS. After accepting comments and analyzing the proposal, PALS initially determined that the RPW Project was reasonably likely to have a "significant adverse environmental impact." WAC 197–11–330(1)(b). PALS

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reports in the future.) This is not a case involving a SEPA threshold determination, and therefore is not applicable here.

> and RPW then worked cooperatively to reduce the project's significant adverse environmental impacts. WAC 197–11–350(2). RPW altered its plans, and PALS imposed substantial mitigating measures. These mitigation measures reduced all significant adverse environmental impacts below the threshold level of significance, such that an EIS was no longer required. WAC 197–11–350(5).

Anderson, at 304-05 (footnote omitted). Thus, the impacts had been clearly identified, as well as the needed mitigation; the submission of the final mitigation plan would merely reflect them. This case is not relevant to the present case.

In the Shoreline Hearings Board case cited by Respondents, *Overaa v. Bauer*, SHB No. 10-015 (2011), the Board addressed a situation in which future studies, included as conditions in an MDNS, were not expected to reveal any new significant adverse impacts. The Board concluded that the county had the information necessary to determine whether the project would have significant environmental impact at the time it issued the DNS, and that the study would not provide pertinent information. *Id.* at CL 18. The Board, in fact, remanded the MDNS and ordered the county to either modify or eliminate the future study condition because the results were not necessary for the threshold determination. *Id.* at Order.

Here, unlike *West 514*, there has been no prior EIS completed to provide information regarding the impacts from this level of increase in rail and vessel traffic. Unlike *Anderson*, there have been no major changes made to the proposal prior to the issuance of the MDNS to reduce the identified impacts. Unlike *Overaa*, the RTIA and VTIA studies are fundamental and vital to the determination of whether the rail and vessel increases that will result from these two projects, individually and cumulatively, will create significant adverse impacts.

The Co-leads argue as a factual matter that they determined that there were not going to be probable significant adverse impacts from the increase in rail and vessel traffic from these two proposals. They state they were ". . . told by the subject matter experts, the Port, and the rail company, that there would be no probable significant impacts." They explain that they required the RTIA and VTIA studies, merely to ". . . verify that there would be no probable significant impacts and also, for safety and clarity, to document the information on how things would be done in Grays Harbor." Toteff Decl., ¶¶ 5, 6. While the Co-leads may have reached the conclusion that there was not likely to be more than a moderate environmental impact from 520 additional vessel transits per year in Grays Harbor, and 973 unit trains per year to the Port of Grays Harbor, they did not share the basis for that conclusion in any of the SEPA documents. Further, the Co-leads' after-the-fact explanation as to why they required the preparation of the RTIA and VTIA, after they had already concluded there would not be impacts, is not supported by the required scope of the RTIA and VTIA analysis. The scoping documents for the RTIA and VTIA clearly focus on evaluating potential adverse impacts. Toteff Decl., Ex. B, Contract and Scope of Services document for Westway, p. 1, 2 ("Two of the mitigation measures required in the MDNS as currently published includes the need to further evaluate potential adverse impacts of the proposal by conducting a Rail Transportation Impact Analysis (RTIA) and a Vessel Transportation Impact Analysis (VTIA) that would identify potential transportation impacts for both modes of travel in and around Grays Harbor.") The objective of Task 1 is stated as "Evaluate the potential adverse impacts to existing railroad and roadway traffic along the rail route resulting from projected rail traffic as defined by the traffic table provide above. The

analysis and potential mitigation measures included in the analysis will be for trains during both peak and non-peak traffic hours along the rail route from Centralia to the facility." *See also*, Toteff Decl., Ex. A, Contract and Scope of Services document for Imperium.

Based on the information in the MDNS issued for the Westway project, the Co-leads' factual statements in the declarations filed in support of these motions, and the responsibilities imposed on SEPA responsible officials when making a threshold determination, the Board is left with a firm and deep conviction that the Co-leads clearly erred in concluding that there would not be probable significant impacts to the environment from the increases in rail and vessel traffic prior to receipt of the RTIA and VTIAs. The Board grants summary judgment to QIN on those parts of issue A.1 and A.6 pertaining to the lack of pre-approval analysis of rail and shipping impacts.

4. SEPA analysis of other individual and cumulative impacts and failure to require pre-approval analysis (Remainder of Issues A.1and A.6)

The Petitioners raise other factual challenges to the MDNS. They contend that the Westway MDNS failed to adequately consider the cumulative risks posed by the Westway and Imperium proposals, and to require sufficient pre-approval analysis of, potential impacts from oil spills, seismic and tsunami events, greenhouse gas emissions, impacts on marine life, impacts on recreational uses, and impacts to archeological and cultural resources. If the Board were not invalidating the MDNS on other grounds, these challenges would need to proceed to an evidentiary hearing. They are highly factual, and there has been a sufficient showing made of disputed issues of fact to require a hearing. However, because the Board is invalidating the

MDNS and remanding it back to Ecology and the City, it is unnecessary to conduct a hearing on the remaining issues pertaining to the MDNS.

Although these matters will not proceed to hearing at this time, the Board notes that there are areas of the existing SEPA review, in addition to the failure to consider cumulative impacts from USD, and the failure to require the RTIA and VTIA prior to the issuance of the MDNS, that it finds troubling. In particular, the current record before the Board presents troubling questions of the adequacy of the analysis done regarding the potential for individual and cumulative impacts from oil spills, seismic events, greenhouse gas emissions, and impacts to cultural resources prior to making the threshold determination. The pre-threshold determination analysis of cultural resources, for example, appears incomplete. Despite information from the Department of Archeology and Historic Preservation (DAHP) that the project area has a high potential for containing archeology resources, and their recommendation that a professional archaeological survey of the project area should occur before ground breaking activities, the MDNS reaches the conclusion that a condition requiring construction to be halted in the vicinity of any potentially historical objects or other resources found during construction, adequately mitigates any potential for impact. Boyles Decl., Ex. C, p. 9. While the Co-leads argue that the information from DAHP was conclusory, and that prior construction on the site revealed no historic or cultural resources, they cite no evidence for this statement. Ecology and City's Reply, pp. 7-8. The Co-leads might have been able to prove at hearing that there would not be a potential for impact to archeological resources, however, the Board is not convinced by the record on summary judgment alone that this is the case.

The Board also encourages the inclusion of more analysis in the SEPA documents, so that the public and future reviewing bodies can be confident that the Co-leads analyzed all potential impacts. As an example, the Co-leads acknowledge that different types of crude oil could have different characteristics when spilled, and that the MDNS does not analyze or address the difference. Ecology and City Response, p. 10. They then go on to explain in briefing that they relied on current regulatory requirements regarding oil spills to address any potential impacts from any types of spills. *Id.* at 10-14. While the Co-leads might have been able to prove at a hearing that other regulatory requirements are sufficient to mitigate for impacts from spills of any type of oil, the Co-leads do not provide this information in the SEPA documents themselves.[14] Although SEPA may not require "explicit" mention of every minor potential impact in a decision document, as argued by the Co-leads, certainly an impact with the potential to "wipe out generation(s) of a livelihood of work they [the shellfish folks or agricultural families, or tribes and local communities] have enjoyed and are skilled to do" should be explicitly addressed. 3rd Boyles Decl., Ex. JJ.

5. Consideration of alternatives, reliance on existing laws, and adequate conditions (Issue A.3).

The Petitioners attack the validity of the Westway MDNS on two other legal grounds.[15] First, they contend that the MDNS is invalid because it does not consider alternatives to the

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[14] As is apparent from record on summary judgment, the Ecology Spills Program had concerns. See 3rd Boyles Decl. Exs. II, Washington 's oil movement evolution: Talking points 02-12-2103 (draft) at 4-5, Ex. JJ, Email from Dale Jensen, Ecology Spills Program, Re: Aberdeen media on Crude By Rail Public Meeting -250 attend meeting (Feb. 1, 2013): "Crude or refined products have not been moved out of the Grays Harbor in the large quantities as is being proposed . . .ever. . . Crude oil . . . no matter the makeup, behaves differently than the refined product . . . ."

[15] The third part of issue A.3 is whether the MDNS is adequately conditioned and/or mitigated. Because the Board has invalidated the MDNS on other grounds, and therefore the SEPA process will need to redone, the Board concludes that the question of the validity of these conditions on the MDNS is now moot.

proposal. Secondly, they contend that it incorrectly relies on state and federal laws as mitigation. The Respondents move for summary judgment on both of these contentions.

The Respondents argue that there is no requirement in SEPA that SEPA officials consider alternatives to a proposal prior to preparation of an EIS. See RCW 43.21C.030(2)(c)(iii) (requiring in every EIS, consideration of alternatives to the proposed action.) Neither the Environmental Petitioners nor QIN cites to any such requirement, nor does the Board know of any. In fact, QIN concedes this portion of Issue A.3. *See* QIN's Response Brief, p. 10, n. 9. The Board grants summary judgment to the Respondents on this issue, noting that this does not mean it is inappropriate to consider alternatives at the threshold determination stage – just that it is not explicitly required by SEPA.

The second contention, that the Co-leads incorrectly relied on state and federal law as mitigation, is not as straightforward. The Respondents correctly state, and QIN concedes, "Reliance on state and federal legal requirements in an MDNS plainly is appropriate." City and Ecology's Motion, p. 13, citing WAC 197-11-330(1)(c)(in making threshold determination, lead agency should consider mitigation required by other environmental laws); QIN response brief, p. 11. The issue, however, as recognized by all parties, is whether the Co-leads supported their reliance on existing laws and regulations with sufficient analysis. The Board concludes that the evaluating agency cannot "simply list generally-applicable laws that a project must by law comply with and, without more, conclude that compliance will be sufficient to render impacts insignificant." QIN Response Brief, p. 12.

