SHORELINES HEARINGS BOARD
FOR THE STATE OF WASHINGTON

QUINAULT INDIAN NATION, Petitioner, and FRIENDS OF GRAYS HARBOR, SIERRA CLUB, SURFRIDER FOUNDATION, GRAYS HARBOR AUDUBON, and CITIZENS FOR A CLEAN HARBOR, Petitioners, vs. CITY OF HOQUIAM, WASHINGTON STATE DEPARTMENT OF ECOLOGY, WESTWAY TERMINAL COMPANY, LLC, and IMPERIUM TERMINAL SERVICES, LLC, Respondents,	SHB NO. 13-012 c FRIENDS OF GRAYS HARBOR ET AL.'S PETITION FOR RECONSIDERATION

I. INTRODUCTION.

Petitioners Friends of Grays Harbor, Sierra Club, Surfrider Foundation, Grays Harbor Audubon, and Citizens for a Clean Harbor (collectively "FOGH") respectfully submit this Petition for Reconsideration of part of the Board's Order on Summary Judgment ("Order") issued on November 12, 2013. Reconsideration of two legal issues is warranted. First, the Board should reconsider its decision that the Ocean Resources Management Act ("ORMA") does not apply to the crude-by-rail proposals by analyzing the specific provisions in the statute and

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regulatory definitions. Second, the Board should reconsider its decision that compliance with RCW 88.40.025 is not required at this time. In addition to reconsidering these two rulings, FOGH requests that the Board reconsider and revise the phrasing of its Order to make clear that Imperium's Shoreline Substantial Development Permit ("SSDP") was reversed and remanded.

II. FACTUAL AND LEGAL BACKGROUND.

FOGH moved for summary judgment on several legal issues identified in the pre-hearing order, including issues B.3 and B.4. FOGH Motion for Partial Summary Judgment at 7-8 (July 12, 2013). Issue B.3 questioned whether the City of Hoquiam ("the City") erred in issuing the SSDPs by failing to consider and comply with laws and requirements related to ocean management and uses under ORMA.[1] Issue B.4 questioned whether the City erred in failing to consider and comply with RCW 88.40.025's requirement that the proposed crude-by-rail facilities must demonstrate financial responsibility to compensate the government for damages from a worst case scenario oil spill. A full recitation of the legal issues and factual information is available in FOGH's Motion for Partial Summary Judgment. FOGH Motion at 1-8.

On November 12, 2013, the Board issued its Order on the motions for summary judgment filed by FOGH and all of the other parties. With regard to the issues raised in FOGH's Motion, the Board granted summary judgment to respondents on Issues B.3 and B.4. Order at 37-41.

The Board granted summary judgment to respondents on issue B.3 on the basis that the crude-by-rail proposals are not an "ocean use" and therefore not subject to ORMA. Order at 41. The Board's decision relied on Ecology's regulatory definitions of "ocean uses," "transportation uses," and "oil and gas uses and activities." Order at 39-40 (citing WAC 173-26-360(3), (8), and (12)). In reaching its decision, the Board did not discuss or cite to the specific statutory

[1] After the Westway and Imperium appeals were consolidated, the motions for summary judgment and legal issues regarding Westway applied with equal force to Imperium.

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provisions in ORMA raised by FOGH.

The Board granted summary judgment to respondents on issue B.4, concluding that Westway and Imperium did not need to comply with RCW 88.40.025's financial responsibility requirements as part of the SEPA evaluation process. Order at 37-38. The Board noted that Westway and Imperium will be required to comply with the financial responsibility requirements as part of their preparation of an oil spill prevention plan under RCW 88.46.040(2)(a). Order at 38. The Board noted that the MDNS relied on compliance with an Ecology-approved spill prevention plan for mitigation but that the spill plan is not yet required, so Westway and Imperium did not yet need to comply with the financial responsibility requirements before issuance of the MDNSs and SSDPs. Order at 37-38. The Board stated that no party cited to a requirement in the Shoreline Management Act ("SMA") that the project proponents comply with RCW 88.40.025 prior to issuance of an SSDP. *Id.*

A petition for reconsideration may be granted when "it is contrary to law" or when "substantial justice has not been done." CR 59(a)(7) and (9); *see Friends of the San Juans v. San Juan County*, SHB No. 13-001, Order Denying Reconsideration (Sept. 5, 2013) ("The Superior Court's Civil Rules guide the Board when it reviews a petition for reconsideration").