Here, the MDNS does more than just list the applicable laws. A good example of this can be seen in section 7 of the MDNS where spill prevention is addressed. Boyles Decl., Ex. C., pp. 6-8. The MDNS states that Washington State has strong oil spill prevention, preparedness and response regulations, and then goes on to generally discuss those requirements. It does not, however, address the potential impacts from oil spills from these proposals (including quantities and types of oil, locations of potential spills, and impacts to resources). In their summary judgment material, Ecology and the City provide more information regarding the information the Co-leads considered in determining that existing laws were adequate mitigation for the potential for impacts from oil spills. 2nd Butorac Decl., ¶¶ 8-10. This analysis, however, is absent from the SEPA documentation.

Here again, the Board concludes that a factual hearing would be necessary to rule on whether the MDNS's extensive reliance on existing laws was appropriate. When, in response to this opinion, the Co-leads take a second look at the SEPA MDNS, the Board encourages the Co-leads to identify potential impacts and then analyze how existing laws will mitigate for those impacts. The SEPA documents themselves should reflect this analysis.

The Board grants summary judgment to Respondents on the legal questions of whether alternatives must be analyzed in a threshold determination and whether an MDNS can rely on existing laws for mitigation. However, on the factual question of whether the Westway MDNS inappropriately relied on existing laws without sufficient analysis, the Board declines to rule, given the invalidity of the MDNS on other grounds.

6. Compliance with RCW 88.40.025 (Issue A.7 and B.4)

RCW 88.40.025 requires a facility to demonstrate financial responsibility in an amount determined by Ecology to compensate the affected state and local counties and cities for damages from a worst case spill of oil into the waters of the state. The statute directs Ecology to consider various factors such as the amount of oil that could be spilled, the costs of response, damages, operations at the facility, and affordability of financial responsibility. RCW 88.40.025. RCW 88.46.040(2)(a) requires that a spill prevention plan include any applicable state or federal financial responsibility requirements.

Issues A.7 and B.4 pose the question of whether the MDNS and the SSDP for the Westway facility are invalid because neither requires that Westway demonstrate financial responsibility. The Respondents move for summary judgment on these issues, contending that financial responsibility guarantees are unrelated to potential environmental impacts, and that the SMA and local shoreline master program (SMP) do not require evaluation of this statute when reviewing an SSDP.

In response, Petitioners point out that the MDNS relies, in part, on the requirement that Westway comply with an Ecology-approved spill prevention plan as mitigation for the potential impacts from oil spills. The statute requires that a spill prevention plan show compliance with financial responsibility requirements. *See* RCW 88.46.040(2)(a). They contend that this means that Westway must show financial responsibility as part of the SEPA process and that its failure to do so to date invalidates the MDNS.

After consideration of Petitioners arguments, the Board concludes that an appropriate evaluation of SEPA impacts by the Co-leads did not require Westway to make a showing of compliance with RCW 88.40.025. As pointed out by the Respondents, the spill prevention plan is not yet required, and therefore it is premature to contend that Westway is out of compliance with one of the plan's requirements by not having made a showing of financial responsibility. If Westway fails to establish a showing of financial responsibility at the time it submits a spill plan, it will be subject to enforcement and penalty sanctions. WAC 173-180-670, 173-180-065. Spill plans, along with the required showing of financial responsibility, will be required before the facilities can begin operations. Butorac Decl., Ex. G, p. 3. Importantly, as pointed out by Ecology, regardless of any financial assurances, a responsible party is strictly liable for unlimited oil spill costs and damages. RCW 90.56.360, 370.

Further no party points to any requirements in the SMA or local SMP requiring a showing of compliance with RCW 88.40.025 prior to approval of an SSPD, and the Board is not aware of any such requirement. The Board grants summary judgment to Respondents on Issues A.7 and B.4.

7. Compliance with Ocean Resources Management Act (Issues A.8 and B.3)

The Ocean Resources Management Act (ORMA), ch. 43.143 RCW, adopted in 1989, requires local governments adjacent to certain defined coastal waters to incorporate policies, guidelines, and project review criteria for "ocean uses" into their shoreline master programs. Ecology has implemented ORMA through the adoption of WAC 173-26-360, which includes a definition of the critical term "Ocean uses". WAC 173-26-360(3) provides:

> 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.

Hoquiam's Shoreline Master Program includes provisions mirroring these statutory and regulatory requirements. HMC 11.04.030(20), 11.04.180(6).

Ocean uses, as defined in WAC 173-26-360(3), are "activities or developments" involving "renewable/and or non-renewable resources that occur on Washington's coastal waters." The definition goes on to clarify that "Ocean uses involving nonrenewable resources include such activities as extraction of oil, gas and minerals, energy production, disposal of waste products, and salvage." From this definition, it is clear that Ecology understands that the Legislature designed ORMA to address facilities directly engaged in resource exploration and extraction activities in Washington waters.

As further clarification of this purpose, the regulation defines specific categories of ocean uses. "Oil and gas uses and activities" are those that "involve the extraction of oil and gas resources from beneath the ocean." WAC 173-26-360(8). Ocean uses that are considered "transportation uses" are those 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 proposed Westway terminal does not fall within these definitions.

Westway does not intend to extract or otherwise service the extraction of crude oil or any other resources *from Washington waters*. It is not transporting oil from *beneath the ocean*. Rather, the Project will facilitate the movement of crude oil from and to areas outside the Washington border.

Petitioners argue for a very broad interpretation of "ocean uses" based on the policy goals of ORMA. Their proposed interpretation, however, would expand ORMA's reach and require ORMA analysis for every transportation project in ports along the Washington coast, regardless of whether those projects transport extracted materials from the outer continental shelf. The Petitioners offer no evidence that ORMA, which has been in place in Washington for 24 years, has ever been interpreted in this manner nor that this interpretation is consistent with its stated purposes and administration by the agency primarily responsible for its administration, Ecology.

The critical term "ocean uses" has been defined by Ecology, the agency charged with implementation of ORMA through the SMA, in WAC 173-26-360. The City has further implemented this definition through its SMP. The Board must apply that regulatory definition. Based on the plain language of WAC 173-26-360, the Westway facility is not a facility involved in an "ocean use" as defined by Ecology regulation. WAC 173-26-360. *See also* HMC 11.04.065, 11.04.180(6).

Because Westway is not proposing an ocean use, its facility is not subject to the provisions of ORMA, through the provisions of the SMA and the local SMP. Further, there is no requirement that the SEPA Co-leads consider the provisions of ORMA when reaching a

threshold determination for the same reason: Westway proposes no ocean use. The Board grants summary judgment to the respondents on issues A.8 and B.3.

8. Issue A.9, and B.8, 9 and 10 are now moot

Issue A.9 raises challenges to procedural aspects of the SEPA MDNS, such as notice, consideration of comments, and obtaining sufficient information. Because the Board is invalidating the MDNS on other grounds, and the City and Ecology will need to go through another SEPA process in adopting a new threshold determination, a challenge to the process on the existing MDNS is now moot. Similarly, Issue B.10, which raises challenges to the SSDP based on alleged procedural errors, is also moot. Other challenges to the MDNS and SSDP's validity based on compliance with the SMA, the local SMP, the Coastal Zone Management Act, and critical areas ordinances are also moot because of the invalidity of the MDNS on other grounds.[16] The Board declines to address these moot issues.

Based on the foregoing analysis, the Board enters the following:

ORDER

1. Summary judgment is granted to Petitioners on Issues A.1 and parts of A.6 as set forth in this Order.

2. Summary judgment is granted to Respondents on parts of Issue A.3, and all of issues A.7, A.8, B.3, and B.4.

[16] The Board does note that the Coastal Zone Management Act is applicable only to projects requiring a federal license or permit. 16 U.S.C. § 1456(c)(3)(A). There is no indication in the record that such federal authorization is required for the Westway project.

3. The City's approvals of the Westway and Imperium SSDPs are reversed based on the invalidity of the underlying MDNSs. This matter is remanded to the City for further SEPA analysis consistent with this opinion.

SO ORDERED this 9th day of December, 2013.

SHORELINES HEARINGS BOARD

TOM MCDONALD, Chair,

KATHLEEN D. MIX, Member

JOAN MARCHIORO, Member

PAMELA KRUEGER, Member

-See Dissent and Partial Concurrence-
GRANT BECK, Member

-See Dissent and Partial Concurrence-
JOHN BOLENDER, Member

Kay M. Brown, Presiding
Administrative Appeals Judge

Chapter 43.143 RCW
OCEAN RESOURCES MANAGEMENT ACT

RCW Sections

Notes:

Oil or gas exploration in marine waters: RCW 90.58.550.

Transport of petroleum products or hazardous substances: Chapter 88.40 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.]

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.]

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.]

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.]

43.143.050
Washington coastal marine advisory council.

(1) The Washington coastal marine advisory council is established in the executive office of the governor to fulfill the duties outlined in RCW 43.143.060.

(2)(a) Voting members of the Washington coastal marine advisory council shall be appointed by the governor or the governor's designee. The council consists of the following voting members:

(i) The governor or the governor's designee;

(ii) The director or commissioner, or the director's or commissioner's designee, of the following agencies:

(A) The department of ecology;

(B) The department of natural resources;

(C) The department of fish and wildlife;

(D) The state parks and recreation commission;

(E) The department of commerce; and

(F) Washington sea grant;

(iii) The following members of the Washington coastal marine advisory council established by the department of ecology and as existing on January 15, 2013:

(A) One citizen from a coastal community;

(B) Two persons representing coastal commercial fishing;

(C) One representative from a coastal conservation group;

(D) One representative from a coastal economic development group;

(E) One representative from an educational institution;

(F) Two representatives from energy industries or organizations, one of which must be from the coast;

(G) One person representing coastal recreation;

(H) One person representing coastal recreational fishing;

(I) One person representing coastal shellfish aquaculture;

(J) One representative from the coastal shipping industry;

(K) One representative from a science organization;

(L) One representative from the coastal Washington sustainable salmon partnership;

(M) One representative from a coastal port; and

(N) One representative from each outer coast marine resources committee, to be selected by the marine resources committee.

(b) The Washington coastal marine advisory council shall adopt bylaws and operating procedures that may be modified from time to time by the council.

(3) The Washington coastal marine advisory council may invite state, tribal, local governments, federal agencies, scientific experts, and others with responsibility for the study and management of coastal and ocean resources or regulation of coastal and ocean activities to designate a liaison to the council to attend council meetings, respond to council requests for technical and policy information, perform collaborative research, and review any draft materials prepared by the council. The council may also invite representatives from other coastal states or Canadian provinces to participate, when appropriate, as nonvoting members.

(4) The chair of the Washington coastal marine advisory council must be nominated and elected by a

majority of councilmembers. The term of the chair is one year, and the position is eligible for reelection. The agenda for each meeting must be developed as a collaborative process by councilmembers.

(5) The term of office of each member appointed by the governor is four years. Members are eligible for reappointment.

(6) The Washington coastal marine advisory council shall utilize a consensus approach to decision making. The council may put a decision to a vote among councilmembers, in the event that consensus cannot be reached. The council must include in its bylaws guidelines describing how consensus works and when a lack of consensus among councilmembers will trigger a vote.

(7) Consistent with available resources, the Washington coastal marine advisory council may hire a neutral convener to assist in the performance of the council's duties, including but not limited to the dissemination of information to all parties, facilitating selected tasks as requested by the councilmembers, and facilitation of setting meeting agendas.

(8) The department of ecology shall provide administrative and primary staff support for the Washington coastal marine advisory council.

(9) The Washington coastal marine advisory council must meet at least twice each year or as needed.

(10) A majority of the members of the Washington coastal marine advisory council constitutes a quorum for the transaction of business.

[2013 c 318 § 1.]

43.143.060
Washington coastal marine advisory council — Duties.

(1) The duties of the Washington coastal marine advisory council established in RCW 43.143.050 are to:

(a) Serve as a forum for communication concerning coastal waters issues, including issues related to: Resource management; shellfish aquaculture; marine and coastal hazards; ocean energy; open ocean aquaculture; coastal waters research; education; and other coastal marine-related issues.

(b) Serve as a point of contact for, and collaborate with, the federal government, regional entities, and other state governments regarding coastal waters issues.

(c) Provide a forum to discuss coastal waters resource policy, planning, and management issues; provide either recommendations or modifications, or both, of principles, and, when appropriate, mediate disagreements.

(d) Serve as an interagency resource to respond to issues facing coastal communities and coastal waters resources in a collaborative manner.

(e) Identify and pursue public and private funding opportunities for the programs and activities of the council and for relevant programs and activities of member entities.

(f) Provide recommendations to the governor, the legislature, and state and local agencies on specific coastal waters resource management issues, including:

(i) Annual recommendations regarding coastal marine spatial planning expenditures and projects, including uses of the marine resources stewardship trust account created in RCW 43.372.070;

(ii) Principles and standards required for emerging new coastal uses;

(iii) Data gaps and opportunities for scientific research addressing coastal waters resource management issues;

(iv) Implementation of Washington's ocean action plan 2006;

(v) Development and implementation of coast-wide goals and strategies, including marine spatial planning; and

(vi) A coastal perspective regarding cross-boundary coastal issues.

(2) In making recommendations under this section, the Washington coastal marine advisory council shall consider:

(a) The principles and policies articulated in Washington's ocean action plan; and

(b) The protection and preservation of existing sustainable uses for current and future generations, including economic stakeholders reliant on marine waters to stabilize the vitality of the coastal economy.

[2013 c 318 § 2.]

43.143.900
Captions not law.

Section captions as used in this chapter do not constitute any part of the law.

[1989 1st ex.s. c 2 § 18.]

43.143.901
Short title.

Sections 8 through 12 of this act shall constitute a new chapter in Title 43 RCW and may be known and cited as the ocean resources management act.

[1989 1st ex.s. c 2 § 19.]

43.143.902
Severability — 1989 1st ex.s. c 2.

If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

[1989 1st ex.s. c 2 § 20.]

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.]

RCW 88.40.025

Evidence of financial responsibility for onshore or offshore facilities.

An onshore or offshore facility shall demonstrate financial responsibility in an amount determined by the department as necessary to compensate the state and affected counties and cities for damages that might occur during a reasonable worst case spill of oil from that facility into the navigable waters of the state. The department shall consider such matters as the amount of oil that could be spilled into the navigable waters from the facility, the cost of cleaning up the spilled oil, the frequency of operations at the facility, the damages that could result from the spill and the commercial availability and affordability of financial responsibility. This section shall not apply to an onshore or offshore facility owned or operated by the federal government or by the state or local government.

[1991 c 200 § 704.]

Notes:

Effective dates -- Severability -- 1991 c 200: See RCW 90.56.901 and 90.56.904.

1989

SESSION LAWS

OF THE

STATE OF WASHINGTON

REGULAR SESSION
FIFTY-FIRST LEGISLATURE
Convened January 9, 1989. Adjourned April 23, 1989.

1st EXTRAORDINARY SESSION
FIFTY-FIRST LEGISLATURE
Convened April 24, 1989. Adjourned May 10, 1989.

2nd EXTRAORDINARY SESSION
FIFTY-FIRST LEGISLATURE
Convened May 17, 1989. Adjourned May 20, 1989.

Published at Olympia by the Statute Law Committee pursuant to Chapter 6, Laws of 1969.

DENNIS W. COOPER
Code Reviser

(5) The supplemental rate charged under this section to fund postretirement adjustments which are provided on a nonautomatic basis to current retirees shall be calculated as the percentage of pay needed to fund the adjustments as they are paid to the retirees. The supplemental rate charged under this section to fund automatic postretirement adjustments for active or retired members of the public employees' retirement system plan I and the teachers' retirement system plan I shall be calculated as the level percentage of pay needed to fund the cost of the automatic adjustments not later than June 30, 2024.

Passed the Senate May 4, 1989.
Passed the House May 5, 1989.
Approved by the Governor May 8, 1989.
Filed in Office of Secretary of State May 8, 1989.

CHAPTER 2

[House Bill No. 2242]

OCEAN RESOURCES MANAGEMENT ACT

AN ACT Relating to oil spills and the transfer and safety of petroleum products across the marine waters of the state of Washington; adding a new chapter to Title 88 RCW; adding a new chapter to Title 43 RCW; adding new sections to chapter 90.58 RCW; creating new sections; prescribing penalties; and making appropriations.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. The legislature recognizes that oil spills and other forms of incremental pollution present serious danger to the fragile marine environment of Washington state. It is the intent and purpose of this chapter to define and prescribe financial responsibility requirements for vessels that transport petroleum products across the waters of the state of Washington.

NEW SECTION. Sec. 2. The following definitions apply throughout this chapter:

(1) "Department" means the state department of ecology;

(2) "Petroleum products" means oil as it is defined in RCW 90.48.315;

(3) "Vessel" means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

NEW SECTION. Sec. 3. Any vessel over three hundred gross tons, that transports petroleum products as cargo, using any port or place in the state of Washington or the navigable waters of the state shall establish, under rules prescribed by the director of the department of ecology, evidence of financial responsibility in the amount of the greater of one million dollars, or one hundred fifty dollars per gross ton of such vessel, to meet the liability to the state of Washington for the following: (1) The actual costs

for removal of spills of petroleum prc
(3) natural resource damages.

NEW SECTION. Sec. 4. Fina
by any one of, or a combination of, t
director of the department of ecology
bonds; (3) qualification as a self-ins
responsibility. Any bond filed shall
orized to do business in the United S
responsibility shall be kept on any b
leum products as cargo and filed wit
tor of any other vessel shall maintain
United States coast guard evidencin
section 311 of the federal clean wate

NEW SECTION. Sec. 5. Any
meet the financial responsibility requ
scribed thereunder shall be reported
shall suspend the privilege of operati
bility is demonstrated.

NEW SECTION. Sec. 6. Any
this chapter, who fails to comply with
issued thereunder, shall be subject to
dollars. The penalty shall be imposed

NEW SECTION. Sec. 7. Sectio
tute a new chapter in Title 88 RCW.

NEW SECTION. Sec. 8.
Washington's coastal waters, seabed
valuable and fragile of its natural res

(2) Ocean and marine-based in
aquaculture, tourism, and marine tra
the history of the state and will co
Other industries and activities, such a
extraction of minerals and other non
and economic benefits as well.

(3) Washington's coastal waters,
conflicting use demands. Some uses
or social risks at certain times.

(4) At present, there is not enou
assess the potential adverse effects of
off Washington's coast.

(5) The state of Washington ha
agement of coastal and ocean natur
coastline. From three miles seaward
mile exclusive economic zone, the U

for removal of spills of petroleum products; (2) civil penalties and fines; and (3) natural resource damages.