III. ARGUMENT.

A. The Board Should Reconsider its Decision that ORMA Does Not Apply.

The Board's decision on legal issue B.3 that the crude-by-rail facilities are not subject to ORMA did not analyze the plain language of the statute and ignored part of Ecology's regulatory definitions. FOGH respectfully requests that the Board re-consider its decision on this legal issue and determine that the proposed projects are subject to ORMA.

The Board determined that Ecology's regulatory definition of "ocean uses" limited

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ORMA's application to facilities "directly engaged in resource exploration and extraction activities in Washington waters." Order at 39. Yet the Board's limitation is nowhere to be found in the non-restrictive definition promulgated by Ecology. WAC 173-26-360(3) ("Ocean uses involving nonrenewable resources *include* such activities as . . .") (emphasis added); *see Queets Band of Indians v. State*, 102 Wn.2d 1, 4 (1984) ("'includes' is construed as a term of enlargement"). The Board similarly applied a restriction to Ecology's definition of ocean transportation uses that does not exist in the regulatory definition. Order at 40. "Ocean transportation" is defined to *include* "transportation activities that originate or conclude in Washington's coastal waters *or* are transporting a nonrenewable resource extracted from the outer continental shelf off Washington." WAC 173-26-360(12) (emphasis added). The Board cited solely to the second clause of this definition, ignoring the first clause which is not limited to the transportation of resources extracted from Washington's waters. The Board's restrictive interpretation of these regulatory definitions is not based upon their plain language and thus should be reconsidered.

Furthermore, the Board's restrictive interpretation of Ecology's regulatory definitions created a limitation not found in the statute. RCW 43.143.030(2) commands that "*[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.*" (emphasis added). This provision requires ORMA's permitting criteria be applied to the uses and activities described therein—nothing in this statutory provision suggests a limitation of ORMA's permitting criteria to activities involving resource exploration and extraction activities in Washington waters.

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The Board was required to consider the plain language of the statute, including RCW 43.143.030(2), when determining whether the crude-by-rail proposals are subject to ORMA. *See In re Parentage of J.M.K.*, 155 Wn.2d 374, 393 (2005) (court must not "simply ignore" express language when interpreting a statute). Even where administrative rules have been promulgated under the statute, the Board must consider the actual statutory language when determining the applicability of a statute. *See Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 713-715 (2007) (interpreting a statute based on its plain language before rejecting an interpretation of administrative regulation that would command a contrary result). Yet, in determining whether ORMA applied to the crude-by-rail proposals, the Board's opinion does not discuss the meaning of the statutory provisions and language relied on by the Petitioners but rather dismissed those statutory arguments as being based upon "the policy goals of ORMA." Order at 40. While Petitioners did cite to ORMA's policy goals listed in RCW 43.143.010, FOGH specifically relied on RCW 43.143.030(2), which does not describe policy but rather establishes the heart of ORMA's regulatory scheme. *See* FOGH's Motion at 9.

A further review of ORMA's language demonstrates that its application is not limited to activities that involve the extraction of oil from Washington waters. Only one provision in ORMA even mentions the extraction of non-renewable resources—RCW 43.143.010(2)—which established a moratorium on oil and gas leasing in coastal waters. Nothing else in the statute mentions, let alone restricts, ORMA's reach to ocean uses that involve the extraction of nonrenewable resources from Washington's waters. The only rational interpretation of the statute is that the legislature intended ORMA's regulatory criteria to apply to ocean uses that do not involve extraction of nonrewewable resources; given the moratorium on oil and gas leasing created by the statute, the permitting criteria establish in RCW 43.143.030 would be superfluous

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if they only applied to nonrenewable resource extraction that was simultaneously banned in Washington's waters.