NEW SECTION. Sec. 4. Financial responsibility may be established by any one of, or a combination of, the following methods acceptable to the director of the department of ecology: (1) Evidence of insurance; (2) surety bonds; (3) qualification as a self-insurer; or (4) other evidence of financial responsibility. Any bond filed shall be issued by a bonding company authorized to do business in the United States. Documentation of such financial responsibility shall be kept on any barge or tank vessel transporting petroleum products as cargo and filed with the department. The owner or operator of any other vessel shall maintain on the vessel a certificate issued by the United States coast guard evidencing compliance with the requirements of section 311 of the federal clean water act, 33 U.S.C. Sec. 1251 et seq.

NEW SECTION. Sec. 5. Any vessel owner or operator that does not meet the financial responsibility requirements of this act and any rules prescribed thereunder shall be reported to the secretary of transportation who shall suspend the privilege of operating said vessel until financial responsibility is demonstrated.

NEW SECTION. Sec. 6. Any owner or operator of a vessel subject to this chapter, who fails to comply with section 3 of this act or any regulation issued thereunder, shall be subject to a penalty not to exceed ten thousand dollars. The penalty shall be imposed pursuant to RCW 43.21B.300.

NEW SECTION. Sec. 7. Sections 1 through 6 of this act shall constitute a new chapter in Title 88 RCW.

NEW SECTION. Sec. 8. 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. Other industries and activities, such as those based on the development and extraction of minerals and other nonrenewable resources, can provide social and economic benefits as well.

(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) At present, there is not enough information available to adequately assess the potential adverse effects of oil and gas exploration and production off Washington's coast.

(5) 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.

NEW SECTION. Sec. 9. LEGISLATIVE POLICY AND INTENT. (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 until at least July 1, 1995. During the 1995 legislative session, the legislature shall determine whether the moratorium on leasing should be extended past July 1, 1995. This determination shall be based on the information available at that time, including the analysis described in section 12 of this act. If the legislature does not extend the moratorium on leasing, the moratorium will end on July 1, 1995. At any time that oil or gas leasing, exploration, and development are allowed to occur, these activities shall be required to meet or exceed the standards and criteria contained in section 11 of this act.

(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 section 11 of this act. It is not the intent of the legislature, however, to permanently exclude these uses from the requirements of section 11 of this act. If information becomes available which indicates that such uses should reasonably be covered by the requirements of section 11 of this act, 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.

NEW SECTION. Sec. 10. DEFI
requires otherwise, the definitions in
chapter:

(1) "Coastal counties" means Cl
Pacific counties.

(2) "Coastal waters" means the
from Cape Flattery south to Cape D
seaward two hundred miles.

NEW SECTION. Sec. 11. PLA
CRITERIA. (1) When the state of W
velop plans for the management, conse
ral resources in Washington's coastal w
act shall guide the decision-making pr

(2) Uses or activities that requir
permits or other approvals and that
sources, marine life, fishing, aquacultu
ter quality, or other existing ocean or c
the criteria below are met or exceeded:

(a) There is a demonstrated signif
the proposed use or activity;

(b) There is no reasonable alterna
proposed use or activity;

(c) There will be no likely long-
coastal or marine resources or uses;

(d) All reasonable steps are taken
ronmental impacts, with special protec
resources of the Columbia river, Willa
and Olympic national park;

(e) All reasonable steps are taken
and economic impacts, including impa
ism, navigation, air quality, and recrea

(f) Compensation is provided to
resources or uses;

(g) Plans and sufficient performa
that the site will be rehabilitated after

(h) The use or activity complies
federal laws and regulations.

NEW SECTION. Sec. 12. OIL
Prior to September 1, 1994, the depa
department of ecology, working toget
select committee on marine and ocean
of the potential positive and negative i
lands which is described in section 9(
consult with the departments of fisheri

NEW SECTION. Sec. 10. 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.

NEW SECTION. Sec. 11. 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 section 9 of this act 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.

NEW SECTION. Sec. 12. OIL AND GAS LEASING ANALYSIS. Prior to September 1, 1994, the department of natural resources and the department of ecology, working together and at the direction of the joint select committee on marine and ocean resources, shall complete an analysis of the potential positive and negative impacts of the leasing of state–owned lands which is described in section 9(2) of this act. The department shall consult with the departments of fisheries, wildlife, community development,

and trade and economic development, and with the public, when preparing this analysis. The analysis shall be presented to the legislature no later than September 1, 1994. This analysis shall be used by the legislature in determining whether the oil and gas leasing moratorium contained in section 9 of this act should be extended.

NEW SECTION. Sec. 13. A new section is added to chapter 90.58 RCW to read as follows:

SHORELINE MASTER PLAN REVIEW. (1) The department of ecology, in cooperation with other state agencies and coastal local governments, shall prepare and adopt ocean use guidelines and policies to be used in reviewing, and where appropriate, amending, shoreline master programs of local governments with coastal waters or coastal shorelines within their boundaries. These guidelines shall be finalized by April 1, 1990.

(2) After the department of ecology has adopted the guidelines required in subsection (1) of this section, counties, cities, and towns with coastal waters or coastal shorelines shall review their shoreline master programs to ensure that the programs conform with sections 9 and 11 of this act and with the department of ecology's ocean use guidelines. Amended master programs shall be submitted to the department of ecology for its approval under RCW 90.58.090 by June 30, 1991.

NEW SECTION. Sec. 14. The energy office shall prepare and transmit to the governor and the appropriate legislative committees of the legislature no later than September 1, 1994, a report on liquid fossil fuel supply and demand and on strategies which exist or which can be developed for conserving liquid fossil fuels. This report shall include information on how the conservation of liquid fossil fuels might affect the need for new supplies of liquid fossil fuels, and how conservation might affect the need for oil or gas leasing, exploration, or development off the coast of Washington. This report shall also contain suggestions for implementing the identified conservation strategies. This report shall be used by the legislature in determining whether the oil and gas leasing moratorium contained in section 9 of this act should be extended.

NEW SECTION. Sec. 15. A new section is added to chapter 90.58 RCW to read as follows:

The department of ecology shall consult with affected state agencies, local governments, Indian tribes, and the public prior to responding to federal coastal zone management consistency certifications for uses and activities occurring on the federal outer continental shelf.

NEW SECTION. Sec. 16. The authority for the joint select committee on marine and ocean resources is extended until June 30, 1994. During this time, the committee shall perform the following tasks:

(1) Analyze how the state can m
and minimize the potential negative i
eral outer continental shelf lands act o
coastal waters.

(2) Analyze the advantages and
cilities——site locations act for maki
ties. The committee shall also explor
these decisions.

(3) Work in coordination with,
ment of natural resources in preparin
of this act.

(4) Complete those tasks assigne
sion in SHCR 4407.

NEW SECTION. Sec. 17. (1) T
sand dollars, or as much thereof as n
the biennium ending June 30, 1991,
ment of ecology for the purposes of
twenty thousand dollars of this amoun
essary, shall be distributed by the de
ments for the purpose of reviewing
programs.

(2) The sum of one hundred tho
may be necessary, is appropriated for
from the general fund to the joint se
resources to be used to contract with
ral resources for purposes of the analy

(3) To the maximum extent pos
the department of natural resources sh
the appropriations under this section.

NEW SECTION. Sec. 18. Secti
constitute any part of the law.

NEW SECTION. Sec. 19. Sectic
stitute a new chapter in Title 43 RCW
ocean resources management act.

NEW SECTION. Sec. 20. If any
to any person or circumstance is held
the application of the provision to o
affected.

Passed the House May 1, 1989.
Passed the Senate May 3, 1989.
Approved by the Governor May
Filed in Office of Secretary of St

(1) Analyze how the state can maximize the potential positive impacts and minimize the potential negative impacts associated with proposed federal outer continental shelf lands act oil and gas lease sales of Washington's coastal waters.

(2) Analyze the advantages and disadvantages of using the energy facilities——site locations act for making decisions on onshore energy facilities. The committee shall also explore alternative approaches for making these decisions.

(3) Work in coordination with, and provide direction to, the department of natural resources in preparing the analysis described in section 12 of this act.

(4) Complete those tasks assigned to it during the 1987 legislative session in SHCR 4407.

NEW SECTION. Sec. 17. (1) The sum of one hundred eighty thousand dollars, or as much thereof as may be necessary, is appropriated for the biennium ending June 30, 1991, from the general fund to the department of ecology for the purposes of section 13 of this act. One hundred twenty thousand dollars of this amount, or as much thereof as may be necessary, shall be distributed by the department of ecology to local governments for the purpose of reviewing and amending their shoreline master programs.

(2) The sum of one hundred thousand dollars, or as much thereof as may be necessary, is appropriated for the biennium ending June 30, 1991, from the general fund to the joint select committee on marine and ocean resources to be used to contract with the departments of ecology and natural resources for purposes of the analysis in section 12 of this act.

(3) To the maximum extent possible, the department of ecology and the department of natural resources shall use federal grant funds instead of the appropriations under this section.

NEW SECTION. Sec. 18. Section captions as used in this act do not constitute any part of the law.

NEW SECTION. Sec. 19. Sections 8 through 12 of this act shall constitute a new chapter in Title 43 RCW and may be known and cited as the ocean resources management act.

NEW SECTION. Sec. 20. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

Passed the House May 1, 1989.
Passed the Senate May 3, 1989.
Approved by the Governor May 8, 1989.
Filed in Office of Secretary of State May 8, 1989.

any employer, unless the commissioner finds the specific work unsuitable for a particular individual.

Beginning January 1, 1990, contributions for successor employers will be at the rate class assigned to the predecessor employer at the time of the transfer of the business, rather than at the rate paid by the predecessor employer.

The Employment Security Department is required to work with agricultural employers to improve their understanding of the unemployment insurance system and increase compliance. The department must report its progress in 1990, 1991, and 1992. The Employment Security Department, the Department of Labor and Industries, the Department of Licensing, and the Department of Revenue must develop a plan to implement voluntary combined reporting for agricultural employers and report to the Legislature by December 1, 1989.

Agricultural Employees Labor Standards. An advisory committee is created to develop recommendations for rules on labor standards for the employment of minors in agriculture. Based on these recommendations, and on cultural and harvesting requirements, the Department of Labor and Industries must adopt rules by July 1, 1990, on only the following: (1) minor employment rules; and (2) rest and meal breaks for all employees, taking into consideration naturally occurring breaks. In addition, employers who are required to keep employment records under the State Minimum Wage Act must keep the records for three years. When agricultural employees are paid, the employer must provide the employees with itemized statements indicating the pay basis, the rate of pay, the gross pay, and any deductions. Violations of these labor standards are class I civil infractions, with a maximum penalty of $250 for each violation.

Votes on Final Passage:

House	85	12	
Senate	35	10	(Senate amended)
House	86	6	(House concurred)

Effective: July 23, 1989
January 1, 1990 (Sections 69, 71 – 73, 78 – 81)
July 1, 1990 (Section 76)

HB 2242

C 2 L 89 E1

By Representatives Phillips, Van Luven, May, Holland, Hankins, Moyer, Patrick, Miller, Schoon, Winsley, Brough, Ballard, Wood, D. Sommers, Horn, S. Wilson, Chandler, and Ferguson

Prescribing financial responsibility for vessels that spill oil and establishing guidelines for management Washington's coast.

Background: Financial Responsibility

Under the federal Water Pollution Control owners and operators of vessels over 300 gross ton required to post evidence of financial responsibili the federal government for meeting liability for of oil and hazardous substances. The amount re for inland barges is $125 per gross ton or $12 whichever is greater. The amount required f other vessels is $150 per gross ton or $250,000, w ever is greater. Financial responsibility may be lished by evidence of insurance, surety bon qualification as a self–insurer.

Owners and operators who fail to compl financial responsibility requirements are subje federal penalty of $10,000. The Coast Guar deny entry to any port or place in the United or detain at any port or place in the United Stat vessel which does not produce evidence of fi responsibility upon request.

Seven of the 24 coastal states have followed t of the federal government and enacted fi responsibility requirements for liability to the s oil and hazardous substance spills. Although th Water Pollution Control Act does impose liabi spills, it does not contain financial respon requirements.

Ocean Management

The ocean sea floor and resources off Washi coast are owned by the state from extreme lo three miles seaward, and by the federal gov from three miles seaward to two hundred m ward. There are at present few statewide reg guidelines, or policies for the use or develop Washington's coastal resources. While local governments have some authority to regulate resources, these governments have done address coastal resource management throu shoreline management programs or under laws.

The federally owned waters off Washingto are governed by many federal laws and age immediate concern to the State of Washingto Mineral Management Service (MMS), w responsible for the development of mineral a resources within federally owned ocean wat MMS is authorized to lease ocean areas for of exploration, development, and extraction of resources. The MMS is required under th Continental Shelf Lands Act (OCSLA) to dev

lease plans relating to the exploration and extrac- of oil and gas.

he MMS' current five year lease plan provides for ;ase sale of ocean areas off the coasts of ;hington and Oregon in April of 1992. As prelimi- , steps to the sale itself, MMS will request state- ts of interest from the oil industry in 1989 and will tify the sale area in 1990.

nder the OCSLA, the Secretary of the Interior t consider recommendations from an adjacent e's governor concerning the size, location, and tim- of a proposed lease sale. The federal Coastal Zone nagement Act (CZMA) and current case law do provide for any state input in deciding when or ther a lease sale should be held, nor in deciding t areas will be included in the lease sale. The MA does, however, provide for some state input r the lease sale. The CZMA directs that federal ncies conduct and support activities directly affect- the coastal zone in a manner which is, to the max- m extent practicable, consistent with approved e management programs. It also provides that any licant for a federal license to conduct an activity cting land or water uses in the coastal zone of a e must provide a state approved certification of sistency with that state's management program. s requirement of certification also applies to any ns for exploration or development of, or production n, any area which has been leased under the SLA.

'he approved state management program consists :he adjacent state's "coastal authorities" laws and ulations that have been approved by the Secretary Commerce. At present, the approved coastal horities for Washington include the Shoreline nagement Act(SMA) and county and city master grams, certain environmental laws, and the Energy ilities Site Locations Act.

Because of this system, any exploration, develop- nt, or production activities conducted or permitted MMS must be consistent with the above sections of shington law. There is, however, dispute as to the ent to which actions must be consistent.

n 1987, due to concern over the upcoming lease :, the Washington Legislature and the Governor k several actions. The Governor wrote to the partment of the Interior suggesting that the lease : may need to be delayed, and stating that he does support leasing north of the forty seventh parallel within 12 miles of Gray's Harbor, Willapa Bay, and lumbia River estuaries. Further, several committees re formed and/or asked to conduct studies on ects of the proposed lease sale. These groups include the Legislature's Joint Select Committee on Marine and Ocean Resources, the University of Washington Sea Grant program, and several task forces.

Summary: Owners or operators of vessels over 300 gross tons that transport petroleum products in the state are required to establish evidence of financial responsibility to the state to cover liability for cleanup, natural resource damages, and civil penalties and fines. The amount required is $1 million or $150 per gross ton, whichever is greater.

Evidence of financial responsibility may be established by one or a combination of the following methods: (1) insurance; (2) surety bonds; (3) qualification as a self-insurer; or (4) other evidence acceptable to the director of the Department of Ecology.

Owners or operators of barges and oil tankers must keep documentation of evidence of financial responsibility on the vessel and on file with Ecology. Other vessel owners and operators must keep their Coast Guard certificate indicating compliance with federal requirements on the vessel.

The Secretary of Transportation is required to suspend the operating privileges of vessel owners or operators that do not meet financial responsibility requirements. Failure to comply with financial responsibility requirements subjects the owner or operator of a vessel to a $10,000 civil penalty.

Legislative policies regarding coastal waters off Washington are adopted. These policies will guide the decision-making process for the management, conservation, use, and development of natural resources in Washington's coastal waters. Among these policies are the following: (1) There shall be no leasing of state-owned tidal or submerged lands 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. This policy will expire on July 1, 1995, unless extended by the Legislature; (2) If conflicts arise, 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; (3) The state shall actively encourage the conservation of liquid fossil fuels and explore available methods of encouraging such conservation; (4) Generally, fishing and currently existing commercial uses are excluded from having to meet the planning and project review criteria; and (5) The state shall participate to the maximum extent possible in federal ocean and marine resource decisions.

year lease plans relating to the exploration and extraction of oil and gas.

The MMS' current five year lease plan provides for a lease sale of ocean areas off the coasts of Washington and Oregon in April of 1992. As preliminary steps to the sale itself, MMS will request statements of interest from the oil industry in 1989 and will identify the sale area in 1990.

Under the OCSLA, the Secretary of the Interior must consider recommendations from an adjacent state's governor concerning the size, location, and timing of a proposed lease sale. The federal Coastal Zone Management Act (CZMA) and current case law do not provide for any state input in deciding when or whether a lease sale should be held, nor in deciding what areas will be included in the lease sale. The CZMA does, however, provide for some state input after the lease sale. The CZMA directs that federal agencies conduct and support activities directly affecting the coastal zone in a manner which is, to the maximum extent practicable, consistent with approved state management programs. It also provides that any applicant for a federal license to conduct an activity affecting land or water uses in the coastal zone of a state must provide a state approved certification of consistency with that state's management program. This requirement of certification also applies to any plans for exploration or development of, or production from, any area which has been leased under the OCSLA.

The approved state management program consists of the adjacent state's "coastal authorities" laws and regulations that have been approved by the Secretary of Commerce. At present, the approved coastal authorities for Washington include the Shoreline Management Act(SMA) and county and city master programs, certain environmental laws, and the Energy Facilities Site Locations Act.

Because of this system, any exploration, development, or production activities conducted or permitted by MMS must be consistent with the above sections of Washington law. There is, however, dispute as to the extent to which actions must be consistent.

In 1987, due to concern over the upcoming lease sale, the Washington Legislature and the Governor took several actions. The Governor wrote to the Department of the Interior suggesting that the lease sale may need to be delayed, and stating that he does not support leasing north of the forty seventh parallel or within 12 miles of Gray's Harbor, Willapa Bay, and Columbia River estuaries. Further, several committees were formed and/or asked to conduct studies on aspects of the proposed lease sale. These groups include the Legislature's Joint Select Committee on Marine and Ocean Resources, the University of Washington Sea Grant program, and several task forces.

Summary: Owners or operators of vessels over 300 gross tons that transport petroleum products in the state are required to establish evidence of financial responsibility to the state to cover liability for cleanup, natural resource damages, and civil penalties and fines. The amount required is $1 million or $150 per gross ton, whichever is greater.

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Planning and project review criteria are established. These set the minimum standards which must be met before the state may support any activities that are likely to have an adverse impact on marine life, fishing, aquaculture, recreation, navigation, air or water quality, or other existing ocean or coastal uses. The criteria include a demonstrated significant need for the activity; no reasonable alternative to the activity; no likely long-term significant adverse impacts to coastal or marine resources or uses; minimization of adverse environmental and social impacts; compensation for adverse impacts; plans and sufficient performance bonding to ensure site rehabilitation; and compliance with all applicable laws.