Even if Ecology's regulatory definitions did attempt to restrict ORMA in such a manner, the rules would be unenforceable because they conflict with the statute. *Bostain*, 159 Wn.2d at 713 (an "administrative rule is invalid and unenforceable if it contravenes the statute which it implements"); *and see Campbell v. Dep't of Soc. & Health Servs.*, 150 Wn.2d 881, 892 (2004) (rule is invalid if not reasonably consistent with statute). Rather than ignoring the statutory language as establishing merely policy goals, the Board should have interpreted Ecology's definitions in a manner that harmonized them with the statute.

Finally, the Board should not have rejected Petitioners' argument as impermissibly broad. Petitioners' inability to provide an example of ORMA's application in a similar manner is a direct result of the novel scope of the proposed crude-by-rail facilities, which present a perilous and unprecedented use of Washington's coast and waters. ORMA was designed to encompass projects like these that cause conflicts among ocean uses and activities to ensure that priority is "given to resource uses and activities that will not adversely impact renewable resources." RCW 43.143.010(3). The Board's decision was based upon a restrictive reading of Ecology's regulatory definitions that was contrary to law and should therefore be reconsidered.

B. The Board Should Reconsider its Decision Regarding RCW 88.40.025.

The Board incorrectly decided legal issue B.4 by concluding that Westway and Imperium need not comply with RCW 88.40.025's financial responsibility requirements before receiving approval of the SSDP. The crux of the mitigation of impacts from oil spills is the oil spill prevention plan, which incorporates the financial responsibility requirements in RCW 88.40.025. In order for Ecology to rely on this mitigation to support its conclusions in the MDNS, Ecology

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needed to determine whether it is even possible for the project proponents to comply with the financial responsibility requirements. The project proponents' inability to comply with the financial responsibility requirements would render the oil spill mitigation inadequate and thereby undermine the validity of the MDNS. If this occurs, potential enforcement and penalties would not guarantee a remedy to non-compliance with the financial responsibility requirements—if the companies do not have sufficient funding for mitigation, paying a penalty will not ensure that they are able to acquire sufficient capital to fund a cleanup in the event of a worst case scenario oil spill even if they may be strictly liable. *See* Order at 38 (citing RCW 90.56.360, 370). Accordingly, the significance of the environmental impacts from a worst case scenario oil spill hinges directly on the project proponents ability to comply with the financial responsibility requirements. Therefore, compliance with RCW 88.40.025 should be required before issuing the MDNS and SSDP.

Finally, the Board erroneously concluded that "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 SSDP." Order at 38. However, FOGH's motion for summary judgment cited to HMC 11.04.065, which requires an "applicant proposing oil and/or gas uses and/or 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." FOGH Motion at 18. Because HMC 11.04.065 applies as part of ORMA, compliance with financial assurances is also required.

C. The Board Should Clarify that Imperium's SSDP was also Remanded.

The end of the Order states that the "City's approval of the Westway SSDP is reversed based on the invalidity of the underlying MDNS." Order at 42. Although the Board does not explicitly state that the City's approval of Imperium's SSDP is also reversed, the Order

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recognizes that the reasoning for invalidating the SSDP and MDNS for Westway is applicable to the SSDP and MDNS for Imperium. *See, e.g.,* Order at 16, FN7. To clarify to the parties and the public, the Board should amend its order to explicitly state that the Imperium SSDP is also reversed and remanded. Granting reconsideration to clarify the Board's order in a case of public importance such as this is warranted. *See John Mack v. City of Marysville*, SHB NO. 11-028, Order on Petition for Reconsideration (May 2, 2012) (recognizing in response to a petition for reconsideration that the Board's decision "could benefit from some additional clarity" and therefore amending the original order).

IV. CONCLUSION.

For these reasons, the Board should grant this Petition for Reconsideration and amend its decision related to the legal issues discussed herein.

Dated this 22nd day of November, 2013.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on November 22, 2013, I caused this Petition for Reconsideration to be served in the above-captioned matter upon the parties herein via e-mail:

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