The Departments of Natural Resources and Ecology shall complete an analysis of the potential positive and negative impacts of leasing state coastal waters for oil and gas development. This analysis shall be done at the direction of the Joint Select Committee on Marine and Ocean Resources, and it shall be presented to the Legislature no later than September 1, 1994.

Local governments are directed to review and amend their shoreline master programs to ensure that they conform with the policies and intent of this bill. The Washington State Energy Office is directed to prepare a report on liquid fossil fuel supply and demand, on strategies for conserving those fuels, and on ways of implementing those strategies.

The Shoreline Management Act is amended to direct the Department of Ecology to consult with affected state agencies, local governments, Indian tribes, and the public prior to responding to federal coastal zone management consistency certifications.

The Joint Select Committee on Marine and Ocean Resources is extended until June 30, 1994, and it is assigned additional tasks.

Votes on Final Passage:

House	96	0
Senate	46	0

Effective: August 9, 1989

HB 2244

C 10 L 89 E1

By Representatives Vekich, Anderson, Braddock, Hine, Dellwo, Jones, Fraser, K. Wilson, Nelson, Jacobsen, Sayan, R. King, Rust, Prentice, Wang, Cole, P. King, Zellinsky, R. Fisher, Appelwick, Pruitt, Cooper, H. Myers, Valle, Leonard, Nutley, Spanel, Raiter, G. Fisher, Sprenkle, Morris and Rector

Providing for maternity care for low-income families.

House Committee on Health Care
Senate Committee on Ways & Means

Background: Access to maternity care (prenat
ery, and postpartum) has become increasingly
for low-income women. Of the 70,000
Washington state during 1988, approximat
were delivered without consistent matern
Washington state has a higher rate of infan
than the national average. This is particula
tant when the United States, as a whole,
the highest rates of infant mortality among
ized nations.

Low birth weight deliveries (5.5 lbs or 2.
are identified as the major factor in infan
illness. Adequate maternity care is ident
effective tool in reducing low birth weight
is estimated that for every $1 spent on p
over $3 are saved in medical cost during
of an infant's life.

In addition to adequate medical care,
support services is identified as an impor
having healthy babies. These include: ed
tion counseling, transportation, child c
services. Recent changes to federal Me
mit a state to expand its federally m
for low-income pregnant women and t
state is now able to extend medicaid c
nant women and children, under the
income is below 185 percent of the
level (FPL), and children up to age
cent FPL.

Summary: The Legislature finds tha
rate of infant death and illnes
Washington. Further, this problem
the lack of adequate maternity ca
quate health care to low-income p
their young children, a maternity c
established.

Nothing in this act creates a v
not be repealed by the Legislatu
risk person," "eligible person,"
vices," and "support services" are

The Department of Social
(DSHS) is required to establi
access program with the followi
maternity care to low-income w
to their children to the extent m
law and having in place, by D
tem that expedites the medic
process for pregnant women
and simplified application for
determining eligibility within

EDITION NO. 8 - FINAL

VOLUME 2 — HOUSE AND RCW TO BILL TABLE

Legislative Digest and History of Bills

of the

Senate and House of Representatives

FIFTY-FIRST LEGISLATURE

1989 Regular Session:	January 9, 1989	to	April 23, 1989
1st Special Session:	April 24, 1989	to	May 10, 1989
2nd Special Session:	May 17, 1989	to	May 20, 1989
1990 Regular Session	January 8, 1990	to	March 8, 1990
1st Special Session:	March 9, 1990	to	April 1, 1990

DIGEST & HISTORY ON LEGISLATIVE BILLS, MEMORIALS AND RESOLUTIONS; RCW — BILL TABLE; and TOPICAL INDEX

**** Compiled to and Inclusive of April 25, 1990 ****

GORDON A. GOLOB
Secretary of the Senate

ALAN THOMPSON
Chief Clerk, House of Representatives

With the Cooperation of the Statute Law Committee
& the Legislative Service Center

For 1990 2nd Special Session
See Volume 1 - Senate inside front cover

Requires courts, before entering idgments in actions to recover damages ır personal injuries or wrongful ıath, to reduce a verdict or award by ıe amount of certain payments or ıounts payable to the claimant as com-ınsation for the same damages awarded ı the action.

Requires the trier of fact to be ıformed of the tax consequences of all ımage awards.

--1989 1ST SPECIAL SESSION--

ır 26 First reading, referred to Judiciary.

--1989 2ND SPECIAL SESSION--

ıy 17 By resolution, reintroduced and retained in present status.

--1990 REGULAR SESSION--

ın 8 By resolution, reintroduced and retained in present status.

2241 by Representatives Locke, ıy, Moyer, H. Sommers

ıgarding medical injury recovery.

Sets forth the medical injury re-ıvery act (MIRA).

Encourages expedited payment of ːonomic and related losses to a person ıo has suffered an injury or loss be-ıuse of substandard health care ırvices.

Defines terms.

Provides for the filing of a MIRA .aim with a superior court clerk, and ıe completion of proceedings required ' this act, prior to commencing an ac-.on in state courts which is based on ıat claim.

Provides one format and procedures ır submitting a "MIRA claim" where a .aimant alleges less than fifty thou-ınd dollars in compensation benefits.

Provides different procedures for :RA claims involving fifty thousand ıllars or more.

Establishes procedures for panel ıarings and other matters related to .spute resolution.

Limits attorneys' fees.

Makes panel findings admissible in ıbsequent civil actions, under certain ınditions.

Makes liability for attorneys' fees ıd costs contingent on the outcome of civil action as related to the amount ' compensation benefits recommended by ıe panel in its written findings, and ıe amount tendered by a health care ˈovider.

Strikes defenses or claims in any ıbsequent civil action of those who ıil or refuse to participate in MIRA ˈoceedings.

Provides for certain payments to claimants from the compensation fund created by this act if, upon future change to an award, there is no solvent entity available to make such payments.

Tolls statutes of limitation during MIRA proceedings.

Subrogates those entities which have provided benefits to an injured person to the injured person's rights, to a certain extent.

Exempts amounts received for health care and related expenses from assignment or attachment, with certain exceptions for health care providers.

Creates the medical injury compensation fund to be administered by the insurance commissioner. Supports this fund by imposing a one percent surcharge on malpractice premiums paid by health care providers, and by imposing a surcharge on funds reserved for the payment of claims. Also provides moneys to the fund by a surcharge on compensation benefits paid, by a surcharge on judgments and settlements in malpractice lawsuits, and by possible legislative appropriations.

Provides for administration of the program by the insurance commissioner.

Subrogates the state to payments from the fund.

Terminates this law on July 1, 1995, and requires annual reports by the insurance commissioner.

Modifies the physician-patient evidentiary rule for MIRA claims.

Applies to all actions filed on or after August 1, 1989.

--1989 1ST SPECIAL SESSION--

Apr 26 First reading, referred to Judiciary.

--1989 2ND SPECIAL SESSION--

May 17 By resolution, reintroduced and retained in present status.

--1990 REGULAR SESSION--

Jan 8 By resolution, reintroduced and retained in present status.

H. B. 2242 by Representatives Phillips, Van Luven, May, Holland, Hankins, Moyer, Patrick, Miller, Schoon, Winsley, Brough, Ballard, Wood, D. Sommers, Horn, S. Wilson, Chandler, Ferguson

Prescribing financial responsibility for vessels that spill oil and establishing guidelines for management of Washington's coast.

(DIGEST AS ENACTED)

Sets forth the ocean resources management act.

Recognizes the danger of oil spills to this state's marine environment, and defines and prescribes financial re-

sponsibility requirements for vessels that transport petroleum products across the waters of this state.

Defines terms.

Requires those vessels over three hundred gross tons that transport petroleum products as cargo to provide evidence of certain financial responsibility if they use any port or place in this state, or the navigable waters of this state.

Provides for rulemaking by the director of the department of ecology.

Sets forth the alternative means for establishing and demonstrating financial responsibility.

Provides sanctions for failure to comply.

Makes certain findings regarding the importance of this state's coastal waters, seabed, and shorelines.

Recognizes primary state jurisdiction over the management of coastal and ocean natural resources in that exclusive economic zone which is within three miles of the coastline.

Sets forth certain guidelines for the exercise of state and local management authority over state coastal waters, seabed, and shoreline.

Imposes a moratorium until July 1, 1995, on the leasing of certain tidal or submerged lands for oil and gas purposes.

Requires that certain oil or gas-related activities meet or exceed certain standards.

Encourages conservation of fossil fuels.

Addresses the continuing status of current uses.

Directs state participation in federal ocean and marine resource decisions.

Requires that by September 1, 1994, certain agencies analyze the impacts of leasing certain state-owned tidal or submerged lands.

Requires preparation and adoption of certain ocean use guidelines and policies for application to the shoreline master programs of those local governments having coastal waters or coastal shorelines within their boundaries.

Requires a certain report by the energy office on the supply of liquid fossil fuel.

Requires certain consultations by the department of ecology before responding to the federal government on matters relating to the federal outer continental shelf.

Extends until June 30, 1994, the authority for the joint select committee on marine and ocean resources, and assigns specific tasks to this committee.

Appropriates one hundred eighty thousand dollars to the department of ecology for the purpose of shoreline master plan review under this act, with one hundred twenty thousand dollars of this amount earmarked for local government use.

Appropriates one hundred thou dollars to the joint select comm for this act.

Requires maximization of the us federal funding.

--1989 1ST SPECIAL SESSION--

May 1 First reading.
Rules suspended.
Placed on second reading.
Rules suspended.
Placed on third reading.
Third reading, passed; Yeas, nays, 0; absent, 2.
-IN THE SENATE-
May 3 First reading.
Rules suspended.
Placed on second reading.
Rules suspended.
Placed on third reading.
Third reading, passed; Yeas, nays, 0; absent, 3.
-IN THE HOUSE-
May 4 Speaker signed.
-IN THE SENATE-
President signed.
-OTHER THAN LEGISLATIVE ACTION-
Delivered to Governor.
May 8 Governor signed.
Chapter 2, 1989 Laws 1st Special Session.

H. B. 2243 by Representatives H. Sommers, Ferguson

Establishing a six-year term of pointment for the director personnel.

Amends RCW 41.06.130 (2) to provide.

--1989 1ST SPECIAL SESSION--

May 10 First reading, referred to R 2 Review.

--1989 2ND SPECIAL SESSION--

May 17 By resolution, reintroduced retained in present status.

--1990 REGULAR SESSION--

Jan 8 By resolution, reintroduced retained in present statu
Jan 9 Rules Committee refers to Committee on State Governm

H. B. 2244 by Representatives Vekich, Anderson, Braddock, Hine, Dellwo, Jones, Fraser, K. Wilson, Nelson, Jacobsen, Sayan, R. King, Rust, Prentice, Wang, Cole, P. King, Zellinsky, R. Fisher, Appelwick, Pruitt, Cooper, H. Myers, Valle, Leonard, Nutley, Spanel, Raiter, G. Fisher, Sprenkle, Morris, Rector

HOUSE JOURNAL

VOLUME II , pt. 2

1989
REGULAR SESSION, FIRST & SECOND
SPECIAL SESSIONS
OF THE

FIFTY-FIRST LEGISLATURE

STATE OF WASHINGTON

AT

OLYMPIA, the State Capitol

SUBSTITUTE HOUSE BILL NO. 2136: Relating to mobile home relocation assistance.

Sincerely,
Terry Sebring, Counsel.

The Speaker (Mr. O'Brien presiding) declared the House to be at ease.
The Speaker called the House to order.

There being no objection, the House advanced to the fourth order of business.

INTRODUCTIONS AND FIRST READING

HB 2242 by Representatives Phillips, Van Luven, May, Holland, Hankins, Moyer, Patrick, Miller, Schoon, Winsley, Brough, Ballard, Wood, D. Sommers, Horn, S. Wilson, Chandler and Ferguson

AN ACT Relating to oil spills and the transfer and safety of petroleum products across the marine waters of the state of Washington; adding a new chapter to Title 88 RCW; adding a new chapter to Title 43 RCW; adding new sections to chapter 90.58 RCW; creating new sections; prescribing penalties; and making appropriations.

HJM 4023 by Representatives Vekich and Anderson

Requesting the President and Congress to promote a solution to the Cyprus problem.

MOTION

Mr. Heavey moved that the rules be suspended and the bill and memorial listed on today's introduction sheet under the fourth order of business be placed on the second reading calendar. The motion was carried.

There being no objection, the House advanced to the sixth order of business.

SECOND READING

MOTION

Mr. Heavey moved that the House immediately consider House Bill No. 2242 on the second reading calendar. The motion was carried.

HOUSE BILL NO. 2242, by Representatives Phillips, Van Luven, May, Holland, Hankins, Moyer, Patrick, Miller, Schoon, Winsley, Brough, Ballard, Wood, D. Sommers, Horn, S. Wilson, Chandler and Ferguson

Prescribing financial responsibility for vessels that spill oil and establishing guidelines for management of Washington's coast.

The bill was read the second time.

With consent of the House, the rules were suspended, the second reading considered the third, and the bill was placed on final passage.

Representatives Rust and Phillips spoke in favor of passage of the bill.

ROLL CALL

The Clerk called the roll on the final passage of House Bill No. 2242, and the bill passed the House by the following vote: Yeas, 96; excused, 2.

Voting yea: Representatives Anderson, Appelwick, Ballard, Basich, Baugher, Beck, Belcher, Bowman, Braddock, Brekke, Bristow, Brooks, Brough, Brumsickle, Cantwell, Chandler, Cole, Cooper, Crane, Day, Dellwo, Dorn, Doty, Ebersole, Ferguson, Fisher G, Fisher R, Fraser, Fuhrman, Grant, Hankins, Hargrove, Haugen, Heavey, Hine, Holland, Horn, Inslee, Jacobsen, Jesernig, Jones, King P, King R, Kremen, Leonard, Locke, May, McLean, Meyers R, Miller, Morris, Moyer, Myers H, Nealey, Nelson, Nutley, O'Brien, Padden, Patrick, Peery, Phillips, Prentice, Prince, Pruitt, Raiter, Rasmussen, Rayburn, Rector, Rust, Sayan, Schmidt, Schoon, Scott, Silver, Smith, Sommers D, Sommers H, Spanel, Sprenkle, Tate, Todd, Valle, Van Luven, Vekich, Wall, Walker, Wang, Wilson K, Wilson S, Wineberry, Winsley, Wolfe, Wood, Youngsman, Zellinsky, and Mr. Speaker - 96.

Excused: Representatives Betrozoff, Gallagher - 2.

House Bill No. 2242, having received the constitutional majority, was declared passed. There being no objection, the title of the bill was ordered to stand as the title of the act.

SENATE JOURNAL

VOLUME 2, pt. 2

—1989—

REGULAR SESSION
AND FIRST AND SECOND SPECIAL SESSIONS
OF THE

Fifty-First Legislature

STATE OF WASHINGTON

AT

OLYMPIA, the State Capitol

Regular Session Convened January 9, 1989
Adjourned Sine Die April 23, 1989

1989 First Special Session
Convened April 24, 1989
Adjourned Sine Die May 10, 1989

1989 Second Special Session
Convened May 17, 1989
Adjourned Sine Die May 20, 1989

WHEREAS, Rebecca Lowe, a member of the Senate kitchen staff, also reports digging clams Sunday, many of which were older clams of five inches in length; and

WHEREAS, Reports from other clam diggers bear out the need for harvesting older clams while they are still alive; and

WHEREAS, The economy of the communities in Grays Harbor and Willapa Harbor have been depressed and clam diggers this spring have brought new life to the area; and

WHEREAS, An extension of the clam digging season through May 15, will provide five diggable tides; and

WHEREAS, Utilization of the resource of older clams is imperative and the assistance to the economy would be highly beneficial to the entire state;

NOW, THEREFORE, BE IT RESOLVED, That the Washington State Senate hereby strongly urges the Department of Fisheries to extend the clam digging season on the ocean beaches through May 15, for the reasons listed above.

Senator Metcalf spoke to Senate Resolution 1989-8701.

There being no objection, the President returned the Senate to the sixth order of business.

SECOND READING

HOUSE BILL NO. 2242, by Representatives Phillips, Van Luven, May, Holland, Hankins, Moyer, Patrick, Miller, Schoon, Winsley, Brough, Ballard, Wood, D. Sommers, Horn, S. Wilson, Chandler, and Ferguson

Prescribing financial responsibility for vessels that spill oil and establishing guidelines for management of Washington's coast.

The bill was read the second time.

MOTION

On motion of Senator Newhouse, the rules were suspended, House Bill No. 2242 was advanced to third reading, the second reading considered the third and the bill was placed on final passage.

Debate ensued.

The President declared the question before the Senate to be the roll call on the final passage of House Bill No. 2242.

ROLL CALL

The Secretary called the roll on the final passage of House Bill No. 2242 and the bill passed the Senate by the following vote: Yeas, 46; excused, 3.

Voting yea: Senators Amondson, Anderson, Bailey, Barr, Bauer, Bender, Benitz, Bluechel, Cantu, Conner, Craswell, Fleming, Gaspard, Hansen, Hayner, Johnson, Kreidler, Lee, Madsen, Matson, McDonald, Metcalf, Moore, Murray, Nelson, Newhouse, Niemi, Owen, Patterson, Pullen, Rasmussen, Rinehart, Saling, Sellar, Smith, Smitherman, Stratton, Sutherland, Talmadge, Thorsness, Vognild, von Reichbauer, Warnke, West, Williams, Wojahn - 46.

Excused: Senators DeJarnatt, McCaslin, McMullen - 3.

HOUSE BILL NO. 2242, having received the constitutional majority, was declared passed. There being no objection, the title of the bill was ordered to stand as the title of the act.

MOTION

At 11:58 a.m., on motion of Senator Newhouse, the Senate recessed until 2:00 p.m.

The Senate was called to order at 2:05 p.m. by President Pritchard.

SECOND READING

CONFIRMATION OF GUBERNATORIAL APPOINTMENTS

MOTION

On motion of Senator Lee, Gubernatorial Appointment No. 9006, M... Bouchey, as a member of the Small Business Export Financial Assistance ... Board of Directors, was confirmed.

APPOINTMENT OF M. TOB...

The Secretary called the roll. The appointme... vote: Yeas, 37; absent, 9; excused, 3.

Voting yea: Senators Amondson, Bailey, Barr, Bend... Hansen, Hayner, Johnson, Kreidler, Lee, Madsen, Ma... Newhouse, Niemi, Patterson, Pullen, Rasmussen, Rineha... Sutherland, Talmadge, Thorsness, Vognild, von Reichba...

Absent: Senators Anderson, Bauer, Cantu, Conner, ... - 9.

Excused: Senators DeJarnatt, McCaslin, McMullen -

MOTIONS

On motion of Senator Williams, Senator Baue...

On motion of Senator Newhouse, Senators Mc...

MOTION

On motion of Senator Lee, Gubernatorial App... as a member of the Lottery Commission, was con...

APPOINTMENT OF ROY M...

The Secretary called the roll. The appointme... vote: Yeas, 44; excused, 5.

Voting yea: Senators Amondson, Anderson, Bailey, ... Conner, Craswell, Fleming, Gaspard, Hansen, Hayner, Jo... McCaslin, Metcalf, Moore, Murray, Nelson, Newhou... Rasmussen, Rinehart, Saling, Sellar, Smith, Smitherm... Thorsness, Vognild, von Reichbauer, Warnke, Williams, ... Wojahn, West, Bauer, DeJarnatt, McDonald, McM...

MOTIONS

On motion of Senator Newhouse, the Commi... Engrossed Substitute Senate ... and Engrossed Substitute Hou...

On motion of Senator Newhouse, the rules ... Senate Bill No. 5336 and Engrossed Su... placed on the third reading calendar.

On motion of Senator Newhouse, the rules ... Substitute House Bill No. 1825 was placed on the s...

There being no objection, the President adv... order of business.

THIRD READING

ENGROSSED SUBSTITUTE SENATE BILL NO. 53... (originally sponsored by Senators McDona... of Governor Gardner)

Making appropriation for the 1989-91 bienniu...

The bill was read the third time.

Debate ensued.

The President declared the question before th... Engrossed Substitute Senate Bill N...

ROLL CALL

The Secretary called the roll on the final pas... 5352 and the bill passed the Senate ... 2...

Senators Amondson, Anderson, Bailey, ... Lee, Matson, McCaslin, McDonald, ... Thorsness, von Reichbauer, ... Bauer, Bender, Conner, Fleming, ... Rasmussen, Rinehart, ... Williams, Wojahn - 22.

McMullen - 2.

App'x-76

CURBS ON OIL-DRILLING DIE QUIETLY IN LEGISLATURE

THE SEATTLE TIMES - Wednesday, April 5, 1989

Author: *JIM SIMON*

OLYMPIA - An effort to protect Washington's coastline from the potential hazards of oil drilling has apparently died quietly in the Senate Ways and Means Committee, leaving in its wake a game of legislative whodunit

Backers of the Ocean Resources Management Act, including advisers to Gov. Booth Gardner, claim the bill's death could make it more difficult to block the federal government from leasing offshore areas for drilling.

The measure, HB 1190, was on the agenda of the Senate Ways and Means Committee on Monday, but never was put up for a vote. Chairman Dan McDonald, R-Bellevue, said the legislation fell victim to a simple equation of too many bills and too little time left in the session, which is scheduled to end in less than three weeks.

Monday was the deadline for non-budget bills to be moved out of the Ways and Means Committee.

``Frankly, the idea seemed to have some merit. But it's one of those bills - like hundreds of other bills - that just didn't make the cutoff," said McDonald, adding that there was little chance it would be resurrected.

But Washington Environmental Council lobbyist Betty Tabbut wasn't buying McDonald's explanation. Instead, she pointed the finger at oil companies, who had pushed to weaken the bill in a previous Senate committee.

In turn, the oil industry has pleaded innocent, claiming it was as dumbfounded by inaction on the bill as anyone else.

The House version of the bill, which passed by a 92-1 vote, would have imposed a six-year moratorium on offshore oil and gas development while the state devised a comprehensive policy on the exploitation of natural resources in its waters.

The state has jurisdiction for a three-mile area off its coastline. The House legislation was opposed by the Western States Petroleum Association, which represents oil companies.

Its lobbyist, Vernon Lindskog, said the industry was particularly opposed to a moratorium in state waters since the federal Department of the Interior may open leasing on parcels farther offshore.

But the bill was amended more to the liking of the oil companiesby the Senate Environment and Natural Resources Committee.

That version got rid of the moratorium and called for a task force to help the state prepare plans for oil, gas and mining development.

David McCraney, the governor's adviser on offshore drilling, said he and environmentalists were fighting that version because it ``presumes there is going to be some kind of development." But McCraney said the state urgently needs some kind of oil policy if it is to succeed in preventing the federal Interior Department from leasing sites off the Washington coastline for oil exploration.

The department has made tracts on the Oregon and Washington coasts eligible for oil leasing between now and 1992.

Gardner has fought those proposals, saying certain environmentally sensitive areas should be exempted, studies completed and a national energy policy formulated first. But McCraney said it will be hard for the state to make its

case without an ocean-development policy of its own.

``We need to get our own house in order first. Until then, it's very difficult for us to tell the federal government what they shouldn't be doing," said McCraney.

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OFFSHORE-OIL BILL TAKES ON NEW LIFE - SENATE COMMITTEE REVERSES ACTION

THE SEATTLE TIMES - Friday, April 14, 1989

Readability: *11-12 grade level (Lexile: 1250L)*
Author: *JIM SIMON*

OLYMPIA - A bill to create a state policy on offshore oil exploration is back from the dead, its resuscitation aided by public outrage over the Exxon Valdez spill in Alaska.

The Senate Ways and Means Committee yesterday passed the Ocean Resources Management Act, a bill designed to protect state waters from the hazards of oil drilling and other development.

That action was a surprising reversal. Only one week ago, committee Chairman Dan McDonald, R-Bellevue, had apparently killed the bill, HB 1190, by refusing to bring it up for a vote - a move that was harshly criticized by environmental groups as being orchestrated by the oil companies.

Lobbyists for the oil industry have denied that.

McDonald wasn't specific about why he decided to reconsider the bill. ``I felt my only obligation in this was to bring it up for a vote and I did," he said.

The future of the bill remains cloudy, however. Several hours after the committee action, the Senate Rules Committee voted 9-8 against pulling the measure to the floor, with Lt. Gov. Joel Pritchard, a Republican, casting the deciding vote. The vote was nearly on a strict party line, with all Republicans except Sen. Gary Nelson, R-Edmonds, opposed and all Democrats in favor.

But GOP leaders insisted they weren't killing the bill, because it can still be dealt with next week, when the state budget is hammered out between the House and Senate.

``There's still some big hurdles," said House Natural Resources Committee Chairwoman Jennifer Belcher, D-Olympia.

Several senators complained that the timing of the original decision not to hear the bill was a public-relations disaster since it came on the heels of the Alaska spill.

And the bill's demise prompted the House sponsor of the bill, Rep. Doug Sayan, D-Grapeview, to threaten a citizen's initiative to restrict any oil drilling in a three-mile area off the state coast.

Supporters, including Gov. Booth Gardner, claim the coastal development policy that would be established under the bill is essential if the state hopes to block the Bush administration from leasing offshore areas for drilling.

The bill would set up a task force to study the effect of exploration on the fishing industry and other marine resources as well as assess potential environmental hazards of gas, oil and mineral development.

It would revise the state's Shoreline Management Act so that it would regulate activities within state waters. That means that if the federal government leases offshore areas, lessees would have to comply with stringent state requirements.

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OFFSHORE-OIL BILL IS REVIVED

THE SEATTLE TIMES - Friday, April 14, 1989

Readability: *11-12 grade level (Lexile: 1260L)*
Author: *JIM SIMON*

OLYMPIA - A bill to create a state policy on offshore oil exploration is back from the dead, its resuscitation aided by public outrage over the Exxon Valdez spill in Alaska.

The Senate Ways and Means Committee yesterday passed the Ocean Resources Management Act, a bill designed to protect state waters from the hazards of oil drilling and other development.

That action was a surprising reversal. Only one week ago, committee Chairman Dan McDonald, R-Bellevue, had apparently killed the bill, HB 1190, by refusing to bring it up for a vote - a move that was harshly criticized by environmental groups as being orchestrated by the oil companies.

Lobbyists for the oil industry have denied that.

McDonald wasn't specific about why he decided to reconsider the bill. ``I felt my only obligation in this was to bring it up for a vote and I did," he said.

But the committee action doesn't guarantee the bill will ever reach the Senate floor. It still must get out of the Rules Committee, where influential lobbies such as the oil companies can often kill legislation they don't like without much of a public fuss.

``I'm cautious about this because I don't know what the motives were. And there's still some big hurdles," said House Natural Resources Committee Chairwoman Jennifer Belcher, D-Olympia.

``I suspect it wasn't brought back for action without some concurrence by the oil companies, and that's because they're feeling the heat from the public right now."

Several senators complained that the timing of the original decision not to hear the bill was a public-relations disaster since it came on the heels of the Alaska spill.

And the bill's demise prompted the House sponsor of the bill, Rep. Doug Sayan, D-Grapeview, to threaten a citizen's initiative to restrict any oil drilling in a three-mile area off the state coast.

Supporters, including Gov. Booth Gardner, claim the coastal development policy that would be established under the bill is essential if the state hopes to block the Bush administration from leasing offshore areas for drilling.

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Gardner tours oil spill aid center

Associated Press

OCEAN SHORES — Gov. Booth Gardner today toured an oil spill response center and watched with fascination as volunteers worked to save some of the thousands of birds contaminated by one of the worst spills in Northwest history.

The oil spilled when a tug and barge collided Dec. 22 about two miles off Grays Harbor. Although officials thought it had largely broken apart and dissipated at sea, it began washing up along more than 300 miles of coast from Oregon to British Columbia last weekend, including pristine wilderness beaches of Olympic National Park.

It was Gardner's first trip to the Ocean Shores convention center, where more than 1,000 volunteers, plus dozens of state, federal and local government officials have responded to the spill.

"Amazing, just amazing," the governor said as he walked through "the dirty bird hospital," the volunteers' nickname for a huge staging area where an estimated 5,200 seabirds have been received.

Gardner started his tour by viewing pens where murres, normally sporting snowy white breasts, were all a uniform oily black. The birds were being tube fed and stabilized before being washed.

Gardner, accompanied by his wildlife director, Curt Smitch, then watched other crews scrubbing struggling birds in about three separate baths